No. 17-1432

In The Supreme Court of the United States

COUNTY OF AMADOR, CALIFORNIA,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IONE BAND OF MIWOK INDIANS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Indian Reorganization Act, 25 U.S.C. §§ 5101 *et seq*. (the "IRA," previously codified at 25 U.S.C. §§ 461 *et seq*.) provides the Secretary ("Secretary") of the U.S. Department of the Interior ("Department" or "DOI") with discretionary authority to acquire land in trust for "Indians" (25 U.S.C. § 5108 ("IRA Section 5," previously codified at 25 U.S.C. § 465)), meaning both tribes and individuals (*id.*). The IRA definition of "Indian," found at 25 U.S.C. § 5129 ("IRA Section 19," previously codified at 25 U.S.C. § 479), consists of three distinct prongs, the first of which encompasses "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction[.]"

As to the meaning of "now," this Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"), held that

> for purposes of [IRA Section 19], 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, [IRA Section 19] 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. (*Id.* at 382.)

But *Carcieri* left unanswered two relevant questions: (i) whether a tribe could be "recognized" subsequent to

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

the IRA's enactment and (ii) what it meant for a tribe to have been "under Federal jurisdiction" in 1934.

The Court of Appeals for the Ninth Circuit determined in this case that the issue of when a tribe had to be "recognized" – what the court referred to as the "timing-of-recognition" issue – was ambiguous (County Appendix ("App.") 17-18) and held that recognition can occur at any time prior to a trust land acquisition decision (App. 24-25). The Ninth Circuit also determined that the meaning of the phrase "under Federal jurisdiction" was ambiguous and held that the Secretary did not err in adopting a two-part test to determine whether a tribe such as respondent Ione Band of Miwok Indians ("Ione" or "Band") was "under Federal jurisdiction" in 1934 so as to qualify for the IRA's benefits. App. 30-31.

1. Whether, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"), Petitioner established that the Secretary's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under any basis claimed in the complaint, when the Secretary determined that the Band was under the jurisdiction of the United States in June 1934 at the time of IRA enactment, was a recognized tribe within the meaning of the IRA, and is eligible to have land accepted into trust as the restoration of lands for a tribe restored to federal

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

recognition within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA").

2. Whether, pursuant to the APA, the United States Court of Appeals for the Ninth Circuit properly affirmed the Secretary's rational determinations in the May 2012 Record of Decision in this case (the "ROD") that, within the meaning of the IRA, the Band was a recognized tribe and was "under Federal jurisdiction" in June 1934 at the time of IRA enactment based on, *inter alia*, the federal government's attempts to acquire a 40-acre portion of the Band's ancestral lands in trust for over 25 years beginning in 1915, which efforts would have been consummated but for an interminable title defect.

3. Whether, pursuant to the APA, the United States Court of Appeals for the Ninth Circuit properly upheld the Secretary's interpretation of when a tribe must be "recognized," as that term is used in the IRA Section 19 definition of "Indian."

4. Whether, pursuant to the APA, the United States Court of Appeals for the Ninth Circuit properly affirmed the Secretary's determination to "grandfather" Ione as a restored tribe under the 25 C.F.R. Part 292 regulations that were enacted in 2008, so as to allow consideration of its 2006 Indian lands determination,

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

where the regulations changed prior criteria for how a tribe may be deemed a restored tribe for purposes of an IGRA post-1988 trust land gaming exception and where Congress failed to define the term "restored tribe" while also expressing no intent as to the term's meaning when enacting IGRA.

5. Whether Petitioner properly challenged below the validity of 25 C.F.R. Part 292 regulations regarding a tribe's eligibility to be treated under IGRA as a restored tribe to whom lands may be restored, and in particular the "grandfather" provision at 25 C.F.R. § 292.26 permitting the Secretary to rely on Department-written determinations regarding such status that were issued prior to the promulgation of the regulations, when the alleged invalidity was not claimed in the complaint, the statute upon which the regulation is based does not mandate that any regulations be promulgated, and the statute is silent as to whether or not earlier Department opinions may be relied upon.

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BRIEF OF RESPONDENT IONE BAND OF MIWOK INDIANS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Ione Band of Miwok Indians ("Ione" or "Band") respectfully opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

But for a title issue encountered by the federal government in the early 1900s as it attempted to acquire in trust lands that have been occupied for centuries by respondent Ione and its predecessors-in-interest (who signed a treaty with the United States for the very purpose of setting aside such lands for tribal use), the petition of County of Amador, California (the "County") would not be before this Court. The title defect was unrelated to the government's recognition of, or jurisdiction over, Ione. Yet, the County has taken that single defect under real property law and the resulting inability to acquire those Ione trust lands and attempted to turn them into a basis for challenging a determination by the Secretary of the Interior ("Secretary") to acquire other lands within the Band's ancestral territory in trust, pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 5101 *et seq*. ("IRA"), for Ione for purposes of conducting tribal governmental gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). As explained in detail below, such challenge is unfounded, and there is no

compelling reason for this Court to grant the County's petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit's decision in this case correctly interpreted when a tribe has to be "recognized" and how a tribe could have been "under Federal jurisdiction" in 1934 in order for a tribe such as Ione to come within the first-prong definition of "Indian" in 25 U.S.C. § 5129 ("IRA Section 19"), thereby entitling it to the acquisition of trust land pursuant to 25 U.S.C. § 5108 ("IRA Section 5"). That court analyzed the ambiguity in each of those requirements to uphold the Secretary's interpretations enunciated in the May 2012 Record of Decision ("ROD") even without invoking the deferential standard of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Ninth Circuit decision also pointed out the faulty premise upon which the County attempts to challenge the "grandfathering" of Ione as a restored tribe under the 25 C.F.R. Part 292 regulations, enacted in 2008, so as to allow consideration of its earlier 2006 Indian lands determination, which determination correctly found Ione to be a tribe "restored to Federal recognition" for purposes of an exception in IGRA permitting gaming on post-1988 acquired tribal trust lands. The petition to this Court by the County for a writ of certiorari to review the Ninth Circuit's well-reasoned decision should be denied.

In challenging the Ninth Circuit's decision, the County petition makes a curious appeal to the "profound" adverse effects that tribal trust land

acquisitions have on local governments. County Petition ("County Pet.") 1-2. Such assertions in the County petition are misleading and should not serve as a basis for review by this Court.

The County completely overlooks the requirement that a tribe seeking to engage in casino-style (or "class III") gaming under IGRA also must seek to negotiate a gaming compact with the state to govern the conduct of its gaming activities. 25 U.S.C. § 2710(d)(3). Such tribal-state compacts have become a vehicle in states such as California to mitigate the off-reservation effects the County references. *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 716 (9th Cir. 2003). Furthermore, the County and other potentially-affected parties were provided ample notice and opportunity to comment throughout the National Environmental Policy Act ("NEPA") review process for the Ione project and in fact extensively did so, which input the Department of the Interior ("Department" or "DOI") considered and integrated into the ROD. Finally, it seems odd for the County to now claim that it and other local governments have minimal ability to mitigate the purported adverse effects of tribal trust land acquisitions when the County instituted successful litigation to vitiate a municipal services agreement between Ione and a city within the County's borders that had been negotiated explicitly for mitigation purposes. *See generally Cnty. of Amador v. City of Plymouth*, 149 Cal. App. 4th 1089, 57 Cal.Rptr.3d 704, *as modified on denial of reh'g* (May 10, 2007). Such actions undercut the County's appeals for review.

STATUTORY AND REGULATORY PROVISIONS

In addition to the statutory and regulatory provisions referenced in the County's petition (County Pet. 4-5) and included in its appendix, the Band's supplemental appendix filed with this opposition brief includes the following additional statutory provisions involved in this case:[1]

1) 5 U.S.C. § 706 – Scope of review (Supp. App. 1-2)

2) 25 U.S.C. § 2719(a)-(b)(1) – Gaming on lands acquired after October 17, 1988 (Supp. App. 3-4, replaces errant version of statute in County appendix, App. 205)

3) 25 U.S.C. § 5110 – New Indian reservations ("IRA Section 7," formerly codified at 25 U.S.C. § 467) (Supp. App. 4-5)

4) 25 U.S.C. § 5125 – Acceptance optional ("IRA Section 18," formerly codified at 25 U.S.C. § 478) (Supp. App. 5)

STATEMENT OF THE CASE

Ione is a federally-recognized Indian tribe that traces its ancestry to Miwok peoples who have lived in

[1] The County's appendix is cited herein as "App. [page #]." The Band's supplemental appendix is cited herein as "Supp. App. [page #]."

California for thousands of years. The Miwoks' native lands included the Sierra Nevada foothills of central California, covering current-day Amador County. During the California gold rush, the U.S. government attempted to obtain land cessions from tribal inhabitants in exchange for safe set-aside lands. The government's treaty commissioners engaged in government-to-government negotiations with California tribal leaders and entered into 18 treaties. Ancestors of current-day Band members were among those who negotiated one of those treaties in 1851, known as the Treaty with the CU-LU, YAS-SI, etc. or "Treaty J." It included a provision that "said tribes or bands acknowledge themselves jointly and severally under the exclusive jurisdiction, authority and protection of the United States."[2] The U.S. Senate, however, refused to ratify any of the 18 treaties, and the Miwok lost their native lands. By the time of California statehood in 1850 and the creation of Amador County in 1854, Northern Sierra Miwok tribal communities were pushed into the periphery.

California's displaced tribes did not fare well after their eviction from their ancestral lands. Cognizant of their circumstances, the Office of Indian Affairs appointed Special Agent C.E. Kelsey in 1905-1906 to examine the conditions of the dispossessed California tribal members. Kelsey conducted a census for Amador

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[2] *See* "1851-1852 – Eighteen Unratified Treaties between California Indians and the United States" at 14-16 (2016). *US Government Treaties, Reports, and Legislation*. Book 5, *available online at* https://digitalcommons.csumb.edu/cgi/viewcontent.cgi?article=1004&context=hornbeck_usa_2_b (last visited May 10, 2018).

County that enumerated, among others, those at Ione. The federal government revisited Ione's situation in 1915, when Special Indian Agent John J. Terrell conducted a census and identified Captain Charlie Maximo as the leader of the Ione Band, which then consisted of 101 individuals.

Special Agent Terrell also reported on the importance of securing land for the Band, and he and other government officials made significant efforts to do so. Accordingly, the government approved the Ione land purchase and appropriated necessary funds. A 40-acre tract of land in Amador County located within a larger parcel was targeted for purchase because, as Terrell noted, "[T]hese Indians are among the most needy and worthy of any I have visited in California . . . [and] the proposed purchase embraces the ancient Village of their and their ancestors' home as far back as they have a history." Early land deeds stated that the 40-acre tract had been "sold to the United States . . . fenced, and used as an Indian Reservation[,]" and hundreds of pages of correspondence in the administrative record below show that, in furtherance of that unequivocal act, for more than two decades after the 1915 Terrell census government agents attempted to negotiate with the landowners to finalize some technical details regarding the land purchase. Those details continued to cloud some title issues on the 40-acre tract. Although these early land purchase efforts appear to have been ceased being pursued around 1941, the Band continued for decades to occupy the land that

had been purchased for it by the federal government, as its members had done for decades prior.

In 1972, Bureau of Indian Affairs ("BIA") Commissioner Louis Bruce, the highest ranking federal official entrusted by Congress with administering Indian affairs (25 U.S.C. § 2), and the predecessor in rank, function, and authority to the current DOI Assistant Secretary-Indian Affairs ("AS-IA"), sent a letter to Ione confirming that federal recognition had been extended to the Band at the time of the land purchase efforts in the early 1900s and agreeing, on behalf of the federal government, to take the 40-acre parcel into trust for Ione's benefit pursuant to the terms of the IRA. Commissioner Bruce's confirmation that the IRA applied to Ione, and his unambiguous implementation of the government-to-government relationship between the Band and the federal government, was a formal federal action.

Approximately two years later, then-Commissioner of Indian Affairs Morris Thompson reiterated the formal acknowledgment of Ione's previously recognized tribal status in a memorandum to the BIA Sacramento Area Director by stating, "I hereby reaffirm the conclusion reached by Commissioner Bruce in October 1972 that recognition had been extended to this group as a group of Indians at the time the purchase by the United States of this tract was originally contemplated." He concluded, after reviewing the record submitted by the BIA Sacramento Area Director and other materials, that the Band was still recognized as of his memo and "decided that it is unnecessary to insist that

the group articulate and submit any further request for formal recognition."

Despite their official determinations, some DOI advisors and staff refused to adhere to the official Bruce and Thompson directives. Then, in the late 1970s, the government's executive branch began consistently taking the position that Ione was not a federally-recognized tribe. By consistently denying that the Band was (or ever had been) federally recognized and failing to treat it as such, DOI instituted a *de facto* administrative termination of the Band's recognition. This termination was effected in several key ways, including omitting Ione from the BIA's formal list of federally-recognized tribes in the years 1979-1994; taking the position in a 1990 letter from Hazel Elbert, Deputy to the AS-IA (Tribal Services) that Commissioner Bruce's 1972 recognition of the Band was not in fact a recognition and that the Band was not federally recognized; court filings by DOI in an earlier case, *Ione Band of Miwok Indians v. Burris*, No. Civ. S-90-0993-LKK (E.D. Cal. April 22, 1992) arguing that in order to be federally recognized Ione must follow the formal tribal acknowledgment (i.e., federal recognition) procedures enacted in 1978 and outlined in 25 C.F.R. Part 83 ("Part 83"); a 1992 decision by the Interior Board of Indian Appeals in *Ione Band of Miwok Indians v. Sacramento Area Director* – based on positions advocated by the BIA – that Ione had not yet been recognized and would need to follow the Part 83 process; and a 1992

letter from AS-IA Brown taking that same position.[3] All of these actions demonstrate that between at least 1977 and 1992 the federal government reversed its previous policy of recognizing, and dealing accordingly with, the Band, and instead maintained for the first time that the Band was not federally recognized.

Nevertheless, the Band continued to insist on its federal status and persevered in its attempt to secure a land base.[4] In 1994, the federal government officially agreed with what had been the Band's understanding for so many years and abandoned its termination policy, reverting to its previous position by formally re-recognizing the Band. In her March 22, 1994 determination, AS-IA[5] Ada Deer explicitly re-affirmed the

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[3] In its petition, the County cites these type of documents in support of the proposition that Ione had in fact never been recognized in the past or to call into question the manner in which it was recognized. County Pet. 9-12. But these documents were issued by government staff in the period between Commissioner Bruce's 1972 letter and the Band's 1994 restoration, when the government was denying Ione's recognition. Rather than evidencing the historic absence of recognition, the documents issued during the "termination period" appear to have been aimed at undoing Ione's recognition and the federal government's historic government-to-government relationship with Ione prior to the 1970s.

[4] Throughout all of the Band's history of dealing with the government, the highest ranking officials authorized to handle Indian affairs, with the sole exception of AS-IA Brown during the termination period, have consistently maintained that Ione is, and was in the past, federally recognized. The individuals who have denied Ione's federal recognition have been lower-ranking bureaucrats or attorneys.

[5] The position of Commissioner for Indian Affairs was replaced with Assistant Secretary-Indian Affairs in 1977. 42 Fed.

Band's recognition and instructed that the same 40-acre parcel or other suitable land be taken into trust for the Band. She also instructed that Ione be given its rightful place on the list of federally-recognized tribes and that the BIA deal with the Band accordingly. The Band was placed on the official Federal Register list of federally-recognized tribes in 1995 and has been on that list ever since. Neither the County nor any other party has ever challenged the Band's inclusion on that list.

Several years after being restored to federal recognition, the Band sought to establish a governmental and economic base in order to provide for its members. Accordingly, the Band began revitalized efforts to have land in Amador County placed in trust. Income from a proposed gaming development on that trust land would enable the Band to provide its members with their basic necessities. Working with its development partner to purchase or option land on its behalf, Ione sought to have twelve parcels in Amador County, within or adjacent to the City of Plymouth and totaling approximately 228 acres, taken into trust ("Plymouth Parcels").

IGRA restricts the lands upon which Indian tribes may conduct gaming and provides that a tribe may only do so on land taken into trust after 1988 if one of several conditions is met. 25 U.S.C. § 2719(a)-(b)(1)

Reg. 53682 (Oct. 3, 1977). Thus, Ada Deer was the highest ranking federal official with authority to administer Indian affairs in 1994.

(Supp. App. 3-4). Thus, in order to conduct gaming activities, Ione would have to apply to have the Plymouth Parcels taken into trust and demonstrate that they meet the applicable post-1988 criterion, namely that the land if taken into trust would be part of the "restoration of lands for an Indian tribe that is restored to federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii) ("Restored Tribe Exception") (Supp. App. 4). It would also have to comply with all of the requirements imposed by the 25 C.F.R. Part 151 regulations that implement the Secretary's trust land acquisition authority under the IRA. Those regulations require, *inter alia*, compliance with NEPA, an intensive process to determine, analyze, and address issues related to a project's potential impacts.

In September 2004, Ione submitted to federal officials with supporting evidence its request for a determination (called an "Indian lands determination," referenced as Ione's "ILD") that the Plymouth Parcels would qualify as "restored lands" for Ione as a "restored tribe" if and when taken into trust. And in November 2005, with the ILD request pending, the Band submitted its application to DOI to have the Plymouth Parcels taken into trust for gaming purposes. The County thoroughly opposed both submissions.

In September 2006, DOI Associate Deputy Secretary James Cason issued a positive ILD, holding that the Plymouth Parcels would qualify as "restored lands" if acquired in trust and that Ione is a "restored tribe" for IGRA purposes. DOI's rationale was set forth in detail in a memorandum written by Associate Solicitor,

Division of Indian Affairs, Carl Artman. Artman opined that Commissioner Louis Bruce's 1972 determination dealt with Ione as a recognized tribe, such that it was formally recognized as of 1972 and thereafter. Artman also determined that after 1972 the government had taken the position that Ione was not recognized, thereby terminating the Band, but that AS-IA Deer's 1994 re-affirmation actions amounted to a restoration of the Band. Cason, as the highest ranking federal official presiding over Indian affairs at the time, explicitly concurred in and adopted Artman's ILD as the Department's official position toward Ione.[6]

In February 2009, this Court issued its decision in *Carcieri*, holding that the Secretary is only authorized to take land into trust for the benefit of tribes that had been "under Federal jurisdiction" in 1934. Soon thereafter, the County sent comments to DOI arguing that under *Carcieri* the Secretary lacked authority to take land into trust for Ione. The Band responded with its own comprehensive submissions providing extensive evidence demonstrating that the Band had been under federal jurisdiction in 1934.

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[6] Notwithstanding the County's contrary assertion, (County Pet. 14), Ione's ILD has never been withdrawn and is, and always has been, in effect. In January 2009, then-DOI Solicitor David Bernhardt drafted an internal memorandum explaining his personal opinion that Ione was not a restored tribe and suggesting that Artman's ILD be withdrawn. The Bernhardt draft was never finalized or acted upon by any authorized official, and DOI Solicitor Hilary Tompkins expressly disavowed the memo. Thus, Bernhardt's suggestion that Ione's ILD be withdrawn was rejected.

In May 2012, after careful consideration of all of the documents in its files (including those submitted by the County and Band) dating back more than 100 years, and arguments on both sides, DOI issued its official determinations in the ROD, granting the Band's request to take the Plymouth Parcels into trust as well as recording its adoption of the positive ILD. The ROD rationally included, relied upon, and found Ione to satisfy (*see* App. 178-199) an interpretation of IRA Section 19's ambiguous "under Federal jurisdiction [as of 1934]" phrase using a two-part inquiry into Ione's history. App. 182, 184. The County initiated this lawsuit soon thereafter.

REASONS FOR DENYING THE PETITION

I. THERE ARE NO COMPELLING REASONS FOR GRANTING THE PETITION

The decision of the court of appeals provides no compelling reasons for review by this Court.

a. Upon examination of the well-reasoned opinion of the Ninth Circuit, there clearly is no split among the decisions of the circuit courts of appeals as to the issues in this case nor within the Ninth Circuit's own precedent.

The County attempts to conjure up a split in the decisions of the circuit courts of appeals where none exists. The County's petition should be denied.

It must be kept in mind that the County is challenging DOI's issuance of the ROD under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. ("APA"). App. 14. Under the APA, agency action will be upheld as long as it has a reasonable basis, a rational connection exists between the facts found and choices made, and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (Supp. App. 1); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *superseded by statute on other grounds*, Pub. L. No. 94-574, 90 Stat. 2721 (1976), *as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1057-1058 (9th Cir. 2013) (citation omitted); *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 788, 795 (9th Cir. 2012).

As stated above, the first prong of the IRA Section 19 definition of "Indian" encompasses members of "any recognized Indian tribe now under Federal jurisdiction" and the *Carcieri* majority held that the temporal limitation of the word "now" – meaning at the time of IRA enactment in 1934 – applied to the subsequent phrase "under Federal jurisdiction." The *Carcieri* majority did *not* address whether a tribe had to be recognized in 1934 for the IRA to apply. However, Justice Breyer's concurring opinion noted that the word "now" modifies "under Federal jurisdiction," not "recognized," because the two concepts can be distinct, and concluded that the IRA therefore "imposes no time limit upon recognition." *Carcieri*, 555 U.S. at 397-399. Justice Souter, joined by Justice Ginsburg, agreed. *Id.* at

400 (Souter, J., concurring in part and dissenting in part).

The Ninth Circuit decision in this case overruled the County's position that the phrase "now under Federal jurisdiction" modifies the entire phrase "recognized Indian tribe," which would have led to the conclusion that tribal recognition in 1934 would be required to benefit from the IRA. In accordance with the separately written opinions by Justices Breyer and Souter, with Justice Ginsburg joining the latter, the Ninth Circuit correctly held, after a well-reasoned analysis, that tribal recognition "can occur at any time." App. 24.

The Ninth Circuit's analysis found the IRA to be ambiguous as to the timing-of-recognition issue. App. 18. Even after applying the usual rules of statutory construction, there is no clear congressional intent as to the timing-of-recognition issue. *Id*. Because the IRA is ambiguous with respect to the required timing of tribal recognition, Interior has argued that, as the agency responsible for the administration of the IRA, its interpretation of the statute as to the timing-of-recognition issue is entitled to *Chevron* deference. *Id*. But the Ninth Circuit determined that, even without *Chevron* or any other level of deference, the court reached the same conclusion as Interior: IRA Section 19's first-prong definition of "Indian" encompasses all members of tribes that are recognized as of the time a relevant decision is made under the IRA – whether such recognition first occurred before or after 1934 – so long as the tribe was "under Federal jurisdiction" in 1934. App. 18-19.

Like Justice Breyer's and Justice Souter's separately written opinions in *Carcieri*, the Ninth Circuit's analysis noted that the concepts of "now under Federal jurisdiction" and "recognized" are best understood as two separate requirements, based on its examination of the statutory text and the subsequent addition of "now under Federal jurisdiction." App. 16-17, n. 8. Because these are not identical concepts, the 1934 temporal limitation does not necessarily also apply to the phrase "recognized Indian tribe." *Id*.

While finding that neither of the other two prongs of the IRA Section 19 definition of "Indian" nor the other provisions of the IRA shed much light on the timing-of-recognition issue (App. 19-20), the Ninth Circuit found in the purpose and history of the statute support for Interior's interpretation of "recognized" not to be limited to 1934 (App. 20-22). The court noted that the IRA was intended to reverse and undo prior detrimental policies that sought to eliminate tribal sovereignty, lands, and culture and to instead promote tribal political and economic self-governance. App. 21-22. The Ninth Circuit noted that given these purposes, the IRA is best interpreted to apply to all tribes "under Federal jurisdiction" at the time of IRA enactment in 1934, regardless of the date of recognition, especially in light of the fact that at the time of IRA enactment the federal government had neither a comprehensive list of recognized tribes nor the formal policy or process needed for determining recognized (and therefore potential IRA beneficiary) status. *Id*.

With the foregoing, the Ninth Circuit's decision is in full accord with the only other post-*Carcieri* appellate opinion to address the timing-of-recognition issue, the Court of Appeals for the District of Columbia's decision in *Confederated Tribes of the Grande Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), *cert. denied sub nom. Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017) ("*Grand Ronde*"). There is no circuit split on this issue.

The County's citation to *U.S. v. State Tax Comm'n of Miss.*, 505 F.2d 633 (5th Cir. 1974) (County Pet. 27-28) in its search for a purported circuit conflict as to the timing-of-recognition issue misses the mark. That court never addressed tribal recognition. It only examined in relevant part whether the group at issue constituted a "tribe" at all for IRA purposes, which the court answered in the negative. *State Tax Comm'n of Miss.*, 505 F.2d at 642. Even the sentence quoted by the County clearly shows this: "The language of IRA Section 19 positively dictates that *tribal status* is to be determined as of June, 1934, ..." *Id*. (italics added); County Pet. 27-28. This reasoning makes sense in light of the *Carcieri* requirement that a "tribe" have been "under Federal jurisdiction" in 1934, but in no way compels the conclusion that such a tribe also must have been recognized at that time. And this reasoning aligns with *Grand Ronde*, which found the timing-of-recognition issue ambiguous, thus permitting DOI to reasonably find there to be no temporal limitation on recognition. *Grand Ronde*, 830 F.3d at 560 ("If 'now under Federal jurisdiction' only modifies 'tribe,' there is

no temporal limitation on when recognition must occur." [citing *Carcieri*, 555 U.S. at 391]), 563.

The County then incorrectly claims that a factual statement in the Ninth Circuit's case, *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1281 (9th Cir. 2004) ("*Kahawaiolaa*"), *cert. denied*, 545 U.S. 1114 (2005), means that the benefits of the IRA are available only to tribes that were federally recognized in 1934. County Pet. 28. But the issue of whether a tribe must have been federally recognized in 1934 to qualify under the first definition of "Indian" in IRA Section 19 was neither presented nor considered in *Kahawaiolaa*, and therefore no such holding could result. The County attempts to twist the court's statement 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." County Pet. 28 (quoting *Kahawaiolaa*, 386 F.3d at 1281). But that is not a holding; it is a statement of fact that in 1934 none of the Hawaiian peoples were "tribes" (as defined in the IRA) under federal jurisdiction and none were recognized as "tribes." *Kahawaiolaa*, 386 F.3d at 1280. Furthermore, a plain reading of the cited language in *Kahawaiolaa* shows that the "in 1934" requirement applies only to being under federal jurisdiction, not to recognition. The statement does not stand for the proposition that a tribe had to be recognized in 1934 to qualify under the IRA.

b. The Ninth Circuit decision in this case does not conflict with any decisions of this Court.

The County attempts to support the notion that under IRA Section 19 a tribe must have been recognized in 1934, and thereby create a conflict between the Ninth Circuit decision and the precedent of this Court, with faulty interpretations of *U.S. v. John*, 437 U.S. 634 (1978) ("*John*"). That case and this Court's inserted parenthetical in the phrase "any recognized [in 1934] tribe now under Federal jurisdiction" do not support the County's assertion that this Court previously "held" that a tribe must have been recognized in 1934. County Pet. 27. Whether a tribe had to be recognized in 1934 to qualify under IRA Section 19 was not one of the questions presented in *John* for this Court's consideration. *John*, 437 U.S. at 635. The "in 1934" parenthetical is only mentioned in passing by the Court, on its way to determining that the Choctaws of Mississippi qualify as Indians under the IRA by satisfying another prong of the IRA Section 19 "Indian" definition. *Id.* at 647-650. Other than the "in 1934" parenthetical, there is no other reference to recognition in 1934 in *John*. The parenthetical language was not and never has been deemed controlling law, and the Ninth Circuit court characterized it as, at most, unreasoned dicta. App. 17 n. 10.

II. THE LEGISLATIVE HISTORY OF IRA SECTION 19 IS UNCLEAR, AS IS THE CONGRESSIONAL INTENT BEHIND "UNDER FEDERAL JURISDICTION," AND THE NINTH CIRCUIT CORRECTLY UPHELD THE SECRETARY'S INTERPRETATION OF THAT PHRASE IN IONE'S ROD, MAKING REVIEW BY THIS COURT UNNECESSARY

As the Ninth Circuit and the Secretary found, the IRA Section 19 phrase "under Federal jurisdiction" is ambiguous.[7] App. 30, 178. As head of the agency delegated principal authority over Indian affairs (25 U.S.C. §§ 2, 9; 43 U.S.C. § 157), the Secretary had to interpret its meaning to continue exercising the authority granted in IRA Section 5 to acquire trust land for tribes like Ione, as was validly done in the ROD. App. 178.

In doing so, the Secretary found that the legislative history does not clarify the meaning of "under

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[7] The *Carcieri* majority's statement that "Congress left no gap in [IRA Section 19] for the agency to fill" when it provided three definitions of "Indian" was made in the context of determining whether the Section's introductory clause "shall include" permitted the Secretary to define "tribe" so as to expand its scope beyond those encompassed by the three definitions. *Carcieri*, 555 U.S. at 391-392. It did not mean that there are no ambiguities at all in the language of IRA Section 19, as the County implies. County Pet. 18. And the County's reference to Justice Breyer's concurrence statement that "the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty" is in reference to the word "now" and nothing else. *Id.* (quoting *Carcieri*, 555 U.S. at 396, 397 (Breyer, J., concurring))

Federal jurisdiction." *Id.* It certainly does not do so in the straightforward manner the County's petition portrays in attempting to find a compelling reason for review. County Pet. 18-21.

The County incorrectly asserts that the legislative history shows

> the specific underlying difficulty Congress thought it was resolving by defining "Indian" was to prevent Indian "tribes" (other than treaty tribes) from taking advantage of the Act "unless they are enrolled [with the Indian Office] at the present time," or "[i]f they are actually residing within the present boundaries of an Indian reservation at the present time. . . ." (County Pet. 18 (footnote citations omitted).)

The County's errors in identifying the underlying problem that Congress sought to resolve, and the resulting errant intent behind the "Indian" definition reached by the County, can be shown in several ways.

First, if the County's formulation of the problem was correct, the Senate committee could have simply added language to that effect in IRA Section 19. The Senate committee discussed these issues at length, but no one directed that any explicit language be added to IRA Section 19 other than Commissioner Collier's ambiguous "under Federal jurisdiction" suggestion at the end of the hearing, which had not been mentioned the entire day and never discussed afterwards. App. 226-227. Based on the committee hearing, a tribe being "under Federal jurisdiction" does not

mandate enrollment of its members with the Indian Office, residency on a reservation was never discussed as a requirement for the first prong of the IRA Section 19 definition of "Indian," and treaties were not discussed at all at the hearing. Furthermore, the County provides no explanation based on the Senate hearing why the broadly-encompassing phrase "under Federal jurisdiction" might include one thing not discussed at the committee hearing (being a signatory to a treaty) but not others (such as other tribal-specific federal legislation or even general legislation of which the tribe is a beneficiary). The IRA legislative history cited by the County simply does not correspond with the County's attempts to severely restrict the possible means of being "under Federal jurisdiction," and it therefore does not support the County's interpretation of the intent behind the phrase.

Second, the purported reservation residency requirement attributed to Commissioner Collier by the County (County Pet. 18 and n. 10) is actually taken from his discussion about the second prong of the IRA Section 19 definition of "Indian" pertaining to descendants of members of recognized tribes, and that requirement only appears in that part of the definition. App. 221. Residency requirements on tribal member descendants would have no effect on the ability of other purported tribes to benefit from the IRA, as the County asserts is the problem being addressed. Furthermore, as noted above, if this reservation requirement were intended to apply to the first prong of the IRA Section 19 "Indian" definition, it could have been added there

as it was in the second prong. It was not, and that omission must be regarded as intentional by the bill's drafters. *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

Third, the County's error in stating the problem being addressed is shown by an earlier colloquy taken from the Senate hearing transcript of the same day but not included in the County's appendix excerpt.[8] *See generally* Supp. App. 6-10. In it, Chairman Wheeler and Commissioner Collier discussed IRA Section 7 of the draft IRA bill pertaining to proclamations of reservations on IRA-acquired lands, and Commissioner Collier wondered if a Chairman-proposed amendment might prevent the Department's "colonizing" efforts:

> Commissioner Collier. I mean these wandering bands of Indians who have no reservation at all – they could still be colonized somewhere, I suppose?
>
> The Chairman. Oh, yes; they could be colonized some place else; but certainly you would not want to colonize them on a present Indian reservation.
>
> Senator Frazier. They would be put on a new Indian reservation.
>
> The Chairman. They would be put on a new Indian reservation; yes.

(Supp. App. 9-10.)

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[8] The date of the Senate hearing is actually May 17, 1934, not February 27, 1934 as it states on the County's appendix excerpt. App. 216, Supp. App. 6-7.

There is no mention of a requirement that these "wandering bands of Indians" be enrolled with the Indian Office or have a treaty, as the County claims would be required to come under the IRA, and as wandering bands it is hard to imagine how or why they would do either. The colloquy explicitly states they "have no reservation at all," so that purported requirement by the County to be eligible under the IRA would not be fulfilled either. Yet Chairman Wheeler determined that such wandering bands without reservations were intended beneficiaries of the IRA for whom land could be acquired and a new reservation proclaimed. The County's interpretation of the IRA's legislative intent and its resulting limited requirements for a tribe being "under Federal jurisdiction" do not hold up.

The County's errors reflect the wide-ranging and confusing May 17, 1934 Senate committee hearing wherein the "under Federal jurisdiction" language was originally proposed, and the hearing transcript shows how unclear the phrase's legislative history is. The relevant discussion initially focused on the three prongs of the IRA Section 19 definition of "Indian" as proposed, which would determine the scope of the bill's coverage. The participants in that debate, which culminated in inclusion of the phrase "under Federal jurisdiction" in IRA Section 19, were concerned about different aspects of the definition and their conversation was thus disjointed. *See generally* App. 216-227.

When Commissioner Collier proposed inserting the "under Federal jurisdiction" into the definition of

"Indian" at the end of the committee exchange, it was unclear which concern the phrase intended to assuage. The phrase was not defined in the proposed bill or at the hearing (which was convened to address a version of the bill that used a different phrase, "under federal tutelage," in its title). The issue the Commissioner sought to address with the addition, and by extension his intent in proposing it, is unclear. There is no further reference in the legislative history to the "under federal jurisdiction" language. We do not know if Commissioner Collier's proposal satisfied whomever he addressed or if it had the desired effect.

Thus, the intent behind the phrase "under Federal jurisdiction" is uncertain based on the legislative history's lack of clarity. The County's attempt to limit the meaning of "under Federal jurisdiction" to only encompass tribes with a treaty, whose members were enrolled with the Indian Office, or who were living on a reservation, should not be heard in the absence of such clarity.

Based on the foregoing, it was proper for the Secretary to interpret the ambiguous phrase "under Federal jurisdiction" in the ROD and apply that interpretation to Ione. App. 178-199. As to that application, under APA standards, the ROD is rational and well-supported. Relying on evidence contained in the administrative record below, the ROD sets forth Ione's history, starting with the fact that the Band is a successor in interest to the signatories of a California tribal treaty negotiated with the U.S. in the mid-1800s, and continuing through the 2011 acknowledgment in *Muwekma Ohlone Tribe*

v. Salazar that the Band had a longstanding and continuing government-to-government relationship with the United States starting prior to 1934. App. 186-197. On this basis, the Secretary reasonably concluded that Ione was "under Federal jurisdiction" prior to and in 1934. *Id.*

III. FEDERAL JURISDICTION OVER AN INDIAN TRIBE IN 1934 WAS NOT LIMITED TO THOSE LIVING ON FEDERALLY-HELD LAND AND SUCH ARGUMENT SHOULD NOT SERVE AS A BASIS TO GRANT THE COUNTY'S PETITION

The County separately makes the misguided argument that in 1934, absent a treaty, a tribe had to have Federally-reserved land in order to be deemed "under Federal jurisdiction" but now without reference to possible Indian Office enrollment. County Pet. 21, 23.[9] Along the way, it reaches this conclusion by erroneously reasoning that: (1) Indians under federal jurisdiction are not subject to state laws, and (2) state laws are inapplicable on federally-held tribal lands, (3) therefore a tribe under federal jurisdiction must have federally-held lands. County Pet. 23-24. But the relevant IRA inquiry is whether the federal government

[9] As an alternative to the purported requirement of federally-held lands, the County asserts in passing that being "under Federal jurisdiction" in 1934 also could have been satisfied by a tribal "executive order, or tribe-specific legislation." County Pet. 21. The County never discusses these asserted criteria further or their source, however, so they are not addressed.

could have exercised jurisdiction over tribes such as Ione that were not on a reservation in 1934. That inquiry must be answered affirmatively.

The County's arguments ignore the breadth of federal jurisdiction over tribes. The federal government has plenary power over tribes (*Morton v. Mancari*, 417 U.S. 535, 551-552 (1974)), and prior to 1934, this Court detailed the expanse of federal power over tribes throughout the entire country, which is not dependent on land ownership (*U.S. v. Sandoval*, 231 U.S. 28, 45-46 (1913); *U.S. v. Kagama*, 118 U.S. 375, 384-385 (1886)).

The County argues that as of 1934 it was understood that Indians under federal jurisdiction were not subject to state laws and that Indians outside of reservation boundaries were fully subject to them, implying that federal jurisdiction over Indians could only be had on a reservation. County Pet. 23. But the authorities put forth by the County do not help its case. The IRA legislative history it cites, along with *Ward v. Race Horse*, 163 U.S. 504, 507-508 (1896) and *Kennedy v. Becker*, 241 U.S. 556 (1916) (County Pet. 23-24), all pertained to assertions of federal or state *criminal judicial jurisdiction* over *individual* Indians, not the plenary authority of the federal government in all matters over tribes.

The County's reference to a 1925 Comptroller General opinion and an August 1933 letter from Sacramento Indian Agency Superintendent O.H. Lipps to Commissioner of Indian Affairs John Collier also does not further its case. County Pet. 22-23. The County

implies that the two documents taken together show that Ione was not under federal jurisdiction in 1934, but merely a group of Indians for whom no guardian-ward relationship existed with the federal government. *Id*.

The County provides no basis for linking individual Indians being classified as non-wards by the Comptroller General with the relevant inquiry of whether a tribe was "under Federal jurisdiction" for IRA Section 19 purposes. Furthermore, the August 1933 letter has no bearing on the question of whether Ione was under federal jurisdiction in 1934 because its content and purpose are at best ambiguous. The letter does not indicate, and the County offers no evidence to show, on what basis or for what purpose the Comptroller made its "non-wards" classification. Furthermore, the cited Comptroller General opinion was issued in response to appropriations authorization requests for individual Nevada Indians with no tribal affiliation, which request was denied. App. 210-212. However, a similar appropriations authorization had previously been issued for Ione (as a tribe, not just a group of Indians) to purchase the 40-acre parcel. Supp. App. 11-13. And further administrative record evidence summarized in the ROD shows that federal operatives referred to Ione as a distinct band and acknowledged the exercise of their jurisdiction over the Band. App. 186-199.

The County's argument that federal jurisdiction over a tribe requires federally-held land also is contrary to the IRA's text. The first prong of the IRA Section 19 definition of "Indian" at issue contains no

requirement that a tribe have federally-held lands in order to be "under Federal jurisdiction." The law's drafters were obviously aware of this concept, having incorporated it into other sections of the bill – including the reservation residency requirement in IRA Section 19's second-prong definition of "Indian" – but failed to insert it in IRA Section 19's first prong. *See also* 25 U.S.C. § 5125 (IRA Section 18 requiring votes on reservations to determine the law's application), Supp. App. 5.

The broader implication of the County's federally-held lands requirement would be that no landless tribe could ever have benefitted from the IRA. Such an interpretation would impermissibly frustrate the IRA's remedial purpose of providing land for landless tribes and Indians. *See South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 798-799 (8th Cir. 2005) (citing 1934 congressional reports relating to such land purchases). This purpose is clearly shown by the Senate committee colloquy on IRA Section 7 discussed above. Commissioner Collier's *Annual Report of the Commissioner of Indian Affairs* for 1934, issued soon after IRA enactment, also noted that the statute "authorized the establishment of new reservations for now completely landless and homeless Indians[.]" Supp. App. 19; *see also*, Supp. App. 14-17 (Rep. Howard, the House bill sponsor, reporting to the House as to how IRA Section 5 was designed to provide land for landless bands and individual Indians). The County's faulty interpretation of "under Federal jurisdiction" would vitiate this congressional purpose.

IV. THE COUNTY'S ATTEMPT TO INVALIDATE THE NINTH CIRCUIT'S INTERPRETATION OF THE TIMING-OF-RECOGNITION ISSUE, WHICH ALLOWS POST-1934 RECOGNITION, IS UNAVAILING AND DOES NOT WARRANT REVIEW

The County argues that the Ninth Circuit's interpretation in this case would render the term "recognized" meaningless by permitting recognition at any time subsequent to IRA enactment "because the mere decision by the government to accept land into trust would effectively recognize that tribe." County Pet. 29. But in order for the Secretary to have the authority under IRA Section 5 to make the trust land acquisition decision in the first place, the tribe already would have to qualify as "Indian" under IRA Section 19, and if under the first-prong definition, would have to be a "recognized Indian tribe" at or immediately before the trust acquisition decision is made, not a tribe recognized by such decision. *See* App. 19 (Ninth Circuit noting that "'recognized Indian tribe now under Federal jurisdiction,' when read most naturally, *includes all tribes that are currently – that is, at the moment of the relevant decision – 'recognized'* and that were 'under Federal jurisdiction' at the time the IRA was passed." (italics added).) And contrary to the County's argument (County Pet. 29), interpreting "recognized Indian tribe" to mean recognition existing at or subsequent to IRA enactment does not mean that "recognized" no longer qualifies "tribe." It still distinguishes

"recognized" tribes from non-recognized or unrecognized tribes.

The County's further attempted reliance on the legislative history of the IRA to show the law was intended only to benefit Indian tribes and individuals under governmental care as of 1934, in order to support a 1934 recognition requirement (County Pet. 29-30), is similarly unavailing. The County's attributions to Chairman Wheeler regarding Indians of "less than half blood" (County Pet. 29) is actually in reference to IRA Section 19's third-prong definition of "Indian," not the first prong relevant here, and similarly the quotation attributed to Commissioner Collier (*id.*) is to the explicit 1934 reservation residency requirement of the second-prong definition of "Indian." The County's references to comments by Chairman Wheeler and the House sponsor regarding the IRA taking care of those Indians already under federal government care (App. 29) are belied by the subsequent addition of the phrase "now under Federal jurisdiction." If the bill's drafters already understood "recognized Indian tribe" to mean only those tribes recognized as of 1934, then the addition of the word "now" would have been superfluous – even without "now" the entire phrase "recognized Indian tribe ~~now~~ under Federal jurisdiction" would have been understood as limited to 1934. Yet the drafters purposefully added "now."

The County's position is also belied by the fact that, prior to the addition of the "under Federal jurisdiction" language, the bill's drafters had already included an explicit temporal limitation to the IRA

Section 19 second-prong definition of "Indian" pertaining to the descendent on-reservation residency requirement as of June 1, 1934. If the drafters considered a temporal limitation to recognition to be necessary, they obviously knew how to include it but did not. The omission is to be construed as intentional. *Russello*, 464 U.S. at 23.

The County, without merit, then attacks the decision in *Grand Ronde*, claiming the D.C. Circuit erred "by giving *Chevron* deference to Interior's interpretation of the IRA," purportedly because "[i]nterpretations such as those in opinion letters . . . lack the force of law [and] do not warrant *Chevron*-style deference." County Pet. 28 (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). But this argument by the County revolves around an incomplete analysis that is nowhere nearly as broad as the County implies, for this Court later clarified that there can be instances of applying "*Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking." *Barnhart v. Walton*, 535 U.S. 212, 221-222 (2002) (internal citations omitted). Furthermore, the County has no standing to attack the *Grand Ronde* decision in the D.C. Circuit, which this Court denied review upon petition.

V. DOI CONSIDERED IONE'S 2006 INDIAN LANDS DETERMINATION PURSUANT TO THE ORDINARY APPLICATION OF A VALID GRANDFATHERING CLAUSE IN THE SUBSEQUENTLY-ENACTED 25 C.F.R. PART 292 REGULATIONS AND SUCH CONSIDERATION DOES NOT WARRANT REVIEW

The regulations at 25 C.F.R. Part 292 ("Part 292"), enacted in 2008, articulate DOI's current policy and standards for determining which tribes may operate gaming on land acquired in trust after IGRA's enactment on October 17, 1988 ("newly-acquired lands"), in accordance with exceptions to the 25 U.S.C. § 2719(a) general prohibition on gaming upon such lands, including the Restored Tribe Exception. *See generally* 25 C.F.R. §§ 292.1-.26, enacted May 20, 2008. These exceptions "ensur[e] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). Some of the Part 292 regulations implement a policy as to criteria tribes must meet to be deemed "restored" (*see in particular* 25 C.F.R. §§ 292.10 and 292.26, App. 206-209) in order to proceed where such lands qualify under the Restored Tribe Exception.

In 1994, AS-IA Deer administratively restored Ione to federally-recognized status. In September 2006, DOI Associate Deputy Secretary James Cason issued Ione's ILD, determining that the Plymouth Parcels would qualify as "restored lands" if acquired in trust and that Ione is a "restored tribe" for IGRA

purposes based on the 1994 administrative restoration. The Plymouth Parcels thus would be eligible for gaming under IGRA if acquired in trust, even though they would be newly-acquired lands on which gaming is generally prohibited.

Subsequently, on May 20, 2008, DOI published its final regulations in Part 292. *See in relevant part*, Final Rule comments, App. 228-241; 25 C.F.R. §§ 292.10 and 292.26, App. 206-209. The final regulations reversed DOI's policy regarding administratively re-affirmed tribes, like Ione, with the promulgation of Section 292.10, which essentially provides that administratively re-affirmed tribes will *no longer* be eligible to be classified as "restored." App. 236.

DOI recognized that its new policy would adversely affect tribes like Ione that had relied on DOI's prior policy for years, had applied for and been issued a formal opinion letter confirming that it would qualify as "restored," and had subsequently – in reliance on the formal opinion – expended further funds, efforts and time. App. 239-240. DOI therefore also enacted Section 292.26(b) (App. 208-209), clarifying that its new rule would not apply retroactively and would grandfather in administratively re-affirmed tribes to whom DOI or the National Indian Gaming Commission had "issued a written opinion regarding the applicability of 25 U.S.C. 2719 [i.e., the newly-acquired lands exceptions, including the Restored Tribe Exception] for land to be used for a particular gaming establishment" prior to the regulations' 2008 enactment.

a. DOI did not find that Congress expressly sought to preclude all administratively re-affirmed tribes from qualifying as "restored."

The County maintains that DOI's "Review of Public Comments," which were published as background material to the final Part 292 regulations (App. 233-241), rejected the possibility that Congress may have intended to permit tribes, like Ione, who were administratively re-affirmed *after* the Part 83 tribal acknowledgment (i.e., federal recognition) regulations were enacted in 1978, to be considered "restored" under IGRA. County Pet. 30-32. This assertion is plainly wrong.

The DOI explanatory remarks that the County quotes extensively (County Pet. 31-32), claiming that Congress did not mean to include administratively-restored tribes within the IGRA exception, refer to tribes that were administratively restored *prior to* the 1978 enactment of Part 83. None of the remarks refer to tribes that were administratively restored *after* 1978, as was Ione in 1994. The comments explicitly say this, *twice*. County Pet. 31-32 (italicized language).

In other words, what the comments say is that DOI believed (when it enacted Part 292 in 2008) that when Congress enacted IGRA (in 1988), Congress did not mean to consider as "restored" those tribes that had been administratively re-affirmed *prior to Part 83 enactment in 1978*. The comments say nothing about what Congress may or may not have intended in

connection with tribes that – like Ione – were administratively re-affirmed *after* 1978.

It is Ione's 1994 restoration by agency action that is relevant for purposes of IGRA's Restored Tribe Exception. DOI's explanatory comments on what Congress intended when it used the word "restored" say nothing about this kind of action. This part of the County's argument is wrong.

b. Section 292.26(b) is not inconsistent with congressional intent because no such intent exists.

In enacting Part 292, DOI explicitly acknowledged that Congress's intent with regard to the word "restored" is unclear. Thus, as the Ninth Circuit concluded, there is no clear congressional intent as to what qualifies as a restored tribe for IGRA purposes. App. 38-40. Any interpretation DOI adopts in connection with this section is a matter of DOI policy, not legislative intent. And even the County concedes that the criteria it advocates to determine if DOI can implement Section 292.26(b) only apply when seeking to "'grandfather' past administrative practices that run contrary to congressional intent. . . ." County Pet. 32-33. Section 292.26(b) cannot be inconsistent with congressional intent given the lack of such intent.

c. The retroactivity standards the County urges are inapplicable.

The third flaw in the County's arguments is that the standards it seeks to apply to determine whether DOI was permitted to apply Section 292.26(b) to grandfather Ione are inapplicable. These standards apply when an agency elects to apply a new rule retroactively, but they are wholly inappropriate for purposes of determining whether and under what circumstances an agency *must* apply a rule retroactively.

This Court has held that "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988); *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). Thus, administrative regulations do not apply retroactively to entities that previously functioned under and relied on the old rules, unless the agency expressly applies them retroactively or Congress so requires. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835 (9th Cir. 1997).

Here, because IGRA does not define "restored," it is left to DOI to develop a policy by which restored tribes may qualify as such. IGRA gives no preference and does not require that any single policy apply retroactively. Accordingly, DOI determined in Section 292.26(b) that its new policy would apply retroactively to administratively-recognized tribes seeking to qualify as "restored" that had not obtained ILDs, but would

not apply retroactively to such tribes that, in reliance on the old policy, had sought and obtained ILDs stating that they qualified as "restored" tribes. As such, the Ninth Circuit rightfully upheld the ROD and the ILD with Ione as a grandfathered restored tribe. The County's as-applied challenge as to Ione under the Section 292.26(b) grandfathering provision must fail, and to the extent the County also makes a facial challenge to the invalidity of that regulation (which invalidity was not claimed in the complaint), that must fail also.

CONCLUSION

For all of the foregoing reasons, Respondent Ione Band of Miwok Indians respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

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