JEROME L. LEVINE (CA Bar No. 038613)
TIMOTHY Q. EVANS (CA Bar No. 231453)
ZEHAVA ZEVIT (CA Bar No. 230600)
HOLLAND & KNIGHT LLP
400 South Hope Street, 8th Floor
Los Angeles, California 90071
Telephone 213.896.2400
Facsimile 213.896.2450

Attorneys for Intervenor-Defendant
Ione Band of Miwok Indians

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

COUNTY OF AMADOR, CALIFORNIA, Plaintiff, vs. THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and the IONE BAND OF MIWOK INDIANS, Intervenor-Defendant.	Case No. 2/12-cv-01710-TLN-CKD **INTERVENOR-DEFENDANT IONE BAND OF MIWOK INDIANS' REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT** Date: November 6, 2014 Time: 2:00 pm Judge: Hon. Troy L. Nunley (Courtroom No. 2)

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

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Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

I. INTRODUCTION

The County fails to meet its burden under the Administrative Procedure Act ("APA"). Courts conducting APA judicial review "[are] not required to resolve any facts in a review of an administrative proceeding," but instead determine "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Specifically, the court's role is to determine whether the facts found by the agency rationally support its conclusions, under the deferential arbitrary and capricious standard of review. *Conservation Congress v. U.S. Forest Serv.*, 720 F.3d 1048, 1054, 1057-1058 (9th Cir. 2013). Agency action is to be affirmed as long as a reasonable basis exists for it. *Id.* Here, the Department of the Interior's ("DOI") conclusions in the Record of Decision ("ROD") are fully supported by the record ("AR"), and the County fails to prove otherwise.

II. THE COUNTY IS BARRED FROM CHALLENGING THE BRUCE AND DEER DETERMINATIONS

The six-year statute of limitations bars the County from collaterally challenging the Assistant Secretary Ada Deer and Commissioner Louis Bruce determinations made 20 and 42 years ago, respectively. Citing *Wind River Mining Corp. v. U.S.*, 946 F.2d 710 (9th Cir. 1991) (hereinafter, "*Wind River*"), the County argues that the limitations period for challenging these determinations commenced with the ROD. Docket 85, hereinafter "Opp'n" at 5:13-18. But the County misunderstands *Wind River*.

That case does not hold that *any* subsequent application of long-past agency action extends the limitations period. Instead, it only extends the limitations period when the earlier action is applied in a "particular" situation that it so unique that the plaintiff *could not otherwise have known about it*. The court specifically noted that its holding would apply where "no one was likely to have discovered that the [agency's action] was beyond the agency's authority until someone actually took an interest in that particular piece of property…." *Wind River* at 715. The same rationale applied in the County's second cited case, *N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 743 (9th Cir. 2009), where the court extended the limitations period because the plaintiff "'could have had no idea' in 1993 that the [earlier agency action] 'would affect them' in 2006…" That is

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

not the situation here. Intervenor-Defendant Ione Band of Miwok Indians' ("Ione" or "Tribe") federally recognized status has been published in the Federal Register continuously since 1995. Further, the County has been on notice as to the Tribe's recognition since 1994, when the government notified the County of the Deer determination (and, through it, of the Bruce determination) in the course of the *Burris* litigation. AR 1133-1143; 1147-49; 1153-1156, 4449. Accordingly, the rationale underlying *Wind River* does not apply here.

The County's attack on the Bruce and Deer determinations is also barred because the *Wind River* exception does not apply to procedural attacks. *Wind River* at 715. The County's attack on the Bruce determination is purely procedural. The County complains that Bruce failed to follow what the County asserts (but does not show) were required procedures when he made his determination, and concludes that "[b]y bypassing established Department procedures for recognizing tribes, [Bruce] committed an *ultra vires* and void act." Opp'n at 4:11-12. Despite the County's use of "ultra vires," as if to somehow raise the action taken to a substantive level, the County's attack on Bruce's actions, taken approximately 42 years prior to the filing of this APA challenge, are admittedly procedural. *Wind River* explicitly holds that challenges to agency actions based on *procedural* violations must be brought within six years of the decision. *Wind River* at 715.

The same is true for the County's arguments about the Deer determination. The County challenges Deer's actions because she allegedly "ignored the Part 83 regulatory process…" (a *procedure* for recognizing tribes), allegedly changed her agency's position without providing explanation (another *procedural* matter), and "bypass[ed] the customary system of 'program review and surname' and fail[ed] to distribute copies for review in advance," (yet a third *procedural* objection). Opp'n 4:19-5:7. The procedural challenges do not qualify for the *Wind River* exception. The County also points out that Deer met with congressional representatives in the course of making her determination (Opp'n 4:17-19), but does not explain why this might be problematic or argue that doing so was outside the scope of her authority. And in any event, Deer's consultation with other government officials is a policy matter, which similarly must be raised within six years of the agency action. *Wind River* at 715. Thus, all of the County's arguments against the Deer determination are time barred.

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

In addition, even if this Court were to hold that the limitations period only commenced when the Bruce and Deer determinations were first applied to the County rather than when they were issued, the County's claims would still be barred because the determinations that Ione is a federally-recognized tribe were applied to the County at least twice in the past, in 1994 and 2004. First, Deer announced the Tribe's re-affirmed federal recognition in 1994 while the *Burris* litigation was pending. Her determination flatly undermined the County's main argument in that case that the Tribe was not recognized. The determination was applied to the litigants (including the County), and the final outcome in the case hinged on it. Thus, the Deer and Bruce determinations were applied to the County in 1994. AR 1133-1143; 1147-49; 1153-1156, 4449. Second, in 2004 the County filed for a petition of mandate against the City of Plymouth, which had entered into a government-to-government agreement with the Tribe. The County argued that the agreement – signed in anticipation of the Tribe having land in trust – impaired its interests. The agreement was based on the Tribe being federally-recognized, and the County's lawsuit demonstrated that the Tribe's recognition had negatively impacted the County. *See* Request for Judicial Notice (filed concurrently herewith), Ex. 1, Petit. for Writ of Mandate 4:5-7, 4:14. The County's petition conceded that "The Tribe is a recognized Native American tribe" that is "not subject to state court jurisdiction" and that "the state court has no jurisdiction over the Tribe." *Id.* Thus, in both 1994 and 2004, the Bruce and Deer determinations were applied to the County and affected its interests, but the County made no attempt to set them aside or otherwise object to them. The statute of limitations for contesting these determinations ran long ago.

In addition to being time barred, the County's allegations against the determinations are factually unsupported. The County fails to prove that the Bruce determination deviated from any required procedures. The County does not show that involvement by "Tribal Services" was required or why the involvement of Real Estate Services matters. In fact, the County's entire argument is based on two internal memoranda written by staffer Michael Lawson (AR 783, 678-79) who admits that his information about alleged "anomalies" in the Bruce determination were gleaned from hearsay he heard from "Bureau personnel who were then [i.e., in 1972, *twenty years earlier*] on staff…." (AR 784). Thus, the attempt to procedurally invalidate the Bruce determination fails.

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

The County's assertion that Commissioner Bruce failed to consider criteria which the County implies were germane to his decision (Opp'n 4:5-8) is similarly unfounded. It is based solely on the same conclusory memorandum, written by the same staff member as the previous argument. *Id*. The County fails to provide any independent support for the proposition that Bruce was required to apply the particular criteria the County references when he made his determination, nor does the County show that these criteria were ignored.

Finally, the County points to a few documents that demonstrate some internal disagreement with the Bruce determination. But the record is replete with documents demonstrating that numerous other DOI officials supported the determination. AR 553-554, 558-559, 591. The fact that some lower-level officials may have disagreed is irrelevant.

As to the Deer determination, the County argues that Deer's actions were procedurally flawed because they ignored purportedly binding regulations. Opp'n 4:19-21. In so arguing the County again ignores the fact that Commissioner Bruce had already recognized Ione in 1972, as had the earlier administrations that tried to obtain land for the Tribe. Thus, when Deer affirmed the Tribe's recognition in 1994 she was re-stating and re-affirming the prior governmental position thereby correcting her agency's treatment of Ione. AR1056. Since Ione had already been recognized in the past it did not need to go through a new recognition process, and the regulations the County cites therefore did not apply.

Next, the County asserts that Assistant Secretary Deer was "subjected to raw political pressure" (Opp'n 4:17-20), implying that her decision resulted from this pressure rather than a reasoned conclusion based on careful consideration of supporting evidence. But the County fails to support that claim with any evidence. That Deer met with Congressional representatives (as stated in her own determination regarding Ione, AR 1056) is unremarkable and unworthy of the County's conclusion that she was subjected to undue or improper influence. It certainly does not prove the existence of, or bowing to, any sort of overwhelming pressure, or any procedural deficiency.

The County also complains that Deer "changed" her agency's position on Ione's recognition (Opp'n 5:3-7), but ignores the fact that the Deer determination actually *continued* a policy and position that had been ongoing for decades. AR1056. And the County fails to explain the potential

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

problem with the highest-ranking Indian Affairs official altering agency policy to better reflect her government's longstanding practice. That is precisely what Deer was required to do. Finally, citing an undated and unsigned 4-line document, written on an unknown date by an unknown writer, the County asserts the Deer determination was adopted through an unusual round of decision-making. Opp'n 5:4-7. The document the County cites proves neither the existence of any procedure Deer might have been required to follow nor that she failed to do so.

III. THE ROD APPROPRIATELY APPLIED REGULATION 292.26

A. The County Failed to Raise its Claim about the Validity of Sec. 292.26 in the Complaint and May Not Do So Now

Attempting to rectify its failure to argue against the validity of Sec. 292.26 in its Complaint, the County now tries in vein to demonstrate that such an argument could have been inferred. But Fed. R. Civ. P. 8 requires that claims be set forth in "short and plain" terms that give defendants "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964 (2007). Such a showing requires "more than labels and conclusions." Instead, a plaintiff must provide "factual allegations" that "raise a right to relief above the speculative level" to the "plausible" level. *Id.* Thus, any legal conclusions found in a complaint must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009). Here, the Complaint provides only a broad and general allegation of arbitrariness in the application of Sec. 292.26 to the Tribe. The Complaint fails to allege that a fundamental basis for challenging the application of Sec. 292.26 will be the alleged lack of authority to enact it in the first place, and there was no way to infer this argument from the Complaint. Defendants were given no notice that this matter would be raised and that consequently the administrative record underlying the Secretary's adoption of that regulation was necessary. The Defendants, and this Court, are left without the factual basis necessary to adjudicate this new claim.

The County clearly recognizes its fatal omission but tries to correct it by arguing that an administrative record is not necessary to defend against a claim of lack of authority to enact the regulation. Opp'n 18:22-28. But the County's own arguments focus on material that the Secretary allegedly "considered" prior to enacting it. Opp'n 18:27-28. Without the full administrative record the Defendants cannot show this Court what the Secretary actually considered. Defendants thus

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

cannot respond to this argument other than by relying on the materials published in the Federal Register which, obviously, are incomplete and merely summarize, but do not fully reflect, the materials contained in the administrative record. Defendants were prejudiced by the County's omission and accordingly the County may not now raise this new claim. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000)(precluding plaintiffs from raising a new claim in an MSJ).

Further, the County may neither amend its Complaint nor file a new action to set aside the regulation at this late date, because the six year statute of limitations for challenging the regulation expired on May 20, 2014, six years after its publication in the Federal Register. The County's attempt to extend the statute of limitations under the *Wind River* exception discussed above fails as a matter of law because it is inapplicable. First, the County's challenge to Sec. 292.26 is policy-based, as explained fully in Ione's Cross Motion for Summary Judgment, Docket 82 (hereinafter "MSJ") at 20:4-25. *See also Strahan v. Linnon*, 967 F. Supp. 581, 607 (D.Mass. 1997), *aff'd*, 187 F.3d 623 (1st Cir. 1998) (finding that a claim that a regulation is inconsistent with Congress' mandate in a federal statute is "policy based," and that grounds for such a challenge should have been apparent within a six-year period following the regulation's promulgation). Second, the County had ample notice of the regulation's enactment via the Federal Register. Third, the County's attack on Sec. 292.26 is a an outright facial attack and, as such, does not qualify for the *Wind River* exception.[1] The County's facial challenge – which is wholly unrelated to the claims contained in the Complaint – should have been brought within six years of the regulation's publication. They cannot be brought now.

B. The BIA Did Not Find That Congress Expressly Sought to Preclude All Administratively Re-affirmed Tribes from Qualifying as "Restored"

Notwithstanding the Federal Register's express language, which *on its own terms* applies to tribes that were administratively re-affirmed before 1979 but not to tribes like the Ione that were administratively re-affirmed after 1979, the County insists that the Federal Register language

[1] A facial challenge is one arguing that "any enforcement of the ordinance" would be unlawful, whereas "an as-applied challenge contends that the law is [unlawful] as applied to the litigant's particular" situation, "even though the law may be capable of valid application to others." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). The County's claims are facial challenges and thus do not qualify for the *Wind River* exception.

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

applies to post-1979 tribes. This is clearly wrong, as explained extensively at MSJ 19-20. Further, the County continues to imply that Sec. 292.26 is inconsistent with "legislative intent," but the County's only proof as to what Congress intended by the word "restored" are the Part 292 regulations themselves. This argument is circular and thus immaterial. It is also wrong because the preamble to the Part 292 regulations expressly asserts that legislative intent cannot be inferred from IGRA or its legislative history. ("Neither the express language of IGRA nor its legislative history defines restored tribe …" 73 Fed.Reg. at 29363.) The lack of clarity as to what Congress meant by "restored" accounts for the fact that agency policy is required to interpret that term. And when agencies adopt new policy, they are authorized to exempt entities that previously relied on the old policy. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988)

C. The *NRDC* Test Does Not Apply

The County's unfounded insistence that the test articulated in *NRDC v. Thomas,* 838 F.2d 1224 (D.C. Cir. 1988) applies is wrong, and its discussion of *Bowen* is off point. Both *NRDC* and *Sierra Club v. EPA,* 468 U.S. 1204 (1984), focused on regulations purporting to implement an amendment to the Clean Air Act. The court held that Congress' express statutory goal in enacting the amendment was to retroactively apply a new rule articulated in that amendment. This is explained in detail at MSJ 22. Thus, the statute at issue there was enacted specifically to effect retroactive application of a new rule. The court held that in light of the statute's mandate, the agency implementing that statute *must* apply its implementing rule retroactively, and that it must follow certain guidelines (the "NRDC test") in doing so.

Unlike the Clean Air Act, IGRA does not require the retroactive implementation of any particular policy regarding "restored" tribes. Thus, unlike the *NRDC* agency, DOI had discretion in whether to apply its policy retroactively, and it elected not to do so. Accordingly, the *NRDC* test – which an agency must apply when it applies new policies retroactively but which is irrelevant when an agency permissibly elects not to do so – does not apply.

The County discusses *Bowen,* which held that statutes and administrative rules will not be construed to have retroactive effect unless their language so requires. *Bowen,* 488 U.S. at 208, 109 S. Ct. at 471. *Bowen* also held that a statutory grant of legislative rulemaking authority generally

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

will not encompass the power to promulgate retroactive rules unless expressly conveyed by Congress. *Id.* Those general principles, applied in numerous situations in the cases cited in *Bowen* (including ones similar to this case), apply here for purposes of determining whether IGRA requires that DOI apply any of its policies retroactively.

The distinction the County draws between *Bowen* and *NRDC* ("two different kinds of retroactivity," Opp'n 11:15-17) is immaterial. The *NRDC* test only applies when an agency elects to apply its rule retroactively. *See, e.g., Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012). When, as here, the agency elects *not* to apply its rule retroactively, the test is inapposite.

D. Even If the *NRDC* Test Applies, its Requirements Were Met Here

With another facial attack on Sec. 292.26, the County argues that the Secretary failed to consider the *NRDC* factors *upon enacting* Sec. 292.26. Opp'n 13:3-8. But the County has no way of proving what the Secretary considered because the necessary record is unavailable. The County's bald assertions, based only on the regulation's preamble, prove nothing.

Further, even assuming *arguendo* that the *NRDC* test applies to DOI's application of Sec. 292.26 to the Tribe, its requirements were met. The County contends that the Tribe must show that it relied on DOI's pre-2008 policy such that applying Sec. 292.26 to continue that policy rather than retroactively applying a new policy was permissible. The County errs in asserting that the immense efforts Ione invested between 2003 and 2005 are irrelevant. Ione would not have invested such efforts, which were based on the factual and historical reality of Ione's administrative re-affirmation, but for DOI's policy of considering administratively-re-affirmed tribes as "restored." And, in any case, Ione's (and its developer's) investments continued well beyond 2005, based on DOI's pre-2008 policy. MSJ 24.

Ione was fully justified in relying on the Indian Lands Determination ("ILD") because the then-applicable federal law and policy permitted it to do so. The fact that DOI subsequently considered revising its policy is immaterial because, as evidenced by the preamble to Part 292, DOI was immediately made aware (by several tribes, including Ione (AR4857-4860)) that its proposed regulation would be harmful to tribes that had already been issued ILDs. DOI quickly published a notice stating that it intended to revisit its proposed rule, and Ione reasonably anticipated that DOI

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

would address this matter, as it justifiably did in its final rule. *See* 73 Fed.Reg. 29372 (May 20, 2008). As long as an ILD is in effect it represents the agency's opinion as to its subject matter. Ione's reliance was thus fully justified.

Finally, the County fails to explain how or why *WRT Energy Corp. v. FERC,* 107 F.3d 314 (5th Cir. 1997), supports its argument. In *WRT* the court held that the federal agency's interpretation of the statute at issue did not retroactively apply any rule to plaintiff, and accordingly the question of reliance (in the form of expenses incurred) on an old rule was immaterial. *Id.* at 321-22. Here, as in *WRT*, DOI expressly elected *not* to retroactively apply its new policy to Ione. DOI did so, as explained in the preamble to regulation 292.26, in order avoid the problems created by retroactive application of new policies. When no retroactivity is involved, there is no need to look at reliance issues. *WRT* does not say that expenses do not constitute reliance, but rather that when there is no retroactivity, reliance is not a factor.

E. The Internal Bernhardt Memo Has No Bearing on the Application of Section 292.26

In its search for some credible way to support its arguments, the County now asserts that an internal memo drafted by DOI solicitor Bernhardt overrode the ILD issued by DOI for Ione. The County then claims that when Solicitor Tompkins clarified that the Bernhardt memo never affected the ILD, Tompkins was somehow – and despite her own words – issuing a *new* ILD. Finally, the County asserts that since the "new" ILD only issued in 2009, Sec. 292.26 does not apply. All of the County's allegations are wrong.

Mr. Bernhardt, a lawyer for DOI, lacked authority to withdraw the ILD that was issued by his client DOI three years earlier. A solicitor cannot, on his own, invalidate previous agency actions (here, the issuance of an ILD).[2] The County asserts that a solicitor can withdraw an ILD previously issued by his agency because issuance of an ILD by DOI is not an "official" act since, as an opinion, it is advisory and not legally binding. But whether an ILD is advisory or not is not the question. Issuance of Ione's ILD was an action by DOI, effected by an authorized DOI official.

[2] The MOU cited by the County (Opp'n 16:8-19) is an internal agreement between NIGC and DOI that clarifies which agency's legal staff is responsible for researching the legal implications of requests for Indian Land Opinions lodged with each of those two agencies. The agreement does not authorize any attorney to overrule or otherwise withdraw actions that were previously taken by DOI, and it is unclear why the County cites to it. The MOU is wholly irrelevant.

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

The County fails to establish (and cannot do so) that Mr. Bernhardt, an internal DOI lawyer, possessed the legal authority to overturn or otherwise affect that agency's action, regardless of the its nature. Moreover, by its own terms the Bernhardt memo was a "draft opinion" on which Mr. Bernhardt sought comments. AR7108, 7724-26, 7764, 7712, 8823; MSJ 10-11. As such, it had no effect and could not extend the statute of limitations for challenging Ione's 2006 ILD.

IV. COLLATERAL ESTOPPEL DOES NOT APPLY TO THE TRIBE

Collateral estoppel, or issue preclusion, is irrelevant here because the two issues identified by the County as subject to estoppel are not being litigated in this case. This is an APA proceeding in which the only question of law at issue is whether the Department's determinations in the ROD – to acquire land in trust for Ione and to deem such acquisition a restoration of lands for a restored tribe under IGRA – meet the deferential arbitrary and capricious standard based on the AR. 5 U.S.C. § 706(2)(A); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (explaining that in APA proceedings "the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law."). The question of law posed in this case has never been litigated. And in an APA proceeding, there are no disputed facts for the district court to resolve because the agency serves as the finder of fact. *Occidental Eng'g Co.*, 753 F.2d at 769-770. Since no issues of law or fact are being re-litigated, the doctrine of collateral estoppel does not apply.[3]

Further, the prerequisites to application of collateral estoppel are absent. Issue preclusion means that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995), *quoting Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980). Collateral estoppel only applies where it is established that (1) an issue necessarily decided in the first proceeding is identical to the one sought to be relitigated; (2) a final judgment on the merits issued in the first proceeding; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000). The party

[3] To the extent the County's MSJ or Opposition asserted that Ione was precluded by the doctrine of *res judicata* or claim preclusion, the same reasoning and result apply.

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

asserting collateral estoppel "bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Clark v. Bear Stearns & Co, Inc.*, 966 F.2d 1318, 1321 (9th Cir. 1992). The asserting party also bears the burden of proof as to each element. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050-1051 (9th Cir. 2008). Further, "[i]t is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *Clark*, 966 F.2d at 1321 (quotation omitted).

The County claims that the 1992 order by the Hon. Lawrence Karlton in the *Burris* litigation held that Ione had never been previously recognized and that the only way for it to become recognized was to file an application for acknowledgment under the DOI's Part 83 regulations. Opp'n 27:18-28:10. But that is not what Judge Karlton's Order says.

The portion of the order the County references (Opp'n 27:20-26) addressed plaintiffs' claims against the U.S., two of which stemmed from the main claim seeking an order to compel the United States to recognize Ione. AR7772-7773, 7775. In regard to these claims, the United States moved for summary judgment on the ground that it had not waived its sovereign immunity from suit. AR7775-7779. The Court held that the U.S. had not waived its immunity as to these claims because the APA's waiver only applies where there is final agency action, and "[p]laintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review." AR7775-7776. This was the basis for the Court's refusal to accept jurisdiction over plaintiffs' claims compelling recognition, and for its grant of the U.S. motion. AR7779. In other words, the order concerned the absence of a waiver of sovereign immunity by the U.S. and the Court's resulting lack of jurisdiction over the plaintiffs' claims. The order did not focus on or otherwise discuss whether Ione had ever been federally recognized or any limitations on how it might become recognized. AR7763-7788. Without an identity of issues, the County's assertion of collateral estoppel fails.

Even if the issues raised in this case are identical to those in the *Burris* litigation (which they are not), collateral estoppel does not apply because there has been a material change in facts since *Burris*. Changes in facts essential to a judgment preclude assertion of collateral estoppel in a

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

subsequent action raising the same issues. *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1357 (9th Cir. 1985); *U.S. v. Certain Land at Irving Place & 16th St.*, 415 F.2d 265, 269 (2nd Cir. 1969), *amended*, 420 F.2d 370 (2nd Cir. 1969). Most significantly, Assistant Secretary Ada Deer reaffirmed Ione's status as a federally recognized tribe in 1994, based on Bruce's 1972 recognition and the Band's prior recognition of the early 1900s. AR6036. In fact, in 1995, DOI submitted an amicus filing in the *Burris* litigation, at the Court's request, informing the Court that Ione was federally recognized and listed in the 1995 Federal Register list of recognized tribes. AR1133-1140. Thus, there were substantial changes in material facts for the issues the County claims were litigated and adjudged by Judge Karlton in the *Burris* litigation. Collateral estoppel cannot be asserted by the County against the Tribe under these circumstances.

Finally, collateral estoppel does not apply because any issues litigated in the present action would be decided upon a different burden of proof or standard of review than the one applicable in *Burris*. An issue previously decided under a different burden of proof than when subsequently raised in a second action is not subject to preclusion. *Clark*, 966 F.2d at 1321, 1322; *Dias v. Elique*, 436 F.3d 1125, 1129 (9th Cir. 2006); *see also* 18 James Wm. Moore et al., Moore's Federal Practice § 132.02[4][e] (3d ed. Matthew Bender 3d Ed.). Challengers to agency action under the "arbitrary and capricious" standard bear the heavy burden of this APA standard in light of presumed agency regularity. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013). Any *Burris* issues would have been decided pursuant to a lower civil action burden of proof. Accordingly, the County may not benefit from issue preclusion.

V. THE RECORD SUPPORTS THE ROD'S DETERMINATION THAT IONE WAS A TRIBE IN 1934

Under 5 U.S.C. § 706(2)(A) a court may set aside agency action only if it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The County's focus on the substantial evidence standard is thus irrelevant. Opp'n 29:1-30:3. The "substantial evidence" standard is found in 25 U.S.C. § 706(E), which applies to the review of agency hearings. That section, including its standard of review, is inapplicable. Further, all of the cases cited by the County in this section – except *Citizens Against Casino Gambling v. Kempthorne*

– apply this standard and are therefore similarly irrelevant.

In an attempt to show that Ione was not a tribe under the IRA in 1934, the County gives its own interpretation of a few individual AR documents. None of these alternative interpretations, when viewed in light of the 40+ volume printed record, enable the County to meet its "heavy burden" of showing that no reasonable basis exists for the ROD's determinations. *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1057-1058 (9th Cir. 2013); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244, 1249 (9th Cir. 2013).

The County first tries to discount a memorandum authored by Commissioner of Indian Affairs Morris Thompson, which concurred in the Bruce determination (AR565-568, 870-873), by arguing that the memorandum was never finalized or sent because the then-Solicitor disagreed with it and as such staff felt it could not be issued. Opp'n 30:14-31:3. Notwithstanding the Solicitor's views on the matter, what is important about the Thompson memorandum is that it demonstrates that Commissioner Thompson, the highest-ranking federal official responsible for Indian affairs, concurred with the Bruce determination and deemed it well-supported. The memorandum demonstrates that the ROD's conclusion that Ione was a tribe was rational.

The County next argues, as it did in its initial moving papers, that historical AR documents show Ione "was not a separate and distinct entity from the Buena Vista and Jackson Rancheria[.]" Opp'n 31:4-6. But the County's strained reading to reach this conclusion never explains the AR documents explicitly listing Ione distinctly and simultaneously with the Jackson and Buena Vista bands. *See, e.g.*, AR8129, 8138-8140. Nor does the County account for the fact that a 1934 letter by the Sacramento Indian Agency Superintendent shows that rancheria lands already had been set aside for the Buena Vista and Jackson Rancherias (AR20755-20756), yet as of 1941 the same Agency was continuing its long but unsuccessful attempts to purchase land for Ione (AR506-507).

The County misstates Ione's arguments by saying, "The Band's response is to deny that 'Ione Band' was used interchangeably with 'Buena Vista,' 'Richey' and "Jackson' to refer to a single tribe with multiple land bases." Opp'n 32:16-17. What the Tribe's MSJ actually stated in relevant part is: (i) "The early BIA documents cited by the County *do not* refer to Ione, Buena Vista, and Jackson interchangeably, as the County claims, though they were referenced together at

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

times" (MSJ 32:17-18); (ii) the MSJ clearly disputed "that Ione was not a 'separate and distinct tribal entity' because [as the County claimed] its members historically 'were actually part of the modern-day Buena Vista Rancheria and/or Jackson Valley Rancheria tribes'" (MSJ 32:11-13); and (iii) "*Contrary to the County's claims, the 1915 Terrell Census did not group all of the tribes together*" (MSJ 32:21-23).

The AR documents cited in the Tribe's MSJ show that members of the tribes at Buena Vista Rancheria and Jackson Rancheria descend from Ione members and that there were Ione members living at those two locations who maintained ties to Ione. But the early AR documents cited by the County did not refer to these three tribes "interchangeably" or show that Ione and its members were subsumed under those two other tribes, as the County claimed. Docket 65, 30:13-16. And the fact that some Buena Vista and Jackson Rancheria members descended from members of Ione is not surprising given their members' geographic proximity, but it certainly does not mean that Ione members historically "were part of the modern-day Buena Vista Rancheria and/or Jackson Valley Rancheria tribes." Put simply, it means members of Ione were and are members of Ione, and there are Indians at Buena Vista and Jackson that descend from Ione.

Nevertheless, the County asks "how the Ione Band believes that it *helps* its case that the documents [cited in the Opp'n,] have the headings 'Ione Indians' and 'Buena Vista Rancheria' but 'only discuss the proposed Ione Band land purchase." Opp'n 32:24-26. The headings in those documents referring to both "Ione Indians" and "Buena Vista Rancheria" are not inconsistent with Ione's position and certainly not determinative. The documents' text only discussed the 40-acre land purchase proposed for Ione. There is no mention of Buena Vista as a separate tribe, only Ione. If Ione was subsumed under Buena Vista and was not a distinct tribe, the documents would have discussed Buena Vista. They do not. One may speculate as to why these headings appear together on these documents – perhaps the documents were organized by geographical proximity, but again that is speculation. What the County's strained reading of such documents avoids is the inescapable fact that there are other documents in the AR listing the Ione and Buena Vista (and Jackson) tribes separately as "distinct bands" at the same time, immediately prior to 1934. *See, e.g.,* AR8139.

The County also tries to rely on the *title* of the document containing the Ione census

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

conducted by Special Indian Agent John Terrell in May 1915, "Census of Ione and vicinity Indians," (AR3490). The County concludes that the title means that Terrell *had* to enumerate all the Indians in the vicinity of Ione, including Richey[4] and Jackson, not just the Ione members, but because he did not, the document must mean that there was only one tribal entity among Ione, Richey, and Jackson. Opp'n 33:17-28. The County's own cited document, a 1916 letter by Terrell to Mrs. Lena Oliver, refutes this absurdity:

> It appears from the *census of the Ione Indians* [not "of Ione and vicinity Indians"] compiled by me last May through the kind assistance of Charley Maximo and some few other Indians of the band that your name does not appear, unless you are the wife of either John or Casus Oliver, *then reported as living at Jackson, but belong [sic] properly to the Ione band*. [¶] This census indicates a total of 101 Indians, of which 62 then resided at Ione and near there, 10 at Jackson and 29 at Richey. If you are not the wife of either John or Casus Oliver, but really belong to the Ione band of Indians, am [sic] sure the omission of your name has been an unintentional oversight…. AR959 (italics added).

This clearly shows the 1915 Terrell Census only intended to encompass Ione members, including its members who lived at Jackson and Richey, and that the County's strained reading of the Census title fails to fit its theory. The document also largely negates the County's assertion that because Buena Vista claims some of its members are descended from John, Casus, and Lucy Oliver, Ione must be subsumed under Buena Vista (Opp'n 31:4-6, 10-13), because clearly John and Casus were "then reported as living at Jackson, but belong[ed] properly to the Ione band."

The County places undo weight on a letter dated between 1916-1920, by an unknown author, that includes the reference "Ione and Richey Band of Indians." Opp'n 33:3-6. But this description is not surprising given the close proximity of Ione and Richey. In fact, the letter references a census with nearly identical figures for the three locales mentioned in the 1915 Terrell Census, indicating the Terrell Census' veracity. AR866, 944, 3490. The County's contrived reading of AR documents again fails.

The County tries to support its argument that Ione was not a separate and distinct entity by citing handwritten notes by an unknown author on some AR documents, which suggest, perhaps in confusion, that Ione and Buena Vista were the same tribe. Opp'n 33:9-16. The lack of attribution

[4] "Richey" can refer to the place known as Buena Vista (AR3547) or the Rancheria of the same name (AR20756).

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

for the annotations makes them suspect. But even more so, the AR index shows that these documents plus others, all with annotations, were submitted by Gerald Glazer to the BIA on February 14, 1994, with a copy to "Chief Nicolas Villa." AR860-873. The AR indicates that in the early 1990s "Chief" Nicolas Villa was involved in a leadership dispute among factions at Ione but insisted on his leadership role there. AR788, 998-1000.[5] He also misleadingly held himself out to be a leader of various entities including those he called the "Buena Vista Rancheria Miwok Indian Tribe" and the "Buena Vista Rancheria/Ione Band of Miwok Indians," as well as of the Buena Vista Racheria, and the BIA pointed out the fallacy of his assertions. AR842-853, 875-876, 976-977. Glazer is copied as "Tribal Attorney" on correspondence by "Chief" Nicolas Villa (AR843-844), and Glazer also told the Acting Deputy Commissioner of Indian Affairs that in 1916 the Department "considered the Ione Indians and the Buena Vista Rancheria to be one in the same" (AR976). The obviously self-serving annotations in documents submitted by Glazer, the "Tribal Attorney," on behalf of his client "Chief" Nicolas Villa, in order to advance Villa's incessant desire to be a tribal leader (of whatever group he purportedly represented at the time), have no bearing on the history of the Tribe.

In contrast to the other arguments it makes to claim Ione was not a tribe for IRA purposes, the County actually concedes that "[t]he only sensible understanding of those [pre-1934] documents [it cites] is that all of the Indians at Jackson and Buena Vista *were members of the Ione Band*. And that, in turn, leads to the inescapable conclusion that there was but a single band with multiple land bases." Opp'n 33:25-27 (italics added). Those statements may call into question the existence of Jackson and Buena Vista Rancherias being separate tribes at some earlier time (which question is not at issue in this proceeding), but the County finally reaches the conclusion that the AR shows Ione was a distinct tribal entity prior to 1934, just as DOI's ROD concludes. And nearly as astounding, the County cites to the Supreme Court case *Conners v. United States* to make a distinction between a "band" and a "tribe," with the apparent intent to assert that Ione was at most a "band" and not a "tribe." Opp'n 34:1-9. But in doing so the County blithely ignores IRA Section

[5] Ada Deer directed her March 1994 recognition reaffirmation letter for Ione to Nic Villa, Jr. (AR1056) but later clarified that the letter was not intended to recognize him or his faction rival Harold Burris as the legitimate tribal government leader (AR1129).

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

19's definition of "tribe," which makes the IRA applicable to tribes *and* bands. 25 U.S.C. § 479.

In sum, the County fails to meet its burden. The County's strained attacks on a few individual documents in a 20,000+ page AR that, when taken as whole, clearly shows Ione was a "tribe" prior to 1934 for IRA purposes, fails to undermine the ROD's conclusion.

VI. THE SECRETARY CORRECTLY INTERPRETED AND APPLIED THE IRA SECTION 19 "UNDER FEDERAL JURISDICTION" REQUIREMENT TO THE TRIBE

A. The Legislative History of the Phrase "Under Federal Jurisdiction" is Ambiguous and Without Clear Intent

The phrase "under Federal jurisdiction" in Section 19 is ambiguous. As head of the agency delegated principal authority over Indian affairs (25 U.S.C. §§ 2, 9; 43 U.S.C. § 157), the Secretary had to interpret its meaning to continue exercising the authority granted in IRA Section 5 to acquire trust land for tribes like Ione. AR10103. Such agency interpretation of a statute it administers is judicially reviewed pursuant to the Supreme Court's two-part framework established in *Chevron, USA, Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S. Ct. 2778, 2781-2782 (1984), and is to be accorded "considerable weight" (*Id.* at 844, 2782-2783).

The County incorrectly asserts that the legislative history and intent behind the phrase "under Federal jurisdiction" *clearly resolved* an underlying problem, and that therefore the Secretary's interpretation is unwarranted and *Chevron* is inapplicable. Opp'n 36:25-27, 44:4-12. However, the transcript of the wide-ranging and confusing May 17, 1934 Senate Committee on Indian Affairs hearing ("Senate Hearing"),[6] wherein the "under Federal jurisdiction" language was originally proposed, shows how ambiguous the phrase's legislative history is. The relevant discussion initially focused on the definition of "Indian" as it had been proposed (Senate Hearing at 264), which would determine the scope of the bill's coverage. The Senators' discussion, including input from Commissioner of Indian Affairs John Collier, focused on the three distinct parts of that definition: (i) members of any recognized Indian tribe (without any Indian blood quantum requirement); (ii) descendants of such members residing on reservations as of June 1, 1934 (without any Indian blood quantum requirement); and (iii) all other persons with ¼ or more Indian blood

[6] *See Hearings on S.275 and S.3645: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, Before the S. Comm. On Indian Affairs*, 73d Cong., 2d Sess., pt. 2 (1934), pages from May 17 hearing attached hereto in App. Supp. Auth. Ex. 1; full record available at http://hdl.handle.net/2027/uc1.b5157913.

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

quantum (subsequently changed to a ½ minimum, per the Chairman's proposal (*see* Senate Hearing at 263-264)). The participants in that debate, which culminated in inclusion of the phrase "under federal jurisdiction" in Section 19 of the IRA, were concerned about different aspects of the definition and their conversation was thus disjointed. Senate Hearing at 264-267. Some were concerned with whether and how to divest the government's current responsibility for enrolled tribal members with a low blood quantum who were already under federal supervision, and whether they should be covered by the bill going forward. Others worried about the separate issue of the acceptable blood quantum to remain or come under federal supervision, and whether it should apply only to those falling under the third part of the "Indian" definition or to all parts. Other issues were (1) whether specific tribes would come under the bill, including the Catawbas and the Miamis, (2) whether such tribes had a reservation or only land on which they lived; (3) whether the bill's property management provisions would apply to enrolled tribal members who had less than ½ blood quantum; (4) whether the bill's benefits should be extended to tribal members who did not live on a reservation and if so, whether they had to meet a blood quantum requirement; (5) what it meant to be "living as" Indians; and (6) what language to use to address any or all of these issues. *Id.*

When Commissioner Collier proposed inserting the phrase "under Federal jurisdiction" into the definition of "Indian" at the end of the exchange described above, it was unclear which concern the phrase was intended to assuage. The phrase was not defined in the proposed bill or at the hearing (which was convened to address a version of the bill that used a different phrase, "under federal tutelage," in its title). The Commissioner gave no indication of his intent in proposing it. It is not even clear to whom he addressed his proposal – Senator O'Mahoney or the Chairman – and by extension, what issue he sought to address with it. There is no further reference in the legislative history to the "under federal jurisdiction" language. We do not know if Commissioner Collier's proposal satisfied whomever he addressed or if it had the desired effect.[7]

The County incorrectly asserts that the Chairman and other Senators were specifically

[7] *See also* "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, Opinion M-37029, Office of the Solicitor, U.S. Dep't of the Interior, Mar. 12, 2014, at 12 (recounting Collier's then-Assistant Solicitor Felix Cohen describing the meaning of "under Federal jurisdiction," as "whatever that may mean" and requesting the language be removed because it would "provoke interminable questions of interpretation."), available at http://www.doi.gov/solicitor/opinions/M-37029.pdf (last visited Oct. 15, 2014).

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

concerned that the definitions of "Indian" and "tribe" in Section 19 were so broad that they threatened to subsequently create more tribes who would come under federal supervision and benefit from the IRA. Opp'n 37:22-38:4. But the Chairman had already addressed his concern about limiting new *future* beneficiaries by proposing to change the blood quantum requirement in the third part of the "Indian" definition from one-fourth to one-half. Senate Hearing at 263-264. There was no need for Collier to further address that issue of potential future beneficiaries. Chairman Wheeler in the hearing exchange clearly had in mind the question of how to remove from the government rolls "those Indians who are *at the present time*" already improperly under federal supervision. Collier's "under Federal jurisdiction" language would do nothing to address that issue either. Thus, the intent behind the proposal is ambiguous. As such, it was proper for the Secretary to interpret the phrase "under Federal jurisdiction" in the Ione ROD.

B. The IRA's Legislative History Shows It Was Intended to Benefit Landless Tribes Such as Ione

Based on its faulty reading of the IRA's legislative history, the County incorrectly concludes that, absent a treaty, a tribe would have to have had federally set-aside land in 1934 to be "under federal jurisdiction", and because Ione did not have such land, it could not qualify as being "under federal jurisdiction." Opp'n 44:26-45:4. The broader implication of the County's argument is that no landless tribe could ever benefit from the IRA.

Such an interpretation would impermissibly frustrate the IRA's remedial purpose of providing land for landless tribes and Indians. Remedial statutes are to be read broadly to effectuate their intended purposes (*Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S. Ct. 548, 553 (1967)), and laws affecting Indian rights and privileges are to be construed liberally, with ambiguities resolved in their favor (*County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992)).

The overall purposes of the IRA were to establish the means for Indian tribes to assume a greater degree of political and economic self-government, further the federal government's trust responsibility towards tribes, and protect Indians from the negative effects of non-Indians administering their affairs. *Morton v. Mancari*, 417 U.S. 535, 541-542, 94 S. Ct. 2474, 2478-2479 (1974); *Johnson v. Shalala*, 35 F.3d 402, 406 (9th Cir. 1994). The IRA has been characterized as a

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

"comprehensive reform statute, providing, among other things, for tribal self-government, restoration of lands to tribal ownership, economic development, and vocational training." *E.E.O.C. v. Peabody Western Coal Co.*, __ F.3d __, 2014 WL 4783087 at *4 (9th Cir. 2014). Congress believed a necessary part of this tribal economic self-sufficiency was "to conserve and develop Indian lands and resources." *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (quoting and citing 1934 congressional reports).

The IRA's text and legislative history clearly evince the drafters' intent to further the remedial goal of acquiring land for completely landless Indians, both tribes and individuals. *See, e.g.*, 25 U.S.C. § 465 (authorizing the Secretary to acquire land "for the purpose of providing land for Indians" and requiring that "[t]itle to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired[.]"); 78 Cong. Rec. 11727, 11728, 11730 (June 15, 1934) (Rep. Howard, the House bill sponsor, stating that "[t]he Indians now landless must be provided for[;]" "It is estimated that there are now more than 100,000 landless Indians…These landless Indians, in … California … and many other States, constitute a tragic problem in destitution and an acute problem of social relief which neither the Federal Government nor the States are adequately dealing with[;]" and "Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land[.]…[¶] This program would permit the purchase of land for many bands and groups of landless Indians …."), attached hereto as App. Supp. Auth. Ex. 2; *see also South Dakota*, 423 F.3d at 798-799 (citing and quoting parts of 1934 Senate and House IRA legislative history relating to purchase of land for landless Indians). In fact, federal courts have had to rule against claims that the IRA extended only to landless tribes. *See, e.g., Chase v. McMasters*, 573 F.2d 1011, 1015-1016 (8th Cir. 1979). Commissioner Collier's *Annual Report of the Commissioner of Indian Affairs* for 1934, issued soon after IRA enactment, noted that it "authorized the establishment of new reservations for now completely landless and homeless Indians and directed that title to all newly purchased land should be taken in the name of the United States in trust for the Indian tribe or individual Indian…." *See* Extract from the Annual Report of the Commissioner of Indians Affairs, 1934, *reprinted* in Francis P. Prucha, S.J., *Documents of United States Indian Policy* 226 (3d ed. 2000), attached

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

hereto as App. Supp. Auth. Ex. 3. The County's wrongheaded interpretation of "under Federal jurisdiction" to mean a tribe needed to have federally-set aside land in 1934 to come under the IRA would completely vitiate this congressional purpose.

The County further argues that as of 1934 it was understood that "Indians under Federal jurisdiction are not subject to State laws" and that Indians outside of reservation boundaries were fully subject to them, implying that federal jurisdiction over Indians could only be had on a reservation. Opp'n 39:7-14 & nn. 33-34. What the County omits is that the legislative history it cites and the *Ward v. Race Horse* and *New York ex rel. Kennedy v. Becker* cases (Opp'n 39:7-14 & n. 33) all pertained to assertions of state *criminal judicial* jurisdiction over *individual* Indians, not the plenary authority of the federal government in all matters over tribes, which are the relevant entities for IRA federal jurisdiction purposes. The County also cites *Williams v. Lee* and *United States ex rel. Marks v. Brooks* for the unremarkable and irrelevant proposition that states have no authority to regulate Indians on a reservation. Opp'n 39-40 n.34. The relevant IRA inquiry– whether the Federal government could have exercised jurisdiction over tribes not on a reservation – was answered affirmatively in the Tribe's MSJ, with case law holding the federal government's plenary power over tribes is completely independent of land ownership status. MSJ 40:3-10. The County neither attempts to address this argument nor rebut the case law cited by the Tribe.[8]

The County also cites *TOMAC v. Norton*, 433 F.3d 852, 856 (D.C. Cir. 2006), stating that the Pokagon Band of Potawatomi Indians' petition for reorganization under the IRA in 1935 was denied because the BIA determined "residence on trust lands held in common for the Band was required for reorganization[.]" Opp'n 40:11-41:5. The County concedes that a 1994 House Report accompanying Pokagon's restoration legislation found that conclusion to be a "misguided assumption," then attempts to dismiss that finding as "*post hoc*" legislative history of little weight. *Id.* at 41 n.36. But the *TOMAC* court clearly relied upon this House Report when it held that Pokagon "'was unfairly terminated as a result of both faulty and inconsistent administrative

[8] The County additionally asserts that an August 15, 1934 letter by Sacramento Indian Agency Superintendent O.H. Lipps supports a finding that Ione was not under federal jurisdiction because the Jackson and Buena Vista Rancherias are listed as communities within the Agency's jurisdiction but Ione is not. Opp'n 40:1-10. The Tribe's MSJ showed this argument to be incorrect (MSJ 29:22-31:3) and the County offers no counter-argument.

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

decisions contrary to the intent of the Congress, federal Indian law and the trust responsibility of the United States.'" *TOMAC*, 433 F.3d at 865 (quoting S. Rep. No. 103-266); *see also id.* at 855-856. *TOMAC* thus undermines the County's argument.

Furthermore, the IRA's plain text shows that reservation residence is not a prerequisite to organization under the IRA. Section 16 provided that "[a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary...." (underline added). The first underlined phrase in Section 16 replicates (with the addition of an errant comma after "or tribes") the Section 19 definition of "tribe," including the distinction that definition makes between "any Indian tribe" on the one hand – a phrase which does not imply residence on a reservation -- and "the Indians residing on one reservation" on the other. The distinction between "[a]ny Indian tribe" and "tribes, residing on the same reservation" is reinforced by the second underlined phrase above. Also, it would be unnecessary to use the phrase "same reservation" in Section 16 if only talking about "[a]ny Indian tribe" in the singular. Finally, recent case law found the Section 16 organization provision to have been generally applicable to all tribes who submit a petition to vote under it, as opposed to the mandatory elections called for on reservations to opt out of the IRA under Section 18. *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F.Supp.2d 51, 58 & n.10 (D.D.C. 2013).

The County cites several other authorities in support of its claim, but these are unhelpful. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) (Opp'n 41:6-10) does not preclude "the formation and exercise of tribal self-government" outside reservation lands under IRA Section 16. The case merely notes that Congress encouraged self-government on reservations. The language cited from Judge Karlton's 1992 order (AR7774) and case law that used the same language explicitly concerns how "[*r*]*ecognition could* be shown" (e.g., by showing the existence of a reservation). It has nothing to do with how being "under Federal jurisdiction" must be shown. Opp'n 41:10-42:3. The County's reference to IRA

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

Section 17, which pertains to tribal charters (Opp'n 43:18-26), is irrelevant because it merely shows that issuance of such charters could only proceed by tribal petition for a special election on a reservation. The section does not say that those without a reservation were not "under Federal jurisdiction." Finally, the County claims that two AR documents (AR20752 and AR8138-8164) cited by the Tribe (MSJ 30:18-31:3) that show that the Tribe came under the federal jurisdiction of the Sacramento Indian Agency in the early 1900s, are irrelevant. The County claims there is a distinction between a tribe being "under Federal jurisdiction" and it being under the jurisdiction of a particular federal agency. Opp'n 44:13-25.[9] No such distinction exists because governmental jurisdiction, which the County defines as "the power or right to exercise govern [sic] or legislate," can only be exercised by government agents within "the limits or territory within which authority may be exercised." Opp'n 44:18-19; *see, e.g., County of Lewis v. Allen,* 163 F.3d 509, 514 (9th Cir. 1998) (pursuant to a tribal-state agreement, county law enforcement officers had the right to come onto a reservation to exercise the state's concurrent criminal jurisdiction over Indians). If the federal Sacramento Area Agency exercised jurisdiction over Ione, the government must have had jurisdiction to do so.

The County then attacks (i) the Band's status as a successor in interest to the signatories of the unratified Treaty J and (ii) the proposed use of Departmental appropriations to acquire the 40-acre parcel for the Band, and claims that the ROD did not rely on these facts in support of its ultimate conclusion. Opp'n 45:7-20. But the ROD's ultimate conclusion that "[t]he Ione Band was under Federal jurisdiction in 1934….[as] confirmed by application of the Department's two-part inquiry" (AR10111) shows that DOI conducted a two-part inquiry in concluding that Ione was "under federal jurisdiction." The first part of that inquiry would encompass a review of all of the relevant record documents, including those reflecting both the Tribe's status as a treaty successor in interest and the Department's proposed use of appropriations to acquire land for the Tribe, since those facts clearly "establish or … generally reflect Federal obligations, duties, responsibility for or authority over the tribe by the Federal Government" at or before 1934. AR10111. As the D.C.

[9] It is ironic that the County asserts the Sacramento Indian Agency's jurisdiction does not equate with federal jurisdiction, when it attempts to assert the opposite a few pages prior. Opp'n. 40:1-10.

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400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

District Court has held, "[t]he fact that the Secretary did not cite [a pre-1934 fact] specifically within the section analyzing his statutory authority" does not undercut a finding of federal jurisdiction in 1934 because "the fact…was clearly considered in the IRA ROD [citation omitted], and a court's 'task is to enforce a standard of agency reasonableness, not perfection.'" *Stand Up for California!*, 919 F.Supp.2d at 69 (quoting *Nw. Airlines v. U.S. Dep't of Transp.*, 15 F.3d 1112, 1119 (D.C. Cir. 1994)). That same court, in upholding the Secretary's "under Federal jurisdiction" determination as to the North Fork Rancheria, found that Tribe's ROD, just like Ione's, "discussed numerous other historical facts that could reasonably indicate federal jurisdiction over the North Fork Indians prior to 1934, such as the fact that 'the Tribe's predecessors were represented by signatories to [an unratified] 1851 Treaty…." *Id.* at n.22.[10]

The County then reiterates the argument from its initial moving papers regarding the pre-1934 land purchase appropriation for Ione not being specific to the Band, but rather for landless California Indians, and therefore not within the scope of examples Justice Breyer's concurring *Carcieri* opinion gave of possible ways to show a federal-tribal jurisdictional relationship. Opp'n 46:8-13. This argument was completely rebutted in the Tribe's moving papers by pointing out that Justice Breyer only gave examples, not an exhaustive list, and even so, pre-1934 appropriations to a specific tribe under a general appropriations bill would still satisfy Justice Breyer's criteria. MSJ 39:1-18. And the County certainly cannot deny all of the other AR documents showing how the Tribe meets the two-part "under Federal jurisdiction" inquiry. MSJ 4-5.

VII. THE FEDERAL GOVERNMENT ADMINISTRATIVELY TERMINATED IONE AFTER 1972 AND LAWFULLY RESTORED IT IN 1994, AS THE ROD CORRECTLY DETERMINED

The County asserts that in order for termination to occur a tribe must have initially been a party to a treaty with the United States and received tangible benefits under its treaty (e.g., treaty compensation, reservation lands, federal services, and tax exemptions), and must subsequently been denied those tangible benefits. Opp'n 49:13-18. But the County's argument confuses termination

[10] *See also*, Felix Cohen, Handbook of Federal Indian Law at 150-151 (2005 ed.) (Burns Paiute Indians held to be a "tribe" under the IRA based on, *inter alia*, having had treaty relations with the federal government, as shown by an unratified treaty between the U.S. and the tribe's ancestors), attached hereto as App. Supp. Auth. Ex. 4.

Holland & Knight LLP
400 South Hope Street, 8th Floor
Los Angeles, CA 90071
Tel: 213.896.2400 Fax: 213.896.2450

of benefits with termination of federal recognition. Only the latter type of termination is relevant in the context of tribal restoration.

Termination occurs when a tribe's previously-conferred *status* as a recognized political entity, and the accompanying rights stemming from such status, are terminated by the federal government. And when that status and those concomitant rights are subsequently restored, restoration occurs. The court in *TOMAC,* 433 F.3d at 856, acknowledged that termination and restoration are alterations in a tribe's formal status: "The Tribe's *status* as a federally recognized tribe was reestablished [by legislative act],[11] thus bringing the Tribe within the umbrella of federal services and benefits extended to other federally recognized tribes." (italics added.) *See also id.* at 865 ("The Restoration Act also put the Band back into its 'former' place as a recognized tribe.") and 866 (reading statutory language that extended federal recognition to another tribe to mean the tribe's rights – not benefits – as a federally recognized tribe were restored by the legislation). If a tribe was granted tangible benefits pursuant to a treaty prior to its termination, this fact may be helpful in demonstrating that the tribe did in fact have the status of a federally-recognized tribe before that status was retracted.[12] But treaty benefits are not the exclusive means of gaining status as a federally-recognized tribe. The County's focus on tangible benefits misses the point.

The ROD properly determines the initial conferral, termination and restoration of Ione's federally recognized status to fall within IGRA's restored tribe exception. AR10101-10102. For all of the reasons set forth herein, the County's Motion for Summary Judgment should be denied in its entirety and the Tribe's Cross-Motion for Summary Judgment granted and judgment entered thereon with prejudice as to all defendants.

Dated: October 16, 2014

HOLLAND & KNIGHT LLP

By: /s/ Timothy Q. Evans
Jerome L. Levine
Timothy Q. Evans
Zehava Zevit
Attorneys for Intervenor-Defendant
IONE BAND OF MIWOK INDIANS

[11] As previously noted, a tribe may be terminated and restored by administrative action as well as congressional legislation. MSJ 44:2-19.

[12] *See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for the Western District of Michigan*, 46 F. Supp. 2d 689, 699 (W.D. Mich. 1999).