No Casino in Plymouth (NCIP)

"Working to Preserve Rural Amador County"

www.nocasinoinplymouth.org

Honorable Dirk Kempthorne
Secretary of the Interior
U.S. Department of the Interior
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RE: NICP requests the immediate and permanent withdrawal of the Artman restored lands opinion for the Ione Band because the opinion is deficient, has little basis in history or fact, and is not supported by the record currently available. If our request for withdrawal is denied , we request that the entire administrative record used and relied on by Solicitor Carl J. Artman in preparing the restored lands opinion for the Ione Band of Miwok be provided to No Casino in Plymouth with a detailed explanation as to why the opinion will not be withdrawn.

NCIP requests a Formal Opinion from the Department's Solicitor as to whether the Assistant Secretary of Indian Affairs has authority outside the Section 83 process to administratively <u>restore</u> federal recognition to tribes whose federal recognition has been officially terminated? <u>We respectfully withdraw this request if the Artman restored lands opinion for the Ione Band is permanently withdrawn.</u>

NCIP requests a Formal Opinion from the Department's Solicitor as to whether the Department has the authority to officially terminate federal recognition of tribes through action before a Federal Court or the IBIA. <u>We respectfully withdraw this request if the Artman restored lands opinion for the Ione Band is permanently withdrawn.</u>

Dear Secretary Kempthorne:

No Casino in Plymouth, a grass roots community based 501C4, respectfully makes these requests because the questions are particularly relevant to the federal recognition of the Ione Band of Miwok in 1972, the reaffirmation of that recognition by Assistant Secretary Ada Deer in 1994 and the restored lands opinion delivered by Solicitor Artman in September 2006 for the Ione Band. The history of the Ione Band, as indicated by Solicitor Artman, is unique and complex. However, Solicitor Artman failed to provide an accurate factual review of the history of the Ione Band in the opinion. We believe an accurate factual review of the Ione Band's history would have resulted in a different conclusion. We now offer an what we believe is an accurate factual review of Ione Band history to assist you in understanding the reasons this inaccurate, ill advised, illogical, and error filled opinion should be permanently withdrawn immediately.

At mid page three, Solicitor Artman declares that the 1972 letter from Commissioner Bruce is a clear and unambiguous statement that he is dealing with the band as a recognized tribe. He further informs that Commissioner Bruce's 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.

However, in the very next paragraph he writes that for reasons that are not entirely clear the Department did not follow through on the Commissioner's directions. Secretary Kempthorne, which is it, A “clear and unambiguous act of recognition” or “not entirely clear”? NCIP believes the reasons for the Department's failure to follow through are clear and well documented. An examination of the records of Solicitor Scott Keep and former Solicitor Reid Chambers and other Department / Solicitor's Office records relating to the Ione Band pursuant to Commissioner Bruce's letter will reveal precisely why there was no follow through on the Commissioner's federal recognition of the Ione Band and his direction to take their land into trust.

Without explanation, Solicitor Artman declares that the Department took the position that the Band was not yet recognized and placed the Band on the list of petitioners for recognition. The reasons for these actions are clear, well documented, and will be found if you review the records of Solicitors Scott Keep, Reid Chambers, and other Department / Solicitor Office records. We believe, based on our knowledge of the records that it was the Solicitor's Office that withheld department action on Commissioner Bruce's 1972 recognition memo which delayed the inclusion of the Ione Band on the list of federally recognized tribes for more than 20 years. Please provide any information and documents that might clarify this if our conclusion is incorrect.

Solicitor Artman conveniently skips sixteen years of history of the Ione Band and their relationship with the Department and references a 1992 Federal case and IBIA appeal. Solicitor Artman next opines that the Department's defense of its non recognition position in the 1992 Federal Court case and before the IBIA terminated the relationship Commissioner Bruce had recognized. Are we to believe that the Departments successful defense of its non recognition position in Federal Court and the IBIA rises to the level of a termination? If by stretching the bounds of logic and common sense we consider this was a termination, it must be explained why the Ione Band would undertake an action in Federal Court and at IBIA that would result in the termination of its recognition when the Band had been trying for 20 years to have the department follow through on the “clear and unambiguous” directions from Commissioner Bruce that the Ione Band was recognized. At issue in the court case alluded to by Mr. Artman was an internal tribal dispute concerning whether the Band was exempt from county jurisdiction. In taking a position in court contrary to the “clear and unambiguous” position taken by Commissioner Bruce in 1972 that the Ione Band was recognized the Department and Solicitor's Office simply defended their erroneous “unclear” non recognition of the Ione Band dating to 1972 and it must be explained beyond Solicitor Artman's opinion how this twenty year old erroneous “unclear” non recognition of the Ione Band became a termination in 1992.

To assure the public that this termination created by Solicitor Artman has some basis in law or regulation please provide the authority that allows a tribe to be terminated through Department action before a Federal Court or before the IBIA?

NCIP requests copies of any records, memos, federal register notices or other documents that indicate the Ione Band was officially notified by the Department or any agency of the United States that the 1992 Federal Court action and/or the IBIA action terminated the federal recognition of the Ione Band and any documents indicating that the Department notified any other agency of the United States that the recognition of the Ione Band had been terminated as a result of the 1992 Federal Court and/or IBIA action referred to by Solicitor Artman in his opinion. A similar request of Solicitor Artman in 2006 remains unanswered.

These documents are important because in the very next paragraph Solicitor Artman informs that representatives of the Ione Band met with Assistant Secretary Ada Deer in 1993 and

that she "specifically reaffirmed the conclusions of Commissioner Bruce's 1972 letter " and agreed to accept into trust the specific parcel of land described in Commissioner Bruce's 1972 letter. We ask the following related to this portion of Solicitor Artman's opinion.

> If the Ione Band was terminated in 1992, why was the Ione Band still seeking a reaffirmation or recognition of Commissioner Bruce's 1972 letter and not a restoration of the 1992 termination?
>
> If the Ione Band was terminated in 1992, why did Assistant Secretary Ada Deer "specifically reaffirm the conclusions of Commissioner Bruce's letter" as opposed to restoring the 1992 termination? Surely, the Assistant Secretary would have been aware of any termination of the Ione Band.

We believe the answers are quite simple.

> Neither the Ione Band or any one else was ever notified that the 1992 Federal Court and/or IBIA actions had terminated their recognition and the Ione Band continued to seek reaffirmation of the recognition given them in the "clear and unambiguous" 1972 letter from Commissioner Bruce. and
>
> Assistant Secretary Ada Deer, like the Ione Band, was not aware of any termination of the Ione Band and since the Ione Band was not seeking restoration of the non existent 1992 termination she "specifically reaffirmed" the 1972 Bruce letter.

Not only does this section of the opinion raise serious questions about the validity of the termination and restoration invented by Solicitor Artman, it introduces the subject of land, which in the case of the Ione Band plays a major role in their unique and complex history.

According to Department documents the Ione Band has lived continuously and collectively on the 40 acres described in the 1972 Bruce letter since before 1916. While the United States failed for over 50 years to purchase the property for the tribe, the tribe finally acquired title to the 40 acre property in 1972. This is the property that both Commissioner Bruce and Assistant Secretary Deer agreed to take into trust for the Ione Band. Again, Solicitor Artman offers no explanation as to why the property has not been taken into trust 46 years after the Bruce letter and 14 years after the reaffirmation from Assistant Secretary Deer.

Therefore, we would welcome any explanation as to why this 40 acre property has not been taken into trust by a Department whose job it is to assist tribes. Additionally, please explain how the Ione Band, which still owns the 40 acres that both Commissioner Bruce and Assistant Secretary Deer agreed to take into trust, can now present itself to the Department in its request to the NIGC for a restored lands opinion and in its Fee to Trust Application as a "landless" tribe.

We now refer to Civil Action No. 03-1231(RBW) a case currently in the DC District Court which involves the plaintiff MUWEKMA OHLONE TRIBE vs. defendant DIRK KEMPTHORNE, Secretary of the Interior. We direct your attention to this case because references to the Ione Band are frequent, and prominent in the case documents and these relevant references clearly demonstrate that Solicitor Artman's opinion is not based on the factual history of the Ione Band and should be withdrawn.

The following is an excerpt from Judge Walton's September 21st 2006 memorandum opinion page 8-9 which as part of the opinion background are facts not in dispute. Emphasis added.

Moreover, the Department does not dispute Muwekma's allegation that Ione and Lower Lake, like Muwekma, "were Central California tribes previously recognized at least as late as 1927" who did not appear on the 1979 list of federally recognized tribes despite "never [having] been terminated by Congress [or] by any official action of [the Department]." Pl.'s Opp. at 5; see also Pl.'s Mem. at 23-27; Answer at 22-23.

On several occasions, Muwekma requested that the Department reaffirm its tribal status through administrative correction, as the Department had done with Ione and Lower Lake, without requiring that its completed petition be evaluated under the Part 83 criteria. Pl.'s Mem. at 11; Compl. 27; Answer at 23. The Department denied Muwekma's requests, stating that it did not have the power to ***restore*** *Muwekma to the list of recognized tribes by administrative means.* Emphasis added

Is the Department misrepresenting the facts related to the Ione Band before Judge Walton in the Muwekma case or is Solicitor Artman representing a non existent termination and unauthorized restoration of the Ione Band in his opinion. NCIP believes the latter to be the case and that an immediate withdrawal of the restored lands opinion for the Ione Band prepared by Solicitor Artman is justified and in the best interest of the Department.

Further review of a Department brief filed on April 27, 2007 reveals more inconsistencies in Solicitor Artman's opinion. Solicitor Artman briefly mentions the 40 acre parcel in his opinion and observes that the Department was directed by both Commissioner Bruce and Assistant Secretary Deer to take this parcel into trust. However, he fails to offer any explanation as to what happened to the parcel or explain why it is not held in trust for the Ione Band or inform as to the current status of the parcel or explain how a tribe that owns 40 acres can claim it is "landless" and needs "restored lands".

This is particularly concerning because the Ione Band in its September 2004 request to the NIGC for a restored lands opinion claims that it is landless. This landless claim is also made in their November 2006 Fee to Trust Application. This Fee to Trust Application was made available for public comment in November 2006 and lists Solicitor Artman's restored lands opinion as an exhibit. However, the opinion was withheld from the Fee to Trust Application made available for public comment. While it would seem a relatively simple task to determine whether the Ione Band is landless it appears this has been beyond the capability of the BIA's Sacramento Regional Office since the Ione Band began making the unfounded claim.

However, the 4/27/2007 Department brief in the Muwekma Ohlone case provides some key insight into the Department's findings and policies relative to the Ione Band. Let us review what the Department has presented to the DC District Court pertaining to the Ione Band, its reaffirmation, and the land it owns and occupies from Case 1:03-cv-01231-RBW, Document 66 Filed 04/27/2007 and how its contents compares to the Artman opinion. (emphasis added below)

From Page 1: Those two decisions emphasized correcting an administrative error on behalf of groups that had either trust land or collective rights to land and a history of dealings with the federal government. Unlike Ione and Lower Lake, Plaintiff also cannot demonstrate that it possesses collective rights in tribal lands. *The Department confirms that the decision by Assistant Secretary Deer to administratively reaffirm Ione was based in part on the fact that the Ione Band owned land.*

From Page 6: Defendants' Motion also explained that, unlike Lower Lake and Ione, Plaintiff lacks collective rights in lands. Defs.' Mot. (Dkt. No. 61) at 13-17; *see also id.* 14 (detailing that the United States held land in trust on behalf of Lower Lake for forty years); *id.* at 14- 15 (explaining the efforts made by the Department of the Interior

("Department") to obtain land for Ione and noting that the members of Ione successfully quieted title to land); *id.* at 15 *Here again is a reference to the fact that the U.S. attempted to purchase land for the Ione Band and that members of the Ione Band currently own land and are not landless.*

From Page 6: In addition, Ione's common land base, which it successfully quieted title to, demonstrates that Ione's members lived in a centralized geographic location. *And the members live in this centralized geographic location which happens to be about 5 miles southwest of the city of Ione and not on lands in or near Plymouth.*

From Page 6-7: The fact that Lower Lake and Ione possessed collective rights in land provided evidence that these Indian tribes are continuously existing political entities. *Again, we see the department acknowledging to the D.C. District Court that the Ione Band is not landless.*

From Page 7: Indeed, the Ione were not, as Plaintiff suggests, merely individual Indians living in a California town. The Band lived on an Indian Rancheria, composed almost exclusively of Indian residents, who worked on a ranch that was contiguous to the Rancheria. This land is the same property where they have lived continuously and collectively until the present. *This is the land where the Ione Band has lived continuously since before 1916 and collectively until the present. Again, not landless.*

Secretary Kempthorne, if the Ione Band is landless as claimed in their 2004 restored lands request to NIGC and their November 2006 Fee to Trust Application, is the land the Department referred to in its April 2007 brief on which members of the Ione Band are presently living the same land referred to in Commissioner Bruce's letter and Assistant Secretary Deer's reaffirmation? If no, please explain. If yes, please explain why the Ione Band can claim it is landless in its Fee to Trust Application and request for a restored lands opinion without question from the BIA's Regional Office in Sacramento, the NIGC, and the Solicitor's Office.

From page 8: In the Ione decision, the Assistant Secretary stated that she was acting to correct a failure to complete an acquisition of **land** to be held in trust authorized by the Commissioner of Indian Affairs in 1972. *A failure by the Department that continues to this day without explanation.*

What happened to their land after their recognition was reaffirmed in 1994 and again we ask why has the 40 acres not been taken into trust as directed by Commissioner Bruce 46 years ago and by Assistant Secretary Deer 14 years ago?

From page 13: Plaintiff's efforts to draw the Court into fabricating a "standard" for reaffirmation out of these two admittedly brief decisions recognizing a longstanding relationship with the United States, communal interest in land and correcting an administrative error, stand in stark contrast to the Department's efforts to develop general regulations through notice and public comment.

Nowhere in this brief does the Department suggest or inform the Court that the Ione Band was terminated by the Department in 1992 or ever terminated. In fact according to the Department the 1994 decision recognized a longstanding relationship with the United States, communal interest in land, and the correction of an administrative error.

Clearly, Solicitor Artman's opinion stands in stark contrast to the content of the Department's April 4th 2007 brief and Judge Waltons September 21st 2006 memorandum opinion. Again, one must consider that either the opinion offered by Solicitor Artman is not based on the facts relating to the Ione Band, their recognition, their reaffirmation, and their land

or the Department is presenting false and misleading statements about the Ione Band, their recognition, their reaffirmation, and their land to the D.C. District Court in the Muwekma case.

NCIP reaffirms our belief that the Department has accurately represented the facts and history concerning the Ione Band before the D.C. District Court and that the Artman opinion does not accurately represent the facts and history of the Ione Band. Therefore, we request that the Artman restored lands opinion for the Ione Band of Miwok be immediately and permanently withdrawn due to its gross misrepresentations of the facts and history concerning the Ione Band.

The reaffirmation of the Ione Band of Miwok was not a restoration as Solicitor Artman opines but was, according to the Department, the correction of an administrative error as presented in Muwekma case. His opinion that the Ione Band is a "restored tribe eligible for restored lands at a site other than the 40 acres owned by the Ione Band has provided the Ione Band and the Regional BIA Office in Sacramento with a lands opinion that has the practical effect of a final agency action. This is demonstrated by the Sacramento Regional Office's continued processing of an incomplete Fee to Trust Application and premature preparation of a Draft Environmental Impact Report at a cost of millions of taxpayer dollars while denying the public any opportunity to comment and/or challenge the opinion by withholding the Artman opinion from the Ione Band's Fee to Trust Application. This opinion is the foundation of the Ione Band's Fee to Trust Application and is the guiding document for the information gathering and documentation of the Administrative Record of Decision (ROD). Without Solicitor Artman's opinion there can be no the Fee to Trust Application for gaming for the Ione Band per the restored exception in the IGRA. The Fee to Trust process for gaming for the Ione Band continues to move forward on the basis of this opinion. Meanwhile the public and their representative governments are denied any opportunity to comment or challenge the specious, fictional, and unsupportable opinion delivered by Solicitor Artman and we are respectfully requesting its immediate and permanent withdrawal.

The opinion offered by Solicitor Artman failed to provide an accurate review of the history of the Ione Band of Miwok and does not accurately represent past department decisions or policies which pre-date the acknowledgment regulations that resulted in the unique and complex history of the Ione Band. An examination of the record would reveal his considerable oversight relating to the history of the Ione Band, their recognition, their reaffirmation, and the status of lands owned by the Ione Band.

Because of his opinion, the Ione Band of Miwok ROD for an off reservation fee-to-trust gaming application is fatally flawed due to the corrupting, unsupportable, imaginative, and fictional perspective of Solicitor Artman's opinion.

> How will the Department verify that a restored lands decision for a Fee to Trust Application for gaming under the IGRA is based on factual and objective criteria if the restored lands opinion on which the Fee to Trust Application is based is not founded on supportable objective documented criteria on which a Final Department decision could be made?
>
> Secretary Kempthorne, we believe it is clear that Solicitor Artman's restored lands opinion is being intentionally withheld from public comment and challenge. How else can you explain its absence from the Fee to Trust Application on which the Application is based? Provided that the Artman opinion is being withheld from the Administrative Record, how could a court provide a thorough judicial review if a complete and extensive Administrative Record of a tribe's history related to federal recognition is not available?

Solicitor Artman's opinion lacks factual objective criteria and he appears to have purposefully ignored, abbreviated and misrepresented the documented history of the Ione Band to construct a restored conclusion where none exists. To be blunt his opinion is a considerable work of fiction that bears little resemblance to fact, history, or truth about the Ione Band, its land or its relationship with the United States. This opinion is the foundation of the Ione Band's Fee to Trust for gaming Application which is, has been, and continues to be an extremely contentious and controversial Fee to Trust application. Withholding the opinion from the application to avoid comment and challenge is viewed by many as an effort by the Sacramento Regional Office and the Department to manipulate the ROD, frustrate challenges in the courts and ultimately deny judicial review of the Ione Band's Fee to Trust application. When exactly in the process will the public and affected governments have an opportunity to comment on and challenge the veracity of Solicitor Artman's opinion that the Ione band is restored and the lands in and near Plymouth qualify as restored lands under the IGRA?

All questions and requests are respectfully withdrawn if the Artman Opinion is permanently withdrawn.

For the reasons we have presented, No Casino in Plymouth respectfully requests you immediately and permanently withdraw Solicitor Artman's September 19th, 2006 Restored Lands opinion for the Ione Band. Should you decide to not immediately and permanently withdraw the Artman opinion please advise NCIP as to why the Department believes the Artman opinion should not be withdrawn and respond to all our questions and requests. NCIP thanks you in advance for your prompt reply and assistance in this very important matter.

Sincerely,

D.W. Cranford Vice President NCIP

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