SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

JUDITH RABINOWITZ
Trial Attorney
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105
Telephone: (415) 744-6486
Facsimile: (415) 744-6476
E-mail: judith.rabinowitz2@usdoj.gov
Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF AMADOR, CALIFORNIA,

Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR; S.M.R. JEWELL, Secretary of the United States Department of the Interior; KEVIN WASHBURN, Assistant Secretary—Indian Affairs, United States Department of the Interior,

Federal Defendants,

and

IONE BAND OF MIWOK INDIANS

Intervenor-Defendant.

CASE NO. 2:12-cv-01710-TLN-CKD

FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Date: November 6, 2014
Time: 2:00 p.m.
Courtroom: Hon. Troy L. Nunley
Courtroom No. 2

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The United States Department of the Interior ("Interior" or "Department"), S.M.R. Jewell, Secretary of the Interior ("Secretary"), and Kevin Washburn, Assistant Secretary – Indian Affairs ("Assistant Secretary") (collectively, "United States" or "Federal Defendants"), respectfully submit this Reply Memorandum of Points and Authorities in support of their Cross-Motion for Summary Judgment. For the reasons set forth below, and as amply supported by the Administrative Record,[1] the Record of Decision ("ROD") at issue is fully reasoned and consistent with applicable statues, regulations and the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Thus, Plaintiff Amador County's ("County's") motion for summary judgment should be denied and United States' cross-motion should be granted.

INTRODUCTION

Under the Administrative Procedure Act's, 5 U.S.C. §§ 701-706 ("APA's"), arbitrary and capricious standard, the reviewing court's role is to "insure a fully informed and well-considered decision, not necessarily a decision the . . . Court would have reached had [it] been . . . the decisionmaking unit of the agency." *Vt. Yankee Nuclear PowerCorp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 558. Review is thus "highly deferential, presuming the agency action to be valid and affirming the [] action if a reasonable basis exists." *Pacific Coast Federation of Fishermen's Ass'n's v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012). A reasonable basis for upholding agency action exists when the agency has relied on "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) . And, "[i]f the evidence is susceptible of more than one rational interpretation" the court must still uphold the agency's finding and not substitute its judgment for that of the agency. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 12071212 (9th Cir. 2008) ,; *Bear Lake Watch, Inc*. 324 F.3d at 1076; *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002). Here, the job is made easy by the "fully informed and well considered" agency decision that rationally interprets a complex history between the United States and the Ione Band spanning more than a century. The County has not demonstrated otherwise.

As articulated in our opening memorandum, U.S. Mem. Dkt. 84-1, ("U.S.M."), the all-

[1] The Administrative Record of the challenged Record of the challenged decision will be cited herein as "ARXXXXXX." The Supplement to the Administrative Record will be cited herein as SARXXXXXX.

important statutory backdrop includes 1) Congress's intent in the 1934 Indian Reorganization Act ("IRA") to support the reorganization of tribal governments and restore the dramatically denuded tribal land base through acquisition of land into protective federal trust status; and 2) Congress's purposes in the 1988 Indian Gaming Regulatory Act ("IGRA") to address the lack of economic opportunity in Indian Country in a manner that seeks a measure of "parity" of opportunity among tribes. U.S.M. 3-8.[2] Consistent with these goals, the ROD allows for acquisition of the Plymouth Parcels as a reservation land base (the "Plymouth Parcels") to be acquired for the federally recognized Ione Band of Miwok Indians ("Tribe" or "Band"), upon which the Band might *finally* realize the tribal economic opportunity envisioned by IGRA. The ROD should be upheld.

Amador County's campaign to convince this Court otherwise rests largely on unofficial, un-adopted, undated, unattributed documents and otherwise officially eschewed policies and assorted other weak reeds selected out of context from a one hundred-year history. The County in effect also asks this Court to ignore and/or treat as *ultra vires* official determinations in 1916, 1972 and 1994 of two Assistant Secretaries and one Commissioner of Indian Affairs regarding the Band. The County pronounces the 1972 determination by Commissioner Louis Bruce and the 1994 determination by Assistant Secretary – Indian Affairs Ada Deer "*ultra vires*" even though these decisions are decades outside the applicable statute of limitations. The County builds its contentions that the ROD is arbitrary and capricious upon this improper and unsupportable foundation.

The County further urges the Court to accord *no* deference to either the Department's interpretations of ambiguous provisions in the statutes it is charged with administering, or even to its *own* regulations. Instead, the County gives the IRA and IGRA--cornerstones of modern Federal Indian policy--the narrowest, non-Indian favoring readings possible, turning Congress's intent in the IRA and IGRA on its head.[3] It also claims entitlement to the *in*applicable IGRA

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[2] *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (noting the importance of tribal gaming operations to "core governmental functions" especially in light of "the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means"); *Redding Rancheria v. Salazar*, 881 F.Supp.2d 1104, 1110 (N.D. Cal. 2012); *City of Roseville v. Norton*, 219 F.Supp.2d 130, 161 (D.D.C. 2002).

[3] Indeed, the County's brief reads as though the operable canons of construction are County-favoring

"two-part" determination[4] while insisting that the Band is not entitled to the *applicable* "restored land for a restored tribe" determination. 25 U.S.C. § 2719(b)(1)(B)(iii) ("Restored Exception"). Without providing sufficient notice in its Complaint, the County also mounts a time-barred facial attack--belatedly and unconvincingly couched as an as-applied challenge--on the grandfather provision contained in the Department's IGRA regulations. 25 C.F.R. § 292.26(b).[5]

The County has not met its heavy burden to establish arbitrary and capricious decisionmaking here. Instead, the ROD, underpinned by an exhaustive Administrative Record, reflects considered evaluation of the Secretary's IRA land acquisition authority in light of the *Carcieri* decision together with Congress's IGRA purposes as interpreted by courts and the Department's regulations – a most thorough approval process spanning almost a decade.[6]

I. THE SECRETARY'S DETERMINATION THAT THE PLYMOUTH PARCELS ARE GAMING ELIGIBLE "INDIAN LANDS" SHOULD BE UPHELD

A. The County's Collateral Attack on the Validity of the Determinations Made by Commissioner Louis Bruce and Assistant Secretary Ada Deer Must Fail

The proper subject of review here is whether the ROD reflects reasoned and reasonable agency decsionmaking under the APA. The only reviewable questions, therefore, are whether the ROD reasonably concludes that (1) Commissioner Bruce's actions constituted "recognition"; (2) the Band was "terminated" by virtue of not being included on the official list of recognized tribes; and (3) Assistant Secretary Deer's 1994 actions, including official listing of the Band,

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rather than Indian-favoring. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of the Indians, with ambiguities to be resolved in their favor. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *see also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); F. Cohen, *Handbook of Federal Indian Law* § 2.02[1]-[2], at 113-119 (Nell Jessup Newton ed., 2012).

[4] 25 U.S.C. § 2719(b)(1)(A) (available to tribes seeking trust status for "after acquired" lands that do not fall within the scope of an IGRA exception; and for which the Secretary must make no-community-detriment findings and the Governor of the State must concur).

[5] Whether the County's challenge is viewed as facial or as-applied, Federal Defendants do *not* concede that the County may bring its challenge at the summary judgment stage, or that it gave sufficient notice. *See Navajo Nation v. USFS*, 535 F.3d 1058, 1079 (9th Cir. 2008) (stating that "our precedents make clear that where, as here, the complaint does not include the necessary factual allegations to state a claim, raising such claim in a summary judgment motion is insufficient to present the claim to the district court").

[6] The County's assertion that the Department did not consider comments opposing the Band's FTT application is belied by the Acting Regional Director, BIA's May 17, 2012 recommendation memorandum to the Assistant Secretary – Indian Affairs. AR009997-010025. That memorandum details the opposing comments received and the responses thereto, evidencing consideration by Interior.

constituted "restoration."

i. The County's Claims are Beyond the Scope of this Court's Review

The County's challenges Bruce's 1972 confirmation and Deer's 1994 reaffirmation of the Band's recognized status as *ultra vires*. Those decisions are *not* proper subjects of review.[7] Nor can the Court at this juncture make *ultra vires* findings, for which there could be no remedy anyway.[8] These challenges are far outside the applicable statute of limitations, a condition of the United States' waiver of sovereign immunity in the APA, and as statutes of limitation, must be narrowly construed. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). The applicable statute of limitations, 28 U.S.C. § 2401(a), provides in relevant part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Failure to sue the United States or its agency within the limitations period deprives the federal courts of jurisdiction.[9]

The County erroneously contends that its "cause of action to challenge the Band's recognition accrued with the issuance of the ROD," before which time it would have lacked standing to pursue. Plaintiff's Reply Memorandum ("P.R.M.") 5-6. The Ninth Circuit has rejected this argument. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1366 (9th Cir. 1990). There, the court explicitly "decline[d] to accept the suggestion that standing to sue is a prerequisite to the running of the limitations period" because that "would virtually nullify the statute of limitations for challenges to agency orders." *Id*. at 1365-66. Here, the County knew

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[7] *See Alabama v. PCI Gaming Auth.*, 2014 WL 1400232*16 (M.D. Ala. 2014) (rejecting State of Alabama's *Carcieri*-based challenge to validity of decades-old land acquisition as an improper collateral challenge outside of the APA's six-year statute of limitations).

[8] *See* Federally Recognized Indian Tribe List Act ("List Act"), 25 U.S.C. § 479a (Nov. 2, 1994). The List Act expressly reserves to Congress the sole authority to terminate or de-list a listed tribe. *See* Finding (4). Further, post-List Act, the County's recognition challenges appear to be beyond the APA's waiver of the United States' sovereign immunity for the additional reason that "another statute expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

[9] Sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action. *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990) (citing *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *Block v. North Dakota*, 461 U.S. 273, 292 (1983); *Soriano v. United States*, 352 U.S 270, 273 (1957)). *See also John R. Sand & Gravel Co. v. U.S.*, 553 U.S. 130 (2008) (confirming that 28 U.S.C. § 2501, the analogue statute to 28 U.S.C. § 2401(a), establishes a jurisdictional period of limitations not subject to equitable principles of waiver and estoppel).

the facts upon which its claims are based in 1994. AR00111-112, AR001133. The County cannot now, twenty years later, mount time-barred *ultra vires* attacks via its challenge to the ROD.[10]

The so-called *Wind River* exception to the statute of limitations, which the County seeks to hide behind, has no application to this case. That exception is a narrow one wherein a "late-comer" can challenge the substance of an agency action more than six years after it was finalized, when it would have been *impossible* for a potential claimant to *know* of an agency rule or decision until the rule or decision was later directly applied to it personally. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). The allowance of limited as-applied challenges to "late-comers" who did not know the "true state of affairs," *id*. at 715-16, is fundamentally distinguishable from the circumstances of this case.[11] Here, the County had every reason to know the "true state of affairs," and could have, but failed to challenge the 1994 reaffirmation. Indeed, the AR shows that it was well aware of the Assistant Secretary's 1994 reaffirmation of the Band's recognized status. AR00111-112, AR001133. Further, the Band's inclusion on the official *Federal Register* list of recognized tribes[12] certainly provided the requisite notice.[13] Just as the County is not similarly situated to the regulated entity in *Wind River*, neither is it similarly situated to the Alliance in *N. County Cmty Alliance*, or the card rooms in *Artichoke Joe's. See supra*, n. 11. The County was aware of and understood the implications of the reaffirmation of the Band's recognition, including the governmental immunities that attach.[14] The County's strained claim that its ability to challenge the Band's

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[10] *See, e.g. California Sea Urchin Comm'n v. Jacobson*, 2014 WL 948501 (C.D. Cal. 2014) ("Plaintiffs' argument that the door is re-opened to an otherwise time-barred challenge whenever there is a more recent agency action invoking that previous final rule [ ] would render the statute of limitations meaningless.")

[11] *N. County Cmty. Alliance v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009) (observing that a late-comer's challenge might not be time-barred because until earlier decision was applied to a particular plaintiff, plaintiff "*could have no idea*" that the agency may have exceeded its authority) (emphasis added) (citing and quoting *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1183 (E.D. Cal. 2003)).

[12] *See* 60 Fed. Reg. 9250, 9252 (Feb. 16, 1995).

[13] *Shiny Rock*, 906 F.2d at 1364 ("[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance"); *Sisseton-Wahpeton Sioux Tribe*, 895 F.2d at 595 (9th Cir. 1990) (statute of limitations "is not tolled by litigative timidity," citing *Welcker v. U.S.*, 752 F.2d 1583 (Fed. Cir.), *cert. denied*, 474 U.S.826 (1985)).

[14] The County admits such immediate impacts in its brief when it contends that, given the failure to *Federal Defendants' Reply Memorandum in Support of Cross-Motion for Summary Judgment*

recognition did not accrue until issuance of the ROD is a transparent bid to end-run the statute of limitations. The County's formulation would put tribes and the United States in the position of perpetually defending, and the courts thereby perpetually refereeing, their sovereign status. It must be rejected.

The County's further argument that the reasoning of the Court's prior dismissal of its challenge to the 2006 Indian Lands Determination issued by former Associate Solicitor for Indian Affairs Carl Artman, and concurred in by former Associate Deputy Secretary James Cason ("ILD"), on ripeness and non-finality grounds,[15] somehow tolls the statute of limitations is also unavailing. P.R.M. 6. To the extent the dismissed challenge was premised on the County's theories about the legitimacy of the same, time-barred recognition determinations, *such ILD claims were time-barred then too*. The Court dismissed that challenge because there had not yet been final agency action incorporating the ILD. Now that the ROD has been issued, the County can challenge the reasonableness of the ILD's conclusions, but not the legality of Bruce's and Deer's actions.

B. In Any Event, the 1972 and 1994 Determinations were Valid and the County's Arguments to the Contrary Lack Merit

The ROD's reliance on Bruce's 1972 determination as establishing the Ione Band's then (and earlier) recognized status "in accordance with the practices of the Department at the time," AR010102, is sound. U.S.M. 30-33, 36. In contrast, the County's various assaults on the legality of Bruce's determination fail. The County relies on an "Issue Paper" prepared by Michael Lawson, a non-lawyer historian within the Branch of Acknowledgment and Research, from the period of *de facto* administrative termination (1990) that had, by 1994, been eschewed. *Id*. at 4, citing AR000678. The paper reports that the Band "apparently" was not evaluated under the "so-called Cohen criteria"[16] described as the "Department's *informal* standard for recognition from

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acquire the 40-acre parcel in trust, the Band was "subject to state law *at all times prior to 1994 at least.*" P.R.M 42 (emphasis added). While the County is wrong in its conflation of state/county jurisdiction over the 40 acres with the Band having been "under Federal jurisdiction" in 1934, it is right that the Assistant Secretary's reaffirmation of the Band's recognition in 1994 had immediate impacts for the County.

[15] *County of Amador v. U.S. DOI*, 2007 U.S. Dist. LEXIS 95715 (E.D. Cal. Dec. 13, 2007).

[16] According to former Associate Solicitor for Indian Affairs Cohen, various factors were considered singly or jointly in making tribal status determinations, including "treaty relations with the United States;" whether "the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;" and whether "the group has exercised political authority over its members,

1942 to 1978." *Id.* (emphasis added). The reality is that there was no *formal* Departmental process or method for recognizing tribes in 1972.[17]

As previously argued, U.S.M. 28, the County's reliance on a subsequent research report by the same historian, also during the period of *de facto* termination, is self-defeating. While the County continues to appropriate two words from the first part of the report -- "administrative anomaly"-- to describe the Commissioner's determination, when the report is examined, it is clear that Lawson uses those two words to characterize the views of un-named Bureau staff regarding the "Ione situation." AR000784. One year after the filing of his declaration in the *Burris* litigation, Lawson prepared a summary of 115 documents discovered in the National Archives which, according to Lawson, provided "much more detailed information regarding *the basis for the Bureau's decision to purchase land for Ione Band*." AR000783-84 (emphasis added). Discussing the documents, Lawson essentially makes the case for Band's prior recognition as determined by Commissioner Bruce, cataloguing multiple facts demonstrating that the Band was treated as tribe by the government with a collective identity, customs, land base and leadership, and that the Department had assumed a guardianship relationship to it.[18] In short, Lawson's summary of the then recently discovered documents, *refutes* the proposition that Bruce's determination was in any way anomalous. Not only was the Bruce determination grounded in evidence, the evidence was substantial and within the ambit of the Cohen Criteria.[19]

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through a tribal council or other governmental forms." F. Cohen, *Handbook of Fed. Indian Law* at 271 (1941 ed.)

[17] The County's portrait of the Cohen criteria as something uniformly and rigorously applied, P.R.M 4, is contradicted by the very rationale behind the Department's promulgation of the Part 83 procedures: "Heretofore, the limited number of such requests [for formal acknowledgment] permitted an acknowledgment of the group's status on a case-by-case basis of the Secretary. The recent increase in the number of such requests before the Department necessitates the *development of procedures to enable* the Department to take a *uniform approach* in their evaluation." 43 Fed. Reg. 39,361 (Sept. 5, 1978). *See also Allen v. United States*, 871 F. Supp. 2d 982, 989-92 (N.D. Cal. 2012).

[18] *E.g.*, Lawson discussed Special Agent Terrell's compilation of a census "in which he identified *the leader of the Band* and enumerated 101 *tribal* members;" Terrell's reference to "the 40-acre tract as the *ancient village site of the Ione people*;" the corroboration of this fact by the "*Band's leader* 'Captain' Charlie Maximo;" and Terrell's exhortations to the Commissioner regarding the urgency of the acquisition of the tract on behalf of the Band. AR000784.

[19] The County's claim that the Commissioner's determination is "inadequate[e]" and somehow in need of "rehabilitation," P.R.M. 30, is not supported by the April 13, 1990 letter from former Associate Solicitor Reid Chambers to Senators Inouye and McCain. Instead, the letter explains that while then Solicitor Frizzell was of the anomalous view that the Secretary did not have the delegated authority to recognize

Assistant Secretary Deer's corrective reaffirmation in 1994, which was based upon Bruce's determination, also was equally grounded in the evidence of prior recognition and, as a result, equally valid and final. The ROD's reliance on her determination is eminently reasonable. The County, in contrast, improperly relies on an undated, unattributed two-sentence memo to "File" (presumably of staff-level provenance), alleging unsubstantiated deviation from purported "custom[s]" of circulation and review, to assail the Assistant Secretary's final decision. P.R.M. 5 citing AR001057. Deer, as the then highest-ranking Indian Affairs official, had full authority to correct the administrative error that had kept the Band off of the list of federally recognized tribes. The Assistant Secretary is required under 25 C.F.R. § 83.5(a) and the List Act to maintain and publish a list of federally recognized tribes, and it was error not to include Band on the 1979 list. The 1979 list was generated pursuant to the Secretary's broad delegated authority to identify tribes based upon a course of dealing between those tribes and the Federal Government.[20] In correcting the error of omission, the Assistant Secretary acted pursuant to that same authority, as agencies have inherent authority to correct their mistakes. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.s*, 545 U.S. 967, 981 (2005) (citations omitted). The List Act was enacted less than a year after Deer's reaffirmation of the Band's recognized status. Congress expressed no concern with the Secretary's authority to recognize and list tribes to correct errors of omission, and indeed Congress, in effect, ratified that process as regards the Ione Band.[21] The inclusion of the Band on the first list of federally recognized tribes pursuant to the List Act has not been disturbed by Congress and the time to challenge that decision by third

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tribes, Associate Solicitor Chambers expressed his *strong* disagreement with the Solicitor's conclusion, noting that "the denial of Ione recognition at the time (i.e. *de facto* administrative termination) was *extremely unfortunate*" and that from his study of the evidence the Band "*was entitled to recognition and had in fact been recognized*." AR000674.

[20] Congress has authorized Interior to administer Indian affairs and to clarify departmental authority by regulation. *See* 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457; *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 77 (D. D.C. 2002); *James v. U.S. Dep't of Health and Human Servs.*, 824 F.2d 1132, 1137-38 (D.C. Cir. 1987).

[21] The Band was included in the first *Federal Register* list published after the List Act was enacted. *See* 60 Fed. Reg. 9250, 9252 (Feb. 16, 1995).

parties has passed.[22]

C. The ILD Correctly Determined that the Plymouth Parcels were Gaming Eligible under IGRA's Restored Exception

The County has not met its high burden to show that the ROD is unreasonable in concluding that the unique history of federal relations with the Band places it within the intent of the Restored Exception. As previously explained, U.S.M. at 30-39, the ILD, upon which the ROD reasonably relied, applied the legal criteria in place at the time and correctly concluded that the Plymouth Parcels fell within the Restored Exception, obviating any need to address the two-part exception. P.R.M. 1.[23] The language of the Restored Exception is not plain.[24] Hence, the agency's specialized expertise is required to interpret the exception's ambiguity and *Chevron* deference is due. *Redding Rancheria*, 881 F. Supp. 2d at 1116.

Despite this, the County criticizes Bruce's process for recognizing the Ione Band, and asserts that his decision to acquire land in trust for the Band does not establish recognition. P.R.M. 4, 9. Bruce's 1972 determination to extend recognition to the Band was valid and reasonable in light of the evidence of the Federal Government's course of dealing with the Band. Moreover, as the highest-ranking official with delegated Secretarial authority over Indian Affairs at the time, Bruce's decision was final and should have been implemented, despite the objections of some, often lower-ranking, Interior employees. Notably, the County undermines its own argument when, after asking the Court to ignore the significance of Bruce's decision to recognize and acquire land in trust for the Band, it subsequently argues, P.R.M. 37, that land acquisition is the *sine qua non* of the federal-tribal relationship. The County's contentions should be rejected.

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[22] Nonetheless, the County relies on *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074 (10th Cir. 2004) and *Cherokee Nation v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997), to argue that it can properly challenge the Assistant Secretary's 1994 reaffirmation decision as ultra vires in light of the Part 83 procedures. P.R.M. 36. As an initial matter, the 2004 case was not a D.C. Circuit case as indicated by the County, but rather a Tenth 10th Circuit case. In any event, these cases are dramatically distinguishable from the County's challenge here as they concerned challenges brought within the APA's statute of limitations and the Tenth 10th Circuit decision turned exclusively on Interior's interpretation of 1860s era treaties and agreements between the United States, the Cherokee, and the Delaware Indians. *Cherokee Nation*, 389 F.3d at 1087. Here, no treaty interpretation is at issue, and we are far outside the statute of limitations.

[23] *See City of Roseville v. Norton*, 348 F.3d 1020, 1023 (D.C. Cir. 2003) (no requirement to consider the two-part determination criteria when the acquisition fell within the scope of the Restored Exception).

[24] *See Redding Rancheria v. Salazar*, 881 F.Supp.2d at 1116 (N.D. Cal. 2012); *Oregon v. Norton*, 271 F.Supp. 2d 1270, 1277 (D. Oregon 2003) (citing *Confederated Tribe of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F .Supp. 2d 155, 162 (D.D.C. 2000)).

The Court should also reject the County's argument that Interior's failure to include the Ione Band on the 1979 list and other related acts do not constitute termination, entitling the Band to Restored status under IGRA. The County spends considerable space in its brief, P.R.M. 47-49, attempting to distinguish the *Grand Traverse* line of cases on facts that were not pertinent to those courts' administrative termination analyses.[25] Those courts focused instead on principles of statutory construction and the facts surrounding the agency's refusal to treat the tribes as federally recognized to conclude that the Restored Exception applied, even in instances where, like here, a tribe was terminated through administrative, rather than congressional, actions. There is no clearer evidence of *de facto* termination than Interior's refusal to include the Band on the 1979 or subsequent lists, as inclusion on the *Federal Register* list is "unequivocal" evidence of federal recognition, a prerequisite to, among other things, engaging with the United States on a government-to-government basis, and accessing federal benefits and programs.[26]

Likewise, the Court should reject the County's argument that Assistant Secretary Deer's clarification of the Band's status in 1994 does not constitute restoration. P.R.M. 49-50. First, *Grand Traverse* applied standard definitions of the terms "restore" and "restoration," including "to give back," and "to bring back or put back into a former or original state," to conclude that administrative restoration constituted restoration for IGRA purposes. *Grand Traverse*, 369 F.3d at 965. The County contends that the Band faced no changed circumstances prior to Deer's 1994 determination, P.R.M. 49, but in fact, the Band believed it was federally recognized when it received Bruce's 1972 letter, only to learn by 1979 that the Department had changed its position. Deer's actions returned the Ione Band to their former status as a federally recognized Indian tribe, and thus constituted restoration under the *Grand Traverse* analysis. The ROD's interpretation of this history is reasonable and should be upheld.

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[25] *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of MI.*, 369 F.3d 960 (6th Cir. 2004) ("[A] tribe like the Band, which has had its federal recognition terminated by administrative action or inaction, can be restored to federal recognition through the administrative acknowledgment process."), *TOMAC v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006); *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 847 (W.D. Mich. 2008).

[26] H. Rep. No. 103-781 (1994) at 2-3 (providing statement of purpose FRITLA, and expressing concern with Interior's "disturbing tendency" in the direction of "derecognizing" tribes by failing to include them in the published list).

D. **The ILD was Never Withdrawn by the Department**

As Federal Defendants previously argued, U.S.M. 34-35, former Solicitor Bernhardt's actions did *not* effectuate a withdrawal of the ILD because he did not have unilateral authority to withdraw it. The County's arguments to the contrary, P.R.M. 15-17, should be rejected.

When former Associate Deputy Secretary Cason concurred in former Associate Solicitor Artman's analysis, AR005094-95, the ILD reflected the position of the entire agency, not just the position of the Solicitor's Office.[27] Bernhardt's memorandum to former Acting Deputy Assistant Secretary Skibine, on the other hand, reflected at best an indication of a change in the position of the Solicitor's Office that was never finalized or properly adopted by that Office, and did not impact or change the position of the Department overall.[28] The only support the County offers for its contrary assertions is a footnote regarding the deliberative process privilege, P.R.M. 16 n.19, as if to suggest that the failure to protect the document from disclosure evidences that its subject matter was accepted by the agency as a whole.[29] Such an illogical leap in reasoning lacks support in the Administrative Record, as well as in law, and thus must be rejected.[30]

E. **The ROD's Application of the Grandfather Provision to Rely on the ILD was Reasonable and is Entitled to Deference**

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[27] Cason was Assistant Deputy Secretary, who had been delegated all of the Secretary's authority in the area of Indian Affairs, except for Congressional delegations made specifically to the Assistant Secretary. *See* AR008824 (Tompkins Memo at 8 n.34) (citing Secretary of the Interior Order No. 3259, Amendment No. 2 (Mar. 21, 2006) *available at* http://elips.doi.gov/ELIPS/DocView.aspx?id=395&searchid=9d41eaab-7e1d-482b-b864-5ca010f627ef&dbid=0.

[28] *See* AR008824 (Tompkins Memo at 8) (concluding that Bernhardt's memorandum to Skibine "did not alter the Associate Deputy Secretary's earlier concurrence . . . it presented a conclusory statement that the [Artman analysis] 'was wrong' and provided minimal legal analysis of the position . . . and failed to "alter[] the effectiveness of the Associate Deputy Secretary's earlier concurrence").

[29] Indeed, the contents of the Bernhardt memorandum to Skibine were apparently leaked by an Interior employee, AR007113-14; AR007175, and following discovery of the leak, an attorney for the Band requested a copy. AR007120. Skibine consulted with the Solicitor's Office and a determination was made to provide a copy to the Band's attorney. AR007117.

[30] The County's discussion of the Memorandum of Understanding between the Solicitor's Office and NIGC's General Counsel, P.R.M. 16, misses the point. The MOU divides responsibility between the parties for preparing the initial gaming eligibility analysis, AR004505-08, so the absence of language concerning Assistant Secretary concurrence is unremarkable. The fact is, after Artman completed his analysis, and Cason concurred in it, such concurrence reflected the official position of the Department. Also, the County's conflation of "final agency action" with the official position of the agency does not help it. Artman's opinion was advisory, until it was concurred in and accepted by Cason, at which point the analysis reflected the position of the Department. Only a subsequent Interior official with requisite authority could reverse such position; Bernhardt did not have that unilateral authority.

The County's Complaint failed to provide fair notice of the facial challenge it now seeks to mount to § 292.26(b) (the "grandfather provision") of the Department's IGRA regulations. As it acknowledges, P.R.M. 17-18, the Complaint merely alleged (in a footnote) that in light of the purported withdrawal by Bernhardt, the ROD arbitrarily grandfathered the ILD. This bare "arbitrary and capricious" allegation did not provide notice to the Department that the County was challenging the grandfather provision *itself*. A complaint *must* give the defendant "fair notice of what the claim is and the grounds upon which it rests" *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007), and *must* be supported by factual allegations. *Ashcroft v. Iqbal*, 566 U.S.662 (2009). The best evidence of this failing is the fact that the Administrative Record does not include the record of the Department's rulemaking regarding Part 292. Without that record, the County's claim is outside the scope of the Court's APA-based review.[31]

Further, the six-year statute of limitations has run on the County's challenge. 28 U.S.C. § 2401(a). And, because the challenge is necessarily facial (*see*, *e.g.* "[t]he ROD's conclusion relied exclusively on 25 C.F.R. § 292.26(b), which arbitrarily purports to 'grandfather in' tribes who had received a …Indian Lands Opinion in their favor prior to the enactment of the regulations," P.R.M. 7; "[t]he grandfather clause in 25 C.F.R. § 292.26(b) merely serves to frustrate and evade Congress's purpose," P.R.M. 8), these arguments cannot be considered an as-applied challenge. Thus *Wind River* has no relevance and the statute of limitations cannot be tolled.

The County again argues that the Part 292 preamble language conclusively establishes that Congress intended to exclude the Band from the Restored Exception; but as explained previously, U.S.M. 46-48, the preamble specifically identifies examples of reaffirmations made to correct administrative errors (as was the case with the Ione Band) that are construed to *not* fall

[31] See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court") (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). This review-precluding defect is not cured by the existence of a summary preamble to the published regulations, as asserted by the County. P.R.M. 18. A preamble cannot be equated to a certified administrative record of a multi-year notice and comment rulemaking, and Interior cannot be expected to defend its regulation on the basis of a preamble alone. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000). The County's claim is not properly part of this lawsuit and must be disregarded.

outside IGRA's Restored Exception. Its argument that the Secretary acted arbitrarily in *not* applying its policy shift retroactively (and punitively) to the Band, is fundamentally flawed, and because it erroneously relies on *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988), U.S.M. 48-50,[32] it should be rejected.[33]

F. Judicial Estoppel Does Not Apply to Bind Interior to a Mistaken Position Formally Corrected before the Conclusion of the *Burris* Litigation

"It is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Campbell*, 467 U.S. 51, 60 (1984). Judicial estoppel does not apply where "it would compromise a governmental interest in enforcing the law," nor does it apply where the Government's position reflects a "change in public policy." *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001). To establish its claim that the Secretary should be judicially estopped from taking the position that the Ione Band was recognized prior to 1991, the County must demonstrate "a knowing antecedent misrepresentation" in a judicial proceeding that constitutes "an affront to the court." *Wyler Summit P'ship v. Turner Broad. Sys.*, Inc., 235 F.3d 1184, 1190 (9th Cir. 2000) (internal citations omitted). It cannot do so.[34]

Nor can the County demonstrate that the government somehow gained an "unfair advantage" having succeeded in securing its dismissal from the *Burris* litigation. This purported unfair advantage rests on the proposition that the County could not have brought an APA challenge to what it now alleges was an "unlawful recognition," P.R.M. 21, within the applicable statute of limitations because "there was no direct impact upon its interests sufficient to let it challenge the Band's recognition." This is not the law. Instead, as set forth earlier, a cause of

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[32] *See also* Band's Memo Dkt. 82, 18-25.

[33] Further, the Department's interpretation of its own regulation is due great deference, *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and courts defer to agency regulatory interpretations unless "plainly erroneous or inconsistent with the regulation." *Decker v. NEDC*, 133 S. Ct. 1326 (2013) ("agency's interpretation need not be the only possible reading… – or even the best one – to prevail.").

[34] Absent chicanery or the intent to gain advantage by misleading the court, judicial estoppel does not apply. *Johnson v. State of Oregon*, 141 F.3d 1361, 1369 (9th Cir.1998). Here, the Administrative Record demonstrates that the Department's position in the early phase of the *Burris* litigation was mistaken and that correction of that mistake was urged by Congress, effectuated by the Assistant Secretary, and formally presented to the parties and the court in good faith. In May 1995, the Department confirmed the formal reaffirmation of the Band's prior recognized status and included the Band on the official *Federal Register* list of recognized tribes. AR001133. This chain of events does not constitute "chicanery" or fraud upon the *Burris* court or this Court.

action against an administrative agency accrues as soon as the action is final for purposes of judicial review. *See* 5 U.S.C. § 704. The County could have brought an APA challenge to Deer's reaffirmation of the Band's recognition in 1994, and certainly by the 1995 publication of the *Federal Register* list, which was presumptively sufficient notice to trigger the six-year statute of limitations applicable to claims under the APA. And again, because tribal status is self-executing and inherently carries legal consequences for the County, the County's assertion of "no direct impacts" rings hollow.[35]

In sum, the County's bid to have the Department's eschewed and corrected 1991 litigation position override Commissioner Bruce's determination reaffirmed by Assistant Secretary Deer, must be rejected. For estoppel of *any* kind to be applied against the Government requires an extraordinary showing that simply cannot be made here.

II. THE SECRETARY HAS AUTHORITY TO TAKE LAND INTO TRUST FOR THE IONE BAND CONSISTENT WITH *CARCIERI*

The IRA authorizes the Secretary to acquire land in trust "for the purpose of providing land to Indians." 25 U.S.C. § 465. The Act defines "Indian" as including members of "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. *Id.* In *Carcieri*, the Supreme Court held that the "now" in the phrase "now under Federal jurisdiction" refers to the date of the IRA's enactment. *Carcieri* did not otherwise define or provide guidance as to what "under Federal jurisdiction" means. *See Stand Up for Calif.! v. Dept. of Interior*, 919 F.Supp.2d 51, 66 (D.D.C. 2013). Thus, as the agency charged with implementing the IRA, Interior had to apply its specialized expertise to interpret the remainder of the ambiguous statutory phrase in order to carry out its responsibilities. AR010103. U.S.M. 16-19.

A. The ROD's Conclusion that the Band was a Tribe "under Federal jurisdiction" in 1934 is Substantially Supported and Entitled to *Chevron* Deference

[35] Lastly, the County attempts to justify application of judicial estoppel by resort to yet more insinuation. It goes so far as to accuses Congress of applying, and the Assistant Secretary of merely bowing to, "raw political pressure." P.R.M. 22. The County's unsupported mischaracterization of Congress's actions is remarkable given Congress's plenary authority over Indian affairs and manifest role in tribal recognition issues. *See* Const. Art. 1, § 8, cl. 3. Senator Inouye, then Chairman of the Senate Committee on Indian Affairs, took an appropriate interest in the circumstances of the Ione Band. And there is no proper allegation of agency bias to countermand the presumption of regularity that is afforded agency decisions, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (agencies "entitled to a presumption of regularity"); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998) (petitioner failed to provide sufficient basis to demonstrate agency's bias), much less actual proof of bias.

Applying the Department's post-*Carcieri* two-part framework for interpreting the ambiguous phrase "under Federal jurisdiction," the ROD concluded that the Ione Band was a tribe within the meaning of the IRA's definition of that term, and that the Band was, before, during, and after 1934 "under Federal jurisdiction" for IRA purposes. AR010103-12. It therefore determined that the Secretary has statutory authority to acquire the Plymouth Parcels into trust for the Band. As previously demonstrated, U.S.M. 15-29, these conclusions are carefully reasoned, supported by the Administrative Record, and entitled to *Chevron* deference.[36]

Contrary to the County's strained contention, P.R.M. 36-46, the compelling indicia of a jurisdictional relationship between the federal government and the Ione Band discussed in the ROD are not negated by the Government's inability to acquire a particular tract of land, despite its determined and longstanding efforts. Instead, the Band was "subject to federal plenary power over Indian affairs," as reflected by "acknowledge[d] federal power and responsibility toward the tribe," and therefore properly found to have been "under Federal jurisdiction" consistent with *Carcieri*.[37] This same evidence was found by the district court in the *Muwekma* case to reflect a persistent relationship between the federal government and the Band. *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170, 198-199 (D.D.C. 2011) (emphasizing the "dealings between the Federal Government and the Ione … as [an] *entit[y]*") (emphasis in original); *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 214 (D.C. Cir. 2013).[38]

i. The ROD Reasonably Concludes that the Band was a Tribe for IRA Purposes

The County's first line of attack in support of its contention that the Band was not a

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[36] *See, e.g., E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603-1604 (2014) (noting that "[w]e routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language," and interpreting Congress' silence as a delegation of authority to the agency pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

[37] *See Cohen's Handbook of Federal Indian Law* § 3.02 (2012); *Stand Up*, 919 F.Supp.2d at 67.

[38] The County's assertion that the *Muwekma* courts' findings should not be credited, P.R.M. 34, because they were "uncontested," completely ignores the fact that the district court *itself* contested the Department. The Court remanded the matter of the Assistant Secretary's 1994 corrective reaffirmation of the Band's recognition back to the agency for further explication of the agency's position that the plaintiff was not similarly situated to the Ione Band and other tribes. *Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 125 (D.D.C. 2006). Thus, there is no merit to the suggestion that the *Muwekma* courts uncritically evaluated either the Assistant Secretary's authority or the specifics of the Federal Government's dealings with the Ione Band.

"tribe" in 1934 is to assert that the Band refused to seek recognition through the Part 83 regulatory process because it "knew it could not meet the criteria set forth in those regulations." P.R.M. 28. This irrelevant insinuation deliberately conflates the Part 83 process, not extant until 1978, with the inquiry animated around understandings in 1934 and the "under Federal jurisdiction" analysis. It gratuitously attempts to import present-day conceptions into a 1934 Act. Similarly, the County's reliance on an inapposite 1901, pre-IRA case,[39] P.R.M. 34, to disparage the term "band" and suggest that it could not have equated to the 1934 understanding of the term "tribe," is irrelevant and refuted by the plain language of the IRA defining "tribe" broadly to mean "any Indian tribe, *organized band*, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. *See Stand Up*, 919 F. Supp. 2d at 68 (noting "expansive" IRA definition of "tribe" and finding that a formal tribal government was not required).

Compounding its attack on tribal status, the County next contends that there was only one tribe, not three. P.R.M. 33. In fact, there was a discrete land acquisition for the Jackson Tribe in 1895, and another for the Buena Vista Tribe in 1926, and continued attempts to secure a distinct reservation for the Ione Band during this period. The County, once again, contradicts its own argument later in its brief, when it correctly notes that the Buena Vista and Jackson Rancherias were included in the Sacramento Agency's list, while the Ione Band was left off. P.R.M. 40. Though that list is not germane to the issue of the Ione Band's tribal status, it is clearly demonstrative of the distinction between the three tribes, all of which appear independently on the *Federal Register* list of recognized tribes. The conclusion that the County draws from documents that advert to aspects of the Ione, Jackson and Buena Vista Bands in the same document is wrong. P.R.M. 31-32. That culturally related and geographically proximate Bands would be addressed within the same government and other documents is unremarkable, and does not, in any event, countermand the import of the official acts of acquiring and attempting to acquire discrete reservations for these Bands. Indeed, the decades-long history of efforts to acquire a land base for the Ione Band is clearly more than a "scintilla" of evidence as the County

[39] *Connors v. United States*, 180 U.S. 271 (1901) had nothing to do with whether or not a guardianship relationship existed between the Federal government and an Indian tribe. The question in *Connors* was whether the tribe as a whole would be financially liable for a subset of its membership who refused to relocate without a fight, and as a result, harmed the plaintiff.

insinuates -- it is *substantial* evidence that the federal government regarded the Band as an entity for which it could hold land in trust.

Finally, contrary to the County's assertion, P.R.M. 47, there need not have been uninterrupted dealings between the Government and the Ione Band for the Government to retain power to deal with it. *United States v. John*, 437 U.S. 634, 653 (1978) (finding that federal authority over Mississippi Choctaws existed despite periods of no federal supervision).

ii. The County's claim that the Band was not under Federal jurisdiction in 1934 because the Government's multi-decade effort to acquire land for it was foiled by title complications defies logic

Relying on language in the ROD and the ILD addressed to the *distinct* inquiry regarding what constitutes "recognition" for purposes of IGRA's Restored Exception, the County asserts that even if the Band was a tribe it was not under Federal jurisdiction in 1934.[40] The County conflates evidence of federal recognition and evidence of a tribe having been under Federal jurisdiction, P.R.M. 41-42, and then relies on this conflation to baldly assert that the Government's failure to acquire the 40-acre parcel is "conclusive evidence" that the Band was not under Federal jurisdiction in 1934. P.R.M. 37. This proposition is patently illogical, contradicted by the plain language of the IRAand its land restoration purposes, and contrary to the findings of the *Muwekma* courts in their review of the Department's explanation regarding the rationale for the 1994 reaffirmation of the Band's recognized status.[41]

The text of the IRA expressly requires federal jurisdiction over a *tribe*, not over tribal land. 25 U.S.C. § 479. Further, the County's contention cannot be squared with the fact that section 5 of the IRA authorizes the Secretary to acquire in trust for tribes "lands, water rights or surface right to lands, within *or without* existing reservations," *id.* § 465 (emphasis added), and to create *new* reservations, *id.* § 467. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 991 (8th Cir. 2010) (recognizing that § 467 authorizes the Secretary to "proclaim new Indian

[40] Again, this is a distinct inquiry from what the phrase "recognized Indian tribe now under Federal jurisdiction" in the IRA means for the purpose of determining the scope of the Secretary's land acquisition authority under the IRA. All that the IRA requires is that the tribe for whom the acquisition is contemplated is recognized today. U.S.M. 25-26.

[41] The County accuses Federal Defendants of seeking to "bind it" to the findings made in the *Muwekma* courts. P.R.M. 34. The conclusions in those decisions are properly presented to this Court as important and highly relevant precedent.

reservations"). Moreover, not only is the County's interpretation of the first definition of "Indian" in the IRA at odds with its plain language, P.R.M. 37-39, is also negates the purpose of the *second* definition of Indian, "all persons of Indian descent who are descendants of such members who were, on June 1, 1934, residing within the boundaries of any Indian reservation." 25 U.S.C. § 479.

Further, quick review of portions of the S. 2775 hearing record the County failed to produce – which it offers in support of its theory that only tribes with trust lands in 1934 were eligible for additional land acquisitions – readily contradict this theory.[42] From hundreds of pages of legislative history, the County reproduced only a few pages of a very unclear colloquy that included the discussion of "under federal jurisdiction,"[43] as well as a disparaging description of an unnamed northern California tribe. P.R.M. 38. The selection is misleading and the County's interpretation of it profoundly distorts the issues then faced by Congress. A core purpose of the legislation was to *provide* land for Indians to remedy the disastrous consequences of prior federal policies including allotment – that had devastated the Indian land base, by eliminating their land base.[44]

The claim that absent a specific treaty, a tribe could not have been "under Federal jurisdiction" in 1934, and that the Secretary therefore could not then acquire land for it unless the tribe *already* had trust lands, inverts congressional intent and lacks citation and credibility. P.R.M. 42. The County citation to the *Stand Up* court's observation that "[t]his purchase of land is important, and likely dispositive in its own right, regarding whether the North Fork Tribe was

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[42] "The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship and special Federal service to Indians. *On the contrary, it makes permanent the guardianship services, and reasserts them for those Indians who have been made landless by the Government's own acts.*" *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self–Government and Economic Enterprise:* Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong. 2d Sess., at 20 (1934) (emphasis added) ("Senate Hearing").

[43] As explained in the Cowlitz ROD upon which the Ione ROD is built, and the Solicitor's subsequent M-Opinion, "under Federal jurisdiction" is only discussed once in the legislative history, at the end of the day. It was never addressed again there was never any analysis or explanation as to its meaning. Congress and the Supreme Court left open the question of its meaning by not defining it, leaving the interpretive task to the Secretary. That interpretation is entitled to *Chevron* deference. *See* http://www.bia.gov/cs/groups/mywcsp/documents/text/idc012719.pdf, http://www.doi.gov/solicitor/opinions/M-37029.pdf (M-Opinion).

[44] Senate Hearing at 17-20 (discussing the devastating impact of allotment and the "ruined condition" that Indian tribes and their members faced as a result of it).

'under Federal jurisdiction' in 1934," offers the County no support. *Stand Up*, 919 F. Supp. 2d at 68. Contrary to the County's strained reading, the cited passage merely suggests that the Government's success in acquiring land for the benefit of a tribe may dispositively satisfy the "under Federal jurisdiction" inquiry—not that the lack of such acquisition compels the opposite conclusion. Indeed, the *Stand Up* court's reasoning supports the *ROD's* conclusion that the multi-year efforts of the Government to accomplish this likely "dispositive" result *is* evidence of the Ione Band's status as having been under Federal jurisdiction for *Carcieri* purposes.

The County's attempt to ascribe significance to the fact that the funds to be used to purchase the 40 acres were not Congressional appropriations made specifically for the Band, P.R.M. 46, also fails. The May 18, 1916 "Authorization" document executed by the Assistant Secretary, AR000160, specifically approved and designated the land purchase for the "*Ione Band*," not mere miscellaneous landless Indians as implied by the County. The *Stand Up* decision, upon which the County relies, specifically *rejected* this line of argument. *Stand Up*, 919 F. Supp.2d at 68 n.20 (rejecting the argument that because the North Fork Rancheria was acquired under a 1913 appropriation act applicable to "landless California Indians" the Northfork Tribe was not a tribe for IRA purposes).[45] There was no need for an additional act of Congress specifically addressed to the Ione Band to show that it was under Federal jurisdiction and the County's implication otherwise must be rejected.[46]

The County improperly relies on cases principally concerned with criminal jurisdiction to argue that in 1934, jurisdiction was entirely animated by a pre-existing tribal land base. The scope of criminal jurisdiction, however, does not answer the "under Federal jurisdiction"

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[45] The County's continued reliance on the statement of Hazel Elbert during the period of *de facto* administrative termination, and the 2006 Indian Lands Opinion's generic observation that the Department sought to purchase lands for landless California Indians without regard for possible tribal affiliations, P.R.M. 46, does not overcome the Record evidence that the Department sought to acquire a *specific* parcel, *specifically* occupied by members of the *specifically* identified *Ione Band* collectively. Plainly here there *was* regard for tribal affiliation.

[46] The fact that Treaty J, negotiated and signed by the Band's predecessors, AR001005, was not ratified fails to advance the County's argument. P.R.M. 45-46. The absence of ratification does adversely affect the under Federal jurisdiction inquiry. To the contrary, the fact that treaty negotiations took place *at all* evidences a federal/tribal jurisdictional relationship. As the ROD reasonably concluded, AR010103-12, the combination of treaty efforts, appropriations, Governmental intent and sustained effort to acquire a homeland for the Band provides strong evidence that the Ione Band was under Federal jurisdiction in 1934.

Carcieri inquiry. That state jurisdiction may have extended to the Band or its members in various contexts[47] has no bearing on the Band's relationship with the federal government.

Finally, the County reprises its argument that the Band was not "invited" to vote on acceptance of the IRA and twists the Federal Defendants' explanation of the distinction between votes conducted pursuant to §18 of the IRA and those conducted under §16 as evidence that the Band was not under federal jurisdiction. P.R.M. 43. Again, the IRA's §18 mandate was to hold elections by reservations, not tribes. U.S.M. 24-25. The County's assertion that §16 only applied to tribes living on reservations is directly refuted by the Haas Report's listing of tribes that reorganized their government pursuant to a §16, but did not vote in a §18 election.[48]

The ROD's conclusion that the "Government's jurisdictional relationship with the Ione Band began no later than 1915 with the Department's substantial efforts to acquire land for the Band as a permanent reservation," *is* supported by substantial evidence. As the ROD states, "[t]he fact that this effort was not completed in 1934, does not disturb this conclusion; the question posed by *Carcieri* is whether there was a jurisdictional relationship between the United States and a tribe in 1934, *not the specific fruits of that relationship*." AR010111.

CONCLUSION

As the ROD explains, key Interior officials with the requisite authority issued final decisions that confirmed the Band's status and its entitlement to benefit from statutes like the IRA and IGRA. The decision to acquire the Plymouth parcels in trust to allow the Band to pursue the economic development opportunity of gaming furthers the goals of modern Federal Indian policy, including the right of tribal self-government and self-determination. The ROD is amply supported by the Administrative Record and is entitled to substantial deference by the Court. For these reasons, Federal Defendants' Cross-Motion for Summary Judgment should be granted and the County's Motion for Summary Judgment should be denied.

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[47] The County's Record citations for the proposition that the "Ione Band … was at all times subject to state law at all times prior to 1994 at least," P.R.M. 42, are all documents from the *Burris* litigation and all concern the County's retained civil regulatory jurisdiction over the 40 acres *never acquired into trust for the Band*, AR000776. They do not concern jurisdiction over the Band *qua* tribe, hence do not support a conclusion of ouster of federal jurisdiction in 1934.

[48] *E.g.*, the St. Croix Chippewa Indians of Wisconsin are included in Table B of the Haas Report, SAR020786, but not on Table A.

Respectfully submitted this 16th day of October, 2014.

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

/s/ Judith Rabinowitz
JUDITH RABINOWITZ
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105
Email: judith.rabinowitz2@usdoj.gov
Attorney for Federal Defendants

Of Counsel:
Rebecca Ross
Attorney-Advisor
United States Department of the Interior