Case No. 15-17253

In the United States Court of Appeal
For the Ninth Circuit

COUNTY OF AMADOR, CALIFORNIA
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*,
Defendants - Appellees,

IONE BAND OF MIWOK INDIANS,
Intervener/Defendant - Appellee.

COUNTY OF AMADOR'S OPENING BRIEF ON APPEAL

On Appeal from the United States District Court
for the Eastern District of California
The Honorable Troy L. Nunley, Presiding
District Court Case No. 2:12-cv-01710-TLN-CKD

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CORPORATE DISCLOSURE STATEMENT
FED. R. APP. PROC. 26.1

Amador County, California, appellant herein, is not a "nongovernmental corporate party."

RECORD CITATIONS

The following abbreviations are used in citations to the Record throughout this Brief:

"PER":	Plaintiff's Excerpts of Record, filed herewith pursuant to 9th Circuit Rule 30-1. Citations to the Excerpts are in the form "(PER[Page#]-[Page#].)"
"AR":	Citations to portions of the Administrative Record in this case that are not included in Plaintiffs Excerpts of Record. Citations to the Administrative Record are in the form "(AR[Page#]-[Page#].)"
"AA":	Appendix of Authorities, filed herewith pursuant to Fed. R. App. Proc. 28(f). Citations to the Appendix of Authorities are in the form "(AA[Page#]-[Page#].)"

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I.

INTRODUCTION.

Amador County, California, challenges an unlawful and results-oriented determination of the Department of Interior ("Department"), which—if given effect—would take land in the County into federal trust on behalf of the Ione Band of Miwok Indians, intervener herein ("Ione Band" or "Band"), and permit the Band to establish a third large-scale, Las Vegas-style casino operation, which would overwhelm this small, rural County in the Sierra Nevada mountains and foothills, with a total population of less than 39,000 persons, and with limited road and related infrastructure and public services. (AR005425.) The Department's determination is arbitrary, capricious and contrary to law.

There is already one large, Las Vegas-style Indian casino and hotel complex in the County at the Jackson Rancheria; consequently, the County has faced demands on County resources, including the traffic it generates on narrow local roads, which creates serious public safety problems and traffic delays. (*Id.*) A second tribe—the Buena Vista Rancheria—has also obtained permission from the federal government to open a casino in the County. (*Id.*) The addition of a third new casino would overwhelm the County with demands for public safety and other services, clog County roadways by

generating far more traffic than they can handle, and harm air and water quality, among other adverse impacts. (*Id.*) Fearing these impacts, more than 80% of the County's voters recently voted to oppose any new casino in the County. (*Id.*)

In the pursuit of its goal of bringing another casino to Amador County, the Band applied to the Secretary of Interior ("Secretary")[1] in 2005 to have certain lands in the County known as the Plymouth Parcels[2] taken into trust on the Band's behalf pursuant to the Secretary's authority under Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465 (AA1-3). (AR002751-3482.)

However, merely having lands taken into trust on its behalf is not enough to enable the Band to conduct gaming on the Plymouth Parcels. To prevent the opportunistic siting of casinos in unforeseen (and profitable) locales near population centers, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), prohibits gaming on Indian lands acquired in trust

[1] The Secretary of Interior ("Secretary") heads the Department, which is the executive department responsible for the federal government's dealings with Indian tribes. Within the Department is housed the Bureau of Indian Affairs ("Bureau" or "BIA").

[2] The Plymouth Parcels consist of several parcels of land totaling 228 acres and located both within the City of Plymouth and in the unincorporated area of Amador County. These parcels are not currently owned or occupied by the Band. (*See* Dkt. #59, ¶ 17, sentence 1; Dkt. #46, ¶ 17, sentence 1.)

for an Indian tribe after October 17, 1988, unless one of several exceptions applies. 25 U.S.C. § 2719(a) (AA11-12). Since the Plymouth Parcels would be acquired in trust for the Ione Band after that date, gaming is prohibited unless one of the IGRA exceptions applies.

One such exception permits Indian gaming on lands acquired after 1988 if the Band complies with a two-part administrative process (the "Two-Part Test"). This process requires that both the Secretary and California's Governor conclude that gaming would be "in the best interest of the Indian tribe and its members" and would "not be detrimental" to the surrounding community. 25 U.S.C. § 2719(a) and (b)(1)(A). By imposing these requirements, IGRA protects local interests like those of Amador County, which as a small rural county will be drastically and adversely affected by additional large-scale gambling operations, by requiring the Secretary to "consult with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). This "Two-Part Test," designed to give affected local interests a role in the process for authorizing additional gaming, is the exception that must, as a matter of law, be satisfied before the Plymouth Parcels may be used for gaming.

The Ione Band, however, refuses to satisfy the Two-Part Test. Instead, it has sought to invoke another exception, which permits gaming on lands that are taken into trust after October 17, 1988, as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). To this end the Band also filed a request for an "Indian Lands Determination" ("ILD"), asserting that the Plymouth Parcels should be deemed "restored lands" in connection with its Fee-to-Trust Application for those parcels. (AR001401-2532.) Were it applicable (and the County does not believe it is), this "restored lands of a restored tribe" exception would permit gaming on the Plymouth Parcels without affording Amador County and its residents the protections of the Two-Part Test.

This action challenges the Record of Decision ("ROD"), issued on May 24, 2012, by Donald E. Laverdure, Acting Assistant Secretary of Indian Affairs, that, among other things:

- determined to take the "Plymouth Parcels" into trust for the Band; and
- determined that the Plymouth Parcels qualify as "restored lands of a restored tribe" on which the Ione Band may conduct gaming under IGRA, without proceeding through the Two-Part Test.

(PER139-141.) Both decisions are abuses of discretion, arbitrary, capricious and contrary to law.

First, the Department's determination is contrary to Congress's plain intention in adopting IGRA, which the Department has acknowledged was to preclude informally-recognized "tribes" like the Band from being deemed a "restored tribe." Such tribes may only obtain off-reservation gaming by proceeding through the Two-Part Test.

The Department's determination also exceeds the Secretary's authority to take land into trust under Section 5 of the IRA. That statute only authorizes the acquisition of land on behalf of tribes that were both "recognized" and "under federal jurisdiction" in 1934, when the IRA was enacted. *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"). The Band was neither "recognized" nor "under federal jurisdiction" in 1934.

II.

JURISDICTIONAL STATEMENT.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2202-03 (U.S. 2012).

This appeal is from the final judgment, entered October 13, 2015, disposing of all claims. This Court has appellate jurisdiction under 28 U.S.C.

§ 1291. The appeal was timely filed November 10, 2015. FED. R. APP. PROC. 4(a)(1)(B).

III.

ISSUES PRESENTED.

1. Whether the district court erred in upholding the Department's decision to "grandfather" the 2006 Indian Lands Determination, where that court (a) refused to apply the factors that this Court has adopted for determining whether an agency may refuse to enforce new regulatory rules retroactively, when that refusal is contrary to congressional intent, and (b) improperly deferred to the Department's determination on retroactivity, contrary to this Court's precedents?

2. Whether, applying the de novo review prescribed by this Court's precedents, the Department's decision to "grandfather" the 2006 ILD was contrary to law?

3. Whether the Secretary exceeds his authority by taking land into trust under Section 5 of the IRA for a purported "tribe" that was admittedly not "recognized" in a formal, political way in 1934?

4. Whether the Band was "under federal jurisdiction" in 1934, in view of the fact that: (a) the federal government's attempts to obtain land for the Band were unsuccessful, (b) Band members were purportedly "successors-in-interest" to Indians who were parties to an *unratified* treaty from the 1850s, (c) Band members were included on lists of landless, non-reservation individual Indians in 1906 and 1915, (d) Band members never received services or benefits from the government, and (e) the ROD relied exclusively on the failed efforts to acquire land, and not the treaty negotiations or 1906 and 1915 lists?

IV.

STATEMENT OF FACTS.

It is undisputed that Amador County was home to a handful of Indians in the early part of the 20th Century. In 1905 and 1915, the BIA compiled two lists of landless, non-reservation Indian individuals in Amador County—the first by Special Indian Agent C.E. Kelsey, and the second by his successor, John Terrell. (PER334, PER556-559.) The 1915 list identified a genealogically and linguistically mixed population of 101 Indians, scattered at various locations around Ione and its vicinity, including on the Jackson Rancheria and "At Richey" (which became the Buena Vista Rancheria). (PER334, PER493, PER552, PER576-603, PER668-669, PER676-677.)

A. The Federal Government's Unsuccessful Effort To Purchase a 40-Acre Tract of Land Near The City Of Ione, Pursuant To Congressional Appropriations For "Landless" California Indians (1916-1930).

In the early 20th Century, recognizing the plight of Indians in California, Congress established a land purchase program to enable the BIA to purchase tracts of land throughout the State, upon which "landless Indians" could be settled. (PER311-333, PER335-336.) In 1990 Hazel Elbert, Deputy Assistant Secretary of Interior–Indian Affairs, described this program thus:

> The California land purchase program was aimed at buying acreage for miscellaneous, landless Indians, whether or not they then existed as part of a tribal entity or had previously been federally recognized. The purchase of land for these Indians did not, in and of itself, prove or establish the existence of a government-to-government relationship between an Indian tribe and the United States.

(PER376; *see also* PER605.)

Beginning around 1915, Special Agent Terrell determined to use funds allocated by Congress for "landless Indians" to purchase a 40-acre tract of land near the City of Ione, inhabited by several of the local Indians but owned by Ione Iron & Coal Company (the "Arroyo Seco property"). In part, this decision was motivated by a desire to keep landless Indians from being evicted from a site which they did not own, but where they had built homes

and lives; these early efforts also appear to have been related to the inadequacies of the nearby Jackson Rancheria. (PER566-567.)

Because it was unable to obtain clear title to the Arroyo Seco property, the government ultimately abandoned its efforts to acquire the land. (PER341.) Instead, Buena Vista Rancheria, a 70-acre parcel of land four miles south of Ione, was purchased for Amador County Indians in 1928 (PER570.)

In the early 1930s, further desultory attempts at obtaining land for landless Indians near Ione were made, but they also failed.

These abortive land-acquisition efforts were the extent of the federal government's dealings with the Ione-area Indians during this period. In a 1991 declaration, submitted to the Eastern District of California by the Department,[3] former Ione Band chairman Harold Burris detailed the relationship between the Ione Indians and the federal government during the period of Mr. Terrell's efforts to obtain the Arroyo Seco property.[4] He declared that the Ione-area Indians "supported the efforts of the United States to purchase land for [them]" due to fears that they would lose their

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[3] The litigation in which that declaration was made is discussed below.

[4] The families living on the Arroyo Seco tract elected Mr. Burris to be their "chairman" in 1970, and he served in that position into the mid-1990s. He also lived on the Arroyo Seco property from 1924 to 1942, and 1945 onward. (PER865-867.)

homes on land they did not own, but that "[t]here was never any expectation that any further relationship or further services would develop out of the government's efforts to buy the land for [them]." (PER866.) There is no record that any federal aid or other benefits that are normally available to recognized tribes were ever provided to members of the "Ione Band" before 1994.

B. THE SECRETARY DID NOT ASK THE IONE BAND TO VOTE ON ACCEPTANCE OF THE INDIAN REORGANIZATION ACT IN 1934.

In 1934, Congress enacted the Indian Reorganization Act. June 18, 1934, ch. 576, 48 Stat. 988 (AA6-10).[5] Section 18 of the IRA as originally enacted required the Secretary to hold a special election, within one year of the "passage and approval of the Act," for each Indian tribe then under federal jurisdiction, to decide whether the tribe wished to be organized under the IRA, and adopt a tribal constitution. *Id.* § 18 (codified at 25 U.S.C. § 478). In Amador County, the Jackson and Buena Vista "tribes" each voted to accept the terms of the IRA (PER738), but the "Ione Band" held no such election, and there is no evidence it was ever invited to do so. (PER482, PER716-768.)

Indeed, with the exception of a single inquiry in 1941 regarding the possibility of clearing title to Arroyo Seco (PER341-342), there was no record

[5] Section 5 of that Act provides the statutory authority by which the Secretary purports to take land into trust for the Band. (PER141.)

of communication between the Ione-area Indians and the federal government from 1930-1970.

C. FOLLOWING COMMISSIONER LOUIS BRUCE'S EQUIVOCAL 1972 LETTER, ISSUED OUTSIDE THE NORMAL REGULATORY PROCESS AND WITHOUT CONSIDERATION OF THE TRADITIONAL "COHEN CRITERIA," WHICH STATED THAT "FEDERAL RECOGNITION WAS *EVIDENTLY* EXTENDED TO" THE IONE BAND WHEN THE GOVERNMENT SOUGHT TO PURCHASE THE 40-ACRE ARROYO SECO PROPERTY, THE DEPARTMENT REPEATEDLY CONFIRMED THAT THE BAND WAS NOT RECOGNIZED AS A TRIBE, AND WAS REQUIRED TO SUBMIT A FORMAL APPLICATION FOR RECOGNITION.

In 1970, the residents of the Arroyo Seco plot—who, according to Harold Burris, "had never acted as a tribe" (PER521)—decided to organize as a tribe for the purpose of seeking title to the land on which they had lived for decades. (PER521, PER867.) Mr. Burris was elected chairman of the Ione Band. (*Id.*) The residents filed a quiet title action in California state court, and obtained title to the Arroyo Seco property in 1972. (PER867.) Thereafter, several Band members sought to have the land taken into trust, to exempt themselves from property taxes. (*Id.*)

In 1972, BIA Commissioner Louis Bruce sent a letter to Nicholas Villa, as the purported representative of the Band, in which Commissioner Bruce stated that "Federal recognition was evidently extended to the [Band]" at the time a purchase of 40 acres for the Band was contemplated between approximately 1915 and 1930, and stating that he intended to take the 40-

acre parcel into trust. (PER344.) Various documents establish that Commissioner Bruce made his determination without undertaking any effort to assess "the so-called 'Cohen criteria,' which was the Department's informal standard for recognition from 1942 to 1978." (PER347 [1973 letter from Chief, Division of Tribal Govt Servs. to Sacramento Area Director inquiring into the factual basis for recognizing Ione Band]; *see also, e.g.,* PER392.)[6] Subsequent research, conducted in the early 1990s by the Bureau's Branch of Acknowledgment and Research (which is responsible for researching the historical bases for claims of federal tribal recognition, *see* PER784-785),[7] concluded that the Bruce letter was "an administrative anomaly," because it was handled outside the normal administrative process

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[6] "In connection with the tribal reorganization established under the IRA, the Department of Interior, under the guidance of Felix Cohen, the first solicitor of the BIA, developed five hierarchical considerations (known as the 'Cohen criteria') to determine whether a group constituted a tribe, including whether: (i) the group has had treaty relations with the United States; (ii) the group has been denominated a tribe by act of Congress or executive order; (iii) the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe; (iv) the group has been treated as a tribe or band by other Indian tribes; and (v) the group has exercised political authority over its members, through a tribal council or other governmental forms." *Allen v. United States*, 871 F. Supp. 2d 982, 990 (N.D. Cal. 2012).

[7] *See also Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013).

(by Real Estate Services, rather than by Tribal Relations), and because it was based on "no evaluation of [the Band's] history and ancestry." (PER477.)

In light of the "anomalous" circumstances surrounding the Bruce letter, the Department did not treat it as conclusive, even at the time it issued, and no action was ever taken to formally recognize the Band or take the identified parcels into trust.[8] In fact, extensive correspondence—both within the Bureau itself, and between the Bureau and the Band—reflected the Bureau's position that the Band's status was under review and that the Band had the affirmative duty to establish that it was entitled to federal recognition. (*See, e.g.,* PER345, PER346-349, PER351-356, PER390-393, PER469.)

In December 1978, the Secretary of Interior promulgated regulations establishing procedures whereby groups of Indians could attain federal "recognition" as "tribes." 25 C.F.R. §§ 83.1–83.13 ("the Acknowledgment Regulations" or "Part 83") (AA56-73). The BIA concurrently issued two lists. The first identified all federally-recognized Indian tribes (the "1978 List"). (PER361-363.) The second identified all groups whose petitions for

[8] In fact, no land was ever taken into trust by the United States for the benefit of the Ione Band. These 40 acres comprising the Arroyo Seco property are approximately 12 miles away from the Plymouth Parcels at issue here and are unrelated to the Band's request. (AR005429.)

recognition were on file at the BIA, but that were <u>not</u> federally-recognized tribes. (PER356-357.) The Ione Band was placed on the second list. Though it had not formally submitted a petition for recognition when the two lists were published in 1978 (*id.*; *see also* PER359-360, PER368), in light of the government's effort to purchase land in 1916, it was treated as having applied for acknowledgment at that time. (PER354-355.)

There is no record of communications between the Band and the Department between January 1979 and 1989, though the record indicates that members of the Band sought to collect historical information to attempt to justify their recognition under the regulations. (PER364-371.) In mid-1989, a faction of the Band's membership unsuccessfully sought acknowledgement as a federally-recognized tribe by filing a "tribal" resolution with the Department, without proceeding through the regulatory acknowledgement process or providing the records and other materials required by those regulations. (PER372-374, PER406, AR000618-39.)

In February 1990, the Department wrote an extensive letter to Glen Villa, Sr., concerning the Band's informal request for acknowledgment, demonstrating in correspondence dated as early as October 1973 that the Band had not met the criteria for federal recognition. That letter further explained that the Band "was not recognized as an Indian tribe within the

meaning of Federal law," and that the only option for the Band to achieve such federal status was through the acknowledgment regulations. (PER380-384.)

Hazel Elbert, Deputy Assistant Secretary of Interior—Indian Affairs, sent a similar letter to Harold Burris on February 15, 1990 (PER769-774), and to U.S. Senator Alan Cranston on the same date as the Villa letter (PER375-379). Among other things, the Cranston letter stated:

- "After extensive research in our files regarding the Bureau of Indian Affair's (Bureau) historic relationship with this group, we have determined that the Ione Band is not recognized presently to be an Indian tribe within the meaning of Federal law…."

- "Even if the Bureau had been successful in its attempt to purchase land, this may not have constituted Federal recognition of the Ione Band as an Indian tribe. The California land purchase program was aimed at buying acreage for miscellaneous, landless Indians, whether or not they then existed as part of a tribal entity or had previously been federally recognized. The purchase of land for these Indians did not, in and of itself, prove or establish the existence of a government-to-government relationship between an Indian tribe and the United States."

- "Commissioner Bruce's letter indicates clearly the intent of the Bureau to recognize and establish a trust land base for the Ione Band. However, the letter is of no legal effect, in and of itself, because these actions were never implemented. … The Ione Band had no acknowledged government-to-government relationship with the United

States prior to this letter, and there is no evidence that the Commissioner based his decision on the recognition criteria then being utilized by the Department."

- "Subsequent correspondence and memoranda in our files indicate that despite the Commissioner's letter, the question of Ione recognition remained open."

(*Id.*)

Sometime after April 8, 1990, Department staff prepared a memorandum entitled "Ione Acknowledgment Issues" (PER711), which relates much of the same history as the Villa and Cranston letters, and explicitly states, "[I]t is clear that the Ione Band had no acknowledged government-to-government relationship with the United States prior to" 1972, and also, "Thus it is clear that the Ione Band was not considered by the Department to be a federally recognized tribe either before or after 1979." (PER712-713.) Further attempts by the Band faction favoring federal recognition outside the acknowledgement regulations were rebuffed on August 20, 1990. (PER395-396.)

D. THE "IONE BAND" UNSUCCESSFULLY SUES THE FEDERAL GOVERNMENT, DEMANDING TO BE RECOGNIZED AS A "TRIBE."

In August 1990, the Ione Band sued the Department in the Eastern District of California, seeking to require recognition of the Band as a "tribe" and to have the Arroyo Seco plot taken in trust. *Ione Band of Miwok Indians*

v. Burris, Civ. No. S-90-0993 LKK/EM (E.D. Cal.) (hereinafter "*Ione Band Lawsuit"*). Amador Countys' Treasurer-Tax Collector was also named as a defendant in that action, because the Band sought a declaration that, as "Indian land," the property was not subject to taxation by the County. (PER658-659, PER914.) The plaintiffs named the Burris faction of the group—which opposed federal recognition—as defendants too. (PER168-192.)

In Paragraph 3 of the complaint, the Ione Band alleged that it "has been recognized by the United States as being under federal jurisdiction." (PER170.) The Band included similar allegations throughout the complaint. The Band sought a declaration from the Court that the Band had 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 Burris faction of Ione Indians. And, the Band challenged the constitutionality of the Part 83 Regulations. (PER190-192.)

The United States and the Burris faction of Ione Indians consistently disputed the Band's claim to have been a federally-recognized tribe, including in their Answers (PER195 & PER212) and Status Reports (PER231 ["The government denies that the Ione Band of Miwok Indians has ever been a federally-recognized tribe."] & PER236).

In 1991, the United States moved for summary judgment in its favor on the ground that the Band failed to exhaust administrative remedies by applying for recognition through the BIA's acknowledgment regulations, and that the regulations were the sole mechanism for the Ione Band to gain federal recognition. (PER397-437.) Throughout briefing on that motion, the government expressly disputed the Band's claim to have been a federally-recognized tribe, and further disavowed the notion that the Bruce letter evidenced "recognition" of the Band. (*See, e.g.,* PER403 ["In 1972, the head of BIA, Commissioner Louis Bruce, was not entirely convinced that the Ione Band was federally recognized."]; PER409 ["To the extent that plaintiffs viewed this decision as a change from recognition status to nonrecognition status, *which change the government disputes*, plaintiffs were bound to bring suit no later than 1985 pursuant to the statute of limitations set forth at 28 U.S.C. 2401(a)."]; PER459 ["the Commissioner did not make a determination or findings that the Ione Band was a tribe within the meaning of the IRA"].)

The district court granted the United States' motion for summary judgment, holding the Band must apply for recognition through the BIA's acknowledgment regulations, and held that the acknowledgement

regulations were the sole mechanism for the Ione Band to gain federal recognition. (PER634-659.)

Based on this decision, the BIA's Sacramento Area Director refused to review an economic development agreement submitted by the Band. The Band appealed the Area Director's decision to the Interior Board of Indian Appeals ("IBIA"), which upheld the refusal, further affirming that the Part 83 Regulations were the "exclusive mechanism" for the Band to be recognized, and for the Department "to correct any errors it may have made with respect to the recognition of appellant." (PER811-813.)

Sometime after summary judgment was granted in favor of the federal government in the *Ione Band Lawsuit*, the Department issued a "Briefing Paper" addressed to the "President of the United States," regarding the status of the Band, which unequivocally stated:

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

(PER482-483.)

On August 26, 1992, Eddie Brown, then-Assistant Secretary-Indian Affairs, wrote to Senator Inouye that "The Department has never viewed the

absence of the Ione Band from the Federal Register list of federally recognized tribes as a simple clerical error. This group has never attained Federal tribal status and is not, therefore, eligible for restoration of that status." (PER916.)

E. ASSISTANT SECRETARY ADA DEER ABRUPTLY REVERSES COURSE IN THE FACE OF CONGRESSIONAL PRESSURE, "AFFIRMS" THE BRUCE LETTER, AND ORDERS THE IONE BAND TO BE PLACED ON THE LIST OF RECOGNIZED TRIBES WITHOUT REQUIRING IT TO PROCEED THROUGH THE ACKNOWLEDGEMENT REGULATIONS.

Having lost its federal lawsuit and IBIA appeal, the Ione Band engaged in an extensive political lobbying effort. As related in the Declaration of Michael Lawson, Ph.D., an historian in the BIA's Branch of Acknowledgement and Research ("BAR"), members of the Band supporting recognition told him as early as 1990 that "the group was planning to 'put the squeeze' on the Assistant Secretary (through Congressional pressure) for a decision that the group was recognized." (PER788.) It appears to have worked. The record between 1989 and 1994 shows extensive communications between the Department and members of Congress,[9] and

[9] *See* PER373-379 (Sen. Cranston); PER385-389 (Rep. Shumway); PER394, PER481 & PER485-486 (Rep. Miller); PER473-475 & PER484 (Sen. Inouye); PER490 (Rep. Richardson), PER501-507 & PER509-512 (Senate staff), PER508 (Sen. Inouye, Reps. Richardson & Doolittle), PER515-517 (Rep. Fazio); PER479 (meeting with staff for Sen. Inouye and House committee staff).

in early 1994, Assistant Secretary Ada Deer abruptly reversed the federal government's long-held position and relieved the Band of the requirement to proceed through the acknowledgement regulations. (PER513.)

Purporting to "clarify the United States' political relationship" with the Band, Assistant Secretary Deer wrote that she was "reaffirming the portion of Commissioner Bruce's letter which reads .... 'Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated.'" (*Id.*) The Deer letter contains no mention of: (1) the contrary positions taken by the United States in the *Ione Band Lawsuit*, (2) the contrary conclusion of the BAR, which is specifically responsible for researching the historical bases for claims of federal tribal recognition (PER784-785); (3) the decision of the IBIA that the Band was never recognized and that proceeding through the regulations was the sole means of becoming recognized, (4) the purposeful omission of the Band from the 1978 list of recognized tribes, or (5) the many detailed letters—only some of which are discussed above—expressly concluding the Band had never attained Federal tribal status.

Notably, however, the Deer letter <u>does</u> mention meetings with members of Congress. (PER513 ["I am writing regarding our meeting on October 28, 1993 and subsequent discussions with Congressman

Doolittle."].) A contemporaneous file memorandum shows that this determination was also an administrative anomaly. The Deer letter issued without "program review and surname" (a process by which the Solicitor's office would review and endorse such communications, *see* PER350), and that "file copies were not prepared for distribution" in advance. (PER514.)

F. THE INITIAL DETERMINATION IN 2006 THAT THE PLYMOUTH PARCELS WERE "RESTORED LANDS OF A RESTORED TRIBE" ELIGIBLE FOR GAMING; AND AMADOR COUNTY'S FIRST LEGAL CHALLENGE THERETO.

In 2004, the Band petitioned the National Indian Gaming Council ("NIGC") for an "Indian lands determination" regarding the Plymouth Parcels, under the "restored lands for a restored tribe" exception to the prohibition of gaming on lands acquired after 1988. 25 U.S.C. § 2719(b)(1)(B)(iii). (AR001401-2549.) And in November 2005, the Band applied to the Secretary to have the Plymouth Parcels taken into trust. (AR002751-3482.) Amador County and the State of California opposed both requests. (AR004204-4414, AR004851-53, AR004862-4908, AR004915-5012.)

On September 19, 2006, then-Associate Solicitor, Division of Indian Affairs, Carl Artman opined—based on the actions of Assistant Secretary Deer—that the Plymouth Parcels are "restored lands for a restored tribe";

then-Associate Deputy Secretary James Cason concurred on September 26. (PER604-609, AR005094-95.)

Amador County and the State of California appealed the Artman/Cason determination to the IBIA (AR005119-38, AR005150-51), and following that body's determination that it lacked jurisdiction over the appeal, Amador County filed suit in federal court challenging the ILD. *County of Amador v. United States Dep't of Interior*, Case No. 2:07-cv-00527-LKK-GGH (E.D. Cal. filed Mar. 16, 2007). The Band intervened in the action, waiving its tribal immunity as a condition of the County's non-opposition to intervention. (PER627.)

The federal defendants and the Ione Band moved to dismiss that suit on the ground that the Artman/Cason memoranda did not constitute "final agency action" under the APA, and that judicial review of the ILD had to wait until a final decision was made to approve the Band's trust application. (PER610-611.) The district court granted the motion to dismiss but stated, "If and when DOI approves the trust application, final agency action will exist, and the county will be able to sue." (PER621.)

G. REVERSAL AND WITHDRAWAL OF THE 2006 INDIAN LANDS DETERMINATION BY THE SOLICITOR IN 2009.

In January 2009, Department Solicitor David Bernhardt sent a memorandum to George Skibine, Acting Deputy Assistant Secretary for

Policy and Economic Development, withdrawing the 2006 Artman/Cason memorandum. (PER633.) That letter stated in part, "We are now in the process of reviewing the preliminary draft Final Environmental Impact Statement for the Plymouth parcel. As a result, I determined to review the Associate Solicitor's 2006 Indian lands opinion and have concluded that it was wrong. I have withdrawn and am reversing that opinion. It no longer represents the legal position of the Office of the Solicitor. The opinion of the Solicitor's Office is that the Band is not a restored tribe within the meaning of IGRA." (*Id.*)

H. THE SUPREME COURT DECIDES *CARCIERI* AND THE COUNTY SUBMITS A LETTER EXPLAINING HOW THAT DECISION PRECLUDES THE SECRETARY FROM ACCEPTING LAND IN TRUST FOR THE BAND.

In 2009, the Supreme Court decided *Carcieri*, holding that § 19 of the IRA, 25 U.S.C. § 479 (AA4-5), "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." 555 U.S. at 382. On July 15, 2009, Amador County wrote to Larry EchoHawk, then-Assistant Secretary of Indian Affairs, explaining why *Carcieri* precludes the Department from taking land into trust on behalf of the Ione Band. (AR007757-97.)

I. THE RECORD OF DECISION REVERSES COURSE YET AGAIN.

On May 24, 2012, Defendant Laverdure made a final decision to take the Plymouth Parcels into trust on behalf of the Ione Band. (PER88-155.) The ROD reversed the Bernhardt opinion, reinstated the Artman opinion, and rejected the conclusion that *Carcieri* precludes the Secretary from taking land into trust for the Ione Band. Flip-flopping once again, the ROD stated that the Parcels are "restored lands of a restored tribe." (PER139-149.)

V.

STATEMENT OF THE CASE.

Amador County filed its complaint on June 27, 2012, naming the Department, then-Secretary of Interior Ken Salazar, and then-Acting Assistant Secretary of Indian Affairs Donald Laverdure as defendants. (Dkt. #1.) A group of local citizens filed a parallel lawsuit, which was designated as "related" to the case on appeal herein. *No Casino in Plymouth v. Jewell*, No. 2:12-cv-01748-TLN-CMK (E.D. Cal.) ("*NCIP*").

The County filed a First Amended Complaint on September 20, 2012, and moved to file a Second Amended Complaint, but pursuant to a stipulation between the parties, certain contested documents were included in the administrative record, the First and Second Amended Complaints

were withdrawn, and the original complaint was revived as the operative pleading (Dkt. #45).

The district court granted the Ione Band's unopposed motion to intervene on September 13, 2013. (Dkt. #55.)

Following the lodging of the administrative record on May 7, 2013 (Dkt. #42), and lodging of the supplemental administrative record on February 19, 2014 (Dkt. #64), the County moved for summary judgment pursuant to a court-ordered briefing schedule, and the Federal Defendants and Ione Band filed cross-motions. (Dkt. #s 65, 82, 84.) Briefing on those motions was completed in October 2014, and a hearing set for November 6. (Dkt. #s 85-87, 89-90, 92).

On November 3, 2014, the district court vacated the November 6 hearing, taking the cross-motions under submission without oral argument. (Dkt. #91.) On September 30, 2015, the district court entered an order denying summary judgment to Amador County and granting it to the Federal Defendants and Ione Band. (Dkt. #95.) That same day, the court issued a parallel order denying summary judgment to the plaintiffs in *NCIP* and granting summary judgment to the Federal Defendants and Band in that case too. (PER54-87.) The order in this case cross-referenced the order in *NCIP*.

Judgment was entered in both cases on October 13, 2015, and timely appeals were filed.

VI.

STANDARD OF REVIEW APPLICABLE ON APPEAL.

This Court reviews a district court's grant of summary judgment *de novo*, "applying the same standards that applied in the district court." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). It owes no deference to the district court's ruling. *Univ. of Wash. Med. Ctr. v. Sebelius*, 634 F.3d 1029, 1033 (9th Cir. 2011).

Under the APA, this Court will set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Applying this standard, "[t]he APA requires meaningful review; and its enactment meant stricter judicial review of agency factfinding than Congress believed some courts had previously conducted." *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999). When determining whether an agency's action was arbitrary, capricious, or contrary to law, courts "engage in a substantial inquiry … a thorough, probing, in-depth review of [the] discretionary agency action." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). "Courts must

carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors, and may not rubber-stamp … administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute….” *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003) (quoting *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir. 2003)) (ellipses in original).

The Court “must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the [agency]’s conclusion, and may not affirm simply by isolating a specific quantum of supporting evidence.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citation and internal quotation marks omitted).

VII.

SUMMARY OF ARGUMENT.

First, the Secretary of Interior has *expressly* recognized, in adopting regulations in 2008 to govern the process of taking land into trust for gaming purposes, that when Congress enacted IGRA it *did not intend* for tribes to be able to take advantage of the “restored lands” exception when those “tribes” were informally recognized outside the formal acknowledgement regulations, as the Ione Band indisputably was.

The ROD, however, relied on a "grandfather" provision in the 2008 regulations that exempted tribes from plain congressional intent if they had received an opinion from the Department or the NIGC, prior to the regulations' effective date, that they did qualify as a "restored tribe," even if no final agency action had been taken based on that opinion. The Department's circumvention of congressional intent was contrary to law. The D.C. Circuit has articulated the narrow circumstances in which an agency may "grandfather" past administrative practices that run contrary to congressional intent, in *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) (hereafter "*NRDC*"), and *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail Union*"), and this Court has "adopted the framework set forth by the D.C. Circuit in *Retail Union*" and *NRDC*. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2013) (en banc).

The district court, however, refused to apply the *NRDC* factors, due to a demonstrable misreading of that case. It also deferred to the Department's decision to grandfather pre-2008 decisions that were not the basis of any final agency action, which is contrary to this Court's precedents prescribing de novo review for such decisions.

Moreover, as discussed more fully below, applying that de novo review leads to the conclusion that grandfathering the Ione Band's 2006 ILD was improper. In adopting and applying Regulation 292.26(b), the Secretary failed to address any of the *NRDC* criteria but one (reliance), and it applied that criterion incorrectly, failing to require *actual, reasonable* reliance, instead of hypothetical reliance. Any reliance by the Band on the preliminary ILD, prior to final agency action, could not have been reasonable, especially in light of the course of events in this case.

Second, the ROD itself notes that the Ione Band was not "recognized" until 1972 (at the earliest), and in fact, as late as the 1990s the Department asserted in litigation that the Band was <u>not and never had been</u> federally recognized. *Ione Band of Miwok Indians v. Burris*, No. S-90-0993-LKK/EM (E.D. Cal.); PER397-467, PER775-889. That being so, the Secretary lacks authority to take land into trust for the Band under Section 5 of the IRA, which only authorizes trust acquisitions for a tribe that was a "recognized tribe" in 1934.

And finally, though the ROD takes the position that the Band was a "tribe" that was "under federal jurisdiction" in 1934, as *Carcieri* unquestionably requires, the ROD's assertion relies solely on the federal government's *failed* attempts to acquire land for the Band between 1915 and

1930, which does not remotely rise to the level of establishing "federal jurisdiction" over the Ione Band in 1934. The government's efforts to acquire land for many landless California Indians did not create "jurisdiction" over groups of Indians and convert them into "tribes" under the IRA. In fact, long-standing case law, the legislative history of the IRA, and contemporaneous administrative practice reflect the understanding that "federal jurisdiction" over an Indian tribe in 1934 went hand-in-hand with the federal government's ownership and superintendence of land on the tribe's behalf, which undisputedly did not occur here.

Nor is "federal jurisdiction" established by two other facts that the ROD notes (but does not ultimately rely on):

1. That certain Ione Band members are purportedly successors-in-interest of signatories to an *unratified* treaty from the 1850s; and
2. That ancestors of present Band members were included on two lists of landless, non-reservation Indians in California in 1906 and 1915.

An unratified treaty is a nullity, and cannot give rise to obligations or rights on the part of the federal government or the Band. And there is no authority to support the premise that the appearance of individual, landless Indians on a list establishes federal jurisdiction over that Indian's "tribe."

Again, in 1934 it was understood that—with respect to Indian tribes—federal jurisdiction meant federal land.

VIII.

THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARDS IN UPHOLDING THE DEPARTMENT'S ILLEGAL DECISION TO "GRANDFATHER" THE 2006 INDIAN LANDS DETERMINATION ("ILD").

If the Ione Band were to initiate a land-to-trust application today, there is no question it would be unable to take advantage of the "restored lands" exception under IGRA, because in 2008 the Secretary of Interior adopted regulations (25 C.F.R., Part 292, the "Part 292 Regulations") that foreclose a "tribe" that was administratively recognized outside the formal Part 83 Acknowledgment Process from availing itself of that exception.

Specifically, 25 C.F.R. § 292.10 (AA13), provides that to qualify as a "restored tribe" the tribe must have been restored by (1) congressional legislation, (2) a judgment or settlement agreement in a federal court case, to which the United States is a party, or (3) recognized "*through the administrative Federal Acknowledgment Process under § 83.8 of this chapter [Part 83.]*" It is undisputed that the Band does not fit within any of the foregoing provisions; instead the ROD asserts the Band was *informally*

"recognized" by Ada Deer in 1994 *outside* of the "Federal Acknowledgement Process under § 83.8." (PER139-141, AR007156.)

The exclusion of informally-recognized tribes from Section 292.10's definition of "restored tribe" was no oversight; it was a conscious choice, designed to implement Congress's acknowledged intention in adopting IGRA.

Following publication of the draft Part 292 regulations, the Secretary received comments suggesting that the regulations be amended to include tribes (like the Ione Band) that were purportedly "restored" pursuant to agency action outside the Part 83 regulations. The Secretary rejected those suggestions, stating: "We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. ***We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations.***" 73 Fed. Reg. 29354, 29363 (May 20, 2008) (emphasis added) (AA38). The Secretary further elaborated:

> In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process. The part 83 regulations were adopted in 1978. These regulations govern the determination of which groups of Indian descendants were entitled to be acknowledged as continuing to exist as Indian tribes. *The regulations were*

> *adopted because prior to their adoption the Department had made* *ad hoc* *determinations of tribal status and it needed to have a uniform process for making such determinations in the future. We believe that in 1988 Congress did not intend to include within the restored tribe exception these pre-1979*[10] *ad hoc* *determination.* [sic] *Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified only the part 83 procedures as the process for administrative recognition.*

Id. (emphasis added).

Despite acknowledging that treating informally-recognized tribes like the Ione Band as "restored tribes" contravenes congressional intent, the ROD concluded that the Band could avail itself of the "restored tribe" exception pursuant to 25 C.F.R. § 292.26(b) (AA14), which provides:

> These [2008] regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

(PER139-141.)

In applying this grandfathering provision, the Department acted contrary to law. The district court erred in holding otherwise.

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[10] The ROD states that "in 1972, Commissioner Bruce sent a letter that amounted to recognition for the Tribe in accordance with the practices of the Department at the time." (PER141.)

A. THE DISTRICT COURT ACTED CONTRARY TO THIS COURT'S PRECEDENTS IN (1) REFUSING TO APPLY THE "*NRDC* FACTORS" FOR DETERMINING THE NARROW CIRCUMSTANCES IN WHICH AN AGENCY MAY GRANDFATHER PAST REGULATORY ACTIONS THAT ARE CONTRARY TO CONGRESSIONAL INTENT, AND (2) DEFERRING TO THE DEPARTMENT'S DETERMINATION ON RETROACTIVITY.

It is black-letter law that administrative agencies <u>must</u> apply statutes in accordance with congressional intent. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). However, the courts have held that, in some narrow circumstances, past practices that were inconsistent with congressional intent can be "grandfathered" for equitable reasons. In *NRDC*, the D.C. Circuit articulated the following "considerations governing an agency's duty to apply a rule retroactively":

> (1) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (2) the extent to which the party against whom the new rule is applied relied on the formed [sic] rule, (3) the degree of the burden which a retroactive order imposes on a party, and (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

838 F.2d at 1244 (quoting *Retail Union*, 466 F.2d at 390).

Again, this Court has "adopted the framework set forth by the D.C. Circuit in *Retail Union*" and *NRDC*. *Garfias-Rodriguez*, 702 F.3d at 518 (en banc).

The district court, however, concluded that the *NRDC* factors were inapplicable because (1) it determined that *NRDC* only applied to cases

where the agency "refused to provide any grandfathering," rather than cases like this one where it chose to do so (PER48), and (2) it concluded that, though "[t]here is some inconsistency between the Department's position in the final rule that administrative restoration of tribes—at least prior to promulgation of the Part 83 regulations—be foreclosed as a route to being a 'restored tribe'; and the Department's position that administrative restoration is permitted in the Ione Band's case" (PER44), it was proper to "afford[] deference to the Department in its decision to promulgate the grandfathering provision as part of the Part 292 regulations." (*Id.*) Both determinations were wrong as a matter of law.

First, the district court appears to have simply misread *NRDC,* insofar as it concluded that case dealt only with an agency's *refusal* to grandfather. In fact, *NRDC* addressed challenges to both an agency's refusal to grandfather *and its decision to do so. See* 838 F.2d at 1243 ("*The agency has in several cases grandfathered stacks … NRDC attacks several elements of the grandfathering as too generous* …." (emphasis added)). The D.C. Circuit identified the factors listed above as "[s]ome general principles [that] are applicable to all these issues." *Id.* at 1244.

Nor is *NRDC* the only case the County cited that applied those criteria to overturn an agency's refusal to apply a new rule retroactively. *See, e.g.,*

Sierra Club v. EPA, 719 F.2d 436, 467 (D.C. Cir. 1983) (applying *NRDC* factors to overturn EPA rule that grandfathered-in stack heights).

In other words, contra the district court, the *NRDC* factors apply whether the agency chooses to grandfather or not.

Likewise, the district court erred in concluding that the agency's decision to grandfather pre-2008 ILD's was entitled to deference. The application of the *NRDC* factors "is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision[.]" *Retail Union*, 466 F.2d at 390; *see also Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1144 (9th Cir. 1988) ("The question of whether new [administrative] standards should be applied retroactively is one of law, which we review under the *de novo* standard."); *Garfias-Rodriguez*, 702 F.3d at 515 (en banc) (declining to remand to agency for determination of retroactivity, because "there is no need to defer to an agency's position on the issue").

Moreover, *Chevron* deference is not a warrant for courts to "rubber-stamp … administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute …." *Friends of Yosemite Valley*, 348 F.3d at 793.

B. APPLYING THE *NRDC* FACTORS AND THE DE NOVO REVIEW PRESCRIBED BY THIS COURT'S PRECEDENTS, THE DEPARTMENT'S GRANDFATHERING OF THE IONE BAND'S 2006 ILD WAS CONTRARY TO LAW.

The *only* rationale the Secretary gave for "grandfathering in" interim ILDs that were not yet the basis for final agency action under 25 C.F.R. § 292.26(b) was that "It is expected that in those cases, the tribe and perhaps other parties may have relied on the legal opinion to make investments into the subject property or taken some other actions that were based on their understanding that the land was eligible for gaming." 73 Fed. Reg. 29354, 29372 (emphasis added). This cannot sustain the Department's action. It wholly ignores the other *NRDC* criteria, and it applies the reliance prong erroneously.

1. First *NRDC* factor: refusing to treat tribes recognized outside the Part 83 process as "restored tribes" was not "an abrupt departure from well-established practice" that warranted grandfathering.

In adopting the grandfather provision the Secretary did not address the first *NRDC* factor—whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law. "If a new rule 'represents an abrupt departure from well established practice,' a party's reliance on the prior rule is likely to be reasonable, whereas if the rule 'merely attempts to fill a void in an unsettled

area of law,' reliance is less likely to be reasonable." *Garfias-Rodriguez*, 702 F.3d at 521 (en banc).

This factor militates against grandfathering the 2006 ILD in this case.

Prior to 2008, a determination of whether a given tribe was a "restored tribe" was an *ad hoc* inquiry, made by the NIGC or Solicitor's Office on a case-by-case basis. (73 Fed. Reg. 29354-55; AR002613.) Trust acquisitions by the Secretary for gaming purposes were governed by a "Checklist" that contained no guidance regarding the criteria for a "restored tribe." (AR002604-18.) The entire purpose of the Part 292 regulations was to provide concrete rules where none previously existed.

Moreover, treating informally-restored tribes as "restored tribes" was not a well-established practice under the *ad hoc* analysis. The administrative record identifies only one other tribe that was informally recognized outside of the Part 83 regulations—the Lower Lake Rancheria in Santa Rosa. (AR006193). The record does not indicate that the Lower Lake Rancheria was issued an ILD prior to the adoption of the Part 292 Regulations, but in fact, in November 2008 (*i.e.*, after the Part 292 Regulations were already in

effect) the NIGC ruled that the Lower Lake Rancheria was <u>not</u> a "restored tribe."[11]

The district court cited one other example, based on extra-record evidence submitted by the Ione Band—the case of the Karuk Tribe of California. But as the district court *itself* described the facts, the NIGC concluded that the Karuk Tribe was <u>not</u> a "restored tribe" in 2004, and only reversed course in 2012—four years *after* the agency decided to adopt the grandfathering provision (and only weeks before the ROD issued in this case). The Department's *2012* decision to reverse course and treat the Karuk Tribe as a "restored tribe" under the grandfather clause cannot logically serve as a reasonable justification for the Department's *2008* decision to adopt that clause in the first place.

Simply put, neither *Lower Lake* nor *Karuk*, nor anything else in the record of this case, reveal a "well established" practice of treating tribes acknowledged outside the Part 83 regulations as "restored" tribes that would have justified the adoption of the grandfather provision in 2008.

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[11] *See* http://www.nigc.gov/images/uploads/indianlands/Lower%20Lake%20Appeal%2010.07.08.pdf (last visited Mar. 10, 2016).

2. **Second *NRDC* factor: the grandfather clause fails to require a showing of *actual* reliance, and under the specific facts here any reliance by the Ione Band would not have been reasonable.**

Though the Secretary's rationale for the grandfathering clause did address the second *NRDC* factor—reliance—it took that factor into account in a wholly improper way.

When an agency seeks to grandfather prior actions that are contrary to congressional purpose, the agency's grandfathering rule must require a showing of *actual* and *reasonable* reliance by the affected party. *Garfias-Rodriguez*, 702 F.3d at 519 & 522 (en banc); *NRDC*, 838 F.2d at 1248; *Sierra Club*, 719 F.2d at 467-68.

However, 25 C.F.R. § 292.26(b) does not require a showing of *actual* reliance on the previously-issued ILD, and in any event, reliance by the Band on pending (rather than final) agency action would been unreasonable,[12] *especially* in light of the events leading up to the ROD's issuance:

- Regulation 292.10 was initially proposed by the BIA in substantially its present form on October 5, 2006, *less than 10 days after the final 2006 ILD was made public. See* 71 Fed. Reg.

[12] The County does not challenge 25 C.F.R. § 292.26*(a)*, which grandfathers decisions upon which final agency action was *already taken* prior to the regulations' 2008 adoption. In this case, however, there was no final agency action until May 2012.

58769, 58774 (Oct. 5, 2006) (AA15-28). From the beginning, the proposed regulation included the requirement that only tribes administratively restored through the Part 83 process could be a "restored" tribe, and that initial version of the regulations did *not* contain a "grandfather" clause (which did not appear until the final adoption in May 2008). *Id.* Thus, the Band was on notice from the time the 2006 ILD issued that their eligibility to proceed thereunder was tenuous, and there can have been no reasonable reliance between the issuance of the 2006 ILD and May 2008.

- Amador County and the State of California appealed the 2006 ILD within a month of its issuance (AR5119-38, AR 5150-51), and the County filed suit challenging the ILD's "restored tribe" determination several months later. (PER627.) The Band intervened in that challenge. (*Id.*; PER610.) When that case was dismissed as unripe, the court said the County could sue later, and the County made clear its intention to do so, including in the stipulation to dismiss the appeal signed by the Band itself. (PER626-631.)
- Even after issuance of the final Part 292 Regulations, the Department reserved "full discretion to qualify, withdraw or

modify such opinions." 25 C.F.R. § 292.26(b). This retained discretion was fully consistent with the Department's position in the County's prior challenge that "[a]n examination of the opinion memorandum shows that its determination has no effect unless the land at issue is acquired in trust by the United States" and that the ILD was therefore not final agency action.[13] An administrative action becomes final agency action if it is the agency's intention that third parties will rely upon that action. *See Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 438 (D.C. Cir. 1986).

- Any claim of reliance by the Band also conflicts with the Band's own characterizations of the ILD in the earlier litigation: "as a *preliminary* assessment intended to assist the Secretary in making a final determination with regard to the [Band]'s pending fee-to-trust application"[14]; as an "interim," "interlocutory," and merely "advisory" opinion[15]; and as a document that "standing

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[13] PER257.
[14] PER280 (emphasis added).
[15] PER272, PER279, PER295.

alone has no legal force or practical legal implications" unless the fee-to-trust application was approved.[16]

- Finally, there cannot have been any reasonable reliance after Solicitor Bernhardt *withdrew* the ILD in 2009 (PER633). The record shows the Band learned of that withdrawal almost immediately. (AR007120.)

Simply put, the Ione Band always faced—and acknowledged—the prospect that the ILD might be changed, withdrawn, or overturned at any time prior to final agency action being taken. Under such circumstances, any action that the Band took "in reliance" on the ILD was at its own peril, and any claim of reliance is wholly unjustified as a rationale for grandfathering an ILD that is otherwise inconsistent with Congress's recognized intention in adopting IGRA. *See Garfias-Rodriguez*, 702 F.3d at 521-22 (en banc) (reliance on prior administrative actions generally not reasonable where that action has been subject to ongoing challenges, faced possibility of being overturned, and where—as here—it was one of "multiple changes in the agency's position"); *WRT Energy Corp. v. FERC*, 107 F.3d 314, 321 (5th Cir. 1997) (where energy company "apparently relied, perhaps imprudently," on a preliminary administrative decision subject to further review, the Court

[16] PER295.

rejected a claim by WRT that the FERC's ruling was impermissibly retroactive in light of its reliance).

3. Third *NRDC* factor: refusing to treat the Ione Band as a "restored" tribe in accordance with congressional intent would not impose an unfair burden on the Band, because it would not prevent the Band from conducting gaming under IGRA but would only require that it engage in the two-step consultation process.

The Secretary also did not address the third *NRDC* factor—the degree of burden that retroactive application would impose on a party—but that factor also cuts against grandfathering in the 2006 ILD. Overturning the determination that the Ione Band is not a "restored" tribe does not mean that it can never have a gaming facility (assuming the Band is entitled to have land taken into trust on its behalf under *Carcieri*, *see infra*). It simply means that the Band must comply with a Two-Part Test set out by Congress, in which the Secretary and California's Governor both conclude, after consultation with affected interests, including local governments, that gaming would be "in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," 25 U.S.C. § 2719(a) & (b)(1)(A). The ILD is nothing more than an attempt by the Ione Band to circumvent the process set out by Congress (just as it evaded the Part 83 acknowledgement process via political pressure).

4. Fourth *NRDC* factor: there is a strong statutory interest in preventing tribes from improperly taking advantage of the exceptions to the consultation process prescribed by IGRA before allowing gaming.

Nor did the Secretary address the fourth *NRDC* factor—the statutory interest in applying a new rule despite the reliance of a party on the old standard (though, of course, the Band did not reasonably rely)—but this prong also militates against grandfathering the 2006 ILD. In enacting IGRA, Congress concluded that unless certain narrow exceptions applied, the State and local governments who would be affected by casino gaming should be consulted before the effects of such an impactful business could be imposed upon them and their residents. The Band cynically seeks to deprive the State and Amador County of the protections conferred upon them by Congress.

In summary, the ROD's determination that the Ione Band may acquire land for gaming purposes under the "restored tribe" exception rests on an ILD that is inconsistent with Congress's acknowledged intent and the Secretary's own regulations, and the Department's attempt to "grandfather in" that ILD was contrary to law.

IX.

THE IONE BAND IS NOT ELIGIBLE TO HAVE LANDS TAKEN INTO TRUST UNDER THE INDIAN REORGANIZATION ACT.

The Secretary may not take land into trust on behalf of Indians who were not "members of any recognized Indian tribe now under federal jurisdiction," *i.e.*, a tribe that was both "recognized" and "under federal jurisdiction" in June 1934.

This requirement has two separate dimensions. There must have been a formal government-to-government relationship in 1934—hence "recognized" tribe—and that tribe also had to be "under federal jurisdiction," which in 1934 meant living on federally-supervised Indian lands, exempt from state law. To the extent the Secretary proposes to take lands into trust for "tribes" that do not meet these requirements, he exceeds his delegated authority and usurps power that may only be exercised by Congress.

A. THE IONE BAND IS NOT A "RECOGNIZED INDIAN TRIBE" WITHIN THE MEANING OF THE IRA.

1. The IRA requires "recognition" in 1934.

The IRA authorizes the Secretary to take land in trust for "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. It is undisputed (because the Supreme Court has said so) that the phrase "now under Federal jurisdiction" refers to tribes that were under federal

jurisdiction in 1934. *Carcieri*, 555 U.S. at 395. It is also clear that the phrase "now under Federal jurisdiction" modifies the term "recognized Indian tribe." It follows that the Act requires the tribe to be "recognized" at the same time at which it was "under Federal jurisdiction"—in 1934. That is because the temporal limitation of the modifying term ("now under Federal jurisdiction") necessarily applies to the modified term ("recognized Indian tribe"). A tribe cannot be a "recognized Indian tribe now under Federal jurisdiction" in 1934 if it was not a "recognized Indian tribe" in 1934.

In fact, the only time the Supreme Court addressed this question, it concluded that a tribe had to be recognized in 1934. In *United States v. John*, 437 U.S. 634 (1978), the Court explained that "[t]he 1934 Act defined 'Indians' … as 'all persons of Indian descent who are members of any recognized [*in 1934*] tribe now under Federal jurisdiction.'" *Id.* (quoting 25 U.S.C. § 479) (brackets in original; emphasis added). The bracketed phrase "in 1934" reflects the Court's understanding that the word "now" restricts the operation of the IRA to tribes that were "recognized" in 1934.

Likewise, in *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975), the D.C. Circuit stated that "the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation *at that time*"—*i.e.*, when the IRA was enacted in

1934. *Id.* at 1256 (emphasis added). In *United States v. State Tax Commission of Mississippi*, 505 F.2d 633 (5th Cir. 1974), the Fifth Circuit held that "[t]he language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the additional language to like effect." *Id.* at 642. And in *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157 (D.D.C. 1980), the court held that "the IRA was intended to benefit only those Indians federally recognized at the time of passage." *Id.* at 161 n.6. These authorities confirm that the IRA unambiguously requires recognition in 1934.

2. The term "recognized Indian tribe" refers to formal political recognition.

The phrase "recognized Indian tribe" was a term of art by 1934, and it unambiguously referred to a tribe's political status. A 1934 Solicitor's Opinion states that "[a] tribe is not a geographical but a political entity." (AA79.) A year earlier, the Supreme Court discussed "recognition" in political terms, when it held that only *Congress* could determine "'to what extent, and for what time [Indian tribes] *shall be recognized and dealt with as dependent tribes* requiring the guardianship and protection of the United States." *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting *United States v. Sandoval*, 231 U.S. 28, 45 (1913) (emphasis added)).

Decades earlier, Congress abrogated the Executive's power to treat with Indian tribes in unequivocally political terms: "No Indian nation or tribe within the territory of the United States shall be *acknowledged or recognized* as an independent nation, tribe, or power with whom the United States may contract by treaty." Appropriations Act of March 3, 1871, ch. 120, § 1, 6 Stat. 544 (codified as amended at 25 U.S.C. § 71) (emphasis added). And in 1884, the Supreme Court discussed the political significance of recognition when it described the condition of Massachusetts Indians as "remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 108-09 (1884). Congress obviously understood "recognized" to denote a political status by 1934.

Consistent with this understanding, in the *Ione Band Litigation*, the federal government observed in its reply brief supporting summary judgment:

> Normally a group will be treated as a tribe or a "recognized" tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; <u>and</u> (b) the United States has had some continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs.

(PER459-460 n.15 [quoting Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 6 (1982)]; underline in U.S. brief.) In granting that motion, Judge Karlton

adopted this test (PER645), as have a number of other courts. *See, e.g., Mashpee Tribe v. Secretary of Interior*, 820 F.2d 480, 484 (1st Cir. 1987); *W. Shoshone Bus. Council v. Babbitt,* 1 F.3d 1052, 1056 (10th Cir. 1993); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Atty.*, 369 F.3d 960, 968 (6th Cir. 2004).

3. The ROD itself states that the Band was not "recognized" until 1972 (even assuming it was then).

The ROD is replete with statements that the Band was first "recognized" by the government as a tribe in 1972:

- The actions of the Department in furtherance of its efforts to acquire land for the Indians at Ione are not conclusive as to the Tribe's recognized tribal status. However, in 1972, Commissioner Bruce sent a letter that amounted to recognition for the Tribe in accordance with the practices of the Department at the time. (PER141.)

- In the 1970s the Bureau of Indian Affairs recognized the Ione Band as an Indian tribe based on the 1915 and later efforts to acquire land for the Band." (PER149.)

- "The [1972 Bruce] letter does recognize the lone Band as an Indian tribe based on the 1915 determination by the United States to acquire land for the Band." (*Id.*)

- The "2006 Indian Lands Determination … found, inter alia, that the 1972 letter from Commissioner Bruce recognized the Ione Band as an Indian tribe." (*Id.*)

- The [1972] Bruce letter recognized the Ione Band as an Indian tribe based on the 1915 determination by the United States to acquire land for the Band. (PER151.)

The Department is bound by these statements, because agency action can only be upheld based on the rationale adopted by the agency in making the decision. *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

In light of these statements, and the requirement of the IRA that a "tribe" be "recognized" in 1934, there can be no question that the Secretary is not authorized to take land into trust on the Band's behalf under the IRA.

B. BECAUSE THE IONE BAND DID NOT LIVE ON FEDERALLY-RESERVED LAND AND DID NOT HAVE A TREATY, EXECUTIVE ORDER, OR LEGISLATION, IT WAS NOT "UNDER FEDERAL JURISDICTION" IN 1934.

1. Absent a treaty, "federal jurisdiction" over an Indian tribe unambiguously meant Indians on federally-held land in 1934.

The ROD itself flatly acknowledges, "The actions of the Department in furtherance of its efforts to acquire land for the Indians at Ione are not conclusive as to the Tribe's recognized tribal status." (PER141 [emphasis added].) If such unconsummated purchases were admittedly not conclusive as to the "recognized" tribal status of the Band, they certainly cannot be regarded as establishing that said Band was "under federal jurisdiction." To the contrary, the government's failure to acquire land for the Ione Band is conclusive evidence that the Band—regardless of its tribal status—was <u>not</u> then "under federal jurisdiction," because in 1934 federal jurisdiction over

Indians unambiguously went hand-in-hand with federally-supervised land reserved for those Indians, at least where there was no valid treaty in effect. That understanding is definitively established by long-standing case law, the legislative history of the IRA, and contemporaneous administrative practice.

As the legislative history of the IRA itself specifically noted, "Indians under Federal jurisdiction *are not subject to State laws.*"[17] This is significant, because prior to the enactment of Public Law 280 in 1953 (*i.e.,* in 1934), whether an Indian or tribe was subject to state laws turned on whether that Indian or tribe was on federally-supervised land. *See Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 662 (9th Cir. 1975) ("Prior to passage of P.L. 280, Congress had encouraged, under § 476 of the Indian Reorganization Act, the formation and exercise of tribal self-government *on reservation trust lands.*" (emphasis added)).

As the Supreme Court explained in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), citing a series of cases going back to 1913, Supreme Court case law requires "both a federal set-aside and federal superintendence [to conclude] that the Indian lands in question constituted Indian country and *that it was permissible for the Federal Government to exercise jurisdiction over them.* … The federal set-aside requirement ensures

[17] PER161.

that the land in question is occupied by an 'Indian community'; *the federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question*." *Id.* at 530 (emphasis added; footnote omitted).

Thus, the courts have held that land taken into trust by the federal government under Section 5 of the IRA itself "is effectively removed from state jurisdiction." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1011 (8th Cir. 2010). *See also* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW at 116 (1942 ed.) ("That state laws have no force *within the territory of an Indian tribe* in matters affecting Indians is a general proposition that has not been successfully challenged, at least in the United States Supreme Court, since that Court decided" *Worcester* in 1832) (emphasis added) (AA81).

By contrast, Indians going beyond the boundaries of lands set aside for their protection were, and are, subject to state law. *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962); *Ward v. Race Horse*, 163 U.S. 504, 507-08 (1896) (Indian who killed game outside the boundaries of a reservation in violation of Wyoming state laws could be prosecuted by the

State); *Kennedy v. Becker*, 241 U.S. 556 (1916) (state could prosecute Indian for illegal spear-fishing off the reservation).

Consistent with this unambiguous, long-standing distinction between federal jurisdiction over Indians on federally-controlled Indian lands and state jurisdiction over Indians off-reservation, the Comptroller General opined in 1925 that:

> There exists no relation of guardian and ward between the Federal Government and Indians who have no property held in trust by the United States, have never lived on an Indian reservation, belong to no tribe with which there is an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress. The duty of relieving the indigency of such Indians devolves upon the local authorities the same as in the case of any other indigent citizens of the State and county in which they reside.

5 Comp. Gen. 86 (Aug. 3, 1925) (AA75).[18]

This is extremely significant, because in a 1933 letter from then-Superintendent of the Sacramento Indian Agency O.H. Lipps to then-Commissioner of Indian Affairs John Collier, quoted by the district court in the *NCIP* decision, Mr. Lipps described the Indians living near Ione thus:

> The situation of this group of Indians is similar to that of many others in this Central California area. They are classified as non-wards under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or

[18] Opinions of the Comptroller General are subject to judicial notice by this Court. *Osage Tribe of Indians of Okla. v. United States*, 95 Fed. Cl. 469, 475 (2010).

> rancheria, and none of them have allotments in their own right held in trust by the Government. They are living on a tract of land located on the outskirts of the town of Ione.

(PER339-340 [emphasis added].)[19]

The IRA's legislative history also reflects that the addition of the phrase "under federal jurisdiction" was proposed by Commissioner Collier, "a principal author of the [IRA],"[20] and incorporated in Section 19 of that Act to prevent "tribes" not already living on federal land from taking improper advantage of the Act.

During consideration of the bill, several Senators voiced concerns that (1) there were already a number of self-identified "Indians" and "tribes" on whose behalf the federal government owned land, but who really should not have been under federal jurisdiction, and (2) concerns that the definitions of "Indian" and "tribe" in Section 19 were so broad that they threatened to create more such "Indians" and "tribes" who would be able to take advantage of the provisions of the Act, against the wishes of the Senators.[21]

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[19] *See also In re Blackbird*, 109 F. 139, 143 (W.D. Wisc. 1901) ("*The true and unimpeachable ground of federal jurisdiction in such a case as this is that the Indians placed upon these reservations in the states are the wards of the government*, and under its tutelage and superintendence, and that, congress having assumed jurisdiction to punish for criminal offenses, that jurisdiction is exclusive." (emphasis added)).

[20] *Carcieri*, 555 U.S. at 390 n.5 (quoting *United States v. Mitchell*, 463 U.S. 206, 221 n.21 (1983)).

[21] PER165-167.

As examples of the abuses that the legislative sponsors wished to avoid, the bill's chief co-sponsor in the Senate, Senator Wheeler, noted that former Vice President Charles Curtis, whose claim to be an "Indian" was highly dubious, "ha[d] lands today under the supervision of the Department," which Senator Wheeler deemed "idiotic."[22] The Senator also pointed to the specific case of a so-called "tribe" in California, living on federal land, which in the Senator's estimation had no business being under federal jurisdiction. He believed that "Their lands ought to be turned over to them in severalty and divided up and let them go ahead and operate their own property in their own way."[23] Commissioner Collier, when asked if other such "Indians" would be able to take advantage of the Act replied, "If they are actually residing within the present boundaries of an Indian reservation at the present time."[24]

Senator Wheeler cautioned that the purpose of the Act was not to deal with the problem of those "tribes" already (but improperly) under federal jurisdiction.[25] Nevertheless, he and other Senators were anxious that IRA not make the problem worse.[26] Thus, the legislative record contains a

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[22] *Id.*
[23] PER166.
[24] PER165 (emphasis added).
[25] PER163-164.
[26] PER165-167.

detailed discussion of the Catawba Indians in South Carolina, who did not then have a reservation. The question arose whether the Catawbas would be "Indians" within the meaning of the IRA. Senator Mahoney believed that they should be, because "the Catawbas certainly are an Indian tribe[,]" and he saw no reason "Why, if they are living as Catawba Indians, why should they limit them any more than we limit *those who are on the* reservation[.]"[27] Chairman Wheeler, however, disagreed, and Senator Mahoney suggested that the definitions of "Indian" and "tribe" would then need to be modified to avoid that result. It was in response to this suggestion that Commissioner Collier proposed the addition of the phrase "now under federal jurisdiction," to modify the term "recognized Indian tribe."[28] In sum, the whole purpose of that phrase was to leave existing reservation Indians unaffected, but limit the ability of non-reservation Indians to bring themselves within the Act.[29]

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[27] PER166.

[28] *Id.*

[29] In this same vein, the legislative history also reflects that "Representative Edgar Howard, who co-sponsored the IRA with Senator Burton Wheeler, made the following statements during the congressional debate regarding whom should be classed as an 'Indian:'

> "For purposes of this act, [the definitional section] defines the persons who shall be classed as Indian. *In essence, it recognizes the status quo of the present reservation Indians* and further includes all other persons of one-fourth Indian blood...."

Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002), *aff'd*, 386 F.3d 1271 (9th Cir. 2004) (quoting Congressional Debate on

Consistent with this intention, on August 15, 1934—only two months after passage of the IRA—Superintendent Lipps sent another letter to Commissioner Collier, listing the various Indian communities under the "jurisdiction" of the Sacramento Agency, which then included Amador County. (PER716-720.) The stated purpose of that letter was to respond to the Commissioner's request for information about Indian communities within the Sacramento Agency's jurisdiction, for the purpose of putting into effect the "Wheeler-Howard bill," *i.e.*, the IRA. (PER717.)[30] The Ione Band was not listed, though the Jackson Rancheria and Buena Vista Rancheria were; and the Band was not invited to organize under the Act.

This judicial, legislative and administrative background provide conclusive evidence that the term "federal jurisdiction" as used in the IRA was understood by those who were responsible for its drafting and enactment to apply only to tribes with a reservation set aside on its behalf (at least absent a specific treaty or legislation). *See Carcieri*, 555 U.S. at 390 n.5 ("In addition to serving as Commissioner of Indian Affairs, John Collier was 'a principal author of the [IRA].' [Citation.] And, as both parties note, he

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Wheeler-Howard Bill (1934) in THE AM. INDIAN AND THE UNITED STATES, Vol. III. (Random House 1973)) (emphasis in original).

[30] The "Wheeler-Howard Act" was the IRA. *Morton v. Mancari*, 417 U.S. 535, 537 (1974).

appears to have been responsible for the insertion of the words 'now under Federal jurisdiction' into what is now 25 U.S.C. § 479 … Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it."); *id.* at 397 (Breyer, J., concurring) (rejecting deference to Department's interpretation of "now under federal jurisdiction" because Commissioner Collier favored a different interpretation when the IRA was enacted).

Despite attempts by the federal government to acquire land for the Ione Band, that never ultimately happened, and the Band was subject to state law at all relevant times. (PER372, PER527, PER531, PER537-550.) At most, the government's efforts to obtain land for the Ione Band constituted a failed attempt to establish "federal jurisdiction" over the Band. Thus, the Secretary cannot take land into trust for the Band.

2. The Department's proposed two-part inquiry for "under federal jurisdiction" cannot overcome the statute's plain meaning.

The meaning of "under federal jurisdiction" was not ambiguous with respect to Indian tribes in 1934. The plain legislative intent of incorporating the phrase "now under federal jurisdiction" was to limit the reach of the Act only to those "recognized Indian tribes" then residing on land held for the

tribe's benefit by the federal government. That being the case, there is no ambiguity to be resolved by administrative interpretation, and so the Secretary's newly-minted "two-step" analysis of "under federal jurisdiction" is not entitled to any deference. *See Alaska v. Babbitt,* 72 F.3d 698, 701 (9th Cir. 1995) (when "Congress 'has directly spoken to the precise question at issue' either in the statute itself or in the legislative history[,]" there is no need for "administrative interpretation" such as would warrant deference by this Court (quoting *Chevron*, 467 U.S. at 842); *Carcieri*, 555 U.S. at 396-97 (Breyer, J., concurring) (agreeing with majority's interpretation of the word "now" from the phrase "now under federal jurisdiction" because "the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty," so the Department's "interpretation is not entitled to *Chevron* deference, despite any linguistic ambiguity.").

Nevertheless, as the district court observed, the ROD cites two other "facts" for the proposition that the Band was "under federal jurisdiction" in 1934: (1) the fact that the members of the Band were purportedly successors in interest to the signatories of Treaty J, one of 18 unratified treaties negotiated by the Federal Government with California Indians in the mid-1800s, and (2) the fact that 36 Indians near Ione were included in a "census"

of California Indians accompanying Special Agent Kelsey's 1906 survey of the conditions of said Indians. (PER146-147.)

Crucially, though the ROD noted these purported "facts" in passing, it did not rely on them to support its ultimate conclusion, which was that "the continuous efforts of the United States beginning in 1915 to acquire land for the Ione Band as a permanent reservation demonstrates a consistent 'under federal jurisdiction' relationship between the Federal Government and the Ione." (PER148.) Again, agency action may only be upheld based on the rationale adopted by the agency in making the decision. *Chenery*, 318 U.S. at 87.

But even leaving that aside, these facts are insufficient to support the ROD's conclusions.

a. Failed treaty negotiations cannot establish that the Tribe was "under Federal jurisdiction."

As to the failed treaty negotiations in the 1800s, even if one accepts as true that members of the Band are descendants or "successors in interest" to those Indians that negotiated Treaty J, that fact has little bearing on whether the Band was "under federal jurisdiction" in 1934. The "Ione Band" was indisputably not a party to any "treaty with the United States *(in effect in 1934)*." *Id.* (Breyer, J., concurring) (emphasis added). No party claims

otherwise, and, indeed, in the *Ione Band Litigation*, the tribe "concede[d] that they are not a 'treaty tribe.'" (PER649.)

Treaty *negotiations* obviously cannot establish duties or obligations on the part of the United States such as would give rise to "federal jurisdiction," because an unratified treaty is "a legal nullity." *Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015), *cert. denied*, 2016 U.S. LEXIS 2194 (U.S. Mar. 28, 2016). One needs an *executed* treaty to establish any obligation on the part of the United States. *Donahue v. Butz*, 363 F. Supp. 1316, 1320 n.4 (N.D. Cal. 1973) ("said Karuk treaty, unratified by the Senate, cannot serve as a legal basis for any claim by plaintiffs in this action"). Indeed, "[t]he doctrine of governmental *ratification* has been firmly entrenched during the entire course of the Indian relationship." *Blackfeet et al. Nations v. U.S.*, 81 Ct. Cl. 101, 127 (1935) (emphasis added). *See also Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994) ("The California Indian population is unique in this country and must be understood in historical context. In the 1850s, Congress failed to ratify treaties that the Federal Government had entered into with Indian tribes in California. Thus, although they were eventually recognized in Federal law as individual 'Indians of California,' many California Indians are not members of federally recognized tribes.").

b. Including individual Indians living near Ione on a list of landless, non-reservation Indians also cannot establish that there was a "recognized tribe" that was "under federal jurisdiction."

As to the inclusion of some individual Indians near Ione in the 1906 list of Indians in California, that hardly demonstrates a tribe "under federal jurisdiction." After all, the list in question included Indians throughout Northern California, noting genealogical stock, but without distinguishing among "tribal" groups. Notably, the list includes members of purportedly separate "tribes" at the "Jackson Reservation," and at "Buena Vista" which subsequently obtained its own reservation, and Indians from other counties.

Moreover, that enumeration was undertaken in furtherance of Congress's land purchase program, which, as previously noted, "attempted to purchase land wherever it could for landless California Indians *without regard to the possible tribal affiliation of the members of the group.*" (PER605 [emphasis added].)

Third, the fact that an Indian appears on a government list does not mean that there is a tribe under federal jurisdiction. As the government noted in the *Ione Band Litigation*, there is an extensive list of California Indians from 1928 who were included on a judgment roll for the taking of ancestral lands pursuant to 25 U.S.C. § 651, but "the creation of this Judgment Fund roll did not automatically extend federal recognition to the

myriad of tribal entities identified by Indian applicants who appear on the roll." (PER461.) If that list of Indians, which is far more formal than the Kelsey and Terrell lists, was insufficient to establish a federal relationship with those Indians' "tribes," surely the less formal lists are insufficient.

And finally, it is notable that no pre-*Carcieri* authority supports the proposition that appearing on an Indian "census" equates to federal "jurisdiction." This post-*Carcieri* innovation reflects the Department's well-known hostility to the *Carcieri* decision, and a blatant attempt to create a loophole in the Supreme Court's reading of the IRA to "make sure that all recognized—federally recognized Indian tribes have the same opportunity to acquire land into trust and to make sure that the *Carcieri* decision … is not an impediment, cannot be—is not impediment for such a goal."[31]

[31] Tr. of BIA Carcieri Tribal Consultation: Arlington, Va., Wed., July 8, 2009, p. 17:6-11 (Comments of Acting Principal Assistant Secretary for Indian Affairs George Skibine), *online at* http://www.bia.gov/cs/groups/public/documents/text/idc-001871.pdf (last visited Mar. 29, 2016).

X.

CONCLUSION.

The district court's judgment should be **OVERRULED**, and remanded for entry of judgment in Amador County's favor.

Respectfully submitted,

Dated: April 1, 2016

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STATEMENT RE RELATED CASES
9TH CIRCUIT RULE 28-2.6

No Casino in Plymouth v. Rydzik, Case No. 2:12-cv-01748-TLN-CMK (E.D. Cal.), was designated by the trial court as related to this case. *NCIP* is also currently pending on appeal in this Court. *See* Appeal No. 15-17189 (9th Cir. filed Oct. 30, 2015).

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