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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, v. SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, *et al.* Defendants.	Case No. 2:12-cv-01748-TLN-CMK **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS (FRCP 12(c))** Date: March 27, 2014 Time: 2:00 p.m. Place: Courtroom No. 2 Judge: Honorable Troy L. Nunley

INTRODUCTION

Plaintiffs, NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, respectfully submit this motion for judgment on the pleadings on their first claim for relief. In their first claim for relief, Plaintiffs allege that the Federal Defendants do not have the authority to take land into trust for the Ione Band because it was not a "recognized tribe now under federal jurisdiction" in 1934 when the Indian Reorganization Act (25 U.S.C. §§ 461-479; IRA) was enacted. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

The Plaintiffs are entitled to a judgment on the pleadings on the first claim for relief because the issue of whether or not the Ione Band of Miwok Indians was a federally recognized tribe was decided by Judge Karlton of this Court in Ione Band of Miwok Indians et al. v. Harold Burris et al. (including the United States) (USDC ED Cal. No. CIV-S-90-0993).[1] Specifically, in the Ione v. Burris case, which involved the same parties and the same federal recognition issues that are involved here, Judge Karlton determined that the Ione Band did not have a government and was not a federally recognized tribe.[2] (RJN Nos. 16, 17, 18, 19 and 20.) This determination is conclusive and binding on the Defendants in this case. And, as is outlined in detail below, it requires that the first claim for relief in this case be resolved in Plaintiffs' favor.

Furthermore, Judge Karlton reached this conclusion at the urging of the United States and the individual named defendants who were also members of Ione Band of Miwok Indians (known as the Burris faction).[3] As is outlined below, the United States filed a motion for summary judgment which was joined by the Burris faction of the Ione Band of Indians and granted by Judge Karlton. Both the United States and the Burris faction filed declarations in support of the motion admitting that the Ione Band was not a federally recognized Indian tribe. These declarations, and other pleadings of the defendants in the Ione v. Burris case, are binding admissions and the same Defendants in this case are estopped from claiming otherwise here.

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[1] Plaintiffs, concurrent with the filing of this motion, are also submitting a Request for Judicial Notice (RJN) of relevant Court's Orders and key pleadings in the Ione v. Burris case. Plaintiffs request that the Court take judicial notice of these documents and the entire Court file as the Court deems necessary and appropriate. It should also be noted that some, but not all, of the pleadings and orders in the Ione v. Burris are included in the Administrative Record.

[2] The Plaintiffs in the Ione v. Burris case were led by Nicolas Villa, Sr. who claimed to be Tribal Chairman of the Ione Band of Miwok Indians. (RJN No. 1.) The group of Ione Indians led by Mr. Villa became known as the "Villa faction".

[3] The individual Indian defendants in the Ione v. Burris case were led by Harold Burris, Sr., who also claimed to be the Chairperson of the Ione Band. (RJN No. 3.) This group became known "Burris faction". The Burris and Villa factions of Ione Indians apparently merged with other factions into one group of Ione Indians. This combined group recently sought, and was granted, leave to intervene in this case. (Electronic Case Filing (ECF) Nos. 46 &57.)

LEGAL STANDARDS

Federal Rule Civil Procedure, Rule 12(c) provides that: "After the pleadings are closed - but early enough not to delay trial - a party may move for a judgment on the pleadings." In this case the pleadings were finally closed on November 26, 2013, when the Intervenor Defendant filed its Answer to Plaintiffs' First Amended Complaint. (ECF No.57.) The Federal Defendants filed their Answer on December 10, 2012. (ECF No. 14.)

Although Rule 12(c) does not specifically mention partial motions for judgment on the pleadings on one claim for relief, it does not prohibit them, *Stigliabotti v. Franklin Resources, Inc.*, (ND Cal. 2005) 398 F.Supp.2d 1094, 1097. And, in fact, it is common practice for courts to allow partial motions for judgment on the pleadings. *Moran v. Peralta Community College Dist.*, (ND Cal. 1993) 825 F.Supp. 891, 893. In addition, as is outlined below, a resolution of the Plaintiffs' first claim for relief could resolve this entire case. If the Ione Band is not a recognized tribe qualified to have trust lands, then it is not entitled to build a casino on those lands.

Furthermore, the Court's consideration of this motion will not delay the trial. A trial date has not yet been set by the Court. The Ione Band filed its answer to the Plaintiffs' First Amended Complaint only two and a half months ago. And the parties are just now considering briefing schedules for potential cross-motions for summary judgment. But, if the Court agrees with this motion, it could eliminate the need for a trial and/or cross-motions for summary judgment. These issues were already litigated and decided by Judge Karlton in the Ione v. Burris case. There should be no need for this Court to schedule a trial to re-litigate these same issues here.

The standard applied to a Rule 12 (c) motion is essentially the same as that applied to Rule 12(b)(6) motions to dismiss. A motion for judgment on the pleadings is appropriate when, assuming all the material facts in the subject pleadings are true, the moving party is entitled to judgment as a matter of law. *Fleming v. Pickard*, (9th Cir. 2009) 581 F.3d 922, 925. When

deciding a Rule 12(c) motion, the Court can consider the complaint, the answers, and any documents attached to, or mentioned in, those pleadings. The Court can also consider documents which, though not attached, are mentioned in or are integral to the pleading. And, finally the Court can consider matters and documents subject to judicial notice. *L-7 Designs, Inc., v. Old Navy LLC* (2nd Cir. 2011) 647 F.3d 419, 422. But if there is an inconsistency between the allegations in the pleading and the referenced document, the document governs and trumps contrary allegations. *Steckman v. Hart Brewing Inc.*, (9th Cir. 1998) 143 F.3d 1293, 1295-1296.

Plaintiffs, in their First Amended Complaint, allege that the Ione Band was not a federally recognized tribe in 1934 and therefore, pursuant to the Supreme Court's 2009 *Carcieri* decision, it is not qualified to the benefit of a fee-to-trust transfer under the Indian Reorganization Act. (ECF No. 10 at 1-17.) In Paragraph 32 of the First Amended Complaint, Plaintiffs allege that the Department of Interior had previously determined that the Ione Band was not a federally recognized tribe. (ECF No. 10 at 12.) Both the Federal Defendants and the Intervener Ione Band responded by stating that this allegation "appears to consist of characterizations of filings by the United States in Ione Band of Miwok Indians, et al. v. Harold Burris, et al., Civ. No. S-90-0993 LKK/EM (E.D. Cal.), which speak for themselves and are the best evidence of their content." (ECF No. 14 at 8 and ECF No. 35-5 at 8.) Plaintiffs agree that the orders and filings of the defendants in that case speak for themselves. These filings tell the parties and Court in this case, that the Ione Band was not a federally recognized tribe in 1934 and, therefore, does not qualify for the fee-to-trust benefits of the IRA. Plaintiffs bring this motion based on the allegations in the First Amended Complaint and Defendants responses to those allegations in their Answers. This motion is also based on judicial notice of the pleadings and Court orders in Ione v. Burris which is specifically referenced by the Defendants in their Answers and is specifically referenced in portions of the Administrative Record lodged by the Federal Defendants in this case.

STATEMENT OF THE CASE

This lawsuit was triggered by the Record of Decision (ROD) of the Bureau of Indian Affairs (BIA) dated May 24, 2012 and published May 30, 2012 (77 Fed. Reg. 31871-31872, May 30, 2012.) The ROD purports to place 228.04 acres of privately owned land into trust for the Ione Band for gaming purposes. The land is located in and near the City of Plymouth, Amador County. The property is not owned by the Ione Band. Instead, only10 of the 12 parcels listed in the ROD and the subject of the proposed fee-to trust transfer are owned by private non-Indian investors who hope to reap the economic benefits of building and operating an Indian casino in conjunction with the Ione Band as a front group.

This lawsuit was filed on June 29, 2012, (ECF No. 1) and Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief was filed on October 1, 2012 (ECF No. 10). The Federal Defendants filed their Answer on December 10, 2012. (ECF No. 14.) And the Intervenor Ione Band filed its Answer on November 26, 2013. (ECF No. 57.) Plaintiffs, in their Amended Complaint named several federal officials and employees with the Department of Interior (DOI), the Bureau of Indian Affairs (BIA), the Office of Indian Gaming (OIG) and the National Indian Gaming Commission (NIGC) who were involved in preparing or approving the ROD. The Amended Complaint includes five causes of action:

1. **First Claim for Relief** - The Federal Defendants do not have authority to take land into trust for the Ione Band because it was not a "recognized tribe now under federal jurisdiction" in 1934 when the Indian Reorganization Act (25 U.S.C. §§ 461-479; IRA) was enacted per the Supreme Court. *Carcieri v. Salazar,* 555 U.S. 379 (2009).
2. **Second Claim for Relief** - The Federal Defendants failed to comply with their own regulations when they reviewed and approved the ROD and their approval of the ROD was arbitrary, capricious and an abuse of discretion. 25 C.F.R. §§ 151.10 & 151.11.

3. **Third Claim for Relief** – The Federal Defendants do not have the authority take privately owned lands into trust for the Ione Band free of State and local regulation. To do so, would violate the principles of federalism recently confirmed by the Supreme Court. *Hawaii v. Office of Hawaiian Affairs* 129 S.Ct 1436 (2009).
4. **Fourth Claim for Relief** - The Federal Defendants incorrectly decided that, assuming the lands are taken into trust, the subject property would qualify as "restored land for a restored tribe" under the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2719.
5. **Fifth Claim for Relief** – The Federal Defendants failed to comply with the National Environmental Policy Act when they reviewed and approved the fee-to-trust transfer and the casino project. 42 U.S.C. §§ 4321 et.seq. And 40 C.F.R. §§ 1500 et.seq.

Also, it is important to note that two other lawsuits were initiated challenging the ROD. First a lawsuit was initiated by the County of Amador. County of Amador, California v. The United States Department of Interior (Case No. 2:12-cv-01710-TLN ED Cal.) In that case, as the Plaintiffs did in this case, Amador County alleged that federal defendants incorrectly determined that the Ione Band was a "recognized tribe now under federal jurisdiction" in 1934" and therefore lacked authority to take lands into trust for the Ione Band. (Case 2:12-cv-1710; ECF No. 14 at 8-13.) Second, the Villa faction of the Ione Band of Miwok Indians also challenged the ROD as being "arbitrary and capricious". Villa v. Salazar (Case No. 2:13-cv-00700-TLN ED Cal.) Furthermore, the Ione Band in that case alleged that the "group purporting to be the Ione Band" in the ROD has never been federally recognized. (Case 2:13-cv-0700; ECF No. 1 at 5.) All three cases were related by the Federal Defendants. (See Case 2:13-cv-0700; ECF No. 18.) But the Villa v. Salazar case was later voluntarily dismissed. (Case 2:13-cv-0700; ECF No. 21.) Plaintiffs request that the Court take judicial notice of these two related cases as necessary and appropriate. They confirm that the Ione Band was not a federally recognized tribe in 1934.

SUMMARY OF THE PRIOR CASE

1. Initial Pleadings.

The Ione Band of Miwoks filed its Complaint for Declaratory Relief, Quiet Title, Breach of Trust and to Compel Agency Unlawfully Withheld against the Burris faction and the United States on August 1, 1990. (RJN No, 1.) In Paragraph 3 of the complaint, the Ione Band alleges that it "has been recognized by the United States as being under federal jurisdiction." The Ione Band includes similar allegations throughout the complaint. For example, in Paragraph 14 they allege that "the Ione Band of Miwok Indians were (sic) recognized as a tribe by the federal government." The Ione Band sought a declaration from the Court that the Ione Band has been and remains a federally recognized tribe with all the rights and sovereignty enjoyed by other Indian tribes. It also sought title to land held in common with the non-federal defendants who were members of the Burris faction of Ione Indians. And, the Ione Band challenged the constitutionality of the federal tribal recognition regulations found at 25 C.F.R. Part 83. (*Id.*)

The United States filed its Answer in Ione v. Burris e on September 28, 1990 and denied all the contentions of the Ione Band including the contention that it was a federally recognized tribe. (RJN No. 2.) The Burris faction of Ione Indians filed their Answer on October 22, 1990, and also denied that the Ione Band is a federally recognized tribe. (RJN No. 3.)

2. Initial Status Conference Reports.

The parties in the Ione v. Burris lawsuit each filed separate Status Reports on January 7, 1991. The parties stated their respective positions with respect to the various allegations in the Complaint. The Plaintiffs outline their claims in detail including a contention that the United States breached its fiduciary obligations to the Ione Band by failing to acknowledge and recognize its sovereign status as a tribe. (RJN No. 4.)

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Consistent with its Answer to the Ione Band's Complaint, the United States makes the following crucial judicial admission in its Status Report: "The [United States] government denies that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (RJN No. 5; emphasis added.) And the Burris faction of Ione Indians makes the same important assertion and judicial admission in their Status Report: "Defendants [Ione Indians] deny that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (RJN 6; emphasis added.) As noted above, the Burris faction is one of the Intervenor's predecessors in interest. Thus, given this privity relationship, this judicial admission of the Burris faction also binds the Intervenor.

3. United States' Motion for Summary Judgment.

As anticipated in its Status Conference Report, the United States filed a Motion for Summary Judgment in February 1991. (RJN No. 7.) The Burris faction joined that motion. (RJN No. 8.) In the "FACTS" section of their motion for summary judgment, the United States summarized the different positions of the Villa and Burris factions regarding federal recognition. At that time, the Villa faction claimed federal recognition and the Burris faction denied it.

The United States motion was based on the fact that the Ione Band was notified in 1979 that they were not a federally recognized tribe and that, if they wanted to become a federally recognized tribe, they had to complete an application for federal recognition pursuant to 25 CFR Part 83. In addition, the Ione Band did not challenge the 1979 decision of the federal government that they were not a recognized tribe within the 6 years allowed by the APA. Nor did the Ione Band complete the Part 83 process. Consequently, the United States argued that the Ione Band's lawsuit was barred by the statute of limitation and by a failure to exhaust administrative remedies under Part 83.

A key declaration offered in support of the United States' motion was submitted Michael L. Lawson, Ph.D., a respected historian with many years of experience with the Bureau of Indian

Affairs (BIA). (RJN No. 9). After searching and reviewing all of the BIA's historical records, Dr. Lawson concluded that: "the United States has never extended federal recognition to the Ione Bank of Miwok Indians as an Indian tribe." (RJN No. 9 at 2: 16-18; emphasis added)

Another important declaration filed in support of the United States motion for summary judgment was by Arthur G. Barber, an employee of the BIA, who discussed the federal recognition issue with both the Villa faction and the Burris faction in 1989. (RJN No. 10.) Mr. Barber told representatives of the Villa faction that the Ione Band was not a federally recognized tribe and that they should apply for federal recognition under Part 83 if they wished to receive federal services from the BIA. In contrast, representatives of the Burris faction of Ione Indians told Mr. Barber they and "other members of Ione Band did not wish to be federally recognized." (*Id.*)

The Ione Band opposed the United States motion for summary judgment and the United States filed a reply brief. (RJN No. 11.) In its detailed reply brief, the United States addressed all the legal and factual arguments raised by the Ione Band in support of their claim that they were, and are, a federally recognized tribe. The United States reasserted its contention that the Ione Band was not a federally recognized tribe and that they were specifically notified in 1979 that they were not a federally recognized tribe. Consequently, their claim that they were a federally recognized tribe was barred by the statute of limitations.

The United States filed a Supplemental Brief (RJN No. 12) and supporting declaration (RJN No. 13) in support of its motion for summary judgment in March 1991. The purpose of this supplemental brief was to bring to the Court's additional information that the Ione Band knew that they were not a federally recognized tribe as early as 1973. The United States also provided information that undermined and discredited the plaintiffs' reliance on the 1972 BIA letter from Commissioner Bruce to support its claim of federal recognition. (RJN No. 13, Exh. 1)

Pursuant to Judge Karlton's request, in October 1991, the United States submitted a second supplemental brief on whether or not the Part 83 regulations were the exclusive means to obtain tribal recognition. (RJN No. 14.) The United States argued that the Part 83 process was not the exclusive means to obtain tribal recognition. Congress retained the authority to recognize tribes by legislative means. In addition there are "treaty" tribes which are recognized tribes that were signatories to a treaty with the United States, ratified by the United States Senate. The United States confirmed that the Ione Band was not recognized by an Act of Congress or by a treaty. And, according to the United States, tribal recognition is available administratively only through the Part 83 processes. The United States noted that it had repeatedly urged the Ione Band to complete the Part 83 process.[4] The United States again requested that Judge Karlton dismiss the Ione Band's complaint "for failure to timely challenge the government's determination that plaintiff Ione Band of Miwok Indians is not a federally recognized tribe." (*Id.* at 12)

In its reply brief the United States addressed the final "absurd argument" of the Ione Band based on the settlement of unrelated litigation involving other California tribes that were terminated by legislation. (RJN No. 15.) This settlement did not apply to the Ione Band because they conceded that they were not affected by the termination legislation. Also, the United States disputed the Ione Band's contention that it could be recognized administratively outside the Part 83 process: "The government's position has been and remains that the acknowledgement regulations [Part 83] constitute the exclusive administrative means of obtaining full . . . federal tribal recognition." (RJN No. 15, p. 2 fn. 1; emphasis in the original.) And the United States again urged the Ione Band to avail themselves of the Part 83 process. (*Id.*)

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[4] It is Plaintiffs' understanding that the Ione Band had initiated the Part 83 Process about 30 years ago, but it still has not completed that process and has apparently abandoned it.

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

4. Judge Karlton's Decision Granting the Motion for Summary Judgment.

Judge Karlton issued his decision granting the United States motion for summary judgment on April 23, 1992. (RJN No. 16.) Judge Karlton outlined, in detail the procedural and factual history of the case and the Ione Band's effort to compel the United States to recognize them as a tribe. Judge Karlton summarized all the alternative recognition mechanisms that had been presented and discussed by the United States and the Ione Band, and concluded:

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

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Judge Karlton also found that the challenge by the Ione Band was time barred because they failed to challenge the 1979 determination by the United States that the Ione Band was not a federally recognized tribe within the allowed six-years and, therefore, was placed on the list of unrecognized tribes. The Court found that any injury suffered by the Ione Band was **"the same as that suffered by all unrecognized tribes at the time the regulations were promulgated"**. Thus the Ione Band's challenge to the regulations was "barred by the six-year statute of limitation applicable to claims against the government." (RJN No. 16 at 18; emphasis added.)

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

Although summary judgment was issued in favor of the United States in 1992, the case continued between the Ione Band and the non-federal defendants for four more years. The County of Amador was added as a defendant. The Ione Band tried several more times to assert that it had received federal recognition through an informal (not Part 83) administrative process by the Bureau of Indian Affairs. The litigation became intense as the Ione Band divided itself into three competing factions ("Villa", "Burris" and "Hill" factions). There were over 400 separate docket entries in Ione Band v. Burris between 1992, when Judge Karlton granted the United States' motion (CD No. 73; RJN No. 16) and 1996 when Judge Karlton issued his final Order and Judgment in the case. (CD Nos. 500 &501; RJN Nos. 19 & 20.) But this additional and intense litigation did not change the outcome or the Court's conclusion that the Ione Band was not a recognized tribe.

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

plaintiff's [Ione Band's] claims." (RJN No. 18 at 6.) Judge Karlton held that "the magistrate judge's conclusion that there is no tribal government is clearly correct." (RJN No. 18 at 4.) Judge Karlton also issued declaratory relief in favor Amador County confirming its regulatory and tax jurisdiction over the property which the Ione Band claimed was Indian Country and not subject to local taxes. Judge Karlton found that the Ione lacked standing to claim that their land was Indian Country because it was not a "duly recognized tribal government." (RJN No. 19 at 2.) Judgment was entered on September 4, 1996. (RJN No. 20.) It was not appealed by any party and is binding on all the parties in that case and this case.

ARGUMENT

1. The Ione Band was not a federally recognized tribe in 1934 and therefore does not qualify for the fee-to-trust transfer under the Indian Reorganization Act of 1934.

The ROD states that "Section 5 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465, provides the Secretary of Interior general authority to acquire land in trust status for Indian tribes." (ROD at 3.) This statement of supposed authority is then used to support the decision "to acquire in trust the 228.04 acre Plymouth Parcels in Amador County, California, for the Tribe [Ione Band]." (*Id.*)

The ROD ignores the fact that only three years earlier, in 2009, the United States Supreme Court held that the IRA fee-to-trust provisions applied only to tribes that were federally recognized in 1934. *Carcieri v. Salazar,* 555 U.S. 379 (2009). The majority opinion in that case evaluated the plain language of the IRA and confirmed that Congress intended that it be applied only tribes that were federally recognized in 1934. The Supreme Court found that the IRA was basically a remedial law designed to reverse the 19th century assimilation laws and policies of the United States. And equally important, the Supreme Court held that the federal agencies interpretation of the unambiguous language of the IRA is not entitled to deference. Instead, the Supreme Court held that the unambiguous language of the IRA requires that a tribe must have

been federally recognized in 1934 to be entitled to the benefits of the IRA. See also *Kahawaiollaa et. al v. Norton,* 386 F.3d 1271, 1280 (9th Cir. 2004) (Native Hawaiian group was not a federally recognized tribe in 1934 and therefore did not qualify for the benefits of the IRA of 1934) and *Big Lagoon Rancheria v. State of California,* __ F.4th __(9th Cir. Nos. 10-17803 and 10-17878; January 21, 2014 (Big Lagoon Rancheria was not a federally recognized tribe in 1934 and therefore did not qualify for a fee-to-trust transfer).

It is worth comparing the facts related to the Narragansett Tribe, which was the focus of the *Carcieri* case, with the facts related to the Ione Band. The Narragansett Tribe was federally recognized in 1983 while the Ione Band has never been federally recognized by Congress, by virtue of a treaty or by completing the Part 83 acknowledgement process. After becoming a federally recognized tribe, the Narragansett Tribe applied for, and received, approval from the Secretary of Interior for a fee-to-trust transfer which was immediately challenged by Governor Carcieri of Rhode Island. The Supreme Court reversed the Circuit Court opinion upholding the fee-to-trust transfer. The Supreme Court held that, although the Narragansett Tribe was federally recognized in 1983, it was not recognized in 1934 and, therefore, did not qualify for a fee-to-trust transfer under the express provisions of the IRA. Like the Narragansett, the Ione Band was not recognized in 1934 and, like the Narragansett, the Ione Band does not qualify for a fee-to-trust transfer under the IRA of 1934.

As is outlined above, after extensive and years of briefing on the issue of whether the Ione Band was a federally recognized tribe, this Court confirmed the historical facts presented by the parties and held that the Ione Band was not a federally recognized tribe at least as of 1996. (RJN Nos. 16, 17, 18, 19 & 20). Specifically the Court concluded that the Ione Band was not recognized by Congress or by a treaty. Furthermore, despite the urging of the BIA and DOI in 1979, the Ione Band still had not – as of 1996 – applied for recognition pursuant to Part 83 of the

regulations. The Ione Band v. Burris case was dismissed by Judge Karlton because the Ione Band was not a federally recognized tribe and because it failed to exhaust its administrative remedies by applying for recognition pursuant to Part 83. In fact, it is now 18 years after the judgment in Ione Band v. Burris and the Ione Band still has not applied for federal recognition under Part 83.

It is apparent from the ROD that, despite the admissions and decision in Ione Band v. Burris, the Ione Band, the Defendants still claims that it is a federally recognized tribe based on a comment in a 1972 letter from Commissioner of Indian Affairs, Louis R. Bruce. But, as is outlined above, that letter was specifically addressed and discredited by the United States and the Court in Ione Band v. Burris. (RJN Nos. 12 &13.) The 1972 Bruce letter was not, and was not intended to be, an informal administrative federal recognition of the Ione Band. Nor did it excuse the Ione Band from applying for federal recognition under Part 83. In fact the Court agreed with the United States and found that Part 83 is the exclusive administrative means for acquiring federal recognition. Ambiguous letters from federal employees, such as Commissioner Bruce's 1972 letter, are not a basis for federal recognition. Nor are subsequent ambiguous letters from other federal employees reaffirming portions of Commissioner Bruce's 1972 letter, or making similar unsubstantiated claims, a basis for federal recognition.

In summary, as was admitted by the defendants and determined by this Court in the Ione Band v. Burris case, the Ione Band was not federally recognized tribe in 1934. Consequently, per the Supreme Court's decision in *Carcieri,* the Ione Band does not qualify for a fee-to-trust transfer under the IRA. Thus, ROD is not compliant with federal law and is, therefore, arbitrary and capricious and should be vacated. Plaintiffs are entitled to a judgment on the pleadings on their First Claim for Relief because the Ione Band does not qualify for a fee-to-trust transfer under the IRA of 1934.

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2. This Court's judgment in Ione Band v. Burris is binding on the parties and conclusively establishes that the Ione Band was not federally recognized in 1934.

The preclusive effect of a prior decision and judgment is a question of law for the court to decide. *In re Jenson* 980 F.2d 1254 (9th Cir. 1992.) Five threshold requirements must be satisfied before the doctrine of preclusion or collateral estoppel to apply: (1) the issue to be precluded must be the same that was decided in the prior lawsuit; (2) the issue must have been actually litigated in the prior lawsuit; (3) it must have been necessarily decided in the prior lawsuit; (4) the decision in the prior lawsuit must be final and on the merits; and (5) the party against whom preclusion is sought must be the same or in privity with the party in the prior lawsuit. *Baldwin v. Kilpatrick* 249 F.2d 912, 917-918 (9th Cir. 2001).

All five threshold requirements to apply the preclusive effect of Ione Band v. Burris are present here. First, the issue is the same in both cases: whether or not the Ione Band was or is a federally recognized tribe. Second, as summarized above, this issue was fully litigated in Ione Band v. Burris. Third, the issue was decided by Judge Karlton who determined, after reviewing all the facts, that the Ione Band was not a federally recognized tribe and had no tribal government. Fourth, the decision in the Ione Band v. Burris is final. Judgment was entered and it was not appealed by any party. And, finally the Defendants in this case are the same as those in the prior case including the United States and the Ione Band.

Also it is important to note that, although mutuality is no longer a requirement for collateral estoppel to apply, there is substantial mutuality of parties in this case with the parties in the Ione Band v. Burris case. See *Parkland Hosiery v. Shore* 439 U.S. 322 (1979); *Coeur D'Alene Tribe of Idaho v. Hammond,* 384 F.3d 674 (9th Cir. 2004). The doctrine of mutuality provides that neither party may use a prior judgment against the other unless both would have been bound by the judgment. In this situation, all the parties in the Ione Band v. Burris case are also parties to one of the three related cases challenging the ROD including the United States,

both factions of the Ione Band, and Amador County. Although the Plaintiffs were not yet organized as non-profit corporations at time of the prior litigation, their position that that the Ione Band was not a federally recognized tribe was successfully asserted by the United States, the Burris faction of the Ione Band and Amador County in that case.

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

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

The Supreme Court also referenced the *Parklane Hosiery* case and confirmed that in most circumstances mutuality is not required for collateral estoppel to apply – with one important exception which involves the federal government and, therefore, needs to be addressed here. Specifically, the Court held that mutuality may still be required for private parties to enforce an adverse judgment against the federal government. This exception was created for policy reasons because the number and nature of the cases that the Government litigates.

The exception to the new non-mutuality standard for collateral estoppel outlined by the Supreme Court in *Mendoza* does not apply in this case for several reasons. First, even if the *Mendoza* exception did apply, as summarized above, there is substantial mutuality of the parties in the two cases involved in the Ione Band federal recognition issue. Second, the *Mendoza* exception should be taken in context of the facts that case. The Court there held that mutuality is required to enforce an adverse judgment against the United States. Here the judgment that the Ione Band was not a federally recognized tribe was not adverse to the United States. Instead, it was favorable to the United States and, in fact, was requested by the United States and the Ione Band in their motion for summary judgment. Also, even if the *Mendoza* exception applied to the United States, mutuality is not required to enforce the prior judgment against the Ione Band.

Finally it is important to note that the binding impact of the Ione Band v. Burris decision has already been applied and confirmed in at least two subsequent cases. First, on May 11, 1992, the Regional Director of the BIA declined to review the economic development agreement between the Ione Band and a private development company on the grounds that the Ione Band is not a federally recognized tribe. The Ione Band appealed to the BIA's decision to the Interior Board of Indian Appeals (IBIA). The IBIA upheld the BIA's decision based on Judge Karlton's order granting the United States motion for summary judgment in Ione Band v. Burris. (RJN No. 21.) The IBIA, like Judge Karlton, held that the Ione Band was not a federally recognized tribe and Part 83 was the exclusive administrative mechanism for the Ione Band to obtain federal recognition. (*Id.*) The Ione Band did not challenge the IBIA's decision in Court. It is final and binding on the Ione Band and the BIA.

Second, in 1997, the Nicolas Villa Jr. faction of the Ione Band of Miwok Indians initiated another lawsuit against the County of Amador. (*Nicolas Villa, Jr. et. al v. County of Amador et. al* USDC ED Cal. No. CIV-S-97-0531 DFL JFM.) The Ione Band sought to restrain Amador County from invoking regulatory jurisdiction over their property based on the claim that it was Indian Country. Judge Levi, relying on Judge Karlton's Order granting Amador County's requested relief (RJN Nos. 18 & 19), denied the Ione Band's request for injunctive relief against Amador County. (RJN No. 22.) Judge Levi, quoted Judge Karlton, and held that, because the Ione Band did not introduce any evidence showing that they are a federally recognized tribe, it was precluded from contesting Amador County's jurisdiction over fee owned land. (RJN No. 22 at 3.) This decision was not appealed and it is binding on the parties.

3. The assertions by the defendants in Ione Band v. Burris that the Ione Band is not a federally recognized tribe are judicial admissions and binding in this case.

Admissions made in the course of litigation and judicial proceedings are generally treated as judicial admissions which conclusively establish the matter. *American Title Ins. Co. v.*

Lacelaw Corp. 861 F.2d 224, 226 (9th Cir. 1988). Under federal law, stipulations and admissions in the pleadings are binding on the parties and the trial and appellate courts. *Id.* citing *Fergueson v. Neighborhood Housing Services,* 780 F.2d 549, 551 (6th Cir. 1996.) "Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Id.* citing *In re Fordson Engineering Corp.,* 25 B.R. 506, 509 (Bankr.E.D. Mich. 1982.) Factual assertions in the pleadings and pretrial orders are conclusively binding on the party who made them. *Id.*

As is summarized above, in Ione Band v. Burris the United States and at least one faction of the Ione Band of Miwok Indians consistently asserted that the Ione Band is not a federally recognized tribe. They made these assertions in their initial pleadings and in their initial status conference reports. And they successfully pursued this contention in a motion for summary judgment that went through several briefing schedules and was eventually granted by Judge Karlton. (RJN No. 16.) All of the assertions by the Federal Defendants are embodied in the one sentence statement made by the United States at the outset of the Ione Band v. Burris case. That assertion is worth repeating here:

> **"The [United States] government denies that the Ione Band of Miwok Indians has ever been a federally recognized tribe."** (RJN No. 5, p.2; emphasis added.)

The Ione Indians (Burris faction) made a similar assertion at the outset of that case:

> **"Defendants [Ione Indians] deny that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (RJN 6; emphasis added.)**

The United States and Burris faction of the Ione Band repeatedly made and reaffirmed these assertions in Ione Band v. Burris and were successful in convincing this Court that the Ione Band was not a federally recognized tribe. These judicial admissions are binding on the Federal Defendants and Intervenor Ione Band in this case. They conclusively establish the fact that the Ione Band was not a federally recognized tribe in 1934 or any other year before 1996 - when the

Ione Band v. Burris case was finally decided. And, as a consequence of this established fact, the Ione Band does not qualify for the fee-to-trust transfer provisions of the IRA of 1934. *Carcieri v. Salazar supra.* And, for this same reason, the plaintiffs are entitled to a judgment on the pleading on their first claim for relief.

CONCLUSION

As outlined above, it has been conclusively established in Ione Band v. Burris, and related matters, that the Ione Band of Miwok Indians was not a federally recognized tribe in 1934. Therefore, contrary to the conclusions in the ROD, it is not entitled to a fee-to-trust transfer under the IRA of 1934 and the Supreme Court's decision in *Carcieri v. Salazar.* The contention in the ROD that the Ione Band does qualify for a fee-to-trust transfer under the IRA and 25 U.S.C. §465 is contrary to this Court's decision in Ione Band v. Burris and the Supreme Court's decision in *Carcieri.* Therefore the ROD is arbitrary and capricious and contrary to law. It should be vacated. For the forgoing reasons Plaintiffs respectfully request that they be granted a judgment on the pleadings on their first claim for relief.[5]

Dated: February 13, 2014

Respectfully Submitted,

/s/ Kenneth R. Williams
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Attorney for Plaintiffs
No Casino in Plymouth and
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[5] This motion for judgment on the pleadings and supporting documents are being submitted in accordance with the briefing schedule set forth in Updated Joint Status Report filed by the parties in this action on January 21, 2014. (ECF No. 58 at 9).