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IONE BAND OF MIWOK INDIANS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF AMADOR, CALIFORNIA,

Plaintiff,

vs.

THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and the

IONE BAND OF MIWOK INDIANS,

Intervenor-Defendant.

Case No. 2:12-cv-01710-TLN-CKD

INTERVENOR-DEFENDANT IONE BAND OF MIWOK INDIANS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ; MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT THEREOF

Date: November 6, 2014
Time: 2:00 p.m.
Place: Courtroom No. 2

Judge: Honorable Troy L. Nunley

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CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendant Ione Band of Miwok Indians, a federally recognized Indian tribe, through its undersigned counsel of record, under Fed. R. Civ. P. 56 and E.D. Cal. Local Rule 260, hereby moves this Court for an Order entering summary judgment against the Plaintiff on all counts set forth in the Complaint in this action, and affirming all aspects of the May 24, 2012 Record of Decision, and opposes Plaintiff Amador County's Motion for Summary Judgment.

This cross-motion and opposition is based upon the attached memorandum of points and authorities, the administrative record and supplemental administrative record on file herein, the reply papers to be filed, oral argument, and the pleadings and records in this action. Pursuant to this Court's January 24, 2014, amended pretrial scheduling order, no separate statement of material facts is submitted herewith.

For the reasons set forth in the accompanying Memorandum in Support of Intervenor-Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, Plaintiff's Motion for Summary Judgment should be denied in its entirety and Intervenor-Defendant's Cross-Motion for Summary Judgment should be granted and judgment entered thereon with prejudice as to all defendants.

Dated: July 10, 2014

HOLLAND & KNIGHT LLP

By: /s/ Jerome L. Levine
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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

CASES

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STATUTES

OTHER AUTHORITIES

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

This case is the latest in an unrelenting attack by Plaintiff County of Amador ("County") on the legal status of Intervenor-Defendant Ione Band of Miwok Indians ("Ione Band", "Ione" or "Tribe") and on decisions by the United States Department of the Interior ("DOI") made repeatedly and correctly over the past 100 years to acknowledge the Ione Band's historical tribal status and its rightful place as a landholding tribe within the County. Mischaracterizations of the Tribe and its history by the County throughout its moving papers merely underscore what the Tribe has been battling these many years. Even worse is the repeated suggestion that this case and the Tribe's long struggle is really simply about a casino and an attempt to end run a consultative process involving the County and State, but without any mention of the fact that joint efforts by the U.S. and the Tribe to restore a land base to the Tribe began nearly a century ago, before gaming ever became a possible means for achieving tribal economic independence, a primary raison d'etre for the Indian Gaming Regulatory Act's (IGRA's) enactment years later. The County also omits any reference to the extensive consultations among the Tribe, local and state agencies, and the local population that occurred as part of the environmental review process and are detailed in the Record of Decision ("ROD") at issue here.

When viewed accurately, the ROD and administrative record on which it relies fully support the DOI's conclusions.

II. SUMMARY OF ARGUMENTS

Intervenor-Defendant Ione Band is a federally recognized Indian tribe whose relationship with the federal government, particularly DOI's Bureau of Indian Affairs ("BIA"), spanned centuries. Despite efforts by the federal government dating back to the early 1900s to restore to the Tribe a land base, and particularly a certain 40-acre parcel within its historical area, in which many of its members and their ancestors had lived for generations, the Tribe still remains landless. As a result, in 2005 the Tribe filed an application to have land in its historic area in Amador County (the "Plymouth Parcels") taken into trust by the federal government under the Indian Reorganization Act

("IRA"), 25 U.S.C. §§ 461 *et seq*. AR2751-3482.[1] After a seven-year application process that included thousands of pages of record evidence, hundreds of hours of meetings and correspondence, and costly expert analyses, in 2012 DOI's Acting Assistant Secretary - Indian Affairs Donald E. Laverdure determined in a well-reasoned Record of Decision that it would be appropriate and consistent with federal law and policy to grant the Tribe's application and accept the Plymouth Parcels into trust for the Tribe's benefit. AR10049-10116. The ROD also concluded, in accordance with a prior 2006 DOI determination, that the proposed trust land acquisition would constitute the restoration of lands for a restored tribe.

Nevertheless, the County asks this Court to set aside the ROD's determinations -- to acquire land in trust for the benefit of the Tribe and to deem such acquisition a restoration of lands for a tribe restored to federal recognition (AR10054) -- and to adjudge them unlawful pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). Plaintiff's Mem. of Points & Authorities ("PMP&A") 3:17-23. The County attempts to support its claim for such a judgment through five lines of argument, all of which fail.

First, it is fundamental - and the basis of this Court's jurisdiction - that an attack on a federal agency's administrative rulings under the APA be founded on a solid showing that the agency's actions were irrational and arbitrary and capricious, as determined by examining the rulings and the record on which they are based. Yet not surprisingly the County barely attempts to address that test, and instead seeks to place this Court in the position of not simply determining whether the APA legal tests have been satisfied, but whether, based on a portion of the administrative record in this case ("AR"), a different result *might* have been reached. For example, in the course of relating Ione's "history," the County attempts to show that there are documents in the AR that could -- if read as the County suggests -- support a finding that the Tribe is not a "restored" tribe and that the Secretary of the Interior ("Secretary") lacked authority to take land into trust for it. This argument

[1] Citations to documents in the both the administrative record and the supplement to the administrative record previously filed in this case with the Court are cited as labeled "ARXXX". Pursuant to E.D. Cal. Local Rule 133(i)(3)(i), copies of cited authorities not reported, published, or codified are appended as exhibits within the Appendix of Supplemental Authorities and cited as "App. Supp. Auth., Ex. X". For the Court's convenience, a copy of the ROD (AR10049-10116) is attached as Exhibit A.

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fails, first, because even assuming, *arguendo*, that some documents might support these conclusions, such a showing is irrelevant for APA purposes. Government action cannot be overturned simply because the government *could have* reached a different conclusion based on the record. Rather, the County must show that the conclusion that the government *did in fact reach* was arbitrary and capricious. This, the County fails to do -- it never establishes that the agency's reasoning was unsupported or irrational. Indeed, much of the County's argument is based on a comparison of often conflicting legal decisions by various DOI attorneys. But the County fails to note that DOI's own officials, in most instances the highest ranking federal official charged by Congress to make the actual decision, were consistent in their reading of and reliance on the agency's actions and records stretching over the past century.

The County's second argument -- that the ROD is invalid because it relied on the regulation at 25 C.F.R. § 292.26 that the County claims is itself invalid -- is essentially a collateral attack on the regulation that was not raised in the Complaint and cannot be raised here. The claim is barred by the statute of limitations, as the challenged regulation was promulgated and published over six years ago. And, in any event, the County's arguments as to why the regulation might be invalid are wrong. Further, the County's argument that regulation 292.26 was improperly applied to Ione also fails because Ione clearly meets the criteria for its application.

The County's third argument -- that pursuant to the U.S. Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058 (2009) ("*Carcieri*"), the Secretary lacks authority to take land into trust for the Tribe under the IRA -- also lacks merit. *Carcieri*'s holding required that the Secretary answer a simple question: Was the Tribe under the jurisdiction of the United States in June 1934 when the IRA was enacted? Ione clearly was, and the ROD rightfully determined so based on the Secretary's careful consideration of the AR materials, which included extensive internal correspondence, reports, studies, and fact-finding regarding Ione stretching back to the 1800s, that the County ignores or wrongfully challenges when it argues to the contrary. Here, as elsewhere, much of the County's argument is also barred by the statute of limitations in that it attempts to collaterally attack valid, binding actions taken by the government decades ago and referenced in the ROD. There is no evidence that those actions were challenged or were illegal or

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unconstitutional, and on the contrary are well-supported in the AR.

The County's fourth line of attack claims that the Tribe is collaterally estopped from arguing that it was a federally recognized tribe prior to 1991. But the County fails to meet its burden of proof as to this argument, as it does with respect to its apparently alternative *res judicata* argument. The argument further fails because it is based on a misreading of an earlier case, *Ione Band of Miwok Indians v. Burris*, S-90-0993 LKK/EM (E.D. Cal., complaint filed Aug. 1, 1990) ("*Burris*"),[2] which not only does not create an estoppel, but if anything lends substantive and factual support to the Tribe's contention that the ROD was correctly decided.

Finally, the County argues that the Tribe cannot be deemed a restored tribe because it was never terminated or lawfully restored. This argument fails, however, because in addition to being untimely, it is based on the County's misunderstanding of what constitutes an administrative termination.

In short, the County fails to meet the APA standard for overturning the ROD. The ROD therefore must be upheld.

III. FACTUAL BACKGROUND

The Ione Band of Miwok Indians is a federally-recognized Indian tribe that traces its ancestry to Miwok peoples who have lived in California for thousands of years. AR3531. The Miwoks' native lands included the Sierra Nevada Foothills of central California, covering lands that today make up Amador County. AR3528-3530. After gold was discovered in 1848, the conflicts and battles that erupted between gold seekers and the tribal communities precipitated concerns by the U.S. government, which launched attempts to obtain land cessions from tribal inhabitants in exchange for safe set-aside lands. AR3536-3538. The government's treaty commissioners engaged in government-to-government negotiations with tribal leaders in California and entered into 18 treaties. AR3538. Ancestors of current-day Ione Band members were among those who negotiated these treaties. AR3539-3541, 3543. Sadly, however, the U.S. Senate refused to ratify any of the 18

[2] The *Burris* complaint appears in Plaintiff's Request for Judicial Notice in Support of Motion for Summary Judgment ("PRJN"), Ex. 1. The documents submitted in the County's judicial notice request may not be cited by the County for the truth of the matters asserted therein. *Nucal Foods, Inc. v. Quality Egg LLC,* 887 F.Supp.2d 977, 984-85 (E.D. Cal. 2012).

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California treaties, and the Miwok, who were in no position to resist or stem the inexorable flow of new arrivals, lost their native lands. AR3541. By the time of California statehood in 1850 and the creation of Amador County in 1854, mining camps and towns had materialized throughout Northern Sierra Miwok territory, pushing its tribal communities into the periphery. AR3541

California's displaced tribes did not fare well after their eviction from their ancestral lands. Cognizant of their circumstances, the BIA appointed special agent C.E. Kelsey in 1905-06 to examine the conditions of the dispossessed and thus homeless California tribal members. AR3543. Kelsey conducted a census for Amador County that enumerated, among others, those at Ione (AR3543-3544). The federal government revisited the Ione Band's situation in 1915, when BIA Special Indian Agent John J. Terrell conducted a census and identified Captain Charlie Maximo as the leader of the Ione Band, which then consisted of 101 individuals. AR3544-3547.

Special Agent Terrell also reported on the importance of securing land for the Tribe, and he and other government officials made significant efforts to do so. *See* AR3547, 4642, 221, and multiple correspondence AR68-420. Accordingly, the government approved the purchase of land for the Ione Band and appropriated funds for this purpose. AR160, 3547,4634-4635, 4637. A 40-acre tract of land in Amador County located within a larger parcel was targeted for purchase because, as Terrell noted, "[T]hese Indians are among the most needy and worthy of any I have visited in California …[and] the proposed purchase embraces the ancient Village of their and their ancestors' home as far back as they have a history." AR4629; *see also* AR160, 4605-4683. Early land deeds stated that the 40-acre tract had been "sold to the United States … fenced, and used as an Indian Reservation" (AR516), but apparently not quite, as hundreds of pages of correspondence in the AR show that, for over two decades after the 1915 Terrell Census, government agents attempted to negotiate with the landowners to finalize a land purchase and secure a homeland for the Ione Band (AR 68-420), and the transaction was never completed due to clouded title issues on the 40-acre tract. AR1409, 3549, 4605-4613. These early land purchase efforts apparently concluded around 1941, when the government made further unsuccessful efforts towards a land purchase (AR3549). Thereafter, Tribal members continued to survive without federal assistance and to occupy the land as they had for decades prior. AR3549.

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By 1971 the Tribe had renewed its interest in securing BIA housing assistance. To secure control over the 40-acre tract, some Tribal members filed an action in Amador County Superior Court to quiet title as to the 40-acre parcel for the benefit of Tribal members. AR531. In 1972 the court awarded title to the parcel but ambiguously granted judgment to the named plaintiffs as individuals and to "other members of the Ione Band of Indians." AR535-536, 3549. Having obtained a ruling that they owned the 40-acre parcel in fee, Tribal members next sought to have the federal government place that land in trust for the benefit of the Tribe (as the government had undertaken to do starting over 50 years prior). AR544. Unfortunately, the ambiguity in the judgment would cause further title issues. AR1126.

In 1972 BIA Commissioner Louis Bruce, the highest ranking federal official entrusted by Congress with administering Indian affairs (25 U.S.C. §2), and the predecessor in rank, function, and authority to the current DOI Assistant Secretary-Indian Affairs, sent a letter to the Ione Band confirming that federal recognition had been extended to the Band at the time of the land purchase efforts and agreeing, on behalf of the federal government, to take the 40-acre parcel into trust for the Tribe's benefit pursuant to the terms of the IRA. AR4308-4309. Commissioner Bruce's confirmation that the IRA applied to Ione, and his unambiguous implementation of the government-to-government relationship between the Tribe and the federal government, was a formal federal action. AR5552.

Indeed, approximately two years later, then-Commissioner of Indian Affairs Morris Thompson reiterated the formal acknowledgment of Ione's previously recognized tribal status in a memorandum to the BIA Sacramento Area Director by stating, "I hereby reaffirm the conclusion reached by Commissioner Bruce in October 1972 that recognition had been extended to this group as a group of Indians at the time the purchase by the United States of this tract was originally contemplated." AR674,873. He concluded, after reviewing the record submitted by the BIA Sacramento Area Director and other materials, that the Tribe was still recognized as of his memo and "decided that it is unnecessary to insist that the group articulate and submit any further request for formal recognition." AR870-873.

To be sure, not all federal employees agreed with Commissioners Bruce and Thompson.

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Despite their official determinations, some DOI advisors and staff refused to adhere to the official Bruce and Thompson directives. *See,e.g.,* AR673 (stating Bruce decisions not implemented because of Solicitor's disagreement), 678 (same). Then, in the late 1970's, the government's executive branch began consistently taking the position that Ione was not a federally-recognized tribe. By consistently denying that the Tribe was (or ever had been) federally recognized and failing to treat it as such, DOI instituted a *de facto* administrative termination of the Tribe's recognition. AR5553. This termination was effected in several key ways, including correspondence from the Central California Agency of the BIA on July 28, 1977, denying the Tribe's previously recognized status and recommending that the Tribe obtain recognition under the recently-proposed tribal acknowledgment regulations (*see* reference in AR20812); omission from the BIA's formal list of federally-recognized tribes in the years 1979-1994 (AR1409, 4773); a 1990 letter from Hazel Elbert, Deputy to the Assistant Secretary-Indian Affairs (Tribal Services) taking the position that Commissioner Bruce's 1972 recognition of the Tribe was not in fact a recognition, and that the Tribe was not federally recognized (AR20808); briefs filed by DOI in *Burris* arguing that in order to be federally recognized Ione must follow the procedures outlined in 25 C.F.R. 83 (e.g., AR691); a 1992 decision by the Interior Board of Indian Appeals (IBIA) in *Ione Band of Miwok Indians v. Sacramento Area Director* -- based on positions advocated by the BIA -- that Ione had not yet been recognized and that to become recognized it would need to follow the administrative acknowledgment procedures at 25 C.F.R. Part 83 (AR812); and a 1992 letter from Assistant Secretary-Indian Affairs Brown taking that same position (AR4779).[3] All of these actions demonstrate that between at least 1977 and 1992 the government reversed its previous policy of recognizing, and dealing accordingly with, the Ione Band, and instead maintained for the first time

[3] Throughout its brief the County cites these documents in support of the proposition that Ione had in fact never been recognized in the past. E.g., PMP&A 12:1-24; 14:11-15:6. But the County's reliance on these documents is misplaced because it ignores the historic context in which they were drafted and the purpose they were intended to serve. These documents were issued by government staff in the period when the government was denying Ione's recognition. The government's goal during this period was -- as it had been previously with other tribes -- to deny and otherwise terminate any existing government-to-government relationship with the Tribe. Accordingly, all documents issued during the "termination" period were deliberately crafted to deny Ione's recognition by, among other methods, denying that the Tribe had ever been recognized. Therefore, these documents do not contain an accurate account of the government's historic relationship with Ione prior to the 1970's.

that the Tribe was not federally recognized.[4]

Despite these hardships, the Tribe continued to insist on its federal status and persevered in its attempt to secure a land base.[5] Through meetings, correspondence and legal action the Ione Band persistently maintained that it was and always had been a federally recognized Indian tribe. In 1994 the federal government finally agreed, abandoning its termination policy and reverting to its previous position by formally re-recognizing the Tribe. In a determination dated March 22, 1994, Assistant Secretary-Indian Affairs[6] Ada Deer explicitly re-affirmed the Tribe's recognition and instructed that land be taken into trust for the Tribe. AR4312, 4323-4325. Assistant Secretary Deer also instructed that Ione be given its rightful place on the list of federally recognized Tribes and that the BIA deal with the Tribe accordingly. *Id.* The Tribe was placed on the official Federal Register list of federally recognized tribes in 1995 (AR4826) and has been on that list ever since. Neither the County nor any other party has ever challenged the Ione Band's inclusion on that list.

Several years after being restored to federal recognition, the Tribe sought to establish economic independence, security, governmental and residential sites, and an economic base in order to provide for its members' health and welfare. Accordingly, the Tribe began a revitalized effort to have land in Amador County placed in trust.[7] Income from a proposed gaming development on that trust land would enable the Tribe to provide its members with education, healthcare, housing, employment, and other basic necessities.

Lacking funds to purchase and develop land on its own, in 2003 the Tribe engaged and negotiated an agreement with a development partner, IKON Group, LLC., to assist in financing the

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[4] For a more thorough account of Ione's termination see Ione's submission at AR4566-4581.
[5] Importantly, throughout all of the Tribe's history of dealing with the government, the highest ranking officials authorized to handle Indian affairs, with the sole exception of Assistant Secretary-Indian Affairs Brown during the termination period and including every such official before and after him who has addressed the issue, have consistently maintained that Ione is, and was in the past, federally recognized. The individuals who have denied Ione's federal recognition have been lower-ranking bureaucrats or attorneys, but never the authorized officials themselves.
[6] The position of Commissioner for Indian Affairs was replaced with Assistant Secretary-Indian Affairs in 1977. *See* www.Bia.gov/WhoWeAre/BIA/ (last visited Jul. 10, 2014), printed copy in App. Supp. Auth., Ex. 1. Thus, Ada Deer was the highest ranking federal official with authority to administer Indian affairs in 1994.
[7] This process of having fee land taken into trust by the government for the benefit of an Indian tribe, known as the "fee-to-trust" process, is governed exclusively by federal law and regulations. *See* 25 U.S.C. §465 *et seq.*; 25 C.F.R. Part 151.

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purchase and development of land. AR2808. In 2003, IKON Group bought options to purchase the Plymouth Parcels. *Id.*

But federal law requires much more to conduct tribal gaming than simply purchasing land. IGRA restricts the lands upon which Indian tribes may operate gaming projects and provides that a tribe may only operate gaming on land taken into trust after 1988 if one of several conditions is met. Thus, in order to be able to conduct a gaming operation, Ione would have to apply to have the Plymouth Parcels taken into trust and demonstrate that they meet the applicable post-1988 criterion, namely that the land if taken into trust would be 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). It would also have to comply with all of the requirements imposed by the 25 C.F.R. Part 151 regulations that implement the Secretary's trust land acquisition authority under the IRA. AR10056. Those regulations require, *inter alia*, compliance with the National Environmental Policy Act ("NEPA"), an intensive process to determine, analyze, and address issues related to the project's potential impacts that elicits extensive input from federal, state and local agencies, organizations, and individuals. AR10056-10057. The Tribe's NEPA process formally began in 2003 and would not conclude until the issuance of the ROD itself in 2012 (with well over half the ROD devoted to the NEPA analysis). AR10049-10116. The County submitted comments on a range of issues in the NEPA review process, which comments were considered prior to issuance of the ROD. *See, e.g.,* AR8510-8537.

In September 2004, Ione submitted a request for a determination (called an Indian Lands Determination, or "ILD") that the Plymouth Parcels would qualify as "restored lands" for Ione as a "restored tribe" if and when taken into trust. AR1401-1413. In support of its request, Ione submitted hundreds of pages of evidence. AR1414-2532; *see also, e.g.,* AR2728-2750, 3486. The County opposed Ione's ILD request (AR4204-4228, 4862, with nearly two hundred pages of attachments (AR4229-4414). The Tribe responded and provided further evidence that it qualified as a "restored tribe" and that the Plymouth Parcels would qualify as "restored lands." AR4557-4840.

In November 2005, with the ILD request pending, the Tribe submitted its application to DOI to have the Plymouth Parcels taken into trust for gaming purposes. AR2751-3482. The fee-to-trust application, consisting of hundreds of pages of supporting documentation, set forth the legal and

factual bases for the proposed action. AR2757-2764. As with the ILD, the County filed extensive comments opposing Ione's application. AR5425-5437.

In September 2006, DOI Associate Deputy Secretary James Cason issued DOI's determination holding that the Plymouth Parcels would qualify as "restored lands" if acquired in trust and that Ione is a "restored tribe" for purposes of IGRA. AR5094. DOI's rationale was set forth in detail in a memorandum written by Associate Solicitor, Division of Indian Affairs, Carl Artman. AR5550-5554. Artman opined that Commissioner Louis Bruce's 1972 determination dealt with the Ione Band as a recognized tribe, such that Ione was formally recognized as of 1972 and thereafter. AR5552. Artman also determined that after 1972 the government had taken the position that Ione was not recognized, thereby terminating the Tribe, but that in 1994 Assistant Secretary Deer's reaffirmation actions amounted to a restoration of the Tribe. AR5553. Cason, as the highest ranking federal official presiding over Indian affairs at the time, explicitly concurred in and adopted Artman's ILD as the official DOI position toward Ione. AR5094. Thus, by 2006, DOI had determined that the Plymouth Parcels would qualify for gaming under IGRA if taken into trust.

Nevertheless, some internal battles at DOI over restoring lands for Ione continued, for reasons unknown. In January 2009, over two years after DOI issued its formal opinion that Ione was a restored tribe, then-DOI Solicitor David Bernhardt personally disagreed with Carl Artman's conclusion about Ione being a restored tribe. Bernhardt drafted an internal memorandum explaining his opinion and suggesting that Artman's ILD be withdrawn (but without ever addressing how his disagreement with Artman could overturn Cason's official adoption of Artman's opinion). AR7108-7111. The document was obviously an internal draft, *See* AR7108, 7724-7726, 7764, 7712, which Bernhardt sent to several government officials including individuals at the NIGC (AR7664, 7106) and DOI Acting Deputy Assistant Secretary George Skibine (AR7112). Although considered by DOI and NIGC, the Bernhardt draft was never finalized or acted upon by any authorized official. AR8823. The NIGC expressly disagreed with Bernhardt's suggestion that Ione's positive ILD be withdrawn based on his draft opinion. AR7754. Acting Deputy Assistant Secretary Skibine never agreed with or otherwise adopted Bernhardt's suggestions, and DOI Solicitor Hilary Tompkins expressly disavowed the memo. AR8817-8825. Thus, Bernhardt's

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suggestion that Ione's ILD be withdrawn was rejected. *See* AR10035 (Assistant Secretary briefing paper). Notwithstanding the County's assertion to the contrary, Ione's ILD is, and always has been, in effect. AR8820.

In February 2009 the Supreme Court issued its decision in *Carcieri,* holding that the Secretary is only authorized to take land into trust for the benefit of tribes that had been "under Federal jurisdiction" in 1934. Soon thereafter, the County sent comments to DOI arguing that under *Carcieri* the Secretary lacked authority to take land into trust for Ione. AR7757-7797. The Tribe responded with its own comprehensive submissions providing extensive evidence that indeed the Ione Band had been under federal jurisdiction in 1934. AR8000-8210, 8872-9191.

In May 2012, after careful consideration of all of the documents in its files (including those submitted by the County and Tribe) and arguments presented on both sides, DOI issued the ROD, granting the Tribe's request to take the Plymouth Parcels into trust as well as recording its adoption of the positive ILD. AR10049-10051, 10101.

IV. STANDARD OF REVIEW

The County asserts that the ROD fails to meet APA standards and that the defendants are precluded from advancing their claims of eligibility to have land taken into trust for a restored tribe by judicial and collateral estoppel. PMP&A 1:15-17. Setting aside the preclusion doctrine allegations (to be addressed later), the applicable APA standard of review at 5 U.S.C. §706(2)(A) provides that a reviewing court may only invalidate agency action "found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In making the foregoing determinations, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." *Id.* [8]

The Ninth Circuit holds that "[t]his standard is met only where the party challenging the agency's decision meets a heavy burden of showing that 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,

[8] The County complains that the ROD does not mention any of the County's evidence. PMP&A 41 n. 31. There is no requirement under the APA that a ROD mention any particular evidence. The APA only requires that the agency's conclusions be rational and based on facts in the record.

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or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013). The scope of review of agency action under this standard is narrow. *Peck v. Thomas*, 697 F.3d 767, 772 (9th Cir. 2012), *quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856 (1983); *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010). Agency action is to be affirmed as long as a reasonable basis exists for it. *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1057-1058 (9th Cir. 2013); *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010); *Lands Council*, 629 F.3d at 1074. A reasonable basis exists if the agency considered the relevant factors, articulated a rational connection between the facts found and the choices made, and in doing so has not made a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814 (1971) (hereinafter "*Citizens*"), *superseded by statute on other grounds*, Pub.L. No. 94-574, 90 Stat. 2721 (1976), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980 (1977); *Conservation Congress*, 720 F.3d at 1054; *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 795 (9th Cir. 2012). A court may only overturn agency action if it finds the action to be irrational. *Tablada v. Thomas*, 533 F.3d 800, 805 (9th Cir. 2008); *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 768 (9th Cir. 1985).

Furthermore, agency action is presumed valid under the arbitrary and capricious standard. *Peck*, 697 F.3d at 772; *Sacora*, 628 F.3d at 1068. Although a court must conduct a "substantial inquiry" into agency decision-making, the standard of review is highly deferential, and the agency's decision is "entitled to a presumption of regularity[.]" *Citizens,* 401 U.S. at 415, 91 S.Ct. at 823; *Sacora,* 628 F.3d at 1068; *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010). Moreover, "'[w]here there is conflicting evidence in the record, the [agency's] determination is due deference--especially in areas of [its] expertise.'" *Managed Pharmacy Care*, 716 F.3d at 1251 (citation omitted). In light of this deferential standard, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens*, 401 U.S. at 416, 91 S.Ct. 824; *see also Snoqualmie Valley Preservation Alliance v. U.S. Army Corps of Engineers*, 683 F.3d 1155, 1159 (9th Cir. 2012); *Lands Council*, 629 F.3d at 1074.

The process by which a district court conducts APA review of agency action is unique.

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"That court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co.*, 753 F.2d at 769 (citations omitted); *Pinnacle Armor, Inc. v. U.S.*, slip copy, No. 1:07-CV-01655 LJP DLB, 2013 WL 5947340, at *7 (E.D. Cal. Nov. 4, 2013). In APA review, "the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). And the court's determination of agency reasonableness is to be based upon a review of the administrative record before the agency at the time of its decision. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 1607 (1985); *see also Phoenix Mem. Hosp. v. Sebelius*, 622 F.3d 1219, 1225 (9th Cir. 2010).

V. ARGUMENT

A. THE COUNTY'S ATTACK ON THE VALIDITY OF INDIVIDUAL DOCUMENTS INCLUDED IN THE RECORD AND OF THE ACTS REFLECTED IN THOSE DOCUMENTS IS PRECLUDED UNDER THE APA

The County's brief is replete with intimations that some of the documents contained in the record reflect acts and decisions by DOI officials that were arbitrary and capricious and thus invalid. For example, the County claims the determinations by Commissioner Bruce and Assistant Secretary Deer regarding Ione's status as a federally recognized tribe are "two arbitrary, capricious and lawless actions." PMP&A 33:15-34:21. The County further implies that any reliance on such documents in the ROD constitutes grounds under the APA for invalidating it. PMP&A 34:20-21.

As explained above, in actions under the APA a court does not act as a fact-finder, re-hash decisions made decades ago, or adjudicate each individual record document. Rather, the court accepts as a given the fact that these acts occurred, and inquires only whether -- given those facts in the administrative records as a whole -- the present agency action was rationally based.

The Complaint challenges the two determinations made by Acting Assistant Secretary-Indian Affairs Laverdure, to acquire the Plymouth Parcels in trust for Ione and to deem such acquisition a restoration of land for a restored tribe. PMP&A 3:17-22. Those two determinations in the ROD are the only "agency action, findings, and conclusions" at issue here, and they must be

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upheld if they were reasonable and rationally-based on the agency record.

In attempting to circumvent those two narrow inquiries, the County asks this Court to determine (among other things) whether linguistic differences among Indian tribes 2000 years ago have any bearing on Ione (PMP&A 5:7-8); whether Commissioner Louis Bruce's recognition of the Ione Band in 1972 was well-founded and/or procedurally sound (PMP&A sec. II-C); and whether Assistant Secretary Deer's 1994 re-affirmation of the Ione Band was justified and/or procedurally sound (PMP&A sec. II-E). In fact, the crux of the County's argument -- that the ROD is invalid because it relied on acts and information evidenced in the AR -- assumes that the County is permitted under the APA to challenge the validity of these past facts. But since the County is precluded from challenging the facts contained in the AR and limited only to challenging the current agency action, all of the County's arguments in this regard must fail. Further, as explained below, the County's arguments also fail because the previous acts that the County attacks were themselves rational and well-supported.

B. THE ROD'S RELIANCE ON 25 C.F.R. § 292.26 WAS VALID AND JUSTIFIED

The County's first argument is essentially an attack on a regulation that the BIA enacted more than six years ago. The regulations found at 25 C.F.R. Part 292 articulate the BIA's current policy and standards for determining which tribes may operate gaming on trust lands. *See* 25 C.F.R. Part 292, enacted May 20, 2008 (the "Part 292 Regulations"). Specifically, these regulations implement a policy as to the criteria tribes must meet to be deemed "restored." The County argues that 25 C.F.R. § 292.26 ("Section 292.26"), which determines when a tribe may qualify as "restored" under IGRA when its recognized status has been reaffirmed by executive action, was improperly adopted and that the ROD, which applied this regulation to Ione, is arbitrary and capricious because it relied on the regulation. This attack is time-barred and should therefore be denied. The County's claims should also be denied because they were not raised in the Complaint and because they are wrong.

For the first twenty years following IGRA's enactment in 1988, the BIA and National Indian Gaming Commission ("NIGC") classified as "restored" those tribes that had been restored to federal

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recognition following termination of that status, regardless of the particular manner of termination or re-affirmation.[9] This longstanding policy was in effect when the Ione Band commenced preparation of the instant fee to trust application around 2003. AR1382 (indicating that by April 2003 the Tribe had identified land and begun planning its project); AR1404 (development agreement entered in April 2003); AR2808 (land options purchased in March 2003). In 2008 the BIA reversed its policy with regard to tribes that, like Ione, had been administratively reaffirmed, and promulgated a new rule under which administratively reaffirmed tribes would no longer qualify as "restored" for IGRA purposes. 25 C.F.R. § 292.10.

The BIA recognized that its new policy would adversely affect tribes like Ione that had been relying on the BIA's prior policy for years,[10] had applied for and been issued a formal opinion letter confirming that it would qualify as "restored," and had subsequently -- in reliance on the formal opinion -- expended further funds, efforts and time (73 Fed.Reg. 29372, May 20, 2008). The BIA therefore also enacted Section 292.26, clarifying that its new rule would not apply retroactively to administratively re-affirmed tribes that had obtained a formal written determination prior to May 2008 deeming the tribe and their lands to be "restored."

The County now argues that the ROD's reliance on Section 292.26 is "arbitrary and capricious" because the regulation was not properly adopted. This challenge was not raised in the County's Complaint and is tantamount to a collateral attack on the validity of the regulation itself. As such, it is inappropriate and barred by the standard federal six-year statute of limitations. 28 U.S.C. § 2401(a). The argument should further be denied because it is based on inapplicable case law and an erroneous reading of the test used to determine the validity of regulations.

In the alternative, if the County is not questioning the regulation's validity (the County's intent is not completely clear from its brief), it may be arguing that the BIA's application of that

[9] There are various means through which the federal government may affirm/re-affirm Indian tribes, including congressional, judicial, and administrative affirmation. *See* Felix Cohen, Handbook of Federal Indian Law (Lexis-Nexus 2005) §3.02[4], in App. Supp. Auth., Ex. 2. As discussed below, administrative affirmation can be implemented either through the formal process established in 25 C.F.R. 83 or through other administrative action that results in the federal government's commencing a government-to-government relationship with the tribe. This latter form of administrative affirmation is referred to herein as "administrative affirmation" or "administrative re-affirmation" as the case may be.

[10] Ione submitted comments on the proposed regulations in March of 2006. AR4857-4860.

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regulation to Ione in the ROD is arbitrary and capricious. This argument must fail because, as discussed below, the AR demonstrates that Ione met the criteria enumerated in Section 292.26 and that the regulation was properly applied.

The County's argument begins by implying that prior to enacting the Part 292 regulations, the federal government had no clear policy on the standards tribes had to meet to be deemed "restored" under IGRA. MP&A 21:14-15. This is patently wrong. Prior to 2008 the federal government's clearly-articulated policy on the standards tribes had to meet to be classified as "restored" was expressed in judicial opinions and Indian Lands Determinations issued throughout the years. These opinions and determinations, issued *before* the 2008 regulations became final, expressed the government's policy that in order to be classified as a "restored" tribe, a tribe had to prove (1) governmental recognition, (2) a period of non-recognition, and (3) reinstatement of recognition. *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney,* 369 F.3d 960, 967 (6th Cir. 2004). The particular manner in which the government reinstated tribal recognition was irrelevant, as long as recognition had been restored. The government recognized administrative reaffirmation as an acceptable form of "restoration." *See* NIGC Determination, Poarch Band, May 19, 2008, in App. Supp. Auth., Ex. 3 (a tribe may be deemed "restored" under IGRA "whether the reinstatement of recognition was achieved through Congressional action, the administrative federal acknowledgment process [i.e., the formal process found in the Part 83 Regulations], **or administrative recognition.**") (emphasis added). Thus, in an opinion regarding the Sault Ste. Marie Tribe of Chippewa Indians, whose federal recognition had been restored through administrative action (like Ione), the NIGC held that an administratively reaffirmed tribe would qualify as a "restored tribe".[11]

That the government had a clearly-expressed policy that administratively-recognized tribes were eligible to qualify as "restored" is also evident in a number of post-2008 opinions that applied the government's pre-2008 policy. For example, in an opinion regarding the Karuk Tribe,[12] the

[11] *See* NIGC Memorandum regarding The St. Ignace Parcel, July 31, 2006, in App. Supp. Auth., Ex. 4 (stating that Sault Ste. Marie, which had been restored to recognition through an administrative memorandum and not through the Part 83 process, was nonetheless a "restored tribe.")

[12] *See* NIGC Memorandum regarding Approval of Karuk Tribe of California ordinance amendment, April 9, 2012, in App. Supp. Auth., Ex. 5.

agency applied the government's pre-2008 standards (under the very regulation -- 292.26 -- the County now tries to attack as invalid). In distinguishing between the pre-2008 standards and the post-2008 standards, the NIGC stated that prior to 2008 "a tribe claiming to be restored was required to demonstrate a history of governmental recognition, a period of non-recognition, and then reinstatement of recognition." Based on this pre-2008 standard, the NIGC found that the Karuk Tribe was a "restored tribe" notwithstanding the fact that its "restoration" to federal recognition was effected through an administrative memorandum (as occurred with Ione).

In short, for twenty years prior to enactment of the Part 292 regulations, the BIA's policy held that tribes that were administratively reaffirmed would qualify as "restored" as long as they were able to provide evidence that they had in fact been reaffirmed by an authorized agency.

In October 2006, at least three and a half years after Ione had begun working on its fee-to-trust application, the BIA published a proposed rule indicating a possible change in its position as to which tribes could be deemed "restored." 71 Fed.Reg. 58769 (October 5, 2006). Three months later, the BIA issued a statement indicating that it was seriously considering revising its initial proposal. 72 Fed.Reg. 1954 (Jan. 17, 2007); AR4857. On May 20, 2008, after considering multiple comments and revising its rule accordingly, the BIA published its final regulation. By this point Ione had been working on -- and financing -- its fee-to-trust application for five and a half years, as had the developers Ione enlisted for assistance.

Section 292.10 of the final regulations essentially provides that administratively reaffirmed tribes will *no longer* be eligible to be classified as "restored." But section 292.26(b) provides that this restriction will not apply retroactively to tribes that were administratively reaffirmed in the past where, as here, DOI had "issued a written opinion regarding the applicability of 25 U.S.C. §2719 for land to be used for a particular gaming establishment" prior to 2008.

The County's claim regarding Section 292.26(b) appears to conflate two different and distinct arguments. First, the County argues that the ROD is arbitrary and capricious because it relied on Section 292.26 when it found that Ione is a "restored" tribe. But then the County argues that the reason the ROD's reliance on Section 292.26 is arbitrary and capricious is that Section 292.26 is itself invalid. Thus, the County in effect rests its entire argument on a facial attack on the

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regulation found at 25 C.F.R. § 292.26.

1. The County's Claim is Barred by the Statute of Limitations

The County devotes almost seven full pages to arguing that Section 292.26 was improperly enacted. PMP&A 21:4-28:3. The County then tries to connect this argument to the ROD by arguing that the ROD should be invalidated because it relied on and applied a regulation that should also be invalidated. The County's argument, raised here for the first time, is essentially an attack on Section 292.26, which the BIA enacted more than six years ago

A plaintiff's claims must appear in the Complaint, giving defendants notice of the theories on which the plaintiff plans to proceed. *Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1292 (9th Cir. 2000)(precluding Plaintiffs from raising a new claim in a summary judgment motion). Here, defendants had no notice that a defense of regulation 292.26 was required, and accordingly the federal defendants provided an AR for the ROD but not for the enactment of Section 292.26. Defendants had no idea, until now, that the AR for Section 292.26 might be necessary and that an additional attack on the 292 regulations, and not just the ROD, might be raised. Accordingly, having failed to raise the claim in the Complaint, Plaintiff may not do so now.[13]

2. The County's Argument that Section 292.26 is Invalid is Wrong Because It Relies on Inapplicable Case Law and Principles

The County's argument that section 292.26 is invalid runs as follows: (1) The BIA expressly found that Congress did not intend the word "restored" in IGRA to apply to administratively reaffirmed tribes; (2) Section 292.26, which could potentially permit a few administratively reaffirmed tribes to qualify as "restored" is therefore inconsistent with legislative intent; (3) past practices that are inconsistent with legislative intent may only be grandfathered under the standards articulated in *Natural Res. Defense Council, Inc. v. Thomas,* 838 F.2d 1224 (D.C. Cir 1988); and (4) Section 292.26 fails to meet those standards. The County's argument fails because all four parts of its argument are wrong.

[13] Plaintiff may not amend the Complaint now to add this additional argument because the six-year statute of limitations for raising it has expired. 28 U.S.C. § 2401.

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a. The BIA did not find that Congress expressly sought to preclude all administratively re-affirmed tribes from qualifying as "restored"

The County makes much ado of the explanatory remarks found in the BIA's "Review of Public Comments" that was published as background material to the part 292 Regulations. PMP&A 21:10-22:22. First, the County maintains that these remarks "expressly" rejected the possibility that Congress may have intended to permit tribes, like Ione, who were administratively reaffirmed *after* the part 83 regulations were enacted, to be considered "restored" under IGRA. PMP&A 21:27-2. This assertion is plainly wrong.

All of the explanatory remarks that the County quotes extensively (PMP&A 22:7-12) refer to tribes that were administratively reaffirmed *prior to* the enactment, in 1978, of the part 83 regulations. None of the remarks refer to tribes that were administratively reaffirmed *after* 1978. The comments explicitly say this, *twice*. *See* 73 Fed.Reg. 29363 (bottom of the second column and top third of the third column). In other words, what the comments say is that the BIA believed (when it enacted Part 292) that when Congress enacted IGRA, Congress did not mean to include as "restored" tribes those tribes that had been administratively reaffirmed *prior to 1978*. The comments say absolutely nothing about what Congress may or may not have intended in connection with tribes that -- like Ione -- were administratively reaffirmed *after* 1978. Thus, contrary to the County's assertions, BIA never concluded that Congress explicitly intended IGRA to exclude from the definition of "restored" tribes that were administratively restored in the 1990's.[14]

The agency action that reaffirmed Ione occurred in 1994. It is *this* action -- the "restorative" action -- that is relevant for purposes of IGRA's "restored tribe" exception. BIA's explanatory comments on what Congress intended when it used the word "restored" say nothing about this kind

[14] Apparently recognizing that its argument about Congressional intent is irrelevant with regard to tribes like Ione that were reaffirmed *after* 1978, the County asks the Court to ignore the facts of this case (including Ione's reaffirmation in 1994) and pretend that Ione's re-affirmation took place before 1978. *See* PMP&A 22 n.15. By way of explanation the County asserts that "the [1994] Ada Deer letter purported to complete a pre-Part 83 *ad hoc* determination by Commissioner Louis Bruce." But the County's attempt to make Assistant Secretary Deer's determination relate back over a decade flies in the face of AR evidence demonstrating that the determination was an independent administrative act made necessary by events that occurred after the 1972 Bruce recognition, including over a decade of termination and active denial by the government of Ione's existence as a federally recognized tribe. *See* AR4572-4573. Accordingly, a new and independent administrative action was required to have the Tribe re-recognized. Assistant Secretary Deer's reinstatement of the government's recognition of Ione in 1994 constituted such independent action. *See, e.g.,* AR1408, 1126-1127, 1093.

of action. Contrary to the County's assertion, BIA's comments do not ascribe to Congress any particular intention with regard to tribes that were administratively reaffirmed after 1978. Thus, the first part of the County's argument, on which the remainder relies, is wrong.

b. Section 292.26 is not inconsistent with legislative intent

Further, even if the County's assertion that BIA believed that Congress explicitly intended "restored" to exclude tribes that were administratively reaffirmed after 1978 is correct (which it is not), that fact would still not render Section 292.26 inconsistent with legislative intent. First, in enacting the Part 292 regulations the BIA explicitly acknowledged that the legislature's intent with regard to the word "restored" is unclear: "Neither the express language of IGRA nor its legislative history defines restored tribe for the purposes of section 2719(b)(1)(B)(iii)." 73 Fed.Reg. at 29363. Thus, there is no "legislative intent" here. Any interpretation the BIA adopts in connection with this section is a matter of BIA policy, not legislative intent.

Second, there is a difference between legislative intent that is articulated and thereby established by a court, and the intent that federal agencies ascribe to Congress and implement as policy. When a court establishes legislative intent and interprets a statute, its pronouncement is binding and conclusive and is treated as though it embodies what the statute means. In contrast, when agencies present their opinions of what Congress meant by a particular term or phrase those opinions are policy, reflecting only the agency's judgment. *See Garfias-Rodriguez v. Holder,* 702 F.3d 504, 515-516, 518 (9th Cir. 2012) (distinguishing between judge-made interpretation and agency-made interpretation.)

Here, even if the County is correct in its assertion that the BIA believed (in 2008) that Congress had meant (in 1988) to preclude *all* administratively reaffirmed tribes from being deemed "restored," that belief (and any action based thereon) would not rise to the level of statutory enactment as the County suggests. Thus, there is no legislative intent here, and no conflict with legislative intent.

c. The retroactivity standards the County cites do not apply

The third flaw in the County's arguments is that the standards it seeks to apply to determine whether the BIA was permitted to enact Section 292.26 are inapplicable. These standards apply

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when an agency elects to apply a new rule retroactively, but they are wholly inappropriate for purposes of determining whether and under what circumstances an agency *must* apply a rule retroactively. The County conflates the two questions.

The Supreme Court has held that "[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Covey v. Hollydale Mobilehome Estates,* 116 F.3d 830 (9th Cir. 1997) *citing Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208, 109 S.Ct. 468, 471 (1988). Statutes are disfavored as retroactive when their application "'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 37, 126 S.Ct. 2422, 2428 (2006) (citations omitted). Thus, administrative regulations do not apply retroactively, to entities that previously functioned under and relied on the old rules, unless the agency expressly applies them retroactively or Congress requires that they be so applied. *Covey,* 116 F.3d at 835.

Here, because IGRA does not define "restored," instead leaving it to the agency to develop a policy on which reaffirmed tribes should qualify as "restored," IGRA gives no preference to one policy over another nor does it require that any single policy apply retroactively once adopted. Accordingly, the BIA determined that its new policy would apply retroactively to administratively-recognized tribes seeking to qualify as "restored" that had not obtained ILDs, but would not apply retroactively to such tribes that had, in reliance on the old policy, sought and obtained ILDs stating that they qualified as "restored" tribes.

The County now cites various cases that are substantively distinguishable from the case at hand and claims that, based on those cases, the BIA *must* apply its post-2008 policy retroactively to all tribes. But those cases are distinguishable. Two of the cases, *Sierra Club v. EPA* and *Natural Resources Defense Council, Inc. v. Thomas*, involved a federal statute whose stated goals *required* retroactive application. That is plainly not the case here and accordingly the rules developed in those cases are wholly inapplicable. And the other cases, *Garfias-Rodriguez v. Holder* and others, involved situations in which the agency elected to apply its rules retroactively. That is also plainly not the case here. In our case the agency elected *not* to apply its rule retroactively. Thus, none of

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the standards the County identified apply here.

For example, in *Sierra Club v. EPA,* 719 F.2d 436 (D.C. Cir. 1983) (PMP&A 25:8-9) the court found that the federal statute at issue -- the Clean Air Act -- *required* retroactive application of the new rule in order to achieve that statute's clearly intended goals. The court further found that the statute imposed a "duty" on the agency to apply its rule retroactively. (*Id.* at 467, discussing the "agency's duty to apply a rule retroactively.") Accordingly, the court held that the agency *must* apply its rule retroactively, and that it must follow certain guidelines in doing so. Similarly, in *Natural Resources Defense Council, Inc. v. Thomas,* 838 F.2d 1224 (D.C. Cir. 1988) the court analyzed the same federal statute analyzed in *Sierra Club* and similarly concluded that the agency had a "duty to apply a rule retroactively" and that the "statutory goals" required that the new rule be applied retroactively to the extent permissible. *Id.* at 1244. As IGRA imposes no duty to impose BIA's new policy retroactively, the standards articulated in *Sierra Club* and *NRDC* are inapplicable.

The County also cites *Garfias-Rodriguez v. Holder* (PMP&A 23:13), in which the Board of Immigration Appeals elected to retroactively apply a new rule to an individual who had acted based on the old rule.[15] The court held that when an agency *elects* to apply rules retroactively it must comply with certain standards, including a case by case analysis of the equities involved. *Id.* at 519. The case does not say that agencies *must* apply their rules retroactively, and the standards analyzed in the case do not apply when an agency elects *not to apply* its rules retroactively. Here, the BIA elected *not to apply* its new rule retroactively to tribes like Ione. Accordingly, the standards articulated in *Garfias-Rodriguez* are inapplicable.

The County's other cases are similarly irrelevant. (PMP&A 23, 27). In each of these cases a federal agency elected to retroactively apply a rule and the court articulated the standards that must be met for such retroactive application to be valid. None of these cases deals with the separate question of whether and under what circumstances an agency *must* apply its rules retroactively. The County confuses these two issues and argues that the standards that apply when an agency *elects* to actively apply new rules retroactively should also apply to *force* an agency to retroactively

[15] More specifically, the agency applied a new agency rule that conflicted with an earlier rule articulated by the Court. 702 F.3d at 520.

apply its rules. This argument is unfounded and unsupportable and is contrary to Supreme Court case law that eschews retroactive application of rules.

d. The County has no basis for determining whether the standards it advocates apply.

To the extent the County purports to argue that Section 292.26 is invalid because the BIA failed to take certain issues into account when enacting it, the argument is unfounded. There is no administrative record available to demonstrate what the agency considered when enacting the Part 292 regulations. The County makes bare assertions based only on explanatory comments found in the Federal Register, but has no record support for its position. Accordingly, to the extent the County makes any arguments about whether the BIA properly considered relevant evidence prior to enacting Section 292.26, the County's arguments are unfounded.

3. The ROD's application of Section 292.26 to Ione was fully supportable

Finally, BIA's application of section 292.26 to Ione was factually-based, logical and appropriate. Section 292.26 provides:

> These 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…

The County misinterprets the regulation and claims that it should only apply when a tribe obtains a "written opinion regarding the applicability of 25 U.S.C. 2719" that qualifies as "final agency action." PMP&A 22 n.16. There is no textual support for this interpretation, nor does the interpretation make any sense. ILDs issued by DOI and NIGC as part of the fee-to-trust process are, by their very nature, preliminary determinations made prior to a final determination by DOI whether to take land into trust. The County's footnote to the contrary is both unsupported and wrong. Regulation 292.26 means, as it explicitly states, that a tribe that obtained an ILD prior to May 2008 will not be subject to the retroactive application of 292.10. Ione met the prerequisites to the rule's application because its ILD was issued in 2006, well in advance of the 2008 cutoff.

Further, even if the standards outlined in the County's motion (regarding a separate showing of reliance on the old rule as a pre-requisite to non-application of the new rule) apply, which they

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plainly do not, their requirements were met as applied to Ione. Ione and its developers not only relied upon the pre-2008 policy for years, investing significant time, effort, and resources in the process, but its reliance was thoroughly justified.

Ione relied on the BIA's pre-2008 policy when it commenced the arduous and costly process of compiling an application to have land taken into trust for gaming purposes in 2003, as to which no determination was made until the May 2012 ROD. In order to provide all of the information required in a fee-to-trust application -- which it submitted in 2005 -- the Tribe hired consultants to provide, among other things, an ethno-historic analysis and report (e.g., AR3523-4137), title documents (e.g., AR6288, 6853), environmental testing and reports (e.g., AR2764, 10390-10424, 11804-11832), legal advice (evident throughout the AR, including AR2751-3482, 5534-5775), feasibility studies (e.g., AR3378-3482), assistance with public scoping sessions and environmental meetings (e.g., AR5265, 5420, 5918, 6255, 6697, 6701), responses to opposition (e.g., AR4557-4597, 5534-5775, 9646-9657), and related matters. In addition, unable to fund the full cost of the fee-to-trust process on its own, and lacking funds to purchase the land it wanted the government to take into trust, the Tribe entered into agreements with developers that would assist the Tribe in funding its application and securing options to the land. AR2758.

Like the fee-to-trust application, the request for an Indian Lands Determination (AR1402) was also prepared in reliance on the BIA's pre-2008 policy, and it similarly required the investment of significant time and resources by the Tribe, including experts, numerous rounds of comments, correspondence, reports and meetings (E.g., AR2619, 2622, 2652, 2663-2714, 2715, 2728-2748, 2749, 3486, 3488-3522, 4557-4597, 5025-5035). The ILD was similarly based on the government's pre-2008 policy of recognizing as "restored" tribes, like Ione, that had been administratively re-recognized. AR5094.

The County argues that Ione should not have relied on the pre-2008 policy because the draft 292 regulations were issued soon after Ione's ILD had been issued, so that Ione was on notice that the pre-2008 policy might change. PMP&A 25:17-25. This argument makes no sense because, as stated above, by 2006 Ione had been relying on the pre-2008 policy for years and had invested significant time and resources in the process. In addition, the 2006 draft regulations were merely a

draft and the BIA openly stated, only three months after releasing the draft, that it was considering materially revising the draft. Having submitted comments on the draft, and having been involved in following the comment process, Ione knew that the BIA was aware of its predicament (and the predicaments of similarly situated tribes) and could fairly assume that the matter would be addressed (as required under case law addressing the retroactive application of new rules). And, indeed, the matter was addressed in Section 292.26, on which the BIA relied. For all of the reasons above, the County's arguments with regard to Section 292.26 are erroneous.

C. THE IONE BAND IS ELIGIBLE TO HAVE LANDS ACQUIRED IN TRUST UNDER THE INDIAN REORGANIZATION ACT, AND NOTHING IN *CARCIERI V. SALAZAR* PRECLUDES SUCH ACQUISITION

The IRA provides the general authority of the Secretary to take land into trust for tribes and individual Indians. 25 U.S.C. § 465. This authority is explicitly "for the purpose of providing land for Indians[,]" and the IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479.

In *Carcieri*, 555 U.S. at 382, 129 S.Ct. at 1061, the U.S. Supreme Court held that for purposes of section 479 "the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." The AR in this case shows that the Ione Band, a recognized tribe, was under federal jurisdiction in 1934. As such, the Acting Assistant Secretary-Indian Affairs' decision in the ROD to acquire the Plymouth Parcels in trust for the Tribe was supported by the AR and reasonable and appropriate conclusions reached on the basis of the AR by DOI. As the government agency charged with and holding the necessary expertise to make such determinations and prepare the ROD, its actions in that regard should be upheld as a matter of law.

1. The Ione Band Qualified as a Tribe for IRA Purposes in 1934

The Ione Band was a distinct tribal entity under federal jurisdiction at the time of IRA enactment in 1934. It therefore qualifies as a "tribe" for IRA purposes.

The County mischaracterizes the IRA when it asserts that "a group of Indians could be

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deemed a 'tribe' in [only] one of two ways[,]" namely by being (i) an "actual" Indian tribe, organized band, or pueblo or (ii) a group of Indians residing on one reservation. PMP&A 28:19-22. The IRA itself explicitly names *four* types of entities that qualify as a "tribe" for purposes of the Act: "any [1] Indian tribe, [2] organized band, [3] pueblo, or [4] the Indians residing on one reservation." 25 U.S.C. § 479 (bracketed numbers added). Thus, if the Ione Band was either an "Indian tribe" or an "organized band," it would qualify as a "tribe" for IRA purposes.

The U.S. Supreme Court defined "tribe" and "band" as those terms were used at the time of the IRA's enactment in 1934 (and still used today) :

> By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design. *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359 (1901).[16]

Given their proximity in time to enactment of the IRA, these definitions are appropriate for purposes of interpreting the IRA.[17]

The AR contains numerous documents showing that Ione met these contemporaneous definitions of "tribe" and "band." Ethnohistorical evidence shows ancestral descent from native tribelets indigenous to the present-day California, including those in Amador and surrounding counties. AR3525-3552. The Ione Band had a historical method of leadership ascension based on genealogical descent and location, but outside pressure caused changes in traditional village organization. AR3974. Thus, in 1915 Charlie Maximo was chosen by election, rather than by lineal descent or location, to be the Ione Band's leader and spokesman. AR3547, 3972, 3974. Though the method of leader succession may have changed, both Charlie Maximo and his chief rival John Powell came from families of leaders tied to specific locations. AR3547, 3972. The fact

[16] *Montoya* defined the terms "tribe" and "band" for purposes of the Indian Depredation Act of 1891, but its definitions have been used in other contexts. *See, e.g., United States v. Candelaria*, 271 U.S. 432, 441-442, 46 S.Ct. 561, 563 (1926); *Robinson v. Salazar*, 838 F.Supp.2d 1006, 1028 (E.D. Cal. 2012).

[17] The County cites case law decided over half a century *after* IRA enactment for definitions of "tribe" (with an internal quotation from an 1831 case for the mere proposition that tribes are "domestic dependent nations"). PMP&A 7 n.7. It then fails to apply any of these definitions to support its allegation that Ione was not a tribe under the IRA in 1934, instead relying on AR documents that also do no support that allegation. *See* PMP&A 28-32.

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that Charlie Maximo served as the leader of the Ione Band in the early 1900s until his death in 1943 is fully supported in the AR. *See, e.g.,* AR73, 3976. Charlie's father had also served as a tribal leader (AR3547, 3976-3977) and there is no evidence in the AR that the designation of a leader had been a new phenomenon for Ione or its predecessors. Indeed, the Ione Band is a successor in interest, based on its ancestral leader being a signatory, to Treaty J signed in 1851 with United States, which was intended to set aside lands for the use and occupancy of the signing tribes but was never ratified. AR3543, 3539, 10107. The current Plymouth Parcels lie within the boundaries of the territory to have been set aside. AR3539. Notwithstanding the lack of ratification of Treaty J, the Band has occupied a 40-acre parcel in Amador County since before 1900. AR10107. Thus, Ione was united as a community under one leadership and occupied a specific territory, meeting the *Montoya* definitions of both "tribe" and "band".

Further, the U.S. District Court for D.C., in one of the few opinions to interpret IRA section 479 after *Carcieri*, has held that "the broad definition of 'tribe' in § 479 indicates that a formal tribal government is not necessary to be considered a 'tribe' for purposes of the IRA." *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F.Supp.2d 51, 68 (D.D.C. 2013). In that case, although the North Fork Rancheria did not have a formal tribal government in 1934, it pointed to historical documents showing a 1916 land purchase made "for the use of the North Fork band of landless Indians." *Id.* The court concluded this purchase was for members of a "tribe" because the "fact that the North Fork people were, at least as early as 1916, an organized band of individual Indians is sufficient to conclude that the North Fork people were a 'tribe' under the IRA." *Id.*

The AR shows the Ione Band's situation to be nearly identical to that of North Fork Rancheria. The Office of Indian Affairs' "Authority" form for the expenditure of FY 1916 appropriated funds from the line item for "PURCHASE OF LANDS FOR LANDLESS INDIANS IN CALIFORNIA" expressly says 40 acres in Amador County is to be purchased "for the use of 101 homeless California Indians, designated as the Ione Band[.]" AR160 (underline added). Similarly, a governmental transmittal of a partially executed deed, abstract of title, and survey plat indicated a 40-acre parcel to be purchased for the "Ione Band." AR153-154. Likewise, the U.S. District Court for D.C. in *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170, 199 (D.D.C.

2011), *aff'd* 708 F.3d 209 (D.C. Cir. 2013), found that the U.S. dealt with the Ione Band as a tribe, rather than a collection of individual Indians, just as the ROD concluded. AR10110-10111. Thus, the AR clearly supports the ROD's conclusion that the Ione Band was a "tribe" as that term was used at the time of IRA enactment.

The County next argues, based on an incorrect premise, that the IRA required the Secretary to ask all "tribes" to conduct a special election on whether to organize under the Act, and since the Secretary did not ask the Ione Band to conduct such an election, it must not have been a tribe in 1934. PMP&A 28:22-29:3. But the Secretary actually was only required to call elections on reservations in 1934. Since the Ione Band did not have a reservation in 1934, no such election would have been called, nor would Ione have appeared on any documents listing such elections. The County's "strong evidence" purporting to show that the Ione Band was not a tribe based on a lack of an IRA election is in fact no evidence.

The IRA provided for two separate elections. Section 18, codified at 25 U.S.C.§ 478, called for a *mandatory* election to be held by the Secretary within one year of enactment to determine whether the IRA would apply, and this Section 18 election was required only for adult Indians *on reservations*, including California rancherias.[18] Separately, Section 16, codified at 25 U.S.C. § 476, permitted -- but did not require -- a tribe to organize and adopt an IRA constitution and bylaws, which became effective when ratified in an election called by the Secretary upon tribal request. *United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980) (holding a Section 18 vote against IRA applicability precludes adoption of a Section 16 constitution); *Stand Up for California!*, 99 F.Supp.2d at 58 (noting the Sections' distinctions).

The distinction between the mandatory applicability election held only on reservations, and the voluntary organizational election held by some but not all tribes, is evident in the document the County cites, a pamphlet printed in January 1947 (over twelve years after enactment of the IRA) by

[18] The reference to "reservations" in Section 18 encompassed California rancherias. *See, e.g.*, AR20776 (the listing of tribal entities voting on IRA applicability in the Haas Pamphlet, discussed *infra*, includes rancherias under the Hoopa Valley Agency). California's Indian rancherias generally are considered reservations for purposes of federal law. *Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007) (internal citation omitted); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1011-1012 (9th Cir. 2007).

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Theodore H. Haas, Chief Counsel, United States Indian Service, entitled "Ten Years of Tribal Government Under I.R.A." AR20759-20807 ("Haas Pamphlet"). The Haas Pamphlet -- which does not list Ione because Ione did not have a reservation and thus no mandatory election was held for it -- clearly makes the distinction between the optional Section 16 organizational election and the mandatory Section 18 reservation elections on IRA applicability. AR20764-20765. Even its organization of listings of tribes for which elections were held under the IRA shows the distinction between on-reservation tribes voting in the mandatory Section 18 IRA applicability elections and the optional Section 16 organizational elections. *See* AR20775-20782 ("Table A" listing IRA applicability votes), *contra* AR020783-020789 ("Table B" listing approved constitutions and charters).

It should be noted that the Haas Pamphlet's listing of Section 18 election tribes was based on or replicated an earlier DOI list that was *not* complete. *Carcieri*, 555 U.S. at 397-398, 129 S.Ct. at 1069-1070 (Breyer, J., concurring); AR10106, 20765. As such, even if the foregoing analysis regarding Section 16 and 18 elections were not applicable, the Haas Pamphlet's failure to list the Ione Band in no way proves it was not a tribe under federal jurisdiction in 1934.

The County further cites two documents which it claims show that two other rancherias in Amador County -- Jackson and Buena Vista -- voted to organize under the IRA, and that because the Ione Band held no such election and is not included in those documents, the Ione Band was not a tribe under federal jurisdiction at the time. PMP&A 28:25-29:22. Again, because it was a landless tribe, the Ione Band would not have been included in these documents.

The first document cited by the County is the aforementioned Haas Pamphlet (PMP&A 28:25-29:3, citing AR20754-20807), the exclusion of Ione from which has been explained. The second document is an August 15, 1934 letter from O.H. Lipps, Superintendent of the Sacramento Indian Agency, to the Commissioner of Indian Affairs. PMP&A 29:4-22, citing AR20754-20758. The statement in the 1934 Lipps Letter that there were only two groups "under this jurisdiction who have organized tribal or group councils" does not mean, as the County argues, that the Ione Band was not a "tribe" or "organized band" under federal jurisdiction for IRA purposes. It only means they did not have a council. But the AR clearly shows that they were an organized band and that

they had an elected leader, Chief Charlie Maximo. AR3544-3547, 3972, 3976.

Further, the inclusion of Buena Vista and Jackson but not Ione in this letter's listing of Rancherias, which the County thinks supports its claim, is unremarkable, again, in light of Ione's lack of a federal land base. The County overlooks that the 1934 Lipps Letter used the term "rancheria"[19] to refer to federal land set aside for the benefit of tribes while using the term "groups" to refer to the tribes residing upon such land. The Letter encloses "a list of the various rancherias under this Agency, giving name of each, county in which located, size of tract, and population" (AR20755) and immediately below it says, "These [unintelligible number] tracts of land … were purchased several years ago in order that the Indians might have a place to live undisturbed. … [M]any of the tracts remain unoccupied." AR20756-20758 (underline added). Clearly Supt. Lipps' references to "rancherias" were to federal lands, not tribes, and Ione's omission from that list means only that Ione had no land at the time. Further, when referring to the Indians on federal lands, Supt. Lipps *only* used the term "groups." AR20755. This distinction in the 1934 Lipps Letter's use of "rancherias" as compared to "groups" negates the County's implication that the Letter is a complete "listing [of] the various Indian communities under the 'jurisdiction' of the Sacramento Agency (which then included Amador County)" and that Ione's absence means it was not one of those communities. *See* PMP&A 29:4-8, 21-22.

The County's reading of the 1934 Lipps Letter -- as though it supports the erroneous notion that Ione was not under federal jurisdiction -- is also contradicted by another letter. Less than eight months earlier, Supt. Lipps wrote to the Commissioner of Indian Affairs "in reference to the proposed Indian Colony for the homeless Indians near Ione in Amador County, this jurisdiction[.]" AR20752. A prior Superintendent of the Sacramento Indian Agency used even more explicit jurisdictional language to describe the Ione Band in a 1927 letter to the Commissioner. AR8138-

[19] The term "rancheria" can refer to either federally-owned land set aside or held in trust for a tribe in California, or the group of Indians living upon such land. *See, e.g., Williams*, 490 F.3d at 787-788 (" 'Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use from time to time in the early years of [the twentieth] century … [,]' " *quoting Duncan v. United States*, 229 Ct.Cl. 120, 667 F.2d 36, 38 (1981), *but then further stating*, "In 1979, members of thirty-four terminated tribes, including Mooretown Rancheria, filed a class action seeking restoration of tribal status for rancherias."); *Alvarado*, 509 F.3d at 1011-1012.

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8164 (Supt. L.A. Dorrington stating "as the Office is aware, this jurisdiction includes the activities in forty-five counties of Northern and Central California" (AR8138) and including "Ione" among the "detailed bands" in Amador County (AR8139)). Clearly, Ione was under federal jurisdiction.

The County's next purported evidence that Ione did not constitute a tribe in 1934 is an April 19, 1994 letter, written nearly 60 years *after* IRA enactment. AR1096-1103. This letter is a self-interested advocacy piece written by a lawyer representing Harold Burris, Sr. The County quotes: "Although the factions had never acted as a tribe, in 1970 they agreed to call themselves by this name and, in fact, elected Harold, Sr. the Chairman of the Ione Band of Indians [for certain purposes]." PMP&A 29:23-30:4, citing AR1100. But this letter was written in the midst of a leadership dispute between Harold Burris, Sr. and Nicolas Villa, Jr., each representing a rival faction, AR1129, less than a month after Assistant Secretary-Indian Affairs Ada Deer addressed her March 22, 1994, determination to Mr. Villa as "Chief, Ione Band of Miwok." AR1056. The advocacy letter was concerned with establishing Mr. Burris as tribal leader, not with historic accuracy. Thus, notwithstanding the quote above that the "factions had never acted as a tribe," the lawyer proceeded to ask the Secretary to either rescind the recognition decision sent to his client's rival *or to separately recognize both factions as tribes*. AR1103.

Furthermore, the County's claim that there was no tribe in 1934 is undercut by an earlier 1991 declaration by Harold Burris, Sr., who declared under oath that he was born in 1924 and, except for the years 1942-1945, lived his entire life on the Tribe's 40-acre historic parcel (AR20904), among related Miwok families and elders who maintained many of their tribal customs (AR20905-20906). He further declared that "[d]uring my growing up years in Ione, I recall talk among my elders, *including our leader at that time, Captain Charlie*, about getting title to the land where I was born and have lived my life." (AR20905) (italics added). Other evidence in the AR supports these declarations to clearly show the Ione Band was a "tribe" at the time of IRA enactment, recognized as a distinct band with an elected leader and inhabiting a particular area. *See, e.g.,* AR73, 3543-3548, 3972, 3976, 10107.

As further purported evidence of a lack of tribal structure, the County points to a declaration from the *Burris* litigation by Michael Lawson (AR20823-20900), a BIA historian, which states:

"According to BAR records, the United States has never extended federal recognition to the Ione Band of Miwok Indians as an Indian tribe" (AR20824). *See* PMP&A 30:5-12. But the brief 6-page declaration does not mention which documents, if any, Mr. Lawson may have reviewed, except some post-1976 correspondence with the Tribe. In fact, a year after his declaration, Lawson's "Results of Research Report Ione Recognition Issues" was still in draft form. *See* AR783-784. In addition, Lawson never reconciles his statement with the 1972 Bruce determination or explains how Bruce could deem the IRA to apply to the Tribe if the Tribe was not recognized. AR628-629. Whatever Lawson's background or position, Commissioner Bruce made his determination in 1972 as the highest-ranking official with jurisdiction over Indian affairs, under the Secretary's direction. Commissioner Bruce's actions accordingly trump any subsequent opinion by Lawson.

The County next argues that Ione was not a "separate and distinct tribal entity " because its members historically "were actually part of the modern-day Buena Vista Rancheria and/or Jackson Valley Rancheria tribes[.]" PMP&A 30:13-16. This contradicts AR documents clearly listing the Ione Band simultaneously and distinctly alongside both of these other tribes. *E.g.*, AR8129, 8139. The documents cited by the County do not prove this point, and other AR evidence clearly contradicts it.

The early BIA documents cited by the County do not refer to Ione, Buena Vista, and Jackson interchangeably, as the County claims, though they were referenced together at times. Most of these documents have the headings "Ione Indians" and "Buena Vista Rancheria," but only discuss the proposed Ione Band land purchase. AR107, 132, 137, 145, 862-863.

Contrary to the County's claims, the 1915 Terrell Census did not group all of the tribes together (PMP&A 30:18-19); the Census's language clearly shows that members of the Ione Band who were then living at Buena Vista or Jackson *maintained their identity with their own Band at Ione* despite living on other rancherias. AR73, 3490 (listing 62 Ione Band members, then 10 Indians "At Jackson belonging to the Ione Band" and 29 Indians "At Richey[20] belonging to the Ione Band." (underline added); AR137-138, 862-863. Another early census conducted upon a visit to the "Ione Band's Village" to ascertain the members of this "band or tribe" found a similar total of

[20] "Richey" is another name for Buena Vista Rancheria. AR886, AR3543.

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102 "half and full-bloods, mostly full-bloods, twenty-nine of which live in and near Richey, ten at Jackson, and sixty-three in and near 'Captain Charlie's' Village and Ione." AR942-944. This DOI official "[r]ealiz[ed] the importance, if possible, of securing a piece of land on which this Indian Village is situated, by reason of the fact same has been an Indian home through Captain Charlie's wife's people as far back as these Indians can trace their history" and he initiated efforts to purchase the Village site. *Id.* Captain Charlie's wife is listed in the 1915 Terrell Census as an Ione Band member. AR73, 961, 3547.

The County's assertion that Buena Vista Rancheria may claim descent from some of those Ione Band members listed as living "at Richey" (PMP&A 30:23-31:1) means only that some members of Buena Vista may have Ione Band ancestry. And notwithstanding the County quoting from an incorrectly cited document (AR973) that cannot be verified, the Ione Band's historical ties with its neighboring tribes do not mean the tribes were indistinct, and none of the documents cited by the County (AR0842, 847, 874, 882-974, 995, 1107) are to the contrary. PMP&A 31:5-11.

The County similarly misinterprets other documents. Glen Villa, Sr.'s quoted Tribal history asserts that the Buena Vista Rancheria was purchased for the Ione Band but some Ione Band members already lived there. PMP&A 31:16-19. The first assertion does not support a finding that Ione is subsumed under Buena Vista, and the second only reiterates the fact, evidenced by the 1915 Terrell Census, that some Ione Band members lived at Buena Vista but still identified as Ione members. The County further misinterprets Mr. Villa's account by arguing that because Chief Charlie Maximo and his rival John Powell at times lived at Jackson and Buena Vista Rancherias, they could not have been among those Ione Band leaders whose selection historically was tied to residence. PMP&A 31:16-32:1. The County overlooks the facts that Mr. Villa's accounting discussed an early leader-designation method that was based on genealogical descent and location (AR3974), but that by the time of the 1915 Terrell Census, Charlie Maximo was *elected* as chief (AR3972). And the County cannot deny that the AR contains evidence clearly showing Captain Charlie Maximo to be the elected leader of the Ione Band, not of Buena Vista or Jackson Rancheria. *See, e.g.,* AR73, 3544-3547, 3972.

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2. Neither the ILD Nor Other Documents Cited by the County Determined Whether the Tribe Was Under Federal Jurisdiction in 1934, and the ROD Explicitly and Rationally Concluded It Was

The County's argument that "[t]he ROD *itself acknowledges* that the unsuccessful land purchase efforts of the federal government do not, standing alone, establish that the 'Ione Band' was under federal jurisdiction in 1934" (PMP&A 32:15-17) is misleading. The ROD never acknowledged any such thing. The ROD definitively concluded, as required by *Carcieri*, that the "Ione Band was under Federal jurisdiction in 1934." AR10111. The only thing the ROD said in connection with land purchase efforts is that they were inconclusive with regard to *recognition,* but it emphatically did not say they were inconclusive with regard to *jurisdiction.* Similarly, the two other documents cited by the County only discuss whether Ione was "recognized," not whether it was under federal jurisdiction. PMP&A 32:20-33:4. As the County itself acknowledges, the concepts of tribal "recognition" and "under federal jurisdiction" are distinct (PMP&A 10 n.12), so that the two other referenced documents -- which deal with recognition -- are immaterial with regard to being "under federal jurisdiction."[21]

The County's argument fails because the language it quotes from the ROD and ILD -- which purportedly supports the allegation that Ione was not under federal jurisdiction in 1934 -- is quoted out of context. The ROD language on which the County relies is taken in part from the earlier ILD (AR5071-5076, 5094, 10101), which was concerned in relevant part with whether Ione was a "restored" tribe under IGRA, i.e. whether Ione could show (i) establishment of initial federal recognition, (ii) a subsequent lack of recognition, and (iii) ultimately restoration of recognition. AR5072. In trying to ascertain these criteria, the ILD states:

> The evidence shows that the Department intended in 1916 to acquire land for the Indians at Ione. The actions of the Department in furtherance of its efforts to acquire land for the

[21] It is important to note that prior to 1978 there was no formal process for conferring federal recognition on Indian tribes. Thus, the meaning of "recognized" in the IRA is not self-evident. The term "recognized" has been interpreted by the Secretary and discussed at length in *Stand Up for California!*, 919 F.Supp.2d at 69-70. The Secretary maintained, and the court agreed, that "recognized" may be used in the "cognitive" or "quasi-anthropological sense" meaning that federal officials knew or realized the existence of an Indian tribe, or in a formal "jurisdictional" sense to refer to a tribe that is a governmental entity comprised of Indians that has a unique relationship with the United States. *Id.* The court agreed with the Secretary's analysis that the IRA's legislative history shows the term was used in the cognitive or quasi-anthropological sense in the statute. *Id.* Here, the ROD clearly determined, based on the evidence in the AR, that Ione qualifies as a recognized Indian tribe. *E.g.,* AR10102, 10107 -10112.

> Indians at Ione are not conclusive as to the Band's recognized tribal status. Throughout California in the early part of the Twentieth Century, the Department attempted to purchase land wherever it could for landless California Indians without regard to the possible tribal affiliation of the members of the group.
>
> In October 1972, however, former Commissioner of Indian Affairs Louis Bruce sent the Band a letter responding to a request from the Band that the United States accept a forty acre tract in trust for the Band. The Commissioner concluded that:
>
> > Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land purchase was contemplated … [remaining quotation omitted].
> >
> > ***
>
> Commissioner Bruce's letter is a clear, unambiguous statement that he is dealing with the Band as a recognized tribe. Under the Indian Reorganization Act, the Commissioner has authority to acquire land in trust only for groups that are tribes. His statement that he 'hereby agree[s] to accept … the following described parcel of land to be held in trust for the Ione Band of Miwok Indians' is a clear act of recognition. Thus, following Commissioner Bruce's letter, the Ione Band must be deemed to have been a recognized tribe within the meaning of the IGRA. AR5072-5073 (underline added).

The ROD, in the portion referenced by the County, reiterates some of the ILD language verbatim:

> The evidence shows that the Department intended in 1916 to acquire land for the Indians at Ione. 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 practices of the Department at the time. *See* AR10101-10102.

Thus, contrary to the County's assertion, the portions of the ROD and the ILD that the County cites (PMP&A 33:4-12) have no bearing on whether the Ione Band was "under federal jurisdiction" in 1934 because those portions dealt with Ione's formal *recognition*, not whether Ione was under federal jurisdiction, which it was. AR10111.

Furthermore, the ILD and ROD state only that DOI's land purchase efforts in the early 1900s "*are not conclusive* as to the Band's recognized tribal status." AR5072, AR10102 (italics added). But that does not eliminate the possibility that the Ione Band *was indeed* a recognized tribe at the time. In ascertaining when the Ione Band was formally recognized and saying that the early twentieth century land purchase efforts were not conclusive in this regard, the ILD and ROD determined only that those efforts by themselves could not definitively answer the question of recognition. The ILD and ROD did *not* say that the Ione Band was not a federally recognized tribe at the time. It merely left the matter open, because the timing of recognition, unlike the timing of being "under federal jurisdiction," is immaterial for IGRA or IRA purposes.

Importantly, moving forward in the Ione Band's history to ascertain a conclusive point of

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formal federal recognition, the ILD and ROD both found that the definitive determination was effected in 1972 by Commissioner Louis Bruce. AR628-629, 5072-5073, 10101-10102. Bruce's determination constituted a formal and "clear, unambiguous statement that he is dealing with the Band as a recognized tribe" and that after this "clear act of recognition … the Ione Band must be deemed to have been a recognized tribe[.]" AR5073.

3. The Validity of the Bruce and Deer Determinations Is Not Before this Court, and the Statute of Limitations Precludes Any Such Consideration

The entire section of the Plaintiff's Memorandum (PMP&A 33:13-34:21) alleging that the 1972 Bruce determination and the 1994 Deer determination are "arbitrary, capricious, and lawless " agency actions (PMP&A 34:20-21) should be dismissed by this Court for two reasons. First, the County's current APA challenge is to the validity of the determinations made in the May 2012 ROD, not DOI actions taken decades earlier. Second, the statute of limitations has long since run on any potential APA challenge to the Bruce or Deer determinations.

The County's inability to use this lawsuit to challenge the validity of historical actions reflected in AR documents in an APA action on the ROD was explained above. Furthermore, to the extent the County seeks a renewed adjudication of the validity of the Bruce and Deer determinations and to the extent any cause of action would exist to do so, the statute of limitations precludes it. The determination by Commissioner Bruce, providing a definitive statement of the Ione Band's previously-extended federally-recognized tribal status and agreeing to take land into trust pursuant to the IRA, is dated October 18, 1972. AR544. The determination by Assistant Secretary-Indian Affairs Deer reaffirming Commissioner Bruce's statement and trust land acceptance, as well as agreeing to take the same land into trust, is dated March 22, 1994. AR1056. Deer's letter also reiterated her prior statement that the Ione Band would "henceforth be included on the list of 'Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs[.]' " *Id.* As the U.S. eventually told the *Burris* court, Ione was included on such list in 1995 and "[b]eing on the list is conclusive of the Band's tribal status which has been confirmed by Congress." AR1133; BIA List of Recognized Indian Tribal Entities, 60 Fed. Reg. 9250, 9252 (Feb. 16, 1995). And Ione has remained on that list ever since.

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At the latest, this 1995 Federal Register listing would have provided legally sufficient notice to the County of the agency's action. *Williams v. Mukasey*, 531 F.3d 1040, 1042-1043 (9th Cir. 2008); *Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984). A right of action by the County to challenge the Ione Band's federal recognition, if any, would have begun to accrue upon publication in the Federal Register, without regard to any particular party's standing to sue, and the general six-year statute of limitations under 28 U.S.C. §2401(a) would apply to such an APA challenge. *See Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364-1366 (9th Cir. 1990). As such, the six-year statute of limitations would have run, at the latest, in 2001. Not having filed suit until 2012, the County is over a decade too late to challenge either the Bruce or Deer actions.

4. The Ione Band Was "Under Federal Jurisdiction" at the Time of the Attempted Land Purchase and that Jurisdiction Was Not Dependent Upon the Federal Government's Acquisition or Ownership of Land

The first prong of the IRA definition of "Indian" encompasses "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," thereby requiring a tribe to be both recognized and under federal jurisdiction for the IRA to apply to it. 25 U.S.C. § 479. Under *Carcieri,* the word "now" requires a tribe to have been "under Federal jurisdiction" at the time of IRA enactment in June 1934. *Carcieri*, 555 U.S. at 382-383, 129 S.Ct. at 1061. *Carcieri* did *not* hold that a tribe had to be recognized in 1934 for the IRA to apply. Justice Breyer's concurring opinion noted that the word "now" modifies "under Federal jurisdiction," not "recognized," and concluded that the IRA therefore "imposes no time limit upon recognition." *Id.* at 398, 1070. He pointed out that historically there were tribes under federal jurisdiction in 1934 but which were only formally recognized much later. *Id.* at 397-399, 1069-1070. That approach -- that a tribe like Ione that was formally recognized after 1934 may nonetheless have been under federal jurisdiction in 1934 -- was adopted by the Acting Assistant Secretary in the ROD and is supported by substantial evidence of Ione's being under federal jurisdiction in 1934. This evidence is extensively summarized in the ROD. AR10106-10112.

Although academic here, since Ione was clearly known to and recognized by the federal government many years prior to the enactment of the IRA and is formally recognized today, the County claims it is not possible for "a tribe [to have been] 'under federal jurisdiction' in 1934 even

though the federal government did not believe that it was at the time." PMP&A 35:7-9. But as Justice Breyer correctly observed, at least three examples of DOI practices demonstrate "later recognition [that] reflects earlier 'Federal jurisdiction'" and thus IRA authority to acquire trust lands. *Carcieri*, 555 U.S. at 398-399, 129 S.Ct. at 1070 (citing the Stillaguamish Tribe, with no formal recognition until 1976 but determined to have held treaty rights since 1855; the Grand Traverse Band, with no formal recognition until 1980 though continually in existence since 1675; and the Mole Lake Tribe, which was recognized in 1937 after DOI decided a faulty anthropological study had incorrectly determined that the tribe no longer existed, when in fact it did). More generally, Justice Breyer correctly noted that DOI has later recognized some tribes "on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was 'under Federal jurisdiction' in 1934[.]" *Carcieri*, 555 U.S. at 398, 129 S.Ct. at 1070.

Finally, the Secretary's analysis of whether Ione met the "under federal jurisdiction" requirement could hardly be deemed arbitrary, capricious, or otherwise invalid. It is rational and well-supported. The ROD explains the Secretary's two-part analysis:

> [i] [the Secretary looks at] whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions - through a course of dealings or other relevant acts for or on behalf of the tribe or in some instances tribal members - that are sufficient to establish or that generally reflect Federal obligations, duties, responsibility for or authority over the tribe by the Federal Government[; and]
>
> [ii] [o]nce having identified that the tribe was under Federal jurisdiction at or before 1934, the second part ascertains whether the tribe's jurisdictional stratus remained intact in 1934. AR10105.

Relying on evidence in the AR, the ROD sets forth Ione's history, starting with the fact that the Band is a successor in interest to the signatories of one of 18 unratified treaties negotiated with the U.S. in the mid-1800s, and continuing through the 2011 acknowledgment by the U.S. District Court for D.C. in *Muwekma Ohlone Tribe v. Salazar* that the Ione Band had a longstanding and continuing government-to-government relationship with the United States starting prior to 1934. AR10107-10111. The ROD's application of the two-part inquiry to Ione's history provides a detailed explanation of how the Secretary rationally concluded that Ione was "under Federal jurisdiction" prior to and in 1934. AR10106. Again, DOI's process and determinations are entitled

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to a presumption of regularity, and the ROD more than reinforces the validity of that presumption.

The County does not address the Secretary's application of the IRA's "under Federal jurisdiction" test to Ione. Rather, it cites the three examples Justice Breyer used to demonstrate how a tribe could be under federal jurisdiction in 1934 without having been recognized at that time, in order to then argue that Ione could not have been in a similar situation. PMP&A 35:9-18. This argument fails, however, because there is no indication Justice Breyer intended his examples to be exclusive. *Carcieri*, 555 U.S at 398-399, 129 S.Ct. at 1070. Further, the Ione Band in fact meets the criteria set forth in one of Justice Breyer's examples, namely, "a (pre-1934) congressional appropriation." *Id.* at 399, 1070. Even though the congressional funds appropriation for Ione's land purchase was not specific to Ione, the AR contains the Office of Indian Affairs' "Authority" form, showing that monies from the general FY 1916 appropriations for the "PURCHASE OF LANDS FOR LANDLESS INDIANS IN CALIFORNIA" are to be used to buy land in Amador County "for the use of … the Ione Band[.]" AR160, 500. The U.S. District Court for D.C. has held that such use of a general appropriation for a particular tribe is "important, and likely dispositive in its own right, regarding whether the [tribe] was 'under Federal jurisdiction' in 1934" and that the documentation for such a land purchase "demonstrates a clear jurisdictional relationship between the [tribe] and the federal government prior to 1934." *Stand Up for California!*, 919 F.Supp.2d at 68.[22]

The County then conflates the concepts of *federal jurisdiction over land* and a *tribe being under federal jurisdiction*, and wrongly claims that the latter requires federal ownership of land. The County argues that because the government's efforts to purchase land for Ione were unsuccessful, there could be no federal jurisdiction over the Tribe. PMP&A 35:24-36:15. One case is cited for this proposition,[23] *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010), but

[22] The court also cited the fact that "the Tribe's predecessors were represented by signatories to the 1851 Treaty signed at Camp Barbour" as an indication of federal jurisdiction. *Id.* at 69, n.22. Ione's ROD likewise found that Ione "is a successor in interest to the signatories of Treaty J, one of 18 unratified treaties" negotiated with Indians in California. AR10107.

[23] The County also quotes from *Cohen's Handbook of Federal Indian Law* that "[t]aking land into trust …*establishes it as Indian country with all the jurisdictional consequences attaching to that status*." But this only means that "[g]enerally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527,118 S.Ct. 948, 952 n. 1 (1998).

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that case is irrelevant because it concerns a state and county's assertions of jurisdiction over *land*, not federal jurisdiction over *tribes*. *Id.* at 997-998.

The County's argument ignores the breadth of federal jurisdiction over tribes, which is not limited to federal land ownership. The federal government has plenary power over tribes, *American Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2002), and the Supreme Court has detailed the expanse of federal power over tribes throughout the country, which is not dependent on land ownership. *United States v. Sandoval*, 231 U.S. 28, 45-46, 34 S.Ct. 1, 5 (1913); *United States v. Kagama*, 118 U.S. 375, 384-385, 6 S.Ct. 1109, 1114 (1886). Thus, the County's assertion that it and the State have jurisdiction over the *land* the government sought to acquire for the Tribe has no bearing on the fact that the *Tribe* was nonetheless under federal jurisdiction.

The County's argument that jurisdiction over land equates to jurisdiction over a tribe also is contrary to the IRA's text. The first prong of the definition of "Indian" under 25 U.S.C. § 479 explicitly refers to "any recognized Indian tribe now under Federal jurisdiction" without any requirement that land be "under Federal jurisdiction." The drafters of the IRA were obviously aware of the important concept of Indian lands and could have inserted it in section 479 if intended, as prominently done in the IRA's first five sections. 25 U.S.C. §§ 461-465. They did not.

D. THE *BURRIS* LITIGATION DOES NOT COLLATERALLY ESTOP THE TRIBE FROM ARGUING THAT IT IS A FEDERALLY RECOGNIZED, TERMINATED, AND RESTORED TRIBE

Collateral estoppel (or "issue preclusion") provides that " 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " *U.S. v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008). On the other hand, *res judicata* (or "claim preclusion") occurs where " 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Id.*

The party asserting either collateral estoppel or *res judicata* "bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Clark v. Bear Stearns & Co, Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992). The asserting party also bears the burden of proof as

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When land is to be taken into trust, the federal government's concern is with jurisdiction over the land, not the tribe. *Buzzard v. Oklahoma Tax Com'n*, 992 F.2d 1073, 1076 (10th Cir. 1993).

to each element of the applicable doctrine. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008); *In re Brawders*, 503 F.3d 856, 867 (9th Cir. 2007). For collateral estoppel, "'[i]t is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated.' " *Clark*, 966 F.2d at 1321.

Here, the County's claims with regard to *res judicata* and collateral estoppel are ambiguous. The County claims: "[T]he Ione Band itself is bound by the doctrine of *collateral* estoppel (or *res judicata*), because it litigated that issue and lost." PMP&A 39:24-40:1. The reference to "that issue" is unclear but *may* reference the Ione Band's federal recognition as a tribe prior to *Burris* in 1991. PMP&A 36:16-17; 39:20-40:1. The County's apparent basis for claiming that this issue was litigated in *Burris* is a 1992 order by the Hon. Lawrence Karlton of this Court, which the County asserts "held that the Ione Band was not then, and had never been, a federally-recognized Indian tribe, and that the only way for it to become recognized was to file an application for acknowledgment under the Department's regulations governing such determinations." PMP&A 1:6-11, 15:7-10; 34:10-12; 38:6-10. However, that order did not render the holding claimed by the County. The portion of the order the County references (PMP&A 38:6-18) addressed three of the Ione Band and individual plaintiffs' claims against the U.S., two of which claims stemmed from the main claim seeking an order to compel the United States to recognize Ione. AR7772-7773, 7775. In regard to these claims, the defendant United States moved for summary judgment on the ground that it had not waived its sovereign immunity from suit. AR7775-7779. The Court held that the U.S. had not waived its immunity as to these claims because the APA's waiver only applies where there is final agency action, and "[p]laintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review." AR7775-7776. This is why the Court stated it could not agree to accept jurisdiction over plaintiffs' claims compelling recognition and granted the U.S. motion. AR7779. In other words, the order concerned the Court's lack of jurisdiction over the plaintiffs' claims, not whether the Ione Band had ever been a federally recognized tribe or limitations on how it might become recognized. AR7763-7788. Accordingly, the Order cannot

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ground the County's assertion of collateral estoppel or *res judicata*.

The County's claim of "*collateral* estoppel (or *res judicata*)" is even more ambiguous because it uses those terms interchangeably, when in fact they refer to two distinct doctrines.[24] The County initially alleges that the Tribe is precluded from relitigating an issue (i.e., collateral estoppel) (PMP&A 39:24-40:2) but then abandons collateral estoppel without listing the required elements or providing any evidence. In the very next sentence it switches to a theory of *res judicata* (claim preclusion), and purports to state its elements and prove them up. PMP&As 40:4-40:16.

The County's claim of collateral estoppel should be denied because the County completely fails to specify any of its elements or show how any are met. The County's attempt to argue *res judicata* fails on similar basis because *res judicata* applies only if there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties. *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 917 (9th Cir. 2012). As to identity of claims, the County asserts that an identity of claims exists if the two actions arise out of the "same transactional nucleus of facts." PMP&A 40:6-8. However, there are broader criteria for showing an identity of claims:

> (1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions. *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005).

In attempting to address only one of the four required criteria to show an identity of claims, the County fails to meet its burden of proof as to *res judicata* and its claim should be denied.

The *res judicata* claim should be denied for other reasons as well. First, there is no identity of legal claims or causes of action between the two suits. The *Burris* action involved, *inter alia*, a cause of action by the Ione Band requesting that a court compel the Secretary to acknowledge the Band's previously recognized tribal status and to accept the 40-acre parcel of land into trust. *See* PRJN Ex. 1 at 14-21; AR7772-7773, 7779. The current lawsuit neither requests court compulsion of agency action nor involves any claim about the Ione Band's federally recognized status, as that is

[24] Historically, "*res judicata*" encompassed the two doctrines now referred to as claim preclusion and issue preclusion. *Nunes v. Ashcroft*, 375 F.3d 810, 815 (9th Cir. 2004). Today, however, "*res judicata*" refers to claim preclusion, and "collateral estoppel" refers to issue preclusion. *Id.*

an indisputable fact in the AR for purposes of this APA challenge and the County is far too late to challenge it otherwise. The current suit is a pure question of law: whether the determinations made by the Acting Assistant Secretary in the ROD meet the APA "arbitrary and capricious" standard.

And second, the two suits do not arise out of the same transactional nucleus of facts, nor could they. The *Burris* complaint was filed in 1991, after repeated attempts to have DOI acknowledge the Band's previously recognized tribal status. Assistant Secretary Deer's letter in 1994 reaffirmed the Band's federally recognized tribal status under the IRA. The transactional nucleus of facts from which the current lawsuit arises consists of that reaffirmation of the Ione Band's status, the DOI authority and decision to acquire land in trust for the Tribe based on that reaffirmed status, and the DOI determination that the trust acquisition constitutes a restoration of land for a restored tribe. None of those facts existed in 1991 at the time of *Burris*. Even the land at issue is different -- *Burris* involved a request to have the Band's historic 40-acre parcel taken in trust, while the current trust acquisition involves the Plymouth Parcels, which are different tracts of land. Given the disparity in facts, the current lawsuit could not be said to arise from the same transactional nucleus of facts as *Burris*. The County's *res judicata* claim must fail.

E. THE FEDERAL GOVERNMENT ADMINISTRATIVELY TERMINATED AND VALIDLY RESTORED THE TRIBE'S FEDERAL RECOGNITION, AND THE COUNTY IS BARRED FROM ARGUING OTHERWISE

The ROD lays out the Acting Assistant Secretary's rationale, evidence, and factually-supported conclusion based on the AR, that the Plymouth Parcels constitute restored lands for a restored tribe under IGRA. AR10101-10102. The ROD's conclusion that the Ione Band is a restored tribe for IGRA purposes is well-founded: In 1972 Commissioner Bruce formally and conclusively acknowledged the Ione Band's prior federally recognized tribal status and treated it as such under the IRA; subsequent to that, a period of termination of the Tribe's status ensued, as eventually reflected in the positions taken by DOI in the *Burris* litigation and before the IBIA, contrary to Commissioner Bruce's acknowledgment; in 1994 Assistant Secretary-Indian Affairs Ada Deer reaffirmed and restored that status. AR10101-10102. This history fits squarely within the three criteria mentioned above for being deemed a restored tribe -- initial recognition, subsequent

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lack of recognition, and restoration of recognition. AR5072

The County's argument as to the invalidity of this conclusion in the ROD is based on a misunderstanding of the meaning of "termination" for IGRA (not IRA) purposes. The County mistakenly asserts that "'only Congress can terminate' an Indian tribe's status as a recognized tribe." PMP&A 41:5-6. However, "termination" for purposes of IGRA's restored lands exception includes "administrative" or *de facto* terminations. *Grand Traverse Band*, 369 F.3d at 967-969; *TOMAC v. Norton*, 433 F.3d 852, 865-866 (D.C. Cir. 2006). As the Sixth Circuit Court of Appeals found in its analysis of the IGRA restored tribe/restored lands exception:

> [F]ederal recognition of a tribe requires (1) a legal basis for recognition (i.e. Congressional or Executive action) *and* (2) the empirical indicia of recognition, namely, a 'continuing political relationship with the group, such as by providing services through the Bureau of Indian Affairs.' … [T]he empirical acts that are tantamount to the termination of tribal recognition are analytically distinct from the legality of those acts, just as the empirical act of terminating an individual's employment (e.g., being told to leave the workplace and never to return) is distinct from the legality of that act (e.g., a breach of contract). *Grand Traverse Band*, 369 F.3d at 968 (underline added).

The *Grand Traverse Band* court found an administrative "empirical acts" termination to occur when the executive branch unilaterally ceases to treat a federally recognized tribe as such and refuses to recognize it as a political entity, thereby severing the tribe's government-to-government relationship with the U.S. *Grand Traverse Band,* 369 F.3d at 968-969. And since the Secretary has the power to administratively terminate a tribe's federal recognition, he also has the power to administratively restore it. *Grand Traverse Band*, 369 F.3d at 969.

That is exactly what happened with the Ione Band. In 1972 Commissioner Bruce conclusively acknowledged the Ione Band's prior status as a federally recognized tribe and renewed that status. He pointed to the past "empirical indicia of recognition," namely the prior land purchase attempts, and added his own directives to have land taken into trust pursuant to the IRA and for the BIA Sacramento Area Office to assist in the development of a membership roll and governing papers. Subsequently, other DOI officials failed to carry out his directives, refusing to treat the Ione Band as a federally recognized tribe. This administrative termination ended when Assistant Secretary Deer reaffirmed and restored the Band's status administratively in 1994.

As shown above, the County is precluded from challenging the validity of that restoration.

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Though it claims the restoration to be "*ultra vires*, arbitrary and capricious and cannot provide a 'reasoned' basis for the ROD's determination in this case" (PMP&A 41:13-16), the County cannot circumvent the preclusive bars. Further, even if not precluded, those allegations would still fail because they are based on pure conjecture and mischaracterization, with absolutely no legal or administrative rulings to support them. Assistant Secretary Deer's determinations were lawful and in no way contrary to the Court's holdings in the *Burris* action because the *Burris* Court did not hold, as the County claims, that "the only lawful means by which the Ione Band could be federally-acknowledged was by proceeding through the Acknowledgment Regulations[.]" The *Burris* court held that it (the court) did not have jurisdiction to compel DOI to recognize the Tribe.

VI. CONCLUSION

For the reasons set forth herein, Plaintiff's Motion for Summary Judgment should be denied in its entirety and Intervenor-Defendant's Cross-Motion for Summary Judgment should be granted and judgment entered thereon with prejudice as to all defendants.

Dated: July 10, 2014

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