No. 15-17189`

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH
and CITIZENS EQUAL RIGHTS ALLIANCE

Plaintiffs-Appellants

v.

SALLY JEWELL, Secretary; KEVIN WASHBURN, Assistant-Secretary; DONALD LAVERDURE, Acting Assistant-Secretary; BUREAU OF INDIAN AFFAIRS; AMY DUTSCHKE, BIA Reg. Dir.; JOHN RYDZIK, BIA Env. Div.; PAULA HART, OIG Chair; TRACIE STEVENS, NIGC Chair; NATIONAL INDIAN GAMING COMMISSION; and U.S. DEPARTMENT OF INTERIOR

Defendants-Appellees

and

IONE BAND OF MIWOK INDIANS

Intervener-Appellee

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:12-cv-01748 TLN-CMK
Honorable Troy L. Nunley, District Judge

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This case was triggered on May 24, 2012, when the Federal Defendants issued a Record of Decision (ROD) that purports to place approximately 228 acres (12 parcels) of privately owned land in trust for the benefit of one faction of the Ione Band of Indians. (Excerpts of the Record (ER) 274-341.) Defendants' stated purpose for placing this property in trust was for the construction of an Indian casino in the rural community of Plymouth, Amador County, California.

Plaintiffs, No Casino in Plymouth and Citizens Equal Rights Alliance, (collectively referred to as NCIP) filed this lawsuit in June, 2012, and submitted a First Amended Complaint (FAC) on October 1, 2012. (ER 200-227.) NCIP is appealing the two district court orders denying two separate but similar motions.

In the first Order, issued on August 11, 2014, the district court denied NCIP's motion for judgment on the pleadings based on their first claim for relief. (ER 139-148.) In that claim, NCIP alleges that Defendants did not have the authority to take land into trust for the Ione Band because it was not a federally recognized tribe in 1934 when the Indian Reorganization Act (IRA) was enacted. 25 U.S.C. §§ 465 et seq.; *Carcieri v. Salazar,* 555 U.S. 379 (2009).

NCIP's motion was based on a decision issued by District Court Judge Karlton in April 1992 in Ione Band of Miwok Indians et al. v. Harold Burris et al. (including the United States) (USDC ED Cal. No. CIV-S-90-0993). (Ione Band v.

Burris). In that decision, Judge Karlton granted the Federal Defendants' motion for summary judgment and held that the Ione Band was not a federally recognized tribe prior to 1992 (much less in 1934). (ER 571-597.) The final judgment in Ione Band v. Burris was entered in 1996. (ER 616-618.) It was not appealed and it is binding on the Federal Defendants and Ione Band in this case.

The district court did not decide, and the Defendants did not address, the merits of NCIP's motion for judgment on the pleadings or the binding impact of Judge Karlton's 1992 decision and 1996 judgment. Instead, the district court agreed with the Defendants and held that NCIP used the wrong procedural device to present its case. Specifically, instead of a motion for judgment on the pleadings, supported by a comprehensive request for judicial notice of the pleadings and orders in Ione Band v. Burris, the district court directed NCIP to resubmit its contentions by way of a motion for summary judgment supported primarily with references to the administrative record (AR) prepared by the Defendants. NCIP complied with this directive and, on October 14, 2014, filed a motion for summary judgment with references to many of the same Ione Band v. Burris pleadings and orders that were also in the AR. (Electronic Court File (ECF) No. 72.)

The second Order that is being appealed by NCIP was issued by the district court on September 30, 2015, and denied NCIP's motion for summary judgment on its first claim for relief. (ER 105 -138.) NCIP, in its motion for summary

judgment, reasserted that, based on Judge Karlton's decision and final judgment in Ione Band v. Burris, it was established that the Ione Band was not a federally recognized tribe in 1934 and, therefore, it was not entitled to the fee-to-trust benefits of the IRA.

NCIP also responded to the cross-motion filed by Defendants and also argued that the ROD, approved by Defendant Laverdure, is void because he was not appointed by the President or confirmed by the Senate, and consequently he lacked the authority to put the land in trust. NCIP also opposed Defendants' motion for summary judgment on the four remaining claims in the FAC that: (1) the Ione Band was a restored tribe entitled to a restored lands determination under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719; (2) Defendants complied with the Part 151 regulations when processing the fee to trust application; (3) Defendants complied with NEPA, and (5) Defendants did not violate the principles of federalism by removing the private property from State jurisdiction and regulation.

The district court denied NCIP's motion, granted the Defendants' cross-motions and entered a final judgment and closed its case on October 14, 2015.[1]

[1] The district court also granted Intervenor Ione Band's motion to strike the pro hac vice application of the "historic Ione Band." (ER 116-122.) The historic faction claimed that Defendant Dutschke, the BIA Regional Director, improperly created

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706, 28 U.S.C. § 2201, 25 U.S.C. § 2714, and 18 U.S.C. § 1166. The district court entered a final, appealable judgment in this case on October 14, 2015. (ER 104.) And NCIP filed a timely Notice of Appeal on October 30, 2015. (ER 100-103.) Fed. R. App. Proc. 4. This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

This action arises under federal law, including the United States Constitution, the Indian Reorganization Act (IRA), 25 U.S.C. §§ 465 *et seq.* Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2700 *et seq.* and 18 U.S.C. § 1166, and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*

NCIP has standing to pursue the claims asserted in this case and appeal. *Bond v. United States* 131 S.Ct. 2355 (2011) and *Match-E-Be-Nash-She-Wish Band v. Patchak* 132 S.Ct. 2199 (2012). See also *Preservation of Los Olivos v. U.S. Department of Interior,* 635 F.Supp.2d 1076 (C.D. Cal. 2008)**.**

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

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and joined a new faction to replace the historic Ione Band. Ms. Dutschke has a clear conflict of interest which has been known and ongoing since at least 1994.

Ione Band, waived any claim of tribal sovereign immunity by voluntarily intervening in this case as a Defendant.

ISSUES PRESENTED FOR REVIEW

A. Congress has delegated authority to the Secretary of Interior to acquire land in trust for tribes that were federally recognized in 1934. But Congress did not delegate such authority to other Department of Interior (DOI) officials.

Issue: **Did Mr. Laverdure, a DOI official, as "acting" Assistant Secretary, have authority to take property in trust for the Ione Band?**

B. The Supreme Court has interpreted and limited the fee-to-trust benefits of the IRA to tribes that were federally recognized in 1934. The Ione Indians were not a federally recognized tribe in 1934.

Issue: **Is the Ione Band entitled to receive the fee-to-trust benefits of the IRA of 1934?**

STATEMENT OF THE CASE

A. Initial pleadings.

This lawsuit was filed in 2012, thirty days after the ROD was published in the Federal Register. And NCIP filed the FAC on October 1, 2012. (ER 200-227.) NCIP named four federal agencies and six federal officials (including Donald Laverdure) as Defendants all of whom were involved in approving the ROD.

The FAC includes five causes of action. In the first claim for relief, NCIP alleged that Defendants lack the authority to take land into trust for the Ione Band because it was not a federally recognized tribe in 1934 when the IRA was enacted. *Carcieri v. Salazar,* 555 U.S. 379 (2009).

Federal Defendants filed their Answer on December 10, 2012. (ER 228-246.) Thereafter, the Ione Band was granted leave to intervene and filed its Answer on November 26, 2013. (ER 253-273.)

B. Motion for Judgment on the Pleadings

Plaintiffs filed a motion for judgment on the pleadings on February 13, 2014. (ECF Nos. 60, 61 and 62.) NCIP argued that it was entitled to a judgment, as a matter of law, for the following three reasons:

1. District court Judge Karlton, in Ione Band v. Burris, decided that the Ione Band was not a federally recognized tribe at any time prior to 1992 and that decision, which was not appealed, is binding on the Defendants in this case.
2. Judge Karlton reached this conclusion at the urging of the same federal Defendants and some of the Ione Indians. These judicial admissions of the defendants in Ione Band v. Burris are binding on the Defendants in this case.
3. Therefore, the federal Defendants lacked the authority to take land into trust for the Ione Band because it was not a federally recognized tribe in 1934 when the IRA was enacted. *Carcieri v. Salazar, supra.*

Concurrent with the filing of its motion for judgment on the pleadings, NCIP submitted a request for judicial notice of all the key Orders and relevant pleadings filed by the parties in the Ione Band v. Burris case. (ER 400-618.) In addition, NCIP asked the district court to take judicial notice of a 1992 decision by the Interior Board of Indian Appeals in Ione Band v. BIA (IBIA No. 92-189; ER 619-621) and a 1998 decision by district court Judge Levy in Ione Band v. County of Amador (Case No. 97-531; ER 622-625), Judge Levey relied on Judge Karlton's decision and judgment in Ione Band v. Burris and found that the Ione Band had "no recognized tribal government."

Defendants filed oppositions challenging the motion for judgment on the pleadings procedure used by NCIP. They did not seriously challenge the merits of the motion or the binding impact of the 1996 decision and judgment in Ione Band v. Burris. (ECF Nos. 64 and 65.) Instead, Defendants claimed that because this was basically an APA case, the only proper vehicle to adjudicate these issues is by motion for summary judgment. The Ione Band joined this argument despite the fact that the APA rules and protections do not apply to them.

C. Order denying NCIP's motion for judgment on the pleadings.

On August 11, 2014 the district court denied Plaintiffs' Motion for Judgment on the Pleadings (ER 139-148). The district court agreed with the Defendants'

procedural contentions and, because an APA decision must ultimately be "based on a review of the administrative record," declined to grant NCIP's request for judicial notice.[2] The district court held that "a Rule 12(c) motion does not comport with APA review."[3] The district court also held that the allegations the Defendants' answer raised "a material issue of fact which precludes judgment on the pleadings." The district court denied NCIP's motion for judgment on the pleadings and directed NCIP to refile their motion on their first claim for relief as a motion for summary judgment, supported by the AR, within 60 days of August 11, 2014.

D. Motion for Summary Judgment

As directed, NCIP filed a motion for summary judgment on their first claim for relief on October 14, 2014. Like the earlier motion for a judgment on the pleadings, if the motion for summary judgment on the first claim was decided in NCIP's favor, it is would have resolved the remainder of the case. But, instead of a

[2] Nothing in the APA precludes a court from taking judicial notice of pleadings in an earlier case, especially when those same pleadings are also included in the AR.

[3] A motion for summary judgment is often used as a "mechanism" to adjudicate an APA case. See *Sierra Club v. Mainella,* 459 F.Supp.2d 76, 90 (D.D.C. 2009). But it is not required by the APA. Instead, the district court sits as an appellate tribunal in an APA case as to whether an agency arbitrarily or capriciously or contrary to law, "regardless of whether it is presented in the context of a motion for judgment on the pleadings or in a motion for summary judgment (or in any other Rule 12 motion under the Federal Rules of Civil Procedure)." *University Medical Center of So. Nev. v. Shalala,* 173 F.3d 438, 440 n. 3 (D.C. Cir. 1999) (emphasis added).

request for judicial notice, NCIP relied on the AR to support the motion for summary judgment.

Pursuant Rule 260 of the Local Rules, NCIP supported its motion for summary judgment with a Statement of Undisputed Facts (ECF No. 72-2.) The 13 undisputed facts again referenced the decision and judgment in Ione Band v. Burris and were supported by specific references to the AR. NCIP also renewed its request for judicial notice of a few Ione band v. Burris documents that were not in the AR. (ECF 62; ER Vol. 3) NCIP once again argued that Defendants and Ione Indians in Ione Band v. Burris specifically urged, and Judge Karlton found, that the Ione Band was not a federally recognized tribe as of 1992 much less in 1934 when the IRA was enacted.

In response to NCIP's motion, Defendants filed a motion for summary judgment on the remaining four claims in the FAC with its cross-motion on the first claim. The limited briefing schedule should not have allowed for the filing of new motions by the Defendants with their cross-motions. Nevertheless, NCIP filed a reply to the cross-motion on the first claim and an opposition to the Defendants' motion for summary judgment on the remaining four claims.

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E. Order denying NCIP's motion for summary judgment.

The Supreme Court majority in *Carcieri* held that the plain language of the IRA unambiguously required that a tribe to have been federally recognized in 1934 to be eligible for a fee-to-trust transfer and that the DOI's interpretation of IRA was not entitled to *Chevron* deference. Despite this fact, the district court found that the IRA was ambiguous and, as a consequence, it gave *Chevron* deference to Defendants' strained misinterpretation of the IRA. The district court also found that the Defendants were not bound by the judgment, or their admissions, in Ione Band v. Burris. These findings are erroneous and should be reversed.

STATEMENT OF FACTS

A. Record of Decision.

The ROD was approved by Defendant Laverdure on May 24, 2012, and was published on May 30, 2012 (77 Fed. Reg. 31871-31872) The ROD purports to place 228.04 acres, a total of 12 parcels, of privately owned land into trust for the Ione Band for gaming purposes. (ER 274-341.) The property is not now, and never has been, owned by the Ione Band or the United States. Instead, the 12 parcels are owned by different private non-Indian owners and investors who hope to reap the economic benefits of building and operating an Indian casino in conjunction with the Ione Band as a front Indian group. (See ER 768-770.)

According to the ROD, the Ione Band submitted its trust application to the BIA in November 2005. The stated purpose of the proposed trust acquisition is to construct a 120,000 square foot casino, a 250 room hotel, a 30,000 square foot convention facility and related structures in the middle of the small rural town of Plymouth in Amador County. A major casino would overwhelm the little town of Plymouth with traffic and create adverse environmental impacts including irreversible impacts to the air and water quality in Plymouth. It would also forever change the rural and quiet life-style of the community.

While Larry Echohawk was Assistant Secretary, the BIA and DOI had declined to take the subject lands into trust because, according to Solicitor Bernhardt, the Ione Band was not a federally recognized or restored tribe entitled to trust land under the IRA or a casino under IGRA. (ER 753-759). But that position suddenly changed shortly after Assistant Secretary Echohawk resigned in April 2012 and Defendant Laverdure, a BIA official was designated to serve as "acting" Assistant Secretary. One month later Defendant Laverdure reversed the course taken by Assistant Secretary Echohawk and issued the ROD.

At the beginning of the ROD, Mr. Laverdure states that (although he had less than 30 days) his decision was based "on thorough review and consideration of the [Ione Band's] fee-to-trust application and materials submitted therewith" and the statutory and regulatory authorities and the administrative record. But the Table of

Contents for the ROD reveals that the required title information was not included. The ROD does not specifically describe the 12 parcels or identify the private owners of the 12 parcels or individuals who have options to purchase those parcels.

Defendant Laverdure relies on a 2006 written opinion by Associate Solicitor Artman that the 12 parcels were Indian land eligible for gaming under IGRA. But he neglects to mention that this Indian lands determination was withdrawn and reversed by Solicitor Bernhardt in 2009. (ER 753-759.) Solicitor Bernhardt also halted the environmental review of the proposed fee-to-trust transfer in 2009. (Id.) Defendant Laverdure also neglects to mention that Associate Solicitor Artman's determination was never been accepted or published by the National Indian Gaming Commission as required by 25 CFR Part 559. Neither Mr. Laverdure nor the DOI had the authority to make that determination for IGRA purposes.

Mr. Laverdure also claims that "in 1972, Commissioner Bruce sent a letter that amounted to recognition" of the Ione Band. (ER 710-711.) But that statement is not true; Commissioner Bruce did not recognize the Ione Band in his 1972 letter. Instead, he merely speculates that "Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated." (Id.; emphasis added.) Commissioner Bruce did not discuss the history of the Ione Band or any of the other pre-requisites of obtaining formal federal recognition. And, as it turns out, his speculation was wrong. The DOI

determined that the Ione Band was not a federally recognized tribe and urged them to apply for federal recognition under 25 CFR Part 83. (See for example ER 712, 715, 718, 725-729, 730, 731-731 and 742.)

Furthermore, Defendant Laverdure did not follow the Supreme Court's directive in *Carcieri* in the ROD. Instead, Mr. Laverdure claimed that the IRA phrase "under federal jurisdiction" was ambiguous and therefore "the Secretary must interpret that phrase in order to continue to exercise authority delegated to him under section 5 of the IRA," citing *Chevron v. NRDC,* 467 U.S. 837 (1984). As is discussed below, this conclusion is directly contrary to the Supreme Court majority decision *Carcieri*.

Although Laverdure did not mention the judgment in Ione Band v. Burris, he does allude to it by claiming that the "positions taken by the Department in Federal court and before the IBIA against the tribe" were inconsistent with earlier positions of the Department. Mr. Laverdure did not identify these supposed inconsistent positions. And this statement is wrong. The DOI's position in Ione Band v. Burris that the Ione Band was not federally recognized was consistent with the DOI's previous position. In fact, that is why the Ione Band sued the DOI

Finally, Defendant Laverdure claims that the DOI's inconsistent positions terminated the recognized relationship with Ione Band. But later in the ROD,

Laverdure more correctly asserts "only Congress can terminate such a relationship." Laverdure also claims that the Ione Band's recognition, after being terminated by inconsistent DOI positions, was subsequently somehow administratively restored by Assistant Secretary Deer. Laverdure's contentions have no basis in fact. The Ione Band was not recognized in 1972 by Bruce. Nor was it terminated by unidentified positions of the DOI. And it could not be restored to federal recognition that it never had in 1994 by Deer.[4]

B. Administrative Record

The AR was prepared in 2013 about a year after Mr. Laverdure issued the ROD. It consists of over 20,000 pages. Many of the documents are extensively redacted or incomplete. And there are major gaps in the AR. There are almost no documents in the AR dated between 1930 and 1970. But the documents that are in the AR confirm that the Ione Band was not a federally recognized in 1934. Instead the Ione Indians were considered homeless or landless Indians. (ER 700-705.)

[4] NCIP also challenged the Defendants claim that the Ione Band and the 12 parcels, which have not yet acquired by the Ione Band, are restored lands for a restored tribe eligible for gaming under IGRA. 25 U.S.C. § 2719. But instead of discussing the issue in its opinion in this case, the Court incorporated by reference, without a page citation, its discussion about this issue from a related case, "Case No. 1710." (ER 135.) The Plaintiff and Appellant in that case is the County of Amador. In the interest of judicial efficiency, NCIP incorporates by this reference the County's discussion of the "restored land/restored tribe" issue in its Opening Brief to the extent that it is not inconsistent with the arguments in this brief.

SUMMARY OF ARGUMENT

NCIP is asking this Court to reverse and vacate the district court's Order dated August 11, 2014, denying NCIP's motion for judgment on the pleadings (ER 139-148) and the district court's Order dated September 30, 2015, denying NCIP's motion for summary judgment (ER 105-138) for two important reasons:

First, the ROD is void because it was approved by Defendant Laverdure, a DOI official, who was not appointed by the President or approved by the Senate. Although he was designated "acting" Assistant-Secretary, Mr. Laverdure is not the Secretary of Interior or a principal officer as defined by the Constitution. Also, contrary to the Federal Vacancies Reform Act, Mr. Laverdure was not designated by the President to fill the position on interim basis. Nor was he delegated the authority from the Secretary to take land into trust for Indians or tribes.

Second, the Supreme Court has decided that to be eligible for the fee-to-trust benefits of the IRA, a tribe must have been both federally recognized and under federal jurisdiction in 1934. *Carcieri v. Salazar*. Over 20 years ago, the district held in Ione Band v. Burris that the Ione Band was never a federally recognized tribe prior to 1992. The judgment in that case was not appealed and it is binding. The Ione Band was not federally recognized in 1934 and, therefore, is not eligible for the proposed fee-to-trust transfer of 228 acres for the purpose of a casino.

STANDARD OF REVIEW

A denial of a motion for judgment on the pleadings is reviewed de novo. *Goldstein v. City of Long Beach*, 715 F.3d 750, 753 (9th Cir. 2013). "[T]he court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Pit River Tribe v. Bureau of Land Management,* 793 F.3d 1147, 1155 (9th Cir. 2015). A court may also consider matters subject to judicial notice. *United States v. Ritchie,* 342 F.3d 903, 908 (9th Cir. 2003).

A grant or denial of a motion for summary judgment is reviewed de novo. *Jones v. Blanas,* 393 F.3d 918, 926 (9th Cir. 2004). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 157 (1970). And a Court may grant summary judgment on its own and on grounds not initially raised by the movant. Fed. Fed.R.Civ.Proc. 56(f).

An agency action must be set aside if: (1) it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; or (2) it failed to meet statutory, procedural or constitutional requirements. 5 U.S.C. § 706 (2). The court decides questions of law, interprets constitutional and statutory provisions, and determines the meaning of the terms of an agency action. 5 U.S.C. § 706. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971).

ARGUMENT

A. The ROD signed by Defendant Laverdure is void and should be vacated; he had no authority to take land into trust under the IRA.

Defendant Laverdure was not appointed by the President and was not confirmed by the Senate. Instead he was designated as "acting" Assistant Secretary for Indian Affairs in a press release. This purported designation of Mr. Laverdure as acting Assistant Secretary was in violation of the Federal Vacancies Reform Act of 1998 (FVRA). 5 U.S.C. §§ 3345 et seq. And, as a consequence, the 2012 ROD approved by Mr. Laverdure is void and should be vacated. *Hooks v. Kitsap Tenant Support Services, Inc.,* F.3d (9th Cir. March 7, 2016) and *SW General, Inc. v. National Labor Relations Board,* 796 F.3d 67 (DC Cir. 2015).

1. Mr. Laverdure was not appointed by the President nor confirmed by the Senate and does not have the authority to take land into trust.

The Appointments Clause of the United States Constitution provides that the

> "[The President] shall nominate and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."
>
> US Const. Art. II, § 2, cl. 2.

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

The Secretary of Interior is a "principal officer" of the United States which requires a Presidential appointment and a Senatorial confirmation. And when deciding whether to take land into trust, and out of State jurisdiction, the Secretary is obviously exercising "significant authority pursuant to the laws of the United States." In fact, in our Federal system, it hard to imagine a more important power granted to the Secretary of Interior. Chief Justice Roberts, during the Supreme Court hearing in *Carcieri,* emphasized the magnitude of this important obligation:

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

This "extraordinary assertion of power" can only be exercised by the Secretary of Interior who has been appointed by the President and confirmed by the Senate. Interim acting Assistant Secretary Laverdure was not appointed or confirmed as a principal official. Thus he lacked the "significant authority" to transfer the property into trust for the benefit of Ione Indians.

The district court, without any separate analysis, accepted the Defendants claims that Assistant Secretary Echo Hawk, pursuant to FVRA, "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 resigns." (ER [100 19-20]) The district court also states that the authority to transfer land into trust was appropriately delegated from the Secretary of Interior to Assistant Secretary Echo Hawk and then, apparently, to Laverdure as the "acting" Assistant Secretary. Both of these legal conclusions are wrong and clearly erroneous.

2. The designation of Mr. Laverdure as "acting" Assistant Secretary violated the Federal Vacancies Relief Act.

The only "succession plan" referenced by the Defendants, and relied on by the district court, was the Press Release announcing Assistant Secretary Echo Hawk's resignation. (Court Docket No. 94 at 12 n.12). This Press Release was an after-the-fact announcement, not a "succession plan" prepared in advance. Also this announcement cannot replace the requirements of FVRA which are the

"exclusive means for filling a vacancy in an Executive agency office unless another statute expressly provides a means for filling such a vacancy." *Hooks v. Kitsap Tenant Support Services, Inc., supra.* And 5 U.S.C. § 3347(a).

FVRA provides that the "first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity" subject to specified time limits. 5 U.S.C. §§ 3345 and 3346. In the alternative, "the President (and only the President)" may direct another principal officer, who has been appointed by the President with the consent of the Senate, or an officer or employee of the agency "to perform the functions and duties of the office temporarily" within specified time limits. Id.

In this case, Defendants did not claim that Laverdure was appointed by the President to fill this vacancy. See 5 U.S.C. § 3345(3). Nor could they claim that Laverdure was entitled to fill this vacancy because he was principal officer appointed by the President and confirmed by the Senate. Instead Defendants contend that Mr. Laverdure was appointed in advance by former Assistant Secretary Echo Hawk in the press release announcing his resignation. This informal "press release designation" was in violation of FVRA. Therefore, it was void and, as a consequence, Laverdure's approval of the ROD was invalid and should be vacated. *SW General, Inc. v. NLRB supra.* 796 F.3d at 67.

3. The authority to transfer property into trust was not delegated to Laverdure or any other BIA official or employee. Nor could it be.

Congress has plenary power over Indian affairs, including the power to create reservations or accept trust lands for tribes. And Article 1, Section 1, of the Constitution provides: "All Legislative Powers herein granted shall be vested in a Congress of the United States." Congress may delegate its legislative power if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928). Of course "Congress cannot delegate legislative power to the President to exercise unfettered discretion to make whatever laws he thinks may be needed or advisable." *A.L.A. Schechter Poultry v. United States,* 295 U.S. 495, 537-538 (1935). But it is sufficient "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. Securities & Exchange Comm'n,* 329 U.S. 90, 105 (1946).

Congress, in the IRA, delegated authority to the Secretary, as follows:

> The Secretary of 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.
>
> 25 U.S.C. § 465.

Although there was some prior disagreement among the circuits, the consensus now appears to be that this delegation is constitutional. *United States v. Roberts,* 185 F.3d 1125 (10th Cir. 1999) and *South Dakota v. Department of Interior,* 423 F.3d 790 (8th Cir. 2005.).

On the other hand, Congress did not delegate, or authorize the Secretary to re-delegate, this important federal function to an Assistant Secretary much less to a non-appointed BIA official like Defendant Laverdure. Instead, the Secretary of the Interior was given the exclusive responsibility and duty to acquire or take lands into trust for Indians pursuant to 25 U.S.C. § 465 and 25 CFR § 151.3.

The district court states that "[u]nder 25 U.S.C. § 1a, the Secretary of Interior is authorized to delegate his power and duties to the Commissioner of Indian Affairs (now the Assistant Secretary of Indian Affairs.)" But the Commissioner and Assistant Secretary are separate officials with separate histories and statutory bases. 25 U.S.C. § 1 & 43 U.S.C. § 1453a. Section 1a applies to the Commissioner not the Assistant Secretary. Also the delegation in 25 U.S.C § 1a only authorizes the Secretary of Interior "from time to time" to delegate his powers to the Commissioner insofar as they "relate to action in individual cases." It is not a re-delegation of the authority that the Secretary received from Congress. Nor does it authorize the delegation to a public official, like Defendant Laverdure, who has not been designated by the President to fill a vacancy.

B. The Ione Band was not a recognized tribe under federal jurisdiction in 1934 and, therefore, is not eligible for a fee-to-transfer under the IRA.

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

The IRA of 1934 authorized the Secretary to acquire land and hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. The IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479.

In 2009, the Supreme Court interpreted and limited the scope of Section 479. *Carcieri v. Salazar, supra.* Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, wrote the majority opinion and held that the phrase "recognized tribe now under federal jurisdiction" was not ambiguous and the Secretary's broad interpretation was not entitled to deference. Instead, the majority concluded that the plain language of the IRA provides that to qualify for the fee-to-trust benefits of the IRA a tribe must have been both a federally recognized tribe and under federal jurisdiction in 1934.

Justice Breyer concurred with the five Justice majority (and controlling) opinion. And Justice Breyer also suggested that there may be situations when a tribe was recognized in 1934 but was not on the list of 258 tribes compiled shortly after the IRA was enacted in 1934. Justice Breyer suggested three possibilities:

(1) a tribe with an approved treaty that was in effect in 1934, (2) a pre-1934 Congressional appropriation for a specific tribe, or (3) a tribal enrollment list which, as of 1934, was filed with the Indian Office.

In contrast, Justice Souter filed a dissenting opinion and argued "that the two concepts, recognition and jurisdiction, may be given separate content." Thus, Justice Souter suggested that, to qualify for the IRA fee-to-trust benefits, a tribe could be either "Federally recognized" **OR** "under Federal jurisdiction" in 1934. This "two concept-separate content" idea was precluded by the majority opinion and Justice Breyer's concurring opinion. In fact, this is why Justice Souter candidly admits that he could not concur and his vote is in the dissenting column.

The Ione Band was not a federally recognized tribe in 1934 and, therefore, based on the *Carcieri* majority opinion and Justice Breyer's concurring opinion it was not eligible for the proposed fee-to-trust transfer of the under the IRA.

2. The *Carcieri* decision is consistent with prior Supreme Court and Circuit Court decisions that held that the application of the IRA is limited to tribes that were federally recognized in 1934.

The Supreme Court was required to analyze the IRA in 1978 in *United States v. John*, 437 U.S. 634 (1978). That case involved the jurisdiction over certain crimes committed on land designated by Congress as the Choctaw "reservation" in 1944. The issue in that case was whether the lands where crimes

were committed on "Indian lands" as that term is used in the Major Crimes Act of 1885. 18 U.S.C. § 1153. The Mississippi Choctaw Indians were not a federally recognized tribe in 1934. But the Supreme Court held that the Major Crimes Act still applied the IRA defined " 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction' . . . but also as 'all other persons of one-half or more Indian blood.'" *United States v. John, supra.* 437 U.S. at 650. (Emphasis added; brackets in original.) Thus, 31 years prior to its *Carcieri* decision, the Supreme Court had already clearly acknowledged that the first category of Indians in the IRA was limited to "members of any recognized [in 1934] tribe".

This Court discussed the IRA and its potential application to Native Hawaiians in *Kahawaiolaa v. Norton,* 386 F.3d 1271 (9th Cir. 2004). The Court held that, "by its terms, the Indian Reorganization Act did not include any native Hawaiian group. There were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii." (*Kahawaiolaa v. Norton, supra.* 386 F.3d at 1280; emphasis added.) And the Court held that this distinction did not violate equal protection. "It is rational for Congress to provide different sets of entitlement-one governing native Hawaiians and another governing members of American Indian tribes." *Id.*at 1282-1283. Thus, five years

before *Carcieri,* this Court confirmed that the benefits of the IRA are limited to federally recognized tribes in 1934.

In *Maynor v. Morton,* 510 F.2d 1254, 1256 (D.C. Cir. 1975), the Court held that "the IRA was primarily designed for tribal Indians, and neither [the plaintiff] nor his relatives has any tribal designation, organization, or reservation at that time" – which was 1934 when the IRA was enacted. Consistent with the *Maynor* decision, in *City of Sault Ste. Marie v. Andrus,* 532 F.Supp. 157, 160 n.6 (D.D.C. 1980) the district court stated that "the IRA was intended to benefit only those Indians federally recognized at the time of passage." And in *United States v. State Tax Commission of Mississippi,* 505 F.2d 633, 642 (5th Cir. 1974) the Fifth Circuit held that the "language of Section [479] positively dictates that tribal status is to be determined as of June, 1934."

In summary, the *Carcieri* Supreme Court decision did not change the law or the clear language and limits of the IRA of 1934. Instead, the Court reaffirmed the law and tried to correct over 40 years of misinterpretation and misapplication of the IRA by Federal agencies, officials and employees in their never ending effort to expand their authority, to the detriment of the public, beyond the statutory limits set by Congress in the IRA of 1934. The ROD is just the latest attempt by the Defendants to ignore the law and the express limitations of the IRA of 1934.

3. NCIP is entitled to a judgment on their first claim for relief because the district court in Ione Band v. Burris conclusively established that the Ione Band was not a federally recognized Indian tribe in 1934.

NCIP is entitled to a judgment on its first claim for relief because the issue of whether or not the Ione Band was a recognized Indian tribe under Federal jurisdiction in 1934 was decided by Judge Karlton of this Court in Ione Band v. Burris. Specifically, in the Ione v. Burris case, which involved the same parties and the same federal recognition issues that are involved here, Judge Karlton determined that the Ione Band was not a recognized tribe and did not have a government. (RJN Nos. 16, 17, 18, 19 and 20.) Furthermore, Judge Karlton reached this conclusion at the urging of the Federal Defendants and the Ione Band. A final judgment on these issues was entered in 1996 and was not appealed. It is binding on same Defendants here.

The decision and final judgment in Ione Band v. Burris clearly established that the Ione Band was not a federally recognized tribe in 1934 and, therefore, it is not entitled to a fee-to-trust transfer under the IRA of 1934. The following overview of the pleadings and order in Ione Band v. Burris confirms that these issues were adjudicated and decided in that case.

a. The Ione Band's Complaint.

The Ione Band filed its Complaint for Declaratory Relief, Quiet Title, Breach of Trust and to Compel Agency Action Unlawfully Withheld against the

United States on August 1, 1990. (ER 404-427.) In Paragraph 3 of the complaint, the Ione Band alleges that it "has been recognized by the United States as being under federal jurisdiction."

The Ione Band includes similar allegations throughout the complaint. For example, in Paragraph 9 they allege that the Ione Band "has repeatedly been identified as an Indian Tribe by federal authorities." In Paragraph 10 they contend that "federal authorities have identified the Ione Band of Miwok Indians as an American Indian Tribe." In Paragraph 12 they alleged that "the Ione Band of Miwok Indians have been viewed as California Indians under federal jurisdiction," In Paragraph 14 they allege that "the Ione Band of Miwok Indians were (sic) recognized as a tribe by the federal government."

Furthermore, the Complaint identifies the historical documents that support the Ione Band's claim that it is a recognized Indian tribe under Federal jurisdiction. The central document that the Ione Band alleged supported their claim was the October 18, 1972 letter form BIA Commissioner Bruce a copy of which was attached to the Complaint. (Complaint ¶ 20.) The Ione Band lists historical letters and documents that it claimed supported its contention that it was a recognized Indian tribe under federal jurisdiction. (Complaint ¶ 24.) The Bruce letter and many of the historical letters referenced in the Complaint are included in the AR in

this case and are once again being offered by the Ione Band to support its contention here that it is a recognized Indian tribe under Federal jurisdiction.

The Ione Band sought a declaration that it had been and remains a recognized tribe under federal jurisdiction with all the rights and sovereignty enjoyed by other Indian tribes. This claim made by the Ione Band in 1990 is identical to the claim made by the Ione Band in this case.

b. The United States' Answer to the Complaint.

The United States filed its Answer in Ione Band v. Burris on September 28, 1990 and denied all the contentions of the Ione Band including the contention that it was a federally recognized tribe. (ER 430-445.) In Paragraph 18 of its Answer the United States affirmatively states that "the group that calls itself the Ione Band of Miwok Indians have been advised that to obtain federal recognition, the procedures set forth at 25 C.F.R. Part 83 must be followed." In Paragraph 20 of its Answer the United States "affirmatively avers that Ione Band of Miwok Indians is not and has not been federally recognized."

c. The Burris faction of the Ione Band's Answer to the Complaint.

The Burris faction filed their Answer on October 22, 1990, and also denied that the Ione Band is a federally recognized tribe. (ER 447-464.) In Paragraph 18 of its Answer, the Burris faction affirmatively states that "the group that calls itself

the Ione Band of Miwok Indians [Plaintiffs] have been advised that to obtain federal recognition, the procedures set forth at 25 C.F.R. Part 83 must be followed." In Paragraph 20 of its Answer, the Burris faction "affirmatively avers that Ione Band of Miwok Indians [Plaintiff] is not and has not been federally recognized."

d. Initial Status Conference Reports.

The parties filed separate Status Reports on January 7, 1991, stating their position with respect to the allegations in the Complaint. Plaintiff, the Ione Band outlined their claims including a contention that the United States breached its fiduciary obligations to the Ione Band by failing to acknowledge and recognize its sovereign status as a tribe. (ER 466-470.)

The United States made the following judicial admission in its Status Report: "The [United States] government denies that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (ER 472-475; emphasis added.) And the Burris faction of the Ione Band made the same assertion in their Status Report: "Defendants [Ione Indians] deny that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (ER 477-480.)

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/ / /

e. **United States' Motion for Summary Judgment.**

The United States filed a Motion for Summary Judgment in February 1991. (ER 482-501.) The Burris faction of the Ione Band joined that motion. (ER 502-504.) The United States motion was based on the fact that the Ione Band was notified in 1979 that they were not a federally recognized tribe and that, if they wanted to become a federally recognized tribe, they had to complete an application for federal recognition pursuant to 25 CFR Part 83.

A key declaration offered in support of the United States' motion was submitted Michael L. Lawson, Ph.D., a respected historian with many years of experience with the BIA. (ER 505-511). After reviewing all of the BIA's historical records, Dr. Lawson concluded that: "the United States has never extended federal recognition to the Ione Bank of Miwok Indians as an Indian tribe." (Id. at 2: 16-18; emphasis added)

Another important declaration was by Arthur G. Barber, an employee of the BIA, who discussed the federal recognition issue with the Ione Band in 1989. (ER 512-514.) Mr. Barber told the Ione Band that it was not a federally recognized tribe and he suggested that they should apply for federal recognition under Part 83. Despite this suggestion, representatives of the Burris faction told Mr. Barber they and "other members of Ione Band did not wish to be federally recognized." (*Id*.)

The Ione Band opposed the United States motion for summary judgment and the United States filed a reply brief. (ER 515-519.) In its detailed reply brief, the United States addressed all the legal and factual arguments raised by the Ione Band in support of their claim that they were, and are, a federally recognized tribe. The United States reasserted that the Ione Band was notified in 1979 that they were not a federally recognized tribe.

The United States filed a Supplemental Brief (ER 520-524) and supporting declaration (ER 525-549) in support of its motion for summary judgment in March 1991. The purpose of this supplemental brief was to bring to the Court's additional information that the Ione Band knew that they were not a federally recognized tribe as early as 1973. The United States also provided information that undermined the Ione Band's reliance on the 1972 letter from Commissioner Bruce to support its claim of federal recognition. (Id.)

Pursuant to Judge Karlton's request, in October 1991, the United States submitted a second supplemental brief on whether or not the Part 83 regulations were the exclusive means to obtain tribal recognition. (ER 552-564.) The United States argued that, although the Part 83 process was not the exclusive means to obtain tribal recognition, it was the only administrative means available. Also Congress retained the authority to recognize tribes by legislative means. In addition there are "treaty" tribes which are tribes that were recognized as

signatories to a treaty ratified by the Senate. The United States confirmed that the Ione Band was not recognized by an Act of Congress or by a treaty.

In its reply brief, the United States disputed the Ione Band's claim that it could be recognized administratively outside the Part 83 process: "The government's position has been and remains that the acknowledgement regulations [Part 83] constitute the exclusive administrative means of obtaining full . . . federal tribal recognition." (ER 565-570, p. 2 fn. 1; emphasis in the original.) The United States again urged the Ione Band to avail themselves of the Part 83 process. (*Id*.)

In summary, in less than a year, the United States submitted five (5) briefs in support of its motion for summary judgment in the Ione Band v. Burris case. (RJN Nos. 7, 11, 12, 14, & 15.) In each of these briefs, the United States consistently reasserted its position that the Ione Band is not and never has been a recognized Indian tribe under Federal jurisdiction. The Ione Band opposed every brief and claimed that, although they did not follow the Part 83 or any other tribal recognition mechanism, they were recognized as a tribe through an administrative process unrelated to Part 83. In contrast, the Burris faction of the Ione Band supported the United States motion and denied that the Ione Band was ever a federally recognized tribe. Thus the legal and factual issues regarding the federal recognition status of the Ione Band were fully briefed before the United States' motion for summary judgment was submitted to Judge Karlton for decision.

f. Judge Karlton Grants the Motion for Summary Judgment.

Judge Karlton issued his decision granting the United States motion for summary judgment on April 2, 1992. (ER 571-597.) Judge Karlton outlined, in detail the procedural and factual history of the case and the Ione Band's effort to compel the U.S. to recognize them as a tribe. Judge Karlton summarized all the alternative recognition mechanisms that had been presented and discussed by the United States and the Ione Band, and concluded:

> "Plaintiffs' [Ione Band's] argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that 'the Secretary may acknowledge tribal entities outside the regulatory process,' . . . and that the court, therefore, should accept jurisdiction over plaintiff' claims compelling such recognition. **I cannot agree.** Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the above mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA acknowledgement process, the United States motion for summary judgment on these claims must be GRANTED." (RJN No. 16 at 17; emphasis added.)

g. Judge Karlton's dismissal of the lawsuit and entry of judgment.

Magistrate Judge Nowinski submitted Findings and Recommendation re Dismissal in May 1996. (ER 598-602.) Judge Nowinski recommended dismissal because the Ione Band had not obtained federal recognition and, consequently, "there was no tribal government authorized to pursue the tribe's claims." (RJN No. 17 at 2.) Judge Karlton adopted Magistrate Judge Nowinski's findings and recommendations "insofar as it recommends dismissal of all of the plaintiff's [Ione Band's] claims." (ER 603-609 at 6.) Judge Karlton held that "the magistrate

judge's conclusion that there is no tribal government is clearly correct." (RJN No. 18 at 4.) Judge Karlton also found that the Ione Band lacked standing to claim that their land was Indian Country because it was not a "duly recognized tribal government." (ER 610-614.) Judgment was entered on September 4, 1996. (ER 615-618.) It was not appealed and the decision that the Ione Band was not a federally recognized tribe is binding on the Defendants and Ione Band in case.

h. **Subsequent proceedings confirming Ione v. Burris judgment.**

The binding impact of the Ione Band v. Burris decision has been applied confirmed in at least two subsequent cases.

First, in 1992, the BIA declined to review the economic development agreement between the Ione Band and a private company because the Ione Band was not a federally recognized tribe. The Ione Band appealed and the IBIA upheld the BIA's decision based on Judge Karlton's 1992 order in Ione Band v. Burris. (ER 619-621.) The Ione Band did not challenge the IBIA's decision in Court. It is final and binding on the Ione Band and the BIA.

Second, in 1997, the Ione Band initiated another lawsuit against the County of Amador. (*Villa, et. al v. County of Amador et. al* USDC ED Cal. No. CIV-S-97-0531.) The Ione Band sought to restrain Amador County from invoking regulatory jurisdiction over their property. Judge Levi held that, because the Ione Band was

not a federally recognized tribe, it was precluded from contesting Amador County's jurisdiction over fee owned land. (ER 622-625.) This decision was not appealed and it also is binding on the Ione Band.

The doctrine of collateral estoppel was summarized by the United States Supreme Court in *United States v. Mendoza,* 464 U.S. 154, 158 (1984), as follows:

> Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.

The Ione Band litigated against the Federal Defendants and lost their claim of federal recognition three times, twice in the district court and once before the IBIA. The Ione Band and Defendants are estopped from claiming, and litigating yet again, that the Ione Band was or is a federally recognized tribe. Instead, based on the final judgment in Ione Band v. Burris, and the Supreme Court's majority decision in *Carcieri,* NCIP is entitled to a judgment based on its first claim for relief that the Ione Band is not a federally recognized tribe entitled to the proposed fee-to-trust transfer of the 12 parcels under the IRA of 1934.

4. **The Defendants' claim that a tribe need not be federally recognized, and only need to be under federal jurisdiction, in 1934 is based on Justice Souter's dissent and is contrary to the majority opinion in *Carcieri.***

In his analysis in the ROD, Defendant Laverdure ignores the majority decision in *Carcieri* and dropped the requirement that a tribe must have been both

"federally recognized" and "under federal jurisdiction" in 1934 to qualify for a fee-to-trust transfer under the IRA. Instead, consistent with Justice Souter's dissent, Laverdure splits the IRA phrase "recognized tribe now under federal jurisdiction" in two as though there were two separate tests with two separates meanings. Acting Assistant Secretary Laverdure ignores the "recognized tribe" half of the test - implicitly conceding that the Ione Band was not a recognized tribe in 1934. Laverdure then focuses on the "under federal jurisdiction" half of the test - which he claims is ambiguous and subject his interpretation as the "acting" Assistant Secretary. Mr. Laverdure finally creates a confusing two part test to "interpret" the phrase "under federal jurisdiction" and he contends this two part test is entitled to *Chevron* deference.

The district court did not discuss the majority opinion in *Carcieri.* Nor did the court evaluate the Souter dissent. Instead the district court accepted the Defendants' claim that the operative phrase from Section 479 could be split into two separate tests and that the "under federal jurisdiction" half of the test was "ambiguous" and subject to interpretation by the DOI. The district court then gave deference to the DOI's two part inquiry for determining whether a tribe was under federal jurisdiction in 1934. The DOI's interpretation and analysis, adopted by the district, is directly contrary to the Supreme Court majority opinion in *Carcieri.* It is legally erroneous and should be reversed.

As summarized above, Justice Thomas' majority opinion and Justice Breyer's concurring opinion (a total of six Justices) held that a tribe must be **both** federally recognized and under federal jurisdiction in 1934 to qualify for the fee-to-trust benefits of the IRA of 1934. It is true that Justice Souter's dissent provides that, in his view, a tribe could be either federally recognized **or** under federal jurisdiction in 1934 to qualify. But that idea was rejected by the majority and, as a dissenting opinion, is not relevant here or binding law. For the same reason, Defendant Laverdure's separate "under federal jurisdiction" analysis and his two part inquiry are contrary to law and should be rejected.

Furthermore, the factors identified by the district court in support of the finding in the ROD that the Ione Band, although not federally recognized, met the supposed two-part test are weak at best. First, the district court states that the Ione Band is the "successor in interest to Treaty J in the mid-1800s" signed by some California Indians. (22) But that is not correct. There is no evidence that the Intervenor was a party to Treaty J. And, even if it were a party, Treaty J was never ratified. A treaty that was not ratified by the Senate "carries no legal effect." *Robinson v. Jewell,* 790 F.3d 910, 917 (9th Cir. 2015) (unratified Treaty D is a "legal nullity" and created no land rights or other enforceable rights.)

The district court also referenced the efforts by federal officials in the first half of the twentieth century to document or acquire land for Ione Indians. But

those efforts were all on behalf of Ione Indians as "homeless Indian" and not as a tribe or government. In fact, there is no correspondence in the AR that was sent to or from the Ione Band as a tribal government or band or a faction before the 1970s. The first correspondence from any of the Ione Indians describe themselves as the Indians of the Ione Valley – not as a tribe or a government.

The district court also referenced the case of *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp. 2d 170, 198 (D.D.C. 2011). But the Ione Band was not a party to that case and its administrative acknowledgment was not contested. In fact, the plaintiff Indians in that case argued that they wanted the federal government acknowledge them as a tribe administratively outside of the Part 83 process and the government allegedly did for the Ione Band. The decision and binding judgment in Ione Band v. Burris were not mentioned.

CONCLUSION

These two Orders denying NCIP's motions for a judgment were erroneous as a matter of law. They should be reversed and the judgment should be vacated.

Dated: April 1, 2016.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on April 1, 2016.

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

Dated: April 1, 2016.

Respectfully submitted,

/s/Kenneth R. Williams
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Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and a 14-point font and contains 9522 words.

Dated: April 1, 2016.

Respectfully submitted,

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

No. 15-17189`

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH
and CITIZENS EQUAL RIGHTS ALLIANCE

Plaintiffs-Appellants

v.

SALLY JEWELL, Secretary; KEVIN WASHBURN, Assistant-Secretary; DONALD LAVERDURE, Acting Assistant-Secretary; BUREAU OF INDIAN AFFAIRS; AMY DUTSCHKE, BIA Reg. Dir.; JOHN RYDZIK, BIA Env. Div.; PAULA HART, OIG Chair; TRACIE STEVENS, NIGC Chair; NATIONAL INDIAN GAMING COMMISSION; and U.S. DEPARTMENT OF INTERIOR

Defendants-Appellees

and

IONE BAND OF MIWOK INDIANS

Intervener-Appellee

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:12-cv-01748 TLN-CMK
Honorable Troy L. Nunley, District Judge

EXCERPTS OF THE RECORD – VOLUME 1

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APPELLANTS' EXCERPTS OF RECORD

No Casino in Plymouth et al v. Sally Jewell, et al

Ninth Circuit Court of Appeal Case No. 15-17189

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, **v.** SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, *et al.* Defendants.	Case No. 2:12-cv-01748-TLN-CMK **PLAINTIFFS' NOTICE OF APPEAL**

Notice is hereby given that Plaintiffs, No Casino In Plymouth and Citizens Equal Rights Alliance, appeal to the United States Court of Appeals for the Ninth Circuit from the Memorandum and Order of the United States District Court for the Eastern District of California, filed on September 30, 2015 (Electronic Court File (ECF) No. 100) denying Plaintiffs' motion and request for summary judgment and granting Defendants' motions for summary judgment. Judgement was entered on October 14, 2015. (ECF No. 101.)

This notice of appeal includes all related interim and interlocutory Orders, including but not limited to, the Order dated September 13, 2013, (ECF No. 46) granting the "Ione Band of Miwok Indians" motion to intervene (opposed by Plaintiffs) and the Order dated August 11, 2014, (ECF No.71) denying Plaintiffs' motion for a judgment on the pleadings.

Pursuant to Ninth Circuit Rule 3-2, a representation statement identifying all the parties to this action and their respective counsel is attached.

Dated: October 30, 2015

Respectfully Submitted,

/s/ Kenneth R. Williams
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Attorney for Plaintiffs
No Casino in Plymouth and
Citizens Equal Rights Alliance

REPRESENTATION STATEMENT

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U.S. Dist. Ct., E.D. California, Case No. 2:12-CV-01748-TLN-CMK

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

NO CASINO IN PLYMOUTH, ET AL.,

CASE NO: **2:12−CV−01748−TLN−CMK**

V.

JOHN RYDZIK, ET AL.,

XX −− Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 9/30/2015

Marianne Matherly
Clerk of Court

ENTERED: **October 14, 2015**

by: /s/ J. Donati
Deputy Clerk

UNITED STATES 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.

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

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.
- 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

[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.

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 (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 (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, 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' 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").

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

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 (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

[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.

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 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

[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".

"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 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

[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".

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 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, 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

[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.)

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 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 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.)

[8] *See* ECF No. 77-1 ¶ 8.

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 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:

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

[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.)

- "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 '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 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

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

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 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.

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

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 (2009)

Plaintiff argues that *Carcieri v. Salazar*, 555 U.S. 379 (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 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

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

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.*, 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).

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.)

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

[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.

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 (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. 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,

[15] *See* 5 U.S.C. § 702.

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 facts 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]

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 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

[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 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.

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 C.F.R. § 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 non-compliance 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*, 129 S. Ct. 1436 (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 (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 (1973). *See Donnelly v. United States*, 228 U.S. 243, 256 (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 (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 is restored 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]

[17] The Court has addressed the restored lands for a restored tribe provision, 25 U.S.C. § 2719(b)(1)(B)(iii), with

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 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

greater thoroughness in Case No. 1710, ECF No. 95, pp. 35–46.

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 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 Summary 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

Troy L. Nunley
United States District Judge

UNITED STATES 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,

Intervenor Defendant.

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

ORDER

This matter is before the Court on Plaintiffs No Casino in Plymouth and Citizens Equal Rights Alliance's (collectively, "Plaintiffs") Motion for Judgment on the Pleadings as to their first claim under Federal Rule of Civil Procedure 12(c)[1]. (See Pls.' Mot. J. Pleadings, ECF 60; Mem. P. & A., ECF 61.) Plaintiffs also submitted a Request for Judicial Notice. (See Pls.' Req. Judicial Notice, ECF 62.) Defendants, S.M.R. Jewell, et al., ("Federal Defendants") and Ione Band of Miwok Indians ("Intervenor Defendant") (collectively, "Defendants"), oppose the

[1] All further reference to Rule or Rules is to the Federal Rules of Civil Procedure, unless otherwise noted.

motion. (See Defs.' Opp'n to Pls.' Mot. J. Pleadings, ECF 64; Intervenor-Def.'s Opp'n to Pls.' Mot. J. Pleadings, ECF 65.) For the reasons set forth below, Plaintiffs' motion is DENIED.[2]

BACKGROUND

This matter arises out of Plaintiffs' allegations that Federal Defendants did not have the authority to take land into trust for the Intervenor Defendant, because the Ione Band of Miwok Indians was not a "recognized tribe now under federal jurisdiction" in 1934 when the Indian Reorganization Act ("IRA") was enacted. (Pls.' First Am. Compl. ("FAC"), ECF 10 ¶¶ 50-58.) On March 24, 2012, the Bureau of Indian Affairs ("BIA") issued a Record of Decision ("ROD"), placing approximately 228 acres of land located near the city of Plymouth into trust on behalf of the Intervenor Defendant. (Id. ¶ 1.) Plaintiffs allege that, although the Ione Indians were not a federally recognized tribe in 1934, Federal Defendants erroneously concluded it was sufficient that they were an Indian community "under federal jurisdiction" in 1934. (Id. ¶ 58.)

Plaintiffs ask the Court to vacate the ROD, arguing that the Intervenor Defendant was not a federally recognized tribe in 1934, and thus, the Secretary of the Department of Interior ("DOI") lacked authority to transfer the land into trust. (Id. ¶ 2.) Additionally, Plaintiffs allege that the trust acquisition proposed in the ROD is intended to facilitate the construction of a major casino, but the parcels are not eligible for Indian Gaming because the Indian Gaming Regulatory Act ("IGRA") prohibits Indian gaming on land acquired after 1998, unless one of the statute's narrow exceptions apply. (Id. ¶ 3.) Plaintiffs further maintain that the Federal Defendants failed to take a "hard look" at the environmental and socio-economic impacts of this action as required by the National Environmental Policy Act ("NEPA"). (Id. ¶ 3.) Plaintiffs seek declaratory and injunctive relief from the Department of Interior's ROD.

Plaintiffs filed their FAC in this Court on October 1, 2012, asserting claims predicated upon Federal Defendants' alleged (1) violation of IRA, (2) violations of Code of Federal Regulations § 151 and IRA, (3) infringement of state and local police power over non-public domain property, (4) violation of IGRA, and (5) violation of NEPA. (Id. ¶¶ 50–100.)

[2] Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. L.R. 230(g).

STANDARD

A party may move for judgment on the pleadings after the pleadings are closed. Fed. R. Civ. P. 12(c). A Rule 12(c) motion challenges the legal adequacy of the opposing party's pleadings. Westlands Water Dist. v. Bureau of Reclamation, 805 F. Supp. 1503, 1506 (E.D. Cal. 1992). "A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." Ventress v. Japan Airlines, 603 F.3d 676, 681 (9th Cir. 2010) (citations omitted). "For purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989).

To prevail on a Rule 12(c) motion, the moving party must "clearly establish[] on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Lorbeer v. Am. Tel. & Tel. Co., 958 F.2d 377 (9th Cir. 1992). Therefore, "a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery." Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). A judgment on the pleadings also is not appropriate if the court "goes beyond the pleadings to resolve an issue; such a proceeding must properly be treated as a motion for summary judgment" pursuant to Rule 12(d). Hal Roach Studios, 896 F.2d at 1550. A district court may, however, "consider certain materials -- documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice -- without converting the motion to dismiss [or motion for judgment on the pleadings] into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); see also Summit Media LLC v. City of Los Angeles, 530 F. Supp. 2d 1084, 1096 (C.D. Cal. 2008). Further, extrinsic evidence that is subject to judicial notice may be properly considered in a Rule 12(c) motion. Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999).

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ANALYSIS

Plaintiffs move for judgment on the pleadings as to their first claim for relief averring that Federal Defendants lacked authority to take land into trust for Intervenor Defendant. (ECF 61 at 2:1-4.) First, Plaintiffs contend that the Ione Band of Miwok Indians was not a recognized tribe under federal jurisdiction in 1934 when the IRA was enacted, and thus, according to Carcieri v. Salazar, 555 U.S. 379 (2009), it does not qualify for the fee-to-trust transfer. Second, Plaintiffs assert that this Court's decision in Ione Band of Miwok Indians, et al. v. Harold Burris, et al. ("Burris"), holding that the Ione Band of Miwok Indians was not a federally recognized tribe in 1992, is preclusive and binding on the Defendants in the present case. Third, Plaintiffs allege that assertions made by Federal Defendants in the aforementioned litigation are judicial admissions that are also binding in this case. (Id. at 2:1-4.) Specifically, Plaintiffs refer to assertions made by the United States and at least one faction of the Ione Band in their initial pleadings and status conference reports denying "that the Ione Band of Miwok Indians has ever been a federally recognized tribe." (Id. at 19:9-22.)

Both Federal Defendants and Intervenor Defendant oppose the motion, arguing Plaintiffs' motion it is procedurally improper and impermissible under the Administrative Procedure Act ("APA"). (ECF 64 at 6:11-12; ECF 65 at 11:11-16.) Federal Defendants first argue that Plaintiffs' motion is beyond the scope of the United States' waiver of sovereign immunity and that Plaintiffs have not met their burden of establishing otherwise. (ECF 64 at 8.) Second, they maintain the standard of review for a motion for judgment on the pleadings is not an appropriate standard for review of agency action. (Id. at 11.) Third, even if a 12(c) motion was appropriate, Federal Defendants' Answer to Plaintiffs' First Amended Complaint (Fed. Defs.' Answer to FAC ("Answer"), ECF 14) raises facts and defenses that if true would bar recovery. (Id. at 12.) Federal Defendants further argue that the appropriate process for resolving this matter is through cross-motions for summary judgment. (Id. at 13.) As to the merits of Plaintiffs' motion, Federal Defendants contend that Plaintiffs' erroneously interpret Carcieri, mischaracterize this Court's findings in Burris by omitting relevant information and taking documents out of context, and attempt to improperly apply non-mutual collateral estoppel. (Id. at 15, 17-18.)

Additionally, Intervenor Defendant contends that Plaintiffs' motion asks this Court to overturn agency action on the basis of a standard of review and procedure that are inapplicable and inappropriate under the APA. (ECF 65 at 8.) Intervenor Defendant argues that Plaintiffs fail to demonstrate both a right of action and a waiver of governmental sovereign immunity outside the APA. (Id. at 13.) Like the Federal Defendants, Intervenor Defendant maintains that the appropriate process for resolving this matter is through cross-motions for summary judgment. (Id. at 18.)

A. Review under the Administrative Procedure Act

Plaintiffs contend that they are entitled to judgment on the pleadings as to their first claim for relief because Federal Defendants lack authority to take land into trust for Intervenor Defendant. Relying on this Court's decision in Burris, Plaintiffs urge the Court to take judicial notice of several documents from that case that were not included in the administrative record in support of their theory that Intervenor Defendant was not a federally recognized tribe eligible for a fee-to-trust transfer. (ECF 61 at 7-13.) In opposition, rather than addressing the substantive merits of Plaintiffs' motion, Federal Defendants raise procedural concerns. Specifically, they argue that Plaintiffs have not met their burden of establishing that their motion for judgment on the pleadings falls within an explicit waiver of the United States' sovereign immunity from suit and, as such, must rely on the limited waiver under the APA and seek administrative record-based review of agency action. (ECF 61 at 8.)

The Court agrees with Federal Defendants. The United States, as a sovereign, is immune from suit unless it has waived its immunity. Dept. of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999); Dunn & Black, P.S. v. United States, 492 F.3d 1084, 1087–88 (9th Cir. 2007) (citing Gilbert v. Da Grossa, 756 F.2d 1455, 1458 (9th Cir. 1985)). It is well settled that the United States, together with its agencies and employees, may not be sued in the absence of such a waiver of immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); Loeffler v. Frank, 486 U.S. 549, 554 (1988); United States v. Testan, 424 U.S. 392, 399 (1976). A waiver of immunity must be "unequivocally expressed" and is "construed strictly in favor of the sovereign." United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992) (citations omitted). Because only Congress can

waive the federal government's sovereign immunity, a suit against the United States or its agencies or employees acting in their official capacities may proceed only in accordance with federal statute and under such conditions as Congress may impose. Testan, 424 U.S. at 399; United States v. Sherwood, 312 U.S. 584, 586-88 (1941).

Plaintiffs' motion neither cites the federal statute that they believe grants them a right of action against the federal government, nor explains how Federal Defendants may have waived their immunity against such action. However, in the FAC, Plaintiffs invoke 28 U.S.C. § 1331, 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 701-706 *et seq.* as the basis for jurisdiction in this case. (ECF 10 ¶ 10). Of these statutes, only the Administrative Procedure Act, 5 U.S.C. §§ 701-706 *et seq*., provides an independent waiver of sovereign immunity.[3]

Specifically, the APA provides for judicial review of (1) "agency action made reviewable by statute" and (2) "final agency action." 5 U.S.C. § 704. In order to have standing to seek judicial review, a person must "suffer[] a legal wrong because of agency action" or be "adversely affected or aggrieved" by said action. 5 U.S.C. § 702. The proper standard for reviewing an agency's discretionary action, such as the Secretary's ROD in this case, is to determine whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-14 (1971). The critical question in answering this inquiry is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. at 416. "Although this inquiry into the facts is to be searching and

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[3] Sections 1331, 2201 and 2202 do not contain express waivers of sovereign immunity. 28 U.S.C. §§ 1331, 2201–02. Section 1331 "merely provides that the district court shall have original jurisdiction in all civil actions arising under the Constitution, laws or treaties of the United States" and "cannot by itself be construed as constituting a waiver of the government's defense of sovereign immunity." Gilbert v. DaGrossa, 756 F.2d 1455, 1458-59 (9th Cir. 1985); see also Beller v. Middendorf, 632 F.2d 788, 795-97 (9th Cir. 1980). Similarly, sections 2201 and 2202 do not by themselves waive the government's immunity. See Delano Farms Co. v. Cal. Table Grape Comm'n, 1:07-CV-1610 OWW SMS, 2010 WL 2952358, at * 4 (E.D. Cal. July 26, 2010) (citing, inter alia, Wells v. United States, 280 F.2d 275, 277 (9th Cir. 1960)); Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1382-83 (9th Cir. 1988) ("The Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction.")

careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Id. "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (citing Citizens to Preserve Overton Park, 401 U.S. at 414). Further, a court conducting APA judicial review "is not required to resolve any facts in a review of an administrative proceeding," but instead determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985).

While a court is free to consider judicially noticeable documents, such as the ones brought forth by Plaintiffs in their Request for Judicial Notice (ECF 62), under the APA this Court essentially acts as a court of appeal. See Fla. Power & Light Co., 470 U.S. at 743-44; Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1564 (10th Cir. 1994). As such, the Court must ultimately determine, based on a review of the administrative record, whether the DOI considered relevant factors and articulated a rational connection between the facts found and the choices made.[4] Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dep't of Agric., 499 F.3d 1108, 1115 (9th Cir. 2007); Protect Our Water v. Flowers, 377 F. Supp. 2d 844, 858 (E.D. Cal. 2004) (citing Natural Res. Def. Council v. U.S. Dep't of the Interior, 113 F.3d 1121, 1124 (9th Cir. 1997)).

Defendants' argument in the instant case that the standard guiding a Rule 12(c) motion does not comport with APA review is well taken. (ECF 64 at 12.) Specifically, the reviewing court's role is to determine whether the DOI "properly dealt with the facts under the deferential arbitrary and capricious standard of review," rather than weighing or determining whether issues of fact are controverted in the pleadings. (Id. at 11.) Since this Court cannot make the necessary determinations about the DOI's decision without reviewing the full context of the agency's decision in light of the administrative record as is required by the APA, Plaintiffs' motion for

[4] The Court notes that it may, within its discretion, consider documents judicially noticeable on the parties' cross-motions for summary judgment.

judgment on the pleadings is denied.

B. Facts and Affirmative Defenses Raised in Answer

In the alternative, Federal Defendants argue that even if this was not an APA case, Plaintiffs' Motion for Judgment on the Pleadings would fail because Federal Defendants have raised genuine issues of material fact and have pled affirmative defenses in their Answer thereby precluding judgment in Plaintiff's favor. (ECF 64 at 12.) In support of this claim, Federal Defendants direct the Court to allegations in Plaintiffs' FAC. Specifically, Federal Defendants point to Plaintiffs' contention that "[t]he Secretary lacks authority to transfer the Parcels into trust for the Ione Indians . . . [,]" because the Supreme Court's Carcieri decision limits the Secretary's IRA trust acquisition authority to tribes, which in addition to being under federal jurisdiction, were "recognized in 1934." (Id. at 12; ECF 10 ¶ 2.) Plaintiffs' FAC also asserts that the Intervenor Defendants "were not a federally recognized tribe in 1934" and that the Secretary's ROD is "inconsistent with the facts." (ECF 64 at 12; ECF 10 ¶ 2.) Federal Defendants contend that Plaintiffs' first claim "hinges on their view of 'the facts,' as well as their interpretation of Carcieri." (ECF 64 at 12.) In their Answer, Federal Defendants respond that "[t]he IRA, the Carcieri decision, and the ROD speak for themselves and are the best evidence of their contents," opposing Plaintiffs' assertions "to the extent they are incomplete or inconsistent with the IRA, the Carcieri decision or the ROD." (ECF 14 at 11-12; ECF 64 at 12.) Federal Defendants argue that they considered evidence pertaining to the status of Intervenor Defendant in 1934, and concluded that those facts support their ability to acquire land into trust for Intervenor Defendant today. (ECF 64 at 13.) Federal Defendants point to these disputed contentions, as well as affirmative defenses, in their Answer to support their claim that a 12(c) motion cannot be granted in this case.

Judgment on the pleadings is only proper when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 12(c). However, "[a]ll allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party." McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988). Consequently, "a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery." Gen. Conference Corp. of

Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). Similarly, "if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." Id.; see also Cooper v. Sely, No. 1:11-CV-00544-AWI, 2013 WL 4095328 (E.D. Cal. Aug. 13, 2013).

Accepting Federal Defendants' allegations of fact as true and construing them in the light most favorable to the non-moving party, Federal Defendants' argument is well received. The critical question in determining whether the agency acted in a manner that was "arbitrary, capricious, [or] an abuse of discretion" is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, 401 U.S. at 414. In their Answer, Federal Defendants raise issues of material fact and affirmative defenses that if true could bar recovery. There is apparent disagreement about whether Federal Defendants considered proper facts in making their determination. Plaintiffs allege that Federal Defendants' ROD is inconsistent with the facts; however, Federal Defendants argue that they considered evidence pertaining to the status of Intervenor Defendant in 1934 and concluded that those facts support their ability to acquire land into trust for Intervenor Defendant today. (ECF 64 at 13.) Since the Answer raises issues of fact that, if proved, would defeat recovery, judgment on the pleadings is inappropriate at this time. Accordingly, the allegations in Federal Defendants' Answer raise a material issue of fact which precludes judgment on the pleadings.

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CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Judgment on the Pleadings is DENIED. Plaintiffs shall file their motion for summary judgment within sixty (60) days of the issuance of this order. Federal and Intervenor Defendants shall file their combined opposition and cross-motion for summary judgment within Sixty (60) days of Plaintiff's motion for summary judgment. Plaintiffs shall file their reply and opposition to Defendant's Cross-Motion for Summary Judgment within Sixty (60) days of Federal and Intervenor Defendants' combined opposition and cross-motion for summary judgment. Federal and Intervenor Defendants shall file their replies within Thirty (30) days of Plaintiff's opposition.[5]

Dated: August 8, 2014

Troy L. Nunley
United States District Judge

[5] The Court notes that this briefing schedule is similar to the briefing schedule ordered by the Court in the related case of County of Amador v. Dept. of Interior, et al., Case No. 2:12-cv-01710 (E.D. Cal. filed June 27, 2012).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on April 1, 2016.

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

Dated: April 1, 2016.

Respectfully submitted,

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

No. 15-17189`

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH
and CITIZENS EQUAL RIGHTS ALLIANCE

Plaintiffs-Appellants

v.

SALLY JEWELL, Secretary; KEVIN WASHBURN, Assistant-Secretary; DONALD LAVERDURE, Acting Assistant-Secretary; BUREAU OF INDIAN AFFAIRS; AMY DUTSCHKE, BIA Reg. Dir.; JOHN RYDZIK, BIA Env. Div.; PAULA HART, OIG Chair; TRACIE STEVENS, NIGC Chair; NATIONAL INDIAN GAMING COMMISSION; and U.S. DEPARTMENT OF INTERIOR

Defendants-Appellees

and

IONE BAND OF MIWOK INDIANS

Intervener-Appellee

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:12-cv-01748 TLN-CMK
Honorable Troy L. Nunley, District Judge

EXCERPTS OF THE RECORD – VOLUME 2

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APPELLANTS' EXCERPTS OF RECORD

No Casino in Plymouth et al v. Sally Jewell, et al

Ninth Circuit Court of Appeal Case No. 15-17189

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, **v.** KENNETH L. SALAZAR, Secretary of the U.S. Department of the Interior; KEVIN WASHBURN, Assistant Secretary-Indian Affairs, U.S. Department of Interior; DONALD E. LAVERDURE, Acting Assistant Secretary-Indian Affairs, U.S Department of Interior; AMY DUTSCHKE, Pacific Regional Director, Bureau of Indian Affairs; JOHN RYDZIK, Chief, Division of Environmental, and Cultural Resources, Bureau of Indian Affairs, Pacific Regional Office; PAULA HART, Chairwoman of the Office of Indian Gaming; TRACIE STEVENS, Chairwoman of the National Indian Gaming Commission; THE NATIONAL INDIAN GAMING COMMISSION; and THE UNITED STATES DEPARTMENT OF INTERIOR Defendants.	Case No.2;12-CV-01748-JAM-CNK **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, No Casino In Plymouth (NCIP) and Citizens Equal Rights Alliance (CERA), file this First Amended Complaint against Defendants, and each of them, and allege as follows:

NATURE OF THE ACTION

1. Plaintiffs respectfully request that this Court review and vacate the final Record of Decision (ROD) of the Bureau of Indian Affairs (BIA) issued by an acting Assistant Secretary (Secretary) of the Department of the Interior (DOI) on May 24, 2012 and published in the Federal Register on May 30, 2012. (77 Fed. Reg. 31871-31872, May 30, 2012.) The ROD is to place 228.04 acres of land (Parcels) located in the City of Plymouth, Amador County, California, into trust for a group of individuals who identify themselves as the Ione Band of Miwok Indians (Ione Indians). The Parcels are currently owned in fee by private landowners, not the Ione Indians. The fee to trust (FTT) transfer proposed by the Secretary in the ROD is a final agency action. (25 C.F.R. § 2.6 & 5 U.S.C. § 704.) This Court should vacate the ROD for several reasons.

2. The Secretary lacks authority to transfer the Parcels into trust for the Ione Indians. The Indian Reorganization Act of 1934 (IRA) authorizes the Secretary of Interior to take land in trust for only "recognized Indian tribe now under Federal jurisdiction." (25 U.S.C. §§ 465 et seq.) The Supreme Court has determined that this phrase is limited to federally recognized tribes under federal jurisdiction in 1934, when the IRA was enacted. *Carcieri v. Salazar,* 555 U.S. 379 (2009). The Ione Indians were not a federally recognized tribe in 1934. The Secretary's determination in the ROD that the Ione Indians were a recognized tribe under federal jurisdiction in 1934 lacks substantial justification and is inconsistent with the facts. It is an abuse of discretion, arbitrary, capricious and contrary to the law. It should be vacated by this Court.

3. The trust acquisition proposed by the Secretary in the ROD is intended to facilitate the construction of a major gambling casino, hotel and related facilities on the Parcels. But the Parcels are not eligible for Indian gaming. The Indian Gaming Regulatory Act (IGRA) prohibits Indian gaming on land acquired after 1988 unless one of the statute's narrow exceptions applies. (29 U.S.C. §§ 2701-2721). Although, under the ROD, the Parcels would be acquired in trust for

the Ione Indians after 1988, none of the IGRA exceptions applies. The Secretary's determination in the ROD that the Parcels qualified as Indian lands eligible for gaming under the IGRA "restored lands for a restored tribe" exception lacks substantial justification and is inconsistent with the facts and prior positions of the DOI. The Ione Indians are not a "restored tribe" and the Parcels are not "restored lands" as these terms are used in the IGRA. It is also beyond the authority of the Secretary to make this determination. IGRA requires the National Indian Gaming Commission (NIGC), not the Secretary, to make this determination. The Secretary's determination in the ROD that the Ione Indians are a "restored tribe" and the Parcels are "restored lands" under IGRA was an abuse of discretion and is arbitrary, capricious and contrary to the law. It should be vacated by this Court.

4. The Secretary, DOI, BIA and NIGC failed to take a "hard look" at the environmental and socio-economic impacts of his proposed action as required by the National Environmental Policy Act. (NEPA; 42 U.S.C. §§ 4321 et seq.) "Hard look" means that such actions should not cause undue damage to the human and natural environment of the designated and surrounding areas. The proposed action in the ROD, the unregulated construction of a major casino complex in a rural, historic community, is contrary to law because its implementation would cause permanent and irreparable harm to the environment, including the human environment, as defined in NEPA. It would also be contrary to the will of the People of the County of Amador who voted 84.6% against permitting another casino in their county and community. Furthermore, taking the Parcels into trust would create permanent and irreversible regulatory, jurisdictional and tax revenue problems for the State and local governments and their economies. The Secretary, DOI and BIA failed to adequately consider these impacts. Significantly, they also failed to apply a fair and unbiased analysis of the jurisdictional and human impacts caused by the ROD as required by NEPA. For example, in the Final Environmental Impact Statement (FEIS), they wrongfully

assumed that non-Indian interests did not require equal consideration against the interests of the Ione Indians when considering the environmental impacts. The Secretary, DOI and BIA ignored or failed to fully consider or adequately address the traffic, water quality, air quality, increased crime and other negative impacts of the proposed casino and related facilities in the FEIS. The approval of the EIS for the FTT by the DOI, BIA and Secretary should be vacated and the EIS should be updated and recirculated for comment and resubmitted for approval. Furthermore, the NIGC completely failed to study or consider the environmental impacts of the proposal in an Environmental Assessment and EIS as required by NEPA with respect to its "restored tribe" and "restored lands" determinations for the Ione Indians. The NIGC should be required to comply with NEPA prior to considering and making these determinations.

5. The recent United States Supreme Court decisions of *Carcieri v. Salazar* and *Hawaii v. Office of Hawaiian Affairs,* 129 S Ct. 1436 (2009) and previous cases , including *City of Sherrill v. Oneida Indian Nation*, 544 U. S. 197 (2005), *Cayuga Indian Nation v. Pataki*, 413 F. 3d 266 (2nd Cir. 2005), *cert. denied,* 2006 U.S. LEXIS 3949 (U.S., May 15, 2006), and *Summa Corporation v. California ex rel. State Lands Commission* 467 U.S. 1231 (1984), make it clear that the Defendants have no authority to recreate federal public domain land, or create to federal trust land, free from State and local regulation in the State of California. California, like all other states, has sovereign rights over all lands not specifically retained as public domain land of the United States, within its exterior boundaries, including the right to regulate and tax lands that have been conveyed into private ownership. Defendants attempt to create a reservation for the Ione Indians in the State of California, by accepting any privately owned lands into federal trust status for the Ione Indians is unconstitutional, and is contrary to the United States Supreme Court's decision in *Hawaii v. Office of Hawaiian Affairs*. The creation of a reservation in favor of the Ione Indians is also contrary to the 1864 Act of Congress which specifically stated that no

more than four reservations could be established within the State of California (13 Stat. 39). And it is contrary to the Treaty of Guadalupe Hidalgo and the Act of 1851 - which confirmed private titles, and State jurisdiction, over lands previously conveyed into private ownership by Spain or Mexico.

6. Any claim in the ROD that the Ione Indians have an ancestral or aboriginal claim to the Parcels is without merit. After California became a State, and pursuant to the Treaty of Guadalupe Hidalgo, Congress passed the Act of 1851, setting up a comprehensive claims procedure to provide for the orderly settlement of Mexican land claims. (Act of Mar. 3, 1851, sec. 8, ch. 41, 9 Stat. 632.), If a property claim was not filed within the 5 year allowed timeline, then it would be barred and the property moved to public domain for subsequent conveyance to the State or private owners. This claims procedure applied to all property claims, including ancestral or aboriginal claims by Indians or tribes. *Summa Corporation v. California supra*. The Ione Indians did not file a timely claim for ancestral and aboriginal property. Thus, the Ione Indians, regardless of whether they ever existed as a separate governmental entity, long ago waived any ancestral or aboriginal property claims and relinquished any government authority that they might have had over such property. The Ione Indians cannot regain any such property claims now through open-market purchases from current titleholders or through a FTT of private property under the IRA. *Sherrill v. Oneida Indian Nation* and *Carcieri v. Salazar.*

7. The ROD is based on an overreach of the limited authority that Congress gave to the Secretary under the IRA. The Part 151 regulations (25 CFR 151) promulgated by the Secretary, and used by him as a basis for the proposed FTT in the ROD, exceed his statutory authority under the IRA. The asserted authority of the Secretary that he can convert privately held fee lands under state jurisdiction into federal Indian reservation lands under exclusive federal jurisdiction is based on the discredited "unification theory" which allowed the Secretary to "restore" to any

Indian tribe a land base and sovereign status. The "unification theory" was specifically rejected by the United States Supreme Court in *Sherrill*. The Secretary is acting outside the scope of his authority, and beyond his discretion, authorized by the IRA by claiming in the ROD that he has the authority to take private fee lands into federal trust for Indians in California.

8. Furthermore, even if the Part 151 regulations were valid and applicable, the DOI failed to comply with Part 151 when it reviewed and approved the ROD. The specific regulatory violations are listed below. Also the notice of the ROD, published in the Federal Register on May 30, 2012 (77 Fed. Reg. 31871-31872.) was incomplete and premature because it failed to include the required Title Examination for public review and comment. (25 C.F.R. §§ 150.11, 151.12(b), 151.13 and 151.15.) The ROD should be vacated unless and until full notice, including the Title Examination, is provided for public review and scrutiny. The Defendants further violated the regulations by delegating this important decision to an acting Assistant Secretary. The acting Assistant Secretary is not the Secretary and is not authorized to accept or transfer the Parcels into trust and outside the State's jurisdiction. Furthermore, there is insufficient guidance from Congress to delegate this responsibility to the Secretary, Assistant Secretary or acting Assistant Secretary.

9. The Secretary's approval of the ROD is arbitrary, capricious, an abuse of discretion, and not in accordance with law. The ROD should be vacated and its implementation enjoined. And a declaratory judgment should be entered in Plaintiffs' favor.

JURISDICTION AND VENUE

10. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706 et seq. and 28 U.S.C. §§ 2201 and 2202. Declaratory, injunctive and further necessary relief is sought by the Plaintiffs against each and all of the Defendants as allowed by these and other applicable, statutes.

11. The United States waived sovereign immunity from suit under 5 U.S.C. § 702 and 28 U.S.C. § 2209(a). There is an actual controversy between the parties that evokes the jurisdiction of this Court regarding decisions by, and actions of, the individual Defendants, the DOI, the Secretary, and the NIGC that are subject to review by this Court. All federal administrative remedies are exhausted as required by 5 U.S.C. § 704. This case is ready for judicial review. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak 132* S.Ct. 2199 (2012).

12. Venue is proper in United States District Court for the Eastern District of California under 28 U.S.C. §§ 1391(b) (2) and 1391(e), 5 U.S.C. § 703. The Parcels that are the subject of this action are located in this judicial district and members of the plaintiff citizen groups reside in the district.

PARTIES

13. Plaintiff, NCIP , is a non-profit 501 (c) (4) corporation incorporated under the laws of the State of California and has members who own homes and operate businesses in and around the areas that are included in the ROD.

14. Plaintiff, CERA, is a non-profit 501 (c) (4) Corporation incorporated in South Dakota. CERA has members in 22 states including members throughout California and in an around the areas included in the ROD. One CERA board member owns property in California. One board member resides in Amador County near the subject Parcels.

15. The individual Defendants are:

(a) Kenneth L. Salazar, the Secretary of the United States Department of Interior;

(b) Kevin Washburn, the current Assistant Secretary – Indian Affairs for the United States Department of Interior;

(c) Donald E. Laverdure, the acting Assistant Secretary – Indian Affairs for the United States Department of Interior when the ROD was issued;

(d) Amy Dutschke, the Pacific Regional Director for the Bureau of Indian Affairs, United States Department of Interior;

(e) John Rydzik, the Chief of the Division of Environmental, Cultural Resources Management and Safety, of the Bureau of Indian Affairs. Pacific Regional Office;

(f) Paula Hart, the Chairwoman of the Office of Indian Gaming (OIG), United States Department of Interior; and

(g) Traci Stevens, the Chairwoman of the National Indian Gaming Commission.

All of the individual Defendants are being sued in their official capacity and are named Defendants as a result of the actions and decisions of the DOI or NIGC for which they bear some responsibility.

16. Defendant Department of Interior (DOI) is a cabinet level agency of the United State and is the agency responsible for managing the affairs of Indian tribes through the BIA and OIG. The DOI is also responsible for promulgating and insuring compliance with its regulations.

17. Defendant National Indian Gaming Commission (NIGC) is an independent federal regulatory agency established to implement the IGRA and is charged with overseeing gaming on Indian lands and for insuring there is compliance with IGRA and related regulations.

STATEMENT OF FACTS

18. The territory that was to become the State of California, including any remaining public domain lands, was ceded to the United States from Mexico in 1848 pursuant to the Treaty of Guadalupe Hidalgo. (9 Stats. 922 (1848.).) The treaty provided for the protection of public and private property rights; property rights "of every kind," that were respected under Mexican law were also to be respected by the United States. (*Id.*)

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19. On September 9, 1850, California was admitted to the Union. (9 Stats. 452 (1850).) California entered the Union on an "equal footing" with, and with the same public property rights, jurisdiction and regulatory authority, as all other States.

20. In 1851, Congress passed an Act which established a comprehensive claims procedure to provide for the orderly settlement of Mexican land claims. (Act of Mar. 3, 1851, sec. 8, ch. 41, 9 Stat. 632.) If a property claim was not filed within the 5 year allowed timeline, then it would be barred and the property moved to public domain for subsequent conveyance to the State or private owners. This claims procedure applied to all property claims including ancestral or aboriginal claims by Indians or tribes. *Summa Corporation v. California ex rel. State Lands Commission* 467 U.S. 1231 (1984). A timely claim was not filed by or on behalf of any Indian in Amador County. Therefore aboriginal or ancestral claims, if any, of the Ione Indians were relinquished and cannot now be revived by the Defendants with a FTT of the Parcels.

21. In 1864, Congress passed an Act which specifically stated that no more than four reservations could be established within the State of California. (13 Stat. 39.) This Act became known as the Four Reservations Act. The unambiguous purpose of the Four Reservations Act was to "provide for better organization of Indian Affairs in California." (*Id*.) The Ione Indians were not one of the four tribes entitled to a reservation. The four reservations were Round Valley, Hoopa Valley, Tule River and "Mission." *Mattz v. Arnett* (1973) 412 U.S. 481, 489-491.

22. In 1887, Congress passed the General Allotment Act. (24 Stat. 388.) This Act authorized the President to allot and transfer portions of reservation lands to individual Indians. It also allowed the Secretary to negotiate with the tribe for the sale of "excess" lands, remaining after the allotments, for purpose of non-Indian purchase and settlement. The Ione Indians did not own or occupy reservation land that was subject to the General Allotment Act.

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23. In 1891, Congress provided for the creation of a limited number of additional reservations in California for "Mission" Indians in the Mission Indian Relief Act (MIRA). (Act of Jan 12, 1891, 26 Stat. 212.) The MIRA is an exception to the reservation limit established by the Four Reservations Act created for the Mission Indians in Southern California. (See *St. Marie v. United States* (9th Cir, 1940) 108 F.2d 876.) In 1907 Congress supplemented MIRA and created additional reservation land for Southern California Mission Indians. (34 Stat. 1022-1025, c.2285.) The Ione Indians were not one of the tribes entitled to a reservation under MIRA.

24. In 1905 and 1906, C.E. Kelsey of the BIA compiled a "Census of Non-Reservation California Indians." Indians in Amador County were included in the census.

25. In 1915, John J. Terrell, Special Indian Agent with the BIA began an effort to secure lands for the Indians living in the vicinity of Ione. Mr. Terrell compiled a "Census of Ione and vacinity (sic) Indians" in Amador County. And, in 1916 the DOI authorized the purchase of a 40 acre parcel occupied by homeless Indians near Ione. This parcel was privately owned. The BIA's efforts to purchase this land were not successful, in part, because they were not able to resolve title issues related to the property.

26. In 1924, Congress conferred citizenship on all Indians born in the United States including the Indians of Amador County. (8 U.S.C. § 1401(b).) And, by reason of the 14th amendment, the grant of federal citizenship had the additional effect of making Indians citizens of the states where they resided. State citizenship bestows rights and corresponding duties which one is not free to selectively adopt or reject. Included with a citizen's rights and duties is the obligation to comply with State and local laws and regulations and pay appropriate taxes for the support of State and local governments. The Defendants attempt to use the IRA to insulate some California citizens from State and local laws, regulations and taxation is unconstitutional and a violation of equal protection.

27. In 1928, Congress passed the Jurisdictional Act which allowed the Indians of California to sue the United States for the loss of their aboriginal and other property claims in California. (45 Stats. 605.) In May of 1929 the Indians of Amador County filed affidavits to participate in the anticipated California Indian Judgment Fund. The case settled in 1944 for over 17 million dollars. The settlement was divided and distributed to the surviving claimants including the Indians from Amador County.

28. In 1934, Congress enacted the IRA . (25 U.S.C. §§ 461 et seq.) A purpose of the IRA was to reacquire lands within reservation that, pursuant to the General Allotment Act of 1887, were allotted to Indians or sold to non-Indians and rebuild pre-1887 tribal reservation land bases through trust land acquisitions for recognized tribes under federal jurisdiction in 1934. The Ione Indians were not a recognized tribe under federal jurisdiction in 1934 and are not a federally recognized tribe now. Nor was any land owned by Ione Indians in 1934 under federal jurisdiction or subject to the 1887 General Allotment Act remedied by the IRA in 1934.

29. In 1941 some of the Indians at Ione petitioned the DOI, through Congressman Engelbright, to purchase the 40 acre parcel that they had been occupying. The BIA notified Congressman Engelbright that funds were not then available for that purpose. No further action was ever taken by the BIA with respect to the purchase of the 40 acres.

30. In 1946, Congress enacted the Indian Claims Commission Act and created the Indian Claims Commission. (60 Stat. 1049.) The purpose of the Act was to compensate California Indians, as a matter of equity, for any ancestral or aboriginal claims that may have been relinquished, in part, because Indians did not file timely claims under the Act of 1851. Under the Indian Lands Commission process, in 1964 a final settlement of over 29 million dollars was divided and paid to California Indians as compensation for all such Indian claims in California. This comprehensive settlement covered the Ione Indians and all Indians in California.

31. In 1972, the Amador County Superior Court confirmed title in the 40 acre parcel in favor of 12 of the Indians at Ione as tenants in common. Some of the confirmed tenants in common then asked the BIA to accept the lands in trust for their benefit. Other tenants in common opposed the trust request.

32. In 1972, BIA Commissioner Bruce claimed in a letter to the Indians at Ione that federal recognition was "evidently extended to the Ione Band at the time [1916] that the Ione land purchase was contemplated." This claim by Commissioner Bruce was factually and legally incorrect. In fact, in 1990 the DOI determined that the 1972 letter "is of no legal effect" in federally recognizing the tribe. Commissioner Bruce also agreed to take the 40 acres in trust for the Band. But that fee-to-trust process was never completed.

33. On September 2, 1978, the final tribal acknowledgment regulations were published in the Federal Register and became effective October 2, 1978. Originally these regulations were set forth in Part 54 of Title 25 of the Code of Federal Regulations; they now constitute Part 83. The Indians at Ione who had acquired the 40 acres were considered by the DOI to be one of the groups with a petition already pending with the BIA pursuant to subsection 83.8(b) and was on the list of 40 such groups published in the Federal Register on January 2, 1979. The Indians at Ione were given a priority number of 2 based on the 1916 date when DOI first authorized the purchase of land for the group. The acknowledgement regulations and other information were provided to the Ione Indians. However, the Ione Indians did not complete the acknowledgement application or process. The Indians at Ione are not currently a federally recognized tribe.

34. In 2002, the BIA Sacramento Regional Office authorized an initial election for the leadership of the Ione Indians and significantly expanded the voting rolls of the Ione Indians. Several relatives of high ranking officials with the BIA Sacramento Regional Office were added to the rolls.

35. In April 2003, this newly constituted and expanded group of Ione Indians announced that, pursuant to IGRA, it would seek to establish a major Class III gambling casino, hotel and related facilities in the City of Plymouth in Amador County, California. NCIP was formed in opposition to the casino project at that time. In September 2003, 73% of Plymouth voters said NO to a casino in a City administered poll.

36. In February 2004, the Plymouth City Council entered into a Municipal Service Agreement (MSA) with the Band. Amador County and NCIP successfully sued the City and the MSA was set aside. After the MSA was set aside, the City withdrew its support for the project.

37. In the fall of 2004, the Ione Indians requested a restored lands opinion from the NIGC. The Band also filed a FTT application with the DOI/BIA.

38. Prior to 2006, the Bureau of Indian Affairs, Pacific Regional Office entered into a Memorandum of Understanding (MOU) with the California Fee to Trust Consortium of Tribes. The purpose of the MOU is to give the tribes more influence and input into the BIA's fee-to-trust decision making process and to expedite and facilitate that process for tribes that make a monetary contribution to the BIA. In September 2006, the Inspector General determined that the FTT Consortium created a real conflict of interest.

39. In May 2006, the NIGC and the DOI entered into a Memorandum of Agreement (MOA) which provides that, if a tribe requested a lands determination, it would be drafted by DOI's Office of the Solicitor, Division of Indian Affairs and then reviewed by the NIGC.

40. Also, in May 2006, Amador County sent a letter to the NIGC with an extensive report on the history of some of the Indians at Ione.

41. On September 19, 2006, DOI Associate Solicitor Carl J. Artman rendered an opinion that the Ione Indians were a "restored tribe" and that the Parcels would be eligible for Indian gaming pursuant to the "restored lands" exception.

42. The Artman opinion was immediately challenged in the IBIA by Amador County, the City of Plymouth and NCIP. The IBIA challenges were dismissed because the IBIA concluded that it lacked jurisdiction to review Solicitor opinions. A subsequent lawsuit by Amador County was dismissed because the opinion did not constitute a final agency action.

43. In April 2008, the BIA and DOI published a notice in the Federal Register for the Draft Environmental Impact Statement (DEIS) for the proposed FTT transfer for the Ione Indians. The notice was false and misleading because it erroneously stated that the Ione Indians owned the 228.04 acres in fee. The Ione Indians did not then, and do not now, own the Parcels. The DEIS was made available to the public for a 75 day comment period. Requests to extend the comment period were denied.

44. On or about January 16, 2009, DOI Solicitor David L. Bernhardt withdrew the September 19, 2006 Artman opinion because it was wrong; Mr. Bernhardt concluded that the Ione Indians are not a "restored tribe." Mr. Bernhardt reached this conclusion while he was in the process of reviewing the DEIS. Thus, Mr. Bernhardt's decision was also, in effect, a rejection of the veracity and adequacy of the DEIS and a denial of the proposed FTT transfer and casino project studied in DEIS. Despite Solicitor Barnhart's rejection and denial, the BIA issued a Final Environmental Impact Statement, dated February 2009, for comment in August 2010. This was the only publically noticed BIA activity on the project prior to the May 24, 2012 ROD Notice.

45. On April 20, 2009, the President nominated Larry Echo Hawk as Assistant Secretary of Indian Affairs and he was confirmed by the Senate on May 19, 2009. Assistant Secretary Echo Hawk did not change the decision of Solicitor Bernhardt that the Ione Indians were not a restored tribe. Nor did he approve the DEIS.

46. On April 27, 2012, Assistant Secretary Larry Echo Hawk resigned. Donald Laverdure, a Deputy Assistant Secretary, was designated to serve as acting Assistant Secretary.

47. On May 24, 2012, less than a month after Mr. Echo Hawk resigned, acting Assistant Secretary Laverdure issued the ROD. A notice of final agency action was published in the Federal Register on May 30, 2012. (77 Fed. Reg. 31871-31872, May 30, 2012.) Acting Assistant Secretary Laverdure reversed the Bernhardt 2009 decision and reinstated the Artman 2006 opinion and approved the FTT. It is not certain if the revived Artman opinion has been approved by NIGC, as required by the MOA. The acting Assistant Secretary also revived and approved the DEIS, that had been rejected by Bernhardt, in support of the project. The acting Assistant Secretary adopted Alternative A, designated as the Preferred Alternative in the DEIS, to accept the Parcels into trust status for the Ione Indians for gaming purposes.

48. The ROD states, in Section 1.4, that the authority for the Defendants' actions are Section 5 of the IRA (25 U.S.C. § 465), 25 C.F.R. Part 151 and Section 20 of IGRA (25 U.S.C. § 2719). (ROD at 8.)

49. On September 22, 2012, Kevin Washburn was confirmed as the new Assistant Secretary for Indian Affairs.

FIRST CLAIM FOR RELIEF

DOI's Violation of the Indian Reorganization Act of 1934

50. Plaintiffs repeat and re-allege paragraphs 1 through 49 inclusive, of this First Amended Complaint, as if fully set forth here.

51. Defendants cite Section 5 of the IRA (25 U.S.C. § 465) as the source of their authority to take these fee owned lands into trust for the Ione Indians. (ROD at 3.)

52. Under the IRA, the DOI is authorized to take land into trust for only those federally recognized tribes that were under federal jurisdiction in June 1934. 25 U.S.C. §§ 465, 467, & 479; *Carcieri v. Salazar, supra.*

53 The Ione Indians were not a federally recognized tribe in June 1934 when Congress enacted the IRA.

54. The ROD is based on an incorrect and arbitrary analysis, by acting Assistant Secretary Laverdure. Specifically, he concludes that, despite the *Carcieri* decision and the despite clear language in the IRA, a tribe need not be a federally recognized tribe in 1934 to be eligible for a FTT transfer. Instead, according to the acting Assistant Secretary, any Indian community "under federal jurisdiction in 1934" (as interpreted by the DOI without Congressional guidance) is eligible for a FTT transfer under the IRA. The Supreme Court in *Carcieri v. Salazar* completely rejected this argument. Instead of the interpretation suggested by the acting Assistant Secretary, the Supreme Court clearly confirmed that, to be eligible for a fee-to-trust transfer under the IRA, a tribe must have been both federally recognized and under federal jurisdiction in 1934. Given the Supreme Court's decision in *Carcieri*, the legal assertions by acting Assistant Laverdure and the DOI in the ROD are completely without justification.

55. The Ione Indians are not eligible to have lands placed into trust status under the IRA 465 on their behalf because they were not was not a federally recognized tribe nor under federal jurisdiction in 1934 as required by Supreme Court in *Carcieri.*

56. There is no other act, statute or regulation in existence that authorizes the Secretary or the DOI to take the Parcels into trust on behalf of the Ione Indians.

57. The conclusion in the ROD that the Ione Indians were eligible for a FTT transfer under the IRA is arbitrary, capricious and an abuse of discretion that is not in accordance with law. 5 U.S.C. § 706. It should be vacated and its implementation should be enjoined.

58. There is an actual controversy between the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) and an actual case and controversy under Article III of the United States Constitution, regarding the eligibility of an unrecognized Indian

community to receive a FTT transfer under the IRA. The Supreme Court in *Carcieri* held that only recognized tribes under federal jurisdiction in 1934 are eligible for a FTT transfer. Despite the Supreme Court's decision in *Carcieri*, the Secretary and DOI concluded that although Ione Indians were not a federally recognized tribe in 1934, it was sufficient that they were an Indian community "under federal jurisdiction" (as that phrase is interpreted by the DOI) in 1934. Instead of the *Carcieri* decision, the Secretary and DOI relied on the test they created in a decision regarding the Cowlitz Tribe of Indians' FTT application (December 17, 2010). (See ROD at 50-59.) Plaintiffs request that the Court declare that the test outlined in Cowlitz ROD, and relied on by the Defendants in this case, is void and contrary to the *Carcieri* decision. A declaratory judgment by this Court reaffirming that the *Carcieri* test is applies in this case, and confirming that the Ione Indians were not a recognized tribe in 1934, is necessary and proper.

SECOND CLAIM FOR RELIEF

DOI's Violations of 25 C.F.R. Part 151 and the IRA

59. Plaintiffs repeat and re-allege paragraphs 1 through 58 inclusive, of this First Amended Complaint, as if fully set forth here.

60. Defendants acknowledge that, to acquire land in trust for a tribe, the DOI and Secretary must first comply with the regulations in 25 C.F.R. Part 151 in addition to the mandates of the IRA. (ROD at 3.) But Defendants failed to comply with these regulations, including but not limited to the following Sections.

61. Section 151.10(a) requires the Secretary and DOI to consider if there is any statutory authority for the proposed acquisition and, if so, any limitations contained in such authority. There is no statutory authority for the DOI or Secretary to take lands into trust on behalf of an Indian community, like the Ione Indians, which were not a federally recognized tribe in 1934.

62. Section 151.10(b) requires the Secretary and DOI to consider if there is a need for the

acquisition of additional lands. The DOI and Secretary state that the Ione Indians currently have no reservation or trust lands. (ROD at 59.) But the DOI and Secretary do not address the fact that the Ione Indians have occupied, and currently own several properties in Amador County near Ione which has been sufficient to support their needs.

63. Section 151.10(c) requires the Secretary and DOI to consider the purpose for which the land will be used. The DOI and Secretary's description is incomplete because, although it outlines the casino project, if fails to reveal or study that the project also includes the construction of 162 private residences on the Parcels. (See ROD at 59-60.)

64. Section 151.10(e) requires the Secretary and DOI to consider the impact on State and local government if the land is acquired in "unrestricted fee status" and is removed purpose from the tax rolls. There is no evidence offered in the ROD that the Parcels will be acquired in "unrestricted fee status" and therefore eligible to be exempt from State and local tax. If it is not acquired in "unrestricted fee status", the Parcels will remain subject to State and local tax. Furthermore, the ROD's reliance on the "voided" MSA (ROD at 60) to support the contention that the tribe is obligated to reimburse the County of Amador is inappropriate and disingenuous. There is no current requirement for the Ione Indians to reimburse State and local government for lost tax revenue if the FTT transfer is approved. Furthermore, even if taxes were reimbursed, the DOI and Secretary do not discuss the additional costs that will be incurred by State and local government to provide governmental services to the project.

65. Section 151.10(f) requires the Secretary and DOI to consider jurisdictional problems and possible conflicts of land use. The use of the Parcels for a casino and related projects is inconsistent with local land use and zoning rules. The DOI and Secretary have no authority to exempt the Parcels from State and local land use and zoning regulations. A "voided" MSA does not exempt the Parcels from State and local land use and zoning rules. And any authority

assumed by the Secretary in 25 C.F.R. 1.4 to exempt property from State and local regulations was not authorized by Congress and is not applicable to IRA FTT transfers.

66. Section 151.10(g) requires the Secretary and DOI to consider whether, if the land is taken in trust, the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. The DOI and Secretary do not address this issue in the ROD.

67. Section 151.10(h) requires the Secretary and DOI to consider whether the 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. The DOI and Secretary do not address this issue in the ROD and it not clear if the Ione Indians have provided the required information.

68. Section 151.11(c) requires the tribe to provide a plan to Secretary and DOI which specifies the anticipated economic benefits associated with the proposed use. This issue is not addressed in the ROD and it not clear if the Ione Indians provided the required plan.

69. Section 151.13 requires the 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. The title evidence should list all liens, encumbrances and title infirmities on the land to be acquired. And those encumbrances, liens and infirmities must be removed prior to acquisition if they make title to the land unmarketable. The DOI and Secretary do not address this issue in the ROD and it not clear if the Ione Indians have provided the required information or if the Parcels were cleared of all liens, encumbrances or infirmities.

70. For the forgoing reasons, the Secretary's and DOI's decision to acquire land in trust for the benefit of the Ione Indians failed to comply with the procedural and substantive requirements set forth in 25 C.F.R. Part 151 (or in the related OIG implementing guidelines) and, as a consequence, it is arbitrary, capricious, an abuse of discretion, unsupported by substantial

evidence, beyond the scope of the Secretary's and DOI's authority under the IRA and issued in a manner not in accordance with law. 5 U.S.C. § 706. It should be vacated and it implementation enjoined. Also a declaratory judgment by this Court reaffirming the obligation of the Defendants to fully comply with Part 151 is necessary and proper.

THIRD CLAIM FOR RELIEF

DOI's Infringement of State and Local Police Power Over Non-Public Domain Property

71. Plaintiffs repeat and re-allege paragraphs 1 through 70 inclusive, of this First Amended Complaint, as if fully set forth here.

72. After California became a sovereign State of the United States in 1850, on an equal footing with all other States, it received regulatory and police power jurisdiction over all property within the State – including federally owned public domain lands. Until public domain lands are conveyed to the State or into private ownership, the United States retains limited regulatory authority over public domain lands if necessary to further a federal purpose. *Kleppe v. New Mexico* 429 U.S. 873 (1976). Thus, the United States has the authority, in some circumstances, to create an Indian reservation from retained public domain lands. By definition, an Indian reservation is created by the Secretary, or an authorized federal land officer, executing an order withdrawing specific parcels from public domain land and reserving it for the specific purpose of the withdrawal order. *See U.S. v. Midwest Oil Co.* 236 U.S. 459 (1915).

73. After public domain property is conveyed to the State, or into private ownership, the United States no longer has authority to create an Indian reservation over non-public domain lands. In the case of *Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436 (2009), a unanimous Supreme Court held that after federal public domain lands passes out of federal ownership to a State, they cannot be restored to federal jurisdiction by a federal act that purports to change the nature of the original grant of jurisdiction to the State.

74. As a consequence of the rules summarized in the *Hawaii* decision, once public domain land is conveyed by the United States to a State, or into private ownership subject to the police and taxing power of the State, it cannot be returned to public domain status as part of a FTT transfer under the IRA.

75. The Supreme Court concluded that "it would raise grave constitutional concerns" if Congress sought to "cloud Hawaii's title to its sovereign lands" after it had joined the Union. "We have emphasized that Congress cannot, after statehood, reserve or convey…lands that have already been bestowed upon a state…" *Hawaii v. Office of Hawaiian Affairs*, *supra.*

76. The State of California entered the Union on September 9, 1850, on an equal footing with all other States. As is the case with all States, public domain lands in California were to be transferred to either the State or into private ownership subject to State jurisdiction and regulation. In fact, California's Act of Admission mandated that California shall never interfere with the primary disposal of public domain lands by the United States. (9 Stats. 452.)

77. In addition, in 1864, Congress limited the number of Indian Reservations that could be created in California from public domain lands to four. (13 Stat. 39.) The remainder of the public domain land was to be transferred to the State or sold into private ownership development.

78. The DOI's and Secretary's decision to take land into trust in favor of the Ione Indians free from State and local regulation and taxation, as though it is public domain land, is an unconstitutional infringement on private land titles and 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 outlined by the Supreme Court in *Hawaii v. Office of Hawaiian Affairs*, and in the Tenth Amendment of the Constitution

79. 25 C.F.R § 1.4 purports to give the DOI and Secretary the authority to exempt Indian trust lands from State and local regulation. For the reasons outlined above, 25 CFR § 1.4 is

unconstitutional at least to the extent that it is applied to FTT transfers of land that is no longer public domain land and is, instead, land that has been transferred to the State or to private owners. Regardless of 25 C.F.R § 1.4, or whether the DOI and Secretary approve a FTT transfer, such land remains subject to all State and local regulation.

80. The decision by the Secretary and DOI in the ROD to take the lands into trust, free from State and local regulation and taxation, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706. The ROD should be vacated and its implementation enjoined.

81. There is an actual controversy between the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) and an actual case and controversy under Article III of the United States Constitution, regarding whether the Secretary and DOI can take lands into trust free from State and local regulation and taxation. The Supreme Court in *Hawaii* held that that the federal government cannot, after statehood, reserve, convey, or regulate lands that are no longer public domain lands as though they were public domain lands. In contrast, the Secretary and DOI claim that they can take lands into trust free of State and local regulation. A declaratory judgment by this Court in this case on these issues is necessary and proper.

FOURTH CLAIM FOR RELIEF

DOI's and NIGC's Violation of the Indian Gaming Regulatory Act

82. Plaintiffs repeat and re-allege paragraphs 1 through 82 inclusive, of this First Amended Complaint, as if fully set forth here.

83. The DOI's determination in the ROD, and the 2006 Artman opinion it revived, that the Parcels are restored lands for gaming purposes is contrary to the facts and IGRA and it is contrary to previous DOI opinions and previous DOI representations made in other court cases. See *Muwekma Ohlone Tribe v. Salazar* (USDC D.C. No. 03-1231 (RBW).

84. The Ione Indians are not a "restored tribe" for the purpose of IGRA. They were never federally recognized nor terminated. Therefore they cannot be restored to federal recognition.

85. Nor are the Parcels "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. Taking the property into trust does not make it "restored lands" for IGRA purposes,

86. Based on this unlawful determination, the Secretary approved the FTT transfer of the Parcels under the IRA. And the NIGC, apparently pursuant to the MOA with the DOI, improperly accepted the FTT transfer as a "restored lands" determination for IGRA purposes.

87. As a result of this unlawful determination, if the Secretary's approval is not vacated and the NIGC accepts it as a restored lands determination for IGRA purposes, the Ione Indians may be able to build a Class III casino on the Parcels which will cause major environmental impacts in and around the City of Plymouth and Amador County and irreversible harm to the citizens of the City of Plymouth and Amador County.

88. The DOI's, Secretary's and NIGC's determination that the Ione Indians are a "restored tribe" and the Parcels are "restored land" available for gaming is arbitrary, capricious and not in accordance with law. (5 U.S.C. § 706.) It should be vacated and enjoined. Also, a declaratory judgment by this Court on these issues is necessary and proper.

FIFTH CLAIM FOR RELIEF

DOI's and NIGC's violation of the National Environmental Policy Act

89. Plaintiffs repeat and re-allege paragraphs 1 through 88 inclusive, of this First Amended Complaint, as if fully set forth here.

90. The Secretary's and DOI's actions in approving the FTT transfer and certifying the EIS, and the NIGC's failure to prepare an EIS for its "restored tribe" and "restored lands" determinations, were in violation of the National Environmental Policy Act (NEPA; 42 U.S.C. § 4321 et. seq.) and it's implementing regulations. 40 C.F.R. 1500 et seq.

91. The NEPA requires that "all agencies of the Federal Government shall…include in every recommendation or report on…major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official." (42 U.S.C. § 4332.)

92. Plaintiffs' interest in the environmental and economic well-being of Plymouth, Amador County and the State of California are among the interests to be considered under 25 C.F.R. § 151.10(f), 151.10 (h) before land is placed into trust.

93. The proposed casino project approved as part of the ROD has many inherent well documented negative impacts that threaten this small, rural community with among other things: increase in traffic congestion and safety concerns on rural roads in the area, increase in air pollution, increase in water pollution, overuse of limited water resources used by all residents in the area for drinking water and irrigation and potential increases in crime. Some of these impacts were identified in the EIS; none were adequately considered, mitigated or resolved.

94. The DOI, the BIA and the Secretary were required to take a "hard look" at the environmental consequences of the proposed action in the ROD. This required the Secretary to: (1) make a good faith effort to take environmental values into account; (2) to provide full

environmental disclosure to the members of the public; and (3) protect the integrity of the decision making process by insuring that problems are not ignored.

95 In this case, it was not possible for the BIA to take a "hard look," much less a fair look, at the environmental impacts because the BIA only represents the interests of a group of Indians claiming to be a tribe, as those interests are defined by those Indians submitting the fee to trust application. Furthermore, the inability for the BIA to be impartial, when evaluating the impacts of the FTT transfer and a related project, is compounded by the MOU between the BIA and tribes to facilitate FTT transfers. Despite these facts, under the Departmental Manual of the BIA for the application of NEPA in the FTT process, the DOI allows the BIA, which processes, administers, and approves the tribes FTT application to act as "lead agency" for the completion of NEPA documentation . This presents an inherent conflict of interest in terms of producing a fair and unbiased report which takes into consideration the needs of the surrounding communities.

96. The regulatory and cumulative jurisdictional impacts of removing hundreds of acres from the sovereign control of state and local governments were not adequately addressed in the FEIS. The FEIS also fails to provide support for the ROD's conclusion that putting the Parcels in trust is necessary to satisfy the Ione Indian's goal of self-determination and other similar needs of the Ione Indians. And the FEIS fails to adequately assess the impact this determination has on the local communities which is required by 25 C.F.R. 151.10 (e) and the NEPA analysis.

97. The FEIS fails to adequately address the concerns of the local communities. The ROD does not adequately address the Ione Indians' application in terms of the factors deemed part of the "justifiable expectations" of the local non-Indian residents or state and local governments as identified in the *Sherrill*.

98. The failure of the DOI and the Secretary to take a "hard look" at, and adequately address, the adverse environmental and socio-economic impacts of all the anticipated impact of

the project approved in the ROD is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Furthermore, the Secretary's decision to change his position by approving an EIS, a restored lands opinion and a project that was previously rejected in 2009 is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. (5 U.S.C. § 706.)

99. The complete failure of the NIGC to comply with NEPA with respect to the "restored tribe" and "restored lands" determinations is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. (5 U.S.C. § 706.)

100. The approval of the EIS should be vacated and the implementation of the project enjoined until the Defendants adequately and completely comply with NEPA. Also, a declaratory judgment by this Court on these issues is necessary and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, NCIP and CERA, respectfully request that this Court enter judgment in their favor and against Defendants, and each of them, as follows:

A. That this Court declare, adjudge, and decree that the Defendants are without authority to take the Parcels into trust for the Ione Indians and the decision to take the Parcels into trust for the Ione Indians is arbitrary, capricious, and contrary to law and exceeds the authority, if any, delegated to the Defendants under the IRA;

B. That this Court declare, adjudge, and decree that the Defendants' decision to acquire the Parcels in trust for the Ione Indians violated the IRA and its implementing regulations;

C. That this Court declare, adjudge, and decree that the ROD is contrary to law and ordering the Defendants to set aside and vacate the ROD and enjoin its implementation;

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D. That this Court declare, adjudge, and decree that the Defendants failed to comply with NEPA or to assess in an unbiased fashion the jurisdictional issues and the disruptive impacts that acquiring Parcels in trust for the Ione Indians would cause on the state and local communities;

E. That this Court declare, adjudge, and decree that the Final EIS for the fee to trust transfer and the related casino project failed to meet the requirements of NEPA;

F. That this Court declare, adjudge, and decree that the Defendants have no authority to take the Parcels, which are fee non-public domain lands, in trust for the Ione Indians free of State and local taxation and regulation and that their decisions to do so are arbitrary, capricious and contrary to law;

G. That this Court declare, adjudge, and decree that the Defendants' determination that the Ione Indians are a "restored tribe" under IGRA is arbitrary, capricious and contrary to law;

H. That this Court declare, adjudge, and decree that the Defendants' determination that the Parcels are "restored lands for a restored tribe" under IGRA is arbitrary, capricious and contrary to law;

I. That this Court enter judgment and an order enjoining the Defendants from taking the Parcels into trust on behalf of the Ione Indians and enjoining the Defendants from approving or implementing any aspect of the project described in the ROD;

J. That this Court enter judgment and an order awarding Plaintiffs' costs and reasonable attorney's fees to the extent permitted by law including, but not limited to the Equal Access to Justice Act; and

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K. That this Court award the Plaintiffs such further relief as to the Court deems just and proper.

Dated: September 28, 2012

Respectfully submitted,

/s/ Kenneth R. Williams

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH
and
CITIZENS EQUAL RIGHTS ALLIANCE

Plaintiffs,
v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR, Secretary of the U.S. Department of the Interior; KEVIN WASHBURN, Assistant Secretary-Indian Affairs, U.S. Department of Interior; AMY DUTSCHKE, Pacific Regional Director, Bureau of Indian Affairs; JOHN RYDZIK, Chief, Division of Environmental, and Cultural Resources, Bureau of Indian Affairs, Pacific Regional Office; PAULA HART, Chairwoman of the Office of Indian Gaming; TRACIE STEVENS, Chairwoman of the National Indian Gaming Commission; THE NATIONAL INDIAN GAMING COMMISSION; and THE UNITED STATES DEPARTMENT OF INTERIOR

Defendants.

CASE NO. 2:12-CV-01748-JAM-CMK

FEDERAL DEFENDANTS' ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendants Kenneth Salazar, Secretary of the Interior ("Secretary"); Kevin Washburn, Assistant Secretary for Indian Affairs ("Assistant Secretary")[1]; Amy Dutschke, Pacific Regional Director, Bureau of Indian Affairs; John Rydzik, Chief, Division of Environmental and Cultural Resources, Bureau of Indian Affairs, Pacific Regional Office; Paula Hart, Chairwoman of the Office of Indian Gaming; Tracie Stevens, Chairwoman of the National Indian Gaming Commission ("NIGC"); the National Indian Gaming Commission; and the United States Department of the Interior (collectively, "Federal Defendants"), by and through their undersigned counsel, answer Plaintiffs' No Casino, in Plymouth and Citizens Equal Rights Alliance ("Plaintiffs"), Complaint as follows:

GENERAL DENIAL

Federal Defendants deny any allegations of the Complaint, express or implied, that are not expressly admitted, denied, or qualified herein.

NATURE OF THE ACTION

1. Paragraph 1. This paragraph consists of Plaintiffs' characterizations of this action to which no response is required. To the extent a response is required, Federal Defendants deny the allegations. This paragraph also contains Plaintiffs' characterizations of the May 24, 2012 Record of Decision ("ROD"), which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the ROD, they are denied.

2. Paragraph 2. This paragraph consists of characterizations of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq*. ("IRA"), the United States Supreme Court decision, *Carcieri v. Salazar*, 555 U.S. 379 (2009), and the ROD, to which no responses are required. The IRA, the *Carcieri* decision, and the ROD speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the IRA, the *Carcieri* decision, or the ROD, they are denied. This paragraph also contains legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

[1] Kevin K. Washburn, Assistant Secretary for Indian Affairs, is automatically substituted for Donald E. Laverdure, respectfully under Fed. R. Civ. P. 25(d).

3. Paragraph 3. This paragraph consists of characterizations of the ROD and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA") which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the ROD or IGRA, they are denied. This paragraph also contains legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

4. Paragraph 4. This paragraph consists of characterizations of the National Environmental Policy Act, 43 U.S.C. § 4321 *et seq.* ("NEPA") and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with NEPA or the ROD, they are denied. This paragraph also contains legal conclusions, characterizations, and conjecture about speculative future events to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

5. Paragraph 5. The allegations in this paragraph consist of characterizations of the United States Supreme Court decisions, *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436 (2009); *City of Sherrill v. Oneida Indian Nation*, 544 U. S. 197 (2005); *Summa Corporation v. California ex rel. State Lands Commission* 467 U.S. 1231 (1984); as well as *Cayuga Indian Nation v. Pataki*, 413 F. 3d 266 (2nd Cir. 2005), cert. denied, 2006 U.S. LEXIS 3949 (U.S., May 15, 2006); a statute enacted in 1864 (13 Stat. 39); the Treaty of Guadalupe Hidalgo (9 Stat. 922 (1848)); and the Act of 1851 (9 Stat. 632); all which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. This paragraph also contains legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

6. Paragraph 6. The allegations in this paragraph consist of characterizations of the ROD; the Treaty of Guadalupe Hidalgo; the Act of 1851; *Summa Corporation v. California*; *City of Sherrill v. Oneida Indian Nation*; and *Carcieri v. Salazar*, all which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or

inconsistent with the ROD or these legal authorities, they are denied. This paragraph also contains legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

7. Paragraph 7. The allegations in this paragraph consist of characterizations of the ROD; the IRA; the Department of the Interior's ("DOI") regulations governing trust acquisitions completed pursuant to the IRA (*see* 25 C.F.R. Part 151); and *City of Sherrill v. Oneida Indian Nation*, all which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the ROD or these legal authorities, they are denied. This paragraph also contains legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

8. Paragraph 8. The allegations in this paragraph consist of characterizations of the ROD; the regulations set forth at 25 C.F.R. Part 151; and the Federal Register Notice published on May 30, 2012; all of which speak for themselves are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the ROD, the 25 C.F.R. Part 151 regulations, or the Federal Register Notice, they are denied. This paragraph also contains legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

9. Paragraph 9. This paragraph consists of legal conclusions and characterizations of Plaintiffs' action, to which no response is required. To the extent responses are required, Federal Defendants deny the allegations. This paragraph also consists of Plaintiffs' request for relief. Federal Defendants deny that Plaintiffs are entitled to any relief.

JURISDICTION AND VENUE

10. Paragraph 10. This paragraph consists of Plaintiffs' characterizations of this action to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

11. Paragraph 11. This paragraph consists of Plaintiffs' characterizations of this action to which no response is required. To the extent a response is deemed required, Federal Defendants deny the allegations.

12. Paragraph 12. Federal Defendants admit that venue is proper for this action.

PARTIES

13. Paragraph 13. Federal Defendants lack information sufficient to form a belief as to the truth of the allegations in the rest of the paragraph, and on this basis deny the allegations.

14. Paragraph 14. Federal Defendants lack information sufficient to form a belief as to the truth of the allegations in the rest of the paragraph, and on this basis deny the allegations.

15. Paragraph 15. This paragraph consists of Plaintiffs' characterizations of this action to which no response is required. To the extent a response is deemed required, Federal Defendants deny the allegations.

16. Paragraph 16. Federal Defendants admit that DOI is a cabinet level agency and aver that DOI has multiple responsibilities, including responsibilities concerning federally recognized Indian tribes. Federal Defendants admit that DOI has authority to promulgate and enforce regulations.

17. Paragraph 17. Federal Defendants admit that the NIGC is an independent federal regulatory agency within DOI that, *inter alia*, is authorized to enforce IGRA and its related regulations.

STATEMENT OF FACTS

18. Paragraph 18. The allegations in this paragraph consist of characterizations of the Treaty of Guadalupe Hidalgo, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied.

19. Paragraph 19. This paragraph consists of characterizations of an 1850 statute granting the State of California admission to the United States, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied.

20. Paragraph 20. This paragraph consists of characterizations of the Act of 1851 and the United States Supreme Court decision, *Summa Corporation v. California*, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are

incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

21. Paragraph 21. This paragraph consists of characterizations of a statute enacted in 1864 (13 Stat. 39) and *Mattz v. Arnett*, 412 U.S. 481, 489-491 (1973), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

22. Paragraph 22. This paragraph consists of characterizations of the General Allotment Act, 24 Stat. 388 (1887), which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

23. Paragraph 23. This paragraph consists of characterizations of the Mission Indian Relief Act, 26 Stat. 212 (1891); an amendment to such Act, 34 Stat. 1022-23 (1907); and the court decision, *St. Marie v. United States*, 108 F.2d 876 (9th Cir. 1940), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations

24. Paragraph 24. This paragraph consists of characterizations of census and residency information compiled by Agent C.E. Kelsey of the Bureau of Indian Affairs ("BIA") between 1905-1906, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the document prepared by Kelsey, Federal Defendants deny the allegations.

25. Paragraph 25. This paragraph consists of characterizations of a census prepared by BIA Special Indian Agent John Terrell in 1915, which speaks for itself and is the best evidence of its

contents. To the extent the characterizations are incomplete or inconsistent with the census, Federal Defendants deny the allegations. Federal Defendants admit that DOI undertook efforts to acquire land for the benefit of the Ione Band in the early 20th Century and further admit that clearing title to the property was an obstacle to completing the trust acquisition. Federal Defendants deny the remainder of the paragraph.

26. Paragraph 26. This paragraph consists of characterizations of the Nationals and Citizens of United States at Birth Act (8 U.S.C. § 1401(b)); the Fourteenth Amendment to the United States Constitution; and the IRA, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

27. Paragraph 27. The first sentence of this paragraph consists of characterizations of the California Indian Jurisdictional Act, 45 Stat. 602 (1928), and filings made and orders issued in lawsuits brought pursuant to such Act, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the Act, or litigation filings or orders, they are denied. Federal Defendants lack information sufficient to form a belief as to the truth of the allegations in the rest of the paragraph, and on this basis deny the same.

28. Paragraph 28. This paragraph consists of characterizations of the IRA and the General Allotment Act, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. Federal Defendants deny the allegation that the Ione Band is not a federally recognized Indian tribe. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

29. Paragraph 29. Federal Defendants admit that the Ione Band requested that the Secretary acquire a 40-acre parcel of land in trust for the benefit of the Band but that such trust acquisition did not occur. This paragraph consists of characterizations of correspondence which speaks for

itself and is the best evident of its contents. To the extent the characterizations are incomplete or inconsistent with such correspondence, they are denied. Federal Defendants deny the remainder of the paragraph.

30. Paragraph 30. This paragraph consists of characterizations of the Indian Claims Commission Act, 60 Stat. 1049 (1946), and judgments issued by the Indian Claims Commission, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. This paragraph also consists of legal conclusions that require no response. To the extent a response is required, Federal Defendants deny the allegations.

31. Paragraph 31. Federal Defendants admit that some members of the Ione Band opposed the trust acquisition of the 40-acre parcel of land. This paragraph consists of characterizations of court filings made or court orders issued in Amador County Superior Court, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are inconsistent or incomplete with such filings or orders, they are denied.

32. Paragraph 32. Federal Defendants admit that the United States did not acquire the 40-acre parcel of land in trust for the Ione Band. The remainder of the paragraph consists of characterizations of an October 18, 1972 letter sent by BIA Commissioner Louis Bruce to Nicholas Villa and the Ione Band, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the document, they are denied. The third sentence of this paragraph appears to consist of characterizations of filings by the United States in *Ione Band of Miwok Indians, et al. v. Harold Burris, et al.*, Civ. No. S-90-0993 LKK/EM (E.D. Cal.), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such filings, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

33. Paragraph 33. Federal Defendants clarify that DOI adopted regulations concerning the federal acknowledgment of Indian tribes on September 5, 1978. This paragraph consists of

characterizations of these regulations, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such regulations, they are denied. Federal Defendants further admit that the Ione Band was included on a list published in 1979 identifying groups with acknowledgment petitions pending with DOI and that DOI provided the Band with information concerning the acknowledgment regulations. Federal Defendants aver that the Ione Band was included on the list of federally recognized Indian tribes published in 1995 and have been included on every such list published thereafter. Federal Defendants deny the remainder of the paragraph.

34. Paragraph 34. Federal Defendants admit that, pursuant to 25 C.F.R. Part 81, the BIA Pacific Region authorized a Secretarial election held by the Ione Band in 2002 for the purpose of adopting the Ione Band Constitution. Federal Defendants deny that such election was an initial election for leadership and further deny that such election significantly expanded the voting rolls. Federal Defendants deny the remainder of the paragraph.

35. Paragraph 35. Federal Defendants lack sufficient information to affirm or deny the allegations in this paragraph and thus deny the same.

36. Paragraph 36. Federal Defendants admit that the Ione Band and the City of Plymouth entered into a Municipal Services Agreement (MSA) for the development of the Plymouth casino project. Federal Defendants admit that the County of Amador successfully sued the City of Plymouth, thus invalidating the MSA. Federal Defendants deny the remainder of the paragraph.

37. Paragraph 37. Federal Defendants admit the allegations in this paragraph and aver that that the fee-to-trust application was submitted to DOI in November 2005.

38. Paragraph 38. This paragraph consists of legal conclusions and characterizations of a Memorandum of Understanding (MOU) between the BIA Pacific Regional Office and the California Fee to Trust Consortium of Tribes and a report prepared by the Department's Inspector General. The former speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the MOU, they are denied. The latter is not a public document.

39. Paragraph 39. This paragraph consists of characterizations of a Memorandum of Agreement ("MOA") entered in May 2006 between the NIGC and DOI, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the MOA, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

40. Paragraph 40. Federal Defendants admit that Amador County sent DOI letters, memoranda, and other documentation stating its views on the Ione Band's pending fee-to-trust application, including a submission made in 2006, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such letters, memoranda, and other documentation, they are denied.

41. Paragraph 41. This paragraph consists of characterizations of an opinion prepared by former DOI Associate Solicitor Carl J. Artman in September 2006, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with such document, they are denied.

42. Paragraph 42. Federal Defendants admit the allegations in this paragraph.

43. Paragraph 43. This paragraph contains characterizations of the Draft Environmental Impact Statement ("DEIS") and the Federal Register Notice published in April 2008, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such documents, they are denied. Federal Defendants admit that at the time the Band submitted its fee-to-trust application, it did not own the subject parcels. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

44. Paragraph 44. This paragraph appears to consist of characterizations of a privileged memorandum dated January 2009 from former DOI Solicitor David L. Bernhardt to former Acting Deputy Assistant Secretary for Policy and Economic Development George T. Skibine; the DEIS; the Final Environmental Impact Statement ("FEIS"); and the ROD or its related Federal Register Notice published on May 30, 2012, all of which speak for themselves and are

the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such documents, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

45. Paragraph 45. Federal Defendants admit the first sentence of this paragraph. Federal Defendants deny the remainder of the paragraph.

46. Paragraph 46. Federal Defendants admit the allegations in this paragraph.

47. Paragraph 47. Federal Defendants admit the first, second, and sixth sentences of this paragraph. The third, fourth, and fifth sentences of the paragraph consist of characterizations of the ROD, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the ROD, they are denied.

48. Paragraph 48. This paragraph consists of characterizations of the ROD, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the ROD, they are denied.

49. Paragraph 49. Federal Defendants admit the allegations in this paragraph.

RESPONSE TO FIRST CLAIM

50. Paragraph 50. Federal Defendants incorporate by reference their responses to Paragraphs 1 through 49 as if fully set forth herein.

51. Paragraph 51. This paragraph consists of characterizations of the ROD, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the ROD, they are denied.

52. Paragraph 52. This paragraph consists of characterizations of the IRA and *Carcieri v. Salazar*, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The paragraph also consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

53. Paragraph 53. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

54. Paragraph 54. This paragraph consists of characterizations of the IRA; *Carcieri v. Salazar*; and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent responses are required, Federal Defendants deny the allegations.

55. Paragraph 55. This paragraph consists of legal conclusions to which no response is required. To the extent responses are required, Federal Defendants deny the allegations.

56. Paragraph 56. Federal Defendants deny the allegations in this paragraph.

57. Paragraph 57. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

58. Paragraph 58. This paragraph consists of Plaintiffs' characterizations of this action to which no response is required. To the extent a response is required, Federal Defendants deny the allegations. This paragraph also consists of characterizations of *Carcieri v. Salazar* and the December 17, 2010 Record of Decision concerning the decision to acquire land in trust for the Cowlitz Tribe of Indians ("Cowlitz ROD"), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with *Carcieri v. Salazar* or the Cowlitz ROD, they are denied. Federal Defendants deny the allegation that the Ione Band is not a federally recognized Indian tribe. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent responses are required, Federal Defendants deny the allegations.

RESPONSE TO SECOND CLAIM

59. Paragraph 59. Federal Defendants incorporate by reference their responses to Paragraphs 1 through 58 as if fully set forth herein.

60. Paragraph 60. Federal Defendants admit that the regulations set forth at 25 C.F.R. Part 151 are applicable to trust acquisitions completed pursuant to Section 5 of the IRA (25 U.S.C. § 465). Federal Defendants deny the remainder of this paragraph.

61. Paragraph 61. This paragraph consists of characterizations of 25 C.F.R. § 151.10(a), which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(a), they are denied. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent responses are required, Federal Defendants deny the allegations.

62. Paragraph 62. This paragraph consists of characterizations of 25 C.F.R. § 151.10(b) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(a), they are denied. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent responses are required, Federal Defendants deny the allegations.

63. Paragraph 63. This paragraph consists of characterizations of 25 C.F.R. § 151.10(c) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(c) and the ROD, they are denied. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent responses are required, Federal Defendants deny the allegations.

64. Paragraph 64. This paragraph consists of characterizations of 25 C.F.R. § 151.10(e) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(e) or the ROD, they are denied. Federal Defendants clarify that land acquired in trust pursuant to the IRA, 25 U.S.C. § 465, is exempt from state and local taxation under the IRA. Federal Defendants deny that the IRA or the regulations at 25 C.F.R. Part 151 require the Tribe to reimburse Amador County, California for the loss of tax revenue stemming from land acquisitions made pursuant to the IRA. The remainder of the paragraph consists of legal conclusions, characterizations, and conjecture about speculative future events to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

65. Paragraph 65. The first sentence of this paragraph consists of characterizations of 25 C.F.R. § 151.10(f) and the ROD, which speak for themselves and are the best evidence of their

contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(f) or the ROD, they are denied. The remainder of the paragraph consists of legal conclusions and characterizations to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

66. Paragraph 66. This paragraph consists of characterizations of 25 C.F.R. § 151.10(g) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(g) or the ROD, they are denied. Federal Defendants admit that the ROD does not contain specific language concerning 25 C.F.R. § 151.10(g) but deny that Federal Defendants did not comply with 25 C.F.R. § 151.10(g).

67. Paragraph 67. This paragraph consists of characterizations of 25 C.F.R. § 151.10(h) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(h) or the ROD, they are denied. Federal Defendants admit that the ROD does not contain specific language concerning 25 C.F.R. § 151.10(h) but deny that the Band did not submit documentation relevant to 25 C.F.R. § 151.10(h) and further deny that Federal Defendants did not comply with 25 C.F.R. § 151.10(h).

68. Paragraph 68. This paragraph consists of characterizations of 25 C.F.R. § 151.11(c) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.11(c) or the ROD, they are denied. Federal Defendants admit that the ROD does not contain specific language concerning 25 C.F.R. § 151.11(c) but deny that the Band did not submit documentation relevant to 25 C.F.R. § 151.11(c) and further deny that Federal Defendants did not comply with 25 C.F.R. § 151.11(c).

69. Paragraph 69. This paragraph consists of characterizations of 25 C.F.R. § 151.13 and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.13 or the ROD, they are denied. Federal Defendants admit that the ROD does not contain specific language concerning

25 C.F.R. § 151.13 but deny that the Band did not submit documentation relevant to 25 C.F.R. § 151.13 and further deny that Federal Defendants did not comply with 25 C.F.R. § 151.13.

70. Paragraph 70. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations. Federal Defendants deny that Plaintiffs are entitled to any relief.

RESPONSE TO THIRD CLAIM

71. Paragraph 71. Federal Defendants incorporate by reference their responses to Paragraphs 1 through 70 as if fully set forth herein.

72. Paragraph 72. The allegations in this paragraph consist of characterizations of the United States Supreme Court decisions *Kleppe v. New Mexico,* 429 U.S. 873 (1976) and *United States. v. Midwest Oil Co.*, 236 U.S. 459 (1915), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The remainder of the paragraph consists of characterizations that require no response. To the extent a response is required, Federal Defendants deny the allegations.

73. Paragraph 73. This paragraph consists of characterizations of the United States Supreme Court decision, *Hawaii v. Office of Hawaiian Affairs,* 129 S Ct. 1436 (2009), which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

74. Paragraph 74. This paragraph consists of characterizations of *Hawaii v. Office of Hawaiian Affairs*, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent response is required, Federal Defendants deny the allegations.

75. Paragraph 75. This paragraph consists of characterizations of *Hawaii v. Office of Hawaiian Affairs*, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied.

76. Paragraph 76. This paragraph consists of characterizations of a statute granting the State of California admission to the United States, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the statute, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

77. Paragraph 77. This paragraph consists of characterizations of a statute enacted in 1864 (13 Stat. 39) which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the statute, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

78. Paragraph 78. This paragraph consists of characterizations of *Hawaii v. Office of Hawaiian Affairs* and the Tenth Amendment to the United States Constitution, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

79. Paragraph 79. This paragraph consists of characterizations of 25 C.F.R § 1.4, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 1.4, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, Federal Defendants deny the allegations.

80. Paragraph 80. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations. Federal Defendants further deny that Plaintiffs are entitled to any relief.

81. Paragraph 81. This paragraph consists of Plaintiffs' characterizations of this action to which no response is required. To the extent a response is required, Federal Defendants deny the allegations and further deny that Plaintiffs are entitled to any relief. The paragraph also consists of characterizations of *Hawaii v. Office of Hawaiian Affairs*, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of this paragraph consists of legal conclusions and characterizations to which no responses are required. To the extent a response is required, Federal Defendants deny the allegations.

RESPONSE TO FOURTH CLAIM

82. Paragraph 82. Federal Defendants incorporate by reference their responses to Paragraphs 1 through 81 as if fully set forth herein.

83. Paragraph 83. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

84. Paragraph 84. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

85. Paragraph 85. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

86. Paragraph 86. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

87. Paragraph 87. This paragraph consists of legal conclusions, characterizations, and conjecture about speculative future events to which no responses are required. To the extent a response is required, Federal Defendants deny the allegations.

88. Paragraph 88. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations. Federal Defendants deny that Plaintiffs are entitled to any relief.

RESPONSE TO FIFTH CLAIM

89. Paragraph 89. Federal Defendants incorporate by reference their responses to Paragraphs 1 through 88 as if fully set forth herein.

90. Paragraph 90. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

91. Paragraph 91. This paragraph consists of characterizations of NEPA, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with NEPA, they are denied.

92. Paragraph 92. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

93. Paragraph 93. This paragraph consists of legal conclusions, characterizations, and conjecture about speculative future events to which no responses are required. To the extent a response is required, Federal Defendants deny the allegations.

94. Paragraph 94. This paragraph appears to consist of characterizations of NEPA and/or the regulations promulgated pursuant to it, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with NEPA or the regulations promulgated pursuant to NEPA, they are denied.

95. Paragraph 95. This paragraph consists of legal conclusions and conjecture to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

96. Paragraph 96. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

97. Paragraph 97. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

98. Paragraph 98. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

99. Paragraph 99. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, Federal Defendants deny the allegations.

100. Paragraph 100. This paragraph consists of Plaintiffs' claims for relief. Federal Defendants deny that Plaintiffs are entitled to any relief.

RESPONSE TO PRAYER

101. Paragraph 101. Paragraphs A through K constitute Plaintiffs' prayer for relief. Federal Defendants deny that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. The Court lacks subject matter jurisdiction over one or more of Plaintiffs' claims.

2. Plaintiffs have failed to state a claim for which relief can be granted with respect to one or more of their claims.

3. One or more of Plaintiffs' claims is barred by the applicable statute of limitations.

WHEREFORE, Federal Defendants request that the Court dismiss Plaintiffs' Complaint or enter judgment in favor of the United States and grant such other relief as may be appropriate.

Respectfully submitted this 10th day of December, 2012.

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Environment & Natural Resources Division
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Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, v. KENNETH L. SALAZAR, in his official capacity as Secretary of THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	CASE NO. 2:12-cv-01748-JAM-CNK **JOINT STATUS REPORT** Judge: Honorable John A. Mendez

This Joint Status Report is submitted on behalf of Plaintiffs NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, ("Plaintiffs"), and Defendants, KENNETH L. SALAZAR, Secretary of the U.S. Department of the Interior; DONALD E. LAVERDURE, Acting Assistant Secretary-Indian Affairs, U.S Department of Interior; KEVIN WASHBURN, Assistant Secretary-Indian Affairs, U.S. Department of Interior[1] ; AMY DUTSCHKE, Pacific Regional Director, Bureau of Indian Affairs; JOHN RYDZIK, Chief, Division of Environmental, and Cultural Resources, Bureau of Indian Affairs, Pacific Regional Office; PAULA HART, Chairwoman of the Office of Indian Gaming; TRACIE STEVENS, Chairwoman of the National Indian Gaming Commission; THE NATIONAL INDIAN GAMING COMMISSION and THE UNITED STATES DEPARTMENT OF INTERIOR (collectively, "Federal Defendants"), through their undersigned counsel, pursuant to Federal Rule of Civil Procedure 16, in accordance with Local Rule 240 and the Court's Order Requiring Joint Status Report dated July 24, 2012, and served upon Federal Defendants on October 9, 2012.

(a) Nature of the Case

In this case, Plaintiffs allege that actions taken by the Federal Defendants, through a May 24, 2012 Record of Decision (ROD), to approve the acquisition of approximately 228 acres of land near Plymouth, California, in Amador County into trust on behalf of the Ione Band of Miwok Indians ("Ione Band") were arbitrary, capricious, and contrary to law. Plaintiffs challenge the Federal Defendants' decision that, once in trust, the Plymouth Parcels would qualify as "restored lands for a restored tribe" entitled to conduct gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(iii). Plaintiffs further allege that the Federal Defendants incorrectly determined that the Ione Band was a "recognized tribe now under federal jurisdiction" in June of 1934, when the Indian Reorganization Act, 25 U.S.C. §§ 461-479, was enacted by Congress, and therefore the Federal Defendants lack authority to acquire the Plymouth Parcels into trust on behalf of the Ione Band. Plaintiffs also allege that the Federal Defendants' environmental review of the Ione Band's fee-to-trust application and proposed

[1] Federal Defendants contend that Kevin K. Washburn, Assistant Secretary for Indian Affairs, is automatically substituted for Donald E. Laverdure, under Federal Rule of Civil Procedure 25(d).

casino project violated environmental compliance standards set forth in the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347. Plaintiffs further allege that Federal Defendants violated and failed to comply with their own regulations, *see* C.F.R. Part 151, when reviewing and approving the ROD. Plaintiffs further allege that the Ione Band is not currently a federally-recognized Indian tribe. Plaintiffs have requested and, if appropriate, intend to seek attorney's fees pursuant to the Equal Access to Justice Act.

(**b) Status of Service of Process**

Federal Defendants were served with the FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (CD 10) on October 9, 2012.

(c) Possible Joinder of Additional Parties

Federal Defendants anticipate that the Ione Band may move to intervene permissively in this suit pursuant to Federal Rule of Civil Procedure 24(b). Plaintiffs reserve and request an opportunity to oppose that motion.

(d) Anticipated Amendment of Pleadings

Plaintiffs filed an initial Complaint on June 29, 2012, and then subsequently filed a First Amended Complaint on October 1, 2012. Federal Defendants' Answer to the First Amended Complaint is due to be filed on December 10, 2012, in conjunction with this Joint Status Report. To date, no other motions or pleadings have been filed.

(e) Jurisdiction and Venue

This is a civil action arising under the Constitution, laws, and/or treaties of the United States, and this Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331. It is more specifically an action for review of decision making by the United States Department of the Interior, including officers of that agency, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. This action also seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(b) and (e), and 5 U.S.C. § 703.

(f) Anticipated Motions and Scheduling of Motions

Federal Defendants anticipate lodging the Administrative Record by March 29, 2013. Either Party may move to supplement the Administrative Record, provided such amendment is

consistent with the APA. The Parties anticipate that cross-motions for summary judgment may be appropriate to resolve the APA claims. After the lodging of the Administrative Record, and once any issues regarding its content are resolved, the Parties will file a further Joint Status Report setting forth an agreed upon briefing schedule for any potential cross-motions for summary judgment.

Plaintiffs, after they receive a copy of Federal Defendants' Answer, may file a motion for summary judgment and/or judgment on the pleadings, if appropriate, before or after the Administrative Record is filed.

(g) Anticipated Discovery and Scheduling of Discovery

Federal Defendants contend that discovery is not appropriate in this APA record review action. See Fed. R. Civ. P. 26(a)(1)(A) and (B)(i) (identifying "an action for review on an administrative record" as a proceeding exempt from initial disclosure). Federal Defendants reserve the right to challenge the use of discovery in this action.

Plaintiffs contend discovery is permissible in administrative actions, under specified circumstances determined after the Administrative Record is lodged. Plaintiffs also contend that discovery is appropriate with respect to the allegations in the pleadings not governed by the APA.

(h) Proposed Cut-off Dates for Discovery, Law and Motion, and Scheduling of Pretrial and Trial

Federal Defendants contend that this sub-section is not applicable as discovery and trial are not appropriate in this challenge to agency decision making under the APA, pursuant to which review is on the Administrative Record.

Plaintiffs recommend that the need for discovery cut off dates and pre-trial and trial scheduling be re-evaluated after the administrative record is filed. These issues should also be re-evaluated if, and when, the Ione Band is given permission to intervene.

(i) Appropriateness of Special Procedures

Not applicable.

(j) Estimate of Trial Time

Federal Defendants contend that this sub-section is not applicable as trial is not appropriate in this challenge to agency decision making under the APA, pursuant to which review is on the Administrative Record.

Plaintiffs recommend that the need for trial time estimates be re-evaluated after the Administrative Record is filed. This issue should also be re-evaluated if, and when, the Ione Band is given permission to intervene.

(k) Proposed Modification of Standard Pretrial Procedures

Not applicable.

(l) Related Cases

County of Amador, California v. The United States Department of the Interior, No. 2:12-cv-01710 (Eastern District of California), has been related to this case pursuant to Local Rule 123(a).

(m) Scheduling of Settlement Conference

The Parties do not view this case as amenable to settlement.

(n) Other Relevant Matters

None at this time.

Respectfully Submitted,

Dated: December 10, 2012

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Environment & Natural Resources Division
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Dated: December 10, 2012

/s/ Kenneth R. Williams (as authorized on 12/10/12)
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IONE BAND OF MIWOK INDIANS

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	CASE NO. 2:12-cv-01748-TLN-CMK **IONE BAND OF MIWOK INDIANS' ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT** Judge: Hon. Troy L. Nunley

Intervenor Defendant Ione Band of Miwok Indians ("Tribe" or "Ione Band"), a federally recognized Indian Tribe, by and through its counsel, answer Plaintiffs No Casino in Plymouth and Citizens Equal Rights Alliance's ("Plaintiffs") First Amended Complaint for Declaratory & Injunctive Relief ("Complaint") as follows:

GENERAL DENIAL

The Tribe denies any allegations of the Complaint, express or implied, that are not expressly admitted, denied, or qualified herein.

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INTRODUCTION

1. Paragraph 1. This paragraph consists of Plaintiffs' characterization of this action, to which no response is required. To the extent a response is required, the Tribe denies the allegations. The paragraph also contains Plaintiffs' characterization of the May 24, 2012 Record of Decision. The Tribe admits that then-Acting Assistant Secretary of Indian Affairs Donald E. Laverdure issued a Record of Decision ("ROD") on May 24, 2012 approving the Tribe's request to acquire approximately 228 acres of land in Amador County, California ("Plymouth Parcels") in trust for gaming purposes. The Tribe further admits that this is an action challenging the ROD. The remainder of the paragraph characterizes the ROD. The ROD speaks for itself and thus no response is required. To the extent a response is required, the Tribe denies the allegations.

2. Paragraph 2. This paragraph consists of characterizations of legal sources and the ROD as well as legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

3. Paragraph 3. This paragraph consists of characterizations of the ROD and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the ROD or IGRA, they are denied. The remainder of this paragraph contains legal conclusions and characterizations to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

4. Paragraph 4. This paragraph contains legal conclusions and characterizations of legal authorities to which no responses are required. It also contains characterizations of the federal Defendants' positions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

5. Paragraph 5. This paragraph contains legal conclusions and characterizations of legal authorities that speak for themselves and are the best evidence of their contents. No response is required for these characterizations. The paragraph also contains characterizations of

the federal Defendants' intentions and positions to which no response is required. To the extent responses are required, the Tribe denies the allegations.

6. Paragraph 6. This paragraph consists of characterizations of the ROD and other legal authorities, all of which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the legal authorities, they are denied. The paragraph also states legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

7. Paragraph 7. This paragraph contains legal conclusions and characterizations of legal authorities to which no response are required. To the extent responses are required, the Tribe denies the allegations.

8. Paragraph 8. This paragraph contains allegations characterizing the ROD, regulations set forth at 25 C.F.R. part 151, and the Federal Register Notice published on May 30, 2012. All of these authorities speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the authorities, they are denied. The remainder of the paragraph includes legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

9. Paragraph 9. This paragraph consists of legal conclusions, to which no responses are required, and Plaintiffs' request for relief. The Tribe denies that Plaintiffs are entitled to any relief.

JURISDICTION AND VENUE

10. Paragraph 10. This paragraph consists of characterizations of Plaintiffs' lawsuit, legal authorities, and of the Court's jurisdiction under 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706 *et seq.*, and 28 U.S.C. §§ 2201 and 2202, to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

11. Paragraph 11. This paragraph consists of legal conclusions and characterizations of Plaintiffs' lawsuit and of the Court's jurisdiction under 5 U.S.C. §§ 702 and 704, and 28 U.S.C. § 2209(a), to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

12. Paragraph 12. Tribe admits that venue is proper under 28 U.S.C. § 1391(b)(2) and (e) and 5 U.S.C. § 703.

PARTIES

13. Paragraph 13. The Tribe lacks information sufficient to form a belief as to the truth of the allegations in this paragraph and on that basis denies the allegations.

14. Paragraph 14. The Tribe lacks information sufficient to form a belief as to the truth of the allegations in this paragraph and on that basis denies the allegations.

15. Paragraph 15. (a) The Tribe admits that Kenneth Salazar was, at the time this case was filed, Secretary of the United States Department of the Interior ("DOI"). The Tribe avers that the current Secretary of Interior is Sally Jewell, and that the Secretary of Interior has responsibilities concerning federally recognized Indian tribes. The Tribe admits that Secretary Salazar was sued in his official capacity. The Tribe clarifies that current Secretary Sally Jewell has been automatically substituted in this proceeding for Secretary Salazar, pursuant to Fed. R. Civ. P. 25(d), and that she is similarly being sued in her official capacity.

(b) and (c) The Tribe admits that Donald E. Laverdure was, at the time the ROD was issued and at the time this lawsuit was filed, the Acting Assistant Secretary - Indian Affairs of the DOI and that he was sued in his official capacity. The Tribe avers that Kevin Washburn now serves as Assistant Secretary - Indian Affairs of the DOI. The Tribe clarifies that current Assistant Secretary - Indian Affairs Kevin Washburn has been automatically substituted in this proceeding for Donald E. Laverdure, pursuant to Fed. R. Civ. P. 25(d), and that he is similarly being sued in his official capacity.

(d) The Tribe admits that Amy Dutschke is the Pacific Regional Director for the Bureau of Indian Affairs and that she is sued in her official capacity.

(e) The Tribe admits that John Rydzik is the Chief of the Division of Environmental, Cultural Resources Management and Safety of the Bureau of Indian Affairs, Pacific Regional Office, and that he is similarly being sued in his official capacity.

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(f) The Tribe denies that Paula Hart is the Chairwoman and avers that she is the Director of the Office of Indian Gaming, United States Department of Interior. The Tribe admits that she is being sued in her official capacity.

(g) The Tribe admits that Tracie Stevens was, at the time this case was filed, the Chairwoman of the National Indian Gaming Commission and that she was sued in her official capacity. The Tribe avers that the current Acting Chairman of the National Indian Gaming Commission is Jonodev Chaudhuri. The Tribe clarifies that current Acting Chairman of the National Indian Gaming Commission Jonodev Chaudhuri has been automatically substituted in this proceeding for Tracie Stevens, pursuant to Fed. R. Civ. P. 25(d), and that he is similarly being sued in his official capacity.

16. Paragraph 16. The Tribe admits that DOI is a cabinet level agency and avers that DOI has multiple responsibilities, including those concerning federally recognized Indian tribes. The Tribe admits that DOI has authority to promulgate and enforce regulations.

17. Paragraph 17. The Tribe admits that the NIGC is a federal regulatory agency that, among other things, is authorized to enforce IGRA and its related regulations.

STATEMENT OF FACTS

18. Paragraph 18. This paragraph consists of allegations characterizing the Treaty of Guadalupe Hidalgo, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied.

19. Paragraph 19. This paragraph consists of characterizations of an 1850 statute granting the State of California admission to the United States, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied.

20. Paragraph 20. This paragraph consists of characterizations of the Act of 1851 and the United States Supreme Court decision, *Summa Corporation v. California*, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph

consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

21. Paragraph 21. This paragraph characterizes legal authorities that speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

22. Paragraph 22. This paragraph consists of characterizations of the General Allotment Act, 24 Stat. 388 (1887), which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

23. Paragraph 23. This paragraph consists of characterizations of legal authorities that speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

24. Paragraph 24. This paragraph consists of characterizations of census and residency information compiled by Agent C.E. Kelsey of the Bureau of Indian Affairs ("BIA") between 1905-1906, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the document prepared by Kelsey, the Tribe denies the allegations.

25. Paragraph 25. This paragraph consists of characterizations of a census prepared by BIA Special Indian Agent John Terrell in 1915, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the census, the Tribe denies the allegations. The Tribe admits that DOI undertook efforts to acquire land for the benefit of the Ione Band in the early 20th Century and that clearing title to the property was an obstacle to completing the land acquisition. The Tribe lacks information

sufficient to form a belief as to the truth of the allegations in the rest of the paragraph, and on this basis denies the same.

26. Paragraph 26. This paragraph consists of characterizations of legal authorities that speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

27. Paragraph 27. The first sentence of this paragraph consists of characterizations of the California Indian Jurisdictional Act, 45 Stat. 602 (1928), and filings made and orders issued in lawsuits brought pursuant to such Act, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with the Act, or litigation filings or orders, they are denied. The Tribe lacks information sufficient to form a belief as to the truth of the allegations in the rest of the paragraph, and on this basis denies the same.

28. Paragraph 28. This paragraph consists of characterizations of the IRA and the General Allotment Act, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The Tribe denies the allegation that it is not a federally recognized Indian tribe. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

29. Paragraph 29. The Tribe admits that it requested that the Secretary acquire a 40-acre parcel of land in trust for the benefit of the Tribe but that such trust acquisition did not occur. This paragraph consists of characterizations of correspondence that speaks for itself and is the best evident of its contents. To the extent the characterizations are incomplete or inconsistent with such correspondence, they are denied. The Tribe denies the remainder of the paragraph.

30. Paragraph 30. This paragraph consists of characterizations of the Indian Claims Commission Act, 60 Stat. 1049 (1946), and judgments issued by the Indian Claims Commission, which speak for themselves and are the best evidence of their contents. To the extent the

characterizations are incomplete or inconsistent with these legal authorities, they are denied. This paragraph also consists of legal conclusions that require no response. To the extent responses are required, the Tribe denies the allegations.

31. Paragraph 31. The Tribe admits that some individuals opposed the trust acquisition of the 40-acre parcel of land. This paragraph consists of characterizations of court filings made or court orders issued in Amador County Superior Court, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are inconsistent or incomplete with such filings or orders, they are denied.

32. Paragraph 32. The Tribe admits that the United States did not acquire the 40 acre parcel of land in trust for the Tribe. The remainder of the paragraph consists of characterizations of an October 18, 1972 letter sent by BIA Commissioner Louis Bruce to Nicholas Villa and the Ione Band, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the document, they are denied. The third sentence of this paragraph appears to consist of characterizations of filings by the United States in *Ione Band of Miwok Indians, et al. v. Harold Burris, et al.*, Civ. No. S-900993 LKK/EM (E.D. Cal.), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such filings, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

33. Paragraph 33. This paragraph consists of characterizations of federal regulations that speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such regulations, they are denied. The Tribe admits that it was included on a list published in 1979 identifying groups with acknowledgment petitions pending with DOI and that DOI provided the Tribe with information concerning the acknowledgment regulations. The Tribe avers that it was included on the list of federally recognized Indian tribes published in 1995, has been included on every such list published thereafter, and that it is currently a federally recognized tribe. The Tribe denies the remainder of the paragraph.

34. Paragraph 34. The Tribe admits that the BIA Pacific Region authorized a Secretarial election held by the Tribe in 2002 for the purpose of adopting the Tribe's Constitution. The Tribe denies that this election was an initial election for Tribal leadership and further denies that the election significantly expanded the Tribal voting rolls. The Tribe denies the remainder of the paragraph

35. Paragraph 35. The Tribe lacks sufficient information to affirm or deny the allegations in this paragraph, and thus denies the same.

36. Paragraph 36. The Tribe admits that it and the City of Plymouth entered into a Municipal Services Agreement (MSA) for the development of the Plymouth casino project. The Tribe admits that the County of Amador successfully sued the City of Plymouth, thus invalidating the MSA. The Tribe denies the remainder of the paragraph.

37. Paragraph 37. The Tribe admits the allegations in this paragraph and aver that that the fee-to-trust application was submitted to DOI in November 2005.

38. Paragraph 38. This paragraph consists of legal conclusions and characterizations of an alleged Memorandum of Understanding (MOU) between the BIA Pacific Regional Office and the California Fee to Trust Consortium of Tribes and an alleged report prepared by the Department's Inspector General to which no response is required. Any such documents speak for themselves and are the best evidence of their contents. To the extent a response is required, the Tribe lacks sufficient information to affirm or deny the allegations in this paragraph, and thus denies the same.

39. Paragraph 39. This paragraph consists of characterizations of a Memorandum of Agreement ("MOA") entered in May 2006 between the NIGC and DOI, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the MOA, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

40. Paragraph 40. The Tribe lacks sufficient information to affirm or deny the allegations in this paragraph, and thus denies the same.

41. Paragraph 41. This paragraph consists of characterizations of an opinion prepared by former DOI Associate Solicitor Carl J. Artman in September 2006, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with such document, they are denied.

42. Paragraph 42. The Tribe admits the allegations in this paragraph.

43. Paragraph 43. This paragraph contains characterizations of the Draft Environmental Impact Statement ("DEIS") and the Federal Register Notice published in April 2008, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such documents, they are denied. The Tribe admits that at the time it submitted its fee-to-trust application, it did not own the subject parcels. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

44. Paragraph 44. This paragraph appears to consist of characterizations of a memorandum dated January 2009 from former DOI Solicitor David L. Bernhardt to former Acting Deputy Assistant Secretary for Policy and Economic Development George T. Skibine; the DEIS; the Final Environmental Impact Statement ("FEIS"); and the ROD or its related Federal Register Notice published on May 30, 2012, all of which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with such documents, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

45. Paragraph 45. The Tribe admits the first sentence of this paragraph. The Tribe lacks sufficient information to affirm or deny the allegations regarding the remainder of the paragraph, and thus denies the same.

46. Paragraph 46. The Tribe admits the allegations in this paragraph.

47. Paragraph 47. The Tribe admits the first, second, and sixth sentences of this paragraph. The third, fourth, and fifth sentences of the paragraph consist of characterizations of

the ROD, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the ROD, they are denied.

48. Paragraph 48. This paragraph consists of characterizations of the ROD, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the ROD, they are denied.

49. Paragraph 49. The Tribe admits the allegations in this paragraph.

FIRST CLAIM FOR RELIEF

50. Paragraph 50. The Tribe incorporates by reference its responses to Paragraphs 1 through 49 as if fully set forth herein.

51. Paragraph 51. This paragraph consists of characterizations of the ROD, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the ROD, they are denied.

52. Paragraph 52. This paragraph consists of characterizations of the IRA and *Carcieri v. Salazar*, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The paragraph also consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

53. Paragraph 53. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

54. Paragraph 54. This paragraph consists of characterizations of the IRA; *Carcieri v. Salazar*; and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The remainder of the paragraph consists of legal conclusions to which no response is required. To the extent responses are required, the Tribe denies the allegations

55. Paragraph 55. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

56. Paragraph 56. The Tribe denies the allegations in this paragraph.

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57. Paragraph 57. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

58. Paragraph 58. This paragraph consists of Plaintiffs' characterizations of this action to which no responses are required. To the extent responses are required, the Tribe denies the allegations. This paragraph also consists of characterizations of *Carcieri v. Salazar* and the December 17, 2010 Record of Decision concerning the decision to acquire land in trust for the Cowlitz Tribe of Indians ("Cowlitz ROD"), which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with *Carcieri v. Salazar* or the Cowlitz ROD, they are denied. The Tribe denies the allegation that it is not a federally recognized Indian tribe. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

RESPONSE TO SECOND CLAIM

59. Paragraph 59. The Tribe incorporates by reference its responses to Paragraphs 1 through 58 as if fully set forth herein.

60. Paragraph 60. The Tribe admits that the regulations set forth at 25 C.F.R. Part 151 are applicable to trust acquisitions completed pursuant to Section 5 of the IRA (25 U.S.C. § 465). The Tribe denies the remainder of this paragraph.

61. Paragraph 61. This paragraph consists of characterizations of 25 C.F.R. § 151.10(a), which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(a), they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

62. Paragraph 62. This paragraph consists of characterizations of 25 C.F.R. § 151.10(b) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(a), they are denied. The remainder of the paragraph consists of legal conclusions to

which no responses are required. To the extent responses are required, the Tribe denies the allegations.

63. Paragraph 63. This paragraph consists of characterizations of 25 C.F.R. § 151.10(c) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(c) and the ROD, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

64. Paragraph 64. This paragraph consists of characterizations of 25 C.F.R. § 151.10(e) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(e) or the ROD, they are denied. The Tribe clarifies that land acquired in trust pursuant to the IRA, 25 U.S.C. § 465, is exempt from state and local taxation under the IRA. The Tribe denies that the IRA or the regulations at 25 C.F.R. Part 151 require it to reimburse Amador County, California for the loss of tax revenue stemming from land acquisitions made pursuant to the IRA. The remainder of the paragraph consists of legal conclusions, characterizations, and conjecture about speculative future events to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

65. Paragraph 65. The first sentence of this paragraph consists of characterizations of 25 C.F.R. § 151.10(f) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(f) or the ROD, they are denied. The remainder of the paragraph consists of legal conclusions and characterizations to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

66. Paragraph 66. This paragraph consists of characterizations of 25 C.F.R. § 151.10(g) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(g) or the ROD, they are denied. The Tribe admits that the ROD does not contain

specific language concerning 25 C.F.R. § 151.10(g) but denies that the Federal Defendants did not comply with 25 C.F.R. § 151.10(g).

67. Paragraph 67. This paragraph consists of characterizations of 25 C.F.R. § 151.10(h) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.10(h) or the ROD, they are denied. The Tribe admits that the ROD does not contain specific language concerning 25 C.F.R. § 151.10(h) but denies that the Tribe did not submit documentation relevant to 25 C.F.R. § 151.10(h) and further denies that Federal Defendants did not comply with 25 C.F.R. § 151.10(h).

68. Paragraph 68. This paragraph consists of characterizations of 25 C.F.R. § 151.11(c) and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.11(c) or the ROD, they are denied. The Tribe admits that the ROD does not contain specific language concerning 25 C.F.R. § 151.11(c) but denies that the Tribe did not submit documentation relevant to 25 C.F.R. § 151.11(c) and further denies that Federal Defendants did not comply with 25 C.F.R. § 151.11(c).

69. This paragraph consists of characterizations of 25 C.F.R. § 151.13 and the ROD, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 151.13 or the ROD, they are denied. The Tribe admits that the ROD does not contain specific language concerning 25 C.F.R. § 151.13 but denies that the Tribe did not submit documentation relevant to 25 C.F.R. § 151.13 and further denies that Federal Defendants did not comply with 25 C.F.R. § 151.13.

70. Paragraph 70. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations. The Tribe denies that Plaintiffs are entitled to any relief.

RESPONSE TO THIRD CLAIM

71. Paragraph 71. The Tribe incorporates by reference its responses to Paragraphs 1 through 70 as if fully set forth herein.

72. Paragraph 72. The allegations in this paragraph consist of characterizations of United States Supreme Court decisions and apparent characterizations of other legal sources, all of which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with these legal authorities, they are denied. The remainder of the paragraph consists of characterizations that require no responses. To the extent responses are required, the Tribe denies the allegations.

73. Paragraph 73. This paragraph consists of characterizations of the United States Supreme Court decision, *Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436 (2009), which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

74. Paragraph 74. This paragraph consists of characterizations of *Hawaii v. Office of Hawaiian Affairs*, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

75. Paragraph 75. This paragraph consists of characterizations of *Hawaii v. Office of Hawaiian Affairs*, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied.

76. Paragraph 76. This paragraph consists of characterizations of a statute granting the State of California admission to the United States, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with the statute, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

77. Paragraph 77. This paragraph consists of characterizations of a statute enacted in 1864 (13 Stat. 39), which speaks for itself and is the best evidence of its contents. To the extent

the characterizations are incomplete or inconsistent with the statute, they are denied. The rest of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

78. Paragraph 78. This paragraph consists of characterizations of *Hawaii v. Office of Hawaiian Affairs* and the Tenth Amendment to the United States Constitution, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

79. Paragraph 79. This paragraph consists of characterizations of 25 C.F.R § 1.4, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with 25 C.F.R. § 1.4, they are denied. The remainder of the paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

80. Paragraph 80. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations. The Tribe further denies that Plaintiffs are entitled to any relief.

81. Paragraph 81. This paragraph consists of Plaintiffs' characterizations of this action to which no responses are required. To the extent responses are required, the Tribe denies the allegations and further denies that Plaintiffs are entitled to any relief. The paragraph also consists of characterizations of *Hawaii v. Office of Hawaiian Affairs*, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with this legal authority, they are denied. The remainder of this paragraph consists of legal conclusions and characterizations to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

RESPONSE TO FOURTH CLAIM

82. Paragraph 82. The Tribe incorporates by reference its responses to Paragraphs 1 through 81 as if fully set forth herein.

83. Paragraph 83. This paragraph consists of characterizations and legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

84. Paragraph 84. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required the Tribe denies the allegations and avers that the Tribe is a restored tribe for purposes of IGRA; has been and is a federally recognized tribe; and has been terminated and restored to federal recognition.

85. Paragraph 85. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, the Tribe denies the allegations and avers that the Plymouth Parcels are restored lands under IGRA.

86. Paragraph 86. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

87. Paragraph 87. This paragraph consists of legal conclusions, characterizations, and conjecture about speculative future events to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

88. Paragraph 88. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations. The Tribe denies that Plaintiffs are entitled to any relief.

RESPONSE TO FIFTH CLAIM

89. Paragraph 89. The Tribe incorporates by reference its responses to Paragraphs 1 through 88 as if fully set forth herein.

90. Paragraph 90. This paragraph consists of legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

91. Paragraph 91. This paragraph consists of characterizations of a provision of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, which speaks for itself and is the best evidence of its contents. To the extent the characterizations are incomplete or inconsistent with NEPA, they are denied.

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92. Paragraph 92. This paragraph consists of legal conclusions to which no response is required. To the extent a response is required, the Tribe denies the allegations.

93. Paragraph 93. This paragraph consists of legal conclusions, characterizations, and conjecture about speculative future events to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

94. Paragraph 94. This paragraph appears to consist of characterizations of NEPA and/or the regulations promulgated pursuant to it, which speak for themselves and are the best evidence of their contents. To the extent the characterizations are incomplete or inconsistent with NEPA or the regulations promulgated pursuant to NEPA, they are denied.

95. Paragraph 95. This paragraph consists of characterizations, legal conclusions, and conjecture to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

96. Paragraph 96. This paragraph consists of characterizations and legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

97. Paragraph 97. This paragraph consists of characterizations and legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

98. Paragraph 98. This paragraph consists of characterizations and legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

99. Paragraph 99. This paragraph consists of characterizations and legal conclusions to which no responses are required. To the extent responses are required, the Tribe denies the allegations.

100. Paragraph 100. This paragraph consists of Plaintiffs' claims for relief. The Tribe denies that Plaintiffs are entitled to any relief.

RESPONSE TO PRAYER

101. Paragraph 101. Paragraphs A through K constitute Plaintiffs' prayer for relief. The Tribe denies that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. The Court lacks subject matter jurisdiction over one or more of Plaintiffs' claims.

2. Plaintiffs have failed to state a claim for which relief can be granted with respect to one or more of their claims.

3. One or more of Plaintiffs' claims is barred by the applicable statute of limitations.

WHEREFORE, the Tribe requests that the Court dismiss Plaintiffs' Complaint or enter judgment in favor of the Tribe and grant such other relief as may be appropriate.

Respectfully submitted this 26th day of November, 2013.

/s/ Timothy Q. Evans
TIMOTHY Q. EVANS
HOLLAND & KNIGHT LLP

Attorneys for Intervenor/Defendant Ione Band of Miwok Indians

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 South Hope Street, 8th Floor Los Angeles, California 90071.

On **November 26, 2013**, I caused the foregoing document described as **IONE BAND OF MIWOK INDIANS' ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT** to be served on the interested parties in this action as follows:

(SEE ATTACHED SERVICE LIST)

By Electronic Transfer to the CM/ECF System

In accordance with Federal Rules of Civil Procedure 5(d) (3) and Local Rule 135, I uploaded via electronic transfer a true and correct copy scanned into an electronic file in Adobe "pdf" format of the above-listed documents to the United States District Court Central District of California's Case Management and Electronic Case Filing (CM/ECF) system on this date. It is my understanding that by transmitting these documents to the CM/ECF system, they will be served on all parties of record according to the preferences chosen by those parties within the CM/ECF system. The transmission was reported as complete and without error.

By U.S. Mail

Following ordinary business practices, I placed the document for collection and mailing at the offices of HOLLAND & KNIGHT LLP, 400 South Hope Street, 8th Floor, Los Angeles, California 90071, in a sealed envelope. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

[X] **(FEDERAL)** I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct. Executed on **November 26, 2013**, at Los Angeles, California.

Samantha Holloway

No Casino In Plymouth and Citizens Equal Rights Alliance vs. The United States Department of the Interior, et al.
(EDCA Case No. 2:12-cv-01748-TLN-CMK)

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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.

Summary: In November of 2005, the Tribe submitted a fee-to-trust application to the Bureau of Indian Affairs (BIA), requesting that the Department of the Interior (Department) accept trust title to land totaling 228.04 acres in Amador County, California (the Plymouth Parcels). The Ione Band of Miwok Indians (Tribe) plans to construct a gaming facility, hotel, event and convention center, parking facilities, fire station, and a wastewater treatment plant (WWTP).

The proposed trust acquisition (Proposed Action) was analyzed in an Environmental Impact Statement (EIS) prepared pursuant to the National Environmental Policy Act (NEPA), under the direction and supervision of the BIA Pacific Regional Office. The Draft EIS (DEIS) was issued for public review and comment on April 18, 2008. After an extended comment period, a public hearing, and consideration and incorporation of comments received on the DEIS, the BIA issued the Final EIS (FEIS) on August 13, 2010. The DEIS and FEIS considered a reasonable range of alternatives that would meet the purpose and need for the proposal, and analyzed the potential effects of those alternatives, as well as feasible mitigation measures.

With the issuance of this Record of Decision (ROD), the Department announces that the action to be implemented is the Preferred Alternative (Alternative A in the FEIS), which includes acquisition in trust of the 228.04-acre Plymouth Parcels and construction of a gaming-resort complex including a 120,000 square foot casino, 250-room hotel, 1,200-seat event and conference center, parking facilities, fire station, a WWTP, and corresponding mitigation measures including the modified features shown in Figures 5-1 and 5-2 of the FEIS. The Department has determined that this Preferred Alternative will best meet the purpose and need for the Proposed Action, in promoting the long-term economic self-sufficiency, self-determination, and self-governance of the Tribe. Implementing this action will provide the Tribe with a reservation land base and the best opportunity for attracting and maintaining a significant, stable, long-term source of governmental revenue, and accordingly, the best prospects for maintaining and expanding tribal governmental programs to provide a wide range of health, education, housing, social, cultural, environmental and other programs, as well as employment and career development opportunities for its members.

The Department has considered potential effects to the environment, including potential impacts to local governments and other tribes, has adopted all practicable means to avoid or minimize environmental harm (including the

modified site plans that consolidate parking areas within a multi-story parking structure), and has determined that potentially significant effects will be adequately addressed by these mitigation measures, as described in this ROD. The Department also has determined that the Plymouth Parcels are eligible for gaming because they qualify as "restored lands" for a restored tribe under Section 20 of the Indian Gaming Regulatory Act.

The decision is based on thorough review and consideration of the Tribe's fee-to-trust application and materials submitted therewith; the applicable statutory and regulatory authorities governing acquisition of trust title to land and eligibility of land for gaming; the DEIS; the FEIS; the administrative record; and comments received from the public, federal, State, and local governmental agencies; and potentially affected Indian tribes.

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1.0 INTRODUCTION

1.1 SUMMARY

In November of 2005, the Tribe, which is landless, submitted a fee-to-trust application to the BIA, requesting that the Department accept trust title to land totaling 228.04 acres in Amador County, California (Plymouth Parcels). The Tribe plans to construct a gaming facility, hotel, event and convention center, parking facilities, fire station, wastewater treatment plant (WWTP), and associated facilities.

The proposed trust acquisition of the 228.04-acre Plymouth Parcels was analyzed in an Environmental Impact Statement (EIS) prepared by the BIA. The Draft EIS (DEIS), issued for public review on April 18, 2008, and the Final EIS (FEIS), issued August 13, 2010, considered various alternatives to meet the stated purpose and need and analyzed in detail potential effects of various reasonable alternatives. With the issuance of this Record Of Decision (ROD), the Department has determined that Alternative A, consisting of the acquisition of trust title to the 228.04-acre site, construction of an approximately 120,000 square foot casino, a 250-room hotel, a 30,000 square foot convention facility, ancillary infrastructure, and mitigation measures presented in Section 5.0 of the FEIS including the modified site plan (Figures 5-1 and 5-2 of the FEIS) is the Preferred Alternative to be implemented. The Department has determined that the Preferred Alternative would best meet the purpose and need for the Proposed Action. The Department also has determined that under Section 20 of IGRA, the Tribe may game on the Plymouth Parcels, once held in trust, because they will qualify as "restored lands" for a restored Tribe. The Department's decision to acquire trust title to the Plymouth Parcels and the Department's determination that the property is eligible for gaming is based on thorough review and consideration of the Tribe's fee-to-trust application and materials submitted there within; the applicable statutory and regulatory authorities governing acquisition of trust title to land and eligibility of land for gaming; the DEIS; the FEIS; the administrative record; and comments received from the public, federal, State, and local governmental agencies; and potentially affected Indian tribes.

1.2 DESCRIPTION OF THE PROPOSED ACTION

Under the Proposed Action, the BIA would accept the 228.04-acre Plymouth Parcels into trust for the Tribe.[1] On the Parcels, the Tribe proposed to develop a gaming facility, a hotel, an event and convention facility, surface parking facilities, fire station, WWTP, and associated facilities. The site plan for the Proposed Action was subsequently updated prior to the release of the FEIS to reduce surface area parking by incorporating a parking structure into project design. The updated site plan was incorporated into the Proposed Action as a mitigation measure in Section 5.2.5 of the FEIS to reduce impacts to waters of the U.S. in response to comments received on the DEIS.

The Plymouth Parcels are located in the northwest part of Amador County approximately 35 miles east of the City of Sacramento, and approximately 17 miles south of the City of Placerville. The property is located immediately adjacent and east of State Route (SR) 49,

[1] A legal description of the Amador Parcels is incorporated by reference from Section VIII of the Tribe's November 2005 fee-to-trust application.

which provides regional access to the area, two and one-half miles north of the junction of SR 16 with SR 49. Eight of the twelve parcels (10.28± acres) are located within the City of Plymouth (City), while the remaining four parcels (217.76± acres) are located on unincorporated land within Amador County. The casino-resort complex would include Class III gaming conducted in accordance with the Indian Gaming Regulatory Act (IGRA) and Tribal-State Compact requirements and would consist of 65,000 square feet of gaming floor; 35,000 square feet of restaurant and retail facilities and public space; 30,000 square feet of convention and multi-purpose space (with seating for up to 1,200); and an five story, 250-room hotel. In accordance with the updated site plan, approximately 2,965 parking spaces would be provided for the project through a combination of surface parking (1,800) and development of a five-level parking garage (1,165 spaces). The project would be developed in two phases, with the casino and restaurant complex, portions of the surface parking, development of the parking garage, and auxiliary facilities constituting Phase I, and the development of the hotel, convention and conference center, and additional surface parking constituting Phase II.

1.3 PURPOSE AND NEED

In consideration of the present state of the Tribe and its increasing membership, it is necessary that the Tribe regain an ancestral land base upon which it can become self-sufficient. The history of the Tribe and the modern-day needs of the Tribe and its tribal membership provide a strong basis for acquiring lands under 25 U.S.C. § 465, wherein Congress granted to the Secretary of the Interior the authority to acquire lands in trust for Indian tribes.

Without stable economic development, the Tribe will remain unable to meet its need for economic development, self-sufficiency, and self-governance, and will be unable to provide its quickly growing Tribal member population with employment and educational opportunities and critically needed social services.

The purpose and need is as follows:

- Increased employment opportunities for tribal members;
- Improvement of the socioeconomic status of the Tribe; improvement of existing tribal housing; construction of new tribal housing; funding for a variety of social, governmental, administrative, educational, health and welfare services to improve the quality of life of tribal members;
- Capital for other economic development and investment opportunities;
- Restoration of a lost land base;
- Acquisition of land needed to exercise governmental powers; and
- Economic self-sufficiency, thereby eventually removing tribal members from public assistance programs.

The Proposed Action is consistent with the policies underlying the Federal statutory authorities in the Indian Reorganization Act and IGRA, and BIA's implementing regulations,

of promoting meaningful opportunities for economic development and self-sufficiency of the Tribe and its members, and furthering tribal self-governance and self-determination.

1.4 AUTHORITIES

Section 5 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465, provides the Secretary of the Interior with general authority to acquire land in trust status for Indian tribes in furtherance of the statute's broad goals of promoting Indian self-government and economic self-sufficiency. If a tribe is seeking to acquire land in trust, it must apply to the BIA and comply with the regulations in 25 C.F.R. Part 151, which implement the Secretary's trust acquisition authority in Section 5 of the IRA. This ROD records the decision by the Department to acquire in trust the 228.04-acre Plymouth Parcels in Amador County, California, for the Tribe.

The IGRA was enacted in 1988 to regulate the conduct of Indian gaming and to promote tribal economic development, self-sufficiency and strong tribal governments. The IGRA generally prohibits gaming on lands acquired in trust after 1988, unless certain exceptions found in Section 20 of IGRA, 25 U.S.C. § 2719, are met. The Section 20 exceptions are implemented through regulations found in 25 C.F.R. Part 292. Section 20 of IGRA does not provide the Secretary of the Interior with the authority to acquire land in trust; rather, it allows gaming on certain lands acquired in trust after 1988. Because the Tribe has requested that the Plymouth Parcels be taken in trust for gaming, the Tribe must satisfy one of the IGRA Section 20 exceptions before it may game on the property. Here the relevant exception is the "restored lands" exception in Section 20(b)(1)(B)(iii), which allows gaming if the lands are taken in trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." This ROD records the Department's determination that the Plymouth Parcels are eligible for gaming under the "restored lands" exception in IGRA Section 20, such that the Tribe may game on the Plymouth Parcels once they are acquired in trust.

1.5 PROCEDURAL BACKGROUND

The regulations in 25 C.F.R. Part 151 require compliance with the National Environmental Policy Act (NEPA). Accordingly, the BIA published a Notice of Intent (NOI) in the *Federal Register* on November 7, 2003 describing the Proposed Action and announcing the BIA's intent to prepare an EIS. The Council on Environmental Quality's Regulations for implementing NEPA require a process referred to as "scoping" for determining the range of issues and alternatives to be addressed during the environmental review of a Proposed Action (40 C.F.R. §1501.7). The scoping process entails a determination of issues by soliciting comments from agencies, organizations, and individuals. A 30-day public comment period began with the publication of the NOI on November 7, 2003 in the *Federal Register* and ended on December 8, 2003. In addition to accepting written comments, the BIA held a public scoping hearing on November 19, 2003 at the Amador County Fairgrounds in Plymouth to accept comments. Approximately 150 people attended the public hearing and verbal comments were transcribed for the administrative record. During the 30-day NOI comment period, the BIA formally requested Cooperating Agency participation from the United States Environmental Protection Agency (USEPA), National Indian Gaming Commission (NIGC), California Department of Transportation (Caltrans), the City of Plymouth, and Amador County (County). The USEPA, the NIGC, and the City of Plymouth

Cooperating Agency status and serve as Cooperating Agencies for the development of the EIS. The County declined and Caltrans did not respond to the request.

On January 20, 2004, the BIA published a supplemental NOI in the *Federal Register* to announce an additional public scoping hearing with the comment period beginning on January 20, 2004 and ending on February 20, 2004. The BIA held a second public scoping hearing on February 4, 2004, at the Amador County Fairgrounds in Plymouth. Approximately 130 people attended the second public scoping hearing and verbal comments were transcribed for the administrative record. The issues that were raised during the NOI comment period have been summarized within the Ione Band of Miwok Indians Fee-to-Trust and Casino Project EIS Scoping Report published by the BIA in March 2004.

The DEIS was distributed to federal, tribal, state, and local agencies and other interested parties for a 75-day review and comment period. The CEQ Regulations (40 C.F.R. §1506.10(c)) require that agencies provide at least 45 days for comments on a DEIS, subject to the provisions of 40 C.F.R. § 1506.10(d). The DEIS addressed the issues and concerns summarized within the scoping report. The review and comment period began after the Notice of Availability (NOA) was published in the *Federal Register* on April 18, 2008 and ended on July 2, 2008. The NOA provided the time and location of the public hearing on May 21, 2008, to present the Proposed Action with alternatives to the public, and accept comments. Public notice was also published in *Amador Ledger Dispatch* on April 22 and May 20, 2008. Approximately 113 people attended the public hearing and verbal comments were transcribed for the administrative record.

The BIA received a total of 36 comment letters in addition to the comments received during the public hearing. Public and agency comments on the DEIS received during the comment period, including those submitted or recorded at the public hearing, were considered in the preparation of the FEIS. Responses to the comments received were provided in Appendix Volume III of the FEIS and relevant information was revised in the FEIS as appropriate to address those comments. The NOA for the FEIS was published in the *Federal Register* on August 13, 2010 (Volume 75, page 49486) (**Attachment I** of this ROD). Consistent with the BIA NEPA Handbook, the NOA for the FEIS was also published in the local newspaper (*The Amador Ledger Dispatch*) on August 13, 2010 (**Attachment II** of this ROD). The 30-day waiting period ended on September 13, 2010. The comments received during this period are included in **Attachment III** of this ROD. Responses to each agency comment letter (11 received) and public comment letter (7 received) are also provided in **Attachment III** of this ROD.

In February 2004, the Tribe and the City of Plymouth entered into a Municipal Services Agreement (MSA) for the development of the Plymouth Casino Project. The County of Amador sued the City of Plymouth (with the Ione Band as an intervener and appellant) on the grounds that the City did not comply with the California Environmental Quality Act (CEQA) when approving the MSA. The California Superior Court for the County of Amador invalidated the MSA, finding that the agreement constituted the City's approval of its provision of municipal services such that the MSA was subject to the requirements of CEQA and that the City should have initiated a CEQA review of its decision to enter into the MSA, as the conditions within the agreement required City approvals for infrastructure

improvements that qualified as a "project" under CEQA. The Court did not invalidate the City's authority to enter into another MSA with the Tribe that does not constitute the approval of a "project" under CEQA, and the City retains the authority to enter into such an agreement. The Court of Appeals for the Third Appellate District upheld the Superior Court's decision on April 17, 2007. *See County of Amador v. City of Plymouth*, 149 Cal. App. 4th 1089 (3d Dist. 2007). The Tribe petitioned the California Supreme Court for review of that decision, but its Petition for Review was denied on July 11, 2007, rendering the Court of Appeal's decision final. Accordingly, the original MSA is now invalid, but the Tribe remains willing to negotiate with the City for a new agreement.

2.0 ANALYSIS OF ALTERNATIVES

2.1 ALTERNATIVE SCREENING PROCESS

Consistent with the relevant BIA authorities and policies that promote Indian self-government, self-determination, economic self-sufficiency, and tribal economic development, a range of possible alternatives to meet the purpose and need were considered in the EIS, including non-casino alternatives, alternative development configurations, and alternative sites. As described above, the purpose and need for the project is to create a federally-protected land base for the Tribe on which it can engage in the economic development necessary to fund tribal government programs, provide employment opportunities for its members, and allow the Tribe to become economically self sufficient and achieve self determination. Alternatives, other than the No Action Alternative, were first screened to see if they met the purpose and need of the BIA and the Tribe. Remaining alternatives were selected for the EIS largely based on three criteria: 1) providing an adequate and reasonable range of alternatives; 2) feasibility; and 3) ability to reduce environmental impacts.

2.1.1 Non-Casino Alternatives

The EIS evaluated the following non-gaming alternatives: (1) a retail development center and (2) the No-Action Alternative. The proposed retail development center was analyzed in detail as Alternative D in the EIS. A No-Action Alternative was analyzed in detail as Alternative E in the EIS.

2.1.2 Alternative Casino Sites

Plymouth Parcels Site: The Plymouth Parcels consists of 12 contiguous parcels of land, comprising a 228.04± acre project site located in the northwest part of Amador County approximately 35 miles east of the City of Sacramento, and approximately 17 miles south of the City of Placerville. The property is located immediately adjacent and east of SR 49, which provides regional access to the area, two and one-half miles north of the junction of SR 16 with SR 49. Eight of the twelve parcels (10.28± acres) are located within the City of Plymouth, while the remaining four parcels (217.76± acres) are located on unincorporated land within Amador County. The property was selected for its economic viability and historical connection to the Tribe. Some of the project parcels are comprised of vacant lands which have never been developed, while others are developed and include a commercial hotel and residential structures. Cattle grazing and surface mining operations currently occur on the site. Casino development on the Plymouth Parcels was analyzed in Alternatives A, B, and C of the EIS.

Jackson Valley Road Site: The Jackson Valley Road Site is located on an approximately 40-acre parcel off Jackson Valley Road outside of the City of Ione in an unincorporated area of Amador County. Historically, the Tribe has attempted to obtain this land, but the Federal Government has never been able to secure the title for the property. The site was evaluated for its ability to meet the Tribe's purpose and need and environmental suitability for development. The site was not further considered for several reasons, as described below.

In determining the gaming facility design, it was determined that to best achieve the expected customer experience, the casino would require a minimum of 40-acres of relatively level and vacant land. The Jackson Valley Road Parcel is characterized by predominantly forested area, scattered small developments, and some open spaces. The 40-acre site meets the minimum size requirement; however, the topography, existing conditions, and soil characteristics of the property make it unable to accommodate the casino and ancillary components, such as a WWTP.

While the majority of the site has the level terrain required for the facility, there are substantial hills in the center and southern portions of the site. The hill in the center would restrict the facility to the edges of the property, limiting the amount of buffer between the casino and surrounding properties. The southern portion of the property is located in a designated Zone A flood zone (FEMA). Zone A is used to define an area that corresponds to the 100-year floodplains that are determined by the Federal Emergency Management Agency (FEMA) in Flood Insurance Rate Studies. Federal Executive Order 11988 requires the BIA to evaluate Federal actions taken in a floodplain. If an agency proposes to allow an action to be located in a floodplain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the floodplain.

There are approximately seven residences currently located on the site. Displacing these existing residents from the property may not be possible. If the development were to occur on this site, trees and other vegetation would have to be cleared away (to a greater extent than the Plymouth Parcels). This would be a detrimental loss to the natural habitat and aesthetics of the area.

According to the National Resource Conservation Service (NRCS), the majority of the soil is not ideal for construction. The soils are limited by their shrink-swell characteristics and tendency to corrode steel and concrete. Thus, the Jackson Valley Road site alternative was eliminated through the screening process from detailed consideration within the EIS.

2.2 REASONABLE ALTERNATIVES CONSIDERED IN DETAIL

The DEIS and FEIS evaluate the following reasonable alternatives and the mandatory No-Action Alternative in detail.

2.2.1 Alternative A – Preferred Casino-Resort Project (Proposed Action)

Alternative A, the Proposed Action, consists of the following components: (1) placing approximately 228.04 acres into Federal trust status; (2) approval of a gaming development and management contract; and (3) development of a casino-resort complex, including

ancillary components such as parking and a WWTP. This alternative, which constitutes the Preferred Alternative (with incorporation of mitigation measures identified in the FEIS) and the Tribe's and BIA's Proposed Action, most suitably meets all aspects of the purpose and needs of the Proposed Action by promoting the Tribe's self-governance capability and long-term economic development. Components of Alternative A are described below.

Trust Title Acquisition: Alternative A consists of the conveyance of a 228.04-acre area of land into Federal trust status. The IRA authorizes the Secretary of the Interior to acquire land in trust for federally recognized Tribes.

The land transfer would be made in accordance with the procedures set forth in 25 C.F.R. Part 151. The Tribe's fee-to-trust application provides detailed information on the land being taken into trust. The regulations in 25 C.F.R. Part 151 implement Section 5 of the IRA, codified as 25 U.S.C. §465. Section 5 of the IRA provides the Secretary of the Interior with authority to acquire lands in trust status for tribes and individual Indians. Further discussion of the Secretary's authority under Section 5 is discussed in **Section 8.0** of this Record of Decision.

Gaming Development and Management Contract: Congress enacted IGRA with the stated purpose of providing a statutory basis for the operation and regulation of gaming by Native American tribal governments. Because the Tribe is seeking to acquire off-reservation land in trust for gaming purposes, compliance with Section 20 of IGRA (25 U.S.C. § 2701 *et seq.*) must be addressed. The NIGC, which was established by IGRA, has the authority to approve management contracts between tribal governments and outside management groups. Implementation of Class III gaming operations under Alternative A would require NIGC approval of the management contract between the Tribe and its management group.

Proposed Facilities: Alternative A would result in the development of a 120,000 square-foot gaming facility, a 166,500 square-foot hotel and a 30,000 square-foot event/conference center on the 228.04-acre site. The gaming facility would include a casino floor, food and beverage areas (consisting of a buffet, specialty restaurant, bar, and coffee bar), meeting space, guest support services, offices, and security area. The 5-story hotel facility would have 250 guest rooms and the event/conference center would have seating for 1,200 people. Access to the casino would be provided from SR 49.

The main casino complex would include: food and beverage services, small retail shops, administrative offices for gaming-related tribal activities, and the main gaming hall. The gaming facility would include the casino floor, food and beverage areas, back of house and support services, and public/miscellaneous areas and would operate 24 hours per day. Beverages and food would be served within a planned 250-seat buffet, a 100-seat specialty restaurant, a 50-seat sports bar, and a 10-seat coffee bar with service counter. Other components of the gaming facility would include meeting space, guest support services, offices, and security area. The casino floor area would provide 65,000 square feet for gaming purposes. The 5-story hotel building would have a total building space of approximately 166,500 square feet. The main casino driveway would provide primary vehicle access to the hotel. The event center would be a single-story building and occupy approximately 30,000 square feet. Hotel employees would staff the event center.

A revised site plan has been developed for Alternative A (refer to **Section 6** of this ROD), which include the development of a parking structure to reduce the development footprint of the parking lot surrounding jurisdictional wetland habitats. Refer to Figures 5-1 and 5-2 of the FEIS for the updated site plans for Phase I and Phase II of Alternative A, respectively.

Alternative A includes surface parking and a 5-level parking structure for a total of 2,965 spaces, which include 40 spaces for recreational vehicles and 11 spaces for buses. Approximately 25 percent of the total parking spaces for full build-out of Alternative A would be sized to accommodate compact vehicles.

Water Supply: Based on the lack of an agreement between the City and the Tribe regarding future water supplies, the Tribe has selected to meet potable water demands through groundwater development as the Preferred Water Option. Three groundwater wells are located on the Plymouth Parcels. Based on pumping tests, the total sustained yield of the groundwater wells is estimated to be approximately 116,640 gallons per day (gpd), or 81 gallons per minute (gpm). The three wells would be pumped in rotation to allow the groundwater reservoirs to recharge between pumping periods. To meet average and peak hour demands with the use of a rotational pumping schedule, water would be pumped to two 1.0 million gallon water tanks. The rotational scheme would entail pumping of the higher producing wells during times of peak occupancy (such as evenings during summer months on weekdays and weekends). During times of low occupancy (such as overnight during the winter during weekdays) the lower producing wells would be pumped.

Wastewater Treatment and Disposal: The Tribe and the City of Plymouth have not reached an agreement that would allow for the project facilities to connect to the City's municipal wastewater conveyance and treatment system. The Tribe has therefore committed to provide wastewater conveyance, treatment, reuse, and disposal through the construction and operation of a new, independent on-site wastewater treatment plant (WWTP), which would meet or exceed Federal and State standards. Based on unit treatment capacity and to allow for peak flows and redundant capacity for full build-out, the WWTP would be constructed to provide an average day capacity of 200,000 gpd. The WWTP would treat wastewater produced by the project facilities and would not service additional flows beyond those identified for this alternative. Wastewater would be treated using a membrane bioreactor (MBR) system. The MBR system is a state-of-the-art, advanced wastewater treatment process that utilizes membrane technology, comparable to that used for production of potable water. Biosolids produced by the WWTP would be dewatered and trucked off-site for disposal at a licensed landfill. Appendix B of the FEIS further describes the design of the WWTP. Treated water would be used for irrigation and toilet flushing and would be stored in a 750,000 gallon recycled water tank prior to use. This recycled water tank would assure that an adequate reserve capacity is available and recycled water does not mix with potable water in the WWTP. One hundred percent of wastewater flows would be treated to a level that meets the Title 22 of the California Code of Regulations, Division 4, Chapter 3, Water Recycling Criteria standards (Title 22 Standards) definition of tertiary treated recycled water (recycled water), making the water suitable for all recycled water uses and effluent disposal strategies identified for the project.

Under the Preferred Disposal Option, treated wastewater would be disposed of during dry weather through landscape irrigation, sprayfields, and subsurface disposal through leachfields and during the wet season through surface water discharge. Surface water discharge would occur on the Plymouth Parcels to an unnamed tributary of Dry Creek. A National Pollutant Discharge Elimination System (NPDES) permit from the USEPA would be required for the discharge of treated wastewater to the unnamed stream.

Site Drainage: Stormwater runoff generated during the operation of the casino would be conveyed by a combination of open channels, storm drains, and culverts. A drainage plan has been developed for Alternative A, and is included as Figure 2-6 of the FEIS. Runoff from the project facilities would be directed into vegetated swales or through inlets from buildings or curb inlets on roadways into storm drain pipes. Prior to release into the open channels that lead to Little Indian Creek (tributary to the Cosumnes River), runoff would pass through sediment/grease traps that would filter out suspended solids, such as trash and soil sedimentation, oil, grease and other potential materials that could degrade surface water quality. The proposed parking lots would be landscaped with mulched plantings or grass and would serve as bioretention areas to initially treat storm water runoff. Vegetative swales would serve as energy dissipaters and filtering mechanisms for runoff generated on-site prior to release into the site drainage channels. A detention basin would be developed on-site to reduce the increased peak flows that would result from the introduction of impervious surfaces. This basin would assure that post development runoff peaks from the operation of Phase I (and Phase II) will not exceed existing peak runoff volumes. All of the proposed facilities would be constructed outside of the 100-year floodplain.

Utilities: All new and existing utility lines (power lines, cable lines, phone lines, etc.) would be placed underground, as part of the development of Alternative A. Lighting fixtures on the project facilities would be generally consistent with the City's design guidelines specified in the *1997 Downtown Revitalization Strategy*. Lighting features will be downcast where applicable to prevent light pollution onto neighboring properties with non-commercial land uses. This downcast lighting produced will be directed away from surrounding areas and onto the Plymouth Parcels. Signage identifying the entrances to the facilities would be the minimum size and have the minimum lighting required to safely advertise to vehicles along SR 49 the entrances to the development.

Law Enforcement: Prior to operation of Phase I, the Tribe would install security cameras and would employ security personnel to provide surveillance of the casino, parking areas, and surrounding grounds. The security cameras will provide coverage of all surface parking areas and exterior areas of the casino and facility support buildings. Security guards would patrol the facilities to reduce and prevent criminal and civil incidents. Tribal security personnel would work cooperatively with the Amador County Sheriff's Office (ACSO), which provides general law enforcement services to the City on a contract basis. The ACSO has jurisdiction to enforce State criminal laws on the proposed trust lands to the extent authorized by Public Law 83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360).

Fire Protection Services: To provide fire protection and emergency medical services for Alternative A, the Tribe would develop and staff an independent fire station on the Plymouth Parcels prior to the operation of Phase I. The fire station would be located immediately south

of the southern driveway, which would provide ingress and egress to SR 49. At a minimum, the on-site fire station would be equipped with a 1,750-gpm quint (combination fire engine and ladder truck), a 1,500-gpm fire engine with pump capacity and 750-gpm grass fire/foam truck (for wildfire suppression/protection and vehicle fires). The Tribal Fire Department would be staffed, at a minimum, of 4 persons, 24 hours a day, 7 days a week. All the members of the Tribal Fire Department, including the Chief Officer, would be trained to a minimum level of Fire Fighter I standards as defined in 1001 National Fire Protection Association (NFPA) standard for Fire Fighter Professional Qualifications, Chapter 5, 2002 edition. In addition to being trained professional fire fighters under the 1001 NFPA standard, the members of the Tribal Fire Department will be trained to a Paramedic (advanced life support) level under California licensure to provide First Responder emergency medical services.

2.2.2 Alternative B – Reduced Casino with Hotel

Alternative B is similar to Alternative A in most respects, such as the request for the placement of the Plymouth Parcels into trust and approval of a gaming management contract. Like Alternative A, Alternative B also includes the development of a casino-resort, 250-room hotel, event and convention center, water supply facilities, wastewater treatment and disposal facilities, fire department, and site drainage features. However, under Alternative B, the main casino building would be reduced by 16 percent to accommodate less gaming spaces.

Under Alternative B, the infrastructure components related to water supply, wastewater treatment, utilities, law enforcement, and fire protection are similar to those described under Alternative A. Refer to the description of each component under Alternative A (**Section 2.2.1** of this ROD) for more detail. Refer to Figures 5-3 and 5-4 of the FEIS for the updated site plans for Phase I and Phase II of Alternative B, respectively.

2.2.3 Alternative C - Reduced Casino

Alternative C consists of development of a reduced size casino-resort complex without the hotel or event/conference center proposed under Alternative A. Alternative C is similar to Alternatives A and B in most respects, entailing the placement of the property into trust and approval of a gaming management contract. Operation of the casino-resort, project construction, water supply, wastewater treatment and disposal, and site drainage would be similar to Alternatives A and B.

Under Alternative C, the infrastructure components related to water supply, wastewater treatment, utilities, law enforcement, and fire protection are similar to those described under Alternative A. For Alternative C, refer to the description of each component under Alternative A (**Section 2.2.1** of this ROD) for more detail. Refer to Figure 5-5 of the FEIS for the mitigated site plan for Alternative C.

2.2.4 Alternative D – Retail Development

Alternative D is a non-gaming alternative that would result in the development of a retail center on the Plymouth Parcels. Under this alternative, land would still be placed into trust by

the BIA. However, as there would be no gaming under this alternative, there would be no approval of a gaming development and management contract by the NIGC.

Alternative D Facilities: Under Alternative D, retail and restaurant developments would be developed on Parcels #3 through #11. The development would have a horseshoe-like shape with the open end facing to the east of the Plymouth Parcels. All storefronts would face inward toward the parking facilities with no fronts open to SR 49. The horseshoe-like shape would consist of smaller in-line stores with two large anchor stores on each end. Parking for Alternative D would be located east of the retail outlet and would provide a total of 617 parking spaces.

Infrastructure and Public Services: Water supply distribution under Alternative D is similar to that described under Alternative A. Wastewater generated by Alternative D would be treated by an on-site WWTP to be developed by the Tribe. Under Alternative D, there are two options for the disposal of treated wastewater. Option 1 would utilize sprayfields and ground disposal. Option 2 would consist of surface water discharge or a combination of surface water discharge and ground disposal. These two options are similar to those described under Alternative A. However, under Option 1, a winter storage reservoir would not be required under Alternative D.

Under Alternative D, the infrastructure components related to water supply, wastewater treatment and disposal (except for the winter storage reservoir proposed under Alternatives A through C), utilities, law enforcement, and fire protection are similar to those described under Alternative A. For Alternative D, refer to the description of each component under Alternative A (**Section 2.2.1** of this ROD) for more detail.

2.2.5 Alternative E - No-Action Alternative

Under the No-Action Alternative, the Plymouth Parcels would not be placed into Federal trust for the benefit of the Tribe and the site would not be developed as described under the development alternatives. Land use jurisdiction of the Plymouth Parcels would remain with the City and Amador County. The existing residences would remain on the Plymouth Parcels and surface mining activities would continue to operate. The parcels located within the City limits are designated as Urban Commercial on the City's General Plan Future Land Use Map. The remaining parcels within that are located within the County (and designated within the City's sphere of influence) are designated as Agricultural parcels. It is anticipated, that the parcels within the City limits could ultimately be developed with commercial enterprises.

3.0 ENVIRONMENT IMPACTS AND PUBLIC COMMENTS

3.1 ENVIRONMENTAL IMPACTS IDENTIFIED IN THE FEIS

Implementation of the Proposed Action and alternatives could result in direct, indirect, and cumulative impacts to the surrounding environment. Impacts would occur as a result of the construction and operation of the Proposed Action and alternatives. A number of specific environmental issues were raised during the EIS process. The categories of the most substantive environmental issues raised during the EIS process include:

- Water Supply
- Wastewater Treatment
- Biological Resources (including waters of the U.S.)
- Socioeconomic Conditions
- Transportation and Traffic
- Visual Resources
- Public Health and Safety
- Noise

Each of the alternatives considered in the FEIS was evaluated for the potential to impact environmental issues as required under NEPA, as well as the above environmental concerns raised during the EIS process. The evaluation of these project-related impacts included consultations with entities that have jurisdiction or special expertise to ensure that the impact assessments for the FEIS were accomplished using accepted industry standard practice, procedures, and the most currently available data and models for each of the issues evaluated in the FEIS at the time of preparation. Alternative courses of action and mitigation measures were developed in response to the identified environmental concerns and substantive issues raised during the EIS process. A summary of the analysis of the environmental issues within the FEIS, including the issues raised during the EIS process, is presented below.

3.1.1 Land Resources

Topography – All development alternatives (A through D) would involve clearing and grading. The project design of Alternatives A through C ensures that the major topographic features (i.e., steep hills) would be preserved. Alternative D requires more fill compared to the other alternatives due to construction of stable engineered building pads. With design provisions for each alternative to reduce grading and clearing to the extent possible, impacts to topography under Alternatives A and D are less than significant. Under Alternative E, major grading may be necessary on the site and the steep hills may be altered if residential or commercial development were to occur. Through compliance with regulatory requirements, impacts from non-tribal development on the proposed site would be less than significant.

Soils – All development alternatives could potentially impact soils due to erosion during construction, operation, and maintenance activities, including clearing, grading, trenching, and backfilling. Obtaining a NPDES permit from the USEPA for sediment control and erosion prevention is required for construction projects disturbing more than one acre of soil, as under Alternatives A through D. Impacts to soils under Alternative A through D would be less than significant with required compliance with the USEPA's NPDES general permit and required Storm Water Pollution Prevention Plan (SWPPP). Impacts to soils under Alternative E from non-tribal development would be less than significant with required compliance with the State's NPDES general permit and required SWPPP.

Seismicity – There are no known fault traces mapped on the Plymouth Parcels, and the Plymouth Parcels are not within the Alquist-Priolo Zone, therefore, no significant seismic impacts for any of the alternatives would occur.

Mineral Resources – Alterations of the land resources used under any of the alternatives would not significantly diminish the extraction of important ores or minerals, as no economically significant mineral resources are known to exist in the project area. Impacts are less than significant.

3.1.2 Water Resources

Surface Water

Drainage – Impacts from runoff changes from the increase in impervious surfaces resulting from Alternatives A through D would be reduced through minimization of impervious surfaces (as indicated in Figures 5-1 and 5-2 of the FEIS); incorporation of storm drains, vegetative swales, and a sediment/grease trap in the project design, and development of a detention basin ensuring off-site discharge rates would be approximately equivalent to pre-development runoff rates. With the incorporation of these design components into Alternatives A through D, impacts would be reduced to less than significant. Non-tribal development that occurs under Alternative E would be required to follow State, City, and County policies regarding erosion control and storm water control/quality. Compliance with these provisions would ensure impacts to the existing drainage system and downstream drainages are less than significant.

Flooding – Less than one acre of Parcel #3 is within Flood Zone A, an area with a one percent annual chance flooding for which no base flood elevations have been determined. Development of Alternatives A through D would not occur in this portion of the Plymouth Parcels; therefore, no adverse impacts associated with flooding or floodplain management would occur. Non-tribal development that occurs under Alternative E would be required to comply with State and local flood policies, which include the prevention of any development within or the alteration of floodplains. Development of Alternative E would therefore result in no impact associated with flooding and floodplain management.

Surface Water Quality – Construction of Alternatives A through D would result in ground disturbance, which could increase sediment discharge to surface waters during storm events, reducing water quality. Construction also has the potential to generate waste materials that can be washed into nearby surface waters during storm events. In accordance with the requirements of the NPDES Permit, the Tribe would prepare and implement a SWPPP to control discharge of pollutants in stormwater. The plan would incorporate appropriate best management practices (BMPs) to prevent degradation of surface water resources during construction. Through compliance with permit requirements, including incorporation of BMPs outlined in **Sections 6.1** and **6.2** of this ROD, impacts to water quality during construction of Alternatives A through D would be less than significant. Development that occurs under Alternative E would be required to comply with the Central Valley Regional Water Quality Control Board (CVRWQCB) water quality objectives as well as City/County General Plan policies. Impacts associated with anticipated commercial and/or residential development under Alternative E would be less than significant.

Wastewater Disposal – Wastewater from the Alternative A through D WWTP facilities would be treated to a level that meets the Title 22 Standards. Storage and disposal of treated effluent could result in discharges to surface waters, which could potentially impact surface water quality. In part as a result of issues raised during the EIS process, Wastewater Disposal Option 2 was selected as the preferred option. This option entails dry weather discharge through landscape irrigation, sprayfields, and subsurface disposal and surface water discharge during rainy weather to a tributary of Dry Creek under a NPDES permit from the USEPA. This option would result in fewer environmental impacts than Option 1 (storage reservoir option). The NPDES permit would include additional discharge limitations that would ensure that the treated effluent meets established water quality objectives and is of sufficient quality to support beneficial uses of the receiving water. A sampling and monitoring program is provided as mitigation for sprayfield and landscape irrigation and subsurface disposal to reduce the impacts to surface and groundwater quality to less-than-significant levels. Non-tribal development under Alternative E would be required to connect to the City's WWTP; this is discussed in **Section 3.1.8** below.

Groundwater – In response to issues raised during the EIS process, and because the Tribe does not have an existing agreement with the City, Water Supply Option 2 has been selected as the preferred option. Under this option, the Tribe will utilize two on-site wells and one off-site well and two 1-million gallons storage tanks to meet potable water demands. Based on comments received on the DEIS, the Tribe would implement a groundwater-monitoring program in consultation with the BIA. To reduce the potable water demands of Alternative A through C, the Tribe would develop the facilities with dual plumbing to maximize recycled water use. The incorporation of mitigation measures identified in **Section 6.2** of this ROD would ensure potential effects to groundwater resources from development of an on-site groundwater supply system proposed under Alternatives A through D would be less-than-significant. Non-tribal development under Alternative E would connect to the City's water supply system. Therefore, non-tribal commercial and or residential development under Alternative E would result in no impact to groundwater resources.

3.1.3 Air Quality

Construction Emissions – Emissions of ozone precursors nitrogen oxides (NO_X) and reactive organic gases (ROGs) during implementation Alternatives A through D would not exceed Clean Air Act (CAA) General Conformity thresholds; therefore, there would be a minimal adverse effect to air quality from the construction of Alternatives A through D. Through compliance with the National Emissions Standards for Hazardous Air Pollutants (NESHAP) reporting and operating requirements as regulated under the Federal Clean Air Act, the demolition of structures during the development of Alternatives A through D that may contain asbestos would have a less than significant impact on air quality. The impacts to air quality from construction of Alternatives A through D would be less than significant. Under Alternative E, the Plymouth Parcels may be developed in the future, at which time construction of the future project would likely emit ozone precursors ROG and NO_X, as well as, other criteria air pollutants (CAPs).

Operational Emissions – Emissions of ozone precursors NO_X and ROGs from the operation of Alternatives A through D would not exceed CAA General Conformity thresholds; therefore,

there would be a minimal adverse effect to air quality. Under Alternative E, the Plymouth Parcels may be developed and operated in the future, at which time the operation of any future project would likely result in the emission of ozone precursors ROG and NO_X as well as other CAPs.

3.1.4 Biological Resources

Wildlife and Habitats –There are no known United States Fish and Wildlife Service (USFWS) designated critical habitats within the project area of Alternatives A through D. The majority of the habitat disturbance during development would occur in annual grassland habitat. These areas present limited resources for wildlife and are currently subject to disturbance from existing forms of land use, specifically cattle grazing. On-site oak savannah, oak woodland, and riparian woodland provide habitat for several migratory bird species. Measures to mitigate for adverse effects to trees within these habitat types, including avoidance and fencing, are provided. After mitigation, impacts to wildlife and habitats under each of the development alternatives would be reduced to less than significant. Non-tribal development under Alternative E would be required to comply with general plan provisions on resource conservation and with the California Department of Fish and Game provisions. With regulatory requirements restricting impacts to biological resources, non-tribal development would result in less-than-significant impacts to wildlife and habitat.

Waters of the U.S. –Alternatives A through D would impact potentially jurisdictional wetland features. In response to issues raised during the EIS process, and consultation with the USEPA, mitigated site plans have been developed for Alternatives A through C, which include the development of a parking structure to reduce the development footprint of the parking lot adjacent to jurisdictional wetland habitats. Refer to Figures 5-1 and 5-5 of the FEIS. Additional mitigation measures identified in the FEIS including compensatory wetland creation in another location and BMPs related to Land Resources that would further reduce impacts to wetlands and waters of the U.S. to a less-than-significant level. With regulatory requirements restricting impacts to biological resources, non-tribal development under Alternative E would result in less-than-significant impacts to waters of the U.S.

Federally-Listed Special-Status Species – Five federally-listed special-status species have the potential to occur within the Plymouth Parcels: vernal pool fairy shrimp (VPFS) (Branchinecta lynchi), valley elderberry longhorn beetle (VELB) (Desmocerus californicus dimorphus), vernal pool tadpole shrimp (VPTS) (Lepidurus packardi), California red-legged frog CRLF) (Rana aurora draytonii), and the California tiger salamander, central population (CTS) (Ambystoma californiense). The BIA concluded that while the Proposed Action may affect, it is not likely to adversely affect the five federally-listed species and initiated consultation in a memorandum to dated June 6, 2005, with the USFWS in accordance with Section 7 of the Endangered Species Act (ESA). The USFWS responded with a memorandum dated August 12, 2005, which requested additional information regarding the potential for federally-listed special-status species to occur on the Plymouth Parcels. In response to the memorandum from the USFWS, an updated Section 7 consultation package was sent to the USFWS which contained a revised Biological Assessment, a 2007 CRLF Habitat Assessment and a 2010 CRLF Survey Report, a 2003 CTS Habitat Assessment, a 2010 Stream Assessment, and the 2005 and 2007 90-Day Reports of Vernal Pool Branchiopods. The completed protocol-level surveys for VELB, CRLF, CTS, and the vernal

pool species (including 2 years of completed wet season surveys) document negative findings for the listed species.

In addition to the species mentioned above, the 2010 Stream Assessment for the Proposed Action evaluated the potential for impacts to listed salmonids which could be affected by the proposed discharge of tertiary treated wastewater effluent to an on-site tributary to Dry Creek. The assessment discusses the existing hydrology of the Plymouth Parcels and evaluates potential project effects of the proposed discharge to the physical habitats, biological resources (including special status species), and beneficial uses of the proposed receiving waters. Three federal sensitive fish species (all anadromous) were determined to potentially occur in Dry Creek as a result of the special status species searches: Central Valley steelhead (*Oncorhynchus mykiss*) federally threatened (FT), fall run Central Valley Chinook salmon (*Oncorhynchus tshawytscha*) federally endangered (FE), and spring run Central Valley Chinook salmon (*Oncorhynchus tshawytscha*) (FE). Based on stream assessment field observations, literature searches, high level (tertiary) of treatment that would be provided, and the fact that the proposed discharge is above the point of anadromy, the BIA concludes that the proposed project is not likely to adversely affect federally-listed fish species.

After completion of the updated Section 7 consultation package, the BIA concluded that the original conclusion in the 2005 consultation package was accurate to state that while the Proposed Action may affect, it is not likely to adversely affect the following listed species: VELB, CTS, and CRF. Additionally, the Plymouth Parcels have been surveyed over two seasons for vernal pool species, and based on the results of those surveys and the fact that the two vernal pools on the site would be completely avoided by the modified project facilities, the BIA concludes that the Proposed Action would have no effect on any vernal pool listed species. Furthermore, for the reasons stated above, BIA concludes that the Proposed Action is not likely to adversely affect federally listed fish species.

Migratory Birds –The construction of Alternatives A through D may include the removal of trees and vegetation and earth grading which, if phased during nesting seasons, have the potential to adversely affect the nesting activity of the migratory species. Development of Alternatives A through D may have moderate adverse effects on nesting migratory birds. However, mitigation measures including preconstruction surveys, establishment of setbacks, and monitoring, would reduce such effects to a less than significant level. With regulatory requirements restricting impacts to biological resources, non-tribal development under Alternative E would result in less-than-significant impacts to migratory birds.

3.1.5 Cultural Resources

Evaluation of the historic resources identified on the Plymouth Parcels found that they were also ineligible for inclusion to the National Register of Historic Places (NRHP). Development of Alternatives A through D would, therefore, result in a less-than-significant impact to cultural resources. The State Historic Preservation Officer has concurred with the BIA's determination that project development on the Plymouth Parcels under Alternatives A through D would not adversely affect historic properties (refer to Appendix K of the FEIS). Mitigation is provided in the event of unexpected discovery that would reduce impacts to as yet undiscovered cultural resources less than significant, including compliance with the

NHPA, Native American Graves Protection and Repatriation Act, and Archaeological Resource Protection Act.

No known paleontological resources have been reported within or in the immediate vicinity of the Plymouth Parcels. Therefore, no adverse effects would occur from the development of Alternatives A through D.

Non-tribal developments under Alternative E would be required to comply with State and local regulations regarding cultural and paleontological resources, resulting in less than significant impacts.

3.1.6 Socioeconomic Conditions and Environmental Justice

Socioeconomic Conditions – Construction of Alternatives A through D would result in the employment of construction workers and is considered a beneficial impact. Due to the existing labor force in surrounding communities, the number of available vacant residential units, the limited amount of new construction expected, and that new housing is expected to be located over a wide geographic area, the potential effects to housing would be less than significant. The development proposed under Alternatives A through D would benefit the Tribe, as it would generate new income and tribal members would have access to new jobs. The creation of employment opportunities on the reservation would also benefit local residents. Additional students that would attend schools in Amador County School District (District) as a result of Alternatives A through E may place additional demands on the District. Based on issues raised during the EIS process, payments to the District were included within a Municipal Services Agreement (MSA) between the Tribe and the City. The MSA was later voided in court and the Tribe requested BIA incorporate the payment provisions of the MSA as mitigation in the EIS. Therefore, payment of school impact fees to the District in an amount to be agreed upon between the Tribe and the District was included in the FEIS to mitigate effects that may occur as a result of development of Alternatives A through D. This would reduce impacts to a less than significant level. Although an additional casino in Amador County under Alternatives A through C is not expected to substantially increase the prevalence of problem gamblers, in accordance with issues raised during development of the EIS the Tribe has agreed to make an annual contribution to an organization or organizations to address problem gambling issues.

Environmental Justice – Development of Alternatives A through D would benefit all communities within proximity of the Plymouth Parcels by creating employment opportunities that would be primarily filled by the local labor market. These communities would not be disproportionately adversely impacted. A less-than-significant effect would result.

Under Alternative E, the scope of socioeconomic impacts that would result depends on the land use development. Residential development would result in substantial housing impacts, whereas commercial development would generate expenditures and employment similar to Alternative D, discussed above. The beneficial socioeconomic impacts of the magnitude discussed above for Alternatives A through C would not occur under non-tribal commercial development.

3.1.7 Resource Use Patterns

Transportation/Circulation – In response to issues raised on the DEIS, a revised Traffic Impact Analysis (TIA) was prepared and included as Appendix M and summarized in Section 4.8 of the FEIS. Specifically, the analysis and study areas were revised in response to comments on the DEIS and in consultation with local jurisdictions. As stated in the revised TIA, development of Alternatives A through D would cause certain roadway segments and intersections in the vicinity of the proposed casino to operate at an unacceptable Level Of Service (LOS)(refer to Section 4.8 of the FEIS). Mitigation measures have been developed for the roadway segments and project intersections showing unacceptable LOS and for intersections meeting the Manual on Uniform Traffic Control Devices (MUTCD) signal warrant during operation of Alternatives A through D (refer to **Section 6.7** of this ROD). With the incorporation of project mitigation measures, impacts to project roadways would be reduced to a less-than-significant level. Under Alternative E, no casino would be built; however, the site may be utilized for other purposes in the future. The traffic conditions under Alternative E would be as described for the baseline conditions for each target year; however, future traffic increases may occur due to future approved projects.

Land Use –Proposed land uses for Parcels #4 through #11, would be consistent with the City of Plymouth General Plan and Zoning Commercial Designations. Parcels #8 and #9 are currently developed with a land use (single-family dwelling) that is inconsistent with the City General Plan designation for the parcels. Alternative A would replace this use with a casino parking area that would be consistent with the existing planned land use designation. Though consistent with the City General Plan, the development of the City Parcels would result in a noticeable increase in land use intensity, however for Alternatives A through D, this would be a less than significant impact. Development on lands currently under jurisdiction of the County would also result in a noticeable increase in land use intensity. Under Alternative E, non-tribal development would be required to be consistent with City and County zoning and general plan provisions and would result in less-than-significant impacts relating to land use.

3.1.8 Public Services

All development alternatives (A through D) would increase demands for water supply, wastewater, solid waste, gas and electric, telecommunications, law enforcement, fire protection, and emergency medical services.

Water – As discussed in **Section 3.1.2** of this ROD, Water Supply Option 2 has been selected as the preferred option. Development of Alternatives A through D with Water Supply Option 2 would have no impact on the City's water supply. Through compliance with the environmental review process, as well as City and County requirements, non-tribal development under Alternative E would have a less-than-significant impact on the water supply.

Wastewater – An on-site WWTP would be built to treat wastewater discharged from developments planned under Alternatives A through D. With the development of on-site wastewater treatment, no connection to municipal wastewater treatment would be required to

develop Alternatives A through D, and therefore there would be no effect to municipal services.

Solid Waste –Impacts to regional waste disposal and related services would be less than significant and mitigation measures including the preparation of a Waste Management Plan, installation of recycling containers, and the adoption of universal waste disposal practices would further reduce any impacts to the waste stream. Non-tribal development and associated generation of solid waste under Alternative E would not result in adverse impacts to solid waste facilities.

Utilities – Connection to the electrical grid would require upgrade of the existing power transmission lines. Mitigation to reduce potential impacts to less-than-significant levels consists of funding the upgrade of the power lines to support the demands of the project. Impacts associated with power usage would be further reduced through the implementation of the air quality mitigation measures by increasing the energy efficiency of Alternatives A through D. Implementation of Alternative A through D would result in a less-than-significant impact to telecommunications. Non-tribal development on the Plymouth Parcels under Alternative E would be required to upgrade the existing power lines, similar to that of the development alternatives addressed above. With the associated upgrades of the existing power lines, non-tribal development would result in a less-than-significant impact on electrical systems.

Public Health and Safety – The development of Alternatives A through C would increase the number of full-time equivalent (FTE) officers needed in the Amador County Sherriff's Office, the number of staff working at the Amador County District Attorney's Office, and possibly California Highway Patrol and other law enforcement and emergency services operating in Amador County. This is a potentially significant impact. In response to issues raised during the EIS process, mitigation measures including in lieu payments were included within the MSA. Once voided, these payments were included as mitigation measures within the DEIS and carried over to the FEIS. In addition, the implementation of responsible alcohol policies and installation of lighting and signage to decrease loitering would reduce effects to law enforcement and emergency services to a less-than-significant level. A less-than-significant effect is expected for Alternative D and no mitigation is required.

With residential development assumed for the project site, Alternative E would result in an increased need for fire protection and emergency medical services. However, the Tribe would not fund the construction or operation of an on-site fire station. With increased service calls and no additional fire station, impacts associated with non-tribal development would be significant to fire protection and emergency medical services.

3.1.9 Other Values

Noise – In response to issues identified during the EIS process, a noise assessment was conducted to further address potential impacts related to noise. Based on the results of the assessment, construction activities under Alternatives A through D would result in short-term increases in the local ambient noise environment in excess of the 5 dB threshold of significance. Mitigation provided in the FEIS would limit construction activities to normal daytime hours. Operational noise impacts from the use of mechanical equipment, on-site

deliveries, and transportation sources were assessed in the noise analysis. Because the estimated distance from the development to the nearest off-site residence is approximately 500 feet, the mechanical equipment noise from the casino or retail development would not be approach significant noise levels at the nearest sensitive noise receptor. However, loading dock noise would be more than 5 dBA above existing nighttime levels in this area. Mitigation is proposed, including the construction of sound barriers to reduce this effect to a less-than-significant impact. Project related traffic noise level increases would not exceed the threshold of 5 dBA above the equivalent continuous noise level (Leq) along any of the off-site project segments analyzed. Under Alternatives A through C, parking areas in the southwestern and northwestern portion of the Plymouth Parcels have the potential to increase off-site noise levels. For Alternative D, no mitigation would be needed for residences to the northwest, but residences to the southwest would need noise attenuation. Earthen berms would be constructed as mitigation to reduce the effect of on-site traffic noise on nearby residences to below an average Leq of 45 decibels, resulting in a less-than-significant impact. Impacts resulting from Alternative E would be less than significant due to compliance with local regulations required by non-tribal projects.

Hazardous Materials – Existing mine tailings were the only recognized environmental condition on the Plymouth Parcels. The areas adjacent to the mine tailings would not be developed under Alternatives A through D and a 50-foot setback would be established, surrounding the mine tailings. Leaving the mine tailings in place does not pose an immediate risk to human health and the environment. Mitigation measures describing the capping of mine tailings are provided to reduce impacts to less-than–significant levels. Incorporation of the BMPs for containment of accidental releases would reduce impacts from Alternatives A through D to a less-than-significant level. During operation of Alternatives A through D, effects to the environment or public are considered to be less than significant. Mitigation includes provisions for the proper disposal of commercial universal waste, and would ensure impacts from generation and disposal of universal wastes are less than significant. Compliance with Federal petroleum storage regulations would ensure that storage of diesel fuel for emergency generators and bulk propane on-site would be less than significant. Under Alternative E, long-term development would increase use of low levels of hazardous materials ranging from cleaning products at commercial developments to household hazardous materials such as pesticides, paints, and automobile fluids. The increase in hazardous materials use over the long-term on the Plymouth Parcels would be less than significant.

Visual Resources – Development of Alternatives A through D would result in the change of views for both north and south bound travelers along SR 49; however, design features incorporated into Alternatives A through D will ensure the project does not substantially degrade the visual character of the site and its surroundings. All lighting fixtures on the project facilities will be downcast to decrease light impacts to the surrounding vicinity to a less than significant level. As indicated in the updated site plan (Figure 5-2 in Section 5.2.5 of the FEIS), by moving the project farther away from SR-49 and providing landscaping along the property adjacent to 49, the visual impacts are softened such that visual impacts are less than significant. With the implementation of the mitigation measure for participation in Caltrans' Adopt-A-Highway Program, impacts to visual resources would be further reduced.

Under Alternative E, it is anticipated that the project site would eventually be developed with residential and/or commercial structures at a density greater than current conditions, consistent with existing land use designations. Based on long-term development, the rural character of the project site would most likely be transformed, significantly impacting existing visual resources. This development would be required to comply with the City and County general plan and zoning ordinances regarding visual resources, thereby reducing impacts to less-than-significant levels.

3.1.10 Indirect Effects

Indirect Effects from Socioeconomic Conditions – As described in detail in Section 4.7 of the FEIS, Alternatives A through D would not result in significant indirect effects (effects caused by the action but occurring later in time or removed in distance). Indirect socioeconomic effects on the local and regional economy would result in beneficial effects to surrounding communities, creating jobs, expenditures on goods and services, and increasing demand for housing. Additionally, the Tribe will develop and implement a housing program to address the availability of affordable housing within Amador County. The housing program would coordinate its activities with Amador County and the City of Plymouth in order to further countywide planning efforts [refer to Mitigation Measure 5.2.7(C) of the FEIS].

Indirect Effects from Off-Site Traffic Mitigation – As described in detail in Section 4.12 of the FEIS, implementation of off-site traffic mitigation may indirectly affect the environment; however, off-site activities would be required to comply with Federal, State, and local laws, policies, and ordinances. With standard construction practices and specifications required by the NPDES permit program, Caltrans, Amador County, and/or the City of Plymouth, the intersection improvements identified under the project alternatives would result in less-than-significant effects to land resources. To address effects to sensitive habitat and species, biological surveys and appropriate avoidance and/or mitigation measures would be required to comply with the California Environmental Quality Act (CEQA). To address potential impacts to cultural resources, cultural surveys and appropriate avoidance and/or mitigation measures may be required to comply with the CEQA. Because some of the improvements may not be completed for 5-20 years, and as the actual extent of improvements may change due to the actual growth in traffic volume, mitigation has been identified to address the potential indirect effects to air quality, biological resources, socioeconomics, and noise.

3.1.11 Growth-Inducing Effects

The creation of additional jobs within the County would result in an increase in housing demand within Amador and surrounding counties. In the long-term, most employees would likely continue to reside within their existing communities. However, some employees would choose to buy their first home or relocate within the County. Additionally, the increased demand for rental housing in the area could result in the construction of new housing units. Most increased demands for goods and services would be captured by existing businesses. However, it is likely that some existing businesses would expand and other businesses would be created as the result of the increase in commercial activity. As with residential development, commercial development would be subject to approval by local government according to land use plans and ordinances. Therefore, the Proposed Action and alternatives would not induce "disorderly" commercial growth either directly or indirectly.

3.1.12 Cumulative Effects

Alternative A though D

The development alternatives when added to past, present, and reasonably foreseeable future actions would not result in significant cumulative impacts to air quality (except Green House Gases), agricultural resources, biological resources, cultural resources, hazardous materials, land resources, noise, public services, and visual resources with mitigation identified under the direct effects.

Green House Gas (GHG) emissions under Alternatives A through D when added to past, present, and reasonably foreseeable future actions would be cumulatively considerable. With the implementation of diesel anti-idling, participation in the State's 50 percent recycling goal, and increasing water use efficiency as mitigation measures, the development alternatives would conform to the state climate reduction strategies. Therefore, implementation of Alternatives A through D, with mitigation, would result in a less-than-significant cumulatively considerable impact to global GHG emissions and inventories.

Affordable housing impacts of Alternatives A through D when added to past, present, and reasonably foreseeable future actions would be cumulatively considerable. Mitigation for these effects consists of the development and implementation of a housing program to address the availability of affordable housing within Amador County. Therefore, implementation of Alternatives A through D, with mitigation, would result in a less than significant cumulatively considerable impact to affordable housing.

When added to past, present, and reasonably foreseeable future actions, development of Alternatives A through D would result an unacceptable Level of Service (LOS) in the cumulative year 2025 at various roadway segments and intersections in the vicinity of the Plymouth Parcels. As mitigation, the Tribe would be responsible for a certain share of the financial burden of implementing upgrades that would maintain traffic operations at an acceptable level. An estimate of these shares for each affected intersection is provided in **Section 6.7** of this ROD.

Alternative E

Under Alternative E, cumulative impacts from other development would still be experienced. If the Plymouth Parcels were developed by a non-tribal entity in the future, then the cumulative impacts would be similar to those described above for the no-project setting under each alternative.

3.1.12 Unavoidable Adverse Effects

In accordance with the analysis within the FEIS, there are no unavoidable adverse effects that would occur as a result of the implementation of the Proposed Action and alternatives. All identified impacts can be adequately mitigated.

3.2 COMMENTS ON THE FEIS AND RESPONSES

During the 30-day waiting period following issuance of the FEIS on August 13, 2010, the BIA received 11 comment letters from agencies and 8 from other interested parties. During the decision making process for the Proposed Action, all comment letters on the FEIS were reviewed and considered by the BIA and are included within the administrative record for this project. A list of each comment letter and a copy of each comment letter received from the agencies and from interested parties re included within Attachment III. Specific responses to the comment letters are included in the Response to Comments document, which is also included in Attachment III.

4.0 ENVIRONMENTALLY PREFERRED ALTERNATIVE(S)

Either the Retail Development Alternative (Alternative D) or the No-Action Alternative (Alternative E) would result in the fewest effects to the biological and physical environment. Because the exact type of development that would occur under the No-Action Alternative cannot be predicted with certainty assumptions are required to assess whether it would result in similar, lesser, or greater impacts to the natural and human environment than the Proposed Action. Although environmental impacts are anticipated to occur under the No-Action Alternative in relation to future development on the site, these impacts are assumed to be less than those of the Proposed Action because future non-tribal development would be required to comply with County and City zoning ordinances and general plans, and accordingly would be environmentally preferred. The No-Action Alternative would not meet the stated purpose and need. Specifically, it would not provide a land base for the Tribe, which has no trust land, and therefore does not provide the Tribe with an area in which the Tribe may engage in economic development to generate sustainable revenue to allow the Tribe to achieve self-sufficiency, self-determination, and a strong tribal government. The No-Action alternative also would likely result in substantially less economic benefits to Amador County and the City of Plymouth than the development alternatives.

Of the development alternatives, Alternative D would result in the fewest adverse effects on the human environment. Alternative D would have the fewest effects due to a lesser amount of new development than would occur with any of the other development alternatives. However, Alternative D would generate less revenue, and therefore reduce the number of programs and services the tribal government could offer tribal members and neighboring communities. Alternative D is the Environmentally Preferred Alternative, but it would not fulfill the purpose and need for the Proposed Action stated in the EIS.

5.0 PREFERRED ALTERNATIVE

For the reasons discussed herein, the Department has determined that Alternative A (the Proposed Action) is the Preferred Alternative. Of the alternatives evaluated within the EIS, Alternative A would best meet the purposes and need for action by promoting the long-term economic vitality, self-sufficiency, self-determination, and self-governance of the Tribe. The tribal government facilities and casino-resort complex described under Alternative A would provide the Tribe, which has no trust land, with the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for the tribal government. Under such conditions, the tribal government would be stable and better

prepared to establish, fund, and maintain governmental programs that offer a wide range of health, education, and welfare services to tribal members, as well as provide the Tribe, its members, and local communities with greater opportunities for employment and economic growth. Alternative A would also allow the Tribe to implement the highest and best use of the property. Finally, while Alternative A would have greater environmental impacts than either of the environmentally preferred alternatives, those alternatives do not meet the purpose and need for the Proposed Action, and the environmental impacts of the Preferred Alternative are adequately addressed by the mitigation measures adopted in this ROD.

Alternatives B and C, while less intensive than Alternative A, would require similar levels of mitigation for identified impacts (such as mitigation for impacts to wetlands and the regional roadway network); however, the economic returns would be smaller than under Alternative A and the more limited development is not the most effective use of either the land or the Tribe's capital resources. Based on the limitations of the environmental resources in the area (such as the existing roadway network), the Tribe needs a development option that would ensure adequate capital resources to not only fund tribal programs but fund mitigation measures for identified impacts and payment obligations to local jurisdictions. The reduced revenue anticipated from Alternatives B and C would limit the Tribe's ability to fund both tribal programs and mitigation measures. Additionally, without the development of the hotel and the rural location of the Plymouth Parcels, Alternative C would provide further limited opportunities for capital development to fund tribal programs.

The competitive market forces associated with commercial development, the amount of competitive commercial development within Amador County and the surrounding greater Sacramento area, and the location of the Plymouth Parcels make Alternative D (retail center development) less attractive than Alternative A from the standpoint of securing a long-term, sustainable revenue stream. A retail development on the Plymouth Parcels would have limited competitive ability to draw patrons from the greater population centers within Amador County and the Greater Sacramento area compared to the gaming alternatives. In addition, based on peak hour traffic patterns for retail centers compared to gaming operations, Alternative D also would likely have equal to and in certain areas greater traffic impacts during peak hours than would Alternative A.

In short, Alternative A is the alternative. It best meets the purposes and needs of the Tribe and the BIA while preserving the key natural resources of the Plymouth Parcels. Therefore, Alternative A is the Department's Preferred Alternative.

6.0 MITIGATION MEASURES

All practicable means to avoid or minimize environmental harm from the Preferred Alternative have been identified and adopted. The following mitigation measures and related enforcement and monitoring programs have been adopted as a part of this decision. Where applicable, mitigation measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriate governmental authorities, as well as this decision. Specific best management practices and mitigation measures adopted pursuant to this decision are set forth below and included within the Mitigation Monitoring and Enforcement Plan (MMEP) (see Chapter 2.0 of the BIA's Decision Package).

6.1 LAND RESOURCES

A. In compliance with the Clean Water Act, the Tribe shall apply for coverage under the USEPA's NPDES General Construction Permit (GCP). In compliance with permitting requirements, the Tribe shall develop a SWPPP that shall address water quality impacts associated with construction and operation of the project. Water quality control measures identified in the SWPPP shall include but not be limited to the following list. These measures shall be implemented where feasible.

Construction Measures

1. Existing vegetation shall be retained where possible. To the extent feasible, grading activities shall be limited to the immediate area required for construction.
2. Temporary erosion control measures (such as silt fences, fiber rolls, vegetated swales, a velocity dissipation structure, staked straw bales, temporary revegetation, rock bag dams, and sediment traps) shall be employed for disturbed areas.
3. No disturbed surfaces shall be left without erosion control measures in place during the winter and spring months.
4. Construction area entrances and exits shall be stabilized with crushed aggregate.
5. Sediment shall be retained on-site by a system of sediment basins, traps, or other appropriate measures.
6. A spill prevention and countermeasure plan shall be developed, if necessary, which shall identify proper storage, collection, and disposal measures for potential pollutants (such as fuel, fertilizers, pesticides, etc.) used on-site.
7. Petroleum products shall be stored, handled, used, and disposed of properly.
8. Construction materials, including topsoil and chemicals shall be stored, covered, and isolated to prevent runoff losses and contamination of groundwater.
9. Fuel and vehicle maintenance areas shall be established away from all drainage courses and designed to control runoff.
10. Sanitary facilities shall be provided for construction workers.
11. Disposal facilities shall be provided for soil wastes, including excess asphalt produced during construction.
12. The Tribe shall educate all workers in the proper handling, use, cleanup, and disposal of all chemical materials used during construction activities and provide appropriate facilities to store and isolate contaminants.
13. The Tribe shall educate all contractors involved in the project on the potential environmental damages resulting from soil erosion prior to development by conducting a pre-construction conference. Copies of the project's erosion control plan shall be distributed at this time. All construction bid packages,

contracts, plans, and specifications shall contain language that requires adherence to the plan.

14. Construction activities shall be scheduled to minimize land disturbance during peak runoff periods. Soil conservation practices shall be completed during the fall or late winter to reduce erosion during spring runoff.

15. Creating construction zones and phasing construction through grading only one part of a construction zone at a time shall minimize exposed areas. If possible, grading on a particular zone shall be delayed until protective cover is restored on the previously graded zone.

16. Utility installations shall be coordinated to limit the number of excavations.

17. Preserving as much natural cover, topography, and drainage as possible shall protect disturbed soils from rainfall during construction. Trees and shrubs shall not be removed unnecessarily.

18. Disturbed areas shall be stabilized as promptly as possible, especially on long or steep slopes. Recommended plant materials and mulches shall be used to establish protective ground cover. Vegetation such as fast-growing annual and perennial grasses shall be used to shield and bind the soil. Mulches and artificial binders shall be used until vegetation is established. Where truck traffic is frequent, gravel approaches shall be used to reduce soil compaction and limit the tracking of sediment onto SR 49.

19. Surface water runoff shall be controlled by directing flowing water away from critical areas and by reducing runoff velocity. Diversion structures such as terraces, dikes, and ditches shall collect and direct runoff water around vulnerable areas to prepared drainage outlets. Surface roughening, berms, check dams, hay bales, or similar devices shall be used to reduce runoff velocity and erosion.

20. Sediment shall be contained when conditions are too extreme for treatment by surface protection. Temporary sediment traps, filter fabric fences, inlet protectors, vegetative filters and buffers, or settling basins shall be used to detain runoff water long enough for sediment particles to settle out.

21. Topsoil removed during construction shall be carefully stored and treated as an important resource. Berms shall be placed around topsoil stockpiles to prevent runoff during storm events.

22. An independent storm water inspector would be hired by the Tribe to ensure all NPDES permitting requirements are being implemented. The inspector will have authority to require construction contractors as well as their subcontractors to stop work until all aspects of the NPDES permit are implemented.

Operational Measures

23. Storm drains shall be equipped with silt and oil traps to remove oils, debris, and other pollutants. Storm drain inlets shall also be labeled "No Dumping–Drains to Streams and Rivers."

24. The parking lot shall be designed to allow storm water runoff to be directed to vegetative filter strips to help control sediment and to control non-point source pollution, where possible.
25. Permanent energy dissipaters shall be included for drainage outlets.
26. The Tribe shall create, utilize, and update as necessary a maintenance plan for all BMPs for erosion and sediment control. BMPs will be selected and installed according to guidelines in the State of California Stormwater Quality Handbook and/or Caltrans Stormwater Quality Handbook.

B. The existing water pipeline connecting the project wells will be evaluated for compliance with the Uniform Building Code (UBC). Sections and components of the existing pipeline that do not meet UBC standard shall be retrofitted with components complying with the UBC, Division IV, which covers earthquake design.

6.2 WATER RESOURCES

A. In compliance with the Clean Water Act, the Tribe shall apply for coverage under the USEPA's NPDES GCP. In compliance with permitting requirements, the Tribe shall develop a SWPPP that shall address water quality impacts associated with construction and operation of the project. These measures are identified in **Section 6.1.**

B. An NPDES permit shall be obtained for discharge of treated effluent into the Waters of the United States.

C. As part of the overall water sampling and monitoring program for the WWTP a spray field monitoring plan shall be developed and implemented to ensure potential tail water is being captured and that no tail water is discharged to surface waters. The monitoring plan will include, but not be limited to the following:

1. Water from spray field drift shall not migrate out of the spray field boundary.
2. All tail water and/or stormwater shall be collected and returned to the WWTP holding pond at all times when water is being applied to the spray disposal field.
3. The Tribe shall use the spray fields only during periods of dry weather. The Tribe will not use the spray fields 24 hours prior to a forecasted rain event and will wait 24 hours after the rain event to return to spray field operation.
4. A tail water capture system will be operated to capture all waste water runoff, as well as stormwater runoff that occurs 24 hours after the last application of wastewater to the spray fields.
5. The spray fields shall not be operated during periods of high winds exceeding 30 mph.
6. A controlled 100-foot buffer shall be maintained around the spray field operating area.

D. The Tribe shall develop and implement a groundwater-monitoring program in consultation with the BIA. The purpose of the program shall be to monitor groundwater levels to determine if the Tribe's groundwater pumping practices are significantly affecting an off-site user of groundwater. In order to monitor groundwater levels the Tribe shall equip a number of existing wells on the Plymouth Parcels as monitoring wells. These wells shall not be used for groundwater supply. The Tribe shall develop additional monitoring wells if it is later determined that the developed monitoring wells are insufficient. Should off-site monitoring wells be developed, the Tribe shall ensure compliance with the State of California Department of Public Health requirements for well development and the California Department of Water Resources Bulletin 74-90: California Well Standards. A long-term monitoring plan shall be developed and shall include the siting, design and installation of monitoring wells appropriately placed between the Project wells and the nearest off-site wells, taking into consideration the topography, geology, hydrogeology, pump rates of offsite users, and planned future development. The monitoring plan shall identify the number of monitoring wells, the frequency and duration of monitoring, reporting requirements, and the selection of contractors to conduct the monitoring and prepare monitoring reports. Baseline groundwater elevations and water quality data would then be collected. This would be performed during the facility design and construction stage to allow for the monitoring to encompass an entire hydrogeologic cycle. In addition, variances to the baseline values along with "not to exceed" values would be established to ensure there are no significant impacts to offsite well owners.

If it is determined that off-site wells are significantly affected by the Tribe's pumping practices, the Tribe shall undertake one or more of the following measures:

1. The Tribe may alter its groundwater-pumping regime. This may include increasing the resting period or decreasing pumping rate of individual wells.
2. The Tribe may pay for an off-site user's well to be drilled deeper in order to recover pre-project consumptive use that was reduced or lost as the result of the Tribe's pumping practice. The determination regarding whether the groundwater user's pre-project consumptive use is reasonably determined to have been reduced or lost as the result of the Tribe's groundwater pumping practice shall be made by an engineer retained by the Tribe.
3. The Tribe may pay for the development of a new well to replace an off-site user's existing well that is no longer able to supply pre-project consumptive use as the result of the Tribe's pumping practice or financially compensate the impacts to the well owner through mutual agreement.
4. The Tribe may replace the water used by off-site user that is lost as the result of the Tribe's pumping practice through the import of water via tanker truck or, if practical, through the development of a connection to the municipal system.
5. The Tribe may selectively recharge portions of the basin impacted by the Tribe's wells.

6. The Tribe may decrease the project's reliance on groundwater and increase the importation of water via tanker truck.

E. The three wells for obtaining groundwater shall be pumped in rotation to allow for recharge of the aquifer.

F. The following additional conservation measures shall be implemented by the Tribe to further reduce water usage:

1. Checking steam traps and ensuring return of steam condensate to boiler for reuse.
2. Planting of drought resistant landscaping.
3. Limiting boiler blowdown and adjusting for optimal water usage.
4. Using low flow faucets and/or aerators in casino and hotel.
5. Using low flow showerheads in hotel.
6. Encouraging voluntary towel re-use by hotel guests.
7. Using pressure washers and water brooms instead of hoses for cleaning.
8. Using garbage disposal on-demand in restaurant.
9. Incorporating a re-circulating cooling loop for water cooled refrigeration and ice machines in restaurants.
10. Serving water to customers on request at restaurant.

G. A sampling and monitoring program for the WWTP shall be developed and implemented with oversight by USEPA in accordance with the Clean Water Act. Treated effluent shall be monitored to determine the efficacy of the treatment process and to assure compliance with the NPDES permit.

6.3 AIR QUALITY

Construction Impacts

A. The Tribe will follow USEPA, Region 9, reporting and operating requirements in compliance with the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for asbestos as regulated under the Federal Clean Air Act.

B. The Tribe shall control emissions of volatile organic compounds (VOCs), NOx sulfur oxides (SOx), and CO whenever reasonable and practicable by requiring all diesel-powered equipment be properly maintained and minimize idle time to 5 minutes when construction equipment is not in use, unless per engine manufacturer's specifications or for safety reasons more time is required. Since these emissions would be generated primarily by construction equipment, machinery engines shall be kept in good mechanical condition to minimize exhaust emissions.

C. The following mitigation measures shall be implemented where feasible and when reasonable to reduce particulate matter emission from construction activities:

1. Water all active construction areas at least three times daily during dry weather.
2. Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least 2 feet of freeboard.
3. Pave or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas at construction sites.
4. Sweep daily (with water sweepers) all paved access roads, parking areas, and staging areas at construction sites.
5. Sweep streets daily (with water sweepers) if visible soil material is carried onto adjacent public streets.
6. Hydroseed or apply (non-toxic) soil stabilizes to inactive construction areas (previously graded areas inactive for 10 days or more).
7. Enclose, cover, water twice daily or apply (non-toxic) soil binders to exposed stockpiles (dirt, sand, etc.).
8. Limit traffic speeds on unpaved roads to 15 miles per hour.
9. Install sandbags or other erosion control measures to prevent silt runoff to public roadways.
10. Replant vegetation in disturbed areas as quickly as possible.
11. Install windbreaks, or plant trees/vegetative windbreaks at windward side(s) of construction areas.
12. Suspend excavation and grading activity when winds (instantaneous gusts) exceed 25 miles per hour.
13. Limit the area subject to excavation, grading and other construction activity at any one time.

D. The Tribe shall ensure through contract requirements that all development contractors locate construction staging areas on the east side of the project site away from residents. This would reduce sensitive receptor exposure to diesel particulate matter (DPM).

E. The Tribe shall ensure through contract requirements that development contractors establish activity schedules designed to minimized traffic congestion around the construction site. This mitigation measure would reduce idling; thus, reducing NOx, ROG, and DPM emissions.

F. The Tribe shall ensure through contract requirements that all contractors use only construction vehicles and heavy equipment that are equipped with, at a minimum, USEPA-approved emission control devices. This mitigation measure would reduce NOx, ROG, and DPM emissions.

G. The Tribe shall limit outdoor construction activities at the project site to Monday through Saturday between the hours of 6 a.m. to 6 p.m.

Operational Impacts

H. The Tribe shall provide on-site pedestrian facility enhancements such as walkways, benches, property lighting, and building access, which are physically separated from parking lot traffic.

I. Buses and other commercial diesel-fueled vehicles shall comply with the California Air Resource Board's Airborne Toxic Control Measure to Limit Diesel-Fueled Commercial Motor Vehicle Idling (California Code of Regulations, Title 13, Division 3, Article 1, Chapter 10, Section 2485), which requires that the driver of any diesel bus shall not idle for more than 5 minutes at any location, except in the case of passenger boarding where a 10-minute limit is imposed, or when passengers are onboard. Furthermore, the Tribe shall provide a "Drivers Lounge" for bus and truck drivers to discourage idling.

J. The Tribe shall install electrical outlets at the loading dock(s) of the development for refrigeration trucks. By providing electrical outlets to refrigeration trucks they will not need to idle, thus reducing emissions.

K. The Tribe shall encourage and facilitate the use of 'carpools' by construction workers, facility employees, and patrons. Encouraging and facilitating carpools would reduce the number of trips to and from the development, which would reduce operational emissions.

L. The Tribe shall provide signs that inform patrons that smoking is allowed at the facility and shall provide nonsmoking areas. The Tribe shall also provide pamphlets to employees on the health risk from second-hand smoke.

M. The Tribe shall ensure the installation of solar, low-emission, central, or tank less water heaters; wall insulation; and energy efficient appliances in the project facilities where feasible and when reasonable that shall exceed California Title 24 energy requirements.

N. The Tribe shall require the use of energy efficient lighting where feasible and when reasonable, which would reduce indirect greenhouse gas emissions.

O. The Tribe shall install water efficient water heaters, toilets, showers heads, ice machines, and faucets where feasible and when reasonable.

P. The Tribe shall develop an alternative energy plan, which shall include installation of photovoltaic cell arrays where feasible and when reasonable. Potential locations for the photovoltaic cell arrays include the parking structure and other facility rooftops.

6.4 BIOLOGICAL RESOURCES

Habitats

A. Project site plans shall be modified to avoid or minimize impacts to oak trees to the extent feasible. During construction, oak trees that are not to be considered impacted shall be enclosed in 4 foot high temporary construction fencing, installed at least 1 foot outside the dripline of all oak trees located in the vicinity of active construction. Encroachment into fenced areas shall not be permitted until all construction has been completed.

B. Removal of oak trees with a diameter at breast height (dbh) of 5 inches or greater, shall be avoided to the extent feasible. If avoidance is not possible, oak trees with a dbh between 5 inches and 24 inches shall be replaced at a 2:1 ratio and oak trees with a dbh greater than 24 inches shall be replaced at a 3:1 ratio. Replacement plantings shall be a minimum of 1 gallon in size and shall be monitored for 7 years, consistent with Section 21083.4 of the Public Resources Code. Any failed oak tree plantings shall be replaced.

C. Project site plans shall be modified to avoid or minimize impacts to riparian woodland habitat to the extent feasible. Temporary fencing shall be installed around riparian woodland habitat outside of construction areas. Fencing shall remain in place until all construction activities within the vicinity of the protected riparian area are complete. Impacted riparian areas shall be either restored or mitigated for by enhancement of riparian habitat within the property at a 1:1 ratio. Restored and/or enhanced riparian woodland habitats shall be monitored for a period of 5 years.

D. Invasive plant species of concern for Amador County and the State of California shall not be used for landscaping development of the proposed project. Management of the spray fields for wastewater disposal shall be conducted in a way that will discourage the growth of exotic and invasive plant species. Horticultural species of concern in Amador County and the State of California that shall not be included for use in the landscaping plan include, but are not limited to: iceplant (*Carpobrotus edulis*), periwinkle (*Vinca major*), all brooms (*Cytisus* spp., *Spartium* spp.), pampasgrass (*Cortadaria selloana*), cotoncaster (*Cotoneaster* spp.), scarlet wisteria (*Sesbania punicea*), English and Algerian Ivy (*Hedera* spp.), black acacia (*Acacia melanoxylon*), Russian olive (*Elagnus angustifolia*), *Myoporum laetum,* black locust (*Robinia pseudoacacia*), Chinese tallow tree (*Sapium sebiferum*), Brazilian and Peruvian pepper tree (*Schinus terebinthifolius* and *S. molle*), and fountain grass (*Pennisetum setaceum*).

Waters of the U.S.

E. A formal delineation of waters of the U.S. occurring within the proposed project area shall be submitted to the U.S. Army Corps of Engineers (USACE) for verification prior to the commencement of construction activities.

F. Project site plans shall be modified and parking areas for Alternatives A through C shall be reduced through the development of a parking structure to avoid or

minimize impacts to jurisdictional waters of the U. S. and wetland habitats to the extent feasible. Mitigated site plans have been developed for Alternatives A through C, which include the development of a parking structure to reduce the development footprint of the parking lot surrounding jurisdictional wetland habitats. Refer to **Figures 5-1** and **5-2** of the FEIS for the preliminary site plans for Phase I and Phase II of Alternative A, respectively. Refer to **Figures 5-3** and **5-4** of the FEIS for the mitigated site plans for Phase I and Phase II of Alternative B, respectively. Refer to **Figure 5-5** of the FEIS for the mitigated site plan for Alternative C.

G. A Department of the Army permit shall be obtained from the USACE prior to the discharge of any dredged or fill material within jurisdictional wetlands and other waters of the U.S. In addition, Water Quality Certification shall be obtained from the USEPA.

H. Unavoidable impacts to waters of the U.S., including wetlands and wetland habitat, shall be mitigated by creating or restoring wetland habitats either onsite or at an USACE approved off-site location. Compensatory mitigation shall occur at a minimum of 1:1 ratio and shall be approved by the USACE prior to any fill into jurisdictional features. As required by the 404 permit, a wetland mitigation and restoration plan shall be prepared by a qualified biologist for any wetland habitat to be created or restored on site. This plan will describe the mitigation ratio, location of restoration, size and type of native vegetation to be used, and a monitoring and maintenance schedule consistent with the new USEPA and USACE rule, shall include a 5 year monitoring plan that has an 80 percent success criteria for vegetative cover with native plants. Off site mitigation shall be conducted through the purchase of credits through a USACE approved mitigation bank. These measures will adhere to the USEPA Rule guidelines which take into account all aquatic resource functions of the impacted wetlands to the watershed as a whole, the likelihood of success, and time lag of establishment.

I. If the Tribe conducts construction activities in the vicinity of any jurisdictional wetland feature it shall do so during the dry season (April 15 through October 15), to the extent reasonable, to minimize potential erosion.

J. Temporary fencing shall be installed around wetland and intermittent drainage features and associated riparian woodland that is outside of the construction area. Fencing shall be located as far as feasible from the edge of wetlands and riparian habitats and installed prior to any construction. The fencing shall remain in place until all construction activities have been completed.

K. Staging areas shall be located away from the areas of wetland, intermittent drainage and riparian habitat that are fenced-off. Temporary stockpiling of excavated or imported material shall occur only in approved construction staging areas. Excess excavated soil shall be used on-site or disposed of at a regional landfill or other appropriate facility. Stockpiles that are to remain on the site through the wet season shall be protected to prevent erosion (e.g. tarps, silt fences, straw bales).

L. BMPs shall be employed by the construction contractor to prevent the accidental release of fuel, oil, lubricant, or other hazardous materials associated with construction activities into jurisdictional features. As part of the project's NPDES permit, a contaminant program shall be developed and implemented in the event of release of hazardous materials.

Migratory Birds

M. If tree disturbance or other project-related activities are to occur during the nesting season (approximately March – September), pre-construction surveys for all nesting migratory bird and raptor species shall be conducted within 500 feet of the proposed construction areas by a qualified biologist. If active nests are identified in these areas, the USFWS shall be consulted to develop measures to avoid any "take" of active nests prior to commencing tree removal or project related activities. Avoidance measures may include the establishment of buffers and biological monitoring. If active nests are identified within trees proposed for removal or disturbance, removal or disturbance shall be postponed until after the nesting season or after a qualified biologist had determined that the young have fledged and are independent of the nest site.

N. The Tribe shall contribute to the funding of the environmental review and mitigation for traffic improvements identified in **Section 6.7**. The contribution shall be based on the amount of traffic generated by land uses on the 228.04± acre site as a percentage of the overall traffic volume. In the case of improvements that are identified within this document as the sole responsibility of the Tribe, the Tribe's contribution would provide 100 percent of the necessary funds. The Tribe's contribution shall include the cost of preparing environmental documents and the cost of mitigation for biological resources, including but not limited to purchases of land, contributions to mitigation banks or programs, and restoration of habitat. The Tribe's contribution shall be provided to the agency undertaking the improvement (e.g. Caltrans, Amador County, City of Plymouth).

6.5 Cultural Resources

A. In the event of any inadvertent discovery of archaeological resources during construction related earth-moving activities, all such finds shall be subject to Section 106 of the NHPA as amended (36 CFR 800). Once the land has been taken into trust for the Tribe, the inadvertent discovery of archaeological resources would also be subject to the Native American Graves Protection and Repatriation Act (25 USC 3001 et seq.) and the Archaeological Resources Protection Act of 1979 (16 USC 470 aa-mm). Specifically, procedures for post-review discoveries without prior planning found in 36 CFR 800.13 shall be followed. The following shall apply to the inadvertent discovery of both archaeological and paleontological resources: All work within 50 feet of the find shall be halted until a professional archaeologist, or paleontologist as appropriate, can assess the significance of the find. If any find is determined to be significant by the archaeologist, or the paleontologist, then representatives of the Tribe and BIA shall meet with the archaeologist, or paleontologist, to determine the appropriate course of action.

B. If human remains are discovered during ground-disturbing activities on Tribal lands, pursuant to the Native American Graves Protection and Repatriation Act and the implementing regulations found at 43 CFR 10 Section 10.4, *Inadvertent Discoveries*, the County coroner, the tribal official and the BIA representative shall be contacted immediately (on non-tribal land, the BIA representative does not need to be called). No further disturbance shall occur until the County coroner, tribal official, and BIA representative have made the necessary findings as to the origin and disposition (on non-tribal land, no BIA representative is present). If the remains are determined to be of Native American origin, the coroner shall notify the Native American Heritage Commission, which shall notify a Most Likely Descendant (MLD). The MLD is responsible for recommending the appropriate disposition of the remains and any grave goods.

C. Implementation of **Mitigation Measure 6.4(N)** will reduce impacts associated with off-site roadway improvements and potential impacts to cultural resources.

6.6 SOCIOECONOMIC CONDITIONS AND ENVIRONMENTAL JUSTICE

A. The Tribe shall pay an annual contribution of $10,000 to an organization or organizations selected in consultation with the California Office of Problem and Pathological Gambling, to address problem gambling issues.

B. Commencing at the time of the fee-to-trust transfer of the project site, the Tribe shall pay an annual contribution equal to the annual property tax prior to conveyance 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.

C. The Tribe will develop and implement a housing program to address the availability of affordable housing within Amador County. The housing program would coordinate its activities with Amador County and the City of Plymouth in order to further countywide planning efforts.

D. The Tribe shall contribute to school impact fee revenues to mitigate potential fiscal effects to the Amador County Unified School District by paying a one-time payment of $107,610 to the School District or such other amount as may be negotiated between the Tribe and the School District.

6.7 RESOURCE USE PATTERNS

Transportation

Access

A. The Tribe shall require at least three tribal security personnel to be educated in traffic control procedures. These security personnel will perform traffic control at the access roads during special events at the event center to make sure that when fire/emergency vehicles need to leave the site, traffic control is provided at the exit of the service entrance to allow smooth movement of emergency vehicles.

Construction

B. The Tribe shall prepare a Traffic Management Plan (TMP) to identify which lanes require closure, where night construction is proposed, and other standards set forth in the *Manual on Uniform Traffic Control Devices for Streets and Highways* (US DOT FHWA, 2003). The TMP shall be submitted to each affected local jurisdiction and/or agency.

C. Prior to the finalization of construction plans, the Tribe shall work to notify all potentially affected parties in the immediate vicinity of the project site. Notification shall include a construction schedule, exact location of construction activities, duration of construction period, and alternative access provisions.

D. Also prior to the finalization of construction plans, the Tribe shall work with emergency service providers to avoid restricting emergency response service. Police, fire, ambulance, and other emergency response providers shall be notified in advance of the construction schedule, exact location of construction activities, duration of construction period, and any access restrictions that could impact emergency response services. Traffic Management Plans shall include details regarding emergency service coordination. Copies of the TMPs shall be provided to all affected emergency service providers.

Operation-Phase I

Without the jurisdiction to implement off-site mitigation measures, the only feasible mitigation available to the Tribe is to provide funding for recommended roadway improvements. Various study roadway intersections and segments currently operate under unacceptable conditions (according to the corresponding jurisdictional agency) without the project. Therefore, the Tribe would contribute a share of the required funding proportionate to the level of impact associated with the trips added by the project alternatives. Under Caltrans guidelines this proportionate share contribution to recommended roadway improvements are considered appropriate mitigation to reduce the impact of a proposed project. Actual funding mechanisms for impact mitigation shall be determined through negotiations at the time of project implementation.

Mitigation measures are summarized below and are provided in more detail in the revised TIA (Appendix M of the FEIS). Proportionate share contributions for the Preferred Alternative are provided were applicable. As neither the Tribe nor BIA have jurisdictional authority to implement traffic improvement projects outside of the trust site boundaries, the following mitigation measures (6.6E through 6.6NNN) are recommended to reduce off-reservation impacts of the Preferred Alternative, and would be implemented after all requisition approvals are received from the agency(s) with jurisdiction over the roadways.

E. SR 49/Main Street
Install a signal. Construct NB and WB left-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 22 percent.

Construct SB left-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

F. SR 49/Randolph Drive
Install a signal. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

G. Latrobe (Amador)/SR 16
Install a signal. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

H. SR 104 (Preston)/SR
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 21 percent.

I. Preston Avenue/ Main Street
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 22 percent.

J. Main Street / SR 124 (Church)/SR 104 (Main)
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 22 percent.

K. SR 88 / Jackson Valley Road
Install a Signal. Proportionate share calculation of this project impact using Caltrans methodology is 43 percent.

L. SR 88 / Liberty Road
Install a Signal, convert NB right-turn lane into shared through/right-turn, and construct a second NB receiving lane. Proportionate share calculation of this project impact using Caltrans methodology is 37 percent.

M. SR 16 / Grant Line Road
Add NB and SB left-turn lanes. Proportionate share calculation of this project impact using Caltrans methodology is 21 percent.

N. Sunrise Boulevard/SR 16
Convert SB right-turn lane into a shared through/right-turn. Proportionate share calculation of this project impact using Caltrans methodology is 20 percent.

O. SR 49/Project Access Driveway
Restrict left-turn out of driveway. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

P. SR 16 between Bradshaw Road and Excelsior Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 17 percent.

Q. SR 16 between Sunrise Boulevard and Grant Line Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 20 percent.

R. SR 16 between Grant Line Road and Dillard Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 21 percent.

S. SR 16 between Dillard Road and Stonehouse Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 20 percent.

T. SR 16 between Stonehouse Road and Ione Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

U. SR 16 between Latrobe Road (Amador) and SR 124
Widen from two to three lanes. Proportionate share calculation of this project impact using Caltrans methodology is 74 percent.

V. SR 16 between SR 124 and SR 49
Widen from two to three lanes. Proportionate share calculation of this project impact using Caltrans methodology is 97 percent.

W. SR 104 between SR 124 and Main Street
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 22 percent.

X. SR 104 between Main Street and Church
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 22 percent.

Y. SR 124 between Main Street and SR 88
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 31 percent.

Z. SR 88 between SR 124 and Liberty Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 26 percent.

AA. SR 88 between Liberty Road and SR 12 (east)
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 19 percent.

BB. SR 88 between SR 12 (east) and Tully Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 20 percent.

CC. SR 88 between Tully Road and SR 12 (west)
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 20 percent.

DD. SR 88 between SR 12 (west) and Kettleman Lane
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 19 percent.

Operation-Phase II

EE. SR 16 / Ione Road
Install a Signal. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

FF. SR 16 / Grantline Road
Add NB and SB left-turn lanes. Proportionate share calculation of this project impact using Caltrans methodology is 10 percent.

Add NB and SB right-turn lanes. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

GG. SR 16 / Sunrise Boulevard
Convert SB right-turn lane into a shared through/right-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 9 percent.

Add NB right-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

HH. SR 49 / Pleasant Valley Road
Install a Signal. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

II. SR 49 between Casino Entrance and Main Street
Upgrade to Arterial Class II. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

JJ. SR 49 between Casino Entrance and Main Street
Upgrade to Arterial Class II. Proportionate share calculation of this project impact using Caltrans methodology is 84 percent.

Operation-Cumulative

KK. SR 49/Main Street
Install a signal. Construct NB left-turn and WB right-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 33 percent.

LL. SR 49/SR 16
Add NB left-turn lane and second WB receiving lane. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

MM. SR 124/SR
Install a signal. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

NN. SR 104 (Preston)/SR 124
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 55 percent.

OO. Preston Avenue/ Main Street
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 69 percent.

PP. Main Street / SR 124 (Church)/SR 104 (Main)
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 72 percent.

QQ. R 88 / Jackson Valley Road
Install a Signal. Proportionate share calculation of this project impact using Caltrans methodology is 56 percent.

RR. SR 88 / Liberty Road
Install a Signal, convert NB right-turn lane into shared through/right-turn lane, and construct a second NB receiving lane. Proportionate share calculation of this project impact using Caltrans methodology is 23 percent.

Construct separate WB left-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

SS. SR 88 / Victor (SR 12)
Convert SB right-turn lane into shared through/right-turn lane, and lengthen SB receiving lane. Proportionate share calculation of this project impact using Caltrans methodology is 9 percent.

TT. SR 88 /Kettleman Lane
Install EB duel left-turn lanes and SB through lane. Proportionate share calculation of this project impact using Caltrans methodology is 10 percent.

UU. SR 16 / Grant Line Road
Convert EB right-turn lane into shared through /right-turn. Proportionate share calculation of this project impact using Caltrans methodology is 29 percent.

VV. Sunrise Boulevard/SR 16
Convert EB right-turn lane into a shared through/right-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 31 percent.

WW. SR 16/Bradshaw Road
Add NB and SB through lane, an EB left-turn lane, two EB and WB through lanes. Proportionate share calculation of this project impact using Caltrans methodology is 8 percent.

Construct a WB right-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

XX. SR 49/Pleasant Valley Road
Install a Signal. Proportionate share calculation of this project impact using Caltrans methodology is 49 percent.

YY. SR 88 (N)/Elliot Road
Convert SB right-turn lane into shared through/right-turn lane. Proportionate share calculation of this project impact using Caltrans methodology is 5 percent.

ZZ. SR 49 between Casino Entrance and Main Street
Widen from two to three lanes. Proportionate share calculation of this project impact using Caltrans methodology is 55 percent.

AAA. SR 16 between Bradshaw Road and Excelsior Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 21 percent.

BBB. SR 16 between Sunrise Boulevard and Grant Line Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 38 percent.

CCC. SR 16 between Grant Line Road and Dillard Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 69 percent.

DDD. SR 16 between Dillard Road and Stonehouse Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 48 percent.

EEE. SR 16 between Latrobe Road (Amador) and SR 124
Widen from two to three lanes. Proportionate share calculation of this project impact using Caltrans methodology is 60 percent.

FFF. SR 16 between SR 124 and SR 49
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 57 percent.

GGG. SR 104 between SR 124 and Main Street
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 60 percent.

HHH. SR 104 between Main Street and Church Street
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 63 percent.

III. SR 124 between Main Street and SR 88
Implement the Ione Bypass as identified in the 2004 Amador County RTP Update. Proportionate share calculation of this project impact using Caltrans methodology is 82 percent.

JJJ. SR 88 between SR 124 and Liberty Road
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 21 percent.

Widen from four to six lanes. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

KKK. SR 88 between Liberty Road and SR 12 (east)
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 19 percent.

Widen from four to six lanes. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

LLL. SR 88 between SR 12 (east) and Tully Road
Widen from four to six lanes. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

MMM. SR 88 between Tully Road and SR 12 (west) (NB and SB Couplets)
Widen from two to four lanes. Proportionate share calculation of this project impact using Caltrans methodology is 10 percent.

NNN. SR 88 between SR 12 (west) and Kettleman Lane
Widen from four to six lanes. Proportionate share calculation of this project impact using Caltrans methodology is 100 percent.

6.8 PUBLIC SERVICES

Construction Related Solid Waste

A. The Tribe shall create and maintain an aggressive Waste Management Plan that implements recycling strategies to voluntarily meet State recycling and diversion requirements. The Waste Management Plan shall include the installation of a trash compactor for cardboard and paper products, and the placement of recycling bins throughout the facilities for glass, cans and paper products.

B. Environmentally preferable materials shall be acquired to the extent practical for construction of facilities.

Operational Solid Waste

C. A trash compactor shall be installed for cardboard and paper products.

D. Recycling bins shall be installed throughout the facilities for glass, cans and paper products.

E. The Tribe shall adopt universal waste recycling requirements similar to California's Universal Waste Rule.

Electricity, Natural Gas, and Telecommunication

F. The Tribe will fund the upgrade of the existing lines in accordance with PG&E engineers' recommendations.

Public Health and Safety

Law Enforcement

G. The Tribe shall adopt a Responsible Alcoholic Beverage Policy that shall include, but not be limited to, requesting identification and refusing service to those who have had enough to drink. This policy shall be discussed with the California Highway Patrol and the ACSO.

H. All parking areas shall be well lit to prevent areas that would not be visible by patrolling security guards, and monitored by parking staff, and/or roving security guards at all times during operation. This will aid in the prevention of auto theft and other related criminal activity.

I. Exterior areas surrounding the gaming facilities not designed as patron waiting areas shall have "No Loitering" signs in place, shall be well lit to increase the visibility of security features (cameras and guards), and shall be patrolled regularly by roving security guards. This will aid in the prevention of illegal loitering and all crimes that relate to, or require, illegal loitering.

J. The Tribe shall provide traffic control with appropriate signage and the presence of traffic control staff when appropriate. This will aid in the prevention of off-site parking, which could create possible security issues.

K. The Tribe shall provide payments to Amador County to mitigate increased costs to the Amador County District Attorney's Office, Probation Department, Public Defenders Office, and Superior Court system as they relate to law enforcement actions generated by the selected project alternative. Prior to commencement of operations, the Tribe shall negotiate in good faith to provide reasonable payment for services with Amador County.

L. The Tribe shall make payments to the County to provide for one Amador County Sheriff's Deputy to be based in Plymouth on a 24 hours a day/ 7 days a week basis. This would require the addition of 6.5 officers. Financial compensation shall include the equipment necessary for the full staffed officers. Prior to commencement of operations, the Tribe shall negotiate in good faith to provide reasonable payment for services with Amador County.

M. The Tribe shall provide payments to the CHP to mitigate potential impacts to CHP services in the area associated with the operation of the selected project alternative. Prior to commencement of operations, the Tribe shall negotiate in good faith to provide reasonable payment for services with the CHP.

Emergency Call Taking and Dispatching

O. The Tribe shall negotiate in good faith to make a reasonable contribution to Amador County to cover increased operating costs of emergency dispatching in Amador County including dispatching contracted through the State that is attributable to the operation of the selected project alternative.

6.9 OTHER VALUES

Noise

A. Outdoor construction activities shall be limited to the hours of 6 a.m. to 6 p.m., Monday through Saturday.

B. Earthen berms shall be constructed to reduce the effect of on-site traffic noise on nearby residences to below an average (Leq) of 45 decibels at level A attenuation (dBA). For Alternatives A, B, and C the earthen berms shall be designed to reduce noise levels from parking lot activities on residences to the northwest by 4 dBA and designed to reduce parking lot noise on residences to the southwest by 8 dBA. For

Alternative D, no earthen berm would be needed for residences to the northwest, but residences to the southwest would need attenuation of 14 dBA.

C. Earthen berms shall be constructed on the west end of the service court to block the line of site between the loading dock areas and the off-site residences to the west. In combination with the berms identified in above in (B), these berms need to reduce loading dock noise below 45 Leq at the nearest off-site residential receptor.

D. Roof mounted mechanical equipment shall be designed and installed so that noise levels from the mechanical equipment shall not exceed 45 Leq at existing residential property lines.

E. The Tribe shall contribute to the funding of the environmental review and mitigation for traffic improvements identified in **Section 5.2.8**. The contribution shall be based on the amount of traffic generated by land uses on the 228.04± acre site as a percentage of the overall traffic volume. In the case of improvements that are identified within this document as the sole responsibility of the Tribe, the Tribe's contribution would provide 100 percent of the necessary funds. The Tribe's contribution shall include the cost of preparing environmental documents and the cost of mitigation for traffic noise, including but not limited to the installation of sound walls. The Tribe's contribution shall be provided to the agency undertaking the improvement (e.g. Caltrans, Amador County, City of Plymouth).

Hazards and Hazardous Materials

F. Personnel shall follow written standard operating procedures (SOPs) for filling and servicing construction equipment and vehicles. These SOPs address storage and use of hazardous materials and would be implemented during both construction and operation of the casino. The SOPs, which are designed to reduce the potential for incidents involving the use and storage of hazardous materials, shall include the following where feasible and when reasonable:

1. Refueling shall be conducted only with approved pumps, hoses, and nozzles.
2. Catch-pans shall be placed under equipment to catch potential spills during servicing.
3. All disconnected hoses shall be placed in containers to collect residual fuel from the hose.
4. Vehicle engines shall be shut down during refueling.
5. No smoking, open flames, or welding shall be allowed in refueling or service areas.
6. Refueling shall be performed away from bodies of water to prevent contamination of water in the event of a leak or spill.
7. Service trucks shall be provided with fire extinguishers and spill containment equipment, such as absorbents.

8. Should a spill contaminate soil, the soil shall be put into containers and disposed of in accordance with local, State, and Federal regulations.
9. All containers used to store hazardous materials shall be inspected at least once per week for signs of leaking or failure. All maintenance and refueling areas shall be inspected monthly. Results of inspections shall be recorded in a logbook that shall be maintained on-site.
10. Staging areas, welding areas, or areas slated for development using spark-producing equipment shall be cleared of dried vegetation or other materials that could serve as fire fuel. To the extent feasible, the contractor shall keep these areas clear of combustible materials in order to maintain a firebreak.
11. Any construction equipment that normally includes a spark arrester shall be equipped with an arrester in good working order.

G. The amount of hazardous materials used in project construction and operation shall be consistently kept at the lowest volumes needed.

H. During project operation, the least toxic material capable of achieving the intended result will consistently be used. These materials include industrial strength cleaners, detergents, pesticides, and degreasers. All potentially toxic materials would be used as directed according to Federal labeling requirements. All materials shall be kept within their original containers and at no time would the labels be removed from the original containers.

I. A hazardous materials and hazardous waste minimization program shall be developed, implemented, and reviewed annually by the Tribe to determine if additional opportunities for hazardous materials and hazardous waste minimization are feasible, for both project construction and operation. A copy of the hazardous waste minimization program and a full inventory of flammable and hazardous materials will be provided to the Amador County Fire Department.

J. The contractor shall be requested to avoid and minimize the use of hazardous materials and petroleum products during the project's construction to the fullest extent practicable.

K. The Tribe shall minimize the use of pesticides and toxic chemicals to the greatest extent feasible in landscaping or use less toxic alternatives, such as integrated pest management techniques.

L. The existing on-site residences shall be assessed for lead based paint and asbestos containing materials prior to demolition. The assessments will be performed by a licensed inspector. If lead-based paint or asbestos containing materials are found, the materials will be removed from the site according to local, State, and Federal requirements. All applicable Occupational Safety and Health Administration (OSHA) regulations shall be complied with.

M. As part of the WWTP design, hazardous materials used for disinfection of water and treated effluent would be fully stored in the chemical room of the WWTP operations

building. The storage and chemical metering facilities shall be located inside a chemical spill containment area, sized to contain 150 percent of the storage volume in case of an unintentional release. To the extent feasible, chemicals shall be stored as dry material in sealed containers, and then in a 50-gallon mixing tank when needed.

N. In the event that contaminated soil and/or groundwater are encountered during construction related earth-moving activities, all work shall be halted until a professional hazardous materials specialist or a qualified individual can assess the extent of contamination. If contamination is determined to be significant, representatives of the Tribe shall consult with USEPA to determine the appropriate course of action, including the development of a Sampling Plan and Remediation Plan if necessary.

O. The Tribe shall establish a vegetative cover over mine tailings with California Flannelbush (*Fremontodendron californicum*), Yerba Santa (*Eriodictyon crassifolium*), Coyote Brush (Baccharis pilularis), or similar native plants used for soil stabilization/erosion control prior to public access to the project development. The Tribe will ensure the vegetative cover is maintained providing full coverage of the mine tailings. Additionally, the tailings area shall be fenced off to prevent public access.

Visual Resources

The Tribe shall participate in Caltrans' Adopt-A-Highway Program to provide litter removal on one or more highway segments in the vicinity of the project site.

6.10 MITIGATION MEASURES THAT ARE NOT ADOPTED

CEQ NEPA regulations (40 C.F.R. § 1505.2(c)) call for identification in the ROD of any mitigation measures specifically mentioned in the FEIS that are not adopted. All mitigation measures identified in the FEIS have been adopted.

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)(1)(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)(1).

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)(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 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)(1)(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 lands 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 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 Congress to regulate commerce "with the Indian tribes," U.S. Const.,

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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, 139 (1944) (agencies merit deference based on "specialized experience and broader investigations and information" available to them).

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

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 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 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]

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[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 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).

[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.*

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

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.[14] For purposes of deciding the instant application, it is not necessary to posit in the abstract 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

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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).

[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).

[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.

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 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 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 States and the Ione Band prior to and in 1934. 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.

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

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 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 others."[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 owner's 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 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

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[19] Report to Commissioner of Indian Affairs from Special Agent Charles E. Kelsey (March 21, 1906) (Census of Non-Reservation California Indians, 1905-1906) (Kelsey Report).
[20] Pub. L. No. 58-1479, 33 Stat. 1048, 1058 (1905).
[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.

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]

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 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

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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.
[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).
[35] *Id.*
[36] Letter from E. B. Merritt, Assistant Commissioner of Indian Affairs, to L. A. Dorrington, Superintendent, Sacramento Agency, 1 (January 18, 1924).
[37] Report to Commissioner of Indian Affairs from L. A. Dorrington, Superintendent 2 (June 23, 1927).

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, 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 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.

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

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[38] *Id.*
[39] Letter from L. A. Dorrington, Superintendent to John Porter 1 (May 7, 1930).
[40] *Id.*
[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).
[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 1 (April 29, 1941).

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 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 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

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

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]

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 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.

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[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 to Which There is No Genuine 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.

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.

8.3 25 C.F.R. § 151.10(B): THE NEED OF THE INDIVIDUAL INDIAN OR TRIBE FOR ADDITIONAL LAND

Section 151.10(b) requires consideration of the "the need of the…tribe for additional land."

The Tribe has no reservation and no land in trust. Since it was restored to Federal recognition, the Tribe has lacked sufficient funds to purchase land and have that land placed in trust. As a result, the Tribe has been unable to provide for its people in ways similar to the surrounding community and surrounding Indian tribes because the Tribe has no sustainable economic base. Without trust land, the Tribe has had little opportunity for successful economic development and little chance at true self-governance. Placement of the Plymouth Parcels into trust will promote tribal self-determination, provide opportunities for economic development, and aid in the establishment of tribal government programs. The proposed trust acquisition will provide a land base from which the Tribe may exercise governmental powers and operate governmental programs to serve its membership, and will allow the Tribe to operate an enterprise which will provide the revenue for these programs.

The BIA has considered the Tribe's need for lands in trust status and finds that the Tribe has a demonstrable need to acquire the Plymouth Parcels in trust.

8.4 25 C.F.R. § 151.10(C): THE PURPOSES FOR WHICH THE LAND WILL BE USED

Section 151.10(c) requires consideration of the purposes for which the land will be used.

As detailed in the FEIS, the Tribe proposes to construct a casino-resort complex that would include Class III gaming conducted in accordance with the IGRA and Tribal-State Compact requirements. The resort complex would consist of approximately 65,000 square feet of gaming floor; 35,000 square feet of restaurant and retail facilities and public space; 30,000 square feet of convention and multi-purpose space (with seating for up to 1,200); and a 5-story, 250-room hotel. Approximately 2,965 parking spaces would be provided for the project in surface parking lots and a five level parking structure located adjacent to the

proposed casino complex. The project would be developed in two phases, with the casino and restaurant complex, the parking structure, and auxiliary facilities constituting Phase I, and the development of the hotel, convention and conference center, and additional parking constituting Phase II.

The BIA finds that the stated purposes for which the land will be used appropriately meet the purpose and need for acquiring the lands in to trust.

8.5 25 C.F.R. § 151.10(E): IF THE LAND TO BE ACQUIRED IS IN UNRESTRICTED FEE STATUS, THE IMPACT ON THE STATE AND ITS POLITICAL SUBDIVISIONS RESULTING FROM THE REMOVAL OF LAND FROM THE TAX ROLLS

Section 151.10(e) requires consideration of the impact on the state and its political subdivisions resulting from removal of land from the tax rolls.

The potential fiscal impacts of the Preferred Alternative were comprehensively evaluated during negotiations of the now voided Municipal Services Agreement (MSA) and in the FEIS. As stated in the FEIS, the Tribe has incorporated the fiscal mitigation provisions of the voided MSA into FEIS. 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.

8.6 25 C.F.R. § 151.10(F): JURISDICTIONAL PROBLEMS AND POTENTIAL CONFLICTSW OF LAND USE WHICH MAY ARISE

Section 151.10(f) requires consideration of jurisdictional problems and potential conflicts of land use which may arise.

The Plymouth Parcels are located partially within the City of Plymouth and partially within unincorporated Amador County. Accordingly, both the City of Plymouth and Amador County currently exercise land use jurisdiction over the Plymouth Parcels. Through the incorporation of the voided MSA provisions within the FEIS, 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.

9.0 DECISION TO IMPLEMENT THE PREFERRED ALTERNATIVE

The Department has determined that it will implement the Preferred Alternative (Alternative A). This decision has been made based upon the environmental impacts identified in the EIS and corresponding mitigation (including modification of the site plan to reduce surface parking through development of a multi-story parking structure), a consideration of economic

and technical factors, as well as the BIA's policy goals and objectives, and the purpose and need for the project. Of the alternatives evaluated in the EIS, Alternative A would best meet the purposes and needs of the BIA, consistent with its statutory mission and responsibilities, to promote the long-term economic vitality and self-sufficiency, self-determination and self-governance of the Tribe. The casino-resort complex described under Alternative A would provide the Tribe, which has no trust land, with a long deferred reservation land base and the best opportunity for securing a viable means of attracting and maintaining a long-term, sustainable revenue stream for its tribal government and to fund necessary mitigation for development of economic ventures. This would enable the tribal government to establish, fund, and maintain governmental programs that offer a wide range of health, education and welfare services to tribal members, as well as provide the Tribe, its members and local communities with greater opportunities for employment and economic growth.

The Department is aware that completion of the project as detailed in Alternative A will require approval or other actions of Federal or local agencies. For Alternative A to be implemented, NIGC must approve the Gaming Management Contact, USEPA must grant general construction and discharge NPDES permits, USACE must concur with the wetland delineation and issue a CWA Section 404 permit for the fill of water of the U.S., and the USEPA must issue a CWA Section 401 certification. While the No-Action Alternative (Alternative E) and Retail Development Alternative (Alternative D) would result in lesser environmental impacts, these alternatives would limit the ability of the Tribe to facilitate and promote tribal economic development, self-determination and self-sufficiency. The No-Action Alternative would result in no net income or other economic benefits to the Tribe, and thus does not meet the stated purpose and need. Likewise, Alternative D, which has been identified in **Section 4.0** as the Environmentally Preferred Alternative, would substantially limit the beneficial effects that would otherwise be available to the Tribe and surrounding communities under the Preferred Alternative and would not substantially meet the purpose and need for the Proposed Action.

The Preferred Alternative results in substantially greater beneficial effects for the Tribe and surrounding communities than any of the other alternatives. Alternatives B and C, while less intensive than Alternative A, would require similar levels of mitigation for identified impacts while providing less revenue to fund mitigation. The additional impacts from the Preferred Alternative would be reduced to less than significant after the implementation of mitigation measures. Accordingly, the Department will implement the Preferred Alternative subject to the mitigation measures discussed in **Section 6.0**.

9.1 THE PREFERRED ALTERNATIVE RESULTS IN SUBSTANTIAL BENEFICIAL IMPACTS

The Preferred Alternative reasonably is expected to result in beneficial effects for Amador County communities, the Tribe, and its members. Key beneficial effects include:

- Establishment of a land base for the Tribe, from which it can operate its tribal government and provide a variety of health, housing, education, social, cultural and other programs and services for its members, provide employment

opportunities for its members, and promote a sense of community and political cohesion.

- Generation of needed government revenues for the Tribe that will allow the Tribe to fund the governmental operations and programs required to meet Tribal needs, will provide capital for other economic development opportunities, and will allow the Tribe to achieve Tribal self-sufficiency, self-determination, and a strong, stable Tribal government.

- Generation of approximately 392 jobs over the entire construction period.

- Generation at the onset of operations of employment of 1,271 full-time equivalent jobs. Employees who earn tips are estimated to earn additional annual income. Approximately 60 percent of employees are anticipated currently to reside in Amador County.

- Increased off-site spending and economic opportunities benefiting local community members. Revenue from new in-state expenditures on goods and services is estimated to total tens of millions annually.

- Generation of annual and one-time revenues to the State of California through the Tribal State Compact.

9.2 PREFERRED PROJECT WITH REDUCED GAMING AREA (ALTERNATIVE B) AND WITH REDUCED GAMING AND NO HOTEL (ALTERNATIVE C) RESTRICTS BENEFICIAL EFFECTS

The reduced intensity alternatives (Alternatives B and C) would generate less revenue than the Preferred Alternative. As a result, they would restrict the Tribe's ability to meet its needs and to foster Tribal economic development, self-determination, and self-sufficiency. Due to a lesser amount of new development, the effects on the natural and physical environment would be slightly less under Alternatives B and C than those created by the Preferred Alternative. Both alternatives would result in a similar level of impacts after mitigation. The reduced economic and related benefits of Alternatives B and C make them less viable options that would fulfill the purpose and need of the Proposed Action to a lesser degree than the Preferred Alternative. Accordingly, the BIA has selected the Preferred Alternative over Alternatives B and C.

9.3 RETAIL DEVELOPMENT ALTERNATIVE (ALTERNATIVE D) SEVERELY RESTRICTS BENEFICIAL EFFECTS

The Retail Development Alternative (Alternative D) is the Environmentally Preferred Alternative; however, implementation would result in less employment and economic growth for both the Tribe and neighboring communities than from the Preferred Alternative. As a result, it would restrict the Tribe's ability to meet its needs and to foster Tribal economic development, self-determination, and self-sufficiency. The reduced economic and related benefits of Alternative D make it a less viable option that would fulfill the purpose and need of the Proposed Action less than the Preferred Alternative. Additionally, based on the

dynamic differences in patron behavior between gaming and commercial venues, Alternative D would result in greater trip generation and a higher percentage of trip generation at peak hours, subsequently increasing the potential for adverse traffic impacts and associated air quality emissions. Therefore, selection of Alternative D over the Preferred Alternative is not warranted.

9.4 NO-ACTION ALTERNATIVE FAILS TO MEET PURPOSE AND NEED FOR ACTION

Under the No-Action Alternative, it is reasonably foreseeable that the Plymouth Parcels would be developed with commercial and residential uses. The government revenue and employment impacts from such development would be relatively low, particularly compared to the government revenue and employment benefits of a casino. Because of this, City and County residents, the Tribe, and its members would not receive the economic and related benefits that the proposed casino is reasonably anticipated to provide. This would result in a continuation of the poor economic conditions and very limited economic opportunities of the Tribe and its members.

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.

Donald E. Laverdure
Acting Assistant Secretary – Indian Affairs
United States Department of the Interior

Date: 5-29-12

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on April 1, 2016.

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

Dated: April 1, 2016.

Respectfully submitted,

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

No. 15-17189`

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH
and CITIZENS EQUAL RIGHTS ALLIANCE

Plaintiffs-Appellants

v.

SALLY JEWELL, Secretary; KEVIN WASHBURN, Assistant-Secretary; DONALD LAVERDURE, Acting Assistant-Secretary; BUREAU OF INDIAN AFFAIRS; AMY DUTSCHKE, BIA Reg. Dir.; JOHN RYDZIK, BIA Env. Div.; PAULA HART, OIG Chair; TRACIE STEVENS, NIGC Chair; NATIONAL INDIAN GAMING COMMISSION; and U.S. DEPARTMENT OF INTERIOR

Defendants-Appellees

and

IONE BAND OF MIWOK INDIANS

Intervener-Appellee

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:12-cv-01748 TLN-CMK
Honorable Troy L. Nunley, District Judge

EXCERPTS OF THE RECORD – VOLUME 3

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Attorney for Plaintiffs-Appellants

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APPELLANTS' EXCERPTS OF RECORD

No Casino in Plymouth et al v. Sally Jewell, et al

Ninth Circuit Court of Appeal Case No. 15-17189

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Attorney for Plaintiffs
No Casino in Plymouth and
Citizens Equal Rights Alliance

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, **v.** SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, *et al.* Defendants.	Case No. 2:12-cv-01748-TLN-CMK **PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS (FRCP 12(c))** Date: March 27, 2014 Time: 2:00 p.m. Place: Courtroom No. 2 Judge: Honorable Troy L. Nunley

Plaintiffs, NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, pursuant to Federal Rules of Evidence, Rule 201, request that the Court take judicial notice of the following documents which are attached hereto:

1. The "Complaint for Declaratory Relief, Quiet Title, Breach of Trust, and Compel Agency [Action] (sic) Unlawfully Withheld" filed on August 1, 1990, in Ione Band of Miwok Indians et al. v. Harold Burris et al. (USDC ED Cal. No. CIV-S-90-0993 (Ione Band v. Burris); Court Document (CD) 1).

2. The "Answer of Defendant United States of America" filed on September 28, 1990, in Ione Band v. Burris (CD 7).

3. The "Answer of Defendants Harold E. Burris, Esther Burris, 'et al.' (Excluding the United States of America)" filed on October 22, 1990, in Ione Band v. Burris (CD 11).

4. The "Plaintiffs' Status Conference Report" filed on January 7, 1991, in Ione Band v. Burris (CD 19).

5. The "Status Conference Report of Defendant United States of America" filed on January 7, 1991, in Ione Band v. Burris (CD 20).

6. The "Status Conference Report of Defendants Harold E. Burris, Esther Burris, 'et al'. (sic) (Excluding the United States of America)" filed on January 7, 1991, in Ione Band v. Burris (CD 18).

7. The "United States of America's Memorandum in Support of its Motion to Dismiss and for Summary Judgment" filed on February 20, 1991, in Ione Band v. Burris (CD 27).

8. The "Joinder of Motion for Summary Judgment and to Dismiss" filed by the individual defendants (Ione Indians) on February 19, 1991, in Ione Band v. Burris (CD 30).

9. The "Declaration of Michael L. Lawson, Ph.D." filed by the United States on February 19, 1991, in Ione Band v. Burris (CD 31).

10. The "Declaration of Arthur G. Barber" filed by the United States on February 20, 1991, in Ione Band v. Burris (CD 32).

11. The "Defendant United States' Amended Reply to Plaintiffs' Opposition to Motion of the United States to (sic) Summary Judgment and to Dismiss" filed on March 12, 1991, in Ione Band v. Burris (CD 39).

12. The "Supplemental Brief of the United States in Support of its Motion for Summary Judgment and to Dismiss" filed on March 28, 1991, in Ione Band v. Burris (CD 42).

13. The "Declaration of Guy Reynolds, Esq." filed by the United States on March 25, 1991, in Ione Band v. Burris (CD 43).

14. The "Defendant United States' Second Supplemental Brief in Support of its Motion for Summary Judgment and to Dismiss" filed on October 22, 1991, in Ione Band v. Burris (CD 51).

15. The "Defendant United States' Reply Brief to Plaintiffs' Supplemental Opposition" filed on November 12, 1991, in Ione Band v. Burris (CD 56).

16. The "Order" granting the defendants motion for summary judgment signed by Judge Karlton on April 22, 1992, and filed on April 23, 1992, in Ione Band v. Burris (CD 73).

17. The "Findings and Recommendation re Dismissal" signed by Magistrate Judge Nowinski and filed on May 31, 1996, in Ione Band v. Burris (CD 492).

18. The "Order" adopting Magistrate Judge Nowinski's recommendation of dismissal signed by Judge Karlton on August 5, 1996, and filed on August 6, 1996, in Ione Band v. Burris (CD 497).

19. The "Order" dismissing the plaintiffs and entering judgment signed by Judge Karlton on August 28, 1996, and filed on September 4, 1996, in Ione Band v. Burris (CD 500).

20. The "Judgment" filed on September 4, 1996, in accordance with the Court's Order of the same date, in Ione Band v. Burris (CD 501).

21. The Interior Board of Indian Appeals decision in Ione Band of Miwok Indians v. Sacramento Area Director, Bureau of Indian Affairs issued on August 4, 1992 (Docket No. IBIA 92-189-A; 22 IBIA 194).

22. The "Order" signed by Judge Levi and filed on November 3, 1998, in Nicolas Villa Jr. and Ione Band of Miwok Indians v. County of Amador et al. (USDC ED Cal. No. CIV-S-97-0531 DFL JFM).

Most of the documents (RJN Nos. 1- 20) in this Request for Judicial Notice are from the case of Ione Band of Miwok Indians et al. v. Harold Burris et al. (USDC ED Cal. No. CIV-S-90-09930). That case was open for six years and had over 500 filings and docket entries. Most of the documents and filings predate PACER and were not electronically filed. Although it was not feasible to attach copies of the entire Court file in that case, it is requested that this Court take judicial notice of the entire file as the Court deems necessary and appropriate.

Some of the documents listed above, including pleadings in the Ione Band v. Burris case, are also included the Administrative Record. Other pleadings from the Ione Band v. Burris case may be added to the Administrative Record by the parties in the related case of County of Amador, California v. The United States Department of Interior (Case No. 2:12-cv-01710-TLN ED Cal.). Under these circumstances, the Defendants cannot screen or filter the documents filed in Ione Band v. Burris for inclusion in the Administrative Record. The entirety of the court files that were in existence and available to the Defendants before they issued the Record of Decision are and should be included in the Administrative Record. Furthermore, these documents are part of this Court's files and matters of public record and, consequently, are subject to judicial notice.

Dated: February 13, 2014

Respectfully Submitted,

/s/ Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs
No Casino in Plymouth and
Citizens Equal Rights Alliance

DOCUMENT No. 1

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV-S-90-0993 RAR EM

IONE BAND OF MIWOK INDIANS, NICOLAS VILLA SR., BARBARA E. HILL, FRED MIKE, MURIEL MIKE, BERNICE VILLA, DONALD VILLA, GLEN VILLA, NICOLAS VILLA JR., GERALDINE BURRIS, ADELINE YBRIGHT and members of the IONE BAND OF MIWOK INDIANS,

Plaintiffs,

HAROLD E. BURRIS, ESTHER BURRIS, FRANK PINION, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, JEANETTE ALLEN, FRANK VILLA, HAROLD BURRIS JR., and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of IONE BAND OF MIWOK INDIANS and the UNITED STATES OF AMERICA,

Defendants,

Civil Action No.

COMPLAINT FOR DECLARATORY RELIEF, QUIET TITLE, BREACH OF TRUST, AND TO COMPEL AGENCY UNLAWFULLY WITHHELD

Plaintiffs for their complaint allege as follows:

INTRODUCTION

1. This is a complaint for: (a) declaratory relief for

entry of an order declaring that the Ione Band of Miwok Indians has and continues to be a sovereign Indian Tribe having government-to-government relations with the United States; (2) that the Ione Band of Miwok Indians is entitled to all rights of sovereignty generally enjoyed by Indian tribes; for an order declaring that the United States has breached its trust obligation to the Ione Band of Miwok Indians, and its members, by failing to acknowledge the sovereign status of the Band and denying to the Band and its members rights, privileges, and services; (3) for an order declaring that the land described in paragraph 20, infra, is subject to a constructive trust in favor of the Ione Band of Miwok Indians; (4) to quiet title to the reservation of the Ione Band of Miwok Indians described in paragraph 20, infra, in favor of the Ione Band of Miwok Indians; to compel agency action that has been unlawfully withheld; and for injunctive relief.

JURISDICTION AND VENUE

2. This action arises out of the Constitution and laws of the United States. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1361, 1362, 2201 and 2202. Venue for this action is properly within this district in accordance with 28 U.S.C. § 1391 in that the claims arose in this district, the plaintiffs and defendants reside and do business in this district, and the United States is a defendant.

PARTIES

3. Plaintiff Ione Band of Miwok Indians is a sovereign Indian Nation that has existed since time immemorial, has been recognized by the United States as being under federal jurisdiction, and has maintained its tribal status without interruption.

4. Plaintiffs NICOLAS VILLA SR., BARBARA E. HILL, FRED

MIKE, MURIEL MIKE, BERNICE VILLA, DONALD VILLA, GLEN VILLA, NICOLAS VILLA JR., and GERALDINE BURRIS, and the members of the Ione Band of Miwok Indians are members of the Ione Band of Miwok Indians and are some of the constructive trustees of the land occupied by the Ione Band of Miwok Indians that is described in paragraph 20, infra, and of which the Ione Band of Miwok Indians is the beneficiary of such trust.

5. Defendants HAROLD E. BURRIS, ESTHER BURRIS, FRANK PINION, GERALDINE BURRIS, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, JEANETTE ALLEN, FRANK VILLA, and HAROLD BURRIS JR. are also some of the constructive trustees, or may be successors in interest to the original constructive trustees of the land occupied by the Ione Band of Miwok Indians that is described in paragraph 20, infra, and of which the Ione Band of Miwok Indians is the beneficiary of such trust or otherwise claim an interest to such land.

6. Defendant UNITED STATES OF AMERICA includes, but is not necessarily limited to, all government entities and officials authorized by law or treaty to administer Indian affairs and programs and who assume responsibility and administration for programs and the protection of property and rights of Indian Tribes. Pursuant to 5 U.S.C. § 702 federal officers responsible for compliance with any mandatory or injunctive decree will be designated prior to such entry of any decree.

GENERAL ALLEGATIONS

7. The Ione Band of Miwok Indians consists of Locolumne and Mokelumne people that merged into a single band and who were the original inhabitants of Central part of what is now called California.

8. The Ione Band of Miwok Indians:

(a) from historical times until the present on a continuous basis, has been identified as "American Indian," or "Aboriginal;"

(b) it has inhabited a specific area or [lives] as a community viewed as American Indian and distinct from other populations in the area and its members are descendants of an Indian tribe which historically inhabited a specific area;

(c) it has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present;

(d) it has a governing document or statement describing in full the membership criteria and procedures through which it currently governs its affairs and its members;

(e) it has membership consisting of individuals who have established descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity;

(f) it has membership composed principally of persons who are not members of any other tribe; and,

(g) it has not expressly terminated its tribal status or has otherwise been forbidden to participate in the federal-Indian relationship by statute.

9. As a consequence of the facts alleged in the foregoing paragraph the Ione Band of Miwok Indians has repeatedly been identified as an Indian Tribe by federal authorities.

10. Since the days of early contact with European settlers, federal authorities have identified the Ione Band of Miwok

Indians as an American Indian Tribe. Government reports and memoranda dating to 1916 and earlier identify the group as an Indian Tribe. Federal agencies, agents, institutions and employees have identified the Ione Band of Miwok Indians as an Indian band. Federal authorities identified the "Ione Band" of Miwoks under that name as an Indian tribe as well as what it is now called. The Band was also identified as the "Mokelumne" and the "Locolumnes". The Bureau of American Ethnology, Army, federal service agencies and Bureau of Indian Affairs made and maintained contacts with the Ione Band of Miwok Indians and have maintained records of the Ione Band of Miwok Indians activities, describing their disposition, customs and membership.

11. The earliest estimates of the population of the Ione Band of Miwok Indians predate 1890. Federal agency and army records report the presence of the Ione Band of Miwok Indians, due to occasional confrontations. Miwoks, including this Band, were identified repeatedly. The Twelfth and Thirteenth Decennial Censuses identified the Miwok population of Amador County, including traditional elders and Headmen. The Kelsey Census (1906) identified the Miwok non-reservation population.

12. The United States acknowledged the entitlement of tribal members to funds and services in connection with their association with tribal lands. The Ione Band of Miwok Indians have been viewed as California Indians under federal jurisdiction, albeit sometimes only enjoying limited benefits of federal programs for higher education, health services (such as programs to assure satisfactory water on the rancheria property), housing improvements, and the like.

13. The Department of Interior/Bureau of Indian Affairs (BIA), through its agents and actions, acknowledged many tribes in California, and began to establish land bases for them. The Ione Band of Miwoks were among California groups clearly identified as Bands or Tribes in Department of Interior correspondence dating prior to 1919.

14. Although the Ione Band of Miwok Indians were recognized as a tribe by the federal government tribal members were made landless and forced to live as squatters wherever they could within their ancestral lands of which the Ione Band of Miwok Indians has never surrendered its claim to ownership obtained under indigenous law, custom, and practice and/or Spanish, Mexican, United States, or California law. In the early decades of this century, the federal government made some efforts to provide land for California Indians who had no land base and who were forced to live as squatters, setting up rancherias under the old Mexican system. Miwok Indians who by 1915 had taken up residence in the neighboring town of Ione were ordered to confine themselves to a forty-acre parcel with their other relations.

15. Between 1915 to the 1970's the federal government made effort to secure for the Ione Band of Miwok Indians title and federal trust status for the forty-acre parcel mentioned in the foregoing paragraph including the site of the ancient town which was the center of the Band's territory. The Ione Band of Miwok Indians complied with the federal demands to limit its members occupancy to a small reservation based on an unequivocal promise for the United States to purchase the 40 acre parcel and to take in trust for the Ione Band of Miwok Indians. Although the United States made a clear

decision and commitment to purchase the land in 1916, agreed to the purchase price, and even took an option for such purchase, the purchase was not completed.

16. Delays in the purchase resulted from the discovery of a mortgage on the property, the subsequent resale of the property, indifference of the prospective sellers to completing the sale, difficulties with clearing title and obtaining title insurance, bureaucratic hand-wringing and red tape, years of failed communication and the like, until the project all came to a halt in the 1930's, when the government abandoned its efforts.

17. In the 1970's, the Band renewed its effort to have the land it occupied taken in trust for it by the United States. The BIA's caused a title search to be performed for the forty acre parcel by the Western Land Title Company. In a letter dated October 19, 1970 a Western Land Title officer wrote, "there are numerous deeds of record describing the entire Rancho (Arroyo Seco Rancho) wherein a 40 acre tract of land is mentioned." The deeds contained numerous exceptions, and Exception No. 22 in many of the deeds regarded: "A 40 acre tract of land heretofore sold to the United States government, which is now fenced and used as an Indian reservation, as disclosed by various deeds of record wherein said tract was excepted from said deeds, including the deed from McKissick Cattle Company to Stephen & Kieffer, dated January 24, 1925, recorded in Book 45 of Deeds, Page 255, Records of Amador County." The title search yielded no legal description of the 40 acre tract, or any deed to the United States whereby the U. S. obtained a record title to same. A true copy of the October 19, 1970 letter is attached hereto as Exhibit A and is incorporated by

reference to this complaint.

18. Since the United States had failed to obtain a trust land base for the Band, the Ione Band of Miwok Indians filed suit in Amador County on October 18, 1972 to quiet and perfect title to the forty acre tract, and finally succeeded in this effort. True copies of the amended complaint upon which judgment was granted and the judgment are attached hereto as Exhibits B and C, respectively, and are incorporated by reference to this complaint.

19. Prior to initiation of the law suit mentioned in the foregoing paragraph, by letter dated January 20, 1972, Robert J. Donovan, Director of the California Rural Indian Land Project of California Rural Legal Services, contacted the BIA Sacramento Area Director requesting that the United States agree to accept title to the forty acre tract of land near Ione, California and to hold that land in trust for the Ione Band of Indians. A true copy of the January 20, 1970 letter is attached hereto as Exhibit D and is incorporated by reference to this complaint.

20. The Ione Band of Miwok Indians has been informed that, according to the BIA records, the Band has sought federal acknowledgement since 1916. However, by letter dated October 18, 1972, the Bureau of Indian Affairs Commissioner Louis Bruce informed the Ione Band of Miwok Indians that, since they had not voted to reject the Indian Reorganization Act, they were entitled to organize pursuant to that Act, and that "Federal recognition was evidently extended to the Ione Band of Indians at the time the Ione land purchase was contemplated. . . I am directing the Sacramento Area Office to assist in the preparation of a document containing a membership roll and governing papers which conform with the Indian

Reorganization [Act]." In the October 18, 1972 letter BIA Commissioner Bruce, " [a]s the Commissioner of Indian Affairs...", also "... agree[d] to accept ... the following described parcel of land to be held in trust for the Ione Band of Miwok Indians:

> Beginning at the point of intersection of the center line of the County Road to Jackson, with the westerly line of the fifty-two acre tract of land owned by Anthony Meath, Armando Dellaringa, Rocco Dellaringa and Albert Dellaringa, as recorded in Book 130, Official Records, Amador County, California, page 98; thence following the center line of said County Road, North sixty-five degrees, fifty minutes West (N. 65 deg. 50' W.) One thousand seven hundred twenty-five (1725) feet to a point; thence at right angles, North twenty-four degrees, ten minutes East (N.24 deg. 10" E) One thousand seventy-two (1072) feet to a point; thence at right angles, South sixty-five degrees, fifty minutes East *S. 65 deg. 50'E) One thousand five hundred thirty-one (1531) feet to the West boundary of the said property of Anthony Meath, Armando Dellaringa, Rocco Dellaringa and Albert Dellaringa; thence following said boundary line, South fourteen degrees, eight minutes West (S. 14 deg. 08' W) One thousand eighty-seven (1087) feet to the point of beginning.

This is the parcel of land of which the Ione Band of Miwok Indians seeks to declare a trust in its favor or to quiet title in its favor. A true copy of the October 18, 1972 letter is attached hereto as Exhibit E and is incorporated by reference to this complaint.

21. The decisions, directives, and orders made by Commissioner Bruce in his October 18, 1972 letter constituted a final decision of the Commissioner. Said final decision and all matters therein were within the Commissioner's statutory jurisdiction and delegated authority to make such a decision and to determine all matters necessary a foundation for the decision.

22. Notwithstanding the Commissioner's mandate to

complete preparation of Band documents consistent with the Indian Reorganization Act and to take the land described in paragraph 20, supra, in trust for the Ione Band of Miwok Indians, the BIA with out any basis, failed to comply with the mandate. Moreover, despite continuous occupation, for many generations, of lands within their aboriginal range as a tribe, including the land described in paragraph 20, supra, the BIA presently refuses to acknowledge the Ione Band of Miwok Indians as an Indian tribe, and is denying the Band and its members rights and authority enjoyed by tribes generally. Rather, the BIA is attempting to require the Ione Band of Miwok Indians, an already-acknowledged California Indian Tribe, to go through a recently adopted BIA federal tribal acknowledgement process (25 C.F.R. Part 83) as a condition to receiving confirmation of the earlier unequivocal acknowledgements of tribal status.

23. By letter dated February 20, 1990 the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) wrote to Glen A. Villa, Sr. stating the files of the Department of the Interior,

> ... do not show Ione Band [of Miwok Indians] to be federally recognized as an Indian tribe within the meaning of Federal law. Therefore, the only administrative option for the group to achieve such federal status is through the Acknowledgment process set forth in Part 83 of the Code of Federal Regulations (25 CFR 83).

A true copy of the February 20, 1990 letter is attached hereto as Exhibit F and is incorporated by reference to this complaint. At the time the letter was sent, Glenn A. Villa, Sr. not holding any Band office lacked authority to act on behalf of the Ione Band of Miwok Indians, including receiving notices or other correspondence, Nicolas Villa Jr. being the Band Chairman at the time the February 20, 1990 letter was sent. The February 20. 1990 letter from the

Deputy to the Assistant Secretary does not purport to rescind or otherwise overrule the October 18, 1972 decision of BIA Commissioner Bruce recognizing, and acknowledging previous recognition of, the Ione Band of Miwok Indians as a federally recognized Indian tribe. The Department of Interior has not taken any other action to rescind or otherwise set aside the October 18, 1972 decision of BIA Commissioner Bruce recognizing and acknowledging previous recognition of the Ione Band of Miwok Indians as a federally recognized Indian tribe. The linchpin of the Department of Interior's position set out in its February 20, 1990 letter and subsequent pronouncements, is that the BIA's failure to complete its ministerial duties mandated by Commissioner Bruce caused the decision to be of no legal effect. The Department of Interior in its February 20, 1990 letter, and subsequent pronouncements did not address the numerous prior federal acknowledgments of the tribal status of the Ione Band of Miwok Indians.

24. Actions by the Bureau of Indian Affairs in 1915 clearly establish that the Ione Band of Miwok Indians was determined to be a tribal unit entitled to services and benefits generally available under the law to Indian tribes in the same or similar conditions. These determinations are established by the following documents: (1) 1915 letter (believed to be March 24, 1915) from BIA Commissioner Cato Sells to Special Indian Agent John J. Terrell (Reference Land-Allotments, W A M) issuing instructions for the investigation and locating of "small bands of homeless Indians"; (2) April 20, 1915 letter from Cato Sells to Special Indian Agent John J. Terrell (Land Allotments, 41475-15) issuing instructions for the locating of "homeless-bands"; (3) April 20, 1915 letter from John J.

Terrell to Cato Sells recording the continuing existence of the Ione Band (Captain Charlie's); (4) May 1, 1915 letter from John J. Terrell to Cato Sells stipulating to the sovereign status of the Ione Band as a tribe or band of Indians and enumerating the members in a special census; (5) May 21, 1915 letter from Second Commissioner C.F. Hawke (Reference-Land Allotments, 54493-1915,54777-1915) to John J. Terrell regarding the purchase of land for the Ione Band; (6) July 12, 1915 letter from Assistant Commissioner E.B. Meritt to the Secretary of the Interior regarding, inter alia, selection of land for bands located in California; (7) September 2, 1915 letter C.F. Hawke, Chief Clerk, Department of the Interior, to John J. Terrell (Land Allotments, 91779-1915 et al.) regarding purchase of parcels of land including a purchase for the Ione Band; and (8) May 10, 1916 letter from John J. Terrell to Cato Sells (Reference 52797) enclosing tabulated statement for the purchase of land for named California Bands including the Ione Band. True copies of the correspondence described herein are attached hereto as Exhibit G and are incorporated by reference to this complaint. Defendant United States has been presented with the foregoing described documents collected in Exhibit G and has knowledge of them as its official records. However, defendant United States now refuses to acknowledge the clear prior recognition of the Ione Band of Miwok Indians as a federal tribe as stated in said documents. Defendant United States has not offered any explanation why the recognition of the Ione Band of Miwok Indians as a federally recognized tribe set out in the aforementioned documents do not reflect the decision of its agency charged with the administration of Indian Affairs, and as a consequence the position of the United States. The Secretary of the

Interior has not published in the Federal Register any notice that the Ione Band of Miwok Indians is a sovereign tribal entity having government-to-government relations with the United States and entitled to services enjoyed by tribal entities generally.

25. By letter dated June 29, 1990 the Ione Band of Miwok Indians, through its Band Chairman, demanded that the Secretary of the Interior publish in the Federal Register, or otherwise state in writing, his intention to do so, acknowledgment that the Ione Band of Miwok Indians is a "...TRIBAL ENTITY HAVING GOVERNMENT-TO-GOVERNMENT RELATIONS WITH THE UNITED STATES AND IS ENTITLED TO SERVICES GENERALLY PROVIDED TO ALL INDIAN TRIBES." A true copy of the June 29, 1990 letter is attached hereto as Exhibit H and is incorporated by reference to this complaint. The Department of the Interior has not responded to the demand or otherwise published any acknowledgment of the Ione Band of Miwok Indians as an Indian tribe.

26. On or about December 30, 1988 Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr. and Jeanette Allen commenced a law suit in the Superior Court, County of Amador, State of California, Case No. 15292. Each, of these individuals, has been named as defendants in this action. The complaint was amended on or about April 17, 1989 and remains pending in the Superior Court. A true copy of the amended complaint is attached hereto as Exhibit I and is incorporated by reference to this complaint. The plaintiffs in the state litigation seek: (1) a declaration that the Band's land described in paragraph 20, supra, is not subject to federal jurisdiction and supervision of the BIA and that it is private land; and (2) partition of the Band's land described in paragraph 20, supra according to the alleged respective

interests. The trial judge based on the February 20, 1990 Department of Interior letter, Exhibit F hereto, and the absence of publication of the Ione Band of Miwok Indians as an Indian tribe in the Federal Register has refused to acknowledge the sovereignty of the Ione Band of Miwok Indians or otherwise accord it the protections generally enjoyed by Indian tribes.

27. The Ione Band of Miwok Indians and the other plaintiffs herein lack an adequate and/or speedy remedy for the claims stated herein and will be irreparably injured unless plaintiff's are granted preliminary and permanent injunctive relief.

FIRST CAUSE OF ACTION

(Mandamus)

28. The allegations of paragraphs 1 through 27 above are incorporated by reference for this cause of action as if fully stated herein.

29. The decision of Commissioner Bruce in his October 18, 1972 letter mandates that the United States recognize the Ione Band of Miwok Indians as a sovereign Indian Tribe having government-to-government relations with the United States, that the Ione Band of Miwok Indians is entitled to all rights of sovereignty generally enjoyed by Indian tribes, and that the land described in the decision, and in paragraph 20 to this complaint, be accepted by the United States to be held in trust for the Ione Band of Miwok Indians. These mandates are binding on defendant United States because such action was lawfully taken by its authorized agents. The decisions of Commissioner Bruce that the United States has recognized the Ione Band of Miwok Indians as a sovereign Indian Tribe having government-to-government relations with the United

States, that the Ione Band of Miwok Indians is entitled to all rights of sovereignty generally enjoyed by Indian tribes, and that the land described in the decision, and in paragraph 20 to this complaint, be accepted by the United States to be held in trust for the Ione Band of Miwok Indians does not permit agents of the United States any discretion to alter or amend the requirements of such action and such action is purely ministerial. Defendant United States has breached its duty owed to plaintiff Ione Band of Miwok Indians to fully carry out the action required by Commissioner Bruce in his October 18, 1972 decision and pursuant to 28 U.S.C § 1361 must be compelled to fulfill its duty.

SECOND CAUSE OF ACTION

(Agency Action in Excess of Jurisdiction)

30. The allegations of paragraphs 1 through 27 above are incorporated by reference for this cause of action as if fully stated herein.

31. The actions of the United States, through its agents in the executive branch of the federal government, to require the Ione Band of Miwok Indians to seek recognition of its previously recognized tribal status through the procedures set out in 25 C.F.R. Part 83 constitute a de facto termination of the tribal status of the Ione Band of Miwok Indians. Termination of tribal status is reserved only to the Congress of the United States. Any action to terminate tribal status by the executive branch is in excess of authority and is null and void.

THIRD CAUSE OF ACTION

(Violation of Due Process of Law)

32. The allegations of paragraphs 1 through 27 above are

incorporated by reference for this cause of action as if fully stated herein.

33. The actions of the United States, through its agents, to withhold recognition of the Ione Band of Miwok Indians as an Indian tribe with government-to-government relations with the United States, and to deny services and benefits generally enjoyed by Indian tribes, after previously recognizing such status constitutes a termination of rights and privileges of the Ione Band of Miwok Indians without due process of law. The United States is barred by the Fifth Amendment from terminating the rights and privileges of the Ione Band of Miwok Indians without a prior due process hearing.

FOURTH CAUSE OF ACTION

(Unlawful Rule Making)

34. The allegations of paragraphs 1 through 27 above are incorporated by reference for this cause of action as if fully stated herein.

35. The practice of the defendant United States, through its agents, to terminate the Ione Band of Miwok Indians previous recognition of tribal status and to require the Ione Band of Miwok Indians to apply for tribal recognition under 25 C.F.R. Part 83 constitutes rule making without prior notice and comment as required by 5 U.S.C § 553 and is in violation thereof.

FIFTH CAUSE OF ACTION

(Denial of Equal Protection of Law)

36. The allegations of paragraphs 1 through 27 above are incorporated by reference for this cause of action as if fully stated herein.

37. The federal acknowledgment process regulations

promulgated by the Secretary of the Interior and set out in 25 C.F.R. Part 83 permit the continuing recognition of tribes as being federal recognized. However, neither the already recognized tribes or the executive may have been able to, or currently could, meet the burden of demonstrating the requisites for establishing a right to tribal recognition when such federal tribal recognition was first extended, or at times thereafter, if the standards set out in the current regulations (25 C.F.R. Part 83) were, or are, utilized. Thus, Indian entities have and continue to be subjected to differing standards for federal tribal recognition without a lawful basis.

38. Assuming that it is determined that the previous federal recognition of the Ione Band of Miwok Indians was never extended or somehow lawfully terminated or set aside, the federal acknowledgment process regulations promulgated by the Secretary of the Interior and set out in 25 C.F.R. Part 83 deny the Ione Band of Miwok Indians equal protection of the law in violation of the Fifth and Fourteenth Amendments of the Constitution.

SIXTH CAUSE OF ACTION

(Breach of Fiduciary and Trust Responsibility, United States)

39. The allegations of paragraphs 1 through 27 above are incorporated by reference for this cause of action as if fully stated herein.

40. The plaintiffs herein are Indians and an Indian tribal entity and in those capacities, the defendant United States has a fiduciary and trust responsibility to protect and preserve the benefits and privileges granted to Indians and Indian Tribes. Defendant United States as to matters alleged herein breached its fiduciary and trust responsibility to plaintiffs as Indians and as

an Indian Tribe under the laws of the United States to the damage of the plaintiffs.

SEVENTH CAUSE OF ACTION

(Constructive Trust)

41. The allegations of paragraphs 1 through 27 above are incorporated by reference for this cause of action as if fully stated herein.

42. On October 31, 1972, judgment was entered in the Superior Court of the State of California for the County of Amador, Nicolas Villa, Sr., et al. v. W.H. Moffat, et al. Case No. 8160 adjudging that the plaintiffs named in the complaint including "other members of the IONE BAND OF INDIANS" to be owners of the parcel described in paragraph 20, supra, free of all other claims and encumbrances. Although the title was quieted in favor of individual members of the Ione Band of Miwok Indians and other members of the Ione Band of Indians, the purpose of bringing the quiet title action was to obtain title for the parcel described in paragraph 20, supra, for the Ione Band of Miwok Indians. Title was not taken in the name of the individuals and other members of the Ione Band of Indians with the intent of creating any right, title, or interest in the individuals specifically or generically named as plaintiffs. It was intended that the land described in paragraph 20 remain a reservation for the Ione Band of Miwok Indians and that all rights of occupancy and use by individuals be determined by the said Band's custom and practice and requirements of its organizational documents. The specifically and generically named individuals were only granted legal title for the sole and limited purpose of conveying legal title to the United States to be held in trust for

the Ione Band of Miwok Indians.

43. The land described in paragraph 20, supra, is subject to a constructive trust in favor of the Ione Band of Miwok Indians as the beneficiary of the trust.

EIGHTH CAUSE OF ACTION

(Breach of Fiduciary Duty, Private Defendants)

44. The allegations of paragraphs 1 through 27 and 42 and 43 above are incorporated by reference for this cause of action as if fully stated herein.

45. The private defendants named herein are trustees of a constructive trust of which the trust res is the land described in paragraph 20, supra. The defendants, Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr. and Jeanette Allen owe a fiduciary duty to the plaintiff, Ione Band of Miwok Indians and its members to take all necessary action to have the land described in paragraph 20, supra, conveyed to the Ione Band of Miwok Indians and not to interfere with the use and quiet enjoyment of said land by the Ione Band of Miwok Indians and its members.

46. Defendants, Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr. and Jeanette Allen have breached their fiduciary duty owed to the plaintiff, Ione Band of Miwok Indians and its members by: (1) refusing to take all necessary action to have the land described in paragraph 20, supra, conveyed to the Ione Band of Miwok Indians; (2) by claiming ownership of said land and instituting a law suit to appropriate plaintiff's, Ione Band of Miwok Indians, land to their own use; and (3) by continually interfering with the use and quiet enjoyment of

said land by the Ione Band of Miwok Indians and its members including endangering the health and safety of the Band's members.

47. As a proximate result of defendants', identified in the foregoing paragraph, breach of fiduciary duty, and the facts herein alleged, plaintiff, Ione Band of Miwok Indians, and its members, have been damaged in an amount that is not yet known.

48. The aforementioned conduct of the defendants identified in paragraph 46, supra, was made with the intention on the part of said defendants to deprive plaintiffs of property or legal rights or otherwise causing injury, and was despicable conduct that subjected plaintiffs to cruel and unjust hardships in a conscious disregard of their rights, so as to justify an award of exemplary damages by way of example.

NINTH CAUSE OF ACTION

(Quiet Title)

49. The allegations of paragraphs 1 through 27 above are incorporated by reference for this cause of action as if fully stated herein.

50. Plaintiff, Ione Band of Miwok Indians, have occupied and have resided continuously on the land described in paragraph 20, supra, since on and before October 31, 1972; and have maintained actual possession of said lands at all times material to this complaint.

51. Plaintiff, Ione Band of Miwok Indians, has by itself, been in actual, exclusive, and adverse possession of the land described in paragraph 20, supra, and has exercised its exclusive sovereignty over said land, continuously for the period beginning at least October 31, 1972 and continuing thereafter without interrup-

tion, claiming to own the same in fee against the whole world and the right to govern said land as permitted to Indian tribes by law, and have paid all taxes of every kind levied or assessed against said land for all times material to this complaint.

52. Defendants, except the United States, claim an interest or interest therein adverse to the plaintiff, Ione Band of Miwok Indians, and the claims of said defendants are without any right whatsoever, and the said defendants have not, nor has any of them, any estate, right, title, or interest whatsoever, in said land or premises, or any part thereof.

TENTH CAUSE OF ACTION

(Preliminary and Injunctive Relief)

53. The allegations of paragraphs 1 through 27, 42, 43, 45 through 48, and 50 through 52 above are incorporated by reference for this cause of action as if fully stated herein.

54. Defendants conduct is adversely, greatly, and irreparably affecting the health, safety, and well-being of the plaintiffs in their use of the land described in paragraph 20, supra, and the obtaining of benefits and services available to them on the basis of their status of an Indian Tribe and Indians.

55. Plaintiffs are entitled to the granting of preliminary and permanent injunctive relief for the claims stated herein, injunctive relief necessary to insure their right to receive protection of their status as an Indian Tribe and Indians, to protect the health and safety of the plaintiffs and to otherwise give them quiet enjoyment of the land described in paragraph 20 supra, and to the extent necessary to carry out declaratory relief granted as a result of this complaint.

WHEREFORE, plaintiffs pray for judgment as follows:

1. that the Ione Band of Miwok Indians has and continues to be a sovereign Indian Tribe having government-to-government relations with the United States;

2. that the Ione Band of Miwok Indians is entitled to all rights of sovereignty generally enjoyed by Indian tribes;

3. that the action of the defendant United States to terminate the prior recognition of the Ione Band of Miwok Indians as a sovereign Indian tribe without a prior due process hearing is a violation of the due process clause of the Fifth Amendment of the United States Constitution;

4. that the action of the defendant United States to terminate the prior recognition of Ione Band of Miwok Indians as a sovereign Indian tribe and to require the Ione Band of Miwok Indians to apply for tribal recognition under 25 C.F.R. Part 83 constitutes rule making without prior notice and comment as required by 5 U.S.C § 553 and is in violation thereof;

5. That the federal acknowledgment process regulations promulgated by the Secretary of the Interior and set out in 25 C.F.R. Part 83 denies the Ione Band of Miwok Indians equal protection of the law and that the regulations are unconstitutional;

6. that the United States has breached its trust obligation to the Ione Band of Miwok Indians and its members by failing to acknowledge the sovereign status of the Band and as a result of such breach it has caused damage to the Ione Band of Miwok Indians, and its members;

7. that the land described in paragraph 20 of this complaint, is subject to a constructive trust in favor of the Ione

Band of Miwok Indians;

8. that title to the land described in paragraph 20 of this complaint is quieted in favor of the Ione Band of Miwok Indians and that said Band is declared and adjudged the owner of said land and that the defendants, or any of them, have no estate or interest whatsoever in or to said land and premises, and that said defendants be forever barred from asserting any claim whatsoever in or to said land and premises adverse to the interest of plaintiff, Ione Band of Miwok Indians excepting provision for granting legal title in the United States in trust for the Ione Band of Miwok Indians;

9. compelling the United States to take title to, and hold title, of the property described in paragraph 20 of the complaint in trust for the benefit of Ione Band of Miwok Indians;

10. compelling all other action agency action proven to have been unlawfully withheld;

11. granting an award of damages, according to proof, against the defendants identified in paragraph 46 of this complaint including an award for exemplary damages;

12. issuance of preliminary and permanent injunctions and for injunctive relief barring defendants: from taking any actions contrary to any judgment made herein and declarations and determinations made therein; from interfering with the Ione Band of Miwok Indians in the exercise of its self-government; from damaging the health, safety, and well-being of the plaintiffs or to otherwise interfere with their quiet enjoyment of the land described in paragraph 20 of this complaint; and issuance of mandatory injunctions requiring defendants to take or perform all acts necessary to render relief granted by judgment effective;

13. for costs of suit including attorney's fees against all defendants and specifically against the United States under the Equal Access to Justice Act; and

14. such other and further relief as is appropriate.

DATED: August 1, 1990

Louis Demas

LOUIS DEMAS
Attorney for Plaintiffs

DOCUMENT No. 2

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

DAVID F. LEVI
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Attorneys for Defendant United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, NICOLAS VILLA SR., BARBARA E. HILL, FRED MIKE, MURIEL MIKE, BERNICE VILLA, DONALD VILLA, GLEN VILLA, NICOLAS VILLA JR., GERALDINE BURRIS, ADELINE YBRIGHT and members of the IONE BAND OF MIWOK INDIANS, Plaintiffs, v. HAROLD E. BURRIS, ESTHER BURRIS, FRANK PINION, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, JEANETTE ALLEN, FRANK VILLA, HAROLD BURRIS JR., and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of IONE BAND OF MIWOK INDIANS and the UNITED STATES OF AMERICA, Defendants.	CIVIL NO. S-90-0993 RAR/EM ANSWER OF DEFENDANT UNITED STATES OF AMERICA

/ / /

/ / /

Defendant United States of America (hereafter, "defendant"), in answer to plaintiffs' complaint, admits, denies and affirmatively avers as follows:

INTRODUCTION

1. To the extent that Paragraph 1 of plaintiffs' complaint contains a characterization of plaintiffs' action, no response is required. To the extent that factual allegations are contained therein, defendant denies each and every such allegation.

JURISDICTION AND VENUE

2. Paragraph 2 contained conclusions of law to which no response is required. To the extent that a response is required, defendant denies the allegations contained therein.

PARTIES

3. Defendant denies the allegations contained in Paragraphs 3-5.

4. Defendant admits the allegations contained in the first sentence of Paragraph 6. The second sentence of Paragraph 6 contains a statement of plaintiffs' intent and contains conclusions of law to which no response is required; to the extent a response is required, defendant the allegations contained therein.

GENERAL ALLEGATIONS

5. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 7 and 8, and therefore denies the same.

6. Defendant denies the allegations contained in Paragraph 9.

/ / /

7. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 10 and 11, and therefore denies the same.

8. Defendant denies the allegations contained in Paragraph 12. Defendant affirmatively avers that individual Indians living in and around Ione, California, have received federal assistance for Indians.

9. Defendant admits the allegations contained in the first sentence of Paragraph 13; defendant denies the allegations contained in the second sentence of Paragraph 13.

10. The first sentence of Paragraph 14 is unintelligible and therefore defendant cannot frame a meaningful response; to the extent that a response is required, defendant denies the allegations contained therein. With respect to the remainder of Paragraph 14, defendant admits that earlier in this century, the government made efforts to provide land for California Indians; defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 14, and therefore denies the same.

11. With respect to Paragraph 15, defendant admits that it undertook efforts at various times between 1915 and the 1930's to secure title and/or federal trust status for a 40-acre parcel in or around Ione, California. Defendant denies the remaining allegations contained in Paragraph 15.

12. With respect to Paragraph 16, defendant admits that the delay in purchasing the 40-acre tract was due to the discovery of a mortgage on the property, the subsequent resale of the property, the indifference of the prospective sellers to completing the

sale, and the difficulties with clearing title and obtaining title insurance. Defendant denies the remaining allegations contained in Paragraph 16.

13. Defendant denies the allegations contained in the first sentence of Paragraph 17. Defendant admits the allegations contained in the second sentence of Paragraph 17. With respect to the third sentence of Paragraph 17, the letter referenced and quoted therein speaks for itself. With respect to the fourth sentence of Paragraph 17, the deeds referenced and quoted therein speak for themselves. With respect to the fifth sentence of Paragraph 17, defendant admits that it was advised by the Western Land Title Company that their title search yielded no legal description of the 40-acre tract or any deed to the United States whereby the U.S. obtained a record title to same; defendant affirmatively avers that it has never obtained record title or any deed to the 40-acre tract; and defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the fifth sentence and therefore denies the same. With respect to the allegations contained in the last sentence of Paragraph 17, defendant admits that Exhibit A is a true and correct copy of the 19 October 1970 letter from Western Land Title Company to the Bureau of Indian Affairs; again, with respect to its incorporation by reference, the letter speaks for itself. Defendant affirmatively avers that the title search was performed in response to a request on 14 August 1970 from Effie Burris and plaintiffs Fred and Muriel Mike for assistance funds for the purpose of improving their homes.

14. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18, and therefore denies the same.

15. Defendant admits the allegations contained in the first sentence of Paragraph 19. With respect to the allegations contained in the last sentence of Paragraph 19, defendant admits that Exhibit D is a true and correct copy of the 20 January 1972 letter from California Indian Legal Services to the Bureau of Indian Affairs; with respect to its incorporation by reference, the letter speaks for itself.

16. With respect to the first sentence of Paragraph 20, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained therein. With respect to the body of Paragraph 20 commencing at the end of the first sentence and appearing at 8:20-9:16, the letter referenced and quoted therein speaks for itself. With respect to the second-to-the-last sentence of Paragraph 20, defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations therein. With respect to the allegations contained in the last sentence of Paragraph 20, defendant admits that Exhibit E is a true and correct copy of the 18 October 1972 letter from the Bureau of Indian Affairs to Nicolas Villa; with respect to its incorporation by reference, the letter speaks for itself. Defendant affirmatively avers that title apparently has already been quieted in the state court action described in Paragraph 18 of plaintiffs' complaint and, if so, is res judicata as to the issue of quiet title.

/ / /

17. Defendant denies the allegations contained in Paragraph 21.

18. Defendant denies the allegations contained in the first sentence of Paragraph 22. Defendant lacks knowledge or information sufficient to form a belief as to the allegations contained in the second sentence of Paragraph 22 and therefore denies the same. With respect to the third sentence of Paragraph 22, defendant admits that plaintiffs and/or others who constitute the group that calls itself the Ione Band of Miwok Indians have been advised that to obtain federal recognition, the procedures set forth at 25 C.F.R. Part 83 must be followed; defendant denies each and every remaining allegation contained therein.

19. With respect to the allegations contained at 10:15-21 of Paragraph 23, the letter quoted and referenced therein speaks for itself. With respect to the allegations contained in the sixth-to-the-last sentence of Paragraph 23 (commencing at 10:22), defendant admits that Exhibit F is a true and correct copy of the 20 February 1990 letter from the Bureau of Indian Affairs to Glen A. Villa, Sr.; with respect to its incorporation by reference, the letter speaks for itself. Defendant lacks knowledge or information sufficient to form a belief as to the allegations contained in the fifth-to-the-last sentence of Paragraph 23 (commencing at 10:23), and therefore denies the same. The third- and fourth-to-the-last sentences of Paragraph 23 (commencing at 10:28) contain conclusions of law to which no response is required; furthermore, the 20 February 1990 and 18 October 1972 letters to which plaintiffs refer and which appear as plaintiffs' Exhibits F and E, respectively, speak for themselves. The last

two sentences of Paragraph 23 (commencing at 11:9) contain conclusions of law to which no response is required; again, the 20 February 1990 letter to which plaintiffs refer and which appears as plaintiffs' Exhibit F speaks for itself; defendant denies each and every remaining allegation contained in the remainder of the last two sentences of Paragraph 23. Defendant affirmatively avers that the Ione Band of Miwok Indians is not and has not been federally recognized by the United States.

20. Defendant denies the allegations contained in the first sentence of Paragraph 24. With respect to the second sentence of Paragraph 24, the letters referenced therein speak for themselves. With respect to the third sentence of Paragraph 24, defendant denies that true and correct copies of the correspondence identified in the second sentence of said paragraph appear at Exhibit G. Defendant denies the allegations contained in the fourth sentence of Paragraph 24. The fifth sentence of Paragraph 24 contains conclusions of law to which no response is required; to the extent that a response is required, defendant affirmatively avers that the Ione Band of Miwok Indians is not and has not been federally recognized; defendant denies each and every remaining factual allegation contained therein. Defendant denies the allegations contained in the sixth sentence of Paragraph 24. Defendant admits the allegations contained in the seventh sentence of Paragraph 24. Defendant affirmatively avers that the Secretary of the Interior published in the Federal Register on 2 January 1979 a notice of receipt of petition for federal acknowledgement of existence of the "Ione Band" as an Indian tribe. A true and correct copy of the 2 January 1979 Federal Register Notice

entitled "Receipt of Petition for Federal Acknowledgement of Existence as Indian Tribes" appears at Exhibit 1 hereto.

21. With respect to the allegations contained in the first sentence of Paragraph 25, the letter referenced and quoted therein speaks for itself; to the extent that further factual allegations are contained in the first sentence of Paragraph 25, defendant lacks knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same. With respect to the second sentence of Paragraph 25, defendant admits that a true and correct copy of a letter dated 29 June 1990 from Nicolas Villa, Jr., to the Bureau of Indian Affairs is attached as Exhibit H to plaintiffs' complaint; with respect to factual allegations that may be contained therein, the letter speaks for itself. Defendant denies the allegations contained in the third sentence of Paragraph 25 and affirmatively avers that on 20 August 1990 defendant responded to Mr. Villa's letter of 29 June 1990. A true and correct copy of defendant's 20 August 1990 letter to Nicolas Villa, Jr., appears at Exhibit 2 hereto.

22. Defendant admits the allegations contained in the second sentence of Paragraph 26. With respect to the remaining allegations contained in Paragraph 26, defendant lacks knowledge or information sufficient to form a belief as to the truth of said allegations and therefore denies the same. Defendant affirmatively avers that the amended complaint referenced in Paragraph 26 speaks for itself.

23. The allegations contained in Paragraph 27 are conclusions of law to which no response is required. To the extent that factual allegations are contained therein, defendant

denies each and every such allegation.

FIRST CAUSE OF ACTION

(Mandamus)

24. With respect to Paragraph 28, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

25. Defendant denies the allegations contained in Paragraph 29.

SECOND CAUSE OF ACTION

(Agency Action in Excess of Jurisdiction)

26. With respect to Paragraph 30, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

27. Defendant denies the allegations contained in Paragraph 31.

THIRD CAUSE OF ACTION

(Violation of Due Process of Law)

28. With respect to Paragraph 32, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

29. Defendant denies the allegations contained in Paragraph 33.

FOURTH CAUSE OF ACTION

(Unlawful Rule Making)

30. With respect to Paragraph 34, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

/ / /

31. Defendant denies the allegations contained in Paragraph 35.

FIFTH CAUSE OF ACTION

(Denial of Equal Protection of Law)

32. With respect to Paragraph 36, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

33. The first and second sentences of Paragraph 37 are unintelligible and therefore defendant cannot frame a meaningful response; to the extent that a response is required, defendant denies the allegations contained therein. Defendant denies the allegations contained in the third sentence of Paragraph 37.

34. Defendant denies the allegations contained in Paragraph 38.

SIXTH CAUSE OF ACTION

(Breach of Fiduciary and Trust Responsibility, United States)

35. With respect to Paragraph 39, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

36. Defendant denies the allegations contained in Paragraph 40.

SEVENTH CAUSE OF ACTION

(Constructive Trust)

37. With respect to Paragraph 41, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

38. With respect to the allegations contained in the first sentence of Paragraph 42, the judgment entered in the case

referenced therein speaks for itself. Defendant lacks knowledge and information sufficient to form a belief as to the allegations contained in the remainder of Paragraph 42 and therefore denies the same.

39. The allegations contained in Paragraph 43 are conclusions of law to which no response is required. To the extent that a response is required, defendant the allegations contained therein.

EIGHTH CAUSE OF ACTION

(Breach of Fiduciary Duty, Private Defendants)

40. With respect to Paragraph 44, defendant realleges its answers to Paragraphs 1 through 27 and 42 as though fully set forth herein.

41. Paragraphs 45 through 48 contain conclusions of law to which no response is required. To the extent that a response is required, defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

NINTH CAUSE OF ACTION

(Quiet Title)

42. With respect to Paragraph 49, defendant realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

43. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 50 and therefore denies the same.

44. Paragraphs 51 and 52 contain conclusions of law to which no response is required. To the extent that a response is

required, defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained therein and therefore denies the same.

TENTH CAUSE OF ACTION

(Preliminary and Injunctive Relief)

45. With respect to Paragraph 53, defendant realleges its answers to Paragraphs 1 through 27, 42, 43, 45 through 48, and 50 through 52 as though fully set forth herein.

46. Defendant denies the allegations contained in Paragraphs 54 and 55.

47. The paragraphs that follow Paragraph 55 constitute plaintiffs' prayer for relief to which no response is required. To the extent that factual allegations are contained therein, defendant denies each and every such allegation.

48. Defendant specifically denies all of the allegations of the complaint not hereinbefore answered.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' complaint fails to satisfy the requirements of Fed.R.Civ.P. 8(a) in that it fails to contain a short and plain statement of plaintiffs' claim.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' complaint is barred by the statute of limitations and, alternatively, laches.

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FOURTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over plaintiffs' complaint because plaintiffs have failed to exhauste their administrative remedies.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' quiet title claim is barred by the doctrine of res judicata.

WHEREFORE, defendant United States of America prays for judgment dismissing plaintiffs' claim and awarding to defendant her costs in this action and for such further relief as the Court deems appropriate.

DATED: 28 Sep 1990

DAVID F. LEVI
United States Attorney

By: /s/ Deborah E. Weijde
DEBORA VAN DER WEIJDE
Assistant U. S. Attorney

OF COUNSEL:

Neil McDonald, Esq.
U.S. Department of the Interior
Office of the Solicitor
Branch of Tribal Government and Alaska
Washington, D.C. 20240
(202) 208-6526

BOOK 1 OF 3 BOOKS TUESDAY, JANUARY 2, 1979

[4310-02-M]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

RECEIPT OF PETITION FOR FEDERAL ACKNOWLEDGMENT OF EXISTENCE AS INDIAN TRIBES

DECEMBER 26, 1978.

This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 230 DM 2.

Pursuant to 25 CFR 54.8(b), notice is hereby given that prior to October 2, 1978, the effective date of 25 CFR Part 54, the following groups filed petitions for acknowledgment by the Secretary of the Interior that they exist as Indian tribes.

Section 54.8(b) of the regulations gives each petitioning group the opportunity to review, revise or supplement its petition. Therefore, the original petition, with a copy of the guidelines, will be returned to each petitioning group. The return of the petition will not affect the priority established by the initial filing. This is a notice of receipt of petition and does not constitute notice that the petitions listed are under active consideration. Notice of active consideration will be by mail to petitioners and other interested parties at the appropriate time.

Antelope Valley Indian Community, c/o Mr. Wesley Dick, Post Office Box 35, Colville, California 96107, 07/09/76.

Cherokee Indians of Georgia, Inc., c/o Mr. J. C. White Cloud Reynolds, 1516 14th Avenue, Columbus, Georgia 31901, 08/08/77.

Choctaw-Apache Indians, c/o Mr. Raymond L. Ebaro, Route 1, Box 168, Noble, Louisiana 71462, 07/02/76.

Clifton-Choctaw Indians, c/o Mr. Amos Tyler, Route 1, Box 81A, Mora, Louisiana 71455, 03/22/78.

Coos Tribe of Indians, c/o Mr. Russell Anderson, Box 3506, Coos Bay, Oregon 97420, 10/01/75.

Cowlitz Tribe of Indians (Lewis County), c/o Mr. Joseph E. Cloquet, 2815 Dale Lane East, Tacoma, Washington 98424, 09/17/75.

Creek Nation East of the Mississippi (Fourth, Alabama), c/o Mr. Thomas N. Tureen, Native American Rights Fund, Post Office Box 358, Calais, Maine 04106, 05/15/75.

Creeks East of the Mississippi, c/o Mr. John Wesley Thomley, Post Office Box 123, Molino, Florida 32577, 03/21/78.

Delaware-Muncie, c/o Mr. Clio Caleb Church Box 274, Pomona, Kansas 66076, 06/19/78.

Duwamish Indian Tribe, 15814 first Avenue S., Seattle, Washington 98148, 06/07/77.

Eastern Pequot Indians of Connecticut, c/o Mr. Roy Sebastian, Lantern Hill Reservation, RFD 7 Box 941, Ledyard, Connecticut 06339, 06/28/78.

Faircloth Indians, c/o Mr. Jerry Lee Faircloth, Sr., Post Office Box 161, Atlantic, North Carolina 28511, 08/05/78.

Florida Tribe of Eastern Creek Indians, c/o Mr. James E. Waite, Post Office Box 462, Pensacola, Florida 32592, 08/02/78.

Four Hole Indian Organization—Edisto Tribal Council, c/o Mr. Robert Davidson, Route 3, Box 42F, Ridgeville, South Carolina 29472, 12/30/76.

Grand Traverse Band of Ottawa-Chippewas, c/o Eleesha M. Pastor Michigan Indian Legal Services, 3041 N. Garfield Road, Traverse City, Michigan 49684, 05/05/38

Hatteras Tuscarora Indians, c/o Mr. Vermon Locklear, Route 3, Box 47A, Maxton, North Carolina 28364, 06/24/78.

Huron Potawatomi Band, Mr David Mackety, Route 1, Fulton, Michigan 49505, 03/11/72.

Ione Band, c/o Mrs. Bernice Villa, Route 1, Box 191, Ione, California 95640, 1918.

Jamestown Clallam Tribe of Indians, Route 5, Box 687, Port Angeles, Washington 98392, 01/22/76.

Lac Vieux Desert, c/o Mr. John McGeshick, Post Office Box 118, Watersmeet, Michigan 49969, 06/01/71.

Little Shell Band of North Dakota, c/o Ms. Mary Z. Wilson, Dunseith, North Dakota 58329, 11/11/75.

Little Shell Tribe of Chippewa Indians of Montana, c/o Mr. George Plummer, Star Route, Post Office Box 21, Dodson, Montana 59524, 04/28/78.

Lower Muskogee Creek Tribe East of the Mississippi, Inc., c/o Mr. Neal McCormick, Route 1, Tama Reservation, Cairo, Georgia 31728, 02/02/72.

Mashpee Wampanoag, Route 130 Mashpee, Massachusetts 02649, 07/07/75.

Mohegan Indian Group, Mr. John E. Hamilton, c/o Mr. Jerome M. Griner, Attorney and Counsellor at Law, 47 North Main Street, West Hartford, Connecticut 06107, 07/12/78.

Mono Lake Indian Community, c/o Mr. William J. Anderson, Post Office Box 237, Lee Vining, California 93541, 07,09,76.

Munsee Thames River Delaware, c/o Mr. William Lee Little Soldier, Post Office Box 587, Manitou Springs, Colorado 80911, 07/22/77.

Nanticoke Indian Association, c/o Mr. Kenneth S. Clark, Route 1, Box 107A, Millsboro, Delaware 19966, 08/08/78.

Piscataway Indians, c/o Mr. J Rush Proctor, General Delivery, Box 946, Waldorf, Maryland 20601, 02/22/78.

Plumas County Indians, Inc., c/o Mr. John R. Lewis, Post Office Box 833, 206 Main Street, Greenville, California 95947, 01/06/77.

Principal Creek Indian Nation, East of the Mississippi, c/o Mr. Arthur R. Turner, Post Office Box 391, Florala, Alabama 36442, 11/09/71.

Samish Tribe of Indians, c/o Mr. Robert Wooten, Samish Tribal Office, Post Office Box 817, Anacortes, Washington 98221, 06/13/75.

San Juan de Guadalupe Tiwa (Tortugas New Mexico), c/o Diamond, Rash, Leali & Schwartz, 1208 Southwest National Bank, El Paso, Texas 79901, 11/03/76.

Shinnecock Tribe, Post Office Box 16, Southampton, New York 11968, 02/08/78

Snohomish Tribe of Indians, c/o Mr. Alfred Cooper, Snohomish Corresponding Secretary, 8101 27th Avenue West, Everett, Washington 98203, 03/03/75.

Snoqualmie Indian Tribe c/o Ms. Helen C Harvey, 29204 117th S.E., Kent, Washington 98031, 02/05/76.

Southeastern Cherokee Confederacy, Inc. c/o Mr W. R. Jackson, Route 1, Box 111 Leesburg, Georgia 31763, 03/09/87.

Stillaccoom Tribe, c/o Ms Joan K. Marshall 2312 A. Street, Tacoma, Washington 98402, 08/28/74.

Tuinuhian Tribal Council, 1967 Woodland Avenue, Ketchikan, Alaska 99901, 07/03, 78.

Tunica-Biloxi Indian Tribe (Marksville, Louisiana), c/o Native American Rights Fund 1712 N Street, N.W., Second Floor, Washington, D.C. 20036, 09/07/1828.

Petitions may be examined in the Division of Tribal Government Services, Bureau of Indian Affairs, Department of the Interior, 18th and C Streets, N.W., Washington, D.C. 20242.

RICK LAVIS,
Acting Assistant Secretary,
Indian Affairs.

[FR Doc. 78-36384 Filed 12-28-78; 8:45 am]

DUPLICATE

EXHIBIT 1

United States D[illegible]
OFFICE OF THE SECRETA[illegible]
WASHINGTON, D.C. 20240

AUG 20 1990

Mr. Nicolas Villa, Jr.
2919 Jackson Valley Road
Ione, California 95640

Dear Mr. Villa:

This is in response to your letter of June 29 in which you indicated you would file a law suit in the U.S. District Court if the Secretary of the Interior did not take action granting Federal acknowledgment to the Ione Band of Miwok Indians (Band) by July 8, 1990.

It remains our position that the Ione Band is not an acknowledged Indian tribe within the meaning of Federal law, and that its only administrative recourse for obtaining such status is to follow through with the petition it presently has before the Bureau of Indian Affairs (Bureau) for Federal acknowledgment pursuant to Part 83 of Title 25 of the Code of Federal Regulations (25 CFR 83).

We regret you are unhappy with the Acknowledgment procedures, but we feel that it is a fair and appropriate process, especially since there is no guarantee that litigation would resolve the issue of acknowledgment any faster. We are willing and available to continue to discuss the underlying particulars of your case and to review any additional information or evidence you may wish to submit.

We would like to clarify some of the issues raised in your letter. Our records indicate that the February 16 letter you reference was dated February 20, 1990. This letter was sent to Mr. Glen A. Villa, Sr., because it was his letter to which we were responding and not because we assumed that he was the leader or authorized representative of the Ione Band. As a matter of policy, we do not use titles or tribal designations when addressing correspondence to members of unacknowledged groups, because of the complications it may cause in situations like that of the Ione Band where there is more than one individual claiming to be the leader. Secondly, our February 20 letter should not be interpreted as a decision which revoked the Federal status of the Ione Band, but rather as a reaffirmation of the administrative conclusion made in the 1970's that the Band was not federally recognized.

The Ione Band was informed in 1977 that its recognition would be subject to the Acknowledgment regulations, and legal notices to this effect were published in both the Federal Register and the Sacramento Bee in 1979. In 1980, Mr. Glen Villa informed California State Senator John Garamendi by letter that the Bureau had advised the Band that it must submit documentation supporting an acknowledgment petition, and that he was "about 75 percent finished" in finding such documentation. In a letter received

EXHIBIT 2

on March 15, 1989, Mr. Villa informed the Bureau that the Band was continuing to pursue Federal acknowledgment under the regulations and that it would submit its documentation "in the very near future." Given these circumstances, we can only encourage you to continue these efforts and to proceed through the Acknowledgment process.

Sincerely,

[s] Walt R. Mills

Acting Assistant Secretary - Indian Affairs

cc: Sacramento Area Director
Supt., Central California Agency
Senator Pete Wilson
Senator Alan Cranston
Senator Daniel Inouye
Congressman George Miller
Area Director, Sacramento Indian Health Service
Mr. Allogan Slagle

DOCUMENT No. 3

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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Attorney for Defendants

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, NICHOLAS VILLA, SR., BARBARA E. HILL, FRED MIKE, MURIEL MIKE, BERNICE VILLA, DONALD VILLA, GLEN VILLA, NICOLAS VILLA, JR., GERALDINE BURRIS, ADELINE YBRIGHT and members of the IONE BAND OF MIWOK INDIANS, Plaintiffs, v. HAROLD E. BURRIS, ESTHER BURRIS, FRANK PINION, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, JEANETTE ALLEN, FRANK VILLA, HAROLD BURRIS, JR., and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of IONE BAND OF MIWOK INDIANS and the UNITED STATES OF AMERICA, Defendants.	Civ. S-90-0993 RAR EM ANSWER OF DEFENDANTS HAROLD E. BURRIS, ESTHER BURRIS, "et al." (EXCLUDING THE UNITED STATES OF AMERICA)

11

Defendants, HAROLD E. BURRIS, ESTHER BURRIS, "et al." (Excluding the United States of America), in answer to plaintiff's complaint, admits, denies and affirmatively avers as follows:

INTRODUCTION

1. To the extent that Paragraph 1 of Plaintiff's complaint contains a characterization of plaintiffs' action, no response is required. To the extent that factual allegations are contained therein, defendants deny each and every such allegation.

JURISDICTION AND VENUE

2. Paragraph 2 contained conclusions of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained therein.

PARTIES

3. Defendants deny the allegations contained in Paragraphs 3-5.

4. Defendants admit the allegations contained in the first sentence of Paragraph 6. The second sentence of Paragraph 6 contains a statement of plaintiffs' intent and contains conclusions of law to which no response is required; to the extent a response is required, defendants deny the allegations contained therein.

GENERAL ALLEGATIONS

5. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained

in Paragraphs 7 and 8, and therefore deny the same.

6. Defendants deny the allegations contained in Paragraph 9.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 10 and all, and therefore deny the same.

8. Defendants deny the allegations contained in Paragraph 12. Defendants affirmatively aver that individual Indians living in and around Ione, California, have received federal assistance for Indians.

9. Defendants admit the allegations contained in the first sentence of Paragraph 13; defendants deny the allegations contained in the second sentence of Paragraph 13.

10. The first sentence of Paragraph 14 is unintelligible and therefore defendants cannot frame a meaningful response; to the extent that a response is required, defendants deny the allegations contained therein. With respect to the remainder of Paragraph 14, defendants admit that earlier in this century, the government made efforts to provide land for California Indians' defendants lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 14, and therefore denies the same.

11. With respect to Paragraph 15, defendants admit the U.S. Government undertook efforts at various times between 1915 and the 1930's to secure title and/or federal trust

status for a 40-acre parcel in or around Ione, California. Defendants deny the remaining allegations contained in Paragraph 15.

12. With respect to Paragraph 16, defendants admit that the delay in purchasing the 40-acre tract was due to the discovery of a mortgage on the property, the subsequent resale of the property, the indifference of the prospective sellers to completing the sale, and the difficulties with clearing title and obtaining title insurance. Defendants deny the remaining allegations contained in Paragraph 16.

13. Defendants deny the allegations contained in the first sentence of Paragraph 17. Defendants admit the allegations contained in the second sentence of Paragraph 17. With respect to the third sentence of Paragraph 17, the letter referenced and quoted therein speaks for itself. With respect to the fourth sentence of Paragraph 17, the deeds referenced and quoted therein speak for themselves. With respect to the fifth sentence of Paragraph 17, defendants admit that the Western Land Title Company notified the U.S. Government that their title search yielded no legal description of the 40-acre tract or any deed to the United States whereby the U.S. obtained a record title to same; defendants affirmatively aver that the U.S. Government has never obtained record title or any deed to the 40-acre tract; and defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the fifth sentence and

therefore deny the same. With respect to the allegations contained in the last sentence of Paragraph 17, defendants admit that Exhibit A is a true and correct copy of the 19 October 1970 letter from Western Land Title Company to the Bureau of Indian Affairs; again, with respect to its incorporation by reference, the letter speaks for itself. Defendants affirmatively aver that the title search was performed in response to a request on 14 August 1970 from Effie Burris and plaintiffs Fred and Muriel Mike for assistance funds for the purpose of improving their homes.

14. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18, and therefore denies the same.

15. Defendants admit the allegations contained in the first sentence of Paragraph 19. With respect to the allegations contained in the last sentence of Paragraph 19, defendants admit that Exhibit D is a true and correct copy of the 20 January 1972 letter from California Indian Legal Services to the Bureau of Indian Affairs; with respect to its incorporation by reference, the letter speaks for itself.

16. With respect to the first sentence of Paragraph 20, defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained therein. With respect to the body of Paragraph 20 commencing at the end of the first sentence and appearing at 8:20-9:16, the letter referenced and quoted therein speaks for itself. With respect

to the second-to-the-last sentence of Paragraph 20, defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations therein. With respect to the allegations contained in the last sentence of Paragraph 20, defendants admit that Exhibit E is a true and correct copy of the 18 October 1972 letter from the Bureau of Indian Affairs to Nicolas Villa; with respect to its incorporation by reference, the letter speaks for itself.

17. Defendants deny the allegations contained in Paragraph 21.

18. Defendants' lack knowledge or information sufficient to form a belief as to the allegations contained in the first and second sentence of Paragraph 22 and therefore denies the same. With respect to the third sentence of Paragraph 22, defendants admit that plaintiffs and/or others who constitute the group that calls itself the Ione Band of Miwok Indians have been advised that to obtain federal recognition, the procedures set forth at 25 C.F.R. Part 83 must be followed; defendants deny each and every remaining allegation contained therein.

19. With respect to the allegations contained at 10:15-21 of Paragraph 23, the letter quoted and referenced therein speaks for itself. With respect to the allegations contained in the sixth-to-the-last sentence of Paragraph 23 (commencing at 10:22), defendants admit that Exhibit F is a true and correct copy of the 20 February 1990 letter from the Bureau

of Indian Affairs to Glen A. Villa, Sr.; with respect to its incorporation by reference, the letter speaks for itself. Defendants lack knowledge or information sufficient to form a belief as to the allegations contained in the fifth-to-the-last sentence of Paragraph 23 (commencing at 10:23), and therefore denies the same. The third- and fourth-to-the-last sentences of Paragraph 23 (commencing at 10:28) contain conclusions of law to which no response is required; furthermore, the 20 February 1990 and 18 October 1972 letters to which plaintiffs refer and which appear as plaintiffs' Exhibit F and E, respectively, speak for themselves. The last two sentences of Paragraph 23 (commencing at 11:9) contain conclusions of law to which no response is required; again, the 20 February 1990 letter to which plaintiffs refer and which appears as plaintiffs' Exhibit F speaks for itself; defendants deny each and every remaining allegation contained in the remainder of the last two sentences of Paragraph 23. Defendants affirmatively aver that the alleged Ione Band of Miwok Indians is not and has not been federally recognized by the United States.

20. Defendants deny the allegations contained in the first sentence of Paragraph 24. With respect to the second sentence of Paragraph 24, the letters referenced therein speak for themselves. Defendants lack knowledge or information sufficient to form a belief as to the allegations contained in the fourth sentence of Paragraph 24, and therefore deny the

same. The fifth sentence of Paragraph 24 contains conclusions of law to which no response is required; to the extent that a response is required, defendants affirmatively aver that the alleged Ione Band of Miwok Indians is not and has not been federally recognized; defendants deny each and every remaining factual allegation contained therein. Defendants lack knowledge or information sufficient to form a belief as to the allegations contained in the sixth sentence of Paragraph 24 and therefore deny the same. Defendants admit the allegations contained in the seventh sentence of Paragraph 24.

21. With respect to the allegations contained in the first sentence of Paragraph 25, the letter referenced and quoted therein speaks for itself; to the extent that further factual allegations are contained in the first sentence of Paragraph 25, defendants lack knowledge or information sufficient to form a belief as to the truth thereof and therefore denies the same. With respect to the second sentence of Paragraph 25, defendants admit that a true and correct copy of a letter dated 29 June 1990 from Nicolas Villa, Jr., to the Bureau of Indian Affairs is attached as Exhibit H to plaintiffs' complaint; with respect to factual allegations that may be contained therein, the letter speaks for itself. Defendants deny the allegations contained in the third sentence of Paragraph 25 and affirmatively aver that on 20 August 1990 the U.S. Department of the Interior responded to Mr. Villa's letter of 29 June 1990.

22. Defendants admit the allegations contained in the first and second sentences of Paragraph 26. With respect to the third sentence in Paragraph 26, the lawsuit was resolved by an Interlocutory Judgment of Partition of Real Property entered on September 5, 1990, in Amador County Superior Court, State of California. Defendants affirmatively aver that the judgment conclusively resolves questions concerning ownership of the 40-acre parcel and manifest lack of federal jurisdiction over these lands. A true and correct copy of the September 5, 1990, Interlocutory Judgment appears as Exhibit #1 hereto.

23. The allegations contained in Paragraph 27 are conclusions of law to which no response is required. To the extent that factual allegations are contained therein, defendants deny each and every such allegation.

FIRST CAUSE OF ACTION

(Mandamus)

24. With respect to Paragraph 28, defendants reallege their answers to Paragraphs 1 through 27 as though fully set forth herein.

25. Defendants deny the allegations contained in Paragraph 29.

SECOND CAUSE OF ACTION

(Agency Action in Excess of Jurisdiction)

26. With respect to Paragraph 30, defendants reallege their answers to Paragraphs 1 through 27 as though fully set

forth herein.

27. Defendants deny the allegations contained in Paragraph 31.

THIRD CAUSE OF ACTION

(Violation of Due Process of Law)

28. With respect to Paragraph 32, defendants reallege their answers to Paragraphs 1 through 27 as though fully set forth herein.

29. Defendants deny the allegations contained in Paragraph 33.

FOURTH CAUSE OF ACTION

(Unlawful Rule Making)

30. With respect to Paragraph 34, defendants reallege their answers to Paragraphs 1 through 27 as though fully set forth herein.

31. Defendants deny the allegations contained in Paragraph 35.

FIFTH CAUSE OF ACTION

(Denial of Equal Protection of Law)

32. With respect to Paragraph 36, defendants reallege their answers to Paragraphs 1 through 27 as though fully set forth herein.

33. The first and second sentences of Paragraph 37 are unintelligible and therefore defendant cannot frame a meaningful response; to the extent that a response is required defendants deny the allegations contained therein. Defendants

deny the allegations contained in the third sentence of Paragraph 37.

34. Defendants deny the allegations contained in Paragraph 38.

SIXTH CAUSE OF ACTION

(Breach of Fiduciary and Trust Responsibility, United States)

35. With respect to Paragraph 39, defendants reallege their answers to Paragraphs 1 through 27 as though fully set forth herein.

36. Defendants lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 40 and therefore denies the same.

SEVENTH CAUSE OF ACTION

(Constructive Trust)

37. With respect to Paragraph 41, defendants reallege their answers to Paragraphs 1 through 27 as though fully set forth herein.

38. With respect to the allegations contained in the first sentence of Paragraph 42, the judgment entered in the case referenced therein speaks for itself. Defendants deny the allegations contained in Paragraph 42.

39. The allegations contained in Paragraph 43 are conclusions of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained therein.

EIGHTH CAUSE OF ACTION

(Breach of Fiduciary Duty, Private Defendants)

40. With respect to Paragraph 44, defendants reallege their answers to Paragraphs 1 through 27 and 42 as though fully set forth herein.

41. Paragraphs 45 through 48 contain conclusions of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained therein.

NINTH CAUSE OF ACTION

(Quiet Title)

42. With respect to Paragraph 49, defendants reallege their answers to Paragraphs 1 through 27 as though fully set forth herein.

43. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 50 and therefore deny the same.

44. Paragraphs 51 and 52 contain conclusions of law to which no response is required. to the extent that a response is required, defendants deny the allegations contained therein.

TENTH CAUSE OF ACTION

(Preliminary and Injunctive Relief)

45. With respect to Paragraph 53, defendants reallege their answers to Paragraphs 1 through 27, 42, 43, 45 through 48, and 50 through 52 as though fully set forth herein.

46. Defendants deny the allegations contained in Paragraphs 54 and 55.

47. The paragraphs that follow Paragraph 55 constitute plaintiffs' prayer for relief to which no response is required. To the extent that factual allegations are contained therein, defendants deny each and every such allegation.

48. Defendants specifically deny all of the allegations of the complaint not hereinbefore answered.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' complaint fails to satisfy the requirements of Fed.R.Civ.P. 8(a) in that it fails to contain a short and plain statement of plaintiffs' claim.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' complaint is barred by the statute of limitations and, alternatively, laches.

FOURTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over plaintiffs' complaint because plaintiffs have failed to exhaust their administrative remedies.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' quiet title claim is barred by the effect of Interlocutory Judgment of Partition of Real Property in Amador

County Superior Court, State of California.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' complaint fails for lack of condition precedent, which is a determination that the plaintiffs are an Indian band.

WHEREFORE, defendants HARROLD BURRIS, ESTHER BURRIS "et al." pray for judgment dismissing plaintiffs' claim and awarding to defendants their costs in this action for such other relief as the Court deems appropriate.

DATED: Oct. 22, 1990

E. RICHARD WALKER
Attorney for Defendants
(Excluding United States of America)

ENDORSED
FILED

SEP - 5 1990

SHELDON D. Johnson, County Clerk
AMADOR COUNTY.

BY N. EVANS Deputy

GUY REYNOLDS
Lawyer
34 Summit Street, Suite E
Jackson, CA 95642
(209) 223-2144

Attorney for Plaintiffs

SUPERIOR COURT OF CALIFORNIA, AMADOR COUNTY

-o0o-

HAROLD E. BURRIS, ESTHER BURRIS, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, HAROLD BURRIS, JR., JEANETTE ALLEN,

Plaintiffs,

vs.

FRED MIKE, MURIEL MIKE, BARBARA HILL, GLEN VILLA, NICOLAS VILLA SR., BERNICE VILLA, NOMA JEAN HENDRICKS, NICK VILLA, JR., FRANK PINION, AUDRINA HARRISON, JOHN MORLA, aka PETE MORLA, SHELLY MORLA, GERALDINE BURRIS, DONALD VILLA, LINDA ORR, RONALD ORR, RAYMOND OLIVARRIA, DOES 1 through 200 and other members of the IONE BAND OF INDIANS,

Defendants.

CASE NO. 15292

INTERLOCUTORY JUDGMENT OF PARTITION OF REAL PROPERTY

The above entitled cause came on regularly for trial on September 4, 1990, before the court, the Honorable MARTIN H. RYAN, Judge, presiding; GUY REYNOLDS appearing as attorney for plaintiffs and no appearance on behalf of defendants. Witnesses were sworn and examined and documentary evidence was

EXHIBIT "66"

introduce on behalf of the plaintiffs. The evidence being closed, the cause was submitted to the court for decision and, after deliberation thereon,

IT IS ORDERED., ADJUDGED, AND DECREED:

1. Plaintiffs, HAROLD E. BURRIS, ESTHER BURRIS, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, HAROLD BURRIS, JR., and JEANETTE ALLEN, and defendants, FRED MIKE, MURIEL MIKE, BARBARA HILL, GLEN VILLA, NICHOLAS VILLA SR., BERNICE VILLA, NOMA JEAN HENDRICKS, DONALD VILLA and NICK VILLA, JR., are the owners, as tenants in common, of the real property described in Exhibit A which is attached to and made a part of this judgment; plaintiffs collectively being the owners of an undivided one-half interest in the property and the defendants collectively being the owners of an undivided one-half interest in the property.

2. That the property be partitioned in kind and that the plaintiffs be awarded, as tenants in common, the westerly twenty (20) acres, more or less, and that the above-named defendants be awarded, as tenants in common, the easterly twenty (20) acres, more or less.

3. That there is a water well on the property described in Exhibit A, which benefits both plaintiffs' and defendants' portions of the property. Upon the physical division of the partition action, the party who receives the benefitted portion receives an implied easement to continue the use of the water well and its appurtenances across the burdened

portion. Each party shall receive the necessary easements for ingress and egress.

4. STEVEN W. BROWN is hereby appointed referee of this court with full power to divide the property and allot the portions thereof to the parties according to their respective interests and this interlocutory judgment, and in all respects to do those things necessary to carry out the order of this court which have been previously entered and yet to be entered, and to make a report of his proceedings to the court.

Dated: SEP -5 1990

MARTIN H. RYAN
Judge of the Superior Court

The following described parcel of real property, otherwise known as the Jackson Valley Rancheria, in Amador County, California:

Beginning at the point of intersection of the center line of the County Road to Jackson, with the Westerly line of the fifty-two acre tract of land owned by Anthony Meath, Armando Dellaringa, Rocco Dellaringa, and Albert Dellaringa as recorded in Book 130, Official Records, Amador County, California, Page 98; thence following the center line of said County Road, North sixty-five degrees, fifty minutes West (N. 65° 50' W.) one thousand seven hundred twenty five (1725) feet to a point; thence at right angles, North twenty-four degrees, ten minutes East (N. 24° 10' E.) one thousand seventy two (1072) feet to a point; thence at right angles, South sixty-five degrees, fifty minutes East (S. 65° 50' E.) one thousand five hundred thirty one (1531) feet to the West boundary of the said property of Anthony Meath, Armando Dellaringa, Rocco Dellaringa and Albert Dellaringa; thence following said boundary line, South fourteen degrees, eight minutes West (S. 14° 08' W.) one thousand eighty-seven (1087) feet to the point of beginning.

Exhibit A

DOCUMENT No. 4

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

LOUIS DEMAS, State Bar # 87286
Attorney at Law
925 Secret River Drive, Suite J
Sacramento, California 95831
(916) 399-8063

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, NICOLAS VILLA SR., BARBARA E. HILL, FRED MIKE, MURIEL MIKE, BERNICE VILLA, DONALD VILLA, GLEN VILLA, NICOLAS VILLA JR., GERALDINE BURRIS, ADELINE YBRIGHT and members of the IONE BAND OF MIWOK INDIANS, Plaintiffs, HAROLD E. BURRIS, ESTHER BURRIS, FRANK PINION, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, JEANETTE ALLEN, FRANK VILLA, HAROLD BURRIS JR., and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of IONE BAND OF MIWOK INDIANS and the UNITED STATES OF AMERICA, Defendants,	Civil Action No. S-90-993 LKK/EM PLAINTIFFS' STATUS CONFERENCE REPORT

Pursuant to order of the court, plaintiffs submit the following status conference report.

///

(a) Names of the parties counsel represents.

Counsel represents plaintiffs the IONE BAND OF MIWOK INDIANS, its members, NICOLAS VILLA SR., BARBARA E. HILL, FRED MIKE, MURIEL MIKE, BERNICE VILLA, DONALD VILLA, GLEN VILLA, NICOLAS VILLA JR., and GERALDINE BURRIS.

(b) Brief Summary of facts alleged and characterization of legal theories under which recovery is sought.

Plaintiifs allege a complaint for: (a) declaratory relief for entry of an order declaring that the Ione Band of Miwok Indians has and continues to be a sovereign Indian Tribe having government-to-government relations with the United States; (2) that the Ione Band of Miwok Indians is entitled to all rights of sovereignty generally enjoyed by Indian tribes; for an order declaring that the United States has breached its trust obligation to the Ione Band of Miwok Indians, and its members, by failing to acknowledge the sovereign status of the Band and denying to the Band and its members rights, privileges, and services; (3) for an order declaring that the land described in the complaint, is subject to a constructive trust in favor of the Ione Band of Miwok Indians; (4) to quiet title to the reservation of the Ione Band of Miwok Indians described in the complaint, in favor of the Ione Band of Miwok Indians; to compel agency action that has been unlawfully withheld; and for injunctive relief.

The land that is the subject of this action is forty acres more less situated near Ione, California. Plaintiffs contend that the Ione Band of Miwok Indians is a sovereign Indfian Nation enjopying the same rights of other similarly situated tribes. Plaintiffs contends that the sovereignty of Ione Band of Miwok Indians has repeatedly been recognized by Congressional and Executive

acts but agents of the federal defendant presently and illegally deny such sovereignty. Plaintiffs contend that the the subject land is tribal land that must be taken in trust by the United States for the benefit of the Ione Band of Miwok Indians.

The non-federal parties are individuals who claim interests to the subject land, or who show possible interest of record in such land. Plaintiffs seek to quiet title to such land against the non-federal individuals. Plaintiffs assert that the defendants have breached fiduciary duties owed to the Ione Band of Miwok Indians and damages are sought against the non-federal defendants.

(c) Progress in service of process.

All named defendants have been served or have filed an answer to the complaint.

(d) Possible joinder of additional parties.

None anticipated at this time.

(e) Expected or desired amendment of pleadings.

Plaintiffs may request an amendment of the complaint to add a prayer for damages against the United States for breach of trust.

(f) Jurisdiction and venue.

Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1361, 1362, 2201 and 2202. Venue for this action is properly within this district in accordance with 28 U.S.C. § 1391 in that the claims arose in this district, the plaintiffs and defendants reside and do business in this district, and the United States is a defendant.

(g) Anticipated motions and the scheduling thereof.

Plaintiffs contend that they are being harrassed, on and off the subject land, by the defendants and/or individuals acting on their behalf. Plaintiffs anticipate bringing a motion for injunctive relief within 30 days of the status conference.

It anticipated that plaintiffs will file a motion for summary judgment on the question of tribal recognition, and the obligation of defendant Unnitied States to take the subject land in trust, within 60 days of the date of the stautus conference.

(h) Anticipated discovery and the scheduling thereof.

Plaintiffs anticipate serving an initial set of interrogatories, a request for production of documents, and request for admissionns on the defendants within 30 days of the date of the status conference. It is anticipated that plaintiffs will need at least eight months to complete discovery on all issues.

(i) Future proceedings including setting of dates.

It is believed that trial should be scheduled in about one year. It is requested that law and motion be cut-off at pretrial. It is requested that the parties exchange lay and exert witness lists 90 days prior to the pretrial conference.

(j) Appropriateness of special procedures.

None perceived.

(k) Jury demand.

No party has yet demanded trial by jury.

(l) Estimate of trial time.

Five days if the issue of tribal recognition, and the obligation of the United States to take the subject land in trust, is resolved in favor of plaintiffs by summary judgment and, if not, about 10 days.

(m) Modification of standard pretrial procedures.

None perceived as necessary except as stated herein.

(n) Related cases.

This case is related to the case of Harold E. Burris et al. v.Fred Mike et al., now pending in the Superior Court, County of

Amador, State of California, Case No. 15292.

(o) Stipulation as to settlement judge.

Plaintiffs will stipulate to the trial judge acting as settlement judge and will waive any disqualification by virtue of his so acting.

(p) Other matters.

None perceived.

DATED: January 7, 1991

Louis Demas

LOUIS DEMAS
Attorney for Plaintiffs

DOCUMENT No. 5

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

RICHARD H. JENKINS
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Attorneys for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al., Plaintiffs, v. HAROLD BURRIS, et al., Defendants.	CIV NO. S-90-0993 LKK/EM STATUS REPORT OF DEFENDANT UNITED STATES OF AMERICA

Pursuant to this Court's Order Setting Status (Pretrial Scheduling) Conference, Defendant UNITED STATES OF AMERICA submits the following Status Report:

(a) REPRESENTATION

The United States Attorney's Office represents Defendant United States of America.

(b) FACTS AND LEGAL THEORIES

As to the government, plaintiffs contend that the Ione Band of Miwok Indians is a federally-recognized Indian tribe entitled to the rights, privileges, and sovereignty accorded such tribes. Plaintiffs' contention is premised primarily upon isolated

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incidents that occurred some eighty years ago involving attempts to obtain land for Indians in Ione, California.

Alternatively, plaintiffs contend that the alleged tribal recognition status of the Ione Band of Miwok Indians was terminated unlawfully without notice or due process, and that the government's tribal recognition regulations are constitutionally defective.

The government denies that the Ione Band of Miwok Indians has ever been a federally-recognized tribe. In addition, the government contends at the outset that this court lacks jurisdiction because plaintiffs' claims are time-barred and because plaintiffs have failed to exhaust their administrative remedies.

As to nonfederal defendants, plaintiffs assert that said defendants hold in constructive trust for the Ione Band of Miwok Indians a certain parcel of land located in Amador County. Said parcel allegedly was secured, or was attempted to be secured, for certain Indians by the United States several decades ago. Alternatively, plaintiffs assert ownership of the subject land by adverse possession. Plaintiffs seek to have title to the land quieted in the name of the Ione Band of Miwok Indians and an order compelling the government to take title to the property for the benefit of the Ione Band of Miwok Indians.

(c) SERVICE

The United States has been served.

(d) JOINDER OF ADDITIONAL PARTIES

None anticipated.

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(e) AMENDMENT OF PLEADINGS

None anticipated.

(f) JURISDICTION and VENUE

The court's jurisdiction in this action is challenged as to several of plaintiffs' claims. Plaintiff alleges jurisdiction is proper pursuant to 28 U.S.C. §§1331, 1362, 2201 and 2202. Assuming jurisdiction is found, venue appears appropriate pursuant to 28 U.S.C. §1391.

(g) ANTICIPATED MOTIONS

At this time, the government anticipates bringing a motion to dismiss for lack of subject matter jurisdiction and requests that the court schedule a date for said motion. Any issues remaining after the government's motion to dismiss may then be disposed of (as to the government) on summmary judgment motion. The government does not anticipate further motions, except as may arise in the course of discovery. The government requests a hearing date in late February or early March for its dismissal motion.

(h) ANTICIPATED DISCOVERY

The government does not anticipate any discovery in preparation for its motion to dismiss and reserves the right to seek discovery on any issues remaining as to the government following the court's ruling on the dismissal motion.

(i) FURTHER PROCEEDINGS

It is suggested that this case be scheduled for supplemental status conference following the court's ruling on the government's motion to dismiss, in the event that the government remains in this lawsuit.

(j) SPECIAL PROCEDURES

None appear appropriate at this time.

(k) REQUEST FOR JURY TRIAL

No party has requested a jury trial.

(l) ESTIMATE OF TRIAL TIME

Three days.

(m) MODIFICATION OF PRETRIAL PROCEDURES

None appear appropriate at this time.

(n) RELATION TO OTHER MATTERS

The government is unaware of the relation of this case to any other matter.

(o) SETTLEMENT

Settlement does not appear appropriate at this time. The government respectfully declines to waive the prohibition against the trial judge acting as settlement judge.

(p) OTHER MATTERS

None.

DATED: 7 January 1991

Respectfully submitted,

RICHARD H. JENKINS
United States Attorney

By: DEBORA VAN DER WEIJDE
Assistant U.S. Attorney

DOCUMENT No. 6

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al., Plaintiffs, v. HAROLD BURRIS, et al., Defendants.	CIV NO. S-90-0993 LKK/EM STATUS REPORT OF DEFENDANTS HAROLD E. BURRIS, ESTHER BURRIS, 'et al'. (EXCLUDING THE UNITED STATES OF AMERICA)

Pursuant to this Court's Order Setting Status (Pretrial Scheduling) Conference, HAROLD E. BURRIS, ESTHER BURRIS, 'et al' submit the following Status Report:

(a) REPRESENTATION

E. RICHARD WALKER represents Defendants, HAROLD E. BURRIS, ESTHER BURRIS, 'et al'.

(b) FACTS AND LEGAL THEORIES

As to Defendant UNITED STATES OF AMERICA plaintiff contends that the Ione Band of Miwok Indians is a federally-recognized Indian tribe entitled to the rights, privileges, and sovereignty accorded such tribes. Plaintiff's contention is premised primarily upon isolated incidents that occurred some eighty years

ago involving attempts by Dept. of Interior to obtain land for Indians in Ione, California.

Alternatively, plaintiffs contend that the alleged tribal recognition status of the Ione Band of Miwok Indians was terminated unlawfully without notice or due process, and that the government's tribal recognition regulations are constitutionally defective.

Defendants deny that the Ione Band of Miwok Indians has ever been a federally-recognized tribe. In addition, Defendants contend that this court lacks proper jurisdiction because plaintiff's claim is time-barred and because plaintiffs have failed to exhaust their administrative remedies.

In addition, plaintiffs assert that defendants hold in constructive trust for the Ione Band of Miwok Indians a certain parcel of land located in Amador County. Said parcel allegedly was secured, or was attempted to be secured, for certain Indians by the United States several decades ago. Alternatively, plaintiffs assert ownership of the subject land by adverse possession. Plaintiffs seek to have title to the land quieted in the name of the Ione Band of Miwok Indians and an order compelling the government to take title to the property for the benefit of the Ione Band of Miwok Indians.

(c) SERVICE

Defendants HAROLD E. BURRIS, ESTHER BURRIS, 'et al' have been served.

(d) JOINDER OF ADDITIONAL PARTIES

None anticipated.

(e) AMENDMENT OF PLEADINGS

None anticipated.

(f) JURISDICTION and VENUE

The court's jurisdiction in this action is challenged as to several of plaintiffs' claims. Plaintiffs allege jurisdiction is proper pursuant to 28 U.S.C. Sectiond 1331, 1362, 2201 and 2202. Assuming jurisdiction is found, venue appears appropriate pursuant to 28 U.S.C. Section 1391.

(g) ANTICIPATED MOTIONS

At this time, defendants anticipate bringing a Summary Judgment Motion and request that the court schedule a date for said motion. Defendants do not anticipate further motions, except as may arise in the course of discovery. Defendants request a hearing date in late February or early March for said Summary Judgment Motion.

(h) ANTICIPATED DISCOVERY

Defendants do not anticipate any discovery in preparation for the Summary Judgment Motion. However, defendants reserve the right to seek discovery on any issues that remain following the court's ruling on the Summary Judgment Motion.

(i) FURTHER PROCEEDINGS

It is suggested that this case be scheduled for supplemental status conference following the court's ruling on defendants' Summary Judgment Motion.

(j) SPECIAL PROCEDURES

None appear appropriate at this time.

(k) REQUEST FOR JURY TRIAL

No party has requested a jury trial.

(l) ESTIMATE OF TRIAL TIME

Three days.

(m) MODIFICATION OF PRETRIAL PROCEDURES

None appear appropriate at this time.

(n) RELATION TO OTHER MATTERS

Defendants are unaware of the relation of this case to any other matter.

(o) SETTLEMENT

Settlement does not appear appropriate at this time. Defendants respectfully decline to waive the prohibition against the trial judge acting as settlement judge.

(p) OTHER MATTERS

None.

DATED: 7 January 1991

Respectfully submitted,

E. RICHARD WALKER
Attorney for Defendant

By: E. Richard Walker
E. RICHARD WALKER

DOCUMENT No. 7

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al., Plaintiffs, v. HAROLD BURRIS, et al., Defendants.	CIV NO. S-90-0993 LKK/EM UNITED STATES OF AMERICA'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

I. INTRODUCTION

First and foremost, plaintiffs seek a ruling of this Court that the Ione Band of Miwok Indians (hereafter, "Ione Band") has been and remains a federally recognized Indian tribe with the rights and privileges attendant thereto. Plaintiffs' remaining claims, e.g., as to land ownership and status, flow from plaintiffs' assumption that the Ione Band is so recognized.

The United States moves for summary judgment pursuant to Fed.R.Civ.P. 56(b) on the grounds that plaintiffs' claim is untimely because it was not filed within the six year limitations period set forth at 28 U.S.C. §2401(a). In addition, should any claims be deemed to survive the government's summary judgment

motion, the government moves for dismissal for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) as plaintiffs have not exhausted their administrative remedies as required by 5 U.S.C. §704 prior to instituting suit against the United States.

II. FACTS

Prior to 1979, there was considerable controversy surrounding the issue of whether the Ione Band of Miwok Indians was a federally-recognized Indian tribe entitled to the rights and privileges associated therewith.[1] In 1972, the head of BIA, Commissioner Louis Bruce, was not entirely convinced that the Ione Band was federally recognized ("Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated"). Ex. E to Pl's Compl. at 2 (emphasis added). Also prior to 1979, there were no written regulations or policies that definitively set forth the means and criteria by which a tribe might petition the United States for federal recognition. Hence, on 2 October 1978, BIA promulgated regulations governing procedures for obtaining federal tribal recognition. 25 C.F.R. Part 83 ("acknowledgement regulations"). These regulations provide for the annual publication in the Federal Register of all tribes recognized by the federal government, 25 C.F.R. §83.6(b), as well as for the one-time publication in the Federal Register of those putative tribes

[1] This question is separate and distinct from the issue of whether the individual plaintiffs and defendants who would be putative members of the Ione Band are, in fact, of Miwok Indian descent. For purposes of this motion, the government concedes that said individuals are in whole or part Miwok Indian.

deemed to have petitions for federal recognition on file with BIA as of 1978, 25 C.F.R. §83.8(b).

In September 1977, when the acknowledgement regulations were in the "notice-and-comment" or "proposed" stage, the Tribal Operations Officer for the Central California Agency of the BIA wrote to defendant Harold Burris and advised him of the proposed regulations. He further advised that the

> Central Office [of BIA] in Washington, D.C., thinks . . .processing an Ione request [for federal recognition] under the new [acknowledgement] regulations. . .will be the fastest way to reach a final determination as to the Ione Band's [recognition] status.

See letter attached as Ex. 1 to Lawson Declaration.

Following publication of the final acknowledgement regulations in 1978, plaintiff Ione Band of Miwok Indians was designated one of 40 groups with a pending petition for federal recognition pursuant to 25 C.F.R. §83.8(b). Plaintiffs received notice of this determination in several ways: (1) two Federal Register notices, (2) publication in the Sacramento Bee, and (3) letter. The Federal Register notices both appeared 2 January 1979. First, the Ione Band was excluded from the list of those tribes that were deemed to be federally-recognized tribes pursuant to 25 C.F.R. §83.6(b). 44 Fed.Reg. 7235 (1979), attached as Ex. 1 hereto. Second, the Ione Band was included in a separate list of tribes deemed to have petitions pending for tribal recognition pursuant to 25 C.F.R. §83.8(b). 44 Fed.Reg. 116 (1979), attached as Ex. 2 hereto. The latter notice states:

> Pursuant to 25 CFR 54.8(b) [now found at §83.8(b)], notice is hereby given that prior to October 2, 1978, the effective date of 25 CFR Part 54[§83], the following

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> groups filed petitions for acknowledgement by the Secretary Interior that they exist as Indian tribes.
>
> Section 54.8(b)[§83.8(b)] of the regulations gives each petitioning group the opportunity to review, revise or supplement its petition. Therefore, the original petition, with a copy of the guidelines will be returned to each petitioning group. The return of the petition will not affect the priority established by the initial filing. This is a notice of receipt of petition and does not constitute notice that the petitions listed are under active consideration. Notice of active consideration will be by mail to petitioners and other interested parties at the appropriate time.

On 16 February 1979, additional notice of the above action was given to plaintiffs by way of publication in the Sacramento Bee.. See notice attached as Ex. 3 hereto.

Finally, plaintiffs were provided notice of BIA's action by letter dated 19 December 1978 from BIA's Acting Deputy Commissioner to plaintiff Bernice Villa. This letter explained that the Ione Band was deemed to have a petition pending for recognition, and requested that the Ione Band review the enclosed guidelines and resubmit its petition for tribal recognition in compliance therewith. See letter and enclosure attached as Ex. 2 to the Lawson Declaration.

In a letter dated 27 February 1980 to California Senator John Garamendi, plaintiff Glen Villa confirmed that the Ione Band had received information concerning the acknowledgement regulations and admitted "that before [the Ione Band] can be put into Trust Status we must first be Federally Recognized." He further indicated that at that time, he was working on the group's petition for recognition, which was then approximately 75% complete. See letter attached as Exhibit 3 to the Lawson Declaration.

Plaintiffs never resubmitted their petition for tribal recognition under the acknowledgement regulations. Instead, a group designated as the "General Council of the Ione Band" forwarded a signed resolution to the Commissioner of Indian Affairs through their chairman, plaintiff Glen Villa, on or about 7 April 1989 in which the Council unanimously resolved to request federal recognition and the establishment of a reservation in accordance with the Indian Reorganization Act (hereafter, "IRA"), 25 U.S.C. §§479 & 465, respectively. See Ex. 4 to Lawson Declaration. The request was routed to the Branch of Tribal Relations, which has responsibility for the implementation of the IRA and issues arising thereunder. Declaration of Michael Lawson, Ph.D.

A month later, on 10 May 1989, defendants Harold Burris, Esther Burris, Pam Burris and Carol Boring submitted a letter to BIA stating that they were opposed to having the Ione community property taken into federal trust status. See Ex. 4, attached hereto.

During the pendency of their request before the Bureau for recognition under the IRA, plaintiffs Nicolas Villa and Bernice Villa sought various services from the Bureau of Indian Affairs in Sacramento, such as assistance with tribal elections, obtaining federal approval of the tribal constitution, and housing assistance. Declaration of Art Barber. Art Barber, the Area Tribal Operations Officer, repeatedly told plaintiffs that the Ione Band was not federally recognized and until it was, no services could be rendered to the tribe. Id. He encouraged plaintiffs to submit their petition for recognition and work with

the Central Office of BIA in Washington, D.C., to obtain federal recognition for the tribe. Id.

Meanwhile, Dr. Michael Lawson of BIA's Branch of Acknowledgement and Review[2] spoke by telephone with Joan Villa on at least two occasions in November 1989 and February 1990 with respect to correspondence concerning the plaintiffs' recognition request.[3] Lawson Declaration. Ms. Villa advised more than once that a petition for acknowledgement was completed but that the group was not going to submit it until a response to the April 1989 request for recognition was received. Id. Ms. Villa also advised that the Band had collected documents that demonstrated that the Ione Band was federally recognized and that these documents would be used to generate congressional pressure and "put the squeeze" on the Assistant Secretary for a favorable decision. Id.

On 23 and 28 January 1990, BIA received two letters from defendant Harold Burris in which he declared that he was the Chairman of the Ione Band and that the band "will appeal any decision that will Federally Recognize the Ione Band of Indians at this time." See Ex. 6 to the Lawson Declaration.

Finally, on 20 February 1990, the Deputy to the Assistant Secretary--Indian Affairs (Tribal Relations), Hazel Elbert, responded to plaintiff Glen Villa's 7 April 1989 request for

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[2] The Branch of Acknowledgement and Review (hereafter, "BAR") reviews and makes recommendations on petitions for tribal recognition submitted pursuant to the acknowledgement regulations. Declaration of Michael Lawson, Ph.D.

[3] Joan Villa is believed to be the non-Indian spouse of plaintiff Nicolas Villa.

recognition under the IRA.[4] In her exhaustive five-page letter, Ms. Elbert reviewed the history of the Ione Band and advised plaintiff that the Band must seek recognition pursuant to the acknowledgement regulations.

One month later, in March 1990, plaintiff Nicolas Villa, two other individuals from Ione, and their attorney, Allogan Slagle, met with several Central Office-BIA officials from the Branch of Acknowledgement and Review, Tribal Relations, and their attorney to protest Ms. Elbert's contention that the Ione Band must apply for recognition pursuant to the process set forth in the acknowledgement regulations. Declaration of Michael Lawson, Ph.D. During the meeting, the BIA representatives repeatedly advised plaintiff and his constituents that the only administrative option open to the Ione Band for federal recognition was through compliance with the acknowledgement regulations. Id. The Ione representatives insisted that they had documentation of the Band's recognized status and the BIA representatives then agreed to review any supplemental materials the Band wished to submit. Id. No such materials were ever submitted. Id.

To the extent that Ms. Elbert's letter constituted an "agency decision", no appeal has ever been filed. Instead, this lawsuit was filed in August 1990. Plaintiffs now seek this court's edict that their group is a sovereign Indian nation and an order requiring the United States to enter a government-to-government

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[4] An interim response, dated 3 July 1989, advised plaintiff Glen Villa that the BIA had received the April 1989 request for recognition and was in the process of reviewing its merits. See Ex. 5 to the Lawson Declaration.

relationship with it. Alternatively, they challenge the government's acknowledgement regulations.

The essence of plaintiffs' argument is that the Ione Band was a federally-recognized tribe as of 1972 and was subsequently "unrecognized". The government submits that plaintiffs at least in 1977 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). Similarly, plaintiffs' challenge to defendants' rulemaking is time-barred. Therefore, the United States moves to dismiss plaintiffs' suit as time-barred. To the extent that plaintiffs affirmatively seek federal recognition or review of Ms. Elbert's letter of 20 February 1990, plaintiffs have failed to exhaust their administrative remedies and the government moves for dismissal on this ground in the alternative.

III. ARGUMENT

A. SOVEREIGN IMMUNITY MUST BE WAIVED BEFORE A PARTY CAN SUE THE UNITED STATES

An analysis of this case must begin by noting the axiomatic rule that the federal government, as sovereign, can only be sued when and where it so consents, by specific legislation waiving its basic sovereign immunity.

Suits against the government are permitted only in strict accord with statutory enactments promulgated by Congress. The

United States, as sovereign, is immune from suit except to the extent that it consents to be sued. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392, 398 (1976). The terms of the sovereign's consent narrowly define a court's jurisdiction, United States v. Sherwood, 312 U.S. 584, 586 (1940), and any waiver of immunity must be unequivocally expressed. Mitchell, 445 U.S. at 538, Testan, 424 U.S. at 339. See also, Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984); Hill v. United States, 571 F.2d 1098, 1101 (9th Cir. 1982); Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982). Moreover, "[A] party bringing a cause of action against the federal government bears the burden of demonstrating an unequivocal waiver of immunity." Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987), cert. denied, 487 U.S. 1204 (1988).

Although plaintiffs have set forth no grounds for the government's waiver of sovereign immunity, it seems clear that such waiver is found in the Administrative Procedures Act (hereafter, "APA"), 5 U.S.C. §§701 et seq. See, e.g., Impro Products, Inc. v. Block, 722 F.2d 845, 851 n.11 (D.C.Cir. 1983), cert. denied, 469 U.S. 931 (1984). The APA extends judicial review of final agency decisions to persons adversely affected by any agency action except where judicial review is precluded by statute or the said action is committed to the discretion of the agency by law. Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988). Plaintiffs herein complain that the Ione Band once was federally recognized and is no longer. Assuming arguendo the truth of plaintiffs' assertion, it is clear then that they seek

judicial review of the alleged decision to "unrecognize" the tribe. Alternatively, plaintiffs seek review of the government's rulemaking in promulgating its acknowledgement regulations. Again, this review, if timely, would be subject to review under the APA.

B. PLAINTIFFS ARE BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS FROM PURSUING THEIR CLAIM FOR TRIBAL SOVEREIGNTY AND FEDERAL TRIBAL RECOGNITION AS WELL AS FROM CHALLENGING THE GOVERNMENT'S ACKNOWLEDGEMENT PROCEDURES.

1. Summary Judgment Standard

Rule 56(b) of the Federal Rules of Civil Procedure authorizes the defending party to seek summary judgment in its favor "as to all or any part" of a claim or cross-claim asserted against it. Rule 56(c) allows for its entry where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c). As the moving party, the government bears the initial burden of proving that there is no genuine issue of material fact and that judgment may be entered as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986); Lake Nacimiento Ranch v. San Luis Obispo County, 830 F.2d 977, 980 (9th Cir.1987); Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir.1987). Where the moving party has shouldered this burden, it is entitled to an entry of summary judgment unless the opposing party "sets forth specific facts showing that there is genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (citing Rule 56(e)).

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Therefore, at the summary judgment stage, plaintiffs must proffer some evidence, as opposed to simply articulating the evidence they intend to produce at trial, that supports their allegation that their claim is timely. Celotex, supra; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The court must then determine whether there is sufficient evidence to show that there is a triable issue of fact. Under Celotex, Anderson, and Matsushita, plaintiffs bear the burden of showing a genuine issue of material fact as to timeliness. To meet this burden, plaintiffs must "produce specific facts showing that there remains a genuine factual issue for trial and evidence significantly probative as to any material fact claimed to be disputed." Cotton v. City of Hameda, 812 F.2d 1245, 1248 (9th Cir. 1987). Such evidence, at a minimum, must reasonably permit the inference that their claim more likely than not is timely. Id. Any such inferences to be drawn must be plausible, justifiable and reasonable in view of the other undisputed background. Matsushita, supra, and I.W. Elec. Service v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 632 (9th Cir. 1987).

2. Timeliness

Congress has provided that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. 2401(a) (emphasis added).[5] This limitations statute is

[5] Of course, there are a few exceptions to the six-year rule, e.g., 28 U.S.C. §§2401(b)(tort claims), 2409(g)(quiet title claims).

applicable to both suits at law as well as in equity. Christensen v. United States, 755 F.2d 705, 708 (9th Cir. 1985); Werner v. United States, 188 F.2d 266, 268 (9th Cir. 1951) ("The provisions of Section 2401(a) apply to suit for reformation, originally an action in equity, precisely as they would to a suit for damages, an action at law"); Geyen v. Marsh, 775 F.2d 1303, 1307 (5th Cir. 1985); Sisseton-Wahpeton Sioux Tribe v. U.S., 686 F.Supp. 831, 835 (D.Mont. 1988).

Section 2401(a)'s six-year statute of limitations has been held applicable to suits on behalf of Indian tribes and/or Indian individuals, Big Spring v. U.S. Bureau of Indian Affairs, 767 F.2d 614, 616-617 (9th Cir. 1985)(applying §2401(a) to a claim for an mineral rights in Indian allotments), Christensen, supra (to the same effect as Big Spring, supra), Loring v. United States, 610 F.2d 649, 650 (9th Cir. 1979)(applying §2401(a) to a "taking" claim of Indian land without compensation), Sisseton-Wahpeton Sioux, supra, as well as to suits challenging a decision of the federal government under the APA, Shiny Rock Min. Corp. v. U.S., 906 F.2d 1362 (9th Cir. 1990); Sierra Club, supra; Nichols v. Hughes, CIVS-79-752 PCW (E.D.Cal. 2 April 1982)(attached hereto as Ex. 5), aff'd, 721 F.2d 657 (9th Cir. 1983); Blassingame v. Secretary of Navy, 811 F.2d 65 (2nd Cir. 1987); Smith v. Marsh, 787 F.2d 510 (10th Cir. 1986); Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985); Impro Products, supra, and suits brought under the Constitution, Shiny Rock, supra. See also, Crown Coat Front Co. v. U.S., 386 U.S. 503 (1966)(§2401(a) held applicable to plaintiff's challenge to agency administrative decisions affecting its government contract prior to the enactment of the Contracts

Dispute Act).

In Sierra Club, supra, plaintiffs brought suit in 1986 to challenge inter alia the government's implementation of Notice mining operations, pursuant to regulations promulgated in 1980 and amended in 1983. In 1987, plaintiffs sought to expand their suit to include a procedural challenge to the 1980 and 1983 rulemaking under the APA. The Court held that because the APA did not contain a statute of limitations, §2401(a), "as a general statute of limitation,. . .appl[ies] to actions brought under the APA, which challenge a regulation on the basis of procedural irregularity." Id. at 1315. The court then held that plaintiffs' challenge to the 1980 rulemaking was time-barred. Id.[6]

Similarly, in Shiny Rock, supra, plaintiff brought a constitutional challenge to a public land order, claiming that the land order deprived plaintiff of its right to obtain a mineral patent in the Willamette National Forest. The land order was published in the Federal Register in 1964; plaintiff applied for the mineral patent in 1981, which was rejected in 1983 as contrary to the land order; and plaintiff thereafter brought its challenge to the land order. Again, the Court held that plaintiff's challenge was barred by §2401(a)'s six-year statute of limitations. Id. at 1364. Although plaintiff argued that it lacked standing to challenge the regulation until 1983 when its patent was denied, the court ruled that "a party must make a showing that it has standing and that the cause of action was

[6] The court considered whether plaintiffs' challenge related back to the date of the original complaint pursuant to Fed.R.Civ. P. 15(c) and held that it did not meet the criteria for doing so. Id. at 13-15-1316.

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filed within six years of the publication. . .in the Federal Register." Id. at 1365 (emphasis in the original).

In the same vein as Sierra Club and Shiny Rock, several courts have also applied §2401(a)'s limitation period to actions seeking substantive APA review of final agency decisions. One such case is Impro Products, supra, in which plaintiff sought to enjoin the publication by the U.S. Dept. of Agriculture of USDA's adverse test results of one of plaintiff's veterinary products. The Court held that the decision to publish the test results as well as the decision to distribute reprints of the publication constituted "agency actions" for purposes of review under the APA. Id. at 848-849. The Court then held that §2401(a)'s six-year limitations period applied to plaintiffs' APA challenge and, because each of these decisions was rendered at least ten years prior to plaintiffs' suit, the court found plaintiff's claim to be time-barred. Id. at 850 & n.8.

Like the Court in Impro Products, other courts have applied §2401(a) to APA reviews of military discharge decisions. Blassingame, supra at 69-70; Smith, supra at 511; Geyen, supra at 1307; Nichols, supra at 5-6.

In the instant case, plaintiffs bring a hydra-headed challenge to an alleged reversal of its tribal recognition status. Plaintiffs allege that the Ione Band of Miwok Indians was last acknowledged to be a federally-recognized tribe in 1972 and that this alleged recognition disappeared sometime thereafter. Even assuming the truth of plaintiffs' allegation, there can be no dispute that as of 1979, at the latest, plaintiffs were on notice

that the Ione Band was not deemed to be a federally-recognized Indian tribe when the Department published notice of the same in the Federal Register. A brief background leading to this notice publication follows:

Prior to 1978, no federal statutes or regulations existed pursuant to which a group of Indians not residing on a reservation might apply for, be accorded, or secure federal tribal recognition and thereby establish a government-to-government relationship with the United States. See, generally, City of Sault Ste. Marie, Mich. v. Andrus, 458 F.Supp. 465, 472 (D.D.C. 1978); F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 5-17. The absence of any such statutes or regulations led to confusion and dispute concerning the existence of tribal recognition status for groups such as plaintiffs', as exemplified by Commissioner Louis Bruce's 1972 letter to plaintiffs Nicholas and Bernice Villa.

In 1978, the Department of the Interior promulgated regulations for the purpose of "establish[ing] a departmental procedure and policy for acknowledging that certain American Indian tribes exist." 25 C.F.R. §§83.2 & 83.3(a)("This part [25 C.F.R. Part 83] is intended to cover. . .those American Indian groups. . .which are not currently acknowledged as Indian tribes by the Department."). These regulations provide for the annual publication in the Federal Register of all tribes recognized by the federal government, 25 C.F.R. §83.6(b), as well as for the one-time publication in the Federal Register of those putative tribes deemed to have petitions for federal recognition on file with BIA as of 1979, 25 C.F.R. §83.8(b).

As a consequence of the acknowledgement regulations, the

government issued its final decision on the Ione Band's federal recognition status that the putative tribe was not recognized. This decision was conveyed to plaintiffs by every conceivable means: (1) Omission of the tribe's name from the list of federally recognized tribes, as published at 44 Fed.Reg. 7235 (6 February 1979); (2) inclusion of the tribe's name on the list of tribes deemed to have a petition pending for recognition, as published at 44 Fed.Reg. 116 (2 January 1979); (3) by legal notice published in the Sacramento Bee on 16 February 1979; and (4) by letter to plaintiff Bernice Villa dated 19 December 1978 advising that the Ione Band was deemed to be a "petitioning group" for federal recognition, and requesting that the group review its petition in light of the final regulations and guidelines and resubmit the petition after said review. Therefore, at the very latest, plaintiffs' claim accrued on 16 February 1979 and expired in 1985 by application of the six-year statute of limitations set forth at 28 U.S.C. §2401(a).

To the extent that plaintiffs seek to challenge the acknowledgement regulations, this challenge too is stale. Pursuant to Ninth Circuit holdings in Shiny Rock and Sierra Club, §2401(a)'s statutory period applies to rulemaking challenges and the clock begins to run on the effective date of the regulations. Therefore, the statutory period for challenging the acknowledgement regulations expired in October 1984, six years after the regulations became effective.

C. PLAINTIFFS HAVE FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES PRIOR TO FILING THE INSTANT SUIT SEEKING FEDERAL RECOGNITION.

As set forth supra at 8-9, plaintiffs do not identify any

waiver of sovereign immunity by the United States to permit the instant suit. Absent a statute waiving the government's sovereign immunity, this court lacks jurisdiction to entertain the suit. Sherwood, supra at 587-588 (1940)("Except as Congress has consented there is no jurisdiction in the [courts] to entertain suits against the United States.") The only apparent waiver of sovereign immunity permitting plaintiffs to bring the instant suit against the federal government appears to be pursuant to the APA. Where plaintiffs seek judicial review of decisions made by federal agencies and officials, sovereign immunity is waived by 5 U.S.C. 704 only where the agency action is "final". This section has been interpreted to mean that

> when a statute or agency rule dictates that exhaustion of administrative remedies is required, the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete.

White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988) (emphasis added); see also, Montgomery v. Rumsfeld, 572 F.2d 250, 253 n. 3 (9th Cir. 1978). The requirement of exhaustion of administrative remedies ensures that (1) judicial economy is promoted through the utilization of agency appeals procedures, (2) the agencies lend the benefit of their unique expertise to the development of a complete administrative record, and (3) the courts shall have the benefit of a complete administrative record, should the agency and complainant remain at odds at the conclusion of the administrative process and the complainant then pursues judicial action. Joint Bd. of Control of Flathead Irr. D. v. U.S., 862 F.2d 195, 199 (9th Cir. 1988); White Mountain, supra.

Only under exceptional circumstances may the Court determine

that exhaustion is not required. White Mountain, supra. For example, exhaustion may not be required if a determinative ruling is announced by the final administrative decision-maker in advance of reviewing a particular claim, thus rendering exhaustion futile. Also, exhaustion may not be required where evidence of administrative bias is "objective and undisputed." Id., at 677-678.

Regulations for the Bureau of Indian Affairs provide that

> No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considerd final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

25 C.F.R. §2.6(a). Where the decision is rendered by a Deputy to the Assistant Secretary--Indian Affairs, other than the Deputy to the Assistant Secretary--Indian Affairs/Director (Indian Education Programs), appeal is made to the Interior Board of Indian Appeals. Id. at §2.4(e); 43 C.F.R. §4.1(b)(2)(i). Appeals must be filed within 60 days of receipt of the decision being appealed. 43 C.F.R. §4.332(a).

Because plaintiffs have not submitted a petition for tribal recognition pursuant to the acknowledgement regulations, plaintiffs have not exhausted their administrative remedies as required by the APA and there is no decision for this court to review. 5 U.S.C. §704.

In addition, apart from the 1979 decision published in the Federal Register that informed plaintiffs that the Ione Band of Miwok Indians was deemed to be a group with a pending petition for

federal recognition as opposed to a group that was federally recognized, the only other potential agency action of which plaintiffs might complain is the 20 February 1990 letter of Hazel Elbert, Deputy to the Assistant Secretary - Indian Affairs (Tribal Relations), to plaintiff Glen Villa. Ms. Elbert's letter responded to a document entitled "Resolution #890" from the Ione Band of Miwok Indians, which requested tribal recognition under the Indian Reorganization Act, 25 U.S.C. §479. She advised plaintiff that recognition should be sought pursuant to the acknowledgement regulations rather than under IRA. To the extent that Ms. Elbert's letter may have constituted "agency action," this action was appealable under 25 C.F.R. §2.4(e) and 43 C.F.R. §4.1(b)(2)(i) to the Interior Board of Indian Appeals no more than 60 days following its receipt, 43 C.F.R. §4.332(a).

Clearly, plaintiff Glen Villa had received Ms. Elbert's letter by 22 March 1990, when plaintiff Nicolas Villa met with Bureau representatives to protest the 20 February decision. Nearly one year has elapsed since plaintiff Villa's receipt of Ms. Elbert's letter and no administrative appeal has been filed. Instead, plaintiffs chose to file this lawsuit, which must be dismissed for plaintiffs' failure to exhaust their administrative remedies.

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IV. CONCLUSION

For the reasons set forth above, the United States respectfully requests that summary judgment be entered in its favor on the grounds of untimeliness and that any remaining claims be dismissed for failure to failure to exhaust administrative remedies.

DATED: 14 February 1991

Respectfully submitted,

RICHARD H. JENKINS
United States Attorney

By: _____
DEBORA VAN DER WEIJDE
Assistant U.S. Attorney

DOCUMENT No. 8

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

E. RICHARD WALKER
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State Bar No. 31483
428 J Street, Suite 201
Sacramento, CA 95814
Telephone: (916) 446-1891

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al., Plaintiffs, v. HAROLD BURRIS, et al., Defendants.	CIV. NO. S-90-993-LKK JOINDER OF MOTION FOR FOR SUMMARY JUDGMENT AND TO DISMISS

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY given that Defendant, HAROLD E. BURRIS, and all Defendants, excluding the United States of America, hereby join in and adopt the MOTION FOR SUMMARY JUDGMENT AND TO DISMISS and accompanying Memorandum of Points and Authorities and Declaration filed by co-defendant United States.

DATED: 2/14/91

E. RICHARD WALKER
Attorney for Defendant
HAROLD E. BURRIS

PROOF OF SERVICE

I am a resident of the County of Sacramento, State of California, over the age of 18 years of age and not a party to the within matter. My business address is 428 J Street, Second Floor, Sacramento, California 95814.

On February 19, 1991, I served the within JOINDER OF MOTION FOR MOTION FOR SUMMARY JUDGMENT AND TO DISMISS on the parties listed below in said matter by placing a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Louis Demas
Attorney at Law
925 Secret River Drive, Suite J
Sacramento, CA 95814

and personal service upon the following person at the address listed below:

Debra Van Der Weijde
Assistant U.S. Attorney
650 Capitol Mall, Room 3305
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California on February 19, 1991.

Linda Pugh

Linda Pugh

DOCUMENT No. 9

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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Attorneys for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al.,

Plaintiffs,

v.

HAROLD BURRIS, et al.,

Defendants.

CIV NO. S-90-0993 LKK/EM

DECLARATION OF MICHAEL L. LAWSON, Ph.D.

I, MICHAEL L. LAWSON, Ph.D., declare as follows:

1. For the past ten years, I have been employed as a historian within the Bureau of Indian Affairs. Prior to that time, I served as a research historian with the Smithsonian Institution. I have a doctorate in History from the University of New Mexico and have published extensively, including a monograph on American Indian history. Since 1984, I have been employed with the Branch of Acknowledgement and Research and have had administrative responsibility for reviewing the petitions for federal recognition from petitioning groups in California. I have personal knowledge of all facts set forth in this declaration.

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2. The Federal Acknowledgment Project (FAP), which in 1985 became the Branch of Acknowledgement and Research ("BAR"), was created within the Bureau of Indian Affairs in 1978 at the same time the acknowledgement regulations, 25 C.F.R. Part 83, were promulgated. These regulations govern the means by which tribes may petition the government for federal tribal recognition. BAR's responsibilities include reviewing petitions received pursuant to the acknowledgement regulations, making recommendations thereon, and other special projects. The research staff of BAR consists of three anthropologists, all of whom have at least completed their doctoratal course requirements, three historians all with doctorates, and two certified American Indian Lineage Specialists (genealogists). With the exception of two, all of the staff members have over ten years of Native American Indian or Alaska native research experience.

3. According to BAR records, the United States has never extended federal recognition to the Ione Band of Miwok Indians as an Indian tribe. Following is a summary of pertinent contacts with various representatives of the Ione Band, as reflected in the records of this office from 1977 to the present time.

4. As early as 28 September 1977, the Tribal Operations Officer for the Central California Agency of the Bureau of Indian Affairs sent a letter to Harold Burris of the Ione Band advising Mr. Burris of the proposed regulations for seeking federal tribal recognition, suggesting that the group proceed with its request for recognition under the new regulations, and offering to provide assistance in resubmitting the petition for recognition. See letter attached hereto as Exhibit 1.

5. On 19 December 1978, after the acknowledgement regulations became final, the Acting Deputy Commissioner for the Bureau of Indian Affairs wrote to the Ione Band (apparently in care of Ms. Bernice Villa), requesting that the Ione Band review and resubmit their petition for recognition in light of the final acknowledgement regulations. Enclosed with the letter was a copy of "Guidelines for Preparing a Petition for Federal Acknowledgement as an Indian Tribe". See letter and enclosure attached hereto as Exhibit 2.

6. On 27 February 1980, Glen Villa wrote to California Senator John Garamendi to request a letter supporting the Ione Band's efforts to obtain tribal recognition. In his letter, Mr. Villa correctly acknowledges that the Ione Band was provided information in 1978 pertaining to federal recognition and was informed "that before [the Ione Band] can be put into Trust Status we must first be Federally Recognized." He further indicated that at that time, he was working on the group's petition for recognition, which was approximately 75% complete. See letter attached hereto as Exhibit 3.

7. Nothing further was heard from or of any representatives of the Ione Band until 1989. On 7 April 1989, Glen Villa wrote the Commissioner of Indian Affairs to request tribal recognition and enclosed three documents entitled "RESOLUTION # 890", "MEMBERSHIP LIST Ione Band of Miwok Indians", and "CONSTITUTION AND BY-LAWS OF THE IONE BAND OF MIWOK INDIANS KNOWN AS THE IONE RESERVATION." See letter and enclosures attached hereto as Exhibit 4. Because the resolution requested federal recognition

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pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. §479, Mr. Villa's letter was referred to the Branch of Tribal Relations. Tribal Relations has responsibility for reviewing all issues arising under the IRA, such as federal review of tribal constitutions, requests for land to be taken into trust status, etc. Both BAR and Tribal Relations are branches within the Division of Tribal Government Services.

8. On 3 July 1989, the Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) acknowledged Mr. Villa's letter of 7 April 1989 and advised that the Branch of Tribal Relations would research the background of the group. See letter attached hereto as Exhibit 5.

9. On 23 and 28 January 1990, Harold Burris, Sr., sent me two letters in which he maintained that he and other members of the Ione Band do not wish to be federally recognized. See letters attached hereto as Exhibit 6.

10. On 20 February 1990, the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) responded to Glen Villa's 7 April 1989 request for federal tribal acknowledgement. Mr. Villa was advised that the Ione Band should "pursue recognition through the Acknowledgement process and submit . . .documentation supporting its petition." See letter attached hereto as Exhibit 7.

11. In addition to the foregoing correspondence, there were several conversations by telephone and at least one meeting with representatives from the faction seeking recognition for the Ione Band. On 9 November 1989, I spoke with Joan Villa to advise her that BAR had received a request under the Freedom of Information

Act from the Ione Band as well as an inquiry from Senator Cranston. During this conversation, Ms. Villa stated that the group had a completed acknowledgement petition that it was retaining until its tribal status under the IRA was clarified. Three months later, on 8 February 1990, Ms. Villa called me to inquire if Harold Burris had opposed the recognition effort. During this conversation, Ms. Villa advised that her group had gathered documents that showed the Ione Band was recognized and the group was planning to "put the squeeze" on the Assistant Secretary (through Congressional pressure) for a decision that the group was recognized.

13. After receipt of the 20 February 1990 letter from the Deputy to the Assistant Secretary for Tribal Services, several representatives from Ione (Nicolas Villa, Joan Villa, Norma Sanchez, and their attorney, Allogan Slagle) met with myself and several other Bureau representatives (Lynn Forcia, Veronica Murdock, Pat Simmons, and their attorney, Scott Keep) on 22 March 1990. The Ione group protested the 20 February letter, and stated that they were trying to obtain legislative recognition through congressional action. The Ione representatives were repeatedly told that the only administrative option open to them for federal recognition was the petition process set forth under the acknowledgement regulations. The meeting ended on the understanding that the Ione representatives would submit materials to refute the 20 February letter, which would be reviewed by the Bureau.

14. Despite repeated instructions to comply with the acknowledgement regulations in seeking federal recognition and

offers of assistance from BIA staff, the individuals seeking federal recognition on behalf of the Ione Band continue to insist that the Ione Band already is recognized. No documentation was provided subsequent to the meeting held on 22 March 1990, nor has the group sought tribal recognition pursuant to the acknowledgement process set forth in the Bureau's regulations.

15. In the event that the Ione Band submits documentation in the future in support of a request for recognition pursuant to the current acknowledgement regulations, the Band has a priority review number of "2". Because the no. "1" petitioner has already been acknowledged this number means that no other potential petitioner has a prior claim upon the resources of this office for review of its petition for recognition once the petition is determined ready for "active consideration". A petition comes under "active consideration" after petitioner has been given an opportunity to resolve any obvious deficiencies or significant omissions found in the petition. At the present time, BAR would be able to notify petitioners of any such deficiencies or omissions within three to six months of receipt of the petition.

Pursuant to the provisions of 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: 2/18/91

MICHAEL L. LAWSON, Ph.D.

DOCUMENT No. 10

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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Attorneys for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al.,

Plaintiffs,

v.

HAROLD BURRIS, et al.,

Defendants.

CIV NO. S-90-0993 LKK/EM

DECLARATION OF ARTHUR G. BARBER

I, ARTHUR G. BARBER, declare as follows:

1. I have been employed with the Bureau of Indian Affairs since 1978. At the present time, I am the Superintendent of the Blackfeet Agency in Browning, Montana, where I have been assigned since July 1990. Prior to that time, I served as Area Tribal Operations Officer in the Sacramento Area Office for two years. In my position as Area Tribal Operations Officer, I dealt frequently with individuals and tribes seeking verification of their eligibility for BIA services. I have personal knowledge of all facts set forth in this declaration.

2. Beginning around 1989, I became aware of a dispute concerning the tribal recognition status of the Ione Band of Miwok

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Indians. I was contacted by several individuals, including Nick Villa, Jr., Joan Villa, Bernice Villa, and others by telephone and in person about obtaining housing assistance, assistance with tribal elections, tribal constitution approval, and other matters. Because the Ione Band was not listed on the Secretary's annual list of federally recognized tribes (pursuant to 25 C.F.R. §83.6(b), I repeatedly advised these individuals that they first needed to work with the Branch of Federal Acknowledgement and Research ("FAR") in the Bureau's Washington, D.C., office to obtain federal recognition as an Indian tribe before any Bureau services could be rendered to them. I told them that the services they were requesting could not be provided by the Bureau until the Bureau's Central Office in Washington notified the Sacramento office that the Ione Band was federally recognized.

3. During this same time period, I also spoke with Harold Burris several times. Mr. Burris repeatedly informed me that he and several other members of the Ione Band did not wish to be federally recognized.

Pursuant to the provisions of 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: 2/19/91

ARTHUR G. BARBER

DOCUMENT No. 11

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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Attorneys for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al., Plaintiffs, v. HAROLD BURRIS, et al., Defendants.	CIV NO. S-90-0993 LKK/EM SUPPLEMENTAL BRIEF OF THE UNITED STATES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND TO DISMISS

Up to now, the government's position in this lawsuit is that plaintiffs have known for at least 14 years, since 1977, that plaintiff Ione Band was not deemed to be a federally-recognized tribe. The government has recently discovered additional documents that conclusively establish that not only have plaintiffs known for at least 18 years that the tribe was not recognized, but that plaintiffs were represented by legal counsel during the first part of this period, from 1972 (when Commissioner Bruce wrote to plaintiff Nicolas Villa) until 1978 and possibly beyond. It is readily apparent that plaintiffs bring this suit now only to frustrate the state court action rather than to redress concerns pertaining to federal recognition.

These additional documents[1] contain the following language that further buttresses the government's position: (1) A Memorandum to the file by Mr. Forman, dated 17 September 1973 recounts the following telephone conversation:

> Bud Moses, from Reid Chambers' office [of the Office of the Solicitor, U.S. Dept. of Interior[2]], called to inform us that Ione was under review "from scratch," along with several other applications. He stated that the Commissioner's letter had not been cleared or approved by the Department, so they didn't feel bound by it. The Ione group would have to satisfy two tests:
>
> 1) Are they entitled to recognition under 465?
>
> 2) Do they merit the taking of the land into trust?
>
> If they need more information, they'll contact us. Reid's phone number: 202/343-9401.

(2) In a letter dated 5 October 1978 from George Forman, Esq., of California Indian Legal Services, to The Honorable Martin H. Ryan, Judge of the California Superior Court for Amador County, Mr. Forman states in concise and simple terms:

> On October 31, 1972, the [state] Court issued its judgment, in favor of plaintiffs in the [referenced] action, quieting title to a parcel of real property located in Amador County. Since that time, [California Indian Legal Services has] been representing the

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[1] See exhibits attached to the declarations of Guy Reynolds, Esq., and Debora van der Weijde, filed contemporaneously with this brief.

[2] Plaintiffs identify Mr. Chambers as an attorney with the Solicitor's Office of the Interior Department during the 1970's. Pls' Opp. Brf. at n.1.

> plaintiffs[3], who are the Indian residents of that property. . . .

Ex. 1 at 1 (emphasis added).

These two documents are relevant to and support the government's motion for the following reasons: Plaintiffs in the instant suit were on notice as early as September 1973 -- that is, four years earlier than previously urged by defendants -- that the Ione Band was not a federally-recognized tribe. See, Ringgold Corp. v. Worrall, 880 F.2d 1139, 1141-1142 (9th Cir. 1989) ("[Clients] are considered to have notice of all facts known to their lawyer-agent", citing Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962)). Moreover, the 1978 CILS letter solidly demonstrates that not only did the tribe have legal counsel throughout most of the 1970's, the tribe's counsel specialized in the field of Indian Law.

This additional evidence leaves little room for dispute that plaintiffs' delay of 17 years (1973-1990) in bringing the instant lawsuit lacks legal justification and that their true motive in filing this tardy action is to thwart co-defendants' pending state court partition action. As plaintiffs admit:

> [P]laintiffs do not have the luxury of participating in the. . .federal acknowledgement process that the

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[3] The plaintiffs to whom the CILS letter refers were Nicolas Villa Sr., Effie Burris, Esther Burris, Harold E. Burris, Barbara E. Hill, Fred Mike, Muriel Mike, Frank Pinion, Bernice Villa, Donald Villa, Glen Villa, William Villa, and other members of the Ione Band of Indians. See Ex. C to Pls' Compl. Each one of these plaintiffs are parties to the instant, federal court action except for Effie Burris and William Villa who are now deceased. Esther and Harold E. Burris and Frank Pinion are defendants herein; the remaining plaintiffs, above, are also plaintiffs herein.

> government agrees the Band may still pursue. It lacks this luxury, because the defendants in this action are plaintiffs in state court action where they are seeking to partition the Band's land. . . .

Opp.Brf. at 32 (emphasis added).

CONCLUSION

Based upon the foregoing and for the additional arguments set forth in the government's opening and reply briefs, the government urges this court to grant summary judgment and dismissal in favor of the United States.

DATED: 26 March 1991

Respectfully submitted,

RICHARD H. JENKINS
United States Attorney

By: DEBORA VAN DER WEIJDE
Assistant U.S. Attorney

DOCUMENT No. 12

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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Attorneys for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, NICOLAS VILLA SR., BARBARA E. HILL, FRED MIKE, MURIEL MIKE, BERNICE VILLA, DONALD VILLA, GLEN VILLA, NICOLAS VILLA JR., GERALDINE BURRIS, ADELINE YBRIGHT and members of the IONE BAND OF MIWOK INDIANS, Plaintiffs, v. HAROLD E. BURRIS, ESTHER BURRIS, FRANK PINION, CALLIE ALLEN, CAROL BORING, PAMELA BURRIS, JEANETTE ALLEN, FRANK VILLA, HAROLD BURRIS JR., and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of IONE BAND OF MIWOK INDIANS and the UNITED STATES OF AMERICA, Defendants.	CIV NO. S-90-0993 LKK/EM DECLARATION OF GUY REYNOLDS, Esq.

I, GUY REYNOLDS, Esq., declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. My offices are located at 34 Summit Street,

Suite E in Jackson, California. I have personal knowledge of all facts set forth in this declaration.

2. At the present time, I represent plaintiffs Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr., and Jeanette Allen in the matter entitled Burris et al. v. Mike, et al., Case No. 15292, which is a partition action pending in the Superior Court of California for Amador County (hereafter, "partition action"). It is my understanding that my clients in the partition action are defendants in the above-titled action, where they are represented by E. Richard Walker, Esq.

3. On 1 March 1990, I served a Request for Production of Documents (hereafter, "Request") in the partition action upon defendants therein, who include Nicolas Villa, Sr., Barbara E. Hill, Fred Mike, Muriel Mike, Bernice Villa, Donald Villa, Glen Villa, Nicolas Villa, Jr., and Geraldine Burris, all of whom are represented by Louis Demas, Esq. It is my understanding that the latter-named defendants in the partition action are plaintiffs in the above-titled action.

4. On 7 February 1991, after the state court entered an Order in the partition action compelling defendants to produce the documents requested nearly a year ago, Messrs. John Morla and Fred Mike appeared at my office with responsive documents. Among these documents was a Memorandum to the File dated 17 September 1973 from George Forman, Esq., of California Indian Legal Services (hereafter, "subject memorandum"). The next day, 8 February 1991, I provided a copy of this document to my clients, Jeanette Allen and Carol Boring. Attached hereto as Exhibit 1 is a true and

correct copy of the subject memorandum provided to me by Messrs. Morla and Mike on 7 February 1991.

5. I have no knowledge concerning how Messrs. Morla and Mike came into possession of the document attached hereto as Exhibit 1.

Pursuant to the provisions of 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 25, 1991

GUY REYNOLDS

CALIFORNIA INDIAN LEGAL SERVICES

2527 DWIGHT WAY
BERKELEY, CALIFORNIA 94704
TELEPHONE (415) 845-6171

September 17, 1973

M E M O R A N D U M

TO : IONE FILE

FROM : George Forman

17 September 1:25 p.m.

Bud Moses, from Reid Chambers' office, called to inform us that Ione was under review "from scratch," along with several other applications.

He stated that the Commissioner's letter had not been cleared or approved by the Department, so they didn't feel bound by it. The Ione group would have to satisfy two tests:

1) Are they entitled to recognition under 465?

2) Do they merit the taking of the land into trust?

If they need more information, they'll contact us.

Reid's phone number: 202/343-9401

EXHIBIT J

DOCUMENT No. 13

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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Attorneys for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al., Plaintiffs, v. HAROLD BURRIS, et al., Defendants.	CIV NO. S-90-0993 LKK/EM DEFENDANT UNITED STATES' AMENDED REPLY TO PLAINTIFFS' OPPOSITION TO MOTION OF THE UNITED STATES TO SUMMARY JUDGMENT AND TO DISMISS

The United States hereby submits its amended reply brief to which the following single change is made: Footnote 8 of page 12 is deleted. In all other respects, the government's reply brief remains unchanged, including the numbering of footnotes. The Table of Contents and Table of Authorities is amended to reflect changes in pagination resulting from the footnote deletion.

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A. INTRODUCTION[1]

Plaintiffs candidly admit that they are seeking a "quick fix" in federal court because of a pending state court action where individual defendants herein are seeking a partition of land held in common with the individual plaintiffs in this action. Opp.Brf. at 32. Apparently, plaintiffs are upset that the state court has retained jurisdiction over the partition action, instead of dismissing for want thereof.[2] Certainly, such reasoning hardly entitles plaintiffs to sidestep the administrative requirements for obtaining federal recognition, requirements of which plaintiffs have long been aware and have chosen to ignore.

Contrary to plaintiffs' assertion, the Court has sufficient undisputed facts at hand to determine whether plaintiffs' complaint is timely and whether plaintiffs have exhausted their administrative remedy. No discovery by either party is necessary.

To recap, the government's motion as to untimeliness goes to plaintiffs' challenge to the government's published determination in 1979 that the Ione Band is not a federally-recognized tribe. Plaintiffs do not deny a single one of the facts alleged in

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[1] At the outset, the government objects to the evidence proffered by plaintiffs in support of their opposition as lacking in foundation and not relevant to opposing the government's motion, which is premised upon the untimeliness of plaintiffs' action and plaintiffs' failure to exhaust administrative remedies. Most notable, not to mention remarkable, is plaintiffs' attempt to introduce the declaration and research of Allogan Slagle, Esq., as evidence with the caveat that the research is in "draft" form and consists of "tentative conclusions of fact". Slagle Dec. at paras. 3, 4.

[2] Plaintiffs maintain that the land is "tribal land" over which federal courts have exclusive jurisdiction pursuant to 28 U.S.C. §1360(b).

support of the government's dismissal motion: Plaintiffs do not deny that (1) defendant Harold Burris received a letter from BIA's Central California Agency in 1977 advising that the Ione Band should seek federal recognition under the recognition regulations when the latter became final; (2) the Ione Band of Miwok Indians was listed in the Federal Register in 1979 as a tribe with a petition for federal recognition pending; (3) the Ione Band of Miwok Indians has consistently been omitted from the list of federally-recognized tribes printed annually or bi-annually in the Federal Register since 1979; (4) notice of (2), above, was also printed in the Sacramento Bee newspaper in 1979; (5) that in 1978 plaintiff Bernice Villa was advised by letter that the Ione Band of Miwok Indians was deemed to be a tribe actively seeking recognition; (6) that in 1980 plaintiff Glen Villa admitted to California Senator John Garamendi that the Ione Band was not federally recognized and that the band was working on its petition for recognition, which he claimed was 75% complete at that time.

The government also moves to dismiss for failure to exhaust administrative remedies the following claims of plaintiffs: (1) plaintiffs' overall claim for federal recognition, (2) review of the government's denial of plaintiffs' request for tribal recognition under the Indian Reorganization Act ("IRA"), 25 U.S.C. §479, and (3) plaintiffs' challenge, whether procedural or constitutional, to the federal recognition regulations, 25 C.F.R. Part 83. Again, plaintiffs do not deny the relevant, salient facts to a review of the government's dismissal motion, i.e., plaintiffs do not deny that they have failed to submit a petition for recognition pursuant to the recognition regulations;

plaintiffs do not deny that no administrative appeal was taken from the denial of their petition for recognition pursuant to the Indian Reorganization Act, 25 U.S.C. §479; and plaintiffs do not deny that the recognition regulations became final in 1978. In addition to raising various arguments unrelated to the government's motion and for that reason are not addressed herein[3], plaintiffs counter the government's motion by asserting (1) only Congress and not BIA may terminate the government's relations with a tribe, (2) that plaintiffs should not be bound by a limitations statute in their challenge to the government's determination that no trust relationship exists with the tribe, (3) that the limitations statute should be equitably tolled, and (4) that plaintiffs should not be required to exhaust their administrative remedies.

Each of these arguments will be addressed in turn.

B. ARGUMENT

1. Plaintiffs' Argument that BIA Lacked any Authority to Terminate the Tribe's Trust Relationship is Clearly a Cause of Action Under the APA and Hence Subject to the Time-Bar of 28 U.S.C. §2401(a).

Plaintiffs argue that only Congress and not BIA has authority to terminate the government's relations with a tribe.[4] Implicit in plaintiffs' argument is the assertion that an agency official has acted in excess of his authority in determining that the

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[3] The government does not address plaintiffs' argument directed at a substantive review of the recognition regulations as the government did not raise this matter in its opening brief.

[4] This argument assumes that the 13 October 1972 letter from Commissioner Bruce, on which plaintiffs so heavily rely, ever constituted a formal recognition of the Ione Band rather than a simple assumption that was subject to later clarification. See discussion infra at 22-23.

government does not have (or, in plaintiffs' view, no longer has) a government-to-government relationship with the Ione Band. Indeed, §706(2)(C) of the APA, 5 U.S.C. §701 et seq., expressly provides inter alia that

> The reviewing court shall---
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be---
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . .

Again, such an action under the APA is subject to the six-year statute of limitations found at 28 U.S.C. §2401(a). See, e.g., Crown Coat Front Co. v. U.S., 386 U.S. 503 (1966); Shiny Rock Min. Corp. v. U.S., 906 F.2d 1362 (9th Cir. 1990); Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988) and other authorities cited in the government's opening brief at 12. Plaintiffs cite no contrary authority.

What plaintiffs do argue is that while they are willing to believe that the Commissioner of Indian Affairs, who in 1972 was the head of the Bureau of Indian Affairs, was empowered to extend federal recognition to Indian tribes, he was not similarly empowered to correct errors or issue clarifications. See Opp. Brf. at 7, n.11. Plaintiffs are correct that the Interior Department has authority, as delegated to it by Congress at 25 U.S.C. §2, to determine those Indian tribes to which the government has extended recognition. See, e.g., 28 U.S.C. §1362 (federal district courts have jurisdiction of actions "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." Emphasis added.). However,

plaintiffs are incorrect in assuming that the government is estopped from issuing retractions or clarifications of erroneous or misleading statements not in accordance with the law. Walker v. Navajo-Hopi Indian Relocation Com'n, 728 F.2d 1276 (9th Cir.), cert. denied, 469 U.S. 918, reh'g denied, 469 U.S. 1068 (1984).

The plaintiff in Walker was a Navajo woman living on land that was ultimately given to the Hopi Tribe by act of Congress ("Settlement Act").[5] In so legislating, Congress also provided for relocation assistance for Navajos residing on the land given to the Hopis. Id. at 1277. As part of an overall relocation plan to be filed with Congress, an "enumeration" list was prepared of Navajos who were living on land given to the Hopi Tribe. Plaintiff was listed on the enumeration list. However, when she applied for relocation benefits, plaintiffs' application was denied because she determined to have relocated off the transferred land prior to the Settlement Act, and she brought suit. She argued that by virtue of inclusion of her name on the enumeration list, she was per se eligible for relocation benefits. Id.

The court held that estoppel would not bar the government's subsequent determination that plaintiff had, in fact, moved off the subject land prior to the accrual of any relocation benefits. The court noted that "estoppel should be applied against the Government with utmost caution and restraint," citing Schuster v.

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[5] The complex history of the land dispute between the Hopi and Navajo Tribes, and Congress' efforts to legislate a solution is detailed in Walker as well as Healing v. Jones, 210 F.Supp. 125 (D.Ariz. 1962, aff'd, 373 U.S. 758 (1963)(per curiam).

Commissioner, 312 F.2d 311, 317 (9th Cir. 1962). Walker, supra at 1280.

The Court found no detrimental reliance by the plaintiff on the fact that her name had been included on the enumeration list. Moreover, the court found that even had plaintiff detrimentally relied, such reliance would have been unreasonable. Id.

These same factors apply with equal force to the plaintiffs in the case before this court. Plaintiffs do not assert that they have relied to their detriment upon the Commissioner's 1972 letter. Indeed, plaintiff Glen Villa represented to state senator Garamendi that the group was working on their petition for recognition and, in 1980, the petition was 75% complete. Ex. 3 to Lawson Decl. Later on, the group applied for recognition under the IRA. Ex. 4 to Lawson Decl.

In any event, had plaintiffs relied to their detriment, any such reliance would have been unreasonable in the face of the many, many assertions by the government from at least 1977 (and undoubtedly earlier) on up to the present that the Ione Band was not federally recognized.

Plaintiffs' cause of action clearly arises under the Administrative Procedures Act[6] and hence is subject to the time bar of §2401(a). Because plaintiffs' claim accrued no later than 1979, their claim expired in 1985.

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[6] Plaintiffs cannot cite any other authority waiving the government's sovereign immunity to be sued. Therefore, their claim must proceed under the APA.

2. The Six-Year Statute of Limitations of 28 U.S.C. §2401(a) Clearly is Applicable to Plaintiffs' Claim.

Plaintiffs cite no relevant authority for the proposition that they should not be bound by the limitations period of six years set forth at 28 U.S.C. §2401(a), much less do they cite authority for the astounding proposition that they should not be subject to any limitations period. As set forth, supra, plaintiffs squarely predicate their claim that the Ione Band has been deprived of previous federal tribal recognition upon unauthorized agency action. This cause of action is indeed recognized under the APA, and §2401(a) cannot seriously be argued to be inapplicable in light of recent Ninth Circuit precedent. Shiny Rock, supra; Sierra Club, supra.

What plaintiffs do cite are two related Indian cases, Hopland Band of Pomo Indians v. U.S., 855 F.2d 1573 (Fed.Cir. 1988) and Smith v. United States, 515 F.Supp. 56 (N.D.Cal. 1978), both of which addressed complicated issues attendant upon the termination of the Hopland Rancheria in Mendocino County, California. Hopland supports the United States' argument: The Federal Circuit held that §2401(a)'s Claims Court counterpart, 28 U.S.C. §2501, is clearly applicable to the Indian plaintiff's claims for damages based upon the government's conceded unlawful termination of the plaintiff tribe. However, contrary to plaintiffs' construction, neither Hopland nor Smith holds inapplicable §§2401(a) or 2501 to claims of unauthorized agency action or termination of federal recognition status. In fact, in Smith, the government conceded that federal recognition had been wrongfully terminated, thus

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mooting whatever bases may have been available for dismissal. Smith, supra at 57, 58 & 59.

If this court were somehow convinced that these plaintiffs had truly labored under the belief these past 15 years that they were indeed recognized, then the court might well have misgivings as to holding plaintiffs to the established six-year statutory time frame. But plaintiffs are not so ignorant. Indeed, plaintiffs cannot and do not dispute that they were well aware that the Ione Band was not deemed a federally recognized tribe at least at the time of the government's letter to defendant Harold Burris in 1977. In fact, plaintiffs went about gathering materials to comply with the recognition regulations, making numerous requests to defendants under the Freedom of Information Act for all documents relevant to the Ione Band, and writing to state legislators. Most incredulously, plaintiffs admit that the only reason they are in federal court is because a parallel state court action did not get dismissed on jurisdictional grounds and plaintiffs believe that a judgment from this court stating that the Ione Band is a federally-recognized tribe will assist in the dismissal of the state court action! Opp.Brf. at 32.

In contrast, the government is harmed substantially by plaintiffs' delay. While plaintiffs have amassed considerable documentation, as appended to both their complaint as well as their opposition brief, the government has yet been unable to locate many of these documents among its own records. Similarly, documents covering the period from 1972 to 1977 and addressing the Ione Band are missing at the present time despite the apparent existence of a controversy within the Solicitor's Office as

described by former Interior staff attorney Reid Chambers. Opp.Brf. at 6-7, n.11. It is to safeguard against this very situation that Congress enacted 28 U.S.C. §2401 and determined that six years was a sufficient limitations period beyond which time "every civil action commenced against the United States shall be barred."[7] Emphasis added. See, U.S. v. Kubrick, 444 U.S. 111 (1979).

3. Plaintiffs are not Entitled to Equitable Tolling of the Statute Because there was no Fraudulent Concealment by the Government.

The statute of limitations applicable to actions against the United States, including §2401(a), is rarely tolled in suits against the federal government. Zavala by and through Ruiz v. U.S., 876 F.2d 780, 783 (9th Cir. 1989)(refusing to toll the statute in a tort claims action under the FTCA brought on behalf of a minor). Where the government fraudulently conceals facts that results in the plaintiff's filing of an untimely claim, the court may toll the statute as against the government. Id.; see also, Hennegan v. Pacifico Creative Service, Inc., 787 F.2d 1299, 1302 (9th Cir. 1986); Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 249-250 (9th Cir. 1978).

In invoking the concept of fraudulent concealment, plaintiffs must "plead with particularity the circumstances surrounding the concealment and state facts showing [their] due diligence in

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[7] Indeed, rather than expanding the time within which suits will be permitted against the United States, Congress appears intent upon constricting the time within which actions may commence against the United States. See, 28 U.S.C. §1658 (150 Cong.Rec. H13297-13311 (1990)), in which Congress set forth a four-year limitations period applicable to causes of action against the United States that are thereafter created by law.

trying to uncover the facts." Id. at 250. Furthermore, plaintiffs "must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." Id.

Plaintiffs cannot establish any concealment of any facts by the government in this case, much less fraudulent concealment. In the first place, plaintiffs erroneously assert that "the government's argument heavily relies on the fact that the Ione Band submitted a petition to the Department of Interior for tribal recognition in 1916." Opp.Brf. at 20. This is incorrect. In asserting that plaintiffs' action is time-barred, the government most assuredly relies heavily upon the facts that plaintiffs were well-informed as early as 1977 and no later than 1979 that the Ione Band was not deemed to be a federally-recognized tribe by virtue of letters, Federal Register notices, and newspaper publication. The fact that three of these forms of notice make reference to a 1916 petition is irrelevant. What is relevant is that the government made and published its decision that the Ione Band was not a federally-recognized tribe.

Plaintiffs argue that the references to a 1916 petition were a "hoax" and therefore represent fraudulent concealment because the government admitted that the petition did not exist. Even if it is true that the petition did not exist, plaintiffs have failed to submit any evidence that the existence of such a petition caused them to delay the filing of this lawsuit. If anything, a reasonable person would expect that knowledge that a petition were deemed to exist and that the government expected the petition to

be reviewed and resubmitted for the purpose of determining whether the tribe should be federally recognized would hasten the filing of the lawsuit if plaintiffs truly believed that they were already federally recognized. It makes no sense that plaintiffs would have been inhibited from pursuing legal action.

Additionally, plaintiff Bernice Villa, who was the recipient of the government's 1978 letter advising that the Ione Band's petition was enclosed for review and resubmission under the recognition regulations, see Ex. 2 to Lawson Decl., is in the best position to know whether a petition was or was not returned to her. If one had not been enclosed with the government's letter, certainly a reasonable person would have commenced inquiry at that time as to the existence of the petition.

Additionally, plaintiffs maintain that because Ms. Audrina Harrison received housing assistance from the government during the statutory period, that the provision of such assistance somehow "precludes the accrual of the claim on the issue of tribal recognition."[8] Opp.Brf. at 24-25. Plaintiffs grossly misstate the facts pertaining to Ms. Harrison. Ms. Harrison apparently applied initially for housing assistance in 1981. Opp.Brf. at OR 70-74. No action was taken on her application until a letter dated 15 November 1983 was received from the Amador County Health Department, which stated

> You may be aware that in September of this year we had an outbreak of infectious diarrhea among several families living in a portion of the Ione Rancheria. One of the people involved was a newborn infant who was very ill, requiring transfer from our local hsopital to the intensive care nursery at U.C. Davis Hospital in

[8] [Deleted.]

> Sacramento. The infant's mother Adrena [sic] Harrison lives in very modest housing which is without proper sanitation facilities and no hot water (no indoor water at all). The occurrence of illness in Adrena's [sic] newborn baby as well as in herself and other children was directly related to the inadequate housing/ sanitation facilities.

Id. at OR 51. In response to the grave health situation presented and at the specific request of a local government, Ms. Harrison was provided a new home in 1984. Id. at OR 17,42,49. The housing regulations require that applicants have some relation to a federally-recognized tribe. 25 C.F.R. §256.2(e). Ms. Harrison is 1/2 Paiute in addition to being 3/8 Miwok and was eligible for housing assistance on the basis of her Paiute (Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony) heritage. See, id. at OR 73, 84.

In any event, not one of the documents executed by the government and contained in Ms. Harrison's housing application file, Id. at OR 14-84, bear a single reference to "the Ione Band of Miwok Indians".[9] The only references in the file to the Ione Band were made by nongovernment individuals.

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[9] Plaintiffs place emphasis on the government's letter to defendant Harold Burris as proof of the government's relationship with the tribe in the matter of Ms. Harrison's housing application. Id. at OR 52. However, as clearly stated in that letter, the government was providing Mr. Burris with a courtesy copy of the housing grant as he was apparently the lessor on the leasehold contract for the land upon which Ms. Harrison's home would be constructed. See, id. at 56-58. The fact that Mr. Burris signed the leasehold contract in his capacity of chairperson of the Ione Band did not establish any contact between BIA and the Ione Band of Indians with respect to Ms. Harrison's housing grant. Nor does the simple request for a copy of the Constitution and By Laws again constitute any form of recognition. Indeed, the letter fails even to address Mr. Burris as chairperson of the Ione Band.

Again, regardless of whether a petition for recognition did or did not exist, plaintiffs were aware that the Ione Band was not federally recognized. It is the knowledge of this latter fact that causes plaintiffs' cause of action to accrue at the very latest by 1979.

4. Plaintiffs Do not Satisfy the Requirements for being Excused from Exhausting Administrative Requirements.

Plaintiffs outline the following reasons for excusing them from compliance with the government's recognition regulations: (1) the government's alleged delay on the initial petition for recognition; (2) plaintiffs are federally recognized and do not need to comply with the exhaustion requirements; (3) the administrative remedy is inadequate; (4) the issue of recognition is primarily a legal rather than factual issue; (5) the necessary evidence already exists; (6) judicial proceedings are preferable to administrative proceedings; and (7) exhausting the administrative procedure would be futile. Each of these points will be addressed seriatim, with the exception of (2), which is addressed elsewhere in the government's reply. Points 3-6 are addressed together.

First of all, the requirement that parties exhaust administrative remedies prior to resorting to the courts is premised upon the belief that doing so will

promote the policies underlying the doctrine:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have the opportunity to correct its own errors, to afford the parties and the courts the benefit of its own experience and expertise, and to compile a record which is adequate for judicial

review. Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

Sierra Club, supra at 1322. Especially in areas requiring specialized expertise, such as the determination of whether an asserted tribal entity satisfies the criteria for coming into trust status, the administrative process is essential (1) because it is a function of Congress and the Executive to determine whether and when to enter into a government-to-government relationship with an Indian tribe, and not the court's function and (2) to providing a record complete with an analysis of ethnological, historical, sociological and other factual data that determine whether a tribe meets the criteria set forth for federal recognition.

a. The Government Has Not Delayed on the Tribe's 1916 Petition

Plaintiffs are correct that the government is not now aware of any written petition for federal recognition from the Ione Band that goes back to 1916. In providing the Ione Band with a priority date of 1916, the government accorded the Ione Band the benefit of a verbal petition for tribal recognition, because members had been making inquiries during the 1970's, and the group was given the date of 1916 because that was the earliest mention of the group in government records. The following dissertation explains: As can be seen from the early history (up to the 1940's) of the Ione Band as set forth in the Slagle Declaration and accompanying information submitted by plaintiffs[10], Congress

[10] The government reiterates its objection to plaintiffs' proffer of Mr. Slagle's declaration and accompanying material as competent evidence of any value. However, for limited use for illustrative or general background purposes only, the government (continued...)

passed an appropriations act in 1914 appropriating $20,000 for the purchase of land for "homeless Indians in California".[11] The task of identifying "homeless Indians" fell to the Bureau of Indian Affairs, and members of the Ione Band (as they were collectively identified during the years immediately following 1915) were among the many California Indians identified as possible beneficiaries of a land purchase under the appropriations act. The government did attempt to purchase the very 40-acre tract upon which the Ione Band lives today but because of a twisted title history and intermediate property transfers, the government was unable to consummate the land purchase. Purchase efforts tapered by 1920 and only sporadic inquiries were made thereafter until ceased around 1940. By that time, the members of the Ione Band had lived on the 40-acre tract for several decades and they continued to do so with no interference. See Declaration of defendant Harold E. Burris, Sr. Mr. Burris relates very clearly in his declaration that the only contact between the government and the Ione Indians during the years up to 1940 focussed on efforts to purchase land.

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[10](...continued)
does not object to the history set forth therein up to the 1940's.

[11] Plaintiffs' Ex. G(1) contains an undated letter with the following statutory language quoted therein at 1: "The Indian Appropriation Act for the fiscal year 1915 contains the following:

> For the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians, $20,000 to be immediately available and to remain available until expended, said funds to be expended under such regulations and conditions as the Secretary of the Interior may prescribe."

Id. at para. 3. The Indians never had any expectation that a further relationship would develop between their band and the government nor did they expect further services. Id.

Between 1945 (or even earlier) and 1970, there was no contact between the government and the Ione Band or its members at least as to Indian or Indian-related matters. Id. at para. 5. In fact, there was no leadership or governing structure within the Band whatsoever. Id. at para. 6.

Around 1970 with housing on the 40 acres in deteriorating condition, the group made its first contact with the government in several decades. Id. at para. 7. At this time, Harold Burris, Sr., was elected tribal chairperson and he understood from the government that as a threshold matter no services could be provided on land not owned by the Indian requesting services. Id. at paras. 6, 7. California Indian Legal Services were contacted and succeeded in acquiring title to the land in 1972 on behalf of 12 individuals, including Harold Burris and his wife and "other members of the Ione Band of Indians". Id. at para. 7. Once title to the property was quieted, most of the new owners decided to request the Bureau to take the land into trust property. Id. at para. 8. Although Mr. Burris opposed trust status for the property, he agreed to pursue the matter with BIA. Id. According to Mr. Burris, BIA officials consistently represented to him that the tribe was not federally recognized and would need to seek

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formal recognition in connection with its request for the land to be taken into trust status. Id. at para. 11.[12]

Shortly thereafter, around 1977, the drafting of the recognition regulations began and were finalized in 1978. Although the government did not deem the Ione Band to be federally recognized, it nonetheless was aware that the group had requested trust status for the 40-acre property and the government believed the group was preparing a formal request for recognition. Therefore, under the new regulations, the Ione Band was accorded the status of a "petitioner" with a priority date of 1916 based upon the band's identification in that year during the land purchase efforts.

The bottom line of this history is that there has never been an expectation either on the parts of any of the parties to this lawsuit that an actual written petition for federal recognition of the Ione Band has existed since 1916. That date is the date of the government's earliest awareness of the group's existence.

b. Plaintiffs' Challenge to the Recognition Regulations (Points 3-6) Lack Merit

At the outset, it is noted that plaintiffs have not rebutted the government's motion to dismiss plaintiffs' challenge to the constitutionality of the recognition regulations. In particular,

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[12] Mr. Burris specifically denies ever even knowing of Commissioner Bruce's 1972 letter until this lawsuit was filed last year. Id. at para. 9. The Commissioner's letter was sent to Mr. Burris' sister and brother-in-law, Bernice and Nicholas Villa, who never informed him of it even though he was the tribal chairperson. Id. Mr. Burris maintains that the Villas have never had authority to act on behalf of the Ione Band. Id. at para. 8.

nowhere in plaintiffs' opposition brief is the Ninth Circuit's ruling in Shiny Rock, supra, mentioned, much less is it challenged. For this reason alone, as well as for the reason that the regulations have not previously been held to be unconstitutional by any court during the six years following their promulgation[13], the regulations speak for themselves as providing a viable and necessary administrative process pursuant to Weinberger, supra. Indeed, in determining whether the Hou Hawaiians could possibly constitute a tribe for purposes of conferring jurisdiction on the district court pursuant to 28 U.S.C. §1362, the Ninth Circuit looked to factors set forth in the recognition regulations even though there was no contention that the group had ever applied for or received recognition under the regulations. Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985), cert. denied, 475 U.S. 1091 (1986).

In addition, the Supreme Court has stated that in regard to questions of tribal recognition: "[I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs [as tribal recognition]." United States v. Holliday, 70 U.S. 407, 419 (1865) (emphasis added); see also, United States v. Sandoval, 231 U.S. 28, 47 (1913).

The Department issued its final recognition regulations in September 1978. The issuance of the regulations was preceded by extensive consultation with tribal leaders and meetings and discussions with other federal agencies, state governments, tribal

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[13] It does not appear that the regulations were, in fact, challenged during the operable six year period.

governments, potential petitioners, and congressional staff. See, "Supplementary Information" published at 43 Fed.Reg. 3936 (5 September 1978) with the recognition regulations.

The Department of the Interior has now had 13 years of experience in applying the regulations, which became effective 5 October 1978. OR 7-12 submitted by plaintiffs shows that by as of September 1990, the Department has reviewed numerous petitions for recognition. As set forth in that document, eight tribes have been formally recognized while another 12 were resolved outside the recognition process.[14] Still others have been denied recognition, five are under pending review, and 86 are awaiting action by the petitioner. The Ione Band falls into the latter category and is considered to be a "petitioner actively working on petition". OR 10.

The Branch of Acknowledgement and Review is made up of individuals with training in anthropology, geneology, history, and sociology. It includes six persons all of whom have completed doctoral requirements. Lawson Dec. at para. 2.

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[14] Plaintiffs make much of this particular statistic, claiming that extensive discovery is required to determine how recognition could be so accorded outside the process set forth by the regulations. However, had plaintiffs reviewed the document submitted in support of their opposition, they would have found the answer: The Texas Band of Traditional Kickapoos were determined to be part of a recognized tribe and their petition was withdrawn; four tribes were recognized through act of Congress (Cow Creek Band of Umpqua Indians, Western (Mashantucket) Pequot Tribe, Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, and Lac Vieux Desert Band of Lake Superior Chippewa Indians); and seven tribes were determined ineligible for consideration under the recognition regulations (Lumbee Regional Development Association, Hatteras Tuscarora Indians, Cherokee Indians of Robeson and Adjoining Counties, NC, Tuscarora Indian Tribe, Waccamaw Siouan Development Association, Inc., Cherokee Indians of Hoke County, Inc., and Tuscarora Nation of North Carolina). Opp.Brf. at OR 8-9.

The regulations themselves demonstrate that the recognition process is a thorough and in-depth one that is designed to facilitate the recognition of tribal entities that meet the criteria set forth in the Department's regulations. The established criteria are based upon caselaw, treatises, and Interior Department materials. The criteria that must be satisfied to establish tribal existence include, in abbreviated form:

> 1) Facts establishing that the petitioner has a substantially continuous Indian identity.
>
> 2) Evidence that a substantial portion of the petitioning group inhabits a specific area and that its members are descendants of an Indian tribe which historically inhabited a specific area.
>
> 3) Evidence that the petitioner has maintained tribal political influence over its members throughout history until the present.
>
> 4) A copy of the group's present governing document or a statement of membership criteria and of the procedures governing members and affairs.
>
> 5) Current and former membership lists based on tribe's own defined criteria and with individual members being descendants of historical tribe(s).
>
> 6) Membership of petitioner's group is composed principally of persons who are not members of any other North American Indian tribe.
>
> 7) Neither petitioner nor members are the subject of congressional legislation terminating or forbidding the federal relationship.

25 C.F.R. §83.7.

The regulations make clear the Interior Department's commitment to assist petitioners in the preparation of their petitions. Upon request, the Department "shall provide suggestions and advice" to researchers for a petitioner regarding their research. §83.6(d). The Department may also "initiate

research for any purpose" relative to analyzing the petition and obtaining additional information. . . ." §83.9(a). The Department is also obligated, before considering the petition, to notify the petitioner of "obvious deficiencies or significant omissions" apparent upon initial review of the petition and to allow the petitioner an opportunity to correct the deficiencies before the Department considers the petition. When the petition comes under active consideration, the petitioner and other interested parties are notified and also provided the name, office addess, and telephone number of the staff member assigned to review the petition. §83.9(d).

The declaration of Dr. Lawson states that if the Ione Band submits the necessary documentation, the BAR should be able to review such petition within six months. Para. 15. Proposed findings on whether a group constitutes a tribe are normally made within one year after active consideration of a documented petition has begun. §83.9(f).

As is evident from the foregoing, the recognition process is comprehensively thorough and complete. Inexplicably, plaintiffs have simply failed to avail themselves of this procedure.

c. Plaintiffs Fail to Establish that Participating in the Recognition Procedures Set Forth at 25 C.F.R. Part 83 will be Futile.

In support of their argument that exhaustion is futile, plaintiffs argue only that because the government views Commissioner Bruce's letter as "a piece of evidence with no conclusive effect". Opp.Brf. at 27-28. In the first place, the letter was written in response to a request to take title to the 40-acre parcel in trust. The Commissioner agreed to do so under

the terms of the IRA, pursuant to which the Commissioner did not make a determination or findings that the Ione Band was a tribe within the meaning of the IRA. In stating that "federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated", without more, it is further evident that none of the traditional factors for tribal recognition were given consideration, even apart from the IRA.[15] Given the express context of the sentence, it is clear that the Commissioner articulated an assumption, not borne out by any caselaw, treatise or statute, that the identification of a group of Indians and the initiation of efforts to purchase land for said group without more constitutes "federal recognition". Indeed, because a group of Indians collectively identified as the Ione Band were targetted as beneficiaries of a land purchase that unfortunately never materialized, the Ione Band was known to exist in 1916 by the government and in that sense were "recognized" to exist by the "federal" government.

There are a number of such tribes who are known to the federal government to exist in some form but with which there is

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[15] By 1972 and for decades prior thereto, it was well-established law that while

> there is broad federal authority to recognize tribes, the question may arise whether that power has been exercised in a particular instance. Normally a group will be treated as a tribe or a "recognized" tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has had some continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs.

F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 6.

no federal relationship. Indeed, in 1977, the final report to Congress of the American Indian Policy Review Commission states

> Inconsistencies and oversights in the Indian policy of the United States are exposed by one stark statistic: there are more than 400 tribes within the Nation's boundaries and the Bureau of Indian Affairs services only 289. In excess of 100,000 Indians, members of "unrecognized" tribes, are excluded from the protection and privileges of the Federal-Indian relationship.

Attached hereto as Ex. 1. Some of these tribes are serviced by the states, as was the case with the Passamaquoddy Tribe of Maine and Massachusetts. Joint Trib. Coun. of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 372-373 (1st Cir. 1975)("[N]o treaty exists between the United States and the [Passamaquoddy] Tribe and, except for isolated and inexplicable instances in the past, [the federal government], in its trust capacity, has had no dealings with the Tribe. On the contrary, it is the States of Maine and Massachusetts which have acted as trustees for the tribal property for almost 200 years." Emphasis added.).

In California, many thousands of individual Indians have been recognized as descendants of the aboriginal peoples of California for purposes of partaking in the Judgment Fund established to compensate for the taking of ancestral lands. 25 U.S.C. §651 et seq. The Judgment Fund roll established in 1928 to determine who would partake in the fund is a listing of eligible and ineligible Indians and contains genealogical, geographical, and Indian blood quantum information (including tribal information of ancestors) for each individual Indian applicant. However, the creation of this Judgment Fund roll did not automatically extend federal recognition to the myriad of tribal entities identified by Indian applicants who appear on the roll. See, e.g., Donahue v. Butz,

363 F.Supp. 1316 (D.C.Cal. 1973). It was simply a listing of applicants and information to determine their eligibility to participate in the fund. It is this very listing from which the government computes the Indian blood degrees or certifications, such as that submitted by plaintiffs for Ms. Audrinna Harrison. Opp. Brf. at OR 73, 74 & 84.[16] The government submits that there are undoubtedly tribal groups indigenous to California, as represented by descendants whose names appear on the Judgment Fund Roll, that have never come under the government's supervision within the context of "federal recognition."

In any event, to draw a conclusion that exhausting administrative remedies would be futile based only on the government's refusal to ascribe to Commissioner Bruce's letter the broad meaning that plaintiffs would like is overreaching. Indeed, had the government believed such a process would be futile, it is doubtful that the Ione Band would have been included among the list of "petitioners with recognition petitions pending."[17] In any event, plaintiffs can appeal any adverse decision to the Interior Board of Indian Appeals ("IBIA") and ultimately to the district court pursuant to the APA. This court should not usurp

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[16] Indeed, the issuance of a "Certificate of Degree of Indian Blood", OR 84, is not of itself an admission of "federal recognition". It is a reflection of what the holder's ancestors represented themselves to be in notarized affidavits to the government at the time of the 1928 California Judgment Fund Roll. The government will be pleased to provide the court with a declaration to this effect, if requested.

[17] This is not to say that the Ione Band would be entitled to recognition, only that the government has never determined that to submit a petition for recognition under the regulations would necessarily be futile. The government simply does not have all of the information available to it to render a determination on the issue of recognition.

the Department's expertise and prerogative to render a full and complete analysis of the Band's status as a tribe entitled to federal recognition.

C. CONCLUSION

For the reasons set forth in the government's opening brief in support of its motion to dismiss as well as hereinabove, the government respectfully urges the Court to dismiss plaintiffs' action.

DATED: 12 March 1991

Respectfully submitted,

RICHARD H. JENKINS
United States Attorney

By: DEBORA VAN DER WEIJDE
Assistant U.S. Attorney

DOCUMENT No. 14

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al., Plaintiffs, v. HAROLD BURRIS, et al., Defendants.	CIV NO. S-90-0993 LKK/PAN DEFENDANT UNITED STATES' SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND TO DISMISS

Pursuant to this Court's order dated 12 April 1991, defendant United States of America herewith submits its supplemental brief on the issue of the exclusivity of the tribal acknowledgement regulations, 25 C.F.R. Part 83.

I. BACKGROUND

Plaintiffs filed this action in October 1990 to achieve two objectives.[1] First, plaintiffs seek a declaration from this court

[1] In actuality, plaintiffs are seeking a way out of a land partition action brought in state court by individual co-defendants in the instant action. Opp.Brf. at 32 ("Most importantly, plaintiffs do not have the luxury of participating in the admittedly slow federal acknowledgement process that the government agrees the Band may still pursue. It lacks this luxury, because the [individually-named] defendants in this action (continued...)

that the Ione Band of Miwok Indians has been and remains a federally-recognized tribe (plaintiffs' first, second, third, and sixth causes of action). Second, plaintiffs seek an adjudication by this court of title to land held in common by the nonfederal parties hereto (plaintiffs' seventh, eighth and ninth causes of action). Lastly, plaintiffs challenge as constitutionally invalid the tribal acknowledgement regulations found at 25 C.F.R. Part 83 (plaintiffs' fourth and fifth causes of action).

In February 1991, the United States brought a motion for summary judgment premised upon two arguments: Plaintiffs' claims are time-barred pursuant to 28 U.S.C. §2401(a) and plaintiffs failed to exhaust their administrative remedies for obtaining federal recognition pursuant to 25 C.F.R. Part 83 ("tribal acknowledgement regulations" or "acknowledgement regulations"). In plaintiffs' opposition brief, plaintiffs argued that they were entitled to discovery into the exclusivity of the acknowledgement regulations. As a result of the hearing held on 11 April 1991, this court granted plaintiffs' request to conduct discovery on the limited and sole issue of the exclusivity of the acknowledgement regulations and requested further briefing from the parties on this issue as well as on the applicability of the decision rendered in James v. U.S. Dept. of Health and Human Services, 824 F.2d 1132 (D.C.Cir. 1987).

Plaintiffs have now had the opportunity to take discovery, which consisted of interrogatories and a lengthy deposition of one

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[1](...continued)
are plaintiffs in [a] state court action where they are seeking to partition the Band's land that had always been held in common and is sacred to them.").

attorney within the Department of the Interior ("Interior") who is very knowledgeable on Indian law and policy. Defendants contend that there is no new or additional evidence or arguments that merit a denial of the government's motion. The court is urged to grant the government's motion for summary judgment.

II. ARGUMENT

Contrary to plaintiffs' assertion, the United States never has taken the position that the acknowledgement regulations are the exclusive means of obtaining federal tribal recognition. While the Executive Branch has been delegated the power by Congress to extend federal recognition, 25 U.S.C. §§2 & 9, which delegation spawned the acknowledgement regulations, Congress nevertheless retains the ultimate authority to recognize, by legislative means or otherwise, Indian tribes. See, e.g., 25 U.S.C. §1300b-11 et seq. (recognition of the Texas Band of Kickapoo Indians in 1983); 25 U.S.C. §1300f et seq. (recognition of the Pascua Yaqui Tribe in 1978).

Other, limited forms of recognition may also exist. The First Circuit has held that the Nonintercourse Act, 25 U.S.C. §177, is another source of federal tribal recognition but is limited to the obligation of the United States to protect the land rights of Indian tribes. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979); Joint Trib. Coun. of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). Additionally, there are "treaty tribes", which are non-federally recognized tribes that were signatories to a treaty with the United States. United States v. Washington, 384 F.Supp. 312, 343 (W.D. Wash. 1974) ("Boldt decision"), aff'd, 520 F.2d 676

(9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)[2]. In the absence of an unequivocal abrogation of treaty rights by Congress, the United States has a continuing obligation to recognize and uphold the treaty rights of tribes that are not otherwise recognized as eligible for federal services to Indians. 520 F.2d at 692-693.

It is defendant's understanding that plaintiffs do not seek any form of "limited" recognition pursuant to the Nonintercourse Act or pursuant to treaty rights. Rather, plaintiffs seek "full" federal recognition based solely upon an argument that they have been and remain federally recognized since, at the latest, 1972 by virtue of a letter written by then-Bureau of Indian Affairs Commissioner Louis Bruce. Compl. at ¶¶20-21 & 29. In opposition to the United States' motion for summary judgment, plaintiffs made much ado about (1) the government's resolution of 12 tribal acknowledgement petitions "outside of the regulatory process," and (2) the "wholesale listing of Alaska native entities" in the 1988 Federal Register publication and the suggestion that the "tribal status of these [Alaska entities] are to be determined by standards not generally applicable to Indians in other states." Opp.Brf. at 22. To the extent that plaintiffs contend that these two "items" evidence other means of obtaining federal tribal recognition, they are mistaken.

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[2] The Supreme Court approved the Boldt decision in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979).

A. The Resolution of 12 Tribal Acknowledgement Petitions "Outside of the Regulatory Process" Did Not Result in Federal Tribal Recognition through Administrative Means for the 12 Petitioners

Plaintiffs make much of two related documents obtained from the Bureau of Indian Affairs ("BIA") entitled "Status of Federal Acknowledgment Petitioners", consisting of five pages, and "Summary Status of Federal Acknowledgment Petitioners", which is a one-page summary of the five-page document. Both documents were prepared by BIA's Branch of Acknowledgement & Research and are dated 24 September 1990. They are reattached hereto as Exhibit 1 for ease and are hereafter referred to as "Status Report".

The Status Report demonstrates that as of 24 September 1990, the government had reviewed numerous petitions for federal tribal recognition. As set forth in the document, eight tribes have been formally recognized pursuant to the tribal acknowledgement regulations while another 12 petitions were resolved outside the recognition process. Still others have been denied recognition, five were under pending review, and 86 were awaiting action by the petitioner.

Plaintiffs take issue with the 12 petitions "resolved outside [the] acknowledgement process" and suggest therefore that the tribal acknowledgement regulations do not constitute the exclusive administrative means of obtaining federal tribal recognition. Opp.Brf. at 22. However, plaintiffs erroneously assume that each of these 12 petitions resolved in favor of tribal recognition for the petitioners. Only four of the petitions resolved in favor of tribal recognition and each one of the four acquired federal tribal recognition not through any administrative means but

through Act of Congress.[3] Exhibit 1 at 1. Of the remaining eight petitioners, one was determined to be part of a recognized tribe and withdrew its petition (Texas Band of Traditional Kickapoos) and seven were determined by opinion of the Solicitor General of the Department of Interior to be ineligible for consideration pursuant to the recognition regulations.[4] Id.

Therefore, there is nothing in the Status Report to suggest that federal tribal recognition may be obtained administratively through means other than the acknowledgement regulations.

B. There is No Acknowledgement Procedure Available to Native Alaskan Entities that is not also Available to Plaintiffs

Additionally, plaintiffs make much of the 29 December 1988 Federal Register publication of the Secretary's supplementation of the list of federally recognized tribes to add previously omitted but recognized Alaskan entities. Exhibit 2. Plaintiffs allege that "there is a wholesale listing of Alaska native entities" and that the "tribal status of these [entities] are to be determined by standards not generally applicable to Indians in other states." Opp.Brf. at 22. Again, plaintiffs are mistaken.

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[3] The four tribes legislatively recognized are (1) Cow Creek Band of Umpqua Indians of Oregon, 25 U.S.C. §712 et seq., (2) Western (Mashantucket) Pequot Tribe of Connecticut, (3) Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon, 25 U.S.C. §714 et seq., and (4) Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan, 25 U.S.C. §1300h et seq.

[4] The seven petitioners determined ineligible for consideration under the tribal recognition regulations were (1) Lumbee Regional Development Association, (2) Hatteras Tuscarora Indians, (3) Cherokee Indians of Robeson and Adjoining Counties, (4) Tuscarora Indian Tribe of the Drowning Creek Reservation, (5) Waccamaw Siouan Development Association, Inc., (6) Cherokee Indians of Hoke County, Inc., and (7) Tuscarora Nation. All of these petitioners were located in North Carolina.

By way of a brief background on the uniqueness of Alaska Natives, Congress legislated extensively with respect to Alaska in 1971 when it enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §1601 et seq. In enacting ANCSA, Congress revoked all but one of the few reservations established in Alaska, 43 U.S.C. §1618, and created profit-making corporations for Alaska Natives that perform many of the social and economic activities customarily done by tribal governments in the lower 48 states, 43 U.S.C. §1606. In addition, Congress included in ANCSA a list of over 200 known Native villages to which ANCSA would apply. 43 U.S.C. §§1610(b)(1) & 1615. Post-ANCSA legislation has incorporated these unique profit-making corporations within the definition of "tribe." See, e.g., 25 U.S.C. §450b(b) (Indian Self-Determination Act); 25 U.S.C. §473a (amending the Indian Reorganization Act to include Alaska Native corporations).

When Interior first published its list of federally recognized tribes pursuant to 25 C.F.R. Part 83 on 6 February 1979 in the Federal Register, the following notation appeared: "The list of eligible Alaskan entities will be published at a later date." Exhibit 3 at 1. Subsequently, an initial list was published on 24 November 1982 and included inter alia this notation: "[T]he following preliminary list shows those [Alaska] entities to which the Bureau of Indian Affairs gives priority for purposes of funding and services." Exhibit 4 at 5 (emphasis added). On 29 December 1988, the government published in the Federal Register its final list of recognized Alaskan entities, a task made difficult by the widespread, isolated, and sheer numbers of native communities or villages scattered throughout Alaska.

Exhibit 2. The publication included a lengthy explanation of the difficulty encountered in compiling a formal list of federally-recognized Alaska Native entites, explaining:

> The additional [Alaskan] entities are included without the necessity of completing the Federal Acknowledgment Process because of more explicit statutory provisions on groups eligible to receive funding and services on behalf of Alaska Natives.

Id. at 4. The "statutory provisions" to which the foregoing passage referred include ANCSA, 43 U.S.C. §1626; the 1936 amendments to the Indian Reorganization Act, applicable only to Alaska, 25 U.S.C. §473a; and the Indian Self-Determination Act, 25 U.S.C. §450b(b). Id. at 4 - 5. Moreover, the supplemented list included only those Alaska Native entities meeting any of the following criteria:

> 1. "Tribes" as defined or established under the Indian Reorganization Act as supplemented by the Alaska Native Act.
>
> 2. Alaska Native Villages defined in or established pursuant to the Alaska Native Claims Settlement Act (ANCSA) [footnote omitted].
>
> 3. Village corporations defined in or established pursuant to ANCSA.
>
> 4. Regional corporations defined in or established pursuant to ANCSA.
>
> 5. Urban corporations defined in or established pursuant to ANCSA.
>
> 6. Alaska Native groups defined in or established pursuant to ANCSA.
>
> 7. Alaska Native group corporations defined in or established pursuant to ANCSA.
>
> 8. Alaska Native entities that receive assistance from the Bureau in matters relating to the settlement of claims against the United States government, such as in the Act of June 19, 1935, Pub.L. 74-152, as amended by the Act of August 19, 1965, Pub.L. 89-130, and

> 9. Tribes which have petitioned to be acknowledged and have been determined to exist as tribes pursuant to 25 CFR Part 83.

Id. at 5. Hence, the government identified as federally recognized only those Native Alaska entities recognized by Congress or recognized pursuant to the acknowledgement regulations.[5]

As a final note, the 29 December 1988 Federal Register notice did include a comment that BIA intended

> in consultation with Indians and Alaska Natives, [to] review the present acknowledgment process [25 C.F.R. Part 83] to determine if a modified process is needed so that Alaska organizations may seek inclusion on the list of entities recognized and eligible for services without using the present procedure which may be unduly burdensome.

Although such a review of the acknowledgement regulations may still be undertaken, no such modified process has been implemented to date. See Exhibit 5 at 3 (Federal Register publication on 18 September 1991 of proposed changes to the acknowledgement regulations, including republication of the same passage quoted above).

Again, at the present time, there is no method of obtaining tribal recognition that is exclusive to Alaska Natives.

C. This Court is Urged to Follow the Decision Rendered by the District of Columbia Court of Appeals in James v. U.S. Dept. of Health and Human Services.

The court in James v. U.S. Dept. of Health and Human Services, 824 F.2d 1132 (D.C.Cir. 1987), was confronted with a

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[5] Only one Alaska group, Tsimshian Tribal Council, has sought to obtain recognition pursuant to the acknowledgement regulations. Exhibit 1 at 5. The Tsimshian Tribal Council has never completed the acknowledgement process and remains unrecognized by the United States at the present time. Id.

situation nearly identical to that faced by the court herein. In James, descendants of a tribe known as the Gay Head Tribe sought federal recognition pursuant to the acknowledgement regulations. As the result of an intra-tribal dispute, other Gay Head descendants filed suit seeking declaratory judgment that the tribe already was federally recognized long before the acknowledgement regulations were promulgated and was not required to petition for recognition under the regulations. Plaintiffs argued that several documents executed by federal officials during the years 1822 to 1847 conclusively established that the tribe had been federally recognized.

The court refused to entertain plaintiffs' suit and dismissed it for failure to exhaust administrative remedies under the acknowledgement regulations. The court spelled out two bases for its dimissal, both of which apply in the instant case. First, the court declined to make the determination in the first instance that the documents plaintiffs proffered in support of their claim of federal recognition were sufficient to establish tribal recognition. Id. at 1137. In addition,

> [s]econd, and more importantly, the determination whether these documents adequately support the conclusion that the Gay Heads were federally recognized in the middle of the nineteenth century, or whether other factors support federal recognition, should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§2, 9. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. §83.2 That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.

Id. (emphasis added).

For the very same reasons put forth above, this Court must defer to the government and require that plaintiffs exhaust their administrative remedies. Like the plaintiffs in James, plaintiffs herein maintain that numerous historical government documents evince the tribe's status as federally recognized, including census records, correspondence relating to contemplated land purchases, etc. These documents and plaintiffs' claim that they are entitled to federal recognition should be reviewed in the first instance by the Executive Branch.

The Executive Branch, through the Department of Interior, has established a Branch of Acknowledgement and Research (BAR) within the Bureau of Indian Affairs that is staffed with anthropologists, genealogists, and historians most of whom have completed doctoral requirements and all but two of whom have in excess of ten years' experience in Indian and/or Alaska Native research. Declaration of Michael Lawson at 2 (reattached for ease hereto as Exhibit 6). BAR has reviewed 124 petitions for federal tribal recognition. Exhibit 1. Given the expertise developed in this area as well as Congress' determination that the Executive Branch be charged with the responsibility of regulating Indian matters, this court must decline jurisdiction over the question of plaintiffs' tribal status vis-a-vis the United States of America.

The government has never discouraged plaintiffs from participating in the acknowledgement process and, indeed, has repeatedly encouraged plaintiffs to do just that. Exhibit 6 (Lawson Declaration). Should plaintiffs obtain an adverse final decision from the appropriate official on their acknowledgement

petition pursuant to 25 C.F.R. §83.10, they may then appeal this final decision to this court pursuant to 5 U.S.C. §702 et seq. (Administrative Procedures Act).[6] Therefore, plaintiffs ultimately will be entitled to judicial review in the event they remain dissatisfied following the exhaustion of their administrative remedies.

III. CONCLUSION

For the reasons set forth in its four memoranda in support of its motion to dismiss, the United States respectfully requests that this Court dismiss plaintiffs' complaint for failure to timely challenge the government's determination that plaintiff Ione Band of Miwok Indians is not a federally recognized tribe, for failure to timely challenge the government's acknowledgement regulations, and for failure to exhaust administrative remedies.

DATED: 22 October 1991

Respectfully submitted,

GEORGE L. O'CONNELL
United States Attorney

By: DEBORA van der WEIJDE
Assistant U.S. Attorney

[6] Should the proposed changes to Part 83 go into effect, Exhibit 5, plaintiffs may also have an intermediate level of review available to them through the Interior Board of Indian Appeals. Id. at 11 (§83.10(c)).

DOCUMENT No. 15

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

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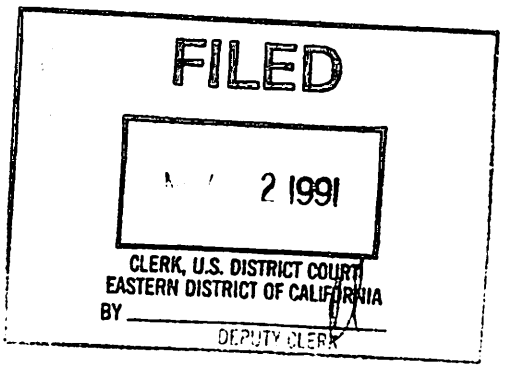

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Attorneys for Defendant
United States of America

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al.,

Plaintiffs,

v.

HAROLD BURRIS, et al.,

Defendants.

CIV NO. S-90-0993 LKK/EM

DEFENDANT UNITED STATES' REPLY BRIEF TO PLAINTIFFS' SUPPLEMENTAL OPPOSITION

DATE: 16 December 1991
TIME: 10:00 A.M.
COURTROOM: 1

This court, in its order of 12 April 1991, expressly limited the parties' supplemental briefing to the issue of whether the federal tribal acknowledgement regulations, 25 C.F.R. Part 83, were the exclusive means of obtaining federal recognition as an Indian tribe. For this reason, the United States does not address, except in passing, other arguments raised by plaintiffs in their supplemental opposition.

In their initial opposition brief to the government's motion for summary judgment, plaintiffs raised the specter of doubt that the acknowledgement regulations might not be the sole means of

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obtaining federal recognition.[1] As examples thereof, plaintiffs referenced (1) the government's resolution of 12 tribal acknowledgement petitions "outside of the regulatory process," and (2) the "wholesale listing of Alaska native entities" in the 1988 Federal Register publication, which allegedly suggested that the "tribal status of these [Alaska entities] are to be determined by standards not generally applicable to Indians in other states." Opp.Brf. at 22. In its second supplemental brief, the government fully and fairly explained plaintiffs' erroneous assumption; in their supplemental opposition, plaintiffs do not challenge or rebut the government's explanation in any way.

Instead, plaintiffs proffer the absurd argument that because the government settled litigation arising out of the government's termination in the 1950's and 1960's of the federal recognition status granted to many of California's Indian tribes, the agency's acknowledgement regulations are not entitled to deference. Supp. Opp.Brf. at 15. Indeed, the very passage quoted by plaintiffs states that the tribes were returned to the status quo ante termination, i.e., federal recognition:

> The Secretary of the Interior shall recognize the Indian Tribes, Bands, Communities or groups of. . .seventeen rancherias. . .with the same status as they possessed prior to [termination]. . . .

Id. (quoting Hardwick v. United States, No. C-79-1710-SW (N.D.Cal. 2 August 1983))(emphasis added). Pursuant to the terms of the

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[1] The government's position has been and remains that the acknowledgement regulations constitute the exclusive administrative means of obtaining full, as opposed to limited, federal tribal recognition. See 2dSupp.Brf. at 3-4. However, Congress still retains the primal authority for extending federal tribal recognition via legislation, treaty, or other means.

stipulated judgment, it was acknowledged that the tribes were federally recognized prior to termination. Indeed, the very policy of "termination" inter alia was to end federal recognition of those rancherias and their Indian inhabitants as identified in the California Rancheria Act, P.L. 85-671, as amended, P.L. 88-419, and related legislation. Importantly, plaintiffs herein do not allege that they were affected by the termination legislation, as indeed they were not.

Plaintiffs adduce no arguments meriting this court's disregard of the acknowledgement regulations as the sole and exclusive administrative means of obtaining federal tribal recognition.[2] As the United States has repeatedly and for many years urged, plaintiffs should avail themselves of this administrative procedure of obtaining federal recognition. Especially because accepting the extension of federal recognition creates substantial statutory and fiduciary duties and obligations upon the federal government in its dealings with recognized tribes, see generally, Seminole Nation v. United States, 316 U.S. 286 (1942), and because the determination of tribal status is best left in the first instance to the expertise within the Bureau of Indian Affairs, see decl. of Michael Lawson, Ph.D at 1-2 (Exh. 6 to Def's 2dSupp.Brf.), where a comprehensive administrative record may be developed, James v. U.S. Dept. of Health and Human Services, 824 F.2d 1132 (D.C.Cir. 1987), this Court should decline to entertain plaintiffs' suit.

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[2] Indeed, given the various references in plaintiffs' brief to their lack of funds to conduct the instant litigation, it is all the more curious that they adamantly refuse to undertake the inexpensive administrative remedy readily available to them.

The "differences", pointed to by plaintiffs herein, that purportedly exist between the plaintiffs in James, supra, and plaintiffs herein are immaterial. The bottom line remains that the government and not the courts should review plaintiffs' documentation in the first instance to determine whether plaintiffs are entitled to federal recognition.

If plaintiffs were under the belief that they were a recognized tribe possessing government-to-government relations with the United States of America at the time Commissioner Bruce issued his 1972 letter, plaintiffs should long ago have contested the government's disavowal of recognition. As set forth in the government's first supplemental brief, plaintiffs were represented by California Indian Legal Services throughout most, if not all, of the 1970's. Exh. 1 to Declaration of Debora van der Weijde.[3] Plaintiffs' attorney, George Forman, noted as early as 1973 that he understood that the Department of the Interior did not deem the Ione Band of Miwok Indians to be a federally recognized tribe. Exh. 1 to Declaration of Guy Reynolds. Plaintiffs nor their counsel challenged this determination for nearly 20 years.

Later still, when the acknowledgement regulations were promulgated, plaintiffs did not challenge their tribe's omission from the first list of federally recognized tribes in 1979. Nor did plaintiffs challenge their tribe's inclusion on the list of petitioning tribes. Plaintiffs knew their tribe was not federally recognized, and for that reason sought to participate in the

[3] See United States' Request to File Supplemental Brief and Evidence in Support of the United States' Motion [for Summary Judgment and to Dismiss], lodged 26 March 1991.

acknowledgment process. Exh. 3 to Lawson Decl. (letter dated 27 February 1980 by plaintiff Glen Villa). For some unknown reason, plaintiffs never completed their petition and now have decided against seeking acknowledgement through the administrative process.

As set forth in the government's opening memorandum, the government moves to dismiss this suit for untimeliness and for failure to exhaust administrative remedies. For the reasons set forth in its previous five briefs, the United States urges the dismissal of this suit with prejudice.[4]

DATED: 12 November 1991

Respectfully submitted,

GEORGE L. O'CONNELL
United States Attorney

By: Debora van der Weijde
DEBORA van der WEIJDE
Assistant U.S. Attorney

[4] Of course, dismissal with prejudice is not intended to preclude plaintiffs from appealing any adverse final decision on their petition for federal recognition under the acknowledgement regulations. To the extent that plaintiffs desire to amend their complaint to obtain different relief (e.g., other than a declaration of federal tribal recognition) based upon a different set of facts (e.g., other than Commissioner Bruce's 1972 letter), than set forth in their present complaint, such a suit would constitute a new and different case upon which the United States expresses no opinion. Otherwise, plaintiffs should not be granted leave to amend as any such amendment would be subject to the same charges of untimeliness and failure to exhaust.

DOCUMENT No. 16

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al.,

Plaintiffs,

v.

HAROLD BURRIS, et al.,

Defendants.

/

NO. CIV. S-90-993 LKK

O R D E R

This matter is before the court on defendants' motion for summary judgment or to dismiss, and plaintiffs' motion to file an amended complaint. For the reasons I now explain, plaintiffs' motion to file an amended complaint is GRANTED. The federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED. The individual non-federal defendants' motion for summary judgment or to dismiss is DENIED.

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PROCEDURAL HISTORY AND BACKGROUND FACTS

Sometime in the early 1970's, some of the plaintiffs[1] and some of the defendants[2] in the case now before the court, William Villa and "other members of the Ione Band of Indians" filed a quiet title action in the Superior Court of the State of California for the County of Amador pursuant to Cal. Civ. Pro. Code § 751. Plaintiffs sought to quiet title to a 40-acre parcel of land known as the Jackson Valley Rancheria. On October 31, 1972, the Amador County Superior Court issued an order adjudging plaintiffs to be the owners in fee simple absolute of the 40-acre parcel of land at issue in this case.

In December 1988, Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr. and Jeanette Allen (defendants in the case before the court, along with Frank Pinion and Frank Villa) filed a complaint for declaratory relief

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[1] The plaintiffs in the case before the court who also were plaintiffs in the state court quiet title action are Nicolas Villa, Sr., Barbara E. Hill, Fred Mike, Muriel Mike, Bernice Villa, Donald Villa, and Glen Villa. Additional plaintiffs in this case and not specifically named in the state court action are Nicolas Villa, Jr., Geraldine Burris, Adeline Ybright and "members of the Ione Band of Miwok Indians."

[2] The defendants in the case before the court who were plaintiffs in the state court quiet title action are Effie Burris, Esther Burris, Harold E. Burris, and Frank Pinion.
Additional defendants in the case before the court and not specifically named in the state court action are Callie Allen, Carol Boring, Pamela Burris, Jeanette Allen, Frank Villa, Harold Burris, Jr., "and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of Ione Band of Miwok Indians and the United States of America."

and partition of the 40-acre parcel of land in Amador County Superior Court. Plaintiffs in that action alleged that the property is private land subject to taxation by Amador County because it is not located on a rancheria, reservation, public domain allotment, or any other type of trust land of the United States. Defendants demurred, arguing that the land is under the jurisdiction of the Secretary of the Interior or the California Bureau of Indian Affairs, and that the state court lacks subject matter jurisdiction over plaintiffs' claims. On February 20, 1991, the superior court denied defendants' demurrer.

On August 1, 1990, some of the defendants in the state court quiet title action filed this lawsuit in federal court. In their original complaint, plaintiffs allege a variety of claims against various individuals and the United States seeking, in essence, a declaration of plaintiffs' status 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, to be held in trust by the federal government. The United States and the individual defendants moved for summary judgment or to dismiss plaintiffs' complaint on the ground that the court lacks subject matter jurisdiction over plaintiffs' claims because plaintiffs have not exhausted their administrative remedies. Defendants also moved for summary judgment on the ground that plaintiffs' facial challenge to the Bureau of Indian Affairs' (BIA) tribal recognition regulations is time-barred. At the hearing on the motions, counsel for plaintiffs conceded that plaintiffs had not applied for federal

recognition of tribal status as provided in the acknowledgment regulations, but argued that the regulatory process is not the only mechanism for tribal recognition. I gave plaintiffs additional time to conduct discovery concerning the exclusivity of the tribal acknowledgment regulations. I ordered further briefing and again set the matter for hearing.

On November 18, 1991, after supplemental briefing had been filed, plaintiffs filed a motion to amend their complaint, pursuant to Fed. R. Civ. P. 15(a), seeking to add the Secretary of the Interior, the Treasurer-Tax Collector of Amador County and the Amador County Superior Court as defendants. Plaintiffs also seek to add claims against the individual non-federal defendants under the Indian Nonintercourse Act and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). The United States does not oppose plaintiffs' motion to amend; the individual non-federal defendants oppose the granting of the motion.

On November 19, 1991, the day after plaintiffs filed their motion to amend, the Third District Court of Appeal for the State of California issued a writ of prohibition directing the trial court to dismiss the state court apportionment action for lack of subject matter jurisdiction on the ground that 28 U.S.C. § 1360(b) precludes state courts from adjudicating the ownership or right to possession of property belonging to any Indian tribe that is held

in trust by the United States.[3] Relying on Boisclair v. Superior Court, 51 Cal. 3d 1140 (1990), the Third District concluded that the state court complaint and answer "unequivocally raise, as essentially the sole dispute submitted to respondent court for resolution, the issue of whether the subject property is Indian trust land." Slip op. at 4.

II

STANDARDS

A. Summary Judgment

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467

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[3] Section 1360(a) provides that California state courts shall have jurisdiction over,

> civil causes of action between Indians or to which Indians are parties which arise in [Indian country] to the same extent that [California] has jurisdiction over other civil causes of action, and those civil laws of [California] that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within [California].

28 U.S.C. § 1360(a).

However, section 1360(b) provides that state courts do not have jurisdiction to "adjudicate, in probate proceedings or otherwise, the ownership or right to possession of" any real property, or interest therein, "belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 28 U.S.C. § 1360(b).

(1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the

burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 242 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to

resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical

doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

B. Motion to Amend

Fed. R. Civ. P. 15(a) provides,

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The Ninth Circuit recently provided guidance for district courts applying this rule.

Although Rule 15(a) should be interpreted with "extreme liberality, . . . leave to amend is not to be granted automatically." Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). The court may deny the motion if amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit. Id. (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

The burden of demonstrating undue delay, prejudice or futility sufficient to justify denial of a leave to amend is on the party opposing amendment. Kiser v. General Electric Corp., 831 F.2d 423, 428 (3d Cir. 1987). The court's "outright refusal to grant the leave without any justifying reason" is an abuse of discretion. Foman, 371 U.S. at 182.

Prejudice to the opposing party is the most important factor to consider in determining whether a party should be granted leave

to amend. Jackson, 902 F.2d at 1387 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-31 (1971)). Prejudice may be found where additional discovery would be required because the new claims are based on different legal theories or where an amendment would permit the plaintiff to relitigate a portion of the action. Jackson, 902 F.2d at 1387-88.

Undue delay is determined in part by looking to whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading. Id. at 1388 (citing EEOC v. Boeing Co., 843 F.2d 1213, 1222 (9th Cir.), cert. denied, 488 U.S. 889 (1988)); Jordan v. Los Angeles County, 669 F.2d 1311, 1324 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982). However, delay alone is insufficient to support denial of leave to amend. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

The test for futility "is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Accordingly, "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Id.

III

ANALYSIS

In their original complaint, plaintiffs allege claims against the United States as follows: (1) mandamus, requiring the United

States to recognize them as a tribe; (2) agency action in excess of jurisdiction; (3) violation of due process; (4) unlawful rulemaking; (5) denial of equal protection; (6) breach of fiduciary duty and trust; and (7) constructive trust. Plaintiffs allege claims against the individual defendants as follows: (1) constructive trust; (2) breach of fiduciary duty; and (3) quiet title. In their first amended complaint, plaintiffs reallege their claims against the United States and the individual non-federal defendants. In addition, plaintiffs add claims against the individual non-federal defendants for violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Plaintiffs also allege a claim for declaratory relief against the Amador County Treasurer-Tax Collector that the 40-acre parcel is not subject to taxation, and a claim for declaratory and injunctive relief barring the Amador County Superior Court from exercising jurisdiction over the private defendants' partition action, in violation of 28 U.S.C. § 1360(b).

A. **Federal Defendants' Motion for Summary Judgment or to Dismiss**

Because the United States does not oppose the granting of the motion to amend, the motion is GRANTED as to plaintiffs' claims against the United States and the Secretary of the Interior. I turn now to analysis of the federal defendants' motion for summary judgment or to dismiss plaintiffs' amended complaint.

Until 1978, the means by which an Indian tribe received

federal recognition was unstructured. Recognition could be shown by Congress or the executive branch creating a reservation for the group by a treaty, agreement, statute, executive order or valid administrative action and by the United States having had some continuing political relationship with the group, such as providing services through the Bureau of Indian Affairs. F. Cohen, Handbook of Federal Indian Law at 6 (1982). In 1978, the Secretary promulgated regulations describing "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." 25 C.F.R. §§ 83.1-83.11. The authority for these acknowledgment regulations is found at 25 U.S.C. §§ 2 and 9.[4] Pursuant to these new regulations, the BIA promulgated a list of those tribes which were already federally-recognized and a second list of those tribes with a recognition petition on file with the BIA. The Ione Band of Miwok Indians was placed on the second list.

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[4] Section 2 provides,

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

25 U.S.C. § 2. Section 9 provides,

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of accounts of Indian affairs.

25 U.S.C. § 9.

The Ione Band did not pursue the administrative federal recognition process. In their original and amended complaints, plaintiffs seek, among other things, an order compelling the United States to recognize the Ione Band. The United States moves for summary judgment on the ground that the United States has not waived its sovereign immunity from suit on plaintiffs' claims, and on the ground that plaintiffs' claims are time-barred.

1. Waiver of Sovereign Immunity

In their first claim, plaintiffs seek an order compelling the United States to recognize them as a tribe, and in their sixth and seventh claims, plaintiffs allege that the federal defendants' failure to recognize and protect them amounts to a breach of fiduciary duty and trust, and that the 40-acre parcel of land is held in trust for the tribe by the United States.

In the absence of an explicit waiver, claims against the United States are barred by sovereign immunity. North Side Lumber Co. v. Block, 753 F.2d 1482, 1484 (9th Cir.), cert. denied, 474 U.S. 931 (1985). Plaintiffs assert that the government has waived its sovereign immunity over these claims by virtue of the Administrative Procedure Act. See 5 U.S.C. § 702.[5] In order for

[5] It appears that plaintiffs' Indian Nonintercourse Act, aboriginal title, and quiet title claims are directed only to the nonfederal defendants. The United States has not waived its sovereign immunity from suit on claims brought under the INA, Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 810 (D. R.I. 1976); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977), or quiet title actions involving trust or restricted Indian land, Newman v. United States, 504 F. Supp. 1176, 1178 (D. Ariz. 1981). And although plaintiffs might bring a federal common law claim under the doctrine of aboriginal title if an executive official or agency

plaintiffs to take advantage of the APA waiver, however, there must be a "final agency action" that is ripe for judicial review. White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988). Plaintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review.

The D.C. Circuit's decision in James v. United States Dept. of Health and Human Services, 824 F.2d 1132 (D.C. Cir. 1987), is directly in point. In James[6], a faction of the Gay Head tribe sued the Department of the Interior seeking an order requiring the Secretary to add them to the Department's list of federally-recognized Indian tribes. Plaintiffs argued that it would be redundant for them to exhaust administrative remedies in an

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attempts to extinguish aboriginal title without congressional authorization, see United States v. Dann, 873 F.2d 1189, 1196 n.5 (9th Cir.), cert. denied, 493 U.S. 890 (1989), presumably the APA waiver of sovereign immunity and its requirements of finality and timeliness would govern plaintiffs' claims.

[6] Plaintiffs attempt to distinguish James on the ground that in James there were two competing groups of Gay Head Indians, one that had already been recognized, and plaintiffs, who had not. Plaintiffs point out that in the case before the court defendants specifically disavow that a Miwok tribe exists. Plaintiffs do not explain why this distinction is relevant.

Second, the plaintiffs in our case say that in James the documents which plaintiffs relied on to demonstrate recognition were scholarly, not the product of government action. And third, in James the documents were older, from the 19th century, while in our case the documents purportedly demonstrating federal recognition are from the 20th century. Neither distinction is relevant. As explained herein, the Bureau of Indian Affairs is best equipped to evaluate all the evidence concerning the plaintiffs' status, whether historical, scholarly, or produced by the agency itself, no matter how old or new.

attempt to obtain federal recognition because the Gay Heads had previously been recognized by the Executive Branch. Id. at 1137. The D.C. Circuit ruled that the determination whether documents offered by plaintiffs in support of their claim of federal recognition are sufficient, and

> should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2 & 9. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2. That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.
>
> In cases such as this, where Congress has delegated certain initial decisions to the Executive Branch, exhaustion of available administrative remedies is generally a prerequisite to obtaining judicial relief for an actual or threatened injury, provided that the purposes of the exhaustion doctrine are furthered.

Id. at 1137. The James court concluded that exhaustion of the Department's procedures for tribal recognition serves the four purposes of exhaustion, id. at 1137-38, and that exhaustion would not be futile, because there was no evidence that "denial of relief would result from a prior indication from that agency that it does not have jurisdiction over the matter or it has evidenced a strong position on the issue together with an unwillingness to reconsider," id. at 1139.

At the first hearing on defendants' motion for summary judgment or to dismiss, I gave plaintiffs additional time to

conduct discovery to determine whether there are mechanisms, other than the regulations, by which plaintiffs could be "recognized" by the federal government. In its supplemental motion to dismiss, the United States acknowledges that Congress could by statute recognize plaintiffs as a tribe, see, e.g., 25 U.S.C. § 1300b-11, et seq.; id. § 1300f, et seq., but that Congress has not done so. This plaintiffs concede. Plaintiffs also concede that they are not a "treaty tribe." See United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), approved by Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 685 (1979).

The United States also demonstrates in its supplemental brief that the government's resolution of 12 tribal acknowledgment petitions "outside the regulatory process" and the "wholesale listing of Alaska native entities" in the 1988 Federal Register do not establish another mechanism for tribal recognition. See United States' further memo in support at 5-9 (Oct. 22, 1991). Plaintiffs also apparently concede that even if such a mechanism were demonstrated, they could not benefit from it.

Plaintiffs do argue that the government's settlement of litigation arising out of termination of the federal recognition status of many California tribes in the 1950's and 1960's somehow demonstrates another "non regulatory" recognition mechanism. Plaintiffs do not assert, however, that they are subject to the termination legislation or that they are beneficiaries of the

settlement.[7]

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," plaintiffs' supplemental brief at 17:7-9 (Nov. 8, 1991), 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 acknowledgment process, the United States' motion for summary judgment on these claims must be GRANTED.

2. Statute of Limitations

In the second through fifth claims in their amended complaint, plaintiffs allege that the federal acknowledgment regulations are facially invalid because they deny them equal protection and due process of law, constitute unlawful rulemaking, and that the Secretary acted in excess of his jurisdiction in placing the Ione Band on the second list. The United States moves for summary judgment on these claims on the ground that they are barred by the six-year statute of limitations applicable to claims against the United States, 28 U.S.C. § 2401.

Plaintiffs' facial challenge to the regulations accrued in

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[7] Indeed, if they had made such an argument, plaintiffs' remedy might lie with the district court in which that litigation was commenced and settled.

1979, when the regulations became final and when the Ione Band of Miwok Indians was placed on the second list indicating that their application for recognition was pending. Plaintiffs had notice of the regulations by virtue of their publication in the Federal Register. Moreover, the injury suffered by plaintiffs is the same as that suffered by all unrecognized Indian tribes at the time the regulations were promulgated, and lack of standing has been held not to bar the running of the limitations period. See Shiny Rock Mining Corp. v. United States, 906 F.2d 1362 (9th Cir. 1990); Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988). Thus plaintiffs' facial challenge to the regulations is barred by the six-year statute of limitations applicable to claims against the government, 28 U.S.C. § 2401.

Because plaintiffs have failed to exhaust administrative remedies by applying for federal recognition through the BIA's acknowledgment process, and because plaintiffs' remaining claims are time-barred, the federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED.

B. Individual Non-federal Defendants' Motion for Summary Judgment or to Dismiss

In their original complaint, plaintiffs allege claims against the individual non-federal defendants for constructive trust, breach of fiduciary duty, and quiet title. The individual nonfederal defendants filed a notice of joinder in the United States' motion for summary judgment or to dismiss plaintiffs' complaint, but offered no argument as to why summary judgment

should be granted as to the claims directed only to them.

Plaintiffs move to amend their complaint to add claims against the individual non-federal defendants for violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Although the individual non-federal defendants oppose the motion to amend, in their brief defendants make only conclusory allegations of delay, prejudice and futility. As I have explained, the burden of demonstrating undue delay, prejudice or futility sufficient to justify denial of leave to amend is on defendants. Defendants assert that they will be prejudiced by plaintiffs' delay in moving to amend the complaint. Delay alone is insufficient to justify denial of leave to amend. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). In addition, the individual non-federal defendants assert that the addition of claims under the Indian Nonintercourse Act and the doctrine of aboriginal title significantly alters the course of this litigation so that leave to amend should be denied. Although this case has been pending for some time, the parties have only conducted limited discovery on the question of alternative mechanisms for tribal recognition, and the court has only considered defendants' motions for summary judgment. No scheduling dates have been set, and no other discovery has taken place. And although plaintiffs' amended complaint alleges new claims, the relatively embryonic status of this litigation suggests that those additions are not unfairly prejudicial. Thus,

the court cannot accept the individual non-federal defendants' assertion that they will be unfairly prejudiced by amendment.

The individual non-federal defendants have offered no argument to support their assertion that plaintiffs' claims under the Indian Nonintercourse Act and the doctrine of aboriginal title are futile, that is, that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim . . . . " Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Because it appears to the court that plaintiffs' amended complaint states a claim under those sections, as I now explain, plaintiffs' motion to amend their complaint to allege additional claims against the individual non-federal defendants is GRANTED.[8]

1. Indian Nonintercourse Act

Plaintiffs seek to amend their complaint to allege a claim against the individual non-federal defendants under the Indian Nonintercourse Act (INA), which provides,

> No purchase, grant, lease, or other conveyance of lands, or 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 into pursuant to the Constitution.

25 U.S.C. § 177.

Plaintiffs allege that without the consent of the United

[8] Because the individual non-federal defendants failed to provide the court with any guidance concerning whether plaintiffs' INA and aboriginal title claims were sufficient, the court's conclusion that the complaint states a claim is not immune from a future motion practice.

States, the state court partition action brought by the individual nonfederal defendants violates the INA. Amended complaint ¶¶ 57-58. Although that action has been dismissed by order of the Third District Court of Appeal, plaintiffs seek a declaratory judgment as to their rights should defendants refile the action.

To state a claim under the INA, plaintiffs must allege that: (1) they are or represent an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States has never been terminated or abandoned. Cayuga Indian Nation of New York v. Cuomo, 667 F. Supp. 938, 941 (N.D.N.Y. 1987); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); see also United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989) (individual Indians do not have standing to contest a transfer of tribal lands under the INA); James v. Watt, 716 F.2d 71 (1st Cir. 1983) (same), cert. denied, 467 U.S. 1209 (1984).

It appears to the court that plaintiffs have alleged the necessary four elements to state a claim under the INA. Although the Ione Band of Miwok Indians has not been recognized through the federal acknowledgment process, courts considering the meaning of "tribe" under the INA have not limited their examination to the question whether the plaintiff tribe has been recognized through that process. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir.) (upholding district court order declining

to stay INA action pending Department of the Interior's consideration of plaintiff's application for federal recognition under newly proposed acknowledgment regulations), cert. denied, 444 U.S. 866 (1979); Cayuga Indian Nation of New York v. Cuomo, 667 F. Supp. 938, 942-43 (N.D. N.Y. 1987) (even if court is not bound by federal government recognition of tribe in claim under INA, recognition should be given great weight in determination of tribal status). Cf. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376-79 (1st Cir. 1975) (rejecting argument that under INA a tribe is limited to a community of Indians which at some point the federal government has specifically recognized).

In Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir. 1979) (Mashpee I), the First Circuit upheld the district court's order refusing to stay plaintiff's INA action pending resolution of its application for federal recognition through the acknowledgment process. The court noted, however, that "in another case, once the Department has finally approved the regulations and developed special expertise through applying them, we might arrive at a different answer." Id. at 581. In Mashpee Tribe v. Secretary of the Interior, 820 F.2d 480, 483 (1st Cir. 1987), however, the court followed Mashpee I, and concluded that certain documents offered by plaintiffs did not establish them as a tribe within the meaning of the INA. Thus, the First Circuit did not defer to the regulatory process in determining whether plaintiffs were a tribe for purposes of a claim under the INA.

In James v. Department of Health and Human Services, 824 F.2d 1132 (D.C. Cir. 1987), a case not brought under the INA, the D.C. Circuit distinguished Mashpee I, noting that "the time for a different conclusion has come; the Department has been implementing its regulations for eight years and, as noted, it employs experts in the fields of history, anthropology and genealogy, to aid in determining tribal recognition." Id. at 1138. Although the James court was not presented with the question whether deference to the Secretary of the Interior was justified with respect to a claim brought under the INA, together James and Mashpee I might stand for the proposition that in order to maintain a claim under the INA, plaintiff must be a "tribe" recognized by the Secretary of the Interior pursuant to the acknowledgment regulations.

The court is disinclined to decide this question in the present posture of the case. The individual non-federal defendants did not make this argument in opposing plaintiffs' motion to file an amended complaint, and plaintiffs have not been given the opportunity to respond to such an argument. The court will consider this issue when and if the individual non-federal defendants move to dismiss plaintiffs' claims.

2. Aboriginal Rights

Plaintiffs seek to amend their complaint to allege a claim against the individual non-federal defendants pursuant to the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Under that doctrine, an Indian tribe

or individual Indians may assert aboriginal title to land deriving from their continued occupation of the land from "time immemorial." The Trade and Intercourse Acts, of which the Indian Nonintercourse Act is one, are "[a]mong the most important protections of aboriginal title." United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989). Plaintiffs are not limited, however, to seeking relief under the Indian Nonintercourse Act for unlawful conveyances of Indian land. See Oneida County v. Oneida Indian Nation of New York, 470 U.S. 226, 236-40 (1985) (Trade and Intercourse Acts do not preempt federal common law remedies).

In their amended complaint, plaintiffs allege that the "Ione Band of Miwok Indians" has occupied the "subject land" "since time immemorial and has been fully enclosed," and the individual non-federal defendants are "barred from interfering with the rights of the Ione Band of Miwok Indians to use and possess the subject land." Amended complaint ¶¶ 59-60. It is not clear whether plaintiffs assert a claim for individual aboriginal rights in the property, i.e., a Cramer claim, see United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1989), or for tribal aboriginal rights, id. at 1194-95. Nonetheless, it appears to the court that plaintiffs have stated a claim, and that the court has jurisdiction over plaintiffs' claim under 28 U.S.C. § 1331 because it arises under the federal common law of the United States.

Plaintiffs' motion to amend their complaint to allege additional claims against the individual non-federal defendants is

GRANTED.[9]

D. **Plaintiffs' Claims Against the Treasurer-Tax Assessor and Superior Court of Amador County**

Plaintiffs seek to amend their complaint to allege a claim for declaratory relief that the Amador County Treasurer-Tax Assessor may not assess property taxes on the 40-acre parcel because it is owned by a "sovereign Indian nation." Amended complaint ¶¶ 61-62.[10] Plaintiffs also seek to amend their complaint to allege a claim for a declaratory relief to the effect that the Superior Court for the State of California of Amador County is barred under 28 U.S.C. § 1360(b) from assuming jurisdiction over defendants' partition action. In essence, plaintiffs seek a declaration that the 40-acre parcel of land at issue in this case belongs to an Indian tribe or community, and is "held in trust by the United States or is subject to a restriction against alienation imposed by the United States." Id. The court would appear to have jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331. Accordingly, plaintiffs' motion to amend their complaint to state claims for declaratory relief against the Treasurer-Tax Assessor and Superior Court of Amador County is

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[9] The court would appear to have supplemental jurisdiction, 28 U.S.C. § 1367, over plaintiffs' state law claims for constructive trust, breach of fiduciary duty, and quiet title.

[10] "[A]bsent cession of jurisdiction or other federal statutes permitting it," a state may not tax Indian reservation lands and reservation Indians. County of Yakima v. Yakima Nation, 116 L.Ed.2d 687, 697 (1992) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); see also McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) (same).

GRANTED.

IV

ORDER

In sum, IT IS HEREBY ORDERED as follows:

(1) Plaintiffs' motion to amend their complaint is GRANTED;

(2) The federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED;

(3) The individual non-federal defendants' motion for summary judgment or to dismiss plaintiffs' amended complaint is DENIED;

(4) Plaintiffs shall file an amended complaint consistent with the terms of this order no later than thirty (30) days from the effective date of this order; and

(5) A status conference is hereby SET in this case for June 1, 1992, at 2:30 p.m. The parties shall file status reports no later than seven (7) days before the date set for status.

IT IS SO ORDERED.

DATED: April 22, 1992.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

DOCUMENT No. 17

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

United States District Court

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

AND CONSOLIDATED ACTION

CIV S-90-0993-LKK-PAN

Findings and Recommendation re Dismissal

—oOo—

In 1990, a group of ten persons calling themselves the Ione Band of Miwok Indians, including Nicholas Villa Sr. and Nicholas Villa, Jr. commenced this action claiming that about 40 acres in Amador County that the plaintiffs and defendants occupied is Indian Country. Amador County filed a separate action against all record title holders, including all the individual plaintiffs and defendants, for a declaration that certain real property in Amador County is not tribal land is subject to exercise of the County's police powers. The defendants in the original action, including Harold E. Burris, crossclaimed and counterclaimed to partition the land; they claimed that the land was private property owned by plaintiffs and defendants as tenants in common. All claims have been consolidated.

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No progress has been made toward resolving the competing claims initially because the plaintiff Indians could not proceed as individuals but only as a tribe, then, when the tribe obtained federal recognition and the tribe was substituted as plaintiff, because there was no tribal government authorized to pursue the tribe's claims.

On March 11, 1996, Judge Karlton referred this matter to me for an evidentiary hearing to determine the existence and identity of a tribal government authorized to proceed upon behalf of the tribe. I made a pre-hearing order and reserved ten court days for the hearing. The various participants lodged lists of over 120 witnesses to be called. At this juncture, there were three more-or-less distinct groups vying for recognition as the tribal government: the Villa faction, the Hill faction and the Burris faction.

On April 16, 1996, the morning the hearing was scheduled to commence, all parties lodged a stipulation requesting that the hearing be continued for four months in order to permit the competing factions to form a permanent tribal roll and tribal government. I rejected the stipulation but after meeting with all parties throughout the day eventually continued the hearing on specific terms and conditions that I understood all parties explicitly agreed to and that, in any event, all parties implicitly agreed to by retiring instead of going forward with the hearing.

My conditions for continuing the hearing consisted of procedural rules for a Bureau of Indian Affairs sponsored effort to compile a tribal membership roll and form a government capable of acting for the tribe within four months. Attorneys representing the Villa faction of the tribe objected to my April 18 order setting forth the conditions for continuing the hearing upon the ground that they had not agreed to the specified terms. No other party then replied to that objection although now the other participants insist there was unanimous agreement.

On May 13 I vacated my April 18 order and required any putative plaintiff to show cause why this action should not be dismissed upon the ground that by the terms of their stipulation to continue the hearing, the putative plaintiffs had admitted there was no tribal roll or government. The time for response has now expired.

In the meanwhile, continuing attempts by the Bureau of Indian Affairs, Hill and Burris factions to form a tribal government appear to have been sabotaged by the Villa faction. See Attachment "A."[1]

The "Hill" faction does not oppose dismissal of all claims without prejudice.

The "Villa" faction contends that the tribe has an interim government, if not a permanent government, and resists dismissal in favor of judicial intervention to supervise proceedings to form a permanent government, which the "Villa" factions contends has run amok. The "Villa" faction does not identify the interim government that it claims exists nor suggest that such interim government was authorized to commence or maintain this action. All other putative plaintiffs contest the claims of the "Villa" faction.

Amador County does not oppose dismissal of the tribe's claims but contends that it would be unjust to dismiss the County's claims to establish its sovereignty over the property after such prolix and costly proceedings. Amador County overlooks that by dismissing the action for want of a plaintiff to assert the tribe's claims, Amador has in effect prevailed in establishing its sovereignty over the property.

The Burris faction contends that the Indians' claims should be dismissed but that the County's claims and the Burris' claims should not be. The Burris' claim is for partition of real property in Amador County and absent an Indian tribe authorized by tribal government to defend that claim the action does not belong in federal court. The Burrises will not be prejudiced because there is no tribal government authorized to resist its claims in state court.

The United States has not taken any position.

For all of the foregoing reasons, I recommend that this action be dismissed upon the ground that there is no tribal government authorized to initiate and conduct proceedings upon

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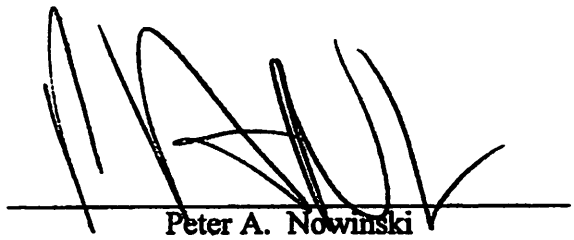
[1] Attachment "A" is a letter from Nicholas Villa, Jr., claiming the title of "traditional chief" of two entities new to the dispute: the "Ione Band of Miwok Indians of California"and the "Miwok Tribal Enterprise Corporation." The letter is addressed to the City of Ione Chief of Police and implicitly threatens violence beyond the means of Ione's police department to control if the City allows a BIA-sponsored meeting at an Ione town hall tomorrow.

behalf of an Indian tribe and without such participation there is no federal interest in the other parties' claims.

Dated: May 31, 1996.



Peter A. Nowinski
United States Magistrate Judge

DOCUMENT No. 18

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

_____/

AND CONSOLIDATED ACTIONS.

_____/

NO. CIV. S-90-993 LKK

O R D E R

On May 31, 1996 the assigned magistrate judge in the above-captioned matter recommended that this case be dismissed because plaintiff does not have an identifiable government capable of suing or being sued. The County defendants filed objections to these Findings and Recommendations on June 18, 1996. The Burris defendants filed objections on June 11, 1996.

Neither set of defendants challenge the magistrate judge's recommendation concerning dismissal of plaintiffs' claims.

Both sets of defendants, however, assert that dismissal of the counter-claims that have been filed in this action is inappropriate. The Burris defendants argue that without a specific ruling on the question of whether the land is Indian Country or Indian Trust Land, they will not be permitted to bring their claim for partition of the land in either state or federal court. Similarly, the County defendants contend that the decision to dismiss leaves open the question of whether the County has jurisdiction over the land -- a question which the County asserts will be without a forum to resolve upon dismissal of the matter at bar. The County stresses that it has patiently waited for years to have a determination concerning jurisdiction reached and should not now be prejudiced by the fact that the tribe has no government. The County thus argues that its claims concerning whether the land is Indian Country should be resolved in these proceedings.

It is not disputed by the defendants and counter-claimants that the plaintiff tribe is without a legitimate government and that therefore there is no individual with authority to act on its behalf.[1] See County's Objections to the Findings & Recommendations filed June 27, 1996 at 5. The County's counter-claim, however, is directed to the individuals who claim to have membership in the tribe. See Order Re: Motions to Consolidate filed herein January

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[1] Indeed, no counsel can be retained in the absence of a contract with the U.S. Government, on approval from the tribal government. See 25 U.S.C. § 81; 25 C.F.R. §§ 88.1, 89.1 and 89.7. Thus, in the absence of a ruling governmental body or individual, the tribe is not authorized to be represented in this suit.

21, 1994. The question then is whether or not a claim under the Declaratory Judgment Act can be maintained under these pleadings.[2]

Two elements must be satisfied for the court to enter a Declaratory Judgment. First, there must be an actual and live controversy over which the court has independent jurisdiction and for which the declaratory relief will serve as a remedy. See Fusco v. Rome Cable Corp., 859 F. Supp. 624 (N.D.N.Y. 1994); Cok v. Forte, 877 F. Supp. 797, 802 (D.R.I. 1995), affirmed, 69 F.3d 531 (1st Cir. 1995). Second, the court must determine whether, in its discretion, the Declaratory Judgment Act should be invoked. See Employers Reinsurance Corp. v. Karussos, 65 F.3d 796, 798 (9th Cir. 1995).

The County seeks a declaration that it may assert jurisdiction over land which some claim as Indian Country. This suffices to raise a federal question. See 18 U.S.C. § 1151. It is also clear from the years of litigation over this land, that there is a live controversy concerning the nature of the land. There exists, however, a real question as to whether any of the parties named as defendants to the counter-claim have standing to challenge the County's jurisdiction over the subject property. Standing is of course a question of Article III jurisdiction, and in its absence

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[2] The counter-claim brought by the County was in fact a complaint in a related case, originally denominated CIV-S-92-1652 LKK. The posture of the claim changed when the actions were consolidated.

this court cannot act.[3]

The record reflects that the Burris defendants do not challenge the County's right to assert jurisdiction over the land. While it is true that the Villa defendants, asserting that they are the tribal government, have claimed that the land is Indian Country the magistrate judge's conclusion that there is no tribal government is clearly correct. Thus, it is uncertain whether anyone other than the United States may represent the interests of the Tribe or hold property in the name of the tribe.[4]

Whatever the correct view is concerning whether this court has jurisdiction over the question of the underlying character of the land in issue under the present pleadings, it would appear that the court has jurisdiction to determine that the Villas are not the government of the tribe, and if it follows, that neither they nor anyone besides the United States presently has a basis for resisting the County's exercise of jurisdiction over the land until such time as a government is formed. I thus conclude that the

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[3] It may be that rather than a question of standing, the issue should be viewed as raising questions concerning whether suit is brought by the real party in interest. What consequences follow if that is the correct characterization has not been addressed by the parties.

[4] While it seems relatively clear that the United States government could challenge the jurisdiction of the County by asserting that the land is Indian Country, it has made no such representation, and to date has not been named as a defendant in the declaratory relief action.

first prong of the test for declaratory relief is satisfied.[5]

The discretionary prong gives the court some pause. Recently the Supreme Court reminded us that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit satisfies subject matter jurisdictional prerequisites." Wilton v. Seven Falls Co., __ U.S. __, 132 L.Ed.2d 214,221 (1995)(referring to Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942)). The status of the parties and the confusion concerning who has authority to speak on behalf of tribal interests all suggest caution in declaring anything about the land. On the other hand, given that it appears that there is no other forum in which this matter can be adjudicated, it may well be that the court should invoke its jurisdiction to render a judgment in this case.

From the above, it appears that this court has the jurisdiction to declare that there is no tribal government, and that under the Declaratory Judgment Act, this court should enter judgment declaring the power of the County to assume jurisdiction until challenged by either the United States or a recognized tribal government.

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[5] As to the Burris defendants' partition claim, there appears to be no basis for the court to entertain that which is inherently a state court cause of action. The court appreciates that these partied are trapped between two unaccepting fora. Nonetheless, if there is no jurisdiction, this court cannot maintain the action.

Accordingly, for all the reasons stated above, the court now ORDERS as follows:

1. The magistrate judge's recommendation of dismissal is ADOPTED insofar as it recommends dismissal of all of plaintiff's claims;

2. The counter-claim of the Burris defendants is also DISMISSED for want of jurisdiction;

3. The counter-claim of the County is MAINTAINED, and shall not be dismissed at this time; and

4. All parties are ordered to show cause in writing not later than twenty (20) days from the effective date of this order, why a declaratory judgment should not be entered noting the power of the County to exercise jurisdiction over the land in issue pending challenge by either the United States or a properly constituted and recognized tribal government.

IT IS SO ORDERED.

DATED: August 5, 1996.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

DOCUMENT No. 19

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

_____/

AND CONSOLIDATED ACTIONS.

_____/

NO. CIV. S-90-993 LKK

O R D E R

On August 6, 1996, this court issued an order directing all parties to show cause in writing within twenty (20) days, why the entire case save and except the County's cross-complaint for declaratory relief should not be dismissed and declaratory judgment entered in favor of the County of Amador. The two plaintiff factions filed responses to this order to show cause on August 26, 1996.

The response filed by the law firm of Peebles & Evans on behalf of the individuals which it represents, addresses the merits

of the Indian Country issue. These individuals argue that declaratory judgment cannot be entered in favor of Amador County because the land is Indian Country within the meaning of 18 U.S.C. § 1151. Such argument does not address the concern articulated in the August 6, 1996, order as to whether any party currently a defendant to the County's counter-claim has standing to assert that the land is Indian Country. In the August 6 order, the court suggested that the proper course was to declare that there is a presumption that land lying within a county is subject to County jurisdiction, and thus until the United States or a duly recognized tribal government properly challenged such jurisdiction the County was free to exercise its presumed authority. See Order filed herein August 6, 1996, at 5. The Peebles & Evans group baldly asserts that "[t]he law does not require the Tribe to have a recognized government in order to have a land base." Reply to Order to Show Cause filed August 26, 1996, at 9. This assertion, made without citation, is non-responsive to the question of who may properly present the question of whether the land in issue is Indian Country. Because it is nonresponsive, the reply filed by the Peebles & Evans group does not persuade the court to alter its August 6, 1996, determination concerning dismissal and entry of judgment.

The response filed by Jory, Peterson, Watkins & Smith, on behalf of the Nicolas Villa group, concerns this court's failure to address the possible conflict of interest problem with the continued representation of some members of the putative tribe by

Peebles & Evans. The document also complains of the inconsistencies and historic failures of the federal government in its dealings with Indians residing on the parcel at issue in this litigation. The Villa group's response, however, concludes that given the history of the process with the federal government and the conflict between the potential members of the tribe, "[t]here is no argument which can be presented at this time which will deter the Court's entry of the proposed Declaratory Judgment." Nicolas Villa Group's Response to Order filed August 6, 1996.

This court has not hitherto addressed the asserted conflict of interest because it appears irrelevant to the issue before the court. Neither Peebles & Evans nor Jory, Peterson, Watkins & Smith have been granted approval by the United States government under 25 U.S.C. § 81 to represent the Ione Band of Miwok Indians. Insofar as the Villa group challenges the propriety of the representation by Peebles & Evans of one faction of the tribe, the validity of its representation is also called into question. This court has treated both sets of counsel as representing individual groups of potential tribal members. Whatever conflict may exist, it does not appear to concern the issue tendered by the court's order to show cause. Put another way, whether Nicolas Villa's decision to leave one group and retain new counsel deprives the remaining individuals who appear to have been continuously represented by Peebles & Evans of their counsel is a complex issue which need not be resolved in order to address the issue before the court.

In sum, it appears that this court's August 6, 1996, order should be fully implemented. The claims of the plaintiffs in this case are DISMISSED and Declaratory Judgment is ENTERED in favor of the County of Amador consistent with the Order filed August 6, 1996. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: August 28, 1996.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

DOCUMENT No. 20

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Ione Band of Miwok Indians

v. CASE NUMBER: CIV S-90-993 LKK

Harold E Burris, et al

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF SEPTEMBER 4, 1995.

Jack L. Wagner,
Clerk of the Court

ENTERED: September 4, 1996

by: G Miyasato Deputy Clerk

gm

United States District Court
for the
Eastern District of California
September 4, 1996

* * CERTIFICATE OF SERVICE * *

2:90-cv-00993

Ione Band of Miwok

v.

Villa

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 4, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

SJ/LKK

JUDGMENT FILE

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Jack L. Wagner, Clerk

BY: Deputy Clerk

DOCUMENT No. 21

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

IONE BAND OF MIWOK INDIANS, Appellant	:	Order Docketing Appeal and Affirming Decision
v.	:	
	:	Docket No. IBIA 92-189-A
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	August 4, 1992

This is an appeal from a May 11, 1992, letter of the Sacramento Area Director, Bureau of Indian Affairs, declining to review an economic development agreement between appellant and the American Development Company, Ltd., on the grounds that appellant is not a Federally recognized Indian tribe.

The issue raised in this appeal appeared to be similar to those addressed in Edwards, McCoy, and Kennedy v. Acting Phoenix Area Director, 18 IBIA 454 (1990), and Northwest Computer Supply, v. Acting Deputy to the Assistant Secretary--Indian Affairs (Operations), 16 IBIA 125 (1988), in which the Board held that Departmental officials are bound by the regulations in 25 CFR Part 83, with respect to which entities may be considered Indian tribes for purposes of statutes which do not define the term "Indian tribe." In particular, Edwards, McCoy, and Kennedy concerned construction of the term "Indian tribe" for purposes of 25 U.S.C. § 81 (1988), the statute under which appellant sought review of its contract in the matter on appeal here. The Board sent copies of the two decisions to appellant's attorney and ordered appellant to show cause why the Area Director's decision should not be summarily affirmed under those decisions.

Appellant's response was received on July 27, 1992. Much like the arguments made in Edwards, McCoy, and Kennedy, appellant here contends that it was recognized by the Department of the Interior prior to promulgation of the regulations now found in 25 CFR Part 83 and therefore should not be required to comply with those regulations. Appellant admits that it unsuccessfully made this argument to the Federal District Court for the Eastern District of California. In an order issued on April 22, 1992, that court held that appellant had failed to demonstrate that it was entitled to federal recognition through any mechanism outside the acknowledgment process in 25 CFR Part 83 and that appellant had failed to exhaust its administrative remedies by applying for acknowledgment in accordance with the regulations. The court also rejected as time-barred

appellant's attack on the regulations themselves and its attack on BIA's failure to include appellant on a list of tribes which were already Federally recognized. 1/ Ione Band of Miwok Indians v. Burris, Civ. S-90-993 LKK (E.D.Cal. April 22, 1992) (order granting Federal defendants' motion for summary judgment) .

Appellant argues that the district court's decision does not preclude administrative action because, inter alia, the Department has authority to correct its own errors. The Board agrees that the Department has authority to correct any errors it may have made with respect to the recognition of appellant. However, the forum in which any corrective action must be taken is the forum established in the acknowledgment regulations. Neither the Area Director nor this Board has any authority either to act under those regulations or to disregard the fact that the regulations are the exclusive mechanism by which Departmental officials may acknowledge Indian tribes. Appellant should present its arguments in connection with its petition for acknowledgment under those regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is docketed, and the Sacramento Area Director's May 11, 1992, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

1/ Appellant was not included on the first list of Federally recognized Indian tribes published pursuant to the then-new acknowledgment regulations. 44 FR 7235 (Feb. 6, 1979). Instead, it was included on a list of Indian groups whose petitions for recognition were pending at the time the regulations went into effect. 44 FR 116 (Jan. 2, 1979). The district court noted that appellant had not pursued its petition through the acknowledgment process.

DOCUMENT No. 22

PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
No Casino in Plymouth et al. v. Jewell et al.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NICOLAS VILLA, JR. and THE IONE BAND OF MIWOK INDIANS,

Plaintiffs,

v.

COUNTY OF AMADOR; OFFICE OF CODE ENFORCEMENT OF COUNTY OF AMADOR; LINDA VAN VLECK; and JIMMIE SIDES,

Defendants.

CIV-S-97-0531 DFL JFM

ORDER

Plaintiffs Nicolas Villa, Jr. and the Ione Band of Miwok Indians move for a temporary restraining order under Federal Rule of Civil Procedure 65(b) to prevent defendants from coming onto tribal land, conducting building inspections, condemning property, evicting occupants, confiscating personal property, and removing children from their homes. The County has stated their intention to inspect tribal property on November 3, 1998. In support of their motion, plaintiffs argue that the County inspection violates

this court's January 9, 1998 Order, which they contend limits the County's jurisdiction to providing police and fire protection on tribal property.

Plaintiffs misread the January 9 Order. During the January 9 hearing, the court ordered that the County provide police and fire protection on tribal property until February 20, 1998. (See Transcript of January 9, 1998 Hearing at 37:24-38:2.) The court made no order, however, that limited the County's jurisdiction to providing only those services, and nothing in the January 9 Order should be construed as limiting the County's jurisdiction to take appropriate regulatory action on tribal property. That Order does not support the issuance of a temporary restraining order here.

Moreover, the question of whether the county has jurisdiction over tribal property in this case has already been settled. By order filed August 5, 1996 in a previous action involving the parties to this motion, Ione Band of Miwok Indians v. Burris, No. CIV-S-90-0993 LKK, Judge Lawrence K. Karlton of this District held that, because the Ione Band has no recognized tribal government, no one "besides the United States presently has a basis for resisting [Amador] County's exercise of jurisdiction over the land until such time as a government is formed." (August 5, 1996 Order at 4:15-17.) The August 5 Order specifically held that Villa and his supporters did not constitute the government of the Ione Band. (See id. at 4:2-9.)

Under the August 5 Order, Judge Karlton "enter[ed] judgment

declaring the power of the County to assume jurisdiction until challenged by either the United States or a recognized tribal government." (August 5, 1996 Order at 5:17-20.) Plaintiffs have not introduced any evidence showing that they are the recognized government of the Ione Band. They are thus barred from contesting the County's jurisdiction over tribal land under the August 5 Order. Accordingly, the motion for a temporary restraining order is DENIED.

IT IS SO ORDERED.

Dated: 3 November 1998.

DAVID F. LEVI
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on April 1, 2016.

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

Dated: April 1, 2016.

Respectfully submitted,

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

No. 15-17189`

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH
and CITIZENS EQUAL RIGHTS ALLIANCE

Plaintiffs-Appellants

v.

SALLY JEWELL, Secretary; KEVIN WASHBURN, Assistant-Secretary; DONALD LAVERDURE, Acting Assistant-Secretary; BUREAU OF INDIAN AFFAIRS; AMY DUTSCHKE, BIA Reg. Dir.; JOHN RYDZIK, BIA Env. Div.; PAULA HART, OIG Chair; TRACIE STEVENS, NIGC Chair; NATIONAL INDIAN GAMING COMMISSION; and U.S. DEPARTMENT OF INTERIOR

Defendants-Appellees

and

IONE BAND OF MIWOK INDIANS

Intervener-Appellee

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:12-cv-01748 TLN-CMK
Honorable Troy L. Nunley, District Judge

EXCERPTS OF THE RECORD – VOLUME 4

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

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APPELLANTS' EXCERPTS OF RECORD

No Casino in Plymouth et al v. Sally Jewell, et al

Ninth Circuit Court of Appeal Case No. 15-17189

Land Allotments (Ione Indians)
40113-1915
Homeless Ind.
Calif.
P.B.M.

DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN SERVICE

Williams, Cal., Sept. 16, 1915.

Commissioner, Indian Affairs,

Washington,

D. C.

Dear Sir:

Replying to that portion of Office letter of the 2d inst., relative to the purchase of 40 acres at the cost of $50 per acre from the Ione Coal & Iron Company, for a home for the Indians near Ione, noting that the Office desires to close this transaction at the earliest possible moment, have by this day's mail again requested Mr. Vanderlynn Stow, President of said Company, 608 Insurance Exchange Bld., San Francisco, Cal, to have prepared the required deed and abstract, forwarding same to me at the earliest possible moment, addressing me at Santa Rosa, Cal., which place will likely be the most convenient place for forwarding my mail.

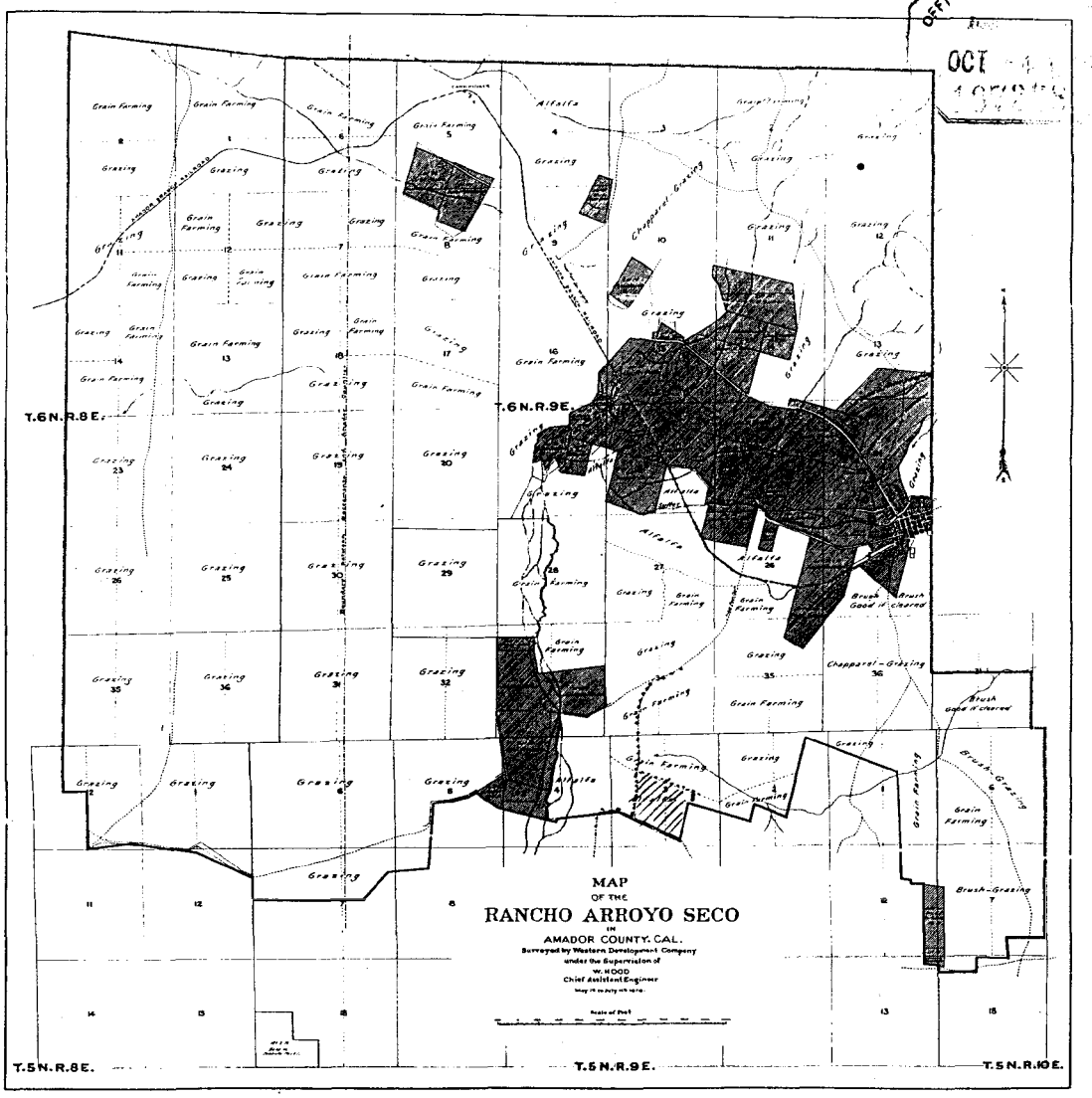
In this connection, beg to advise that on the 18th ult., just prior to my leaving San Francisco, I addressed a letter to Mr. Stow advising him that the Office had approved my recommendation for the purchase of this land, requesting that he have prepared the suggested deed and abstract, forwarding same to me at a early date. The fact that Mr. Stow is a very busy man and that likely the preparing of the abstract has required considerable time, suggests a

delay in this matter. I hope to receive from him, within a very short time, the requisite deed and abstract, which will be, when received, promptly forwarded to the Office, as requested.

Very respectfully,

John J. Terrell,
Special Indian Agent.

JJT/VG



..... = county road

..... = fenced

//// = approximately eighty acres

The property here is marked "Ar Ro" but on our large map "grain"

Land-Allotments
119160-15
P B M

Purchase for Ione
Band of Indians.

NOV 15 1915

Mr. Vanderlyn Stow,
Prest. Ione Coal & Iron Co.,
608 Insurance Exchange Bldg.,
San Francisco, California.

Dear Sir:

I am in receipt, through Special Agent John J. Terrell of your letter to him dated October 26, 1915, regarding the 40 acres of land offered by your company for sale to the United States for the benefit of certain homeless California Indians.

Your unwillingness to deliver the executed deed prior to receiving payment is noted. However, the Office is prevented by law (Revised Statutes, Sec. 3678) from making any advance of public money in any case whatsoever. As this is not possible, would you be willing to deliver to the Office for examination an exact copy of the deed as executed, and accompany it by the abstract of title? After examination of the title has been made, and you have been advised that the Office is ready to make payment upon recordation of the original deed, you could then deliver the original deed for recordation. In this way, a comparatively short time would elapse before you receive payment in the shape of a Treasury warrant. Kindly advise the Office if this procedure will be satisfactory to you.

WITNESSING COPY - FOR FILE.

With regard to the voluminous abstract, you are advised that if you will forward it to this Office for examination, it will, after such examination, be returned to you. You are further advised that effort will be made by the Office to hasten the consummation of this purchase.

It is noted that the 40 acres you propose to sell is a part of a larger tract of approximately 80 acres, and that it is intended to segregate the 40 acre tract from the 80-acre one by a survey. It is requested that a copy of the plat and field notes of this survey be transmitted together with the copy of the deed, in order to facilitate a proper examination of the title.

An early reply will be greatly appreciated.

Respectfully,

(Signed) E. B. Meritt

11-JM-15 Assistant Commissioner.

Carbon to Special Agent J.J.Terrell,
San Francisco, California.

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

Purchase-
Supplies
42-198-16
H S

AUTHORITY.

AUTHORITY

OFFICE OF INDIAN AFFAIRS
RECEIVED
MAY 18 1916
42198

Authority is hereby granted for you to expend, during the fiscal year 1916, from

(1)	"PURCHASE OF LANDS FOR LANDLESS INDIANS IN CALIFORNIA,"	$2,000	00
(2)		$	
(3)		$	
(4)		$	

for the following:

OBJECT. (HERE TABULATE SEPARATELY ITEMS FOR AGENCY, SCHOOL, POLICE, ETC., SHOWING PURPOSE OF EACH.) (Do not crowd this space—use leading sheets, Form 5-262 b, if necessary.)	UNIT PRICE.	AMOUNT.
In 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, ...		2,000 00
PAYMENT TO BE MADE BY THE INDIAN OFFICE AFTER GOOD AND SUFFICIENT TITLE, FREE FROM ALL ENCUMBRANCES, HAS BEEN PLACED ON RECORD AS BEING IN THE UNITED STATES.		
FILED BY E. S. S.		
	TOTAL,	$2,000 00

To Secretary

MAY 17 1916

DEPT. OF THE INTERIOR RECEIVED MAY 17 1916 SEC'Y'S OFFICE

TO:
For signature
Commissioner of Indian Affairs,
(Title or name.)*
Washington, D. C.
(School.)
(Post office.)

HS | A | Pic | | M | L

MAY 18 1916

Approved:-

Assistant Secretary.

DO NOT WRITE IN THIS SPACE.

* Fill in "The Superintendent" if a school superintendent; if not, insert name.

5-EWB-13

6—1580

Any EXPLANATION OR JUSTIFICATION concerning this proposed expenditure must be made in a separate letter if space hereon be insufficient.

Exhibit EE

TO THE DEPARTMENT OF INDIAN AFFAIRS

WASHINGTON, D.C.

The undersigned Indians of the Ione Valley and vicinity respectfully petition the Department and the Federal Government to do something for our large group in the matter of purchase of a tract of land, upon which homes can be built for our use. Our group consists of about twenty families, averaging about five. We have never had a suitable piece of land upon which to build and believe that our plight is one in which the Government should and could spend the necessary funds, for the relief and comfort would be great. A tract could be had in the valley where there would be suitable and sufficient water and which would be land suitable for raising of garden truck which would sustain us in times when work was scarce.

We also respectfully request the Department to look into the matter of allocating sufficient moneys for the building of homes on the tract.

Respectfully submitted;

IONE VALLEY INDIANS

Bernal Gold

	Mr. Al Walloupe
	Mrs. Alfred Walloupe
Mrs. A. Walloupe	George (X) Clifford
William Franklin	Mrs. George (X) Clifford
	M. M. Villa
William Franklin Miss Rita Villa	Mrs. Lucy Villa (X)
	Mrs. Lenora Titman
	Henry Titman
William Franklin Stella Lee	Frank (X) Powell
	Ollie Alex
	Jennie Alex
	Mr. Frank Porter
	Mrs. Frank Porter
	Mrs. Effie Burris
	Mo Howdy
Richard Clifford	Lula Clifford (X)
William Franklin Henry Miller	Richard Wessell (X)
William Franklin	Mr. Luna Wessell
	Mrs. Helen Wes ell
	Mr. Charles Wessell
	Mrs. Mabel Trent
	Pete Kesseler
	Mr. Carl Moran
	Mrs. Carl Moran
	Bernal Gold
	William Franklin

Real Property Mgmt.
305 Ione

JUL 20 1972

AIR MAIL

Commissioner of Indian Affairs

Washington, D. C. 20242

Attention: Real Estate Services

Sir:

The 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.

In August of 1970 a Bureau employee visited the families situated on this tract. At that time there were seven families residing on the tract. Records were searched in the Bureau of Indian Affairs Office and it was found that the Bureau attempted to purchase the property for the Ione Band of Indians during the period 1916 to 1930, but the Bureau was never able to complete the transaction because of not being able to get a clear title to the land. Some of the correspondence has a Central Office file number of 36222-22.

This parcel is a portion of Lot 277 of the 48,857.52 acre Arroyo Seco Rancho, which was patented by the United States to J. Nora Ross and others on August 29, 1863.

A title search was made by the Western Land Title Company, Inc., Jackson, California, who advised that there are numerous deeds of record describing the entire Rancho wherein a 40-acre tract of land is mentioned. In a deed from McKissick Cattle Company, a Nevada corporation, to Stephen E. Kieffer, entered into January 24, 1925, appeared the first specific mention of a 40-acre parcel.

This exception reads as follows:

> "Also excepting therefrom a 40-acre tract of land heretofor sold to the United States Government.
>
> The land is now fenced and used as an Indian reservation."

A similar exception is found in all subsequent deeds.

The CRILP has requested whether or not the Bureau would accept the 40-acre tract of land and hold it in trust for the Ione Band of Indians. This Band can be considered as a group that did not vote against the application of the Indian Reorganization Act, and Sections 5 and 7 of the IRA could be utilized to accept the land and establish a new Indian reservation.

Sincerely yours,

(SGD)Robert N. Seitz

Acting Area Director

Enclosure

cc: Regional Solicitor, Attn: Mr. Bordenkircher, w/cy encl.

Central Office, Frank Hutchinson, w/cy encl.

RNSeitz:mbf 7-20-72

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:

OCT 18 1972

Mr. Nicholas Villa and the
IONE BAND OF INDIANS
c/o Mrs. Bernice Villa
Route 1, Box 191
Ione, California 95640

Dear Mr. Villa:

In January of this year the Bureau of Indian Affairs received a letter from Robert J. Donovan, the Director of the California Rural Indian Land Project. That letter requested that the United States agree to accept title to a certain forty acre tract of land near Ione, California and to hold that land in trust for the Ione Band of Indians.

Since then the Bureau of Indian Affairs has learned that the Ione Band has filed suit in Amador County Superior Court to quiet and perfect title in their names. It has been informed that the Indians continue to desire that the land ultimately be taken by the United States and held in trust status.

The Secretary of the Interior recognizes his authority under 25 U.S.C. 465 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,"

The Secretary also recognizes that, there having been no vote pursuant to 25 U.S.C. 478 by the Ione Indians, the provisions of 465 apply to them. The Secretary also recognizes that obtaining a tribal or community land base for the Ione Band is a part of his policy of Indian self-determination and cultural identification.

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 did not reject the Indian Reorganization Act and thus are eligible for the purchase of land under this act. The Sacramento Area Office of the Bureau of Indian Affairs should determine that the land is merchantable and free of encumbrance. I am directing the Sacramento Area Office to assist in the preparation of a document containing a membership roll and governing papers which conform with the Indian Reorganization.

As the Commissioner of Indian Affairs, 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:

> Beginning at the point of intersection of the center line of the County Road to Jackson, with the Westerly line of the fifty-two acre tract of land owned by Anthony Meath, Armando Dellaringa, Rocco Dellaringa, and Albert Dellaringa, as recorded in Book 130 Official Records, Amador County, California page 98; thence following the center line of said County Road, North sixty-five degrees, fifty minutes West (N. 65° 50'W.) One thousand seven hundred twenty five (1725) feet to a point; thence at right angles, North twenty-four degrees, ten minutes East (N. 24° 10'E) One thousand seventy two (1072) feet to a point; thence at right angles, South sixty-five degrees, fifty minutes East (S. 65° 50'E) One thousand five hundred thirty one (1531) feet to the West boundary of the said property of Anthony Meath, Armando Dellaringa, Rocco Dellaringa and Albert Dellaringa; thence following said boundary line, South fourteen degrees, eight minutes West (S. 14° 08'W) One thousand eighty-seven (1087) feet to the point of beginning.

Sincerely,

Commissioner

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

REPLY REFER TO:
Tribal Government
Services

Memorandum

OCT 3 1973

To: Area Director, Sacramento Area Office

From: Chief, Division of Tribal Government Services

Subject: Ione Indians, Amador County, California

We have been asked by the Solicitor's Office to supplement the information concerning the Ione Indians in Amador County, California, which you supplied in your letter of June 28 addressed to the attention of Real Estate Services.

The Solicitor's Office is interested in knowing what justification there may be for asking that the Secretary extend Federal recognition to those Indians and agree to take in trust the title to a 40-acre tract which it appears they have acquired through adverse possession. That is, where were they residing before they settled on the Arroya Seco Rancho; by what authority did Special Agent C. H. Asbury seek during 1914-1918 to acquire a 40-acre tract within the Arroya Seco Rancho for their use and what appropriation was to be used? Do they have a history of band unity; do they belong to a recognized Indian group or are they a few intermarried families living together? Has the Bureau of Indian Affairs extended services to them at any time, accepted their children in Bureau schools or supplied JOM payments for them?

There may be some pertinent data in File Nos. 36222-22-313, 92781-15-300.3, 10234421-410 or 108465-1914-310. We are advised the first file is on deposit in the Southwest Title Plant and that the second was transferred to you several years ago. Since we have not located the last two here, we are hopeful that they were also sent to Sacramento. Please do all you can to supply the information desired. We shall, of course, continue to seek it here but we have little hope of being able to find it in the files available to us.

Robert Pennington

Acting Chief, Tribal Government Services

amz 1-28

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

Real Prop. Mgmt. Area
320 CCA
308 Ione

JAN 23 1974

AIR MAIL

Memorandum

To: Commissioner of Indian Affairs
Attention: Chief, Division of Tribal Government Services

From: Area Director, Sacramento Area Office

Subject: Ione Indians - Amador County, California

Your memorandum of October 3, 1973, requested additional justification for extending Federal recognition to the Ione Band of Indians. Our Central California Agency is searching for additional file information on the history of this band and the efforts to purchase land for the group in the early 1900's. We will submit our findings as soon as possible.

William E. Finale
Area Director

1-30-74 Elaine McCullen 5134

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

IN REPLY REFER TO:

Tribal Government Services

Memorandum

JAN 12 1976

To: Sacramento Area Director

From: Director, Office of Indian Services

Subject: Ione Indians

Central Cal 2

Thank you for your memorandum of September 17 transmitting a copy of an article published in the California Indian Herald in April of 1923 and a statement in the form of a letter signed by Clarence Burris.

Since there is no way to determine from his letter how long it has been since Mr. Burris first moved to the Ione tract, we doubt that there will be much weight given to that statement when the possible recognition of these people as a band is under consideration. We think, however, that Mr. Burris could be an effective witness if he would state the approximate date when he went to the Ione tract, the circumstances compelling him to do so, whether the group was newly formed or had a long history of existence as a band and whether it has continued to function as a band as opposed to a group of unrelated people. Perhaps he could name other chiefs, report on the group's activities as a band, and state how the leaders are selected. As you know, no action is currently being taken on requests that recognition be extended to various groups claiming such right.

Please contact the California Indian Legal Services again and point out the fact that title has been quieted in individuals rather than in such persons as trustees for the band or in the band itself. We doubt that we could secure the acceptance of the title in trust until there is some evidence that the land is now not simply the property of individual Indians, but actually belongs to the band.

We are hoping that you will be successful in these two instances. We will retain the present material in our files until we hear further from you.

Theodore C. Krenzke
Director, Office of Indian Services

CONSERVE AMERICA'S ENERGY

Save Energy and You Serve America!

Federal Rec

FILE COPY
SURNAME
Shapard 8-2
8/2/77
8/3
autopen

Tribal Government Services

Memorandum

AUG 4 1977

To: Sacramento Area Director

From: Acting Deputy Commissioner of Indian Affairs

Subject: Request for Federal Recognition for Ione

The question of extending Federal recognition to the Ione Band of Indians has been pending for a number of years. It has been of special concern for the past five years. We are enclosing a copy of proposed regulations concerning Federal recognition which were published on June 16. We are looking forward to any comments you or the Ione group may have on the proposal.

We will forward copies of the final regulations as soon as they become available, and request that you assist the Ione Band with the resubmission of its petition for recognition at that time in accordance with the regulations.

We realize that you, your staff and the leaders of the Ione Band have expended a great amount of effort in seeking Federal recognition for the Band. In view of the time and efforts already involved in this task, we regret the inconvenience of submitting another request for recognition. We do feel, however, that processing the Ione request under the new regulations, once they are finalized, will be the fastest way to reach a final determination as to the Ione Band's status.

RAYMOND V. BUTLER

cc: Scott Keep, Rm. 6447

cc: Surname
BCCO
Commr. Reading File
Chrony 440
Mailroom
Holdup:JSHAPARD:dlb:ext. 4045:7/5/77:Rtypd. 8/1/77:Cass. X-B

OFFICE OF THE
ASSESSOR
108 COURT STREET • JACKSON, CA 95642-2379 • PHONE (209) 223-6351

RAYMOND OLIVARRIA, ASSESSOR

April 14, 1988

William Villa
3025 Jackson Valley Rd.
Ione, CA 95640

Dear

It has come to the Assessor's attention that the property known as The Ione Band of Indians, is not indian lands under trust but private property and subject to county property tax.

The source of the information which caused us to check the status and then change it from trust land to privately owned land, was a letter from the U.S. Environmental Protection Agency to Tom Garamendi, County Sanitarian. Following that letter, I asked for and received an opinion from the County Counsel's Office. He also concluded that the property was private property on the basis of a 1972 Court Judgement.

Please be advised that the Assessor's Office intends to show your property as private ownership on our records. The ownership will be shown as follows:

APN	NAME	OWNERSHIP INTEREST
[redacted]		2/12 int. in land & house
		1/12 int. in land
		2/12 int. in land & house
		1/12 int. in land & house
		2/12 int. in land & house
		1/12 int. in land
		1/12 int. in land & M.H.
		1/12 int. in land & M.H.
		1/12 int. in land
		House
		Mobilehome
		House
		House
		House
		Mobilehome
		Trailer
		Mobilehome
		Mobilehome

c: SPO.

The ownership information was determined from the 1972 Judgement that lists 12 individuals "and others". There is no way for the Assessor's Office to know who the "and others" are, so, all owners shown as a 12th interest includes a notation of "and others".

If you have any additional information or need more explanation, please feel free to call this office.

Very truly yours,

Raymond Olivarria
Assessor

Enclosures:
1. Garamendi letter
2. Memo to Hahn
3. Judgement
4. Memo to Olivarria

ps

April 7, 1989

U.S. Department of the Interior
Commissioner of Indian Affairs
Bureau of Indain Affairs
1951 Constitution Avenue, N.W.
Washington, D.C. 20245

Dear Sir

This letter is a request from the Ione Band of Miwok Indians for Federal Recognition as an Indian Tribe and the establishment of an Indian Reservation.

The attached resolution is true and accurate statement(unaminously) approved by the General Council April 4, 1989.

In Favor: 16
Opposed: 0
Abstained: 0

Yours Truly,

Glen A. Villa Sr.

Glen A. Villa, Sr.
Chairman

Ex. 4 H

RESOLUTION # 8901

Request for Federal Recognition as an Indian tribe and the establishment of a reservation.

WHEREAS, the Ione Band of Miwok Indians has been an Indian entity and acted as a tribe for more than one hundred years: AND

WHEREAS, the Ione Band of Miwok Indians presently occupies aboriginal territory as a group: AND

WHEREAS, the Ione Band of Miwok Indians has been known to be an Indian tribe by Federal, State and Local Governments, in writing, as far back as the nineteenth century: AND

WHEREAS: the Ione Band of Miwok Indians are organized under the Indian Reorganization Act of 1934, And has adopted a constitution and by-laws; AND

WHEREAS, the Ione Band of Miwok Indians is and always has been an Indian Tribe; AND

WHEREAS, the Ione Band of Miwok Indians are entitled to Federal Recognition as an Indian Tribe by the United States Government, Department of the Interior and Bureau of Indian Affairs: NOW

THEREFORE BE IT RESOLVED:

1. the Ione Band of Miwok Indians hereby requests Federal Recognition as an Indian Tribe by the Department of the Interior under 25 U.S.C. 479; AND
2. the Ione Band of Miwok Indians further requests establishment

#890]

of an Indian Reservation under 25 U.S.C. 465

"A 40-acre tract of land heretofore sold to the United States government, which land is now fenced and used as an Indian Reservation, as disclosed by various deeds of record wherein said tract was excepted from said deeds, including the deed from McKissick Cattle Company to Stephen E. Kieffer, dated January 24, 1925, recorded in book "45" of Deeds, Page 255, Records of Amador County."

Glen A. Villa Sr.
GLEN A. VILLA, SR.
Chairman

Noma Jean Hendricks 4-7-89
NOMA JEAN HENDRICKS
Vice Chairman

Shelly Morla 4-7-89
SHELLY MORLA
Secretary-Treasurer

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

IN REPLY REFER TO:

Tribal Government Services - TR

JUL 3 1989

Mr. Glen A. Villa, Sr.
3015 Jackson Valley Road
Ione, California 95640

Dear Mr. Villa:

This is in response to your letter of April 7, 1989, and Joan Villa's letter of May 24, 1989, regarding the status of the Ione Band of Miwok Indians. We regret the delay in answering the letters.

As was explained to Joan Villa during a recent telephone conversation with the Chief, Branch of Tribal Relations, the issue of clarifying the status of the Ione Band is a complex one. It is necessary to do extensive research into the background of the group, which is a time consuming task. In our view the need for careful research is mandatory. Due to the work load of the staff in the Branch of Tribal Relations, we are unable to predict when we will be able to start and complete the research necessary. We will, however, make every effort to provide a response as promptly as possible.

In the meantime we are requesting, by copy of this letter, that the Sacramento Area Director provide copies of all documentation which is available in the area or agency regarding the Band and an evaluation of the status of the group. We would also appreciate copies of any documents which you may have relating to this issue. The more information which we have, the more likely we will be able to resolve this issue quickly.

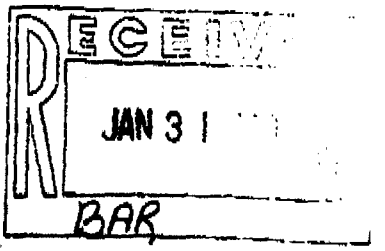
We look forward to working with you to resolve this long standing issue.

Sincerely,

Acting Deputy to the Assistant Secretary -
Indian Affairs (Tribal Services)

Ex 5

January 23, 1990



Acknowledgment Resource Branch
U.S. Department of Interior
Bureau of Indian Affairs
Acknowledgment Resources Branch
MS 4627 MIB Code 440 B
Washington, D.C. 20245
ATTN: Mike Lawson

Dear Sir,

We are members of the Ione Band of Miwok Indians. We are writing to you concerning "the new reservation in Ione." We are sure you know about it already through Joanie Villa, the appointed spokesperson for the Villa Family

We are now aware of someone trying to take over our Band, we have been the Ione Band of Miwok Indians since 1970 when we formed a governing body. Harold Burris was elected Chairman and he has held the position until the present.

We are not seeking Federal Recognition at this time. At the present, a few members of the Ione Band are seeking recognition through Joanie Villa as their spokesperson, by using our Indian Heritage. All Miwoks will not benefit from this recognition, only a selected few. Why is Joanie Villa trying to push this recognition through so fast, when we have been living here all these years and haven't given recognition a second thought?

What kind of papers does she have on our land? How could she give you the deed to this property to take it into Trust for her, when the people who have lived on the property for many years never gave her permission to do so. This forty acres we live on is being taxed by Amador County.

We never gave her permission to apply for Recognition as a tribe, by using us or our ancestors.

If you have any questions you may contact Harold Burris at 2815 Jackson Valley Road, Ione, Ca. 95640, (209) 274-2559. We would appreciate being notified when any hearings come up on this subject.

Sincerely,

Harold Burris Sr.
Harold Burris, Sr.

Ex. 6

IONE BAND OF MIWOK INDIANS
IONE RESERVATION
2919 Jackson Valley Road
Ione , CA. 95640
(209)274-2915
February 10, 1990

Mr. Guy Reynolds
Attorney At Law
34 Summit Street, Suite E
Jackson, CA. 95642

RE: HAROLD BURRIS,SR.,ET AL

Dear Mr. Reynolds,

It has come to attention of the Ione Band of Miwok Indians that Mr. Burris, et al, are making accusations regarding Mr. Burris' status as chairman of the group and status of the Band.

Enclosed please find copies of those statements along with a copy of his resignation from the Band to Indian Health Service. You will need to refer to the two newspapers, Amador Ledger and Stockton Record, interview with Mr. Burris, et al. Mr. Burris, et al, clearly states they are not members of the Band. The Band agrees they do not want to be members, since they have stated so several times.

In accordance with Article III, Section 2 of the Constitution presently governing the Ione Band and reservation, "NO PERSON SHALL BE A MEMBER OF THE IONE RANCHERIA WHO HAS RELINQUISHED IN WRITING HIS RIGHT TO MEMBERSHIP ON THE IONE RANCHERIA:", the Band has accepted his resignation along with Carol Boring, Pamela Burris, Ester Burris and all their direct decendants. As for Jeannette Allen, Callie Allen and their direct decendants, have never been and are not now members of the Ione Band of Miwok Indians(refer to the Ione Band Constitution)

Enclosed you will find a copy of the removal action taken against Mr. Burris as chairman of the Band, dated Oct. 3, 1984. The removal was done, again, in accordance to the Constitution and signed by the majority of the Band. You will find the minutes of the duly called election of Glen Villa, Sr. for chairman dated 1/11/85 and more recently the duly held election of Nicolas Villa, Jr. as chairman, Oct. 16, 1989.

Please note: the Bureau of Indian Affairs cannot and will not interfere in the tribal governmental function such as election of officers at a duly called meeting by a majority of a tribal government general council. Nor, can the Bureau dictate to the sovereign tribal government who the members of the Band or Tribe are. The Bureau of Indian Affairs cannot

support by law a group such as Mr. Burris' that have broken away from the majority of the established group to form his own. The Bureau as well as Indian Health Service cannot and will not provide services for his type of group.

At present,the Ione Band of Miwok Indians consist of 41 members, 18 voting members(2 away at school), 16 under the age of 18, and 4 non-voting members. This does not include Mr. Burris' group.

The Ione Band of Miwok Indians would like you to inform your clients to cease and desist from their current activity. The Ione Band was granted formal recognition in 1916. As the documents clearly show, Mr. Burris is not the Chairman of the Ione Band of Miwok Indians. All agencies, including California Indian Legal Service are quite aware of the status of the Ione Band of Miwok Indians in all respects at present.

The Band, under our own Constitution, has the sovereign right to enforce any decisions made regarding the Burris issue.

Sincerely,

Nicolas Villa Jr.
Nicolas Villa, Jr.
Chairman

Loren Hill
Loren Hill
Vice-Chairman

Barbara Hill
Barbara Hill
Secretary/Treasurer

AND THE FOLLOWING MEMBERS:

Lisa Hill
Shelly Mosa
John Mosa
Audrina Harrison
Muriel Mike
Fred Mike
Ellen Villa
Bernie Villa

Geraldine Burris
Nicolas Villa Sr.
Norma Jean Hendricks

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

Tribal Government Services - AR

FEB 20 1990

Lawson 2/14/90
L. Garcia 2/14/90
Actg Bacon 2-14-90

Mr. Glen A Villa, Sr.
3015 Jackson Valley Road
Ione, California 95640

Dear Mr. Villa:

This is in further response to letters we have received from you on April 7, 1989, from Mrs. Joan Villa on May 24, 1989, from Congressman Norman D. Shumway on September 20, 1989, and from Senator Alan Cranston on October 10, 1989, concerning the request of the Ione Band of Miwok Indians for Federal acknowledgment. Most of the documents referred to in this response have been provided to the Ione Band in response to Freedom of Information Act (FOIA) requests dated June 17, 1989, and October 16, 1989.

Documents in our files do not show the Ione Band to be recognized as an Indian tribe within the meaning of Federal law. Therefore, the only administrative option for the group to achieve such Federal status is through the Acknowledgment procedures set forth in Part 83 of Title 25 of the Code of Federal Regulations (25 CFR 83).

The key question appears to be whether the Ione Band is federally recognized at present by virtue of a letter which Commissioner of Indian Affairs (Commissioner) Louis Bruce sent to Mr. Nicolas Villa and the Ione Band of Indians on October 18, 1972. Commissioner Bruce stated in that letter:

> 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 did not reject the Indian Reorganization Act and thus are eligible for the purchase of land under this act.... I am directing the Sacramento Area Office to assist in the preparation of a document containing a membership roll and governing papers which conform with the Indian Reorganization [Act].
>
> As the Commissioner of Indian Affairs, I therefore, here 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: [land description follows].

The contemplated "Ione land purchase" referred to in the Commissioner's letter is in reference to the long effort of the Bureau of Indian Affairs (Bureau) to obtain trust title to the 40-acre tract which the Ione Band has occupied near the town of Ione in Amador County. This effort was part

of a larger program which the Bureau conducted during the early 1900's to purchase tracts of property throughout Northern California in order to provide a land base for the many landless Indians in that region. The Bureau began negotiations to purchase land for the Ione Band sometime prior to December 1914, but was not successful in securing an option. The owner of the land, the McKissick Cattle Company, finally agreed to sell, and the Department of the Interior (Department) authorized the purchase of the tract on May 8, 1916.

Purchase negotiations were continued for almost another 20 years (until 1935), but the Bureau never succeeded in clearing the title. The proposed transaction was complicated by questions regarding mineral rights and values, by the necessity of securing the release of multiple mortgages, and by the fact that the cattle company had gone into receivership.

Even if the Bureau had been successful in its attempt to purchase land, this may not have constituted Federal recognition of the Ione Band as an Indian tribe. 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 land 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.

The Ione Band appears not to have been directly involved in this contemplated land purchase and had little or no direct contact with the Bureau until 1941 when 31 members of your group petitioned the Department, through Congressman Harry L. Englebright, to "purchase a tract of land, upon which homes can be built for our use." After the Assistant Commissioner of Indian Affairs advised Congressman Englebright that funds were not then available for that purpose, the Bureau had no further contact with your group for almost 30 years.

The Bureau's attention was again focused on the status of the 40-acre tract in August 1970 after two members of your group asked the Sacramento Area Director (Area Director) for assistance in improving their homes. In January 1972 the Director of the California Rural Indian Land Project (CRILP), a special program of California Indian Legal Services (CILS), wrote the Commissioner requesting that the United States accept title to the 40 acres and hold it in trust for the Ione Band. CILS was then in the process of filing suit in the Superior Court of California for the County of Amador to quiet title to the land in the Ione Band by virtue of its adverse possession. Commissioner Bruce's letter was written in response to requests for Federal trust status. Two weeks after the letter, on October 31, 1972, the Ione Band received a favorable judgment from the Superior Court, and its members subsequently gained title to the land.

Commissioner Bruce's letter indicates clearly the intent of the Bureau to recognize and establish a trust land base for your group. However, the letter is of no legal effect, in and of itself, because these actions were never implemented. The Area Director was never directed to assist in the

preparation of a membership roll and governing document for the group, and the described parcel of land was never brought under Federal trust. Your group had no acknowledged government-to-government relationship with the United States prior to the letter, and there is no evidence that the Commissioner based his decision on the recognition criteria then being utilized by the Department.

Subsequent correspondence and memoranda in our files indicate that despite the Commissioner's letter, the question of Ione recognition remained open. The Office of the Solicitor, the Department's legal branch, maintained that the Bureau still needed to prove that the Ione Band met the criteria for Federal recognition established by Associate Solicitor Felix Cohen in the 1930's and contained in the Department's Handbook of Federal Indian Law (1942 edition, pages 268-272).

On October 3, 1973, for example, the Chief of the Bureau's Division of Tribal Government wrote the Area Director that the Solicitor's Office had requested supplemental information regarding the history of the Ione Band in order to determine what justification there might be for "asking that the Secretary [of the Interior] extend Federal recognition to those Indians." In a memorandum sent on January 21, 1975, the Director of the Bureau's Office of Indian Services advised the Area Director that the Solicitor's Office was still considering the proposal to recognize Ione, and had requested "additional supportive material."

On February 12, 1974, the U.S. District Court in the case of U.S. v. Washington, determined that only the federally recognized tribes in western Washington could maintain treaty fishing rights in certain waters within that region of the state. This decision brought into question the status of those unrecognized Indian groups, such as the Stillaquamish, that had previously exercised such fishing rights. Together with the 1975 decision in Maine in the case of Passamaquoddy Tribe v. Morton, which determined that the United States had certain obligations to an unrecognized tribe by virtue of the Indian Nonintercourse Act, the western Washington case focused new attention on the entire issue of administrative recognition of Indian tribes. As a result, the Secretary of the Interior asked the Solicitor and the Commissioner to reevaluate the criteria and procedures for Federal recognition. This request had the effect of suspending decisions on those recognition cases then pending before the Department.

The Director of the Office of Indian Services informed the Area Director on January 12, 1976, in regard to the Ione issue, that "no action is currently being taken on requests that recognition be extended to various groups claiming such right," and this information was passed on to CILS, which was then representing your group, on February 12, 1976.

The Department's solution to the tribal recognition issue was to draft regulations establishing uniform, mandatory criteria and standard procedures for Federal acknowledgment. On August 4, 1977, the Acting Deputy Commissioner for Indian Affairs advised the Area Director that

recognition of the Ione Band would be subject to the proposed Acknowledgment regulations that had been published in the Federal Register on June 16, 1977: "We do feel, however, that processing the Ione request under the new regulations, once they are finalized, will be the fastest way to reach a final determination as to the Ione Band's status." The files show that on July 28, 1977, this message was communicated to Mr. Harold Burris of the Ione Band in a letter from the Tribal Operations Officer of the BIA's Central California Agency in Sacramento.

The final revised Acknowledgment regulations were published in the Federal Register on September 2, 1978, and became effective on October 2, 1978. Set forth originally in Part 54 of Title 25 of the Code of Federal Regulations, they now constitute Part 83. The Ione Band was considered to be one of the groups with a petition already on file with the Bureau, as described in subsection 83.8(b) of the regulations, and was on the list of 40 such groups published in the Federal Register on January 2, 1979. A public notice specific to the Ione Band was published in the Sacramento Bee on February 16, 1979. In accordance with subsection 83.9(c), which required the Federal Acknowledgment Project (now the Branch of Acknowledgment and Research or BAR) to establish a priority register of petitioners, the Ione Band was given priority number 2, based on the 1916 date when the Department authorized the purchase of land for the group.

The Bureau sent a copy of the Acknowledgment regulations and guidelines to your group in January 1979 and group members reportedly attended an Acknowledgment workshop that was held in July of that year. Prior to 1989, however, BAR received little or no communication from members of the Ione Band.

On April 22, 1980, the Native American Heritage Commission, a body created within the California Governor's Office, asked the Bureau to provide information regarding the request of the Ione Band for Federal recognition and Federal trust status for its land. In response, the Commissioner implied in a July 24, 1980, letter that the only option open to the group was the Acknowledgment process, and that "the Secretary cannot take land into trust for an American Indian group for which the Federal relationship has not been acknowledged."

The Ione Band has reportedly completed the task of collecting the documentation necessary to show that it meets the seven mandatory criteria set forth in the Acknowledgment regulations. In a letter which BAR received on March 15, 1989, you claimed to be the leader of the group and advised that the Ione Band expected to submit its documentation "in the very near future." According to a signed resolution which you forwarded to us on April 7, 1989, the General Council of the Ione Band had resolved unanimously to request Federal recognition and the establishment of a reservation. However, on May 10, 1989, Mr. Harold Burris and three other individuals who claimed to be members of the Ione Band sent a letter to the Superintendent of the Central California Agency stating that they did not want the Ione community property to come under Federal trust status. On February 2, 1990, BAR received a letter from Mr. Burris stating that he

was Chairman of the Ione Band and had been so since 1970 despite rumors that he had resigned. He declared further that "We will appeal any decision that will Federally Recognize the Ione Band of Indians at this time." In reference, apparently, to Mrs. Joan Villa, he expressed anger that the Bureau would "take the word of a non-Indian and not investigate what is really happening."

Because the Bureau has no jurisdiction over the Ione Band at present, it is not obliged to conduct an investigation to determine who, if anyone, is the legitimate leader of the group, or to find out if all those who claim to represent the group are indeed Ione members. However, should documentation supporting the Ione Band's acknowledgment petition be submitted by any representative of the group, these questions will be investigated fully by the Bureau when the petition is placed under active consideration, as described in section 83.9(a) of the Acknowledgment regulations.

If the Ione Band wants to come under Federal jurisdiction, it must continue to pursue recognition through the Acknowledgment process and submit the documentation supporting its petition. It is unlikely that the Department would support any legislative proposal to acknowledge the group.

The Bureau's land purchase effort and Commissioner Bruce's letter are both evidence which might weigh heavily in favor of the group, if other documentation can otherwise prove that the Ione Band has continually maintained an identifiable, cohesive, and politically autonomous Indian community as defined in the Acknowledgment regulations.

If you have further questions regarding this issue, please contact Michael Lawson, the Acknowledgment staff member who has administrative responsibility for California petitioners. You may call him at (202) 343-3592, or write him c/o Bureau of Indian Affairs, Branch of Acknowledgment and Research, Mail Stop 4627-MIB, 18th and C Streets, N.W., Washington, D.C. 20240.

Sincerely,

Hazel E. Elbert

Deputy to the Assistant Secretary -
Indian Affairs (Tribal Services)

cc: Sacramento Area Director
Supt., Central California Agency
Senate Select Committee on Indian Affairs
Indian Health Service, Sacramento Area Director
Mr. Allogan Slagle
Ms. Jeanette Allen
California Indian Legal Services

cc: Surname, Chron, 440RF, BAR Chron, 100(Murdock), 440-C, HOLD
440B:MLawson:maw:2/13/90:343-3592:"G-VILLA"

April 3, 1990

LETTER OF OPPOSE AND APPEALS

We the Undersigned member's of the **IONE BAND OF INDIANS** are **opposed** to becoming **federaly recognized** at this time and any time in the future, Until we can get matter's straightened out, out here. We the **IONE BAND OF INDIANS** are **appealing** at this time, **any application's or petition's** regarding the Federal Recognition of the Ione Band of Miwok Indians, or the Ione Band of Indians or any of it's members, To the Bureau of Indian Affairs.

Sincerely,

MEMBER'S

Chairman; Harold Burris Sr.

Vice-Chairman; Norman B Allen.

Secretary; Jeanette Allen & [redacted]

Treasurer; Carol Boring & [redacted]

Esther Burris

Pam Burris & [redacted]

Callie Allen

Michael Allen & [redacted]

Norman H Allen

Norma Allen & [redacted]

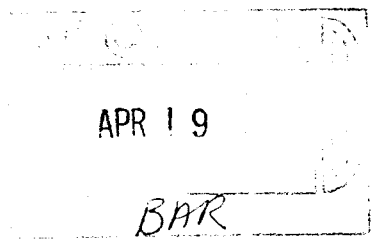
Daniel Boring

Harold Burris Jr & [redacted]

P.S. More letter's to follow by mail.

April 8, 1990

U.S. Department of the Interior
Bureau of Indian Affairs
Deputy to the assistant Secretary
Dr. Eddie Brown
Indian Affairs
Mail Stop 4140 MIB
18th & C Street N.W.
Washington, D.C. 20240



Dear Dr. Brown:

My name is Harold Burris, Sr., I am Chairman of the Ione Band of Indians. I have been Chairman since 1970. We presently reside on a 40 acre tract near the town of Ione, Amador County, California. We are currently paying property taxes to Amador County for this 40 acres. I, myself have lived on this property for 60 years. In 1930 I moved in with my grandmother, she was already living here.

Prior to 1970, we were just living on the property, we were not a group. In 1970, we began to form a group, as we (The Ione Band of Indians) were in contact with California Indian Legal Services to help the group obtain a Quiet Title to our 40 acres. At this time I was elected Chairman for the Ione Band of Indians. I was never in favor of becoming Recognized or this property being turned into a Reservation, but I was willing to go along with the group until six years ago when the harassment began. I had no knowledge of other members pursuing acknowledgement, prior to reading the letters I received from the Bureau of Indian Affairs.

As you continue to read you'll understand more on what has been happening here. I'm sure you'll see that the Ione Band of Indians have never functioned as a group, but more as individuals, as you'll see in this letter, there are some members who broke off from the tribe and are trying to take over the band. This has angered me and the other members. I have represented the tribe since 1970.

My wife and I are both property owners through the Judgement of 1972 from the Amador County Superior Court.

Since the Judgement of 1972, the band still did not function as a group. There were no regular meetings held. The only time a meeting was called, it would be called at the last minute, without notice and only if necessary. For example; take a look at the Documents we received from the Bureau of Indian Affairs in Washington D.C. in February 1990, you can plainly see the Ione Band of Indians did not function as a group.

1. Letter to Mr. Nick Villa dated Aug. 19,1970

2. Letter to Mr. Nick Villa dated Nov. 10, 1970

3. Walk in office note:
Franklin Villa, Sr.
Margarete A. Childs
Frank E. Villa, Jr.
Lucille Villa

4. Memo #5 Chairman (8-23-1973) IONE BAND OF INDIANS HAROLD BURRIS, 1-9-1975 called Harold Burris "He's going to see if he can find out anything and call 1-10-1975.

5. Letter from Clarance Burris July 16, 1975

6. Bernice Villa went to the Sacramento Bee 2-16-1979 and published a Public Notice, this was done without Chairman approval.

7. Glen Villa wrote a letter to Senator John Garamendi on February 27, 1980. "Note" this again was done without Chairman approval as he states is only a member.

8. On 1-11-1985 Ione Band of Miwok Indians Special Elections results. "Note" this again was done by a small group who wanted to break off from the Ione Band of Indians, namely the Villa's and a few Non-voting members to establish their own group.

9. On 5-24-1989 a letter was sent to Rolland Johnson written by Joan Villa. Joan Villa is a Non-Indian and non-member, she was never voted in by the council.

10. Mr. Glen Villa letter dated July 3, 1989.

11. Ms. Shelly Kessler Morla letter dated 7-20-1989. Ms. Morla is a Non-member, she is a member of the Jackson Rancheria which is Federally Recognized.

12. Letter from Nicolas Villa Jr., dated 10-16-1989 to Rolland Johnson.

Here are just a few examples to show you the group was not acting as a group, but as each individual on his own. As to the present date under the leadership of Harold Burris, Sr. the Ione Band of Indians have held regular meetings and elections since July 10, 1984, on the 10th of every month.

In February 1984, Effie Burris passed away, she was one of our Elder Indians, she was the mother, grandmother or mother-in-law to all members but 3. Four months after she passed away a meeting was called (see minutes of June 1984). Results of the meeting were that Effie Burris left a will to Jeanette Allen and Muriel Mike was worried that she would have to move. Glen Villa said "A will didn't mean anything on Indian land". Glen also said " Jeanette can put Effie's house on wheels and take it down the road, that the will didn't include the property." Effie was a land owner as well as other people. A motion by Barbara (Villa) Hill was made to elect officers right now after she argued with an elder. Glen said "we can't hold elections today, we have to give a thirty day notice." The Chairman, Harold Burris, Sr. told all members that elections would be held on the 10th of July, 1984.

When it came time to hold elections on July 10, 1984, the Villa family decided to go camping instead of coming to the elections and elect new officers. Elections were held on July 10, 1984 (see election results on July 10, 1984) and it was agreed by all the members present at the elections that any member not showing up did not care who was elected. Glen Villa wrote a letter to the Bureau of Indian Affairs on 1-11-85 giving his election results and claiming to have had to open the meeting for lack of officers,, this is not true elections on July 10, 1984 were called for by two members of the Villa family and ALL MEMBERS had thirty day notice to attend and elect the officers that they wanted but they chose to go camping instead. Glen opened his own meeting because he was taking over the tribe. On February 10, 1990 Nicholas Villa wrote a letter to Mr. Reynolds stating " the band has accepted the resignation of Harold Burris, Sr" in reference to the letter Mr. Burris wrote to Randy Willard of Indian Health Service. I did not resign. The letter was written to Indian Health Services regarding the bands concern for the water, at that time Indian Health Services was looking into putting the Ione Band of Indians on the Jackson Valley Irrigation District. I am also enclosing the letter I sent to Mr. Willard.

Regarding the February 10, 1990 letter written to Mr. Reynolds from Nicholas Villa, also accepted the resignation of Carol (Burris) Boring, Pamela Burris, Esther Burris, Harold Burris, Jr., and their direct descendents and as for Jeanette Allen and Callie Allen and their direct descendents have never been members of the Ione Band of Miwok Indians. To set the record straight none of the above named individuals have NEVER RESIGNED. If you look at the Ione Band of Miwok Indians Resoultion No. 8903 you will see that the above named individuals are members. In Resoultions No. 8903 & 8904 were supposed to have been adopted by the tribe on May 3, 1989 and claims that our lawsuit was filed on December 30, 1989, our lawsuit was filed on December 30, 1988. The Resoultions were adopted by Mr. Villa and his group on May 3, 1989, so how could we have broken any resoultions, these are examples of how they are trying to push us around and control our lives.

On the 40-acres we own there has always been a divider on the property, (see map). The fence was put up many years ago, to divide the land into 20 acres for each side. The fence is put up from tree to tree, so it could go either way as for being fair about the 20-acres on each side. If you'll look at the map you'll notice the fence. You should also notice where the people live to get a better understanding of how we are living. On 20 acres you have Mr. and Mrs. Villa and their children. On the other 20 acres you have a combination of people, some are members and some are not. On the Villa side you can't move over there if you wanted to. You can't even drive your car over there. Now on our side of the property we once had a NO TRESS-PASSING sign up to keep people off the property that did not belong here. This did not do us any good as Audrina Harrison tore the sign into pieces, she then took the pieces and tacked them on an oak tree down the road a couple of miles from our homes. Audrina Harrison was also going around cutting down other people's fences to show that she could drive where ever she wanted

The Bureau of Indian Affairs built a house of our property in 1984. The lease was between Audrina Harrison and myself. The Bureau said that even though we were having problems with Harrison, they had to build the house since the contractor had been paid, and that I being the Chairman could determine who would live in the house. When the house was finished Harrison moved into the house anyway. She had to climb through the window to enter the house. Fred Mike later changed the lock so she could enter the house.

Since 1984 my members and myself have been harassed daily by Audrina Harrison, Muriel Mike, Fred Mike, Pete (John) Morla and Shelly Morla. We cannot go outside without being called names etc. On 9-17-1984 Jeanette Allen had to go to the hospital and make out a police report because Audrina Harrison and Shelly Morla broke her finger.

We ask Glen Villa to come to a meeting at the Allen residence on December 22, 1987. Mr. Villa did come to talk to us about the problems we have been having with these people and their animals. We told him that our children are being chased by uncontroled animals belonging to the Morlas, Mikes and Harrison. His advice to us was to solve the problem on our own because there was nothing he could do since they would not listen to him. We asked Glen if the trouble makers could move to the Villa side and he said "NO", you'll have to work this out on your own.

Indian Health in Sacramento put in fire hydrants and they did a good job but it did not last long. Pete Morla and Jerry (Audrina Harrison's boyfriend, a non-Indian) and three other

non-members were towing a vehicle on the property and ran over the fire hydrant. Today the pipes are still lying on the ground and no one has bothered to fix them.

By March 1, 1989, all members were subject to sign a contract to use the community water. A $10.00 fee is charged to every family each month to pay the cost of electricity on the pump. Glen Villa is handling the water account now, as he went to P.G. and E. and took the account out of my namd and put in his own name. We have been paying our water bill this way for one year and as of this writing we have not once received a bill or statement, or anything to show us our balance on our water account. Any money left over each month was to be put in a bank account. If something would happen to our pump we would have the money in the account to repair or replace it. Glen Villa has been asked several times to show us our account and as of today we still don't know what is happening with our money.

Glen Villa sent letters on July 18,1989 to fine the Allen household, Boring household and Burris household (his group had adopted the Ione Band Waters Users Association on June 18, 1989, this was done without our knowledge) for violation of water conservation enacted by the board. Mr. Villa did not bother to tell us what we could use the water for and this is what inspired me to write my letter of 8-2-1989 to Mr. Willard. If you look at the letter I'm sending along from the Ione Band of Miwok Indians Water Users Association dated July 18, 1989, you'll notice the President is John (Pete) Morla who has harassed us for six years, so of course he is going to fine us every chance he gets. We were fined for washing our clothes, watering our plants etc. but he can waste the water by letting it run down the drive way.

We also have numerous reports with the Amador County Sheriffs Department, Amador County Animal Control and our local District Supervisor Tom Bamert, who is also aware of our living conditions that we have to put up with daily. Mr. Villa wrote a letter to Animal Control claiming to have the situation under control. Mr. Villa claims to want to control the animals and does not need the assistance of the County to do this. As of today our children are still being chased, are animals are still dying (from being poisoned or taken to the pound) and the trouble makers animals are still un-controlled. Mr. Villa does not seem to have the problem under control.

As of now I'm sure you know there is a problem out here and it has nothing to do with becoming Federally Recognized. The problem goes way back and it has to with the fact that the Villa family does not have to live with the trouble makers, we have to, but on the other hand the Villa family doesn't want to straighten out the problems either. We have asked Glen Villa for a solution and his advice was to handle it on our own, which is exactly what we did. On December 30, 1988, after a Majority Vote by the Ione Band of Indians it was agreed to file a complaint in Amador County

Superior Court (see copy of complaint). After Mr. Villa received his court papers, he started to pursue Federal Recognition so that our lawsuit would be thrown out of the Amador County Superior Court. Mr. Villa feels the lawsuit is a Federal issue and belongs in Federal Court, since this is PRIVATE land it cannot be taken to Federal Court and we feel this is why they (the Villa's) are pushing so hard to get recognized.

It is also our feelings that if it were not for Joan Villa most of the problems would have been solved by now. It is Joan Villa who is pursuing Federal Recognition so she could get a Bingo hall, 7-11 convenience store, gas station, Waste Management. It is also Mrs. Villa's hope of increasing their land from 40 acres to 500 acres (see article Amador Ledger Dispatch, dated January 19,1990).

You will also find copies of letters sent to my members to show you how we are being pushed around. These letters were only sent to us the other people on the property did not receive these letters. This is another way to make us drop our lawsuit or to give up and join Mr. Villa's group, which we will not do. We are still the Ione Band of Indians as we have been since 1984. We are not the ones who walk away from the tribe, Mr. Villa and his group did. This brings me to the By-Laws the Ione Band of Miwoks sent to the Bureau, these By-Laws were made to be broken and changed by their tribe any time they want to change them. It appears Glen Villa and his brother Nicholas Villa want to be Chairman, but yet they don't know what they want or what to do, the Villa brother's did go to the media and did some articles, (which I am sending along), see transcript of K.C.R.A. Channel 3, Glen Villa talks of owning his own property as individuals so you can go to the bank and get a loan, Nick Villa Jr. talks of putting a roof over your head with adequate sewage, lighting, sanitation, the whole works, I see no problem with Mr. Villa getting this on his own, instead of asking the Government for a handout. This is America and a lot of people go out and get jobs and buy housing. There is nothing stopping Nicholas Villa from doing the same. If you'll refer to a letter from James R. Normandeau dated August 19, 1970, in your files (see copy that is outlined) note what Mr. Nick Villa, Sr. says "Mr. Villa was upset with the idea of someone digging into who owns the land". He also stated that "The BIA does not owe him anything and he does not owe the BIA anything. He would like to leave things the way they are". It appears to me the Bureau can look at all the evidence and see Mr. Villa's tribe does not know what they want, nor can they function as a group.

It is also clear that the Villa brothers have no respect for their elder's. With the way they are trying to take control of the Band, by going at it all the wrong ways. By not going through the Tribal Governing Body to take over leadership as it states in our By-Laws. They had their chance in July of 1984 to take control when two members of the Villa family (Barbara Hill and Jeannie Hendricks) called for elections. They didn't show up for the elections to vote. We feel that if anyone has the right to control the tribe and be Chairman, Harold Burris does.

We are also aware that at this time we are not Federally Recognized and the Government does not recognize our tribe, but it does mean something to us, we have held regular meetings and now someone is trying to take our Heritage away from us. We feel the tribe that Glen Villa and his brother Nicholas Villa are trying to form is a take over of our tribe and we are going to fight for it. It does mean a lot to myself and my 20 members.

We are not asking the Government to recognize the Ione Band of Indians or the Ione Band of Miwok Indians at this time and feel the Bureau does not have to make the decision at this time. For we the Ione Band of Indians are not seeking Federal Recognition. As for the Appeals and Applications being sent to the Bureau at this point, it is our feeling the Ione Band of Miwok Indians or Mr. Villa have no right to do this on their own. If you would look at the following letter dated February 10, 1990 from Nicolas Villa to Mr. Reynolds it says "Please Note"

> The bureau will not and cannot interfere in the tribal governmental function such as elections of officers at a duly called meeting by the majority of a tribal government general council. Nor, can the bureau dictate to the sovereign tribal government who the members of the band or tribe are. The bureau of Indian Affairs cannot support by law a group such as Mr. Burris that have broken away from the tribe.

It is not my group that broke away from the tribe, Mr. Villa's tribe has. We are not asking the government to settle our fight, all we ask is to let us settle our problems before the bureau will help any of us. We fell recognition at this time would not benefit all Indians as it should.

There is one more thing we would like to ask the Buerau, how can the Ione Band of Miwok Indians claim to be the Ione Band of Indians, and use all the documents from the early 1900s in the Bureau to establish their newly formed group Mr. Villa has formed the "Ione Band of Miwok Indians".

We would appreciate being notified in the near future of any actions taken by the Ione Band of Indians or the Ione Band of Miwok Indians. We will appeal any new actions taken by the Ione Band of Indians or the Ione Band of Miwok Indians.

I would like to Thank You for looking at our side of the story. This is something we felt none was hearing, this is not everything but it is enough to give you a picture of what is going on.

Sincerely,

Harold Burris, Sr.
Chairman

CC: Michael Lawson
Lynn Forcia
Scott Keep
Rolland Johnson
Hazel Elbert
Michael Smith, Central California Agency
Indian Health Service, Sacramento (Randy Willard)

Fed. Express #
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EXECUTIVE SECRETARIAT

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DR. EDDIE FRANK BROWN
ASSISTANT SECRETARY
DEPARTMENT OF INTERIOR
MS. 4140 M.I.B.
1847 C STREETT N.W.
WASHINGTON, D.C. 20240

JUNE 29, 1990

RE: HAZEL ELBERT LETTER TO GLEN VILLA, MEMBER 2/16/90

DEAR DR. BROWN,

THIS IS IN RESPONSE TO THE RECENT LETTER SENT BY MS. ELBERT TO A MEMBER OF THE IONE BAND OF MIWOK INDIANS REGARDING THE TRIBAL STATUS OF THE BAND.

I MUST FIRST NOTE THAT THE FEBRUARY 16, 1990 LETTER SIGNED BY MS. ELBERT WAS NOT SENT TO THE AUTHORIZED REPRESENTATIVE OF THE IONE BAND OF MIWOK INDIANS, THAT IS, NICOLAS VILLA JR. WHO WAS THE LAWFULLY ELECTED BAND CHAIRMAN UNDER THE TERMS OF THE BAND CONSTITUTION. ACCORDINGLY, TO THE EFFECT THAT THE ELBERT LETTER WAS INTENDED TO BE A NOTICE TO THE IONE BAND OF MIWOK INDIANS OR A NOTICE OF AN OFFICAL DECISION, IT HAS NO EFFECT. MOREOVER, MS. ELBERT HAS NO AUTHORITY TO REVOKE THE LONG STANDING FEDERAL RECOGNITION OF THE IONE BAND OF MIWOK INDIANS AS A SOVEREIGN INDIAN NATION ENTITILED TO THE RIGHTS, PRIVILEGES AND PROTECTIONS ENJOYED GENERALLY BY INDIAN TRIBES. ANY ATTEMPT TO FUTHER SUCH "ADMINISTRATIVE" TERMINATION OF TRIBAL STATUS WOULD CONSTITUTE A VIOLATION OF DUE PROCESS OF LAW.

MS. ELBERT ACKNOWLEDGES IN HER LETTER THE ISSUANCE OF A DECISION BY COMMISSIONER LOUIS BRUCE THAT AGAIN ACKNOWLEDGED THE BAND' TRIBAL STATUS AND ALSO AGREED TO TAKE LAND IN TRUST FOR THE IONE BAND OF MIWOK INDIANS. THE DEPARTMENT OF INTERIOR HAS ACKNOWLEDGED, THROUGH DISCUSSION WITH VERONICA MURDOCK, SPECIAL ASSISTANT TO THE ASSISTANT SECRETARY, AND THE OFFICE OF THE SOLICITOR STAFF, THAT LOUIS BRUCE LETTER HAS NEVER BEEN REFUTED BY THE DEPARTMENT OR OTHERWISE CANCELLED OR OVERTURNED. AS MENTIONED IN THE FOREGOING PARAGRAPH, MS. ELBERT HAS NO AUTHORITY TO OVERRULE THE LOUIS BRUCE PRIOR DECISION.

ALTHOUGH THE IONE BAND OF MIWOK INDIANS HAS LONG BEEN RECOGNIZED BY THE UNITED STATES AS A SOVEREIGN INDIAN NATION, THE SECRETARY OF THE INTERIOR HAS REPEATEDLY FAILED TO IDENTIFY IN THE FEDERAL REGISTER THE IONE BAND OF MIWOK INDIANS AS A TRIBAL ENTITY HAVING GOVERNMENT-TO-GOVERNMENT RELATIONS WITH THE UNTIED STATES. THE FAILURE OF THE SECRETARY OF THE INTERIOR TO ACKNOWLEDGE THE IONE BAND OF MIWOK INDIANS IN THE FEDERAL REGISTER AND THE PUBLICATION OF THE FEBRUARY 16, 1990 ELBERT LETTER HAS CAUSED THE BAND

SUSTANTIAL PROBLEMS WITH GOVERNMENT ENTITIES AND PRIVATE PARTIES. THE BAND HAS SUFFERED AS A CONSEQUENCE. IT HAS MISSED OPPORTUNITIES, IT HAS HAD TO FOREGO OPPORTUNITIES, IT HAS HAD PROJECTS DELAYED, IT HAS HAD TO NEEDLESSLY EXPEND ITS SCARCE RESOURCES TO CONDUCT ITS BUSINESS, AND SERIOUSLY INTERFERED WITH THE SUCCESSFUL FUNCTIONING OF ITS TRIBAL GOVERNMENT. ACCORDINGLY, TO AVOID FURTHER PROBLEMS IT IS DEMANDED THAT THE SECRETARY FORTHWITH PUBLISH IN THE FEDERAL REGISTER HIS ACKNOWLEDGMENT THAT THE IONE BAND OF MIWOK INDIANS IS A TRIBAL ENTITY HAVING GOVERNMENT-TO-GOVERNMENT RELATIONS WITH THE UNITED STATES AND IS ENTITLED TO SERVICES PROVIDED GENERALLY TO ALL INDIAN TRIBES. IF SUCH A PUBLICATION IS NOT MADE WITHIN 10 DAYS OF DATE OF THIS WRITING TO THE IONE BAND OF MIWOK INDIANS WITHIN THE SAME TIME PERIOD, THE IONE BAND OF MIWOK INDIANS WILL COMMENCE A LAW SUIT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, AS SOON AS IS PRACTICABLE, SEEKING A DECLARATION THAT THE IONE BAND OF MIWOK INDIANS IS A SOVEREIGN INDIAN TRIBE AND SUCH OTHER RELIEF AS MAY BE APPROPRIATE.

RESPECTFULLY,

Nicolas Villa, Jr.

NICOLAS VILLA, JR.
CHAIRMAN, IONE BAND OF MIWOK INDIANS

CC. SENATOR PETE WILSON
SENATOR ALAN CRANSTON
SENATOR DANIEL INOUYE
CONGRESSMAN GEORGE MILLER
VERONICA MURDOCK, SPECIAL ASSISTANT, B.I.A.
RON JAEGER, AREA DIRECTOR, SAC. AREA OFFICE B.I.A.
JAY HARWOOD, AREA DIRECTOR, SAC. AREA OFFICE I.H.S.
MICHAEL McCABE, SAN FRANCISCO CHRONICLE
LOUIS DEMAS, TRIBAL ATTORNEY
ALLOGAN SLAGLE, SOLICITOR, A.A.I.A.

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

July 23, 1990

Mr. Harold E. Burris, Sr.
Chairman, Ione Band of Indians
2815 Jackson Valley Road
Ione, California 95640

Dear Mr. Burris:

Thank you so much for your recent letter concerning federal recognition of the Ione Band of Indians.

I appreciate knowing that the Ione Band is not seeking immediate recognition. The legislation to be introduced will not provide immediate recognition to the Ione Band or any other group. However, this is an issue which the Interior Committee considers when it holds hearings on the bill at some point in the future.

In your letter, you asked whether the legislation will recognize every California Indian. The legislation will not recognize every California Indian. Instead, the bill establishes a process whereby those Indian groups that want to can be considered by the Secretary and receive an answer within two years.

If you have additional suggestions about the legislation, please feel free to write to me.

Sincerely yours,

GEORGE MILLER, Chairman
Subcommittee on Water, Power
and Offshore Energy Resources

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 20 1990

Mr. Nicolas Villa, Jr.
2919 Jackson Valley Road
Ione, California 95640

Dear Mr. Villa:

This is in response to your letter of June 29 in which you indicated you would file a law suit in the U.S. District Court if the Secretary of the Interior did not take action granting Federal acknowledgment to the Ione Band of Miwok Indians (Band) by July 8, 1990.

It remains our position that the Ione Band is not an acknowledged Indian tribe within the meaning of Federal law, and that its only administrative recourse for obtaining such status is to follow through with the petition it presently has before the Bureau of Indian Affairs (Bureau) for Federal acknowledgment pursuant to Part 83 of Title 25 of the Code of Federal Regulations (25 CFR 83).

We regret you are unhappy with the Acknowledgment procedures, but we feel that it is a fair and appropriate process, especially since there is no guarantee that litigation would resolve the issue of acknowledgment any faster. We are willing and available to continue to discuss the underlying particulars of your case and to review any additional information or evidence you may wish to submit.

We would like to clarify some of the issues raised in your letter. Our records indicate that the February 16 letter you reference was dated February 20, 1990. This letter was sent to Mr. Glen A. Villa, Sr., because it was his letter to which we were responding and not because we assumed that he was the leader or authorized representative of the Ione Band. As a matter of policy, we do not use titles or tribal designations when addressing correspondence to members of unacknowledged groups, because of the complications it may cause in situations like that of the Ione Band where there is more than one individual claiming to be the leader. Secondly, our February 20 letter should not be interpreted as a decision which revoked the Federal status of the Ione Band, but rather as a reaffirmation of the administrative conclusion made in the 1970's that the Band was not federally recognized.

The Ione Band was informed in 1977 that its recognition would be subject to the Acknowledgment regulations, and legal notices to this effect were published in both the Federal Register and the Sacramento Bee in 1979. In 1980, Mr. Glen Villa informed California State Senator John Garamendi by letter that the Bureau had advised the Band that it must submit documentation supporting an acknowledgment petition, and that he was "about 75 percent finished" in finding such documentation. In a letter received

on March 15, 1989, Mr. Villa informed the Bureau that the Band was continuing to pursue Federal acknowledgment under the regulations and that it would submit its documentation "in the very near future." Given these circumstances, we can only encourage you to continue these efforts and to proceed through the Acknowledgment process.

Sincerely,

/s/ Ward H. Hills

Acting Assistant Secretary - Indian Affairs

cc: Sacramento Area Director
Supt., Central California Agency
Senator Pete Wilson
Senator Alan Cranston
Senator Daniel Inouye
Congressman George Miller
Area Director, Sacramento Indian Health Service
Mr. Allogan Slagle

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

TAKE PRIDE IN AMERICA

MAR 22 1994

The Honorable Nicholas Villa, Jr.
Chief, Ione Band of Miwok
P.O. Box 1152
Ione, California 95640

Dear Mr. Villa,

I am writing regarding our meeting on October 28, 1993 and subsequent discussions with Congressman Doolittle. In that meeting I agreed to clarify the United States' political relationship of the Ione Band of Miwok, as well as Mr. Louis Bruce's 1972 letter regarding the tribe's political status and its historic land base.

Upon review of the matter, I am now reaffirming the portion of Commissioner Bruce's letter which reads:

> The Secretary also recognizes that obtaining a tribal community land base for the Ione Band is a part of his policy of Indian self-determination and cultural identification. *** Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated. *** As the Commissioner of Indian Affairs, 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. (See Bruce letter attached)

As Assistant Secretary of Indian Affairs I hereby agree to accept the parcel of land designated in the Bruce letter to be held in trust as territory of the Tribe. As I stated during the October meeting, the Tribe will henceforth be included on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," last published in the Federal Register on October 21, 1993.

I am hereby directing the Bureau of Indian Affairs and specifically the Sacramento Area Office to deal with the tribe accordingly. The Bureau will maintain contact with the tribe to address the relevant details. I extend my personal congratulations and look forward to working with you and your people.

Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

SEP 15 1994

Mr. Nicolas Villa, Jr.
P.O. Box 1152
Ione, California 95640

Dear Mr. Villa:

Thank you for your letter of July 8, 1994, with questions about the nature of the lines of authority in the Bureau of Indian Affairs (BIA). While the ultimate authority of the BIA, as part of the Executive Branch, resides in the office of the President of the United States, this authority by law and tradition is delegated to the Secretary of the Interior and in turn delegated to the Assistant Secretary - Indian Affairs. Much of the authority has been further delegated to the areas and agencies. In keeping with the Indian Reorganization Tribal Task Force recommendations and the policies of the Department of the Interior (Department), much of the authority which formerly was held in the BIA Central Office has been and is being delegated to the areas and/or agencies.

For efficiency in an organization as large and complex as the BIA, not all the management decisions can be made in the Central Office. The Central Office is expected to provide policy guidance and support as well as address those tasks not delegated to the field. Acknowledgment of tribes is a policy decision retained by the Central Office but once a tribe is acknowledged, many of the decisions affecting the tribe are made in the field. To our knowledge, the Sacramento Area Office has not challenged or refused to accept our acknowledgment of the Ione Band of Indians. They have asked for clarification of certain issues relating to the acknowledgment and we have responded to the area office's questions. Enclosed is a copy of their incoming memorandum and our responses.

Also enclosed is a copy of a later memorandum which was sent to the Area Director, Sacramento Area Office which expanded on the July 14, 1994, correspondence. This memorandum was sent to clarify an apparent ambiguity that had arisen as a result of earlier correspondence. The Department has not anointed either you or Mr. Burris as the single leader of the Ione Band and it has not recognized two distinct entities. The BIA does recognize that the Ione Band of Indians is deeply divided among political factions and is providing technical assistance in helping these factions overcome their differences.

You asked for an update on the request of California tribes calling for the removal of Mr. Ronald Jaeger as the Sacramento Area Director. We have no knowledge or information of any request by the California tribes for Mr. Ronald Jaeger's removal. No formal request has been received in my office.

You requested that Ms. Amy Dutschke be required to withdraw from participation in any discussions relating to the Ione Band of Indians. The Sacramento Area Office recognizes that there is a potential for conflict of interest and Ms. Dutschke has restricted involvement in Ione matters.

The Ione Band of Indians is now formally acknowledged and is within the administrative jurisdiction of the Sacramento Area Office. Since the area office staff has the delegated authority to work with the tribes in California on many issues such as enrollment, secretarial elections, and governing documents, they will be able to assist the Ione Band and answer any questions about organizing and establishing a tribal office. It is our understanding that the Sacramento Area Office has scheduled a meeting between the two factions on September 30, 1994, with the purpose of resolving the differences between you and Mr. Burris. Since the Sacramento Area Office now has the lead in organizing the Ione Band, any questions received in Central Office that relate to the authority delegated to that office will be referred to the area office for response.

We sincerely recommend that you and other tribal members cooperatively work together to resolve the tribe's internal problems so that the tribe can be quickly reorganized. Once efficiently organized, the tribe then can set its goals, provide services to its members and begin to move ahead in its tribal endeavors.

Sincerely,

/S/ Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

Enclosures

cc: Sacramento Area Office
[redacted]

United States Department of the Interior

OFFICE OF THE SOLICITOR
1849 C STREET N.W.
WASHINGTON, DC 20240

In reply, please address to:
Main Interior, MS 6513

MEMORANDUM

To: James E. Cason
Associate Deputy Secretary

SEP 19 2006

From: Carl J. Artman
Associate Solicitor, Division of Indian Affairs

Subject: Ione Band Indian Lands Determination

The Ione Band of Miwok Indians of California has a fee-to-trust application pending before the Department for certain lands near and partially within the boundaries of Plymouth, California (Plymouth parcel). On September 20, 2004, the Band submitted a request to the National Indian Gaming Commission for an opinion on whether this parcel would qualify as "Indian lands" within the meaning of the Indian Gaming Regulatory Act (IGRA) on which the Band could conduct gaming if the lands were acquired in trust by the Department of the Interior.

Pursuant to the Memorandum of Agreement between the Deputy Solicitor for the Department and the Acting General Counsel of NIGC executed at end of May 2006, we have reviewed the Band's request. For the reason stated below, we believe that the lands that are the subject of the fee-to-trust application would qualify as "Indian lands" within the meaning of the Indian Gaming Regulatory Act (IGRA) on which the Band could conduct gaming if the lands were acquired in trust by the Department of the Interior.

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)(1).

The Band has not suggested that it acquired the Plymouth parcel in settlement of a land claim, nor is there any basis for such a claim. Thus, the Band must establish that it is a newly acknowledged tribe under the Secretary's acknowledgment process and the lands will be part of its initial reservation or that it is a restored tribe and that the Plymouth parcel is restored lands.

When the Department adopted its acknowledgment regulations at the end of 1978, the Band was treated as having submitted a letter of intent to petition. Notwithstanding the Department's insistence that the Band had to follow the acknowledgment regulations, the Band continued to insist that it was already recognized and did not need to go through the process. The Band did not complete the petitioning process before former Assistant Secretary Ada Deer clarified the Band's status in 1994. Accordingly, the Band cannot establish that it is a newly acknowledged tribe under the Secretary's acknowledgment process. Thus, the only way that the Band can conduct gaming on the lands it seeks to acquire in trust without a two part determination is if it can that the lands are restored lands for a restored tribe.

To 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.

We believe that the history of the Band's relationship with the United States is unique and complex but we need not describe it in detail. 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 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.

In October 1972, however, former Commissioner of Indian Affairs Louis Bruce sent the Band a letter responding to a request from the Band that the United States accept a forty acre tract in trust for the Band. The Commissioner concluded that:

> Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated . . . I am directing the Sacramento Area Office to assist in the preparation of a document containing a

> membership roll and governing papers which conform to the Indian Reorganization [sic].
>
> As the Commissioner of Indian Affairs, I therefore, hereby agree to accept by relinquishment or title or gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians . . .

Commissioner Bruce's letter is substantially similar to the September 7, 1972, memorandum from the Deputy Commissioner to the Minneapolis Area Director concerning the acquisition of land for the Sault Ste. Marie Band of Chippewa Indians, which was the basis for the Department's determination that that Chippewa band was a recognized tribe. When the Department sought to take land in trust for the Sault Ste. Marie Band of Chippewas based on Deputy Commissioner's memorandum, the City of Sault Ste. Marie, Michigan, challenged the action. The court upheld the Department's action noting:

> [A]lthough the question of whether some groups qualified as Indian tribes for purposes of IRA benefits might have been unclear in 1934, that fact does not preclude the Secretary from subsequently determining that a given tribe deserved recognition in 1934. The 1972 Memorandum constitutes just such subsequent recognition. To hold otherwise would be to bind the government by its earlier errors or omissions.

Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 161 (D. D.C. 1980).

Commissioner Bruce's letter is a clear, unambiguous statement that he is dealing with the Band as a recognized tribe. Under the Indian Reorganization Act, the Commissioner has authority to acquire land in trust only for groups that are tribes. His statement that he "hereby agree[s] to accept . . . the following described parcel of land to be held in trust for the Ione Band of Miwok Indians" is a clear act of recognition. Thus, following Commissioner Bruce's letter, the Ione Band must be deemed to have been a recognized tribe within the meaning of the IGRA.

For reasons that are not entirely clear, the Department did not follow through on the Commissioner's directions. With the development and implementation of the Department's acknowledgment regulations, the Department took the position that the Band was not yet recognized and had to proceed through the newly established acknowledgment process and unilaterally put the Band on the list of petitioners.

The Band sued the Department contending that it was already recognized and did not have to go through the acknowledgment process. The Department defended the litigation and prevailed. *See Ione Band of Miwok Indians v. Burris*, No. CIV. S-90-993 LKK (E. D. Calif.

April 22, 1992). The Interior Board of Indian Appeal (IBIA) subsequently rejected similar claims by the group in an administrative appeal. *See Ione Band of Miwok Indians v. Sacramento Area Director*, 22 IBIA 194 (August 4, 1992). By taking a position in Federal court and before the IBIA contrary to the position taken by Commissioner Bruce in 1972, the Department terminated the relationship Commissioner Bruce had recognized.

In late 1993, Assistant Secretary Ada Deer met representatives of the Band and agreed to clarify the relationship between the United States and the Band. Following her review of the matter, Assistant Secretary Deer specifically reaffirmed the conclusions of Commissioner Bruce's 1972 letter and agreed to accept in trust the specific parcel of land described in the Commissioner's letter. In her March 22, 1994, letter to the Band representatives, the Assistant Secretary states she was directing the Bureau to deal with the Band as a tribe and to add the Band to the list of tribal entities published in the Federal Register.

Commissioner Bruce's 1972 letter amounts to recognition of the Band in accordance with the practices of the Department at the time. The positions taken by the Department in Federal court and before IBIA against the Band are 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 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.

In order to conduct gaming on the land not only must the Band be considered a restored tribe within the meaning of IGRA but the land being acquired must also be considered restored lands. IGRA does not define what constitutes restored lands. The courts have interpreted the term and given it a broad definition consistent with the common meanings of "restored" and the congressional purposes in enacting IGRA to include promotion of tribal economic self-sufficiency. *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003).

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 general principles are already established by the Department's practices. The tribe must have a modern and historical connection to the land and there must be a reasonable temporal connection between the date the land is acquired and the date the tribe was restored.

In this case the evidence is that the land being acquired is in an area that is historically significant to the Band. It is within a few miles of several historic tribal burial grounds and the site where some of the Band's ancestors signed a treaty. Many of the Band's members live in

the surrounding area and the Band has used facilities in the City of Plymouth to hold governmental meetings in recent years establishing a modern connection to the area.

The proposed acquisition of the land is reasonably temporal to the date the Band was restored. Assistant Secretary Deer issued her letter reaffirming and restoring the relationship with the band in March 1994. After her decision, the members of the Band divided into several different factions, which delayed the reorganization of a modern tribal government. The current proposed acquisition coming only twelve years after restoration is reasonably temporal under the circumstances.

In summary, the tribe has established a modern and an historical connection to the land. In addition, the Band's proposed acquisition represents a reasonably prompt effort under the circumstances by a restored tribe to acquire land that could be the basis for its economic self-sufficiency. The proposed acquisition constitutes restored lands for a restored tribe within the meaning of IGRA so once the land is in trust, the Band may conduct gaming on it without obtaining a two-part determination.

cc: Matthew Franklin, Chairman
Ione Band of Miwok Indians
14 West Main Street
P.O. Box 1190
Ione, CA 94640

Phil Hogen
Chairman, Nation Indian Gaming Commission

Penny J. Coleman, Esq.
Acting General Counsel, Nation Indian Gaming Commission

bcc: Director, Office of Indian Gaming Management, Bureau of Indian Affairs
Director, Pacific Region, BIA
Superintendent, BIA Agency

Secretary's RF

Solicitor's Docket RF
DIA RF
SKeep RF

File/Document:
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This copy/revision printed:

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 16 2009

Penny J. Coleman
Acting General Counsel
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, DC 20005

Dear Ms. Coleman:

On September 19, 2006, former Associate Solicitor Carl Artman issued a memorandum opinion to the Associate Deputy Secretary concluding that the Ione Band of Miwok Indians of California was a restored tribe within the meaning of Section 20 of the Indian Gaming Regulatory Act (IGRA)(25 U.S.C. § 2719) and that certain lands the Band purposed to acquire within the boundaries of Plymouth, California, qualified as restored Indian lands within the meaning of IGRA. Based on the Associate Solicitor's conclusions that the Band was a restored tribe and the land being acquired qualified as restored Indian lands, the Band would be entitled to conduct gaming on the parcel once the land was acquired in trust.

We are now in the process of reviewing the proposed draft final environment 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 reversed that opinion. It no longer represents the position of the Department. The Department's opinion is that the Band is not a restored tribe within the meaning of IGRA. A copy of my new opinion is enclosed.

Newly acquired land is eligible for gaming only if it is acquired by a restored tribe and the land is restored. Since I have concluded that the Band does not qualify as a restored tribe within the meaning of IGRA, I have not reconsidered that Associate Solicitor's other conclusion, i.e., that the land was restored lands.

If the acquisition of the Plymouth parcels proceeds, the land will be eligible for Indian gaming only if the Band requests and receives a favorable two-part

determination under 25 U.S.C. § 2719(b)(1)(A) pursuant to our new regulations, 25 C.F.R. §§ 292.13-292.24.

If you have any questions, please don't hesitate to call me.

Sincerely,

David L. Bernhardt
Solicitor

Enclosure

DRAFT

MEMORANDUM

To: George T. Skibine
Acting Deputy Assistant Secretary for Policy and Economic Development

From: David L. Bernhardt
Solicitor

Subject: Ione Band Indian Lands Determination

On September 19, 2006, former Associate Solicitor Carl Artman issued a memorandum opinion to the Associate Deputy Secretary concluding that the Ione Band of Miwok Indians of California was a restored tribe within the meaning of Section 20 of the Indian Gaming Regulatory Act (IGRA)(25 U.S.C. § 2719) and that certain lands the Band purposed to acquire within the boundaries of Plymouth, California, qualified as restored Indian lands within the meaning of IGRA. Based on the Associate Solicitor's conclusions that the Band was a restored tribe and the land being acquired qualified as restored Indian lands, the Band would be entitled to conduct gaming on the parcel once the land was acquired in trust.

We are now in the process of reviewing the preliminary draft Final Environmental Impact Statement for the Plymouth parcel. As a result, I decided 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 IGRA.

Specifically, the Associate concluded that for the Ione Band to 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." The Associate Solicitor's 2006 opinion was prior to the Department's adoption in May 2008 of final regulations governing gaming on newly acquired lands. It was based instead on the court's opinion in *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich.* (*Grand Traverse III*), 369 F.3d 960 (6th Cir. 2004), *aff'g* 198 F. Supp. 920, 928 (W.D. Mich. 2002. To qualify as a restored tribe under *Grand Traverse III*, an Indian tribe must demonstrate: 1) a history of governmental recognition; 2) a withdrawal of recognition; and 3) reinstatement of recognition. *Id.* at 967.

PRIVILEGED CONFIDENTIAL ATTORNEY WORK PRODUCT

Recognizing that the Band had a unique and complex relationship with the United States government dating back to at least 1916, the Associate concluded that former Commissioner of Indian Affairs Louis Bruce had in effect recognized the Band in October 1972 when the Commissioner sent a letter to the Band responding to its request that the United States accept a forty acre tract in trust for the Band. The Commissioner advised the Band that:

> Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated . . . I am directing the Sacramento Area Office to assist in the preparation of a document containing a membership roll and governing papers which conform to the Indian Reorganization [sic].
>
> As the Commissioner of Indian Affairs, I therefore, hereby agree to accept by relinquishment or title or gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians . . .

The plain language of Commissioner Bruce's letter is far less than a clear and unambiguous statement of recognition. The letter reflects a modern conclusion as to what was "evidently extended" by a proposed purchase more than 50 years earlier. I understand that the Department only has authority to acquire land under the Indian Reorganization Act for Indian groups that are tribes, or collections of half-blood individual Indians, and I agree that the Commissioner's agreement to accept the land in trust is some evidence he believed he was dealing with a tribe. I disagree with the Associate's conclusion that the letter is an adequate "clear, unambiguous statement" of Federal recognition.

Moreover, in the years following the Commissioner's letter, the Department did not treat it as a statement of recognition. For reasons that are not entirely clear in the record, the Department never did accept the land in trust for the Band. Rather when the land claims and treaty fishing rights litigation of the mid-1970s led the Department to develop its acknowledgment regulations, the Department took the position that the Band was not yet recognized and had to proceed through the newly established acknowledgment process. The Department went so far as to place the Band on the list of pending petitioners by construing the 1916 request to acquire land in trust for the Band as the required letter of intent to petition for acknowledgment under the Department's regulations.

The Band sued the Department contending that it was already recognized and did not have to go through the acknowledgment process. The Department defended the litigation and prevailed. *See Ione Band of Miwok Indians v. Burris*, No. CIV. S-90-993 LKK (E. D. Calif. April 22, 1992). The Interior Board of Indian Appeal (IBIA) subsequently rejected similar claims by the group in an administrative appeal. *See Ione Band of Miwok Indians v. Scaramento Area Director*, 22 IBIA 194 (August 4, 1992). The Associate Solicitor viewed the Department's actions in insisting that the Band go though the acknowledgment process and denying its tribal

status in both judicial and administrative litigation as evidence that the Department had terminated the relationship Commissioner Bruce had recognized.

Contrary to the Associate's view, the Department's actions in placing the Band on the list of petitioners and insisting in litigation that the Band go through the regulatory acknowledgment process did not amount to termination. Those actions were merely evidence that the Department did not believe the Commissioner Bruce's 1972 letter was adequate unambiguous evidence of prior Federal acknowledgment.

In late 1993, Assistant Secretary Ada Deer met with representatives of the Band. She agreed to clarify the relationship between the United States and the Band. After reviewing the matter, she reaffirmed the conclusions of Commissioner Bruce's 1972 letter and agreed to accept in trust the specific parcel of land described in the Commissioner's letter. Subsequently, in a March 22, 1994 letter Assistant Secretary Deer advised the Band's representatives that she was directing the Bureau to deal with the Band as a tribe and to add the Band to the list of tribal entities published in the Federal Register.

Under the Department's acknowledgment regulations, the Department committed to publishing in the Federal Register within 90 days of the effective date of the regulations a list of all Indian tribes and to updating and publishing that list. *See* 25 C.F.R. § 54.6(b),[1] 43 Fed. Reg. 39,361, 39,362-63 (September 5, 1978). The Department also committed in the original regulations to make an effort to locate Indian groups not previously acknowledged and inform them of their right to petition. In addition the Department committed to publish in the Federal Register a list of groups deemed to have a petition or letter of intent to petition on file with the Bureau of Indian Affairs.[2] The Ione Band was not on the first Federal Register list of Indian tribal entities with a "government-to-government relationship with the United States." *See* 44 Fed. Reg. 7,235 (Feb. 6, 1979). It was on the list of Indian groups with letters of intent or petitions for acknowledgment on file. *See* 44 Fed. Reg. 116 (Jan. 2, 1979). The Band was, however, included on the first Federal Register list of tribal entities published after Assistant Secretary Deer's March 1994 letter to the Ione Band's representatives and every list published since then. *See* 60 Fed. Reg. 9,250, 9,252 (Feb. 16, 1995).

I believe the Department's treatment of the Band subsequent to Commissioner Bruce's 1972 letter is evidence not of termination but that the Commissioner's letter did not constitute adequate evidence of Federal recognition. The Band's recognition as an Indian tribe by the Federal government was not complete until Assistant Secretary Deer's letter of March 1994 and the subsequent inclusion on the Federal Register list of tribal entities.

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[1] The regulations were redesignated Part 83 in 1982. *See* 47 Fed. Reg. 13,327 (March 30, 1982). They were revised in 1994 and maintained the requirement to publish a list in the Federal Register of Indian tribes, although the publication no longer had to be annual. *See* 25 C.F.R. § 83.5 (a),. 59 Fed. Reg. 9,280, 9,294 (Feb. 25, 1994).

[2] *See* 25 C.F.R. §§ 54.6(a) and 54.8(b), 43 Fed. Reg. 39,362- 39,363.

I am aware that since Assistant Secretary Deer's action was taken outside the Department's regulatory acknowledgment process, it could be argued that even her actions and the subsequent listing in the Federal Register are insufficient to establish the Band's status as a federally recognized Indian tribe. I do not question the Band's status as a federally recognized Indian tribe. In November of 1994, Congress enacted the Federally Recognized Indian Tribe List Act of 1994 (List Act) that mandated that the Secretary publish in the Federal Register annually a list of all Indian tribes as a requirement of statutory law, not just Departmental regulation,. *See* 25 U.S.C. § 479a. The Band has been on every tribal list published pursuant to the List Act.

The Band's tribal status is beyond question at this time. The conclusion of this opinion is to clarify that the Band obtained that status for the first time in 1994 not in 1972. Since the Band did not obtain recognized status until 1994, the Associate Solicitor's opinion that the Band had been recognized previously, terminated and restored can't be supported and is reversed.

I am aware that the Band and its supporters have invested substantial effort in their application to have the Plymouth land acquired in trust and used for gaming to foster the Band's economic development. This opinion does not preclude that result but it does mean the Band will have to acquire a favorable two-part determination before the land can be used for gaming.

In May 2008, the Department adopted final regulations, 25 C.F.R. Part 292, interpreting Section 20 of IGRA governing the acquisition of lands in trust for gaming after October 17, 1988. Those regulations do not alter final agency decisions made pursuant to section 2719 prior to their enactment. However, there has been not final agency action on the land into trust request. Further, The regulations also provide that the Department retains full discretion to qualify, withdraw or modify such opinions even in those situations where the agency has previously relied on a legal opinion. *See* 25 C.F.R. § 292.26.

If you have any questions concerning this opinion, I would be glad to discuss them with you.

cc: Matthew Franklin, Chairman
Ione Band of Miwok Indians
14 West Main Street
P.O. Box 1190
Ione, CA 94640

Phil Hogen
Chairman, Nation Indian Gaming Commission

Penny J. Coleman, Esq.
Acting General Counsel, Nation Indian Gaming Commission

PRIVILEGED CONFIDENTIAL ATTORNEY WORK PRODUCT

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 16 2009

MEMORANDUM

To: George T. Skibine
Acting Deputy Assistant Secretary for Policy and Economic Development

From: David L. Bernhardt
Solicitor

Subject: Ione Band Indian Lands Determination

On September 19, 2006, former Associate Solicitor Carl Artman issued a memorandum opinion to the Associate Deputy Secretary concluding that the Ione Band of Miwok Indians of California was a restored tribe within the meaning of Section 20 of the Indian Gaming Regulatory Act (IGRA)(25 U.S.C. § 2719) and that certain lands the Band purposed to acquire within the boundaries of Plymouth, California, qualified as restored Indian lands within the meaning of IGRA. Based on the Associate Solicitor's conclusions that the Band was a restored tribe and the land being acquired qualified was restored Indian lands, the Band would be entitled to conduct gaming on the parcel once the land was acquired in trust.

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 IGRA.

In recognition of the recently executed Memorandum of Agreement with the Nation Indian Gaming Commission (NIGC), I have sent the Acting General Counsel of NIGC a copy of our draft opinion explaining the withdrawal and our contrary conclusion that the Ione Band is not a restored tribe and invited them to comment on it before we advise the tribe of our changed position.

If you have any questions, please don't hesitate to call me.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

JUL 26 2011

ATTORNEY CLIENT COMMUNICATION
Confidential & Privileged

Memorandum

To: Assistant Secretary – Indian Affairs

From: Solicitor

Subject: Ione Band of Miwok Indians of California – Indian Lands Determination Issues

I. INTRODUCTION

The Ione Band of Miwok Indians of California (Ione Band or the Band) has a pending fee-to-trust application before the Department of the Interior (Department) to put certain lands in and near Plymouth, California into trust for gaming purposes (Plymouth Parcels). Under the Indian Gaming Regulatory Act (IGRA), a tribe is prohibited from gaming on lands acquired in trust after October 15, 1988, except under certain circumstances.[1] One exception to such prohibition is for lands taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition."[2]

In 2004, prior to submitting its fee-to-trust application, the Ione Band requested a determination on whether the Plymouth Parcels would be eligible for gaming under the IGRA. On September 19, 2006, Carl Artman, the Associate Solicitor-Indian Affairs, issued an opinion concluding that the Ione Band is a "restored tribe" and that the lands at issue qualified as restored lands under the IGRA (Restored Tribe Opinion).[3] James Cason, the Associate Deputy Secretary, concurred in the opinion and informed the Band that the Plymouth Parcels constituted "Indian lands" under IGRA.[4]

On January 16, 2009, Solicitor David Bernhardt transmitted a memorandum (Withdrawal Memorandum) to the National Indian Gaming Commission (NIGC) and to Acting Deputy Assistant Secretary George Skibine purporting to withdraw and reverse the Restored Tribe

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[1] 25 U.S.C. § 2719.
[2] Id. § 2719(b)(1)(B)(iii).
[3] Memorandum from Associate Solicitor, Carl Artman to James E. Cason, Associate Deputy Secretary, Re: Ione Band Land Determination (Sept. 19, 2006).
[4] Letter from Associate Deputy Secretary James E. Cason to Matthew Franklin, Chairman, Ione Band of Miwok Indians (Sept. 26, 2006). In this letter, Deputy Secretary Cason noted that based on a Memorandum of Agreement between NIGC and the Solicitor's Office "the Office of the Solicitor will make determinations on whether lands that are the subject of a fee-to-trust application are 'Indian lands' on which the tribe may conduct gaming." *Id.*

Opinion.[5] Included in the transmittal to the NIGC was a draft opinion (Draft Opinion). The NIGC submitted comments to the Solicitor's office on July 10, 2009 concluding that it could not concur in the Draft Opinion.[6]

The Ione Band has asked the Solicitor to rescind the Withdrawal Memorandum and the Draft Opinion. The Band sets out two reasons for its request: (1) that the Withdrawal Memorandum constitutes a "last minute" action that should be withdrawn and is inconsistent with the spirit of the Emanuel Memorandum[7] and (2) that the Withdrawal Memorandum and Draft Opinion were arbitrary and capricious.[8]

Based on a review of the record in this matter, I hereby withdraw the Withdrawal Memorandum and decline to issue the Draft Opinion. I also hereby reinstate the Restored Tribe Opinion.

II. CHRONOLOGY OF EVENTS

A. Factual Background

After the turn of the century, the Department began acquiring land for landless California Indians. In 1916, the Department attempted to acquire 40 acres for the Ione Band. This purchase was never completed. In the late 1960's, however, the Ione Band renewed its efforts to have the Department acquire the land in trust. Several years later, Commissioner of Indian Affairs Louis Bruce concluded that:

> Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione purchase was contemplated . . . I am directing the Sacramento Area Office to assist in the preparation of a document containing a membership roll and governing papers which conform to the Indian Reorganization [sic]. As the Commissioner of Indian Affairs, I therefore, hereby agree to accept by relinquishment or title or gift the following described parcel of land to be held in trust for the Ione Band of Miwok Indians. . . .

Letter from Commissioner Bruce to Nicholas Villa, October 18, 1972. For reasons that are not entirely clear in the record, the Department did not take the land into trust for the Ione Band.

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[5] *See* Memorandum from Solicitor David L. Bernhardt to George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, Re: Ione Band Indian Lands Determination (Jan. 16, 2009); Memorandum from Solicitor David L. Bernhardt to Acting General Counsel Penny Coleman, NIGC, Re: Ione Band Indian Lands Determination (Jan. 16, 2009).

[6] Letter from Penny J. Coleman, Acting NIGC General Counsel to Solicitor Hilary Tompkins, Re: Ione Band of Miwok Indians, Indian lands determination (July 10, 2009).

[7] *See* Memorandum from Chairman Matt Franklin to Solicitor Tompkins, Re: Department of Interior Solicitor's Letter dated January 16, 2009 (Sept. 8, 2009). The Emanuel Memo directed the heads of all executive departments and agencies to withdraw, with limited exceptions, all proposed or final regulations that have not been published in the *Federal Register* to allow the President's appointees and designees the opportunity to review and approve them for policy and legal implications. *See* Memorandum by Rahm Emanuel, Re: Regulatory Review (Jan. 20, 2009).

[8] Request for Withdrawal of Bernhardt Memo and Confirmation of Restored Status Under IGRA, Submitted by the Ione Band of Miwok Indians (June 30, 2009) (Band's Submission).

In 1978, the Department developed regulations for federal acknowledgement of Indian tribes (currently known as the Part 83 process).[9] At that time, the Department's position was that the Ione Band had to proceed through the newly established Part 83 process in order to be placed on the Department's list of federally recognized tribes. The Band sued the Department contending that it already was recognized and did not have to go through the acknowledgment process. The Department prevailed in the suit. *Ione Band of Miwok Indians v. Burris*, No. Civ. S-90-993 (E.D. Cal. Apr. 22, 1992). The Interior Board of Indian Appeals (IBIA) also rejected similar claims by the Band in an administrative appeal. *Ione Band of Miwok Indian v. Sacramento Area Dir.*, 22 IBIA 194 (Aug. 4, 1992).

In March 1993, Assistant Secretary Ada Deer clarified the relationship between the United States and the Ione Band. After reviewing the matter, she reaffirmed the conclusions of Commissioner Bruce's 1972 letter and agreed to accept in trust the specific parcel of land described in the Commissioner's letter. Assistant Secretary Deer subsequently advised the Ione Band that she was directing the BIA to deal with the Ione Band as a tribe and to add the Band to the list of tribal entities published in the *Federal Register*.[10]

B. Restored Tribe Opinion

In evaluating whether the Ione Band was a restored tribe, the Associate Solicitor set forth the criterion at that time for the determination of a "restored tribe":

> To be a restored tribe, the Band must establish that it was once recognized by the Federal government, that [sic] Federal government subsequently did not recognize it and that, ultimately, the Federal government restored its recognition of the Band.[11]

The Associate Solicitor determined that the Ione Band met this standard. Although the Department's efforts in 1916 were "not conclusive as to the Band's recognized tribal status," he found that Commissioner Bruce's 1972 Memorandum, which stated that he "hereby agree[s] to accept . . . the following described parcel of land to be held in trust for the Ione Band of Miwok Indians," constituted "a clear, unambiguous statement that he is dealing with the Band as a recognized tribe."[12] In making this determination, the Associate Solicitor relied on an analogous memorandum concerning the Sault Ste. Marie Band of Chippewa Indians' status as a recognized tribe, which was upheld by the federal district court.[13]

The Associate Solicitor further discussed the Department's later refusal to treat the Ione Band as a recognized tribe and litigation challenging the Band's recognition on the ground that it needed

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[9] *See* 43 Fed. Reg. 39361 (Sept. 5, 1978); 47 Fed. Reg. 13,327 (Mar. 30, 1982) (redesignated as part 83); 59 Fed. Reg. 9280 (Feb. 25, 1994) (revised). These regulations are codified at 25 C.F.R. pt 83.

[10] The BIA subsequently held two meetings with the Ione Band to compile a membership list for the tribe. *See* Transcripts of BIA meetings dated Sept. 30, 1994 and October 14, 1994 (submitted by the Ione Band). The Band was included on the *Federal Register* list on February 16, 1995 (60 Fed. Reg. 9,250, 9,252) and has been included on every list since then.

[11] Restored Tribe Opinion at 2.

[12] Id. at 3.

[13] Id. (discussing and citing *Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 (D.D.C. 1980)).

to complete the part 83 process.[14] He explained that those later positions were contrary to Commissioner Bruce's recognition of the tribe and "manifest[ed] a termination of the recognized relationship."[15] He then determined that Assistant Secretary Deer's subsequent reaffirmation of the Ione Band constituted "a restoration of the Band's status as a recognized Band."[16]

As to restored lands, the Associate Solicitor delineated the following as the Department's general standards for "restored lands" under the IGRA:

> The tribe must have a modern and historical connection to the land and there must be a reasonable temporal connection between the date the land is acquired and the date the tribe was restored.[17]

Based on the Ione Band's record, the Associate Solicitor concluded that the Plymouth Parcels met this test because: (1) the land being acquired is located within a few miles of the Band's historic burial grounds and treaty site; (2) many of the Band's members live in the surrounding area and the Band has held governmental meetings in the City of Plymouth; and (3) although the Band's reorganization was delayed until after the Assistant Secretary's restoration of the Band, its land into trust application came only twelve years later, which was "reasonably temporal under the circumstances."[18]

The Restored Tribe Opinion was adopted as the Department's position on the question of whether the lands would qualify as "Indian lands" within the meaning of IGRA. As stated by Associate Deputy Secretary Cason, "[t]he Associate Solicitor, Division of Indian Affairs, has reviewed your request and determined that the lands that are the subject of your application will qualify as "Indian lands" within the meaning of the IGRA on which the tribe may conduct gaming. I concur in that determination."[19] This position has not been withdrawn or modified in any manner since its issuance on September 26, 2006.[20]

C. Part 292 Regulations

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[14] Id. at 3-4.
[15] Id. at 4.
[16] Id.
[17] Id. *See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Att'y for the W. Dist. Of Mich.*, 369 F.3d 960, 967 (6th Cir. 2004). The Associate Solicitor also noted that the Department was still in the process of developing regulations implementing Section 20 of the IGRA, but that "general principles are already established by the Department's practices." Restored Tribe Opinion at 4. Regulations implementing Section 20 were first proposed in September 2000. *See* 65 Fed. Reg. 55,471 (Sept. 14, 2000). Those regulations were never finalized and new regulations with broader application were proposed. *See* 71 Fed. Reg. 58,769, 58,770 (Oct. 5, 2006). After reopening the comment period, the broader proposed regulations became final and effective August 25, 2008. *See* 73 Fed. Reg. 29,355 (May 20, 2008) and 73 Fed. Reg. 35579 (June 24, 2008).
[18] Id. at 5.
[19] *See* slip opinion, *County of Amador v. U.S. Department of the Interior*, Case No. 2:07 cv 00527, at 16 (E.D. Cal. Dec. 13, 2007) (granting the United States' and Ione's motions to dismiss the County's challenge to the Restored Tribe Opinion because the final agency action will occur if and when the federal government makes the decision to take the land into trust).
[20] Letter from Associate Deputy Secretary Cason, *supra* n. 4.

The Department, however, did not immediately take the Plymouth Parcels into trust since the Bureau of Indian Affairs had not completed its review of the Band's application. In 2008, the Department issued final regulations for determining whether lands acquired in trust after October 15, 1988 met the statutory exceptions under section 20 of the IGRA ("Part 292 Regulations").[21] In the preamble to those regulations, the Department explained that it added a grandfather provision for "final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations."[22] The preamble to the regulations provides a detailed explanation of this provision:

> 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 . . . 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 [section] 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 have now created a conflict.[23]

The regulations thus do 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...." Furthermore, the Department and NIGC retain full discretion to qualify, withdraw, or modify such opinions.[24]

D. Withdrawal Memorandum and Draft Opinion

On January 16, 2009, Solicitor Bernhardt sent a memorandum to the Acting Deputy Assistant Secretary stating that he had reviewed "the Associate Solicitor's 2006 Indian lands opinion and

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[21] *See* n.17 supra. The regulations are now codified at 25 C.F.R. pt 292.
[22] 73 Fed. Reg. at 29, 380; *see also* 25 C.F.R. § 292.26.
[23] 73 Fed. Reg. at 29372.
[24] *See* 25 C.F.R. § 292.26(b).

[] concluded that it was wrong."[25] Solicitor Bernhardt stated that the opinion "no longer represents the legal position of the Office of the Solicitor" and advised that he intended to send his Draft Opinion to the NIGC for comment "before we advise the tribe of our changed position."[26] The Draft Opinion was not attached to the Memorandum sent to the Acting Deputy Assistant Secretary.

The Withdrawal Memorandum also was sent to the NIGC with a caveat that "[s]ince I have concluded that the Band does not qualify as a restored tribe within the meaning of IRGA, I have not reconsidered the Associate Solicitor's other conclusion, i.e., that the land was restored lands."[27] The Solicitor included his Draft Opinion in the transmittal to the NIGC.

The Draft Opinion addressed four main issues. First, it pointed out that the Restored Tribe Opinion was issued prior to adoption of the Part 292 regulations and was based on the Sixth Circuit's standard for determining whether a tribe is a "restored tribe" under IGRA.[28] Second, the Draft Opinion rejected the Associate Solicitor's conclusion that Commissioner Bruce's 1972 memorandum was a "clear and unambiguous" statement of recognition,[29] finding instead that "the Commissioner's agreement to accept the land in trust is only some evidence he believed he was dealing with a tribe."[30]

Third, the Draft Opinion rejected the Associate Solicitor's determination that the Department's subsequent refusal to treat the Ione Band like other federally recognized tribes was evidence that the Department terminated the relationship recognized by Commissioner Bruce.[31] Rather, those administrative and judicial actions "were merely evidence that the Department did not believe the Commissioner Brice's 1972 letter was adequate unambiguous evidence of prior federal acknowledgement."[32] The Draft Opinion ultimately concluded that "[t]he Band's recognition as an Indian tribe by the Federal government was not complete until Assistant Secretary Deer's letter of March 1994 and the subsequent inclusion on the Federal Register list of tribal entities."[33]

Lastly, the Draft Opinion addressed the grandfather provision of the Part 292 regulations. While it recognized that the regulations did not alter any final agency action made prior to the regulations' enactment, it observed, however, that "there has been not [sic] final agency action on the land into trust request." It further noted that the regulations allowed for modification, withdrawal, or qualification of pre-enactment opinions.

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[25] Memorandum from Solicitor David L. Bernhardt to George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, Re: Ione Band Indian Lands Determination (Jan. 16, 2009).
[26] Id.
[27] Memorandum from Solicitor David L. Bernhardt to Acting General Counsel Penny Coleman, NIGC, Re: Ione Band Indian Lands Determination (Jan. 16, 2009).
[28] Draft Opinion at 1.
[29] Id. at 2.
[30] Id.
[31] Id. at 2-3.
[32] Id. at 3.
[33] Id.

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.

III. RECISSION OF WITHDRAWAL MEMORANDUM

The Withdrawal Memorandum did not alter the Associate Deputy Secretary's earlier concurrence in 2006 with the Associate Solicitor's Restored Tribe Opinion. It presented a conclusory statement that the Restored Tribe Opinion "was wrong" and provided minimal legal analysis of this position. Moreover, the Draft Opinion was never adopted. It did not have the effect of overturning the Associate Deputy Secretary's previous concurrence with the Restored Tribe Opinion that was sent to the Ione Band.[34] This position of the Department remains intact since an incomplete administrative action cannot negate prior official acts.[35] The Withdrawal Memorandum, the lack of a final legal opinion, and no corresponding change in the Department's position have not altered the effectiveness of the Associate Deputy Secretary's earlier concurrence.

Equally important, the Band was never provided an opportunity to address this precipitous change in the Solicitor's position, contrary to the Department's well-established policy of engaging in government-to-government consultations with Indian tribes on matters that have a direct impact on their affairs.[36] The Band maintains that this disregard for its reliance on the Restored Tribe Opinion in organizing its government and economic affairs has had detrimental consequences to the Band's community.

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.

The Ione Band's land into trust application has been pending since 2005. A full EIS analyzing its proposal to use the land for gaming purposes is complete and the final draft is ready for publication in the *Federal Register*. Before the land can be taken into trust, the Office of the Solicitor must also complete its legal analysis under *Carcieri* to confirm whether the Band was "under federal jurisdiction in 1934" for purposes of the IRA. In addition, I advise you to take into account any new information submitted by the Ione Band, Amador County, or other interested parties to ensure that your decision considers all pertinent information.[37]

If the Band's fee to trust application is approved, the land will be placed into trust after close of a 30 day notice in the *Federal Register*.[38] The 30-day notice provides interested parties with the opportunity to appeal the decision. This approach is not only consistent with the Department's regulations but also with representations previously made by the Department in the *County of*

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[34] *See* Secretary of the Interior Order No. 3259, Amendment No. 2 § 3 (March 21, 2006).
[35] Restored Tribe Opinion at 2, 3. The Draft Opinion did not address or distinguish a similar action taken by the Department recognizing the Sault Ste. Marie Band of Chippewa Indians, a matter discussed and cited in the Restored Tribe Opinion.
[36] *See* Executive Order 12898 (1994); Executive Order 13175 (2000); Presidential Memorandum for Heads of Executive Departments and Agencies, Re: Tribal Consultation under Executive Order 13175 (2009).
[37] *See Butte County v. Hogen*, 613 F3d 190, 194 (D.C. Cir. 2010) (holding that the Department's decision to not evaluate a report submitted by the County calling into question the Department's initial view that a tribe's land consisted of "restored land" under IGRA violated the APA).
[38] 25 C.F.R. § 151.12(b).

Amador litigation that it would not waive the 30-day notice requirement.[39] Similarly, if there is an appeal, the Department has represented to the court that it has a general policy of self-staying final action to provide judicial review of the decision. The Department also has agreed in a Stipulation for Dismissal of Appeal in the *Amador County* litigation to provide the 30-day notice, and in addition, within seven (7) days of making any such final decision, to give Amador County notice of that decision to specific individuals by email and facsimile.

In addition, the Ione Band has not yet negotiated or executed a Tribal-State gaming compact with the State of California as required under the IGRA before gaming on the Plymouth Parcels can occur. Under California law, a negotiated compact must be submitted to the State legislature for ratification before it will be valid under State law. This ratification process can be quite lengthy. Thus, there are several significant steps that the Ione Band and the Department will be required to complete in order for the Band to engage in class III gaming on the Plymouth Parcels.

IV. CONCLUSION

The Draft Opinion reversing the Restored Tribe Opinion was never finalized or formally issued. As such, it is not an official opinion of the Solicitor's Office. Moreover, the Associate Deputy Secretary's concurrence in the Restored Tribe Opinion remains intact and in effect, notwithstanding the Withdrawal Memorandum. Furthermore, for at least two years before the issuance of the Withdrawal Memorandum and Draft Opinion and the promulgation of the Part 292 regulations, the Ione Band relied on the Restored Tribe Opinion to proceed with its land into trust application and invested in and planned for development of the Plymouth Parcels. 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 lands 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.

Hilary C. Tompkins

[39] *County of Amador*, *supra* note 19 at 16.

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May 15, 2012

Via E-mail (Karen.Koch@sol.doi.gov)

Karen Koch
Assistant Regional Solicitor
U.S. Department of the Interior - Office of the
Regional Solicitor (Pacific Region)
2800 Cottage Way
Sacramento, California 95825

Re: Ione Band of Miwok Indians of California

Dear Ms. Koch:

We make the following representations with respect to the twelve (12) parcels of land in Amador County, California, that our client, the Ione Band of Miwok Indians of California, has submitted an application to the U.S. Department of the Interior for acquisition into trust:

1) The current land purchase option agreements for the parcels identified by the APN numbers immediately below ("Optioned Parcels") will be exercised by Bonus Gaming Services, Inc., a California corporation, as optionee. Upon conveyance of title in escrow from the current owners to Bonus Gaming Services, Inc., and a determination by the Secretary of the U.S. Department of the Interior to acquire the Optioned Parcels in trust for the benefit of the Ione Band of Miwok Indians of California, title to the Optioned Parcels will be conveyed in escrow from Bonus Gaming Services, Inc., a California corporation, to the United States of America.

   APN 008-110-009
   APN 010-200-003
   APN 010-200-004
   APN 010-200-008
   APN 010-200-009

2) The parcels identified by the APN numbers immediately below are currently owned by Valley View Packing, LLC, a California limited liability company ("Valley View Packing Parcels"). Upon a determination by the Secretary of the U.S. Department of the Interior to acquire the Valley View Packing Parcels in trust for the benefit of the Ione Band of Miwok Indians of California, title to the Valley View Packing Parcels will be conveyed in escrow from Valley View Packing, LLC, a California limited liability company, to the United States of America.

APN 008-110-021
APN 008-110-022
APN 008-110-026
APN 010-200-006
APN 010-200-007
APN 010-200-010
APN 010-200-011

3) The following exceptions listed in the title commitments issued by First American Title Insurance Company, Schedule B-Section Two, for the referenced APN parcels will be removed in escrow prior to the conveyance of title to the United States of America:

Commitment No. & Date	APN	Exception
NCS-286932-SC January 10, 2011	010-200-003	4
NCS-271188-SC January 10, 2011	010-200-004	4
NCS-271192-SC January 26, 2011	010-200-008	6, 7, and 9
NCS-271194-SC January 11, 2011	010-200-009	7, 8, and 11
NCS-271187-SC January 11, 2011	008-110-009	2
NCS-322954-SC January 11, 2011	008-110-022	6 and 7
NCS-271191-1-SC January 20, 2011	008-110-026	4

4) An associate in our firm's Washington, D.C. office, Tim Evans, will confirm to you the following:

   a) As to the Optioned Parcels, prior to or upon closing of escrow, the options have been exercised by Bonus Gaming Services, Inc.; title to the Optioned Parcels has been conveyed from the current owners to Bonus Gaming Services, Inc.; and Bonus Gaming Services, Inc. has conveyed title to the United States of America to be acquired in trust for the benefit of the Ione Band of Miwok Indians of California;

   b) As to the Valley View Packing Parcels, upon closing of escrow, title to the Valley View Packing Parcels has been conveyed from Bonus Gaming Services, Inc. to the United States of America to be acquired in trust for the benefit of the Ione Band of Miwok Indians of California; and

   c) All of the exceptions listed in paragraph (3) above have been removed from title.

If you should have any questions, please contact me.

Sincerely yours,

HOLLAND & KNIGHT LLP

Jerome L. Levine

JLL:s h

cc: Yvonne Miller - Chairwoman, Ione Band of Miwok Indians (by e-mail)
Sal Rubino, Jr., Bonus Gaming Services, Inc. (by e-mail)
Sam Farb, Berliner Cohen (by e-mail)

Misc.
35376-33
A C G

Extension
49751-36

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
FIELD SERVICE

SACRAMENTO INDIAN AGENCY
Sacramento, Calif.
Dec. 21, 1933.

59603

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

Sir:

In further reference to Office letter dated December 4, 1933, in reference to the proposed Indian Colony for the homeless Indians near Ione in Amador County, this jurisdiction, there is transmitted herewith copy of letter and recommendations received today from Mr. Anson V. Prouty, member of the Board of County Supervisors for Amador County.

In this connection special attention is called to the postcript on Mr. Prouty's letter reading as follows:

"I can't guarantee that all the Indians approve this plan. In fact one of them just came in to tell me that he had been making inquiries among them and very few of them approved the plan.
"What they want is the cash but I think it would be a crime to give it to them. In a short time it would be gone and they would be back right where they are now."

This indicates the feeling of a large number of the California Indians. They are looking forward to a large cash per capita payment. This, of course, they will not receive. It has been my idea that if we could secure reimbursable funds to finance a home improvement program, purchase of needed lands, etc., without waiting for the determination of the suit now pending in the United States Court of Claims, thus hypothecating in advance a large portion of the expected award, we would then be able permanently to improve their social and economic conditions and to convince them of the greater good they will derive from using the funds in this manner rather than by using it to make per capita payments. There will not be much

Commissioner.

difficulty in getting most of the groups to enter into the spirit of a home improvement program if funds can be made available for such purpose before the Court of Claims makes its award and the money is set aside in the Treasury to their credit. But if it is necessary to wait until the award has been made, then there will be no end of complaints, petitions and demands, both on the part of the Indians and of many of their white friends, that the amount awarded be paid to them in cash.

This view of the situation should receive most careful consideration.

Very respectfully,

O. H. Lipps,
Superintendent.

OHL:MR

CC: Salt Lake City Extension Office.

EXHIBIT B

Coer.

Tribal Organizations

Sacramento Indian Agency
Sacramento, California

August 15, 1934

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

Sir:

In compliance with instructions contained in Office letter dated August 1, 1934, there is transmitted herewith in triplicate questionnaires for the Tule River and Fort Bidwell Indians, these being the only groups under this jurisdiction who have organized tribal or group councils.

There is also enclosed herewith, in triplicate, a list of the various rancherias under this Agency, giving name of each, county in which located, size of tract, and population.

None of these groups have any form of tribal or community organization, each member acting for himself. They are divided into factions, two or more factions among each group. We deal with them individually, or in group meetings.

We should like to work out some plan whereby a general election could be held for all the Indians of the jurisdiction to consider whether or not they desire to come under the provisions of the Wheeler-Howard Bill, but scattered as they are over such a large territory and in such small groups it will be very difficult to hold such election.

Would be glad to receive suggestions from the Office regarding the matter.

Very respectfully,

O. H. Lipps
Superintendent

OHL:GG

Exhibit B02

AR020755

LIST OF INDIAN RANCHERIAS

SACRAMENTO AGENCY, CALIFORNIA

1. Amador County

   Buena Vista, 70 acres, only 1 old Indian now on this tract.
   Jackson, 320 acres, only 2 families now on this tract.

2. Butte County

   Mooretown, 80 acres, purchased for 53 Indians.
   Enterprise, 80 acres, purchased for 89 Indians.
   Berry Creek, 160 acres, only one family on this tract.

3. Calaveras County

   Sheepranch, 8 acres, purchased for 18 Indians.

4. Colusa County

   Colusa, 40 acres, 46 Indians on this tract.
   Cortina, 460 acres, 18 Indians on this tract.

5. Eldorado County

   Shingle Springs, 80 acres, only two families on this tract.

6. Fresno County

   Big Sandy, 280 acres, 136 Indians in this group.
   Table Mountain, 160 acres, 28 Indians in this group.
   Cold Springs, 160 acres, 107 Indians in this group.

7. Glenn County

   Grindstone, 80 acres, 54 Indians on this tract.

8. Kings County

   Santa Rosa, 80 acres, 75 Indians on this tract.

9. Lake County

   Upper Lake, 145 acres, 8 families living on this tract.
   East Lake, 108 acres, 15 families living on this tract.
   Middletown, 106 acres, 6 families living on this tract.
   Scotts Valley, 56 acres, purchased for 56 Indians.
   Big Valley, 80 acres, purchased for 82 Indians.
   Sulphur Banks, 80 acres, never been occupied.
   Cache Creek, 160 acres, 4 families on this tract.

Exhibit B03

10. Madera County

Millerton, 140 acres, not occupied.
Northfork, 80 acres, 2 families on this tract.
Picayune, 160 acres, 5 families on this tract.

11. Mariposa County

Mariposa, 80 acres, 6 families on this tract.

12. Mendocino County

Hopland, 2000 acres rough land for 180 Indians.
Laytonville, 200 acres for 96 Indians.
Guidiville, 82 acres for 92 Indians.
Coyote Valley, 160 acres, 3 families on this tract.
Potter Valley, 16 acres, 4 families on this tract.
Manchester, 116 acres, for 84 Indians.
Sherwood, 200 acres, for 92 Indians.
Ukiah, 180 acres, for 98 Indians.

13. Modoc County

Cedarville, 17 acres, 3 families on this tract.
Alturas, 20 acres, 4 families on this tract.
Lilely, 40 acres, 6 families on this tract.
Lockart, 40 acres, 7 families on this tract.

14. Nevada County

Nevada City, 40 acres, 3 families on this tract.

15. Plumas County

Taylorsville, 160 acres, not occupied.

16. Placer County

Colfax, 40 acres, not occupied.
Auburn, 80 acres, 80 Indians on this tract.

17. Sacramento County

Wilton, 38 acres, 6 families on this tract.

18. Shasta County

Pit River, 120 acres, Not occupied
Montgomery Creek, 78 acres, 3 families
Big Bend, 80 acres, 2 "
Redding, 80 acres, 2 families on this tract.

19. Sonoma County

Alexander Valley,	54 acres, 5 families on this tract.
Cloverdale,	37 acres, 6 families on this tract.
Dry Creek,	78 acres, 8 families on this tract.
Stewarts Point,	40 acres, 117 Indians on this tract.
Sebastopol,	40 acres, not occupied.
Lytton,	80 acres, not occupied.

20. Tehama County

Paskenta,	200 acres, 5 families on this tract.

21. Tulare County

Strathmore,	40 acres, not occupied.

22. Tuolumne County

Tuolumne,	280 acres,
Jamestown,	40 acres, not occupied.

23. Yolo County

Ramsey,	72 acres, 4 families on this tract.

24. Yuba County

Strawberry,	1/2 acres, 1 family on this tract.

- - - - - -

REMARKS

These 32 tracts of land located in 24 counties, from Tulare County on the South to the Oregon line on the North, a distance of 600 miles, were purchased several years ago in order that the Indians might have a place to live undisturbed. Since no funds were provided for improvements, many of the tracts remain unoccupied. On those that are occupied, the population varies from year to year. Some of the tracts are now practically deserted as the Indians could not make a living on them.

August 16, 1934.

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

WASHINGTON, D.C. 20245

IN REPLY REFER TO:

Tribal Government Services - AR
BCCO 6579 & 6595

FEB 15 1990

Mr. Harold Burris, Sr.
2815 Jackson Valley Road
Ione, California 95640

Dear Mr. Burris:

This is in response to your January 28th Freedom of Information Act (FOIA) request to Mike Lawson of our Acknowledgment staff for documentation in our files regarding the Ione Band of Miwok Indians, including "all applications and petitions" pertaining to the group and the 40-acre tract it lives on. It is also in response to your FOIA requests of January 29 to Assistant Secretary Eddie Brown and to Hazel Elbert, the Deputy to the Assistant Secretary (Tribal Services), for all information pertaining to the status of the Ione Band. These latter letters also requested that no action be taken regarding Federal acknowledgment of the Ione Band until you have had an opportunity to review the documents provided you.

We are sending to you, under separate cover, copies of all documents in our files related to these matters. These materials were previously furnished to Ms. Shelly Morla and Mr. Nicolas Villa, Jr., of the Ione Band in response to their separate FOIA requests. The documents consist primarily of correspondence and memoranda from the files of the Branch of Acknowledgment and Research, Sacramento Area Office, and Central California Agency of the Bureau of Indian Affairs (Bureau), and the Office of the Solicitor for the Department of the Interior. These files have never been "secret" as described in your letter, although some of the policy documents contained in them may not have been open to public disclosure during an earlier period. It is possible that further documents related to Ione may be contained in files which the Bureau has accessioned to the National Archives and Records Administration (NARA). That agency should be contacted separately for information regarding its holdings.

The persons responsible for reviewing the requested records and advising on the granting or denial of this request are Michael Lawson, Lynn McMillion, and Lynn Forcia of the Branch of Acknowledgment and Research, Scott Keep of the Office of the Solicitor, Division of Indian Affairs, Carol Bacon of the Division of Tribal Government Services, and Hazel Elbert of the Office of Tribal Services.

We are waiving all search and copying fees because we have previously released these materials to members of the Ione Band without charge. However, any subsequent FOIA requests for new materials may be subject to fee.

Included among the documentation provided is a letter the Bureau received from Mr. Glen A. Villa on March 15, 1989. This letter, which Mr. Villa signed as Chairman of the Ione Band of Miwok Indians, stated that the group was still pursuing Federal acknowledgment and would submit documentation "in the very near future." Also included is a copy of an April 7, 1989, resolution which Mr. Villa forwarded to us. According to this document, the General Council of the Ione Band resolved unanimously to request Federal recognition and the establishment of a reservation. A letter in our Central California Agency files indicates that on May 10, 1989, you and three other individuals stated to the Superintendent that you did not want the Ione community property to come under trust status (the copies of the letter you submitted with your January 29 requests contain three other names).

Despite what you may have heard from the media or from other representatives of the Ione Band, Federal recognition of the group is not imminent. Documents in our files do not show the Ione Band to be recognized as an Indian tribe within the meaning of Federal law. Therefore, the only administrative option for the group to achieve such Federal status is through the Acknowledgment procedures set forth in Part 83 of Title 25 of the Code of Federal Regulations (25 CFR 83). Enclosed for your information is a copy of those regulations and our guidelines for preparing a documented petition.

All of the documentation reviewed, including all of the documents referred to in this letter, have been provided to you in response to your FOIA request. The key question appears to be whether the Ione Band is federally recognized at present by virtue of a letter which Commissioner of Indian Affairs (Commissioner) Louis Bruce sent to Mr. Nicolas Villa and the Ione Band of Indians on October 18, 1972. Commissioner Bruce stated in that letter:

> 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 did not reject the Indian Reorganization Act and thus are eligible for the purchase of land under this act.... I am directing the Sacramento Area Office to assist in the preparation of a document containing a membership roll and governing papers which conform with the Indian Reorganization [Act].
>
> As the Commissioner of Indian Affairs, I therefore, here 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: [land description follows].

The contemplated "Ione land purchase" referred to in the Commissioner's letter is in reference to the long effort of the Bureau to obtain trust title to the 40-acre tract which the Ione Band has occupied near the town of Ione in Amador County. This effort was part of a larger program which the Bureau conducted during the early 1900's to purchase tracts of

property throughout Northern California in order to provide a land base for the many landless Indians in that region. The Bureau began negotiations to purchase land for the Ione Band sometime prior to December 1914, but was not successful in securing an option. The owner of the land, the McKissick Cattle Company, finally agreed to sell, and the Department of the Interior (Department) authorized the purchase of the tract on May 8, 1916.

Purchase negotiations were continued for almost another 20 years (until 1935), but the Bureau never succeeded in clearing the title. The proposed transaction was complicated by questions regarding mineral rights and values, by the necessity of securing the release of multiple mortgages, and by the fact that the cattle company had gone into receivership.

Even if the Bureau had been successful in its attempt to purchase land, this may not have constituted Federal recognition of the Ione Band as an Indian tribe. 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 land 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.

The Ione Band appears not to have been involved directly in this contemplated land purchase and had little or no direct contact with the Bureau until 1941, when 31 members of your group petitioned the Department, through Congressman Harry L. Englebright, to "purchase a tract of land, upon which homes can be built for our use." After the Assistant Commissioner of Indian Affairs advised Congressman Englebright that funds were not then available for that purpose, the Bureau had no further contact with your group for almost 30 years.

The Bureau's attention was again focused on the status of the 40-acre tract in August 1970 after two members of your group asked the Sacramento Area Director (Area Director) for assistance in improving their homes. In January 1972 the Director of the California Rural Indian Land Project (CRILP), a special program of California Indian Legal Services (CILS), wrote the Commissioner requesting that the United States accept title to the 40 acres and hold it in trust for the Ione Band. CILS was then in the process of filing suit in the Superior Court of California for the County of Amador to quiet title to the land in the Ione Band by virtue of its adverse possession. Commissioner Bruce's letter was written in response to requests for Federal trust status. Two weeks after the letter, on October 31, 1972, the Ione Band received a favorable judgment from the Superior Court, and its members subsequently gained title to the land.

Commissioner Bruce's letter indicates clearly the intent of the Bureau to recognize and establish a trust land base for your group. However, the letter is of no legal effect, in and of itself, because these actions were never implemented. The Area Director was never directed to assist in the preparation of a membership roll and governing document for the group, and

the described parcel of land was never brought under Federal trust. Your group had no acknowledged government-to-government relationship with the United States prior to the letter, and there is no evidence that the Commissioner based his decision on the recognition criteria then being utilized by the Department.

Subsequent correspondence and memoranda in our files indicate that despite the Commissioner's letter, the question of Ione recognition remained open.

The Office of the Solicitor, the Department's legal branch, maintained that the Bureau still needed to prove that the Ione Band met the criteria for Federal recognition established by Associate Solicitor Felix Cohen in the 1930's and contained in the Department's Handbook of Federal Indian Law (1942 edition, pages 268-272).

On October 3, 1973, for example, the Chief of the Bureau's Division of Tribal Government wrote the Area Director that the Solicitor's Office had requested supplemental information regarding the history of the Ione Band in order to determine what justification there might be for "asking that the Secretary [of the Interior] extend Federal recognition to those Indians." In a memorandum sent on January 21, 1975, the Director of the Bureau's Office of Indian Services advised the Area Director that the Solicitor's Office was still considering the proposal to recognize Ione, and had requested "additional supportive material."

On February 12, 1974, the U.S. District Court in the case of U.S. v. Washington, determined that only the federally recognized tribes in western Washington could maintain treaty fishing rights in certain waters within that region of the state. This decision brought into question the status of those unrecognized Indian groups, such as the Stillaquamish, that had previously exercised such fishing rights. Together with the 1975 decision in Maine in the case of Passamaquoddy Tribe v. Morton, which determined that the United States had certain obligations to an unrecognized tribe by virtue of the Indian Nonintercourse Act, the western Washington case focused new attention on the entire issue of administrative recognition of Indian tribes. As a result, the Secretary of the Interior asked the Solicitor and the Commissioner to reevaluate the criteria and procedures for Federal recognition. This request had the effect of suspending decisions on those recognition cases then pending before the Department.

The Director of the Office of Indian Services informed the Area Director on January 12, 1976, in regard to the Ione issue, that "no action is currently being taken on requests that recognition be extended to various groups claiming such right," and this information was passed on to CILS, which was then representing your group, on February 12, 1976.

The Department's solution to the tribal recognition issue was to draft regulations establishing uniform, mandatory criteria and standard procedures for Federal acknowledgment. On August 4, 1977, the Acting

Deputy Commissioner for Indian Affairs advised the Area Director that recognition of the Ione Band would be subject to the proposed Acknowledgment regulations that had been published in the Federal Register on June 16, 1977: "We do feel, however, that processing the Ione request under the new regulations, once they are finalized, will be the fastest way to reach a final determination as to the Ione Band's status." The files show that on July 28, 1977, this message was communicated to you in a letter from the Tribal Operations Officer of the Bureau's Central California Agency in Sacramento.

The final revised Acknowledgment regulations were published in the Federal Register on September 2, 1978, and became effective on October 2, 1978. Set forth originally in Part 54 of Title 25 of the Code of Federal Regulations, they now constitute Part 83. The Ione Band was considered to be one of the groups with a petition already on file with the Bureau, as described in subsection 83.8(b) of the regulations, and was on the list of 40 such groups published in the Federal Register on January 2, 1979. A public notice specific to the Ione Band was published in the Sacramento Bee on February 16, 1979. In accordance with subsection 83.9(c), which required the Federal Acknowledgment Project (now the Branch of Acknowledgment and Research or BAR) to establish a priority register of petitioners, the Ione Band was given priority number 2, based on the 1916 date when the Department authorized the purchase of land for the group.

The Bureau sent a copy of the Acknowledgment regulations and guidelines to your group in January 1979 and group members reportedly attended an Acknowledgment workshop that was held in July of that year. Prior to 1989, however, the BAR received little or no communication from members of the Ione Band.

On April 22, 1980, the Native American Heritage Commission, a body created within the California Governor's Office, asked the Bureau to provide information regarding the request of the Ione Band for Federal recognition and Federal trust status for its land. In response, the Commissioner implied in a July 24, 1980, letter that the only option open to the group was the Acknowledgment process, and that "the Secretary cannot take land into trust for an American Indian group for which the Federal relationship has not been acknowledged."

If the Ione Band wants to come under Federal jurisdiction, it must continue to pursue recognition through the Acknowledgment process and submit the documentation supporting its petition. It is unlikely that the Department would support any legislative proposal to acknowledge the group.

The Bureau's land purchase effort and Commissioner Bruce's letter are both evidence which might weigh heavily in favor of the group, if other documentation can otherwise prove that the Ione Band has continually maintained an identifiable, cohesive, and politically autonomous Indian community as defined in the Acknowledgment regulations.

Because the Bureau has no jurisdiction over the Ione Band at present, it is not obliged to conduct an investigation to determine who, if anyone, is the legitimate leader of the group, or to find out if all those who claim to represent the group are indeed Ione members. However, should documentation supporting the Ione Band's acknowledgment petition be submitted by any representative of the group, the questions will be investigated fully by the Bureau when the petition is placed under active consideration, as described in section 83.9(a) of the Acknowledgment regulations.

If you have further questions regarding these matters, they should be directed to Mr. Lawson, the Acknowledgment staff member who has administrative responsibility for California petitioners. You may call him at (202) 343-3592, or write him c/o Bureau of Indian Affairs, Branch of Acknowledgment and Research, Mail Stop 4627-MIB, 18th and C Streets, N.W., Washington, D.C. 20240.

Sincerely,

Hazel E. Elbert

Deputy to the Assistant Secretary -
Indian Affairs (Tribal Services)

Enclosures

cc: Sacramento Area Director
Supt., Central California Agency
Mr. Allogan Slagle

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on April 1, 2016.

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

Dated: April 1, 2016.

Respectfully submitted,

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