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COUNTY OF AMADOR, CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF AMADOR, CALIFORNIA, *Plaintiff,* vs. THE UNITED STATES DEPARTMENT OF THE INTERIOR; KEN SALAZAR, Secretary of the United States Department of Interior; DONALD E. LAVERDURE, Acting Assistant Secretary of Indian Affairs, United States Department of Interior *Defendants.*	Case No. **COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF**

COMES NOW the County of Amador, California, and files this Complaint against the above-named Defendants.

1. This Complaint seeks review pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*., of actions taken by the United States Department of the Interior ("Department" or "DOI"), through a May 24, 2012 Record of Decision (hereafter "ROD") by Donald E. Laverdure, Acting Assistant Secretary of Indian Affairs, that, among other things:

- determined to take approximately 228 acres of land near Plymouth, California, in Amador County (the "Plymouth Parcels"), into trust on behalf of the Ione Band of Miwok Indians ("Ione Band" or "Band"); and
- determined that the Plymouth Parcels qualify as "Indian lands" on which the Ione Band may conduct gaming under Section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b) ("IGRA"), pursuant to a provision that authorizes gaming on parcels that constitute the "restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

2. A true and correct copy of the challenged ROD is attached to this Complaint as Exhibit 1, and incorporated herein by this reference. The Department of Interior has represented to the County's attorneys that the Department will postpone taking the Plymouth Parcels into trust, pending the resolution of this action. *See* Exhibit 2, attached.

3. There are several fundamental problems with the ROD.

4. First, the Secretary of Interior lacks authority to take land into trust on behalf of *any* tribe that was not "under federal jurisdiction" in June 1934, when the Indian Reorganization Act was enacted by Congress and signed into law by President Roosevelt. *See Carcieri v. Salazar*, 555 U.S. 379 (2009). Though the ROD takes the position that the Ione Band was "under federal jurisdiction" on that

date, that determination was an abuse of discretion and is arbitrary, capricious and contrary to law. The Department, Secretary and Defendants Laverdure lacked any substantial or other evidence to support the determination that the Ione Band was "under federal jurisdiction" in June 1934; and, additionally, the ROD's determination of "under federal jurisdiction" was contrary to law. Indeed, the Department has itself taken a diametrically opposite position on several occasions, including asserting in prior litigation before this Court that the Ione Band was not federally recognized. *See Ione Band of Miwok Indians, et al. v. Burris, et al.*, No. S-90-0993-LKK/EM (E.D. Cal.).

5. Defendants' determination that the Plymouth Parcels qualify as Indian lands eligible for gaming under IGRA's "restored lands for a restored tribe" exception likewise constitutes an abuse of discretion and is arbitrary, capricious and contrary to law.

6. Defendants Department, Secretary and Laverdure lacked any substantial or other evidence to support the determination that the lands in question constitute the "restored lands of a restored tribe." Indeed, the Department has itself taken a diametrically opposite position on several occasions.

7. The Complaint seeks declaratory relief pursuant to 28 U.S.C. § 2201(a), to declare unenforceable the action taken by Defendants, and preliminary and permanent injunctive relief pursuant to 28 U.S.C. § 2202, including enjoining the Department from taking the land into trust on behalf of the Ione Band.

PARTIES

8. Plaintiff, County of Amador ("the County"), is a county located in the Sierra Nevada region of the State of California, in the United States of America.

9. Defendant Department of the Interior ("Department" or "DOI") is a cabinet agency of the United States and is the agency charged by Congress with managing affairs with Native American tribes.

10. Defendant Ken Salazar ("Secretary") is Secretary of the United States

Department of the Interior and is responsible for implementing the mission of the DOI, which includes complying with the governing law while carrying out the United States' trust responsibilities to Indian Tribes. Secretary Salazar is sued in his official capacity.

11. Defendant Donald E. Laverdure ("Acting Assistant Secretary" or "Laverdure") is Acting Assistant Secretary of Indian Affairs in the DOI and is responsible for performing and carrying out the functions of that office. Acting Assistant Secretary Laverdure is sued in his official capacity.

JURISDICTION AND VENUE

12. 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.

13. This is a civil action for review of an action of the United States Department of the Interior, and this court has jurisdiction pursuant to 5 U.S.C. §§ 701-706.

14. This is an action for Declaratory Judgment and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 for the purpose of declaring the rights and other legal relations of any interested party seeking such declaration with regard to a question of actual controversy between the parties as set forth below.

15. This is a civil action challenging agency action in which the Defendants are officers of an agency of the United States acting in their "official capacit[ies] or under color of legal authority," which requires that this action be heard "in a court of the United States . . ." 5 U.S.C. § 702.

16. Venue lies in this judicial district pursuant to 28 U.S.C. §§ 1391(e)(2)-(3) and 5 U.S.C. § 703.

BACKGROUND

17. The Ione Band seeks to establish gaming operations in Amador County, California, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§

2701-2721. To that end, the Band applied to the Secretary in 2004 to have the Plymouth Parcels[1] taken into trust by the United States on the Band's behalf.

18. In connection with its fee-to-trust application, the Band asked the National Indian Gaming Commission ("NIGC") to determine that the Plymouth Parcels qualify as "Indian lands" on which gaming can be conducted under Section 20 of IGRA, 25 U.S.C. § 2719.

19. IGRA prohibits gaming on Indian lands acquired by the United States in trust for an Indian tribe after October 17, 1988, unless one of several exceptions applies. 25 U.S.C. § 2719(a). Since the Plymouth Parcels would be acquired by the Ione Band after that date, gaming is prohibited unless one of the IGRA exceptions applies.

20. One such exception permits Indian gaming on after-acquired lands if the tribe complies with a two-part administrative process (the "two-part test"). This process requires that both the Secretary and the Governor of the State in which the tribe seeks to conduct gaming conclude that gaming would be "in the best interest of the Indian tribe and its members," and would "not be detrimental" to the surrounding community. 25 U.S.C. § 2719(a) and (b)(1)(A)(emphasis added). By imposing these requirements, IGRA protects local interests like those of Amador County, which will be affected by additional large-scale authorized gaming operations, by requiring the Secretary to "consult with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). This "two-part test" designed to give affected local interests a role in the process for authorizing additional gaming is the exception that must, as a matter of law, be satisfied before the Plymouth Parcels

[1] The Plymouth Parcels consist of several parcels of land totaling 228 acres and located both within the City of Plymouth, Amador County, and in the unincorporated area of Amador County. These parcels are not presently owned by the Ione Band.

may be used for Indian gaming operations.

21. The Ione Band, however, chose not to seek to satisfy the requirements of the two-part test. Instead, it has sought to invoke another exception which permits gaming on lands that are taken into trust after October 17, 1988 as 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). To this end the Band filed its Request for an Indian Lands Determination ("Request"), asserting that the Plymouth Parcels should be deemed "restored lands," in connection with its Fee to Trust Application for the same parcels. Were it applicable, as the County does not believe it is, this "restored lands of a restored tribe" exception would permit gaming on the Plymouth Parcels without affording Amador County the protections of the two-part test.

22. The NIGC did not rule on the Band's Request because a Memorandum of Agreement ("MOA") executed in May 2006 between the NIGC and the Department of the Interior provided that when a tribe requests an Indian lands determination under 25 U.S.C. § 2719(b)(1)(B) in connection with a fee-to-trust application to the Department, the responsibility for making that determination would rest with the Department's Office of the Solicitor, Division of Indian Affairs. As a result of this MOA, then-Associate Solicitor, Division of Indian Affairs, Carl J. Artman rendered an opinion on September 19, 2006, that the Plymouth Parcels are Indian Lands relying on the "restored tribe" exception, and then-Associate Deputy Secretary James E. Cason concurred in that determination on September 26, 2006. (Exhibits 3 and 4 hereto, respectively.)

23. Following the issuance of the Artman/Cason memoranda, the County of Amador filed suit in this court seeking to challenge the Indian Lands Determination. *County of Amador v. United States Dep't of Interior,* Case No. 2:07-cv-00527-LKK-GGH (E.D. Cal. filed Mar. 16, 2007). The Ione Band intervened in the action, waiving its tribal immunity as a condition of the County's

non-opposition to its intervention. The federal defendants and the Ione Band moved to dismiss that suit on the ground that the Artman/Cason memoranda did not constitute "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704, but were instead intermediate steps in the process of the Department's review of the Ione Band's application to have the lands at issue taken into trust by the federal government on behalf of the Band, that judicial review of the Indian Lands determinations was therefore required to wait until a final decision is made to approve the Ione Band's trust application and take the land into trust. The Court ultimately granted the motion but stated, "If and when DOI approves the trust application, final agency action will exist, and the county will be able to sue." *County of Amador v. United States Dep't of Interior*, 2007 U.S. Dist. LEXIS 95715, *16 (E.D. Cal. Dec. 13, 2007).

24. The County initially appealed the dismissal to the Ninth Circuit, but then dismissed the appeal in March 2008 in accordance with a stipulation among the parties that the Department would notify the County in writing within seven days of its making a final decision on the Band's trust application.

25. On or about January 16, 2009, David L. Bernhardt, Solicitor in the Department of Interior, sent a memorandum to George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, by which Mr. Bernhardt withdrew the Artman memorandum of September 19, 2006. That letter stated in 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 IGRA***." *See* Exhibit 5, attached

hereto (emphasis added).[2]

26. On February 24, 2009, the U.S. Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379. In that case the Supreme Court held that held that § 19 of the Indian Reorganization Act ("IRA" or "Act"), 25 U.S.C. § 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*." 555 U.S. at 382 (emphasis added).

27. On or about July 15, 2009, Amador County sent a letter to Larry EchoHawk, then-Assistant Secretary of Indian Affairs in the Department, setting forth the reasons that *Carcieri* precludes the Department from taking land into trust on behalf of the Ione Band.

28. On May 24, 2012, Defendant Laverdure made a final decision to take the Plymouth Parcels into trust on behalf of the Ione Band. Mr. Laverdure's ROD reversed the Bernhardt Opinion and reinstated the Artman Opinion, and additionally rejected the conclusion that *Carcieri* precludes the Secretary from taking land into trust for the Ione Band, and held once again that the Parcels are the "restored lands of a restored tribe."

29. If allowed to stand, these determinations, which are abuses of discretion, arbitrary, capricious and contrary to law, would mean that (1) the Secretary would take the Plymouth Parcels into trust on behalf of the Ione Band, in excess of his delegated authority under the IRA, and (2) that Ione Band need not comply with the two-part test in seeking to establish gaming on the Plymouth Parcels, thereby depriving Amador County of the protections Congress mandated it should have in Section 20 of IGRA.

[2] In view of this withdrawal, the ROD's conclusion that the 2006 Artman determination is "grandfathered," and is not subject to the regulations adopted in 2008 (*see* 25 C.F.R., Part 292), is arbitrary, capricious, and contrary to law.

A. The Ione Band Was Never Recognized By The United States, And It Has No Historical Or Modern Connection To The Plymouth Parcels.

30. When, pursuant to a request filed with the Department under the Freedom of Information Act (5 U.S.C. § 552), the County learned of the Band's Request for an Indian Lands Determination, the County presented evidence concerning the status of the Band to the NIGC. This evidence was collected, documented and summarized by an expert ethno-historian.

31. In accordance with the evidence submitted by the County to the NIGC, an independent basis exists for determining that the Department of Interior's final agency action holding that the Ione Band is a "restored tribe" constitutes an abuse of discretion, and is arbitrary, capricious and contrary to law, *viz*., the Ione Band has was never federally recognized and has never established a historic tribal identity that would justify federal recognition.

32. The origins of the Ione Band are unclear and its tribal antecedents undocumented. At the time of first contact with Euro-American settlers, the geographic area in which Amador County is located was occupied by "Plains Miwok" and "Sierra Miwok." Linguistic differences show these two groups separated from each other about 2,000 years ago.

33. While the Ione Band specifically claims to be descended from the Northern Sierra Miwok, no historical or anthropological documentation provided by the Band in support of its Request traces the ancestry of any individual on the Band's current membership roll to any of the twenty-seven aboriginal Sierra Miwok tribelets that were historically located in the Sierra Nevada foothills in the region near or in Amador County.

34. Between 1905 and 1915, the BIA compiled two census lists of landless, non-reservation Indian individuals in California. The individuals identified on these lists as residing in and around Amador County represent both Miwok and

non-Miwok (Maidu/ Nisenan) linguistic and geneaological groups. The Miwok and Nisenan languages are unrelated and belong to entirely separate language families. The linguistic differences are so vast that speakers of one would have been unable to communicate with speakers of the other.

35. Members of the modern-day Ione Band claim to be descendants of two different tribal and linguistic groups, namely the Miwok and the Nisenan, that may have resided in or around Amador County at some time in the last century.

36. The 1915 list compiled by BIA agent John Terrell identifies 20 individuals as residing in Amador County who also appear on the 1905 list compiled by BIA agent C.E. Kelsey. All 20 individuals are identified as "Maidu-Nishinam," not Miwok, ancestry. Pursuant to their Constitution, members of the modern Ione Band of Miwok consider all 20 of these Nisenan individuals to be their ancestors solely because they appear on the 1915 Terrell List. No historical or anthropological documentation provided by the Band in support of its Request links the ancestry of any individual on the 1915 Terrell List to one of the twenty-seven aboriginal Miwok tribelets.

37. In 1900, there were 122 Indians named on the "Indian Schedule" of the federal decennial census in Amador County. Of these, twenty resided at the "Digger Reservation" at Jackson, California. None of these twenty, however, subsequently appeared on the 1915 Terrell list.

38. By 1910, 132 Indians were identified on the "Indian Schedule" of the Thirteenth Census of the United States as residing in Amador County. These individuals were scattered among six different census districts, precincts, or townships. Thirty-seven were identified as residing at the "Digger Reservation" at Jackson, California. Only one of these thirty-seven was identified as a resident of Amador County when the 1915 Terrell List was compiled five years later.

39. The 1910 Census also identified fifteen (15) Indian individuals residing in Amador County as "Ration Indians." Upon information and belief, "Ration

Indians" denoted individuals receiving some type of assistance from the BIA. The Amador County Ration Indians were identified as residing at the "Digger Reservation" at Jackson, California. None of these Indians appear as residents of Amador County when the 1915 Terrell List was compiled five years later.

40. In 1920, ninety-three (93) Indians were identified on the "Population Schedule" of the Fourteenth Census of the United States as residing in Amador County. These individuals were scattered among eight different census districts, precincts, or townships.

41. In 1929, the BIA obtained affidavits ("the 1929 Affidavits") from numerous individuals identified on the 1915 Terrell List as residents of "Ione and vacinity," "Jackson" or "Richey" California. The signers of the 1929 Affidavits were largely unable to identify their tribal affiliation and recorded no link to the Indians on the 1915 Terrell list.

i. No historical documents corroborate the existence of any tribal government structure.

42. The 1915 Terrell List identifies Charley Maximo as "elected chief" of the Indians in the vicinity of Ione. Charley Maximo does not appear as an Amador County resident on the 1905 Kelsey List.

43. In the 1910 Census, Charley Maximo self-identified his birthplace as San Joaquin County. Charley Maximo did not identify himself as "chief" or headman.

44. The BIA affidavits of 1929 identify Charley Maximo as the brother of Mary Mattinas of San Joaquin County. In 1929, Mary Mattinas identified San Joaquin County, not Amador County, as her parents' birthplace and place of residence after their marriage. In 1929, Mary Mattinas was unable to identify her own tribal affiliation, or that of her father or mother. She was also unable to identify her grandparents, or their tribal affiliation(s), but reported that they had been residents of San Joaquin County.

45. Although the 1915 Terrell List identifies Charley Maximo as "elected chief," in 1929, Mary Mattinas, Charley Maximo's sister, was unable to identify any tribal chiefs, captains, or headmen.

ii. No treaties negotiated by the United States with California Indians corroborate the existence of the "Ione Tribe."

Treaty J

46. In the 1850s, the United States negotiated and executed several treaties with displaced California Indians, setting aside lands for the sole use and occupancy of signatory tribes, but the so-called "Ione Band" was not one of those tribes.

47. One such treaty was "Treaty J," signed on September 18, 1851, which would have set aside certain parcels in California's Sierra region. These lands were located in the traditional territory of the Northern Sierra Miwok, from which members of the modern-day Ione Band claim specific ancestry. Treaty J did not specify which portion of these lands, if any, were to be designated for the purported ancestors of the modern-day Ione Band. Treaty J was never ratified by the United States Senate and never attained the force of law.

48. Seven Indian individuals participated in the negotiation and signing of Treaty J. The modern-day Ione Band of Miwok claims lineal descent from five of these signatories, POL-TUCK of the Locolomne tribelet of Plains Miwok, and HIN-COY-E, MAT-TAS, HOL-LOH, and BOY-ER of the Wapumne tribelet of Nisenan**,** notwithstanding their stated tribal affiliation.

49. Although the modern-day Ione Band claims to be predominantly of Sierra Miwok origin, no Treaty J signatory identified his tribal affiliation as Sierra Miwok.

50. Some members of the modern-day Ione Band claim to be descendants of the Locolomne tribelet of Plains Miwok Indians. Only one Amador County signatory of Treaty J, POL-TUCK, identified his tribal affiliation as Locolomne.

Treaties E and F

51. In 1851, the United States and several Indian representatives negotiated and executed Treaties E and F. Like Treaty J, Treaties E and F were never ratified by Congress and never attained the force of law.

52. Treaty E was signed May 28, 1851. The lands to be ceded to the United States under Treaty E were traditionally inhabited by the Central Sierra Miwok and other, non-Miwok Indians. Treaty E did not specify which portion of these lands, if any, were to be designated for purported ancestors of the modern-day Ione Band. No signatory of Treaty E claimed to be of Northern Sierra Miwok descent.

53. Treaty F was signed July 18, 1851. The lands to be ceded to the United States under Treaty F were traditionally inhabited by Nisenan and other non-Miwok Indians. Treaty F did not specify which portion of these lands, if any, were to be designated for purported ancestors of the modern-day Ione Band. No signatory of Treaty F claimed to be of Miwok descent.

iii. The Secretary did not ask the Band to vote on acceptance of the Indian Reorganization Act of 1934 as he did with the federally recognized tribes.

54. Section 18 of the Indian Reorganization Act, as enacted in 1934, contained a provision requiring the Secretary hold a special election, within one year of the "passage and approval of the Act," for each Indian tribe then under federal jurisdiction to decide whether the tribe wished to accept the terms of—and be organized under—the IRA. June 18, 1934, ch. 576, § 18, 48 Stat. 988 (codified at 25 U.S.C. § 478). In Amador County, the Jackson and Buena Vista tribes each voted on June 12, 1935, to accept the terms of the IRA.

55. The Secretary did not ask the Band to vote on acceptance of the Indian Reorganization Act of 1934 as he did with the federally recognized tribes.

///

B. The Department's Inconsistent and Contradictory Positions Concerning the Ione Band's Status.

56. The Department has been utterly inconsistent and self-contradictory in its positions about the Ione Band's status and its connection to any land in Amador County.

57. The ROD itself flatly acknowledges that "[t]he 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." (Exhibit 1, p. 49.)

58. However, the ROD relies on a 1972 letter in which Bureau of Indian Affairs ("BIA") Commissioner Louis Bruce wrote, "Federal recognition was evidently extended to the [Band]" at the time a purchase of 40 acres for the Band was contemplated between approximately 1915 and 1930. The Bruce letter never states that the Band was granted federal recognition between 1915 and 1972.

59. The Bureau itself did not treat the Bruce letter as conclusive on this point at the time it was issued, and no action was ever taken to formally recognize the Ione Band or to take the identified parcels into trust.[3] After the letter was sent, the Department of Interior advised the Band that the question of its federal recognition was under review and that the Band had the affirmative duty to establish that it was entitled to federal recognition.

60. Amador County is informed and believes, and on that basis alleges, that the Bruce letter was never put into effect because shortly after that letter was issued the Department's Solicitor's Office and the Assistant Deputy Secretary for Indian Affairs questioned the basis of the Bruce opinion, and requested further investigation as to the status of the Ione Band.

61. In 1978, the Secretary of the Interior promulgated regulations

[3] In fact, no land was ever taken into trust by the United States for the benefit of the Ione Band. These 40 acres are located approximately 12 miles away from the Plymouth Parcels and are unrelated to the Band's Request.

outlining procedures whereby groups of Indians could attain federal recognition as Indian tribes. 25 C.F.R. §§ 83.1–83.13 ("the acknowledgment regulations").

62. The BIA issued two lists of tribes pursuant to Part 83. The first list identified all federally-recognized Indian tribes (the "1978 List"). The second list identified all groups whose petitions for recognition were on file at the BIA, or who were deemed to have a petition for recognition on file at that time.

63. The Ione Band was placed on the second list, though it had not formally submitted a petition for recognition as of the date the two lists were published in 1978. The Ione Band was included on the second list based on oral representations to the BIA that the Band intended to submit a petition to the Department.

64. In 1990, members of the Band unsuccessfully sought to be acknowledged as a federally-recognized tribe without proceeding through the regulatory acknowledgement process. They also sought to have title to the previously mentioned forty acres quieted in the name of the Ione Band of Miwok Indians, and to have the land declared to be held in trust by the Federal Government.

65. In 1990, the DOI wrote an extensive letter to Glen Villa, Sr., concerning the Ione Band's request for Federal acknowledgment, demonstrating in correspondence dated as early as October 1973 that the Ione Band had not met the criteria for Federal recognition. That letter further explained that the Band "was not recognized as an Indian tribe within the meaning of Federal law," and that the only administrative option for the Band to achieve such Federal status is through the Acknowledgment procedures set forth in the acknowledgment regulations. Letter from Hazel E. Elbert, Deputy to the Assistant Secretary – Indian Affairs (Tribal Services) to Glen Villa, Sr. (Feb. 20, 1990).

66. Ms. Elbert sent a similar letter to Harold Burris on or about February 15, 1990, and to U.S. Senator Alan Cranston on the same date as the Villa letter. A

copy of the Cranston letter is attached as Exhibit 6. Among other things, that letter stated:

> After extensive research in our files regarding the Bureau of Indian Affair's (Bureau) historic relationship with this group, ***we have determined that the Ione Band is not recognized presently to be an Indian tribe within the meaning of Federal law***. . . . 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.
>
> . . .
>
> 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 the group petitioned the Department, through Congressman Harry L. Englebright, to "purchase a tract of land, upon which homes can be built for our use."
>
> . . .
>
> Commissioner Bruce's letter indicates clearly the intent of the Bureau to recognize and establish a trust land base for the Ione Band. ***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. ***The Ione Band had no acknowledged government-to-government relationship with the United States prior to this 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.***

(Emphasis added.)

67. Amador County is informed and believes, and on that basis alleges, that sometime after April 8, 1990, Department staff prepared a memorandum entitled "Ione Acknowledgment Issues." A copy of that memorandum is attached as Exhibit 7. That memorandum relates much of the same history as the Villa and Cranston letters, and explicitly states, "[I]t is clear that the Ione Band was not considered by the Department to be a federally recognized tribe either before or after 1979." *Id*. at 3.

68. On or about August 1, 1990, the Ione Band sued the federal government in this Court, seeking to require the federal government to recognize the Band as a tribe and to have title to the previously mentioned forty acres quieted in the name of the Ione Band of Miwok Indians, and to have the land declared to be held in trust by the Federal Government. *Ione Band of Miwok Indians, et al. v. Harold Burris, et al.*, Civ. No. S-90-0993 LKK/EM (E.D. Cal. Apr. 23, 1992) (hereinafter "*Ione Band Lawsuit*").

69. In its 1991 Motion for Summary Judgment in the *Ione Band* litigation, the United States took the position that "In 1972, the head of BIA, Commissioner Louis Bruce, was not entirely convinced that the Ione Band was federally recognized." (United States of America's Memorandum In Support Of Its Motion To Dismiss and For Summary Judgment at 2, *Ione Band Litigation*, Civ. No. S-90-0993 LKK/EM (E.D. Cal.) (memorandum filed Feb. 14, 1991). The United States further stated, "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 [sic] 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)." *Id*. at 8 (emphasis added). And finally, in its reply brief supporting summary judgment, the Government further stated:

> [T]he [Bruce] 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 [Indian Reorganization Act], 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. 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 [sic] 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 no federal relationship. . . . The government submits that there are undoubtedly tribal groups indigenous to California. . . . that have never come under the government's supervision within the context of "federal recognition."***

See Defendant United States' Reply To Plaintiffs' Opposition To Motion Of The United States For Summary Judgment And To Dismiss at 22-25, *Ione Band Litigation*, Civ. No. S-90-0993 LKK/EM (E.D. Cal.) (memorandum filed Mar. 7,

1991) (emphasis added).

70. The District Court granted the United States' Motion for Summary Judgment because the Band failed to exhaust administrative remedies by applying for recognition through the BIA's acknowledgment regulations process, and holding that the acknowledgement regulations were the sole mechanism for the Ione Band to gain federal recognition. *Ione Band Litigation*, Civ. No S-90-0993 LKK/EM (Apr. 23, 1992, order granting federal defendants' motion for summary judgment).

71. Based on the *Ione Band Litigation,* the BIA's Sacramento Area Director refused to review an economic development agreement submitted by the Band. On appeal to the Interior Board of Indian Appeals ("IBIA"), the Area Director's decision was upheld. *Ione Band of Miwok Indians v. Sacramento Area Director*, 22 IBIA 194, 195 (1992). The IBIA held, "[A]ppellant 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. . . . 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."

72. Amador County is informed and believes, and on that basis alleges,

that sometime after this Court dismissed the federal government from the *Ione Band Litigation*, the Department issued a "Briefing Paper" addressed to the "President of the United States," regarding the status of the Ione Band. A copy of that "Briefing Paper" is attached hereto as Exhibit 8. In that Briefing Paper the Department unequivocally stated:

> It is the Department's position that this group [the Ione Band] has never attained Federal tribal status and is not, therefore, eligible for restoration. . . . the Ione Band was never considered to be a federally recognized tribal entity. It never appeared on any lists of federally recognized tribes and was not asked to vote on acceptance of the Indian Reorganization Act of 1934 as were the federally recognized tribes."

See Exhibit 8, p. 1.

73. The "Briefing Paper" further stated that:

> In 1972, members of the Ione Band secured fee title to thte tract and requested the Department to bring the land under Federal trust. The Commissioner of Indian Affairs authorized such action based on a decision that the Ione Band had "evidently" been recognized by the Department's 1916 land purchase authorization. However, the Commissioner's memorandum was never implemented because the Deputy Assistant Secretary subsequently questioned whether the Ione Band met the Department's criteria for Federal recognition. This issue was not resolved prior to 1975 when the Department held all request for acknowledgement in abeyance pending clarification of the Secretary's authority and the adoption of a fair and uniform process through public rule making. Consequently, when the Federal Acknowledgement regulations became effective in 1978, the Ione Band was considered to be an unacknowledged Indian group subject to its criteria and new procedures.

74. On August 26, 1992, Eddie F. Brown, then-Assistant Secretary-Indian Affairs, wrote a letter to Senator Daniel Inouye, stating in relevant part, "The Department has never viewed the absence of the Ione Band from the Federal Register list of federally recognized tribes as a simple clerical error. ***This group has never attained Federal tribal status and is not, therefore, eligible for restoration of that status.***" A copy of that letter is attached as Exhibit 9

(emphasis added).

75. In 1994, DOI Assistant Secretary Ada Deer addressed the BIA's position concerning the Ione Band's recognition status. Purporting to "clarify the United States' political relationship" with the Band, Assistant Secretary Deer stated in a letter that she was "reaffirming the portion of Commissioner Bruce's letter which reads . . . . 'Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated.'" In other words, Assistant Secretary Deer sought to interpret the Bruce letter as having *retroactively* recognized the Ione Band as an Indian tribe dating back to the early 1900's. The Deer letter contains no mention of the diametrically contrary positions taken by the United States in the *Ione Band Litigation*, the decision of the IBIA that the Band was never recognized, or the many letters discussed above (*see, e.g.*, paragraphs 62-65, 70-72) which expressly stated the Ione Band had never attained Federal tribal status.

76. Also contrary to the aforementioned position of the federal government in the *Ione Band Litigation* and contrary to the acknowledgment regulations, Assistant Secretary Deer ordered the inclusion of the Band on the 1995 BIA list of federally-recognized Indian tribes. 60 Fed. Reg. 9250 (Feb. 16, 1995). Since 1995, the Band has been included on all subsequent BIA lists of federally-recognized tribes.

77. On September 20, 2004, the Band petitioned the National Indian Gaming Council ("NIGC") for an "Indian lands" determination as to the Plymouth Parcels, under the "restored lands for a restored tribe" exception to the prohibition of gaming on lands acquired after 1988. 25 U.S.C. § 2719(b)(1)(B)(iii).

78. Pursuant to the MOA, Associate Solicitor Artman analyzed the Band's eligibility for status as a "restored tribe" under 25 U.S.C. § 2719(b)(1)(B)(iii), and concluded—in reliance on the actions of Assistant Secretary Deer—that the Band qualified as a tribe whose one-time federal recognition had been terminated and

subsequently restored. (Exhibit 3 [Artman Memorandum] at 5.)

79. In reliance on the analysis and conclusions in the Artman Memorandum, then-Associate Deputy Secretary Cason issued his determination, on behalf of the Department, that the Band was a "restored tribe" for purposes of Section 2719(b)(1), and that the 228 acres comprising the Plymouth Parcels would qualify as restored "Indian lands" within the meaning of IGRA, on which Class II or Class III gaming could be conducted. (Exhibit 4 [Cason Letter].)

80. Assistant Secretary Deer's actions did not "restore" the Band to federal recognition within the meaning of IGRA. To the extent that Deer's actions could be deemed "recognition" under IGRA, it directly conflicts with the Department's position in the *Ione Band Litigation* requiring the Band to seek recognition under the acknowledgement regulations to gain recognition, and also violates those regulations. Having previously taken that position in the *Ione Band Litigation*, the government is judicially estopped from taking the opposite position in this litigation.

81. In January 2009, the Solicitor's Office reversed course yet again, and concluded that the Artman/Cason opinions were wrongly decided. The Solicitor therefore withdrew the Artman opinion.

82. The ROD reverses course yet again, rejecting the Solicitor's 2009 rejection of Mr. Artman's 2006 rejection of the Bureau's 1973-1991 rejection of federal recognition of the Ione Band.

C. The Department's Conclusion That *Carcieri v. Salazar* Does Not Preclude This Trust Acquisition Is Arbitrary And Capricious And Contrary To Law, Because (1) It Fails To Cite Any Evidence That The Ione Band Had An Historical Tribal Identity, (2) It Ignores Evidence Presented By The County That No Such Identity Existed, (3) Its Interpretation of "Under Federal Jurisdiction" Is Contrary to Law, and (4) The Ione Band Was Not "Under Federal Jurisdiction" In June 1934.

83. The Secretary's authority to take land into trust on behalf of Indian

tribes and Indians is found in the Indian Reorganization Act, specifically 25 U.S.C. § 465. Section 19 of the IRA defines the terms "Indian" and "tribe." The U.S. Supreme Court in *Carcieri*, held that Section 19 of the Indian Reorganization Act, 25 U.S.C. "§ 479 limits the Secretary [of Interior]'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*." 555 U.S. at 382 (emphasis added). To the extent the Secretary proposes to take land into trust on behalf of members of a tribe that was *not* under federal jurisdiction in June 1934, the Secretary exceeds his delegated authority, and usurps power that may properly only be exercised by Congress.

84. The ROD relies on the fact that the United States sought to purchase land for certain landless Indians in Amador County in 1915 and thereafter. However, there is no record evidence that the Ione Band were organized as a *tribe*—federally-recognized or otherwise—in June 1934. To the contrary, the government clearly took the position in 1991 in the *Ione Band Litigation* that the Ione Band had never been recognized as a "tribe" within the meaning of the IRA; that the Bruce letter did not alter that fact; and that the only way for the Ione Band to gain federal "recognition" was to proceed through the federal acknowledgement regulations adopted by the Secretary in 1978 (25 C.F.R. §§ 83.1-83.11). Having previously taken that position in the *Ione Band Litigation*, the government is judicially estopped from taking the opposite position in this litigation. Consequently, under the plain holding of *Carcieri* the Secretary lacks the authority to take land into trust on behalf of the Ione Band.

85. Status as a "tribe" requires evidence of a sovereign entity, exercising governmental authority over its members—the formation of "bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare . . . ." *Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 (9th Cir. 1991). *See also* 25 C.F.R. § 83.7(c) (to be recognized as a "tribe" under the

Secretary's regulations, the petitioner must demonstrate that it has "has maintained political influence or authority over its members as an autonomous entity from historical times until the present."). "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)).

86. The ROD cites no evidence that the Ione Band existed as a "tribe" in 1934—a sovereign entity exercising governmental powers over its members—rather than a handful of landless Indians. Indeed, the evidence is to the contrary, as discussed above. As such, the Ione Band could not have been a tribe "under federal jurisdiction" in June 1934. Under the plain holding of *Carcieri*, the Secretary lacks the authority to take land into trust for the Ione Band under the IRA.

87. Moreover, even if the Ione Band did have a tribal structure, that still does not mean that the Band had a government-to-government relationship with the federal government in 1934. As the United States noted in its reply brief in the *Ione Band Litigation*, "There are a number of such tribes who are known to the federal government to exist in some form, but with which there is no federal relationship. . . . The government submits that there are undoubtedly tribal groups indigenous to California. . . . that have never come under the government's supervision within the context of 'federal recognition.'" (Defendant United States' Reply To Plaintiffs' Opposition To Motion Of The United States For Summary Judgment And To Dismiss at 23-25, *Ione Band Litigation*, Civ. No. S-90-0993 LKK/EM (E.D. Cal.) (memorandum filed Mar. 7, 1991) (emphasis added).)

88. The ROD is internally inconsistent with respect to the Ione Band's status in 1934. Its conclusion that the Ione Band was "under federal jurisdiction" in 1934 is based on the government's efforts to acquire land for some Indians near

Ione prior to that date, yet the ROD itself directly states that "[t]he actions of the Department in furtherance of its efforts to acquire lands for the Indians at Ione are not conclusive as to the Tribe's recognized tribal status."

89. Amador County is informed and believes, and on that basis alleges, that "members" of the Ione Band never received services made available to members of Indian "tribes" by the Bureau of Indian Affairs prior to the actions taken by Ada Deer in 1994.

D. The Federal Government's Determination That the Ione Band Is a "Restored" Tribe Constitutes an Abuse of Discretion and Is Arbitrary, Capricious and Contrary to Law, Because Even If The Ione Band Was Recognized, (1) It Was Never Terminated, and (2) It Was Never Lawfully Restored.

90. The conclusion reached by the ROD that the Plymouth Parcels constitute the "restored lands of a restored tribe" entirely fails to consider an important aspect of the problem, runs counter to the evidence that was before the Department, and/or is so implausible that it cannot be attributed to a difference in view, or explained as the product of agency expertise.

91. As set forth in great detail above, The United States took the position in the *Ione Band Litigation*, and in its briefing to the President, and the Interior Board of Indian Appeals held, that the Band was never federally-recognized, and that the Bruce letter did not alter that fact. The facts presented to the Department by the County bear that conclusion out.[4] Because the Band was never federally-recognized, it could not be "terminated" and then "restored."

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[4] Neither the Artman Memorandum, which the ROD adopts and incorporates, nor the ROD itself mention any of the evidence submitted by the County to the NIGC. On information and belief, neither Mr. Artman nor Defendant Laverdure considered the historical evidence submitted by the County. Because the County was therefore effectively denied the opportunity to present these facts to Mr. Artman and Defendant Laverdure (and through them the Department) the determination of the Department is an abuse of discretion and arbitrary, capricious and contrary to law.

92. However, *even assuming arguendo* that the Band had been federally-recognized, the government's position in the *Ione Band Litigation* cannot be interpreted as the equivalent of "termination." As the ROD itself states, "only Congress can terminate" an Indian tribe's status as a recognized tribe. *See* Exhibit 1 (ROD), p. 53 (citing *United States v. Lara*, 541 U.S. 193, 200 (2004)).

93. Moreover, *even assuming arguendo* that the Band had been recognized and then terminated, Ada Deer's 1994 letter could not lawfully "restore" the Band to federal recognition. As the federal government argued, and this Court held, in the *Ione Band Litigation*, the only lawful means by which the Ione Band could be federally-acknowledged was by proceeding through the Acknowledgement Regulations, which it never did. Having previously taken that position in the *Ione Band Litigation*, the government is judicially estopped from taking the opposite position in this litigation.

COUNT I

(Declaratory Relief-IRA/*Carcieri*)

94. The preceding paragraphs are incorporated as if fully set forth herein.

95. There is an actual controversy within the meaning of the federal Declaratory Judgment Act, 28 U.S.C. § 2201, and an actual case and controversy under Article III of the United States Constitution. The Department's determination that the Ione Band was "under federal jurisdiction" in June 1934 constitutes an abuse of discretion and is arbitrary, capricious, and contrary to law. As a result of the Department's illegal determination, the Department has approved the Band's fee-to-trust application as to the Plymouth Parcels, and anticipates taking those parcels into trust for the Band in excess of its jurisdiction under the Indian Reorganization Act, as interpreted by *Carcieri v. Salazar*. The Band plans to conduct Class III gaming on those lands, which are located within Amador County, and will immediately move to construct, open, and operate a large-scale Class III gaming facility. A Class III gaming facility built on the

Plymouth Parcels will cause massive environmental, traffic, public safety, law enforcement and social service problems for the residents and government of Amador County, and will be difficult, if not impossible to satisfactorily mitigate. Moreover, a Class III gaming facility is entirely inconsistent with the Amador County General Plan. As such, the Department's determination constitutes an imminent, direct, and substantial threat of irreparable harm to the County's interests, and those of its residents.

96. The County's request for declaratory relief is ripe for review. By the ROD, the Department has made its final determination to take the Plymouth Parcels into trust on behalf of the Ione Band.

97. This controversy presents definite and highly important questions of federal law.

98. In light of the foregoing, a declaratory judgment by this court is both necessary and proper.

COUNT II

(Injunctive Relief-IRA/*Carcieri*)

99. The preceding paragraphs are incorporated as if fully set forth herein.

100. The ROD's determination that the Ione Band was "under federal jurisdiction" in June 1934 constitutes an abuse of discretion and is arbitrary, capricious, and contrary to law. As a result of the Department's illegal determination, the Department has approved the Band's fee-to-trust application as to the Plymouth Parcels, and anticipates taking those parcels into trust for the Band in excess of its jurisdiction under the Indian Reorganization Act, as interpreted by *Carcieri v. Salazar*. The Band plans to conduct Class III gaming on those lands, which are located within Amador County, and will immediately move to construct, open, and operate a large-scale Class III gaming facility. A Class III gaming facility built on the Plymouth Parcels will cause massive environmental, traffic, public safety, law enforcement and social service problems for the residents

and government of Amador County, and will be difficult, if not impossible to satisfactorily mitigate. Moreover, a Class III gaming facility is entirely inconsistent with the Amador County General Plan. Thus, the Department's determination to grant the fee-to-trust application threatens the County's interests, and those of its citizens, with imminent, direct, and substantial harm. That harm, once it occurs, is irreparable.

101. Now that the fee-to-trust is granted, no remedy short of injunctive relief will alleviate the imminent, direct, and substantial harm the County faces as a result of the Department's determination. Only if the BIA is enjoined from taking the Plymouth Parcels into trust will that harm be prevented.

102. The County's request for injunctive relief is ripe for review. By the ROD, the Department has made its final determination to take the Plymouth Parcels into trust on behalf of the Ione Band.

103. This controversy presents definite and highly important questions of federal law.

104. In light of the foregoing, injunctive relief is both necessary and proper.

COUNT III

(Declaratory Relief-IGRA)

105. The preceding paragraphs are incorporated as if fully set forth herein.

106. There is an actual controversy within the meaning of the federal Declaratory Judgment Act, 28 U.S.C. § 2201, and an actual case and controversy under Article III of the United States Constitution. The Department's "Indian Lands" determination constitutes an abuse of discretion and is arbitrary, capricious, and contrary to law. As a result of the Department's illegal determination, the Department has approved the Band's fee-to-trust application as to the Plymouth Parcels. The Band plans to conduct Class III gaming on those lands, which are located within Amador County, and will immediately move to construct, open, and operate a large-scale Class III gaming facility in Amador

County. A Class III gaming facility built on the Plymouth Parcels will cause massive environmental, traffic, public safety, law enforcement and social service problems for the residents and government of Amador County, and will be difficult, if not impossible to satisfactorily mitigate. Moreover, a Class III gaming facility is entirely inconsistent with the Amador County General Plan. As such, the Department's determination constitutes an imminent, direct, and substantial threat of irreparable harm to the County's interests, and those of its residents.

107. The County's request for declaratory relief is ripe for review. By the ROD, the Department has made its final determination to take the Plymouth Parcels into trust on behalf of the Ione Band.

108. This controversy presents definite and highly important questions of federal law.

109. In light of the foregoing, a declaratory judgment by this court is both necessary and proper.

COUNT IV

(Injunctive Relief-IGRA)

110. The preceding paragraphs are incorporated as if fully set forth herein.

111. The Department's determination that the Plymouth Parcels constitute "Indian lands" on which gaming can be conducted, threatens the County's interests, and those of its citizens, with imminent, direct, and substantial harm. That harm, once it occurs, is irreparable. As a result of, and in reliance on, the Department's determination, the fee-to-trust application has been approved. Once the land is taken into trust, the Band will be able to conduct Class III gaming on the Plymouth Parcels. Accordingly, unless this Court enjoins the processing of the fee-to-trust application or grants other effective relief, the resulting harm to the County's interests and those of its citizens will be substantial and irreparable.

112. No remedy short of injunctive relief will alleviate the imminent, direct, and substantial harm the County faces as a result of the Department's

determination. Only if the BIA is enjoined from taking the Plymouth Parcels into trust will that harm be prevented.

113. The County's request for injunctive relief is ripe for review. By the ROD, the Department has made its final determination to take the Plymouth Parcels into trust on behalf of the Ione Band.

114. This controversy presents definite and highly important questions of federal law.

115. In light of the foregoing, injunctive relief is both necessary and proper.

PRAYER FOR RELIEF

WHEREFORE, the County respectfully requests that this Court enter judgment in its favor and against Defendants as follows:

A. That this Court adjudge, declare, and decree that the Department's determination to take the Plymouth Parcels into trust on behalf of the Ione Band is arbitrary, capricious, and contrary to law, and exceeds the authority delegated to the Secretary under the Indian Reorganization Act.

B. That this Court adjudge, declare, and decree that the Department's determination that the Tribe is a "restored Tribe" under IGRA section 20 is arbitrary, capricious, and contrary to law;

C. That this Court adjudge, declare, and decree that the Department's determination that the Plymouth Parcels are "restored lands for a restored Tribe" under IGRA section 20 is arbitrary, capricious, and contrary to law;

D. That this Court enter an order pursuant to 28 U.S.C. § 2202 enjoining the Department from taking the Plymouth Parcels into trust on behalf of the Ione Band;

E. That this Court enter judgment in favor of the County for its costs and reasonable attorneys' fees to the extent permitted by law; and

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F. That this Court award the County such further relief as this Court may deem just and proper.

Dated: June 27, 2012

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: /s/James R. Parrinello
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