KENNETH R. WILLIAMS, State Bar No. 73170
Attorney at Law
980 9th Street, 16th Floor
Sacramento, CA 95814
Telephone: (916) 543-2918
Fax: (916) 446-7104

Attorney for Plaintiffs
No Casino in Plymouth and Citizens Equal Rights Alliance

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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

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

NATURE OF THE ACTION

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

PARTIES

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

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

15. The individual Defendants are:

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

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

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

/ / /

/ / /

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

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

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

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

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FIRST CLAIM FOR RELIEF

DOI's Violation of the Indian Reorganization Act of 1934

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

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

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

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

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

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

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

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

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

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

SECOND CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

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

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

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

67. Section 151.10(h) requires the Secretary and DOI to consider whether the tribe has provided sufficient, specific information to insure that the potential environmental impacts of the project are considered before the land is taken into trust. The DOI and Secretary do not address this issue in the ROD and it not clear if the Ione Indians have provided the required information.

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

69. Section 151.13 requires the tribe to furnish title evidence meeting the *Standards For the Preparation of Title Evidence in Land Acquisitions by the United States* issued by the United States Department of Justice. The title evidence should list all liens, encumbrances and title infirmities on the land to be acquired. And those encumbrances, liens and infirmities must be removed prior to acquisition if they make title to the land unmarketable. The DOI and Secretary do not address this issue in the ROD and it not clear if the Ione Indians have provided the required information or if the Parcels were cleared of all liens, encumbrances or infirmities.

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

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

THIRD CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

78. The DOI's and Secretary's decision to take land into trust in favor of the Ione Indians free from State and local regulation and taxation, as though it is public domain land, is an unconstitutional infringement on private land titles and on State and local police power to regulate its citizenry for the benefit of all. It is also a violation of the equal footing doctrine and the principles of federalism outlined by the Supreme Court in *Hawaii v. Office of Hawaiian Affairs*, and in the Tenth Amendment of the Constitution

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

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

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

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

FOURTH CLAIM FOR RELIEF

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

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

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

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

85. Nor are the Parcels "restored lands" under IGRA for at least three reasons. First the Ione Indians are not landless. They have a potential ownership interest: (1) in 40 acres near Ione; (2) property in the City of Ione, (3) commercial property in the City of Plymouth, and (4) five parcels totaling 47 acres adjacent to Plymouth. Second, any ancestral lands of the Ione Indians in Amador County were relinquished in the last half of the 19th century. And third any claim by Ione Indians in Amador County for compensation for any ancestral lands was settled in the first half of the 20th century. Furthermore the subject Parcels are far from Ione and any potential ancestral or historical claims of the Ione Indians. Taking the property into trust does not make it "restored lands" for IGRA purposes,

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

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

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

FIFTH CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PRAYER FOR RELIEF

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

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

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

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

/ / /

/ / /

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

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

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

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

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

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

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

/ / /

/ / /

/ / /

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

Dated: September 28, 2012

Respectfully submitted,

/s/ Kenneth R. Williams

KENNETH R. WILLIAMS
Attorney for Plaintiffs
No Casino In Plymouth and
Citizens Equal Rights Alliance