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

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

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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

INTRODUCTION

Plaintiffs, NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, respectfully submit this Motion for Summary Judgment (MSJ) on their first claim for relief in their FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. (ECF 10.) In their first claim for relief, Plaintiffs allege that the Federal Defendants do not have the authority to take land into trust for the Ione Band because it was not a "recognized tribe now under federal jurisdiction" in 1934 when the Indian Reorganization Act (25 U.S.C. §§ 461-479; IRA) was enacted. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

The test outlined in *Carcieri* decision for deciding which tribes are entitled to a fee-to-trust transfer under the IRA is not complicated. In *Carcieri*, the Supreme Court held that the Secretary of Interior's authority under the IRA to take lands into trust is limited to "recognized tribes . . . under federal jurisdiction" in 1934.

The tribe in *Carcieri* was the Narragansett tribe which was federally recognized in 1983. The Supreme Court held that, although the Narragansett had a "documented history dating from 1614", the IRA fee-to-trust benefits did not apply to them because they were not a federally recognized tribe in 1934. The Court also held that this IRA is clear and unambiguous and, therefore, the Secretary of Interior's interpretation of the IRA is not entitled to deference.

The *Carcieri* test should have been easy for the Assistant Secretary of the Interior to apply in this case. The documents in the administrative record clearly and consistently demonstrate that Ione Band has never been a "recognized tribe under federal jurisdiction" and therefore is not entitled to the fee-to-trust benefits of the IRA. In fact, the AR reveals that the issue of whether or not the Ione Band of Miwok Indians was a federally recognized tribe was decided almost 20 years ago by Judge Karlton of this Court in Ione Band of Miwok Indians et al. v. Harold Burris et al. (including the United States) (USDC ED Cal. No. CIV-S-90-0993). ("Ione Band v. Burris.") Specifically, Judge Karlton, at the urging of the Federal Defendants and the Ione Band, held that the Ione Band did not have a government and was not a federally recognized tribe prior to 1994. (AR007763-007788; see also Request for Judicial Notice (RJN) Nos. 16-20 (ECF 62.)

Despite these undisputed facts, the Federal Defendants ignored the *Carcieri* requirements and Judge Karlton's Ione Band v. Burris decision and determined that the Ione Band was entitled to the benefits of the IRA even though it was not a federally recognized tribe in 1934. The ROD is arbitrary, capricious and contrary to law. It clearly violates the IRA and *Carcieri.* The ROD should be vacated. And Plaintiffs are entitled to summary judgment on their first claim for relief.

STATEMENT OF FACTS

1. **Record of Decision**

This case was triggered by the Record of Decision (ROD) of the Bureau of Indian Affairs (BIA) dated May 24, 2012 and published May 30, 2012 (77 Fed. Reg. 31871-31872, May 30, 2012; AR010049 et seq. seq.). The ROD purports to place 228.04 acres of privately owned land into trust for the Ione Band for gaming purposes. The land is located in the City of Plymouth, Amador County. The property is not, and never was, owned by the Ione Band. Instead, it is owned by private non-Indian investors who hope to reap the economic benefits of building and operating an Indian casino in conjunction with the Ione Band as a front group.

According to the ROD, the Ione Band submitted its trust application to the BIA in November 2005. The stated purpose of the proposed trust acquisition was to construct a 120,000 square foot casino, a 250 room hotel, a 30,000 square foot convention facility and related structures in the middle of the small rural town of Plymouth in Amador County. A major casino would overwhelm the little town of Plymouth with traffic and create adverse environmental impacts including irreversible impacts to the air and water quality in Plymouth. It would also forever change to rural and quiet life-style of the community

While Larry Echohawk was Assistant Secretary of Interior for Indian Affairs, the BIA and DOI had declined to take the subject lands into trust because the Ione Band was not a federally recognized or restored tribe entitled to trust land under the IRA or a casino under IGRA. (See AR007112). But that position suddenly changed shortly after Assistant Secretary Echohawk resigned in April 2012 and appointed Defendant Donald E. Laverdure, a BIA employee and tribal member, as acting Assistant Secretary for Indian Affairs. One month later Defendant Laverdure, supposedly after reviewing the 20,000+ page Administrative Record (AR), reversed the course taken by Assistant Secretary Echohawk and issued the ROD.

Furthermore, Defendant Laverdure did not follow the Supreme Court's directive in *Carcieri.* Instead, he did just the opposite in apparent open defiance of the Supreme Court's test. Contrary to *Carcieri,* Mr. Laverdure claimed that the IRA phrase "recognized tribe now under federal jurisdiction" was ambiguous and therefore "the Secretary must interpret that phrase in order to continue to exercise authority delegated to him under section 5 of the IRA." Citing *Chevron v. NRDC,* 467 U.S. 837 (1984). (AR010103 et seq.) This conclusion is directly contrary to the Supreme Court's *Carcieri* decision which held that the phrase "recognized tribe now under federal jurisdiction" was not ambiguous and the Secretary's interpretation was not needed or entitled to deference. To qualify for the fee-to-trust benefits of the IRA a tribe must be a recognized tribe under federal jurisdiction in 1934. *Carcieri v. Salazar, supra.*

Mr. Laverdure then creates an elaborate two part test to "interpret" the phrase "recognized tribe now under federal jurisdiction." (AR010103-AR010106.) The Laverdure two part test has no basis in law and is contrary to *Carcieri.* Acting Assistant Secretary Laverdure's test dropped the requirement that a tribe must have been "federally recognized" in 1934 to qualify under the IRA. Instead, he splits the IRA phrase in two and ignores the "recognized tribe" half of the test and focuses on the "under federal jurisdiction" half of the test which is supposedly ambiguous and subject to interpretation. Although Mr. Laverdure does not discuss the majority opinion in *Carcieri,* he does rely on the minority opinion of Justice Breyer in *Carcieri.* (AR010106.) Justice Breyer concluded that an unrecognized tribe could qualify under the IRA if it was "was under federal jurisdiction" in 1934. This minority position was rejected by the majority in *Carcieri. Carcieri v. Salazar, supra.* See also *United States v. John,* 437 U.S. 634 (1978) (the IRA applies to "recognized [in 1934] tribes".) Defendant Laverdure relying on Justice Breyer's opinion concludes that, although the Ione Band was not federally recognized in 1934, the Ione Band was "under federal jurisdiction" and therefore eligible for a fee-to-trust transfer under the IRA.

Finally, Defendant Laverdure does not mention or discuss Judge Karlton's Decision and Judgment in Order in Ione Band v. Burris. But he does allude to it by claiming that the "position taken by the Department in Federal court and before the IBIA against the tribe" was inconsistent with the earlier position of the Department. (AR010102.) This statement is wrong. The DOI's position in Ione Band v. Burris that the Ione Band was not a federally recognized tribe prior to 1996 was consistent with the position of the Ione Indians in that case and with the Department's position prior to that case. Nevertheless, this statement reveals that Mr. Laverdure was aware of the judgment in Ione Band v. Burris and chose to ignore its implications in the ROD.

Defendant Laverdure's tenure as acting Assistant Secretary lasted only five months until September 2012 when current Assistant Secretary Washburn was appointed by President Obama and confirmed by the Senate. Defendant Laverdure left the DOI and BIA, and returned to his tribe, shortly after Secretary Washburn was confirmed by the Senate. Unfortunately, Defendant Laverdure left the illicit ROD and this litigation as his legacy

2. **Administrative Record**

The first part of the AR was prepared in 2013 about a year after Mr. Laverdure issued the ROD. It consists of over 20,000 pages and is a hodge-podge of random documents. Many of the documents are redacted or incomplete. Many of the documents are self-serving "drafts" or are irrelevant. The documents often reference other documents which are not attached or included in the AR. Some of the documents are covered by a protective order in this case even though they were circulated to other third parties prior to this case. And there are major gaps in the AR.

It is obvious that acting Assistant Secretary Laverdure did not read or have time to read the 20,000 pages in the AR in the one month period after his appointment in April 2012 and the issuance his 63 page ROD in May 2012. Instead, AR was prepared after the fact and included everything in the hope that something in the record supports the ROD. Nothing does.

But, fortunately, the AR does include, at various locations, the following documents from the Ione Band v. Burris case: United States' Memorandum in Support of Motion to Dismiss and for Summary Judgment (AR000691-000731); Declaration of Michael Lawson Ph.D (AR000732-000737); United States Reply Brief (AR00738-000767); Supplemental Brief of the United States (AR000771-000775); Declaration of Timothy Gilden (AR000790-000792); Court Order (AR000816-000841); a DOI Amicus Brief (AR001133-001143); Order entering Judgment AR001160-001168); Order Staying Motions (AR001147-001151); Order dismissing Ione Band's case (AR001153-001158) and a BIA letter to Judge Nowinski sent in 1994 (AR004176) .

The initial AR also includes the 1998 Order in Villa v. Amador in which Judge Levi followed Judge Karlton's decision in Ione Band v. Burris that the Ione Band did not have a government and was not a recognized tribe under federal jurisdiction. (AR001171-001174). The AR also includes the IBIA decision in which the BIA, again based on Judge Karlton's decision, to confirm that the Ione Band is not a federally recognized tribe. (AR00811-AR00813).

Furthermore, the Federal Defendants on February 19, 2014, without a stipulation of the parties or an order from this Court, unilaterally supplemented the record with several additional documents including seven documents from the Ione Band v, Burris case. (ECF 63). The Federal Defendants did not file a hard copy index of the additional documents. But the disc provided to Plaintiffs include the following documents and pleadings from the Ione Band v. Burris case: Declaration of Neil McDonald (SAR020814-020822); Declaration of Michael Lawson (with Exhibits) (SAR020823-020900); Declaration of Arthur Barber (SAR020901-020903); Declaration of Harold Burris, Sr. (SAR020904-020909); United States Second Supplemental Brief in Support of Motion for Summary Judgment (SAR020910-020922); United States Reply Brief (SAR020923-020928); and an Order (SAR020929-020954).

Thus the Federal Defendants acknowledged that the files in the Ione Band v. Burris case are already part of the AR in this case. This should resolve the Court's concern that its review the federal agencies actions should be on AR. All the pleadings in the Ione Band v. Burris case are, or should be part of the AR and support Plaintiffs' MSJ.

3. **Ione Band v. Burris**

The Plaintiffs are entitled to summary judgment the first claim for relief because the issue of whether or not the Ione Band of Miwok Indians was a federally recognized tribe was decided by Judge Karlton of this Court in Ione Band of Miwok Indians et al. v. Harold Burris et al. (including the United States) (USDC ED Cal. No. CIV-S-90-0993). Specifically, in the Ione v. Burris case, which involved the same parties and the same federal recognition issues that are involved here, Judge Karlton determined that the Ione Band did not have a government and was not a federally recognized tribe. (AR007763-007788. See also RJN Nos. 16-20. (ECF 62.)) This determination is conclusive and binding on the Defendants in this case. And, as is outlined in detail below, it requires that the first claim for relief in this case be resolved in Plaintiffs' favor.

Furthermore, Judge Karlton reached this conclusion at the urging of the United States and members of Ione Band. (AR00691-00738, AR020823-AR020903, AR020910- AR02029.) The United States filed a motion for summary judgment which was joined by the Ione Indians and granted by Judge Karlton. Both the United States and the Ione Indians filed declarations in support of the motion admitting that the Ione Band was not a federally recognized Indian tribe. These declarations are binding admissions and the same Defendants in this case are estopped from claiming otherwise here. (See Statement of Undisputed Facts filed with Plaintiffs' MSJ.)

The IBIA subsequently endorsed Judge Karlton's judgment. (AR00811-AR00813.) As did Judge Levi in 1998 in Villa v. Amador where, based on Judge Karlton's decision, he held that the Ione Band was not a government or a federally recognized tribe. (AR00171-AR00174).

STATEMENT OF THE CASE

This lawsuit was filed on June 29, 2012, thirty days after the ROD was published. (ECF No. 1). And Plaintiffs filed their First Amended Complaint for Declaratory and Injunctive Relief on October 1, 2012 (ECF No. 10). Plaintiffs named several federal officials and employees with the Department of Interior (DOI), the Bureau of Indian Affairs (BIA), the Office of Indian Gaming (OIG) and the National Indian Gaming Commission (NIGC) who were involved in preparing or approving the ROD. The action against the Federal Defendants was brought pursuant to the Administrative Procedures Act (APA) and sought Declaratory and Injunctive relief. The Federal Defendants filed their Answer on December 10, 2012. (ECF No. 14.)

The Ione Band filed a motion to intervene as defendant on June 6, 2013 (ECF No. 35.) And the Intervenor Ione Band finally filed its Answer on November 26, 2013. (ECF No. 57.) Thus the Ione Band waived its sovereign immunity claim and became a Defendant. Although the APA does not apply to the Ione Band, the Plaintiffs' Declaratory and Injunctive relief claims do apply against the Ione Band.

The Amended Complaint includes five causes of action:

1. **First Claim for Relief** - The Federal Defendants lack the authority to take land into trust for the Ione Band because it was not a "recognized tribe now under federal jurisdiction" in 1934 when the IRA was enacted. *Carcieri v. Salazar,* 555 U.S. 379 (2009).
2. **Second Claim for Relief** - The Federal Defendants failed to comply with their own regulations when they reviewed and approved the ROD and their approval of the ROD was arbitrary, capricious and an abuse of discretion. 25 C.F.R. §§ 151.10 & 151.11.
3. **Third Claim for Relief** – The Federal Defendants do not have the authority take privately owned lands into trust for the Ione Band free of State and local regulation. To do so, would violate the principles of federalism. See *Hawaii v. OHA,* 129 S.Ct 1436 (2009).

4. **Fourth Claim for Relief** - The Federal Defendants incorrectly decided that, assuming the lands are properly taken into trust, the subject property would qualify as "restored land for a restored tribe" under the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2719.

5. **Fifth Claim for Relief** – The Federal Defendants failed to comply with the National Environmental Policy Act when they reviewed and approved the fee-to-trust transfer and the casino project. 42 U.S.C. §§ 4321 et seq. seq. And 40 C.F.R. §§ 1500 et seq. seq.

Plaintiffs bring this MSJ on their first claim for relief only because it is a keystone claim. Specifically, if this motion is successful, then the property cannot be taken into trust and there should be no need to litigate, or for the Court to decide, the remaining four causes of action.

Also Plaintiffs' MSJ must be viewed in the context of this Court's Order issued on August 11, 2014. (ECF 71.) That Order denied the Plaintiffs' motion for judgment on the pleadings (MJP; ECF 60 & ECF 61). But the Court did not decide that the Plaintiffs' MJP lacked merit. In fact, the Court confirmed that the Defendants did not address the merits of Plaintiffs' MJP. (ECF 71 at 5 ln. 14-15.) However, the Court agreed with the Defendants that the M JP was the wrong procedural vehicle to adjudicate an APA case. Instead, the Court held that cross-motions for summary judgment was more appropriate and directed the Plaintiffs to file their motion for summary judgment first. This motion is being filed pursuant to the Court's August 11th Order.

Finally, Plaintiffs renew their Request for Judicial Notice (RJN), filed in support of their MJP. (ECF 62.) Most of documents in the RJN are from the Ione Band v. Burris. The Court did not deny Plaintiffs' RJN. Instead the Court held that, although it is free to consider judicially noticed documents such as those presented by the Plaintiffs, it must base its review on the AR. (ECF 71.) Many of the RJN documents are already in the AR and, if they are not already part of the AR, Plaintiffs request that they be added to the AR. If some of the pleadings from the Ione Band v. Burris case are in the AR, then all the pertinent pleadings should be in the AR.

STANDARD OF REVIEW

1. Summary Judgment.

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 157 (1970). Under summary judgment practice, the moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the genuine issues of material fact." *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

The non-moving party is required to tender evidence of specific facts in the form of affidavits and/or admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n.11. The non-moving party "may not rest upon the mere allegations or denials of his pleadings," but must instead establish specific, "significantly probative" facts showing a genuine issue of material fact exists on which a reasonable jury might return a verdict. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-249 (1986). To demonstrate a material issue of fact the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matshshita*, 475 U.S. at 587 (citations omitted). If the non-moving party fails to establish the existence of any element essential to its case and for which that party bears the burden at trial, summary judgment should be entered. *Celotex Corp*., *supra*. 477 U.S. at 322.

2. Administrative Procedure Act.

Plaintiffs' first claim for relief against the Federal Defendants is brought under the Federal APA. 5 U.S.C. §§ 701-706. The APA grants a right of action against federal agencies and waives the federal government's sovereign immunity over such suits seeking relief, other than for money damages, unless there is a statutory prohibition or legislative intent to limit or restrict access to judicial review. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410 (1971).

The standard of review that a District Court must follow when evaluating an APA action is outlined in Section 706 of the APA. First it requires a District Court to decide all the legal issues: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Section 706 also provides that the "reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found" not to meet six separate standards. *Citizens to Preserve Overton Park v. Volpe, supra.* 401 U.S.at 413-414. In all cases agency action must be set aside if: (1) it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; or (2) it failed to meet statutory, procedural or constitutional requirements. *Id.*; 5 U.S.C. § 706 (2) (A), (B), (C), (D). Both standards of review are applicable here.

Finally, it is important to note that the APA standards and qualifications only apply to the federal defendants and their waiver of sovereign immunity. The APA does not apply to the actions or decisions of the Defendant-Intervener, the Ione Band. The Ione Band waived any tribal immunity claim that it may have when it voluntarily intervened in this case. That waiver is not qualified or limited by the APA. Specifically, the Plaintiffs need not show that the Ione Band's actions, assertions or decisions were arbitrary or capricious to obtain declaratory and injunctive relief against the Ione Band.

LEGAL CONTEXT

The Indian Reorganization Act of 1934 (IRA) authorized the Secretary of Interior to acquire land and hold it in trust "for the purpose of land for Indians." Ch. 576 § 5, 48 Stat. 984, 25 U.S.C. § 465. The IRA defines the term "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. The purpose of the IRA was to reverse the loss of lands that Indians loss under the General Allotment Act. 24 Stat. 388, as amended, 25 U.S.C § 331 et seq.; *Atkinson Trading Co.v. Shirley*, 532 U.S. 645, 650, n. 1 (2001).

The Supreme Court was required to analyze the IRA in 1978 in *United States v. John*, 437 U.S. 634 (1978). That case involved the jurisdiction over certain crimes committed on land designated by Congress as the Choctaw "reservation" in 1944. The issue in that case was whether the lands where crimes were committed on "Indian lands" as that term is used in the Major Crimes Act of 1885. 18 U.S.C. § 1153. The Mississippi Choctaw Indians were not a federally recognized tribe in 1934. And the State of Mississippi argued that the 1944 Congressional trust proclamation had no effect because the IRA of 1934 did not apply to the Mississippi Choctaw. The Supreme Court found the State's argument unpersuasive because the IRA defined "'Indians' not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction" . . . but also as "all other persons of one-half or more Indian blood." *United States v. John, supra.* 437 U.S. at 650. (Emphasis added; brackets in original.) Although, the Mississippi Choctaw were not a federally tribe in 1934, they were qualified for the land as a half-blood Indian community. The importance of the *John* case for our purposes is that the Supreme Court clearly acknowledged that the first category of Indians in the IRA was limited to "members of any recognized [in 1934] tribe". This phrase, although dicta, demonstrated the Supreme Court's view of the IRA in 1978.

The Ninth Circuit Court of Appeals discussed the IRA and its potential application to Native Hawaiians in *Kahawaiolaa v. Norton,* 386 F.3d 1271 (2004). The issue in that case was whether the exclusion of Native Hawaiians from the IRA and other federal laws governing Indians violated Equal Protection component of the Fifth Amendment's Due Process Clause. The Ninth Circuit held that the IRA did not violate the Constitution under rational basis scrutiny. The Court held that, "by its terms, the Indian Reorganization Act did not include any native Hawaiian group. There were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii." *Kahawaiolaa v. Norton, supra.* 386 F.3d at 1280; emphasis added. "It is rational for Congress to provide different sets of entitlement-one governing native Hawaiians and another governing members of American Indian tribes." *Id.*at 1282-1283. Thus, sixteen years after the *John* decision and five years before *Carcieri,* the Ninth Circuit confirmed that the benefits of the IRA are limited to federally recognized tribes in 1934.

The Supreme Court's decision in *Carcieri* is discussed above. The Supreme Court held that, to receive the fee-to-trust benefits of the IRA, a tribe must have been recognized and under federal jurisdiction in 1934. But it is worth noting the decisions of the District Court and the Court of Appeal in *Carcieri.* The District Court found that the IRA defines Indians to include tribes in existence in 1934, but did not require a tribe to have been federally recognized in 1934. *Carcieri v. Norton,* 290 F. Supp. 2d 167, 179-181 (D.R.I. 2003). The First Circuit Court of Appeal held that the IRA was ambiguous and, therefore, deferred to the Secretary of Interior's interpretation. *Carcieri v. Norton,* 497 F.3d 15, 27-28 (C.A. 1st 2007.) As noted above, the Supreme Court rejected both the District Court's and Court of Appeal's analyses. The Supreme Court held that the IRA was not ambiguous and there was not need to defer to the Secretary of Interior's interpretation. And the Supreme Court found that a tribe must be recognized and under federal jurisdiction in 1934 to qualify for the fee-to-trust benefits of the IRA.

ARGUMENT

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

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

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

It is worth comparing the facts related to the Narragansett Tribe, which was the focus of the *Carcieri* case, with the facts related to the Ione Band. The Narragansett Tribe was federally recognized in 1983 while the Ione Band has never been federally recognized by Congress, by virtue of a treaty or by completing the Part 83 acknowledgement process. After becoming a federally recognized tribe, the Narragansett Tribe applied for, and received, approval from the Secretary of Interior for a fee-to-trust transfer which was immediately challenged by Governor Carcieri of Rhode Island. The Supreme Court reversed the Circuit Court opinion upholding the

fee-to-trust transfer. The Supreme Court held that, although the Narragansett Tribe was federally recognized in 1983, it was not recognized in 1934 and, therefore, did not qualify for a fee-to-trust transfer under the express provisions of the IRA. Like the Narragansett, the Ione Band was not recognized in 1934 and, like the Narragansett, the Ione Band does not qualify for a fee-to-trust transfer under the IRA of 1934.

As is outlined above, after extensive and years of briefing on the issue of whether the Ione Band was a federally recognized tribe, this Court confirmed the historical facts presented by the parties and held that the Ione Band was not a federally recognized tribe prior to 1996. (AR007763-AR007788; see also ECF 62, RJN Nos. 16-20.). Specifically the Court concluded that the Ione Band was not recognized by Congress or by a treaty. Furthermore, despite the urging of the BIA and DOI in 1979, the Ione Band still had not – as of 1996 – applied for recognition pursuant to Part 83 of the regulations. The Ione Band v. Burris case was dismissed by Judge Karlton because the Ione Band was not a federally recognized tribe and because it failed to exhaust its administrative remedies by applying for recognition pursuant to Part 83. (*Id.)*

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

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

The preclusive effect of a prior decision and judgment is a question of law for the court to decide. *In re Jenson* 980 F.2d 1254 (9th Cir. 1992.) Five threshold requirements must be satisfied

before the doctrine of preclusion or collateral estoppel to apply: (1) the issue to be precluded must be the same that was decided in the prior lawsuit; (2) the issue must have been actually litigated in the prior lawsuit; (3) it must have been necessarily decided in the prior lawsuit; (4) the decision in the prior lawsuit must be final and on the merits; and (5) the party against whom preclusion is sought must be the same or in privity with the party in the prior lawsuit. *Baldwin v. Kilpatrick* 249 F.2d 912, 917-918 (9th Cir. 2001).

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

Also it is important to note that, although mutuality is no longer a requirement for collateral estoppel to apply, there is substantial mutuality of parties in this case with the parties in the Ione Band v. Burris case. See *Parkland Hosiery v. Shore* 439 U.S. 322 (1979); *Coeur D'Alene Tribe of Idaho v. Hammond,* 384 F.3d 674 (9th Cir. 2004). The doctrine of mutuality provides that neither party may use a prior judgment against the other unless both would have been bound by the judgment. In this situation, all the parties in the Ione Band v. Burris case are also parties to one of the three related cases challenging the ROD including the United States, the Ione Band, and Amador County. Although the Plaintiffs were not yet organized at time of the prior litigation, their position that that the Ione Band was not a federally recognized tribe was successfully asserted by the United States, the Ione Band and Amador County in that case.

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

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

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

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

Finally it is important to note that the binding impact of the Ione Band v. Burris decision has already been applied and confirmed in at least two subsequent cases. First, on May 11, 1992, the Regional Director of the BIA declined to review the economic development agreement between the Ione Band and a private development company on the grounds that the Ione Band is

not a federally recognized tribe. The Ione Band appealed to the BIA's decision to the Interior Board of Indian Appeals (IBIA). The IBIA upheld the BIA's decision based on Judge Karlton's order granting the United States motion for summary judgment in Ione Band v. Burris. (AR00811-AR00813.) The IBIA, like Judge Karlton, held that the Ione Band was not a federally recognized tribe and Part 83 was the exclusive administrative mechanism for the Ione Band to obtain federal recognition. (*Id*.) The Ione Band did not challenge the IBIA's decision in Court. It is final and binding on the Ione Band and the BIA.

Second, in 1997, the Nicolas Villa Jr. faction of the Ione Band of Miwok Indians initiated another lawsuit against the County of Amador. (*Nicolas Villa, Jr. et. al v. County of Amador et. al* USDC ED Cal. No. CIV-S-97-0531 DFL JFM.) The Ione Band sought to restrain Amador County from invoking regulatory jurisdiction over their property based on the claim that it was Indian Country. Judge Levi, relying on Judge Karlton's Order, denied the Ione Band's request for injunctive relief against Amador County. (AR001171-AR001174) Judge Levi, quoted Judge Karlton, and held that, because the Ione Band did not introduce any evidence showing that they are a federally recognized tribe, it was precluded from contesting Amador County's jurisdiction over fee owned land. (Id.) This decision was not appealed and it is binding on the parties.

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

Admissions made in the course of litigation and judicial proceedings are generally treated as judicial admissions which conclusively establish the matter. *American Title Ins. Co. v. Lacelaw Corp.* 861 F.2d 224, 226 (9th Cir. 1988). Under federal law, stipulations and admissions in the pleadings are binding on the parties and the trial and appellate courts. *Id*. citing *Fergueson v. Neighborhood Housing Services*, 780 F.2d 549, 551 (6th Cir. 1996.) "Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Id.* citing *In re Fordson Engineering*

Corp., 25 B.R. 506, 509 (Bankr.E.D. Mich. 1982.) Factual assertions in the pleadings and pretrial orders are conclusively binding on the party who made them. *Id.*

As is summarized above, in Ione Band v. Burris the United States and the Ione Band of Miwok Indians consistently asserted that the Ione Band is not a federally recognized tribe. They made these assertions in their initial pleadings and in their initial status conference reports. (RJN 1-6. (ECF 62).) And they successfully pursued this contention in a motion for summary judgment that went through several briefing schedules and was eventually granted by Judge Karlton. (AR007763-AR007788; RJN No. 16.9ECF 62.)) All of the assertions by the Federal Defendants are embodied in the one sentence statement made by the United States at the outset of the Ione Band v. Burris case. That assertion is worth repeating here:

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

The Ione Indians made a similar assertion at the outset of that case:

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

The United States and the Ione Band repeatedly made and reaffirmed these assertions in Ione Band v. Burris and were successful in convincing this Court that the Ione Band was not a federally recognized tribe. (AR007763-AR007788.) These judicial admissions are binding on the Federal Defendants and Defendant-Intervenor Ione Band in this case. They conclusively establish the fact that the Ione Band was not a federally recognized tribe or under federal jurisdiction in 1934 or any other year before 1996 - when the Ione Band v. Burris case was finally decided. (RJN 19 & 20 (ECF 62).) And, as a consequence of this established fact, the Ione Band does not qualify for the fee-to-trust transfer provisions of the IRA of 1934. *Carcieri v. Salazar supra.* And, for this same reason, the plaintiffs are entitled to summary judgment on their first claim for relief.

CONCLUSION

As outlined above, the Supreme Court has interpreted the IRA and concluded that the benefits of the IRA are limited to recognized tribes under federal jurisdiction in 1934. *Carcieri v. Salazar, supra.* See also *United States v. John*, 437 U.S. 634, 650 (1978) and *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1280 (9th Cir. 2004) discussed above.

Twenty years ago, it was conclusively decided by Judge Karlton in Ione Band v. Burris, that the Ione Band was not a federally recognized tribe in 1934. (AR007763-AR007788). And it was subsequently enforced by the BIA and upheld by the IBIA. (AR000811-AR000813). Furthermore, Judge Karlton's decision was endorsed and applied by Judge Levi of this Court in a related case in 1998. (AR00171-AR001174.) Contrary to the conclusions in the ROD, the Ione Band is not entitled to a fee-to-trust transfer under the IRA of 1934.

The contention in the ROD that the Ione Band qualifies for a fee-to-trust transfer under the IRA even though it was not a "recognized tribe under federal jurisdiction" is contrary to this Court's decision in Ione Band v. Burris and the Supreme Court's decision in *Carcieri*. Therefore the ROD is arbitrary, capricious and contrary to law. It should be vacated and summary judgment should be granted in Plaintiffs' favor on their first claim for relief...

Dated: October 14, 2014

Respectfully Submitted,

/s/ Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs
No Casino in Plymouth and
Citizens Equal Rights Alliance