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IONE BAND OF MIWOK INDIANS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE,

Plaintiffs,

vs.

S.M.R. JEWELL, in her official capacity as Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and

IONE BAND OF MIWOK INDIANS,

Intervenor-Defendant.

Case No. 2:12-cv-01748-TLN-CMK

INTERVENOR-DEFENDANT IONE BAND OF MIWOK INDIANS' MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: March 26, 2015
Time: 2:00 p.m.
Place: Courtroom No. 2

Judge: Honorable Troy L. Nunley

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I. INTRODUCTION

Intervenor-Defendant Ione Band of Miwok Indians ("Ione Band," "Ione" or "Tribe") is a federally recognized Indian tribe whose relationship with the federal government, particularly the Department of the Interior's ("DOI") Bureau of Indian Affairs ("BIA"), spans centuries. Despite efforts by the federal government dating back to the early 1900s to restore the Tribe's land base, and particularly a certain 40-acre parcel within its historical area, in which many of its members and their ancestors had lived for generations, the Tribe still lacks Indian lands. As a result, in 2005 the Tribe filed an application to have specific land in its historic area in Amador County (the "Plymouth Parcels") taken into trust by the federal government under the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461 *et seq.*[1] AR2751-3482.[2] After a seven-year application process that included thousands of pages of record evidence, hundreds of hours of meetings and correspondence, and costly expert analyses, in 2012 DOI's Acting Assistant Secretary-Indian Affairs Donald E. Laverdure ("AS-IA") determined in a well-reasoned Record of Decision ("ROD") based on that extensive record that it would be appropriate and consistent with federal law and policy to grant the Tribe's application and accept the Plymouth Parcels into trust for the Tribe's benefit. AR10049-116. Consistent with a prior 2006 DOI determination, the ROD also concluded that the proposed trust land acquisition would constitute the restoration of lands for a restored tribe for purposes of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*

Plaintiffs No Casino in Plymouth ("No Casino") and Citizens Equal Rights Alliance (collectively "Plaintiffs") filed a First Amended Complaint for Declaratory and Injunctive Relief ("FAC") (ECF Docket[3] 10) against DOI, the National Indian Gaming Commission ("NIGC"), and several named federal officials, all in their official capacities (collectively, the "Federal Defendants" and with Intervenor-Defendant, the "Defendants"). The FAC challenged the

[1] This process of having fee land taken into trust by the government for the benefit of an Indian tribe, known as the "fee-to-trust" process, is governed exclusively by federal law and regulations. *See* 25 U.S.C. §§461 *et seq.*; 25 C.F.R. Part 151.
[2] Documents in both the administrative record and the supplement to the administrative record are cited as labeled "ARXXX".
[3] All further references to the Electronic Case Filing (ECF) Docket are cited as "ECF."

determinations made in the ROD on various grounds. The Federal Defendants filed an Answer. (ECF 14) The Tribe subsequently sought to intervene in the case (ECF 35-36), and the Court agreed. (ECF 46) The Tribe then answered, taking a position similar to that of the Federal defendants (ECF 57).

The Court's August 8, 2014 Order (ECF 71) required the parties to file staggered motions for summary judgment, as previously requested by Defendants (ECF 58). Plaintiffs elected to file a motion for summary judgment, which was accompanied by a memorandum of points and authorities (cited as "PMP&A") addressing only their first claim for relief ("Plaintiffs' MSJ"). ECF 72. This combined cross-motion and opposition by the Tribe ("Tribe's MSJ") followed. Unlike the limited motion for summary judgment filed by the Plaintiffs, the Tribe's motion for summary judgment is as to all claims asserted by the Plaintiffs. Defendants may file and be granted a cross-motion for summary judgment on all of plaintiffs' claims even though the plaintiffs initially moved for summary judgment only as to some of their claims. *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1167-1168 (9th Cir. 2006).

II. SUMMARY OF ARGUMENTS

The Tribe's MSJ should be granted and Plaintiffs' MSJ denied because the AS-IA validly exercised authority under the IRA in determining to acquire the Plymouth Parcels in trust for the Ione Band for gaming purposes, which gaming would be conducted pursuant to IGRA. Based on the administrative record, the AS-IA rightfully determined that all necessary prerequisites to the exercise of IRA trust acquisition authority have been met, including that the Ione Band satisfies 25 U.S.C. § 479 ("Section 479"), which restricts such acquisitions to those who qualify as "Indian" and defines that term in relevant part to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction[.]" In the ROD, the AS-IA relied on the record in concluding that the requirement that the Tribe was "under Federal jurisdiction" in 1934 had been met.

Plaintiffs' argument that the IRA's requirements have not been met is based on a misreading of the Supreme Court's opinion in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009) ("*Carcieri*"). Plaintiffs contend that *Carcieri* requires a tribe to have been federally

recognized in 1934, in addition to being "under Federal jurisdiction" at that time, under Section 479 of the IRA. But as the concurring opinion of Justice Breyer in *Carcieri* observed (*id.* at 398-399, 1070), and as a recent D.C. District Court opinion also noted (*Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, No. 13-849(BJR), 2014 U.S. Dist. LEXIS 172111, at *17-29 (D.D.C. Dec. 12, 2014)), the majority opinion in *Carcieri* did not discuss, much less find a requirement of, federal recognition in 1934. Plaintiffs' contrary arguments are therefore misplaced as a basis for judicially overturning the ROD under the Administrative Procedure Act ("APA"), 5 U.S.C. §§702 *et seq*.

In an apparent concession to the weakness of that position, Plaintiffs attempt to reinforce their argument about the Tribe's supposedly legally insufficient recognition by asserting, albeit irrelevantly, that despite the actual fact of the Tribe's earlier recognition, it is estopped from asserting that it was recognized prior to 1996. As explained above, the question of when the Tribe was recognized is immaterial. However, Plaintiffs' arguments are legally incorrect for other reasons as well, since they are based on a case previously before this court entitled *Ione Band of Miwok Indians, et al. v. Harold Burris, et al.*, Civ. No. S-90-993 LKK (E.D. Cal., complaint filed Aug. 1, 1990)("*Burris*"), which Plaintiffs erroneously assert held that Ione was never federally-recognized. But *Burris* – which did not deal with the question of whether Ione had ever been federally recognized and instead addressed the scope of this court's jurisdiction to consider the recognition process at that time because of an administrative process that was then in place (the actual holding was to remand the matter to the DOI for determination) – does not support either collateral estoppel or judicial admissions against the Tribe. Collateral estoppel is inapplicable on several grounds, including the absence of re-litigation of an identical issue, lack of a prior judgment on the merits in which the issue to be re-litigated was decided and necessary, changes in intervening material facts, and differences in the burden of proof. Purported judicial admissions are similarly irrelevant on several grounds, most notably because the Tribe has always claimed that it is a federally recognized tribe so that there are no contrary "admissions" to preclude it from claiming so now.

Finally, the relevant agencies' Environmental Impact Statement ("EIS") thoroughly

analyzed and disclosed all foreseeable environmental effects of approving the trust land application, complying in all respects with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. Plaintiffs' NEPA cause of action should be denied and judgment entered for the Tribe, as Plaintiffs' action rests on misunderstandings of NEPA's requirements and misapplication of NEPA's deferential standard of review.

In sum, in light of the extensive record and the exhaustive consideration and reasoned analysis given by the DOI to all of the relevant issues, the ROD fully meets all the requirements for concluding under 25 C.F.R. Part 151 that that the DOI may and should take the Plymouth Parcels into trust status, and the AS-IA therefore was duly authorized to issue it. No good cause under the APA exists to set that administrative action aside. For all of the foregoing reasons, as explained in further detail below, Plaintiffs' MSJ should be denied and the Tribe's MSJ should be granted.

III. FACTUAL BACKGROUND

The Tribe notes at the outset that it is not submitting a separate Statement of Undisputed facts because in APA cases the record itself constitutes the applicable facts. *Weichers v. Moore*, 2014 WL 1400843 at *7 (E.D. Cal. Apr. 10, 2014). For this reason, Plaintiffs' Statement of Undisputed Facts (ECF 72-2) should be disregarded. To the extent this Court should nonetheless determine that a separate statement of fact is necessary, the Tribe hereby reserves the right to submit one.

The following facts, presented here as background to facilitate discussion of the relevant legal issues, are supported by references to the administrative record in this case. To the extent they contradict allegations in the FAC or Plaintiffs' MSJ, they are submitted in rebuttal to such allegations, as is the administrative record in its entirety.

The Ione Band of Miwok Indians is a federally recognized Indian tribe. The Tribe traces its ancestry to Miwok peoples who have lived in California for thousands of years. AR3531. The Miwoks' native lands included the Sierra Nevada Foothills of central California, covering lands that today make up Amador County. AR3526-30. After gold was discovered in 1848, the U.S. government launched attempts to obtain land cessions from tribal inhabitants in exchange

for safe set-aside lands and engaged in government-to-government negotiations with tribal leaders in California to enter into 18 treaties. AR3536-38. Ancestors of current-day Ione Band members were among those who negotiated these treaties. AR3539-41, 3543. Sadly, however, the U.S. Senate refused to ratify any of the 18 California treaties, and the Miwok, who were in no position to resist or stem the inexorable flow of new arrivals, lost their native lands. AR3538-41.

Cognizant of these circumstances, the BIA appointed Special Agent C.E. Kelsey in 1905-06 to examine the conditions of the dispossessed and thus homeless California tribal members. AR3543. Kelsey conducted a census for Amador County that enumerated, among others, those at Ione. AR3543-44. The federal government revisited the Ione Band's situation in 1915, when BIA Special Indian Agent John J. Terrell conducted a census and identified Captain Charlie Maximo as the leader of the Ione Band, which then consisted of 101 individuals. AR3544-47.

Special Agent Terrell also reported on the importance of securing land for the Tribe, and he and other government officials made significant efforts to do so. *See* AR3547, 4642, 221, and multiple correspondence AR68-420. Accordingly, the government approved the purchase of land for the Ione Band and appropriated funds for this purpose. AR160, 3547, 4634-35, 4637. A 40-acre tract of land in Amador County located within a larger parcel was targeted for purchase because, as Terrell noted, "[T]hese Indians are among the most needy and worthy of any I have visited in California …[and] the proposed purchase embraces the ancient Village of their and their ancestors' home as far back as they have a history." AR4629; *see also* AR160, 4605-83. Early land deeds stated that the 40-acre tract had been "sold to the United States … fenced, and used as an Indian Reservation" (AR516), but apparently not quite, as hundreds of pages of correspondence in the record show that, for over two decades after the 1915 Terrell Census, government agents attempted to negotiate with the landowners to finalize a land purchase and secure a homeland for the Ione Band (AR68-420), but the transaction was never completed due to clouded title issues. AR1409, 3549, 4605-13. These early land purchase efforts apparently concluded around 1941. AR3549. Thereafter, and despite no actual consummation of a formal land transfer, Tribal members continued to occupy the land as they had for decades prior. AR3549.

In 1972 BIA Commissioner Louis Bruce, the highest ranking federal official entrusted by Congress with administering Indian affairs (25 U.S.C. §2), and the predecessor in rank, function, and authority to the current DOI Assistant Secretary-Indian Affairs, sent a letter to the Ione Band confirming that federal recognition had been extended to the Band at the time of the land purchase efforts and agreeing, on behalf of the federal government, to take the 40-acre parcel into trust for the Tribe's benefit pursuant to the IRA. AR4308-09. Commissioner Bruce's confirmation that the IRA applied to Ione, and his unambiguous implementation of the government-to-government relationship between the Tribe and the federal government, was a formal federal action. AR5552.[4]

Indeed, approximately two years later, then-Commissioner of Indian Affairs Morris Thompson reiterated the formal acknowledgment of Ione's previously recognized tribal status in a memorandum to the BIA Sacramento Area Director in which he confirmed Commissioner Bruce's conclusion that recognition had been extended to the Tribe at the time of the attempted land purchase by the United States. AR674, 873. He concluded, after reviewing the record submitted by the BIA Sacramento Area Director and other materials, that the Tribe was still recognized as of the date of his memo and "decided that it is unnecessary to insist that the group articulate and submit any further request for formal recognition." AR870-73.[5]

To be sure, not all federal employees agreed with Commissioners Bruce and Thompson. Despite their official determinations, some DOI advisors and staff refused to adhere to the official directives. *See,e.g.,* AR673-674, 678 (stating Bruce decisions not implemented because of Solicitor's disagreement). Indeed, in the late 1970s until the early 1990s, the federal executive branch reversed its previous policy of treating Ione as a recognized tribe and for the first time

[4] Plaintiffs allege in FAC ¶32 that Commissioner Bruce's letter is incorrect and that DOI in 1990 determined it to have been "of no legal effect" in granting recognition to the Tribe. But as to such allegations, Plaintiffs bear the heavy APA burden of showing that it was irrational for AS-IA Laverdure to have concluded in the ROD that the highest-ranking Indian affairs official's declaration affirming prior recognition and directives to the subordinate Area Director in 1972 were valid. Such a showing must be made in light of all the evidence in the AR, including Commissioner Thompson's and Assistant Secretary-Indian Affairs Ada Deer's subsequent confirmation of Commissioner Bruce's determinations.

[5] Commissioners Bruce and Thompson's confirmations of Ione's prior recognition were made before issuance of the Part 83 tribal acknowledgment procedures in 1978. The Commissioners' determinations made any subsequent pursuit by the Tribe of recognition under Part 83 unnecessary, as Assistant Secretary Ada Deer would confirm. *See* AR7170-73.

began consistently taking the position that Ione was not federally recognized. By consistently denying that the Tribe was (or ever had been) federally recognized and failing to treat it as such, DOI instituted a *de facto* administrative termination of the Tribe's recognition.[6] *See, e.g.,* AR1409 and 4773(omission from federally recognized tribes list); *see also* AR691, 812, 4566-81, 4779, 5552-5553, 10102, 20808, 20812.

Despite these hardships, the Tribe continued to insist on its past and present federal status and persevered in its attempt to secure a land base. In 1994 the federal government finally agreed, abandoning its termination policy and reverting to its previous position by formally re-recognizing the Tribe. In a determination dated March 22, 1994, Assistant Secretary-Indian Affairs[7] Ada Deer explicitly re-affirmed the Tribe's recognition, based on Commissioner Bruce's earlier recognition that itself had been based on the earlier recognition extended by the land purchase attempts, and instructed that land be taken into trust for the Tribe. AR4312, 4323-25. Because Tribal membership was embroiled in faction disputes around the time of reaffirmation, Assistant Secretary Deer and other DOI officials would make it clear that she intended to reaffirm the status of the entire Tribe at Ione and was not recognizing any particular faction or leader. AR1126-43. Assistant Secretary Deer also instructed that Ione be given its rightful place on the official Federal Register list of federally recognized tribes and that the BIA deal with the Tribe accordingly. AR4312, 4323-25. The Tribe was placed on the list in 1995 (AR4826) and has been on it ever since. Despite that official and publicly noticed action by DOI nearly 20 years ago, neither Plaintiffs nor any other party has ever challenged the Tribe's inclusion on that list.

Several years after being restored to federal recognition, the Tribe sought to establish governmental and economic independence in order to provide for its members' health and welfare. Accordingly, the Tribe began a revitalized effort to have land in Amador County placed

[6] Importantly, throughout the Tribe's history of federal relations, the highest ranking officials authorized to handle Indian affairs, with the sole exception of Assistant Secretary-Indian Affairs Brown during the termination period, have consistently maintained that Ione is, and was in the past, federally recognized. The individuals who have denied Ione's federal recognition have been lower-ranking bureaucrats or attorneys, but never the authorized officials themselves.

[7] The position of Commissioner for Indian Affairs was replaced with Assistant Secretary-Indian Affairs in 1977. See www.Bia.gov/WhoWeAre/BIA/ (last visited Dec. 14, 2014). Thus, Ada Deer was the highest ranking federal official with authority to administer Indian affairs in 1994.

in trust. Income from a proposed gaming development on that trust land would enable the Tribe to provide its members with education, healthcare, housing, employment, and other basic necessities. Lacking funds to purchase and develop land on its own, in 2003 the Tribe engaged with a development partner who bought options to purchase the Plymouth Parcels in order to assist the Tribe in financing the purchase and development of land. AR2758, 2808.

But federal law requires much more to conduct tribal gaming than simply purchasing land. IGRA restricts the lands upon which Indian tribes may operate gaming projects and provides that a tribe may only operate gaming on land taken into trust after 1988 if one of several conditions is met. 25 U.S.C. § 2719. Thus, in order to be able to conduct a gaming operation, Ione would have to apply to have the Plymouth Parcels taken into trust and demonstrate that they meet the applicable post-1988 trust land criteria, in this instance that the land if taken into trust would be part of the "restoration of lands for an Indian tribe that is restored to federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). It would also have to comply with all of the requirements imposed by the 25 C.F.R. Part 151 regulations that implement the Secretary's trust land acquisition authority under the IRA. AR10056. Those regulations require, *inter alia*, compliance with the National Environmental Policy Act ("NEPA"), an intensive process to determine, analyze, and address issues related to the project's potential impacts that elicits extensive input from federal, state and local agencies, organizations, and individuals. AR10056-57. The Tribe's NEPA process formally began in 2003 and would not conclude until the issuance of the ROD itself in 2012 (with well over half the ROD devoted to the NEPA analysis). AR10049-116. Plaintiff No Casino submitted comments on a range of issues in the NEPA review process, which comments were considered prior to issuance of the ROD. *See, e.g,* 8256-59, 8436-8509.

In September 2004, Ione submitted a request for a determination (called an Indian Lands Determination, or "ILD") that the Plymouth Parcels would qualify as "restored lands" for Ione as a "restored tribe" if and when taken into trust. AR1401-13. In support of its request, Ione submitted hundreds of pages of evidence. AR1414-2532; *see also, e.g.,* AR2728-50, 3486. No Casino opposed Ione's ILD request. 5104-17, 6726-32.

In November 2005, with the ILD request pending, the Tribe submitted its application to DOI to have the Plymouth Parcels taken into trust for gaming purposes. AR2751-3482. The fee-to-trust application, consisting of hundreds of pages of supporting documentation, set forth the legal and factual bases for the proposed action. AR2757-64. As with the ILD, No Casino filed extensive comments opposing Ione's application. AR5388-5404, 9367-83, 1214-19, 1223-25.

In September 2006, DOI Associate Deputy Secretary James Cason issued DOI's determination holding that the Plymouth Parcels would qualify as "restored lands" if acquired in trust and that Ione is a "restored tribe" for purposes of IGRA. AR5556. DOI's rationale was set forth in detail in a memorandum written by Associate Solicitor, Division of Indian Affairs, Carl Artman. AR5550-54. Artman opined that Commissioner Louis Bruce's 1972 determination dealt with the Ione Band as a recognized tribe, such that Ione was formally recognized as of 1972 and thereafter. AR5552. Artman also opined that after 1972 the government had taken the position that Ione was not recognized, thereby terminating the Tribe, but that in 1994 Assistant Secretary Deer's reaffirmation actions restored the Tribe's earlier federally recognized status. AR5552-53. Cason, as the highest ranking federal official presiding over Indian affairs at the time, explicitly concurred in and adopted Artman's ILD as the official DOI position toward Ione. AR5556. Thus, by 2006, DOI had determined that the Plymouth Parcels would qualify for gaming under IGRA if taken into trust. This determination has remained in effect since its issuance, despite the efforts of DOI Solicitor David Bernhardt in January 2009 to withdraw it via draft memoranda that were never adopted by his client DOI and expressly denied and rejected by DOI and NIGC officials. AR7106, 7108-12, 7724-26, 7754-7756, 7664, 8817-25, 10035-10036.

In February 2009 the Supreme Court issued its decision in *Carcieri,* holding that the Secretary is only authorized to take land into trust for the benefit of tribes that had been "under Federal jurisdiction" in 1934. No Casino sent comments to BIA arguing that under *Carcieri* the Secretary lacked authority to take land into trust for Ione. *See, e.g.,* AR8446. The Tribe responded with its own comprehensive submissions providing extensive evidence that indeed the Ione Band had been under federal jurisdiction in 1934. AR8000-8210, 8872-9191.

In May 2012, after careful consideration of all of the documents in its files (including

those submitted by the Plaintiffs and Tribe) and arguments presented on both sides, DOI issued the ROD, granting the Tribe's request to take the Plymouth Parcels into trust as well as recording its adoption of the positive ILD. AR10049-51, 10101.

IV. STANDARD OF REVIEW

Plaintiffs assert that the ROD fails to meet APA standards and that the Defendants are precluded by judicial and collateral estoppel from advancing their claims of eligibility to have land taken into trust for a restored tribe. PMP&A 8:2-10, 9:16-17, 14-19. The applicable APA standard of review at 5 U.S.C. §706(2)(A) provides that a reviewing court may only invalidate agency action when that action is "found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In making the foregoing determinations, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706(2)(A). [8]

The Ninth Circuit holds that a challenger of federal agency action must satisfy a "high threshold" to set it aside (*River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1067 (9th Cir. 2010)) and "[t]his standard is met only where the party challenging the agency's decision meets a heavy burden of showing that 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (*Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013)(internal citation omitted). The scope of review of agency action under this standard is narrow. *Peck v. Thomas*, 697 F.3d 767, 772 (9th Cir. 2012), *quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856 (1983); *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010). Agency action is to be affirmed as long as a reasonable basis exists for it. *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1057-1058 (9th Cir. 2013); *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010); *Lands Council*, 629 F.3d at 1074. A

[8] There is no requirement under the APA that a ROD mention any particular evidence. The APA only requires that the agency's conclusions be rational and based on facts in the record.

reasonable basis exists if the agency considered the relevant factors, articulated a rational connection between the facts found and the choices made, and in doing so has not made a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-824 (1971) (hereinafter "*Citizens*"), *superseded by statute on other grounds*, Pub.L. No. 94-574, 90 Stat. 2721 (1976), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980 (1977); *Conservation Congress*, 720 F.3d at 1054; *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 795 (9th Cir. 2012). A court may only overturn agency action if it finds the action to be irrational. *Tablada v. Thomas*, 533 F.3d 800, 805 (9th Cir. 2008); *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 768 (9th Cir. 1985).

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

The process by which a district court conducts APA review of agency action is unique. "That court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co.*, 753 F.2d at 769 (citations omitted); *Pinnacle Armor, Inc. v. U.S.*, slip copy, No. 1:07-CV-01655 LJP DLB, 2013 WL 5947340, at *7 (E.D. Cal. Nov. 4, 2013). In APA review, the district judge sits as an appellate tribunal and the entire case is to be reviewed as a question of law. *Fla. Power*

& Light Co. v. Lorion, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 1607 (1985); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). And the court's determination of agency reasonableness is to be based upon a review of the administrative record before the agency at the time of its decision. *Fla. Power & Light Co.*, 470 U.S. at 743-44, 105 S.Ct. at 1607; *see also Phoenix Mem. Hosp. v. Sebelius*, 622 F.3d 1219, 1225 (9th Cir. 2010). In an APA review case, though the parties may proceed by way of motions for summary judgment, the motion for summary judgment standard in Federal Rule of Civil Procedure 56(c) "does not apply because of the limited role of a court in reviewing the administrative record[,]" and summary judgment is merely "the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Klamath Siskiyou Wildlands Ctr. v. U.S. Forest Svc.*, ___ F.Supp.3d ___, 2014 WL 4960906, at *5 (E.D. Cal. Oct. 1, 2014) (quoting *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 89-90 (D.D.C. 2006)). In an APA review, the Statement of Undisputed Facts required by E.D. Cal. Local Rule 260(e) is "generally redundant because all relevant facts are contained in the agency's administrative record." *Weichers*, 2014 WL 1400843 at *7.

A court reviews NEPA claims under the same deferential APA standards mentioned above. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quoting 5 U.S.C. § 706(2)(a)). In evaluating the adequacy of an EIS, a court's "review is limited to whether the EIS contains 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *NRDC v. U.S. Dep't of Transp.*, 770 F.3d 1260, 1271 (9th Cir. 2014) (quoting *City of Carmel–by–the–Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150 (9th Cir. 1997). "Once satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, . . . [the court's] review is at an end." *Id.* "For issues requiring agency expertise," a reviewing court "'must defer to the informed discretion of the responsible federal agencies.'" *California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 792 (9th Cir. 2014) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)).

V. ARGUMENT

A. The Ione Band Meets All Requirements Under the IRA, as Interpreted by the Supreme Court in *Carcieri*, to Have Land Acquired in Trust

1. Background of the Indian Reorganization Act and *Carcieri*

The Indian Reorganization Act (IRA) provides the general authority of the Secretary to take land into trust for tribes and individual Indians. 25 U.S.C. § 465 ("Section 465"). This authority is explicitly "for the purpose of providing land for Indians[,]"[9] and "[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[.]" *Id.* The IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction[.]" 25 U.S.C. § 479.[10] The term "tribe" means "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.*

In *Carcieri*, the Supreme Court majority "h[e]ld that for purposes of § 479, the phrase 'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri at* 382, 1061. The record in this case shows that the Ione Band, a recognized tribe, was under federal jurisdiction in 1934. As such, the AS-IA's determination in the ROD to acquire the Plymouth Parcels in trust for the Tribe complied with the IRA.

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[9] Contrary to Plaintiffs' allegation, the IRA did not merely intend to reverse the loss of Indian lands under the General Allotment Act (PMP&A 12:7-9), but rather intended "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272 (1973) (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934)). This included the acquisition of land for tribes and individual Indians with and without an existing land base. *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (quoting and citing 1934 congressional reports); *Chase v. McMasters*, 573 F.2d 1011, 1015-1016 (8th Cir. 1979).

[10] The definition of "Indian" in the IRA includes three prongs. 25 U.S.C. §479. The definition at issue in *Carcieri*, and here, is the first prong. The two other prongs of the definition, which are not at issue here but which are discussed in some of the cases the Plaintiffs cite, refer to "all persons who are descendants of such members [as provided in the first prong] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." *Id.*

Plaintiffs argue that the IRA does not authorize the acquisition of the Plymouth Parcels in trust for the benefit of the Tribe. PMP&A 1:24-28. They rely on three unsupported arguments to reach their erroneous conclusion.

2. *Carcieri*'s Requirement That The Tribe Have Been "Under Federal Jurisdiction" in June 1934 Was Satisfied; *Carcieri* Does Not Require A Separate Showing That the Tribe was Also "Recognized" in 1934

First Plaintiffs argue that the Court in *Carcieri* held that a tribe must have been *recognized* in 1934 in order for the provisions of the IRA to apply. But the Court did not so hold. The Supreme Court's *Carcieri* opinion never even debated, much less held, that a tribe had to be recognized in 1934 in order to qualify for the benefits of the IRA, yet Plaintiffs devote numerous pages to that erroneous understanding of the case and then incorrectly assert that Ione does not qualify for an IRA trust land acquisition because it ostensibly was not a recognized tribe in 1934. *See, e.g.,* PMP&A 2:7-10; 2:23-25; 4:12-28; 12:24-28; 14:10-14; 14:17-20; 15:1-6; 15:18-21; 19:21-28. This argument is manifestly wrong because the Supreme Court never made such a holding in *Carcieri* or in any other case.

The basic premise of Plaintiffs' arguments are best refuted by the Court's express words:

> In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase "now under Federal jurisdiction" in § 479. Petitioners contend that the term "now" refers to the time of the statute's enactment, and permits the Secretary to take land into trust for members of recognized tribes that were "under Federal jurisdiction" in 1934. The respondents argue that the word "now" is an ambiguous term that can reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are "under Federal jurisdiction" at the time that the land is accepted into trust.
>
> We agree with petitioners and hold that, for purposes of § 479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust. We reverse the judgment of the Court of Appeals. *Carcieri* at 382-383, 1061.

As this quote demonstrates, the only question considered about the phrase in question, and the only answer given, was whether a tribe had to be "under Federal jursidiction" when the IRA was enacted in order to reap its benefits. No temporal connection between the enactment of

the IRA and the date of recognition is found anwhere in the opinion.

As the separately written concurring opinions of Justices Breyer and Souter (joined by Justice Ginsburg) and the dissent of Justice Stevens all stressed, neither Section 479 nor the majority opinion express any limit on the tribal recognition requirement. *Carcieri* at 398, 400, 408 and 1069-71, 1075. In fact, Justice Breyer cited specific (but not exclusive) instances in which a tribe might be under federal jurisdiction but not actually "federally recognized" until much later. *Id.* at *Carcieri* at 397-400, 1069-1071 (Breyer, J. concurring). This debate is largely academic as to Ione, however, because in 1972 Commissioner Bruce sent a letter to the Ione Band confirming that federal recognition had been extended to the Band at the time of the land purchase efforts in the early 1900s. AR4308-09, 10110.

The subsequent case law interpreting *Carcieri* also shows the flaws in Plaintiffs' assertion. That case law makes clear that at the very least the Supreme Court left open the question of whether a tribe must have been recognized in 1934 to qualify as "a recognized Indian tribe now under Federal jurisdiction." *Confederated Tribes of the Grand Ronde Cmty. of Or.*, 2014 U.S. Dist. LEXIS 172111, at *17-29 (finding *Carcieri* majority did not address the issue and deferring to Secretary's interpretation that "recognized" has no temporal limitation); *Stand Up for California v. U.S. Dep't of the Interior*, 919 F.Supp. 2d 51, 68-70 (D.D.C. 2013).

In support of their case, Plaintiffs misstate the Supreme Court's *Carcieri* holding in relation to the underlying District Court opinion. Plaintiffs assert it "found that the IRA defines Indians to include tribes in existence in 1934, but did not require a tribe to have been federally recognized in 1934....[T]he Supreme Court rejected both the District Court's and Court of Appeal's analyses." PMP&A 13:18-20, 23-24. But as shown above, the Supreme Court did not address this issue. It limited its holding to requiring an assessment of whether a tribe was "under Federal jurisdiction" in 1934. No where in its opinion did it hold that a tribe must have been recognized in 1934 or that tribal existence in 1934 was insufficient for purposes of Section 479.

Plaintiffs also attempt to support the notion that a tribe must have been recognized in 1934 to qualify for IRA benefits with faulty interpretations of an older U.S. Supreme Court case, *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541 (1978) ("*John*") and a Ninth Circuit Court of

Appeals case, *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004) ("*Kahawaiolaa*"). Without context, Plaintiffs focus on a single sentence in *John* stating that Section 479 "defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,'" as meaning that federal recognition in 1934 was required. PMP&A 12:18-28. It does not.

The issue of whether a tribe had to be recognized in 1934 to qualify as a tribe under Section 479 was not before the Court in *John*. As the opinion states, the questions presented for the Court's consideration were whether the lands at issue constituted "Indian country" as defined in 18 U.S.C. § 1151 and as used in the Major Crimes Act of 1885, 18 U.S.C. § 1153, and if so, whether these statutes precluded the exercise of state criminal jurisdiction over certain offenses committed on such lands. *John* at 635, 2542. The Court explicitly stated that it only "hold[s] that § 1153 provides a proper basis for federal prosecution of the offense involved here, and that Mississippi has no power similarly to prosecute [the defendant] for that same offense." *Id.* at 654, 2557. The "in 1934" parenthetical singled out by Plaintiffs is only mentioned in passing by the Court, on its way to determining that the Choctaws of Mississippi qualify as Indians under the IRA because they satisfy another definition of "Indian" in Section 479, namely, as a community of "persons of one-half or more Indian blood" and therefore their lands qualify as "Indian country" for purposes of prosecutions under the Major Crimes Act. *Id.* at 647-650, 2548-2549. Other than the "in 1934" parenthetical, there is no other reference to recognition in 1934 in *John*, much less is such issue decided. The parenthetical language was not and never has been deemed controlling law, and it is at most dicta as even Plaintiffs concede. PMP&A 12:24-28.

Similarly, Plaintiffs incorrectly claim that a statement in *Kahawaiolaa* means that the benefits of the IRA are available only to tribes that were federally recognized in 1934. PMP&A 13:12-14. But as with *John*, the issue of whether a tribe must have been federally recognized in 1934 to qualify under the first definition of "Indian" in Section 479 was not presented or considered in *Kahawaiolaa*, and therefore no such holding could come from the case. Rather, the court focused on whether DOI's exclusion of native Hawaiians from eligibility to apply for

recognition under the federal acknowledgment regulations constitutes discrimination in violation of the Fifth Amendment's equal protection guarantees. *Kahawaiolaa* at 1272. The Court held only that under rational basis scrutiny, the regulations did not violate the Fifth Amendment. *Id.* Nevertheless, Plaintiffs attempt to twist a factual assertion made by the Court into a holding by asserting: "The Court held that '… [t]here were no recognized Hawaiian Indian tribes under federal jurisdiction in 1934, nor were there any reservations in Hawaii.' " PMP&A 13:6-9 (quoting *Kahawaiolaa* at 1280). But the court's statement is not a holding; it is a statement of fact that in 1934 none of the Hawaiian peoples were "tribes" (as defined in the IRA) under federal jurisdiction and none were recognized as "tribes." *Kahawaiolaa* at 1280. The statement does not mean that a tribe had to be recognized in 1934 to qualify for IRA benefits.

Furthermore, a plain reading of the language in *Kahawaioloaa* – in which the "in 1934" requirement is adjacent to the "under federal jurisdiction" requirement – shows that the "in 1934" requirement applies only to being under federal jurisdiction, and not to recognition. As such, the language cited by Plaintiffs presaged the holding from *Carcieri* requiring a tribe to have been "under Federal jurisdiction" at the time of IRA enactment in June 1934. *Carcieri* at 382, 1061. *Kahawaiolaa* provides no support for Plaintiffs' erroneous and misleading argument.

3. *Carcieri* Does Not Preclude the AS-IA From Interpreting the Phrase "Under Federal Jurisdiction"

Plaintiffs next argue that the *Carcieri* Court held that the IRA in its entirety and/or the phrase, "recognized Indian tribe now under Federal jurisdiction," is unambiguous (it is not clear whether Plaintiffs make one or both such arguments, *see* PMP&A 2:9-10 and 13:23-27, *compare* PMP&A 4:3-12,) and that therefore the AS-IA's interpretation of that phrase in the ROD is unnecessary, unfounded in law, and not entitled to deference. But the Court held no such thing. As noted above, the *Carcieri* Court analyzed the term "now" in the phrase "recognized Indian tribe now under Federal jurisdiction," and determined that "now" was unambiguous and meant when the statute was enacted in 1934 and that therefore as a matter of law a tribe must have been "under Federal jurisdiction" at such time in order to qualify for IRA benefits. *Carcieri* at 382-383, 1061; *see also, id.* at 387, 1063 (reversing the Court of Appeals determination that the the

word "now" is ambiguous and in need of Secretarial interpretation), 388-395, 1064-1068 (analyzing the plain meaning of "now" as it modifies the phrase "under Federal jurisdiction"). Outside of those limited determinations, the Court's opinion does not hold that any other word or phrase in the IRA is unambiguous, nor does it refute the propriety of the Secretary providing a reasonable interpretation for any ambiguity that may otherwise exist in the statute, or by extension for determining whether in fact jurisdiction or recognition was present or when. As such, the AS-IA's interpretation of Section 479 and application to Ione was appropriate.

Plaintiffs' attempt to buttress their overly broad plain-language arguments by reference to the First Circuit Court of Appeals opinion that the Supreme Court reviewed in *Carcieri*. Plaintiffs imply that the Court of Appeals held that the IRA as a whole was ambiguous, but that the Supreme Court rejected that idea and held in contrast that the entire IRA was unambiguous, so that the Secretary's interpretations of the IRA are not entitled to deference. PMP&A 13:21-28. But the Court of Appeals did not hold that the entirety of the IRA was ambiguous, or even that the phrase "recognized Indian tribe now under Federal jurisdiction" was ambiguous. It narrowly held that the meaning of the word "now" was ambiguous as to whether it referred to the time of IRA enactment or the time of a request for a trust acquisition, and that the Secretary's interpretation of the term – to mean at the time of application – was due deference. *Carcieri v. Kempthorne*, 497 F.3d 15, 22 (1st Cir. 2007). That portion of the Court of Appeals' opinion was overturned by the Supreme Court, as noted above. But the Supreme Court's reversal was solely as to the term "now" in modifying "under federal jurisdiction," and it only rejected Secretarial interpretation of the word "now." Plaintiffs' assertions of a broader holding of ambiguity to encompass the entire IRA or the entirety of the phrase "recognized Indian Tribe now under Federal jurisdiction" are nowhere to be found in *Carcieri*.

Finally, whether applying plain statutory language or providing reasonable interpretations of ambiguous statutory terms, nothing in *Carcieri* or other case law deprives the Secretary of the further duty of serving as the finder of fact, i.e. whether and when the U.S. recognized a tribe or whether and when it came under federal jurisdiction. Those facts are uniquely within the province of the Secretary to determine, and the only test thereof under the APA is whether those

determinations were rational on the record before the agency, as explained in Section IV, *supra*. That is precisely what the AS-IA, as the Secretary's lawful delegate, did in the ROD as to Ione with an exhaustive analysis of the facts in the record. AR10100-10112. He provided a reasonable two-part approach for determining whether, as a matter of fact, a tribe was under federal jurisdiction in 1934 and then carefully analyzed the Ione jurisdictional history using that reasonable approach, which was born out from the agency's experience with Indian tribes and the relationships at issue. An orderly approach to that question was appropriate for the agency to fashion inasmuch as no guidance on the question of whether a tribe was "under Federal jurisdiction" is contained in the IRA or its legislative history. AR10103 and n.3.

4. **The ROD's Determination That Ione Is A Recognized Indian Tribe That Was Under Federal Jurisdiction in 1934 is Well Supported**

The determinations made in the ROD that Ione qualifies as a "recognized Indian tribe under Federal jurisdiction" in 1934 for purposes of Section 479 is rationally connected to, and well-supported by, record evidence. Nonetheless, Plaintiffs set forth a number of ambiguous statements apparently aimed at establishing that Ione did not meet all of the Section 479 criteria. But Plaintiffs have not carried their heavy burden of demonstrating that the AS-IA's determinations in the ROD were arbitrary or capricious, as the record and legal authority clearly support the conclusions that Ione (i) was a "tribe" at the time of IRA enactment in 1934 and at the time of issuance of the ROD (and still is) (AR73, 153-154, 160, 3525-52, 3972, 3974, 3976-77, 10107, 10110-111; *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359 (1901) (defining a "tribe" and a "band")); (ii) was federally recognized at the time of IRA enactment in 1934 and at the time of issuance of the ROD (and still is) (AR4308-09; 75 Fed. Reg. 60810, 60811 (Oct. 1, 2010) (2010 list of federally recognized tribes); 77 Fed. Reg. 47868, 47870 (Aug. 10, 2012) (updating the 2010 list); 79 Fed. Reg. 4748, 4750 (current list)); and (iii) was "under federal jurisdiction" at the time of IRA enactment (AR10103-112).

As to this last conclusion, the ROD found the phrase "under Federal jurisdiction" to be ambiguous and provided a reasonable agency interpretation involving a two part test that should be given appropriate deference by the Court. AR10103-106; *Confederated Tribes of the Grand*

Ronde Cmty. of Or., 2014 U.S. Dist. LEXIS 172111, at *29-50 (upholding DOI's two-part test and finding that it is entitled to deference). The Plaintiffs in this case, like those in *Grand Ronde,* fail to show that the test is unnecessary or unreasonable, or that it was irrationally applied to Ione. Lastly, the Plaintiffs' claims that the Defendants in this case are prevented by the doctrines of collateral estoppel and judicial admissions from asserting that the Ione Band was recognized prior to 1996 are shown below to be spurious, and once eliminated, Plaintiffs have once again utterly failed to demonstrate, based on record evidence, that the conclusions reached in the ROD regarding are arbitrary or capricious.

B. The Tribe is Not Bound by the Preclusion Doctrines Asserted by Plaintiffs on the Basis of the *Burris* Litigation[11]

Plaintiffs next allege that this Court held in *Burris* that the Tribe had not been recognized prior to 1996 and that the Tribe and Federal Defendants made statements in *Burris* to that effect, such that the doctrines of collateral estoppel and judicial admissions prevent them from arguing otherwise in this litigation. PMP&A 15:25-19:28. But, as stated above, the doctrines of collateral estoppel and judicial admissions do not apply.

1. The Doctrine of Collateral Estoppel Is Inapplicable

Plaintiffs' collateral estoppel arguments focus on the *Burris* litigation before the Honorable Judge Karlton. That case began in 1990 when the Tribe and individual Tribal members as plaintiffs filed a complaint against the U.S. and other individual Tribal members as defendants, seeking *inter alia*, a declaration of the Tribe's status as a federally recognized tribe and an order quieting title in the Tribe's name to a 40-acre parcel of land, which the Tribe sought to have the government hold in federal trust. AR7764-65. The U.S. moved for summary judgment or to dismiss for lack of subject matter jurisdiction by virtue of the Tribe's failure to exhaust administrative remedies and as to time-barred claims. AR7765. The Court granted the U.S. motion by an April 23, 1992 order. AR7763-88. The plaintiffs then amended their complaint to add claims and Amador County officials as defendants. AR7780-88. The Court

[11] Plaintiffs' preclusion arguments rely on documents Plaintiffs seek to enter into the record pursuant to a request for judicial notice. PMP&A 2:22; 7:14; 9:20-28;19:4-9, 24-25; ECF 62. The Tribe objected to that request when filed (ECF 66) and, to the extent the Court entertains the request now, the Tribe renews its objections on its previously asserted grounds.

entered a final judgment as to these remaining parties on September 4, 1996. AR1160-1168.

Under the doctrine of collateral estoppel, "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) (citation omitted). Offensive nonmutual collateral estoppel –which is subject to the court's broad discretion – involves a plaintiff who seeks to prevent a defendant from relitigating an issue that the defendant previously litigated unsuccessfully against a different party. *Syverson v. Int. Bus. Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007)(citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645 (1979).) Nonmutual collateral estoppel requires that (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated; (3) the issue was necessary to and decided in a final judgment on the merits; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior action. *Syverson*, 472 F.3d at 1078; *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

The party 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)(citation omitted). The asserting party also bears the burden of proof as to each element of the doctrine. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050-51 (9th Cir. 2008); *In re Brawders*, 503 F.3d 856, 867 (9th Cir. 2007). For collateral estoppel, "[i]t is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated." *Clark*, 966 F.2d at 1321 (internal quotation marks and citation omitted)

Collateral estoppel is not applicable in this case because the purported issue identified by Plaintiffs as subject to estoppel is not being litigated. The only question of law at issue is whether the Department's determinations in the ROD meet the arbitrary and capricious standard based on the record. 5 U.S.C. § 706(2)(A); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). That question 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, collateral estoppel does not apply.

Second, collateral estoppel is inapplicable because the issue Plaintiffs assert now, namely "whether or not the Ione Band was or is a federally recognized tribe" (PMP&A 16:9-10), was not necessary to or decided in a judgment on the merits. Neither the April 23, 1992 order nor the September 4, 1996 judgment in *Burris* satisfy that requirement.

The 1992 order in *Burris* required neither a determination of Ione's status as a federally recognized tribe nor decided such status, and even if so, it was not a judgment on the merits. The order addressed the Tribe's and individual plaintiffs' claims against the U.S., two of which stemmed from the main claim seeking an order to compel the U.S. to recognize the Tribe. AR7772-73, 75. In regard to these claims, the U.S. moved for summary judgment on the ground that it had not waived its sovereign immunity from suit. AR7775-79. 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 the plaintiffs' failure to apply for recognition through the 25 C.F.R. Part 83 administrative process barred their claims due to a lack of final agency action ripe for review. AR7775-79. This was the basis for the Court's refusal to accept jurisdiction over the 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. AR819 (November 19, 1992 order stating the U.S. motion had been granted because the U.S. had not waived its immunity from suit and plaintiffs' other claims were time-barred). The April 1992 order did not say that the Ione Band had never been previously recognized or place any limitations on how it might become recognized. AR7763-88. And even if it had, dismissal based on failure to exhaust administrative remedies is not an adjudication on the merits. *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4 (9th Cir. 1983). Plaintiffs' collateral estoppel argument fails.

Furthermore, the issue of Ione's recognized status was not necessary to or decided in the final September 4, 1996 *Burris* judgment. AR1153-58, 1160-68. In fact, the judgment

acknowledged Ione's existing recognized tribal status. *Id.* In this regard, Plaintiffs' assertions (PMP&A 16:13) that Judge Karlton ruled the Tribe "had no tribal government" and therefore was not recognized takes the Judge's ruling out of context. When Judge Karlton said that the Tribe had no tribal government he meant that at the time he issued the 1996 judgment and related orders the Tribe was in the throes of a split among competing factions vying for leadership of the Tribe. AR1153-1158, 1160-1163, 1166, 1177-1182. Because of the faction dispute, there was no identifiable leadership in the Tribal government capable of prosecuting the *Burris* litigation on behalf of the Tribe. *Id.* This ultimately resulted in the September 1996 order granting declaratory relief to the County, enabling it to exercise jurisdiction over the 40-acre historic fee parcel, until such time as the U.S. or a functioning Tribal government could challenge it. *Id.* Judge Karlton did not say there was no federally recognized Tribe; he said only that the Tribe had no functioning Tribal government to act on its behalf. As such, the issue of the Tribe's recognized status was not decided in or necessary to the 1996 judgment granting relief to the County, and Plaintiffs' assertion of collateral estoppel also fails on this basis.

No judgment was entered as to the Tribe's recognized status because, between the time of the dismissal of the United States from *Burris* in 1992 and the final judgment in 1996, Assistant Secretary Ada Deer reaffirmed Ione's status as a federally recognized tribe in 1994. AR4312, 4323-25. 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. AR1133-39.

This intervening reaffirmation by Ada Deer provides yet another basis – a material change in essential facts – to disallow Plaintiffs' use of collateral estoppel. Changes in facts essential to a judgment preclude assertion of collateral estoppel in a subsequent action raising the same issue. *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1357 (9th Cir. 1985); *United States v. Certain Land, etc.*, 415 F.2d 265, 268-269 (2nd Cir. 1969), *amended*, 420 F.2d 370 (2nd Cir. 1969). The Tribe has remained on the federally recognized tribes list since its reaffirmation. 79 FR 4748, 4750 (Jan. 29, 2014). Thus, even if the final 1996 *Burris* judgment incorporated the earlier 1992 Karlton order and even if that order stood for the non-recognition proposition

alleged by Plaintiffs, there still has been a substantial intervening change in material facts by virtue of the Tribe's re-recognition that has gone uncontested. Collateral estoppel cannot be asserted by Plaintiffs under these circumstances.

This change in material facts pertaining to the reaffirmation of Ione's recognized status also negates any preclusive effect of the May 1992 IBIA decision cited by Plaintiffs. PMP&A 17:24-18:8. Indeed, the IBIA would itself change course in a decision issued in 1998, subsequent to both the 1992 IBIA decision and the 1996 final judgment in *Burris*. AR1175-90. In its 1998 decision, the IBIA acknowledged the Tribe's federally recognized status and government-to-government relationship with the U.S. AR1177 and n.4, 1182.

Furthermore, 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 is not subject to preclusion. *Clark*, 966 F.2d at 1321-22; *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] (Matthew Bender 3d Ed.). Challengers to agency action under the APA "arbitrary and capricious" standard bear a heavy burden 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 different civil action burden of proof. Accordingly, the Plaintiffs may not assert collateral estoppel.

Finally, Plaintiffs cite a 1997 case initiated by "the Nicolas Villa Jr. faction of the Ione Band of Miwok Indians" against Amador County (PMP&A 18:9-18), but that case is irrelevant. In it, Judge Levi referenced Judge Karlton's 1996 order, which had held that because the Tribe did not have a functioning government, no one besides the United States could contest the exercise of jurisdiction by Amador County over the Tribe's historic fee lands until a legitimate Tribal government was formed. AR1172. With that order as background, Judge Levi found that Mr. Villa and his faction had failed to introduce any evidence showing that they were the legitimate Tribal government and held that they therefore could not contest the County's jurisdiction. AR1173. Judge Levi's order had nothing to do with introducing evidence about

federal recognition, as Plaintiffs allege. Moreover, any ruling by Judge Levi in a case brought by Mr. Villa, whom Judge Levi noted were not "the recognized government of the Ione Band," has no preclusive effect on Ione because Mr. Villa is not the Tribe or in privity with the Tribe.

2. **The Doctrine of Judicial Admissions is Immaterial and Plaintiffs Mislead the Court by Raising it Against the Tribe**

Plaintiffs incorrectly claim that the Tribe asserted in *Burris* that it is not federally-recognized. PMP&A 19:3-4. As shown below, however, the Tribe maintained throughout the litigation that it was then, and had been in the past, federally recognized.

Plaintiffs cite a seemingly disconnected raft of unhelpful documents to purportedly support their claims. In fact, some of the documents actually establish that the Tribe always maintained, throughout the litigation, that it was then and always had been a federally-recognized tribe. The other documents Plaintiffs cite were submitted not by the Tribe, but rather by a handful of individuals and by the federal government, who were defendants in that case. Those defendants' positions were not the Tribe's positions, so that the alleged "admissions" Plaintiffs cite could not have been made by the Tribe and cannot bind the Tribe in any way. In *American Title Insurance Company v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988), the court stated that "factual assertions in pleadings and pretrial orders … are considered judicial admissions conclusively binding on the party who made them." (Emphasis added.) But where, as here, the statements Plaintiffs cite were made by a third party, and not by the Tribe, no admissions are at issue. Specifically, Plaintiffs cite RJN 1, a complaint filed by the Tribe, in which the Tribe explicitly maintained that it had always been a sovereign tribe recognized by the government, notwithstanding DOI's erroneous (and later corrected) denial of such status; RJN 2 and 3, the federal government's and individual defendants' answers to the complaint, which are irrelevant for purposes of any purported judicial admissions by the Tribe; RJN 4, a status report filed by the Tribe and other plaintiffs, in which the Tribe again maintained that it was then and always had been a sovereign tribe recognized by the government; RJN 5, an immaterial status report filed by the United States; and RJN 6, an irrelevant status report filed by the individual *Burris* defendants (who spoke only for themselves, not for the Tribe, which was suing them).

Plaintiffs also cite AR7763-88, an order in the Burris litigation holding that the court lacked jurisdiction to entertain certain claims under the APA. Given that this is a court order and not a party's brief, the document cannot, by definition, contain any judicial admissions by a party. Thus, most of the statements Plaintiffs cite are either of no consequence or contradict their own position in this litigation. The rest prove that the Tribe has always maintained, as it does now, that it is federally recognized.

Further, citing AR7763-88, Plaintiffs imply that Judge Karlton in *Burris* was convinced that Ione was not a federally-recognized tribe. But his Order explicitly acknowledged that "[u]ntil 1978, the means by which an Indian tribe received federal recognition was unstructured," and that recognition could be shown in different ways. AR7773-74. Judge Karlton then ruled that he could not delve into the substantive question of whether Ione had been "recognized" because he lacked jurisdiction under the APA, which required "final agency action" before a court could become involved. Because Ione had not formally applied for federal recognition under the Part 83 recognition regulations, and because (accordingly) the federal government had not issued a formal denial of recognition, "final agency action" was lacking. The order thus dealt with a jurisdictional question, not with the substantive question of whether Ione had ever been recognized and whether the federal government's administrative termination of that recognition was lawful. In short, Plaintiffs' allegations regarding judicial admissions are unfounded.

C. The Tribe and the Federal Government Fully Complied with 25 C.F.R. Part 151

Plaintiffs argue that the ROD failed to comply with the regulations found at 25 C.F.R. Part 151. Section 151.10(a) requires that the agency consider the statutory authority for the proposed acquisition. The ROD addressed this issue extensively (AR10102-111), concluding that all statutory requirements were satisfied. (AR10111-112) And although Plaintiffs allege that the agency's decision was unwarranted under *Carcieri*, their arguments are based on a misleading presentation of the holding in *Carcieri,* as explained above.

Section 151.10(b) requires that the agency consider whether there is a need for the acquisition of land. Here, the Tribe explained its need for the acquisition (AR2757) and the agency considered the matter (AR10112), concluding that a need existed because the Tribe

currently has no reservation or trust land. Plaintiffs fail to provide any evidence that the agency's conclusion on this matter was flawed.

The FAC alleges that a handful of individual members of the Tribe have occupied and/or own some property in Amador County(FAC ¶¶17-18), as though this might somehow matter for purposes of determining whether the Tribe has a need for the land acquisition. Even if the allegations about private land ownership by a few *individuals* are true, they obviously are immaterial for purposes of determining whether *the Tribe* has a need for tribal lands. AR2757-58; 10112 (need for land).

Section 151.10(c) requires that the agency consider the purposes for which the land will be used. The Tribe explicitly addressed this matter (AR4-5), and the agency clearly considered it. AR10112-113, 15468. Indeed, the hundreds of pages of environmental analyses in the record demonstrate the agency's extensive consideration of the proposed land use. AR15453-20649. And although Plaintiffs allege the existence of a plan to construct "162 private residences on the Parcels," and claim that the federal agency should have, but failed to, consider this plan in considering the purposes for which the land will be used (FAC ¶63), Plaintiffs fail to support their allegations (including the existence of any such plan) with any evidence or authority.

Section 151.10(e) requires that the agency consider the impact on state and local governments if the land is acquired by the federal government and removed from the tax rolls. The ROD explicitly considered and addressed this matter, and the agency spent significant resources addressing it. AR10113, 12339-15360.

In addition, Plaintiffs' arguments in this regard are both unintelligible and wrong. Plaintiffs argue, oddly, that if the land is not acquired for Ione "in 'unrestricted fee status,' the Parcels will remain subject to State and local tax." FAC ¶64. It is unclear what Plaintiffs mean by this. Plaintiffs seem to misunderstand the regulation, which states that the Secretary must consider, "[i]f the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. 151.10(e) (underline added). The regulation plainly references land that, prior to any Secretarial action, "is [currently] in unrestricted fee status," not as Plaintiffs seem to misunderstand, land

that will be taken into unrestricted fee status. This factor references the need to consider the impacts on state and local tax rolls of the taking into trust of unrestricted fee land, as opposed to the taking into trust of restricted fee land, i.e. land the legal title to which is held in the name of an individual Indian or tribe but which includes a restriction against alienation imposed by the federal government, which would already be exempt from local or State real property taxes. Plaintiffs' misunderstanding of the regulation renders their arguments moot.

Plaintiffs also complain that the ROD "relied" on a voided MSA when it concluded that the Tribe is obligated to reimburse the County of Amador for lost tax revenue. FAC ¶64. This is patently wrong, and provides yet another example of Plaintiffs' misunderstanding of the facts. The ROD expressly acknowledged that while the MSA had been voided, the "fiscal mitigation provisions [found in the] voided MSA" were incorporated into the Final Environmental Impact Study ("FEIS") and considered by the agency. AR10113. The provisions that were incorporated into the FEIS included payments of annual contributions equal to lost property tax revenues (which payments go above and beyond the requirements of law). Clearly, the impact on state and local governments was not only considered, but also amply addressed.

Finally, Plaintiffs complain that the agency did not "discuss the additional costs that will be incurred by State and local government to provide governmental services to the project." FAC ¶64. But, again, this allegation misrepresents both legal requirements and plain facts. First, Part 151.10(e) does not require the agency to consider any "additional costs." Second, the agency did, in fact, consider these matters extensively in the FEIS, which addressed everything from impacts on social services (AR15494), to school districts (AR15495), traffic (AR15497-516), land use (AR517-519), water supply (AR15519-520) and numerous other matters. In short, the agency extensively considered an immense array of impacts, as required under Part 151.10(e), and Plaintiffs fail to demonstrate any arbitrariness or capriciousness in this consideration.

Section 151.10(f) requires the agency to consider jurisdictional problems and possible conflicts of land use. The agency plainly considered this. AR 10113, 15517-519. Rather than pointing to any arbitrary or capricious action on the part of DOI in its consideration of Ione's trust application, Plaintiffs make the general argument that DOI and the Secretary lack authority

to exempt land from State and local land use and zoning regulations and, further, that the Secretary's authority under 25 C.F.R. 1.4 to exempt property from State and local regulations was not authorized by Congress and is not applicable to transfers under the IRA. FAC ¶65. Plaintiffs are wrong on both counts, as explained elsewhere in this brief.

Section 151.10(g) requires the agency to consider whether the BIA is equipped to discharge its additional responsibilities resulting from the trust acquisition. Plaintiffs complain that this matter is not addressed in the ROD. FAC ¶66. But the Tribe explicitly addressed this matter in its trust application (AR9), and the agency explicitly considered it (AR10114). Specifically, the ROD discusses BIA's mission and responsibilities and concludes that taking the land into trust "would best meet the purposes and needs of the BIA." *Id.* Plaintiffs' assertions that the matter was not addressed are, again, misleading.

Section 151.10(h) requires the agency to consider whether the Tribe provided sufficient information to ensure that the potential environmental impacts of the project are considered. Plaintiffs complain that this matter was not addressed in the ROD and question whether the Tribe provided the required information. FAC ¶67. The administrative record is replete with evidence demonstrating that the Tribe provided all necessary environmental reports, hired environmental experts, and held several meetings with the agency regarding environmental issues. *See, e.g.,* AR 2764, 5420-21, 5918-19, 6739-6852, 7961-63.

Section 151.11(c) requires the Tribe to provide a plan specifying the anticipated economic benefits associated with the land. Plaintiffs complain that this matter was not addressed in the ROD and question whether the Tribe provided the required information. FAC ¶68. The AR plainly demonstrates that the Tribe provided all required information in this regard. AR6, 3378-3482 (Market Study). It also shows that the agency considered it and the ROD relied upon it in discussing the project's potential to generate "needed government revenues for the Tribe that will allow the Tribe to fund the governmental operations and programs required to meet Tribal needs … and will allow the Tribe to achieve Tribal self-sufficiency, self-determination, and a strong, stable Tribal government." AR10114-115.

Finally, section 151.13 requires the Tribe to provide title evidence. Plaintiffs complain

that this matter was not addressed in the ROD and question whether the Tribe provided the required information. FAC ¶69. But the record plainly demonstrates that the Tribe provided all required evidence as to title and satisfied all applicable requirements, and that the agency properly considered the matter. *See* AR6, 2808-3300 (preliminary title reports submitted with trust application); 5876 (indicating BIA's receipt of title documents); 6288-6518 (submitting remaining title documents); 6853-7087 (updated title insurance policy and supporting documents); 7356-7407 (title evidence); 7420-7660 (updated title insurance commitments); 8582-8642 (option agreements); 8755-64 (option agreements); 9206 (land description review results); 9662-86 (option agreements); 9983-85 (preliminary title opinion); 9989-94 (preliminary title opinion). The title evidence requirement was thus fully satisfied.

Citing regulations 150.11, 151.12(b), 151.13, and 151.15, Plaintiffs also complain that the notice of the ROD was incomplete and premature because it failed to include the Title examination for public review and comment. FAC ¶8. But the cited regulations do not require that title examinations be provided for public review or comment. In fact, other than regulation 151.13 (whose requirements were satisfied), none of the cited regulations even address title examinations. Like numerous other allegations Plaintiffs make, this one too is wrong. In short, all of the regulatory requirements relating to Ione's trust acquisition were met.

D. Plaintiffs' Assertion that the Secretary Was Not Properly Authorized by Congress to Take Land Into Trust Is Wrong and Has Repeatedly Been Rejected

Plaintiffs argue that "there is insufficient guidance from Congress to delegate this responsibility [to place land in trust] to the Secretary…" FAC ¶8. But every court to consider a delegation challenge to Section 465 has rejected it and found that agency regulations sufficiently limit the Secretary's discretion such that the section constitutes a constitutional delegation of power. *See, e.g., Michigan Gaming Opposition v. Kempthorne,* 525 F.3d 23, 30-33 (D.C.Cir.2008); *Carcieri v. Norton,* 497 F.3d 15, 43 (1st Cir.2007)(en banc), *rev'd on other grounds sub nom Carcieri v. Salazar,* 555 U.S.379, 129 S.Ct. 1058 (2009); *South Dakota v. U.S. Dep't of Interior,* 423 F.3d 790, 799 (8th Cir. 2005); *U.S. v. Roberts,* 185 F.3d 1125, 1137 (10th Cir.1999); *Shivwitz Band v. Utah,* 428 F.3d 966, 972-74 (10th Cir. 2005); *Nevada v. U.S.,* 221

F.Supp.2d 1241, 1250-51 (D.Nev. 2002). Further, the Supreme Court stated that it has "almost never felt qualified to second-guess Congress regarding permissible degrees of policy judgment that can be left to those executing or applying the law." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 474-75, 121 S.Ct. 903 (2001).

In addition, the Supreme Court has traditionally upheld the constitutionality of statutes promulgated for the "public interest" as well as to ensure fairness and equity. *See, e.g., Nat'l Broadcasting Co. v. U.S.,* 319 U.S. 190, 225-26, 63 S.Ct. 997 (1943); *New York Central Securities Corp. v. U.S.,* 287 U.S. 12, 24-25, 53 S.Ct. 45 (1932); *Yakus v. U.S.,* 321 U.S. 414, 423-425, 64 S.Ct. 660 (1944). Various provisions of the IRA show it was intended to conserve and develop Indian lands and resources. *See, e.g.,* 25 U.S.C. §§ 461-465. "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152-154, 93 S.Ct. 1267 (quoting H.R.Rep. No. 1804, 73rd Cong., 2d Sess., 6 (1934)). Thus, it is clear that Section 465 was promulgated in the public interest and to ensure fairness and equity, and as such should be upheld. In short, Section 465 is a legitimate delegation of Congressional authority. Plaintiffs' facial challenge should therefore be dismissed.

E. **AS-IA Laverdure Was Authorized to Issue the ROD**

Plaintiffs argue that applicable regulations preclude the AS-IA from exercising the authority delegated to him, and that AS-IA Laverdure was therefore not authorized to accept land in trust. FAC ¶8. But Plaintiffs fail to state which regulations might prohibit such delegations of authority, and indeed none exist. The Secretary has broad authority to re-delegate her authority to other Interior officials, including her trust acquisition authority under the IRA. 5 U.S.C. § 302; 200 DM 1, available at http://elips.doi.gov/ELIPS/DocView.aspx?id=735 (last visited December 15, 2014). The Secretary re-delegated her IRA authority to the Assistant Secretary – Indian Affairs, including her authority to promulgate regulations. 209 DM 8 (providing Assistant Secretary – Indian Affairs is authorized to exercise all of the authority of the Secretary), available at http://elips.doi.gov/ELIPS/DocView.aspx?id=802 (last visited December 15, 2014).

When Assistant Secretary Echo Hawk resigned and delegated his authority to Donald Laverdure, Laverdure possessed the requisite authority to issue the ROD in 2012.

Under 25 U.S.C. § 1a, the Secretary is authorized to delegate his powers and duties to the Commissioner of Indian Affairs (which position was subsequently replaced with the position of Assistant Secretary-Indian Affairs). Thus, federal law expressly permits the delegation of Secretarial authority to take land into trust from the Secretary to the Assistant Secretary-Indian Affairs.

F. **The Federal Government Has Authority to Take Land into Trust Under the IRA**

Plaintiffs' arguments (FAC ¶¶5, 71-81) that the United States does not have the authority to take land into trust or create an Indian reservation over property once conveyed to a state or into private ownership are both immaterial and without merit. The arguments are immaterial because the ROD does not indicate that any proclamation of such land as a reservation is to be made upon acquisition of the Plymouth Parcels in trust. The arguments are wrong because, contrary to the pre-IRA case law cited by Plaintiffs (FAC ¶72), the trust land acquired under the IRA may be proclaimed a reservation without withdrawal of land from the public domain. Congress has broad power to acquire property for federal purposes pursuant to, among its other powers, the Property Clause, U.S. Const. art. IV, § 3, cl. 2, and an enumerated plenary power over Indian affairs pursuant to the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 694 (9th Cir. 1997). Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Tenth Amendment's mutually-exclusive delegation of powers to the federal government and reservation of powers to the states, state and local governments retain only that authority not exercised by the federal government to regulate federal lands acquired in trust for tribes. *Carcieri v. Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007), *rev'd on other grounds sub nom.*, *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009). In the exercise of its Constitutional powers, Congress may appropriately delegate such powers to the Secretary. *Confederated Tribes of Siletz Indians*, 110 F.3d at 694. Congress has indeed delegated its powers with respect to the acquisition of trust lands for tribes by virtue of the IRA at Section 465. And in the exercise of the Secretary's Congressionally-delegated powers, the regulation at 25 C.F.R. § 1.4 has been promulgated to validly exempt Indian trust

lands from state and local regulation.

The case law Plaintiffs cite at FAC ¶¶5, 72-81, is unhelpful to them. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 129 S.Ct. 1436 (2009), is immaterial because none of the Congressional powers mentioned above were at stake there, nor did that case concern a trust land acquisition for a federally recognized tribe such as Ione. FAC ¶¶5, 73-75, 78, 81. Plaintiffs' assertion that Ione's trust acquisition will violate the Equal Footing doctrine is also spurious because "[t]he 'equal footing' clause … negatives any implied, special limitation of any of the paramount powers of the United States in favor of the State." *United States v. Texas*, 339 U.S. 707, 717, 70 S.Ct. 918, 923 (1950), *superseded by statute on other grounds as stated in United States v. Louisiana*, 394 U.S. 11, 14 n.2, 895 S.Ct. 773 (1969). And the so-called Four Reservations Act limitation on reservations created on public domain lands (FAC ¶77) is irrelevant here because the Plymouth Parcels are not public domain lands (as required under that Act) and the acquisition authority arises from Section 465.

Similarly, *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 125 S.Ct. 1478 (2005) and *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2nd Cir. 2005), *cert denied,* 2006 U.S. LEXIS 3949 (U.S. May 15, 2006) (FAC ¶5) do not involve the Secretary's authority to acquire land under the IRA, but rather assertions of sovereignty by tribes over fee lands long-occupied by outsiders and recently purchased by the tribes on the open market, with *City of Sherrill* actually pointing to the IRA trust land process as a valid alternative. *City of Sherill*, 544 U.S. at 220-221, 125 S.Ct. at 1493-1494. These cases are therefore irrelevant to the Plaintiffs' challenge to the determinations made in the ROD in this APA action. Finally, like *Office of Hawaiian Affairs*, Plaintiffs' citations to the Treaty of Guadalupe Hidalgo, the Act of 1851, and *Summa Corp. v. California ex rel. State Lands Commission*, 467 U.S. 1231 (1984)[12] (FAC ¶¶5-6) are inapposite because, as Plaintiffs assert, they relate to how courts "confirmed private titles, and State jurisdiction, over land previously conveyed into private ownership by Spain or Mexico" but fail to discuss in any way the Congressional powers mentioned above that authorize the taking of land into trust for tribes under the IRA.

[12] The citation provided in Plaintiffs' FAC ¶5 for *Summa Corp.* is only to the order denying rehearing. The case referenced here is found at 466 U.S. 198, 104 S.Ct. 1751 (1984).

Plaintiffs also assert that "[a]ny claim in the ROD that the Ione Indians have an ancestral or aboriginal claim to the Parcels is without merit." FAC ¶6. But the only issue before this Court is whether under the APA the two determinations made by the AS-IA in the ROD – to acquire the Plymouth Parcels in trust and to deem such an acquisition to be the restoration of lands for a tribe restored to federal recognition – are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706. The ROD does not in any way purport to assert any ancestral or aboriginal land claims by the Ione Band, nor could it, given that it is the product of DOI and not the Tribe. Plaintiffs fail to explain how any such claims might relate to, or could render invalid, the trust land acquisition or the ILD cited and adopted in the ROD at issue here.

G. DOI Validly Determined that Ione Meets the Criteria under the IGRA Exception for the Restoration of Land for a Tribe Restored to Federal Recognition

Contrary to Plaintiffs' allegations, the facts found in the record fully support the determination in the ROD that Ione qualifies under the IGRA "restored lands for a restored tribe" exception to the general ban on gaming on Indian lands acquired after October 17, 1988. AR5071-76, 10100-102. Plaintiffs' general allegations (FAC ¶83) regarding the DOI determination in the ROD and the ILD being contrary to the facts, IGRA, prior DOI opinions, prior DOI representations made in other cases, and the case record for *Muwekma Ohlone Tribe v. Salazar* (USDC D.C. No. 03-1231(RBW)) are incorrect and unsupported legally or in the record.

Further, Plaintiffs' allegations (FAC ¶84) that the Ione Band is not a restored tribe for purposes of IGRA because the Tribe has never been federally recognized or terminated is patently false. Plaintiffs fail to point to any evidence to support these allegations, which are in fact contradicted by substantial evidence in the record. *See, e.g.,* AR5094, 5550-54.

Similarly, the allegation that the Plymouth Parcels do not constitute restored lands for IGRA purposes (FAC ¶85) are without merit. Plaintiffs base these allegations on their assertion that the Tribe is not "landless." *Id.* But Ione has no trust land or other reservation, and Plaintiffs fail to show otherwise. And Plaintiffs' further allegation (again, with no evidence) that the Band has "a potential ownership interest" in some property is irrelevant. Even if the Tribe has such a

"potential ownership interest," which interest Plaintiffs fail to prove, the existence of such an interest by the Tribe would not preclude the Tribe from having land held in trust, nor would it preclude the land from being deemed "restored land" under IGRA. Tribes are not required to be devoid of land ownership to qualify for IGRA's restored tribe/restored lands exception. Plaintiffs fail to prove otherwise. And to the extent Plaintiffs' allegations in this paragraph refer to ownership interests by individual "Ione Indians" rather than by the Ione Band as a tribe, the allegations are not directed at the Tribe itself and are thus irrelevant.

Plaintiffs also argue (FAC ¶85) that the Plymouth Parcels are not restored lands because "any ancestral lands of the Ione Indians in Amador County were relinquished in the last half of the 19th century" and "any claim by Ione Indians in Amador County for compensation for any ancestral lands was settled in the first half of the 20th century." Plaintiffs fail to explain the relevance of these assertions to the actions taken by DOI that are at issue in this APA case. Plaintiffs also fail to provide any legal authority or record evidence of how such purported claims, even if true, would preclude the valid determinations made in the ROD to acquire the Plymouth Parcels in trust for the Ione Band and to deem such acquisition a restoration of lands for a tribe restored to federal recognition under IGRA.

Plaintiffs conclude their arguments (FAC ¶85) by asserting that "the subject Parcels are far from Ione and any potential ancestral or historical claims of the Ione Indians. Taking the property into trust does not make it 'restored lands' for IGRA purposes[.]" The ILD and the ROD explicitly contradict these allegations (AR5074-75, 10102), and the finding that the Plymouth Parcels lie within the ancestral and historical lands of the Ione Band, its predecessors, and its members' ancestors is fully supported by record evidence (*see, e.g.,* AR1414-2549).

Plaintiffs characterize the ROD's determinations that the Ione Band is a restored tribe and that the acquisition of the Plymouth Parcels in trust would constitute the restoration of lands for a tribe restored to federal recognition under IGRA as unlawful, arbitrary, and capricious. (FAC ¶¶86-88) Yet there is no legal support for Plaintiffs' claims that the NIGC "improperly accepted" DOI's restored lands determination for IGRA purposes or that any such acceptance is required. There is also no legal support for Plaintiffs' argument (FAC ¶ 3) that only the NIGC

may issue Indian lands determinations and that any such determination is beyond the authority of the Secretary. IGRA and case law bely this point. 25 U.S.C. § 2719(c); *Redding Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1116, 1121-22 (N.D. Cal. 2012) (Secretary has authority to interpret and apply regulations pertaining to the IGRA exceptions under 25 U.S.C. § 2719).

Plaintiffs further allege (FAC ¶87) that if this Court upholds the AS-IA's approval of the acquisition of the Plymouth Parcels into trust and the ILD, the implementation of the Preferred Alternative in the ROD with the construction and operation of tribal government gaming "will cause major environmental impacts" and "irreversible harm". As shown below, these assertions completely miss the mark and are either overbroad characterizations or omit the mitigation efforts that will be undertaken and are included in the ROD.

H. The ROD Does Not Violate the Equal Protection Clause

Plaintiffs allege that the taking of land into trust for the benefit of an Indian tribe violates the Constitution's equal protection clause because it leads to disparate treatment of Indians and non-Indians. FAC ¶26. Plaintiffs provide no support for this argument, and none exists. The Supreme Court has long held that statutes conferring preferences upon tribal Indians do not violate the equal protection component of the Fifth Amendment's due process clause as long as they are tied rationally to the fulfillment of Congress's obligations to Indian tribes. *Morton v. Mancari,* 417 U.S. 535, 555, 94 S.Ct. 2474 (1974); *see also Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 83-83, 97 S.Ct. 911 (1977); *U.S. v. Antelope,* 430 U.S. 641, 645-647, 97 S.Ct. 1395 (1977); *Perrin v. U.S.,* 232 U.S. 478, 486, 34 S.Ct. 387 (1914); *U.S. v. Sandoval,* 231 U.S. 28, 46, 34 S.Ct. 1 (1913). Here, taking land into trust for Ione is rationally connected to the fulfillment of Congress's obligations toward the Tribe as outlined in the IRA.

I. The Federal Government Fully Complied with NEPA

In a NEPA claim, like any other APA claim, Plaintiffs bear the burden of persuasion and must overcome the "presumption of regularity" afforded to the agency's action. *San Luis*, 747 F.3d at 601. Plaintiffs have not and cannot point to any evidence in the administrative record that the federal agencies made any error in producing the EIS. But even putting aside the burden of proof, it is evident from the administrative record that the EIS fully complied with NEPA.

Plaintiffs' additional arguments – that the BIA was not permitted to serve as lead agency, and that the NIGC was required to conduct a separate environmental review of the "restored tribe" determination – are meritless.

1. **The EIS Thoroughly Analyzed the Environmental Consequences of Approving the Fee-to-Trust**

Plaintiffs allege that the BIA failed to conduct a thorough environmental review, but the record tells a very different story. From November 2003 to February 2009, the BIA conducted numerous scoping sessions and public hearings, consulted with experts and regulatory agencies, issued a comprehensive Draft Environmental Impact Statement ("DEIS"), and then substantially revised the draft after public comment. AR10384-86, 12337, 15451, 15539-40. The result was a Final Environmental Impact Statement ("FEIS") with more than 600 pages of comprehensive analysis, supported by numerous expert technical reports. The FEIS is, at the very least, a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *NRDC*, 770 F.3d at 1271. The FEIS thoroughly disclosed the project's impacts on the environment and the project's neighbors, so that the agencies could meet their obligation to consider the project's impact on local communities. *Contra* FAC ¶¶92, 96 (lines 19-21).

Plaintiffs contend that air, water, traffic and public safety impacts were not "adequately considered, mitigated, or resolved." FAC ¶¶4, 93. This allegation is impossible to reconcile with the FEIS's extremely thorough analyses of all of these issues.[13] In two recent opinions, this Court granted summary judgment to government defendants who prepared environmental analyses considerably less thorough than this EIS, in the face of considerably more substantial criticisms from challenging plaintiffs. *Klamath Siskiyou*, 2014 4960906, at *5-15; *Conservation Congress v. U.S. Forest Svc.*, No. 2:12-cv-02800 (E.D. Cal. May 19, 2014), 2014 WL 2092385, at *14-16.

[13] *See, e.g.*, AR15760-83, 15888-90, 15941-43, 15961-64, 16002-03 (direct, indirect and cumulative impacts on water), 15784-802, 15943-47, 16003 (air), AR15841-87, 15953-60, 16001 (traffic and transportation); and AR15894-97, 15964 (public safety); AR16017-20 (mitigation measures for water resources), AR16021-23 (air quality), AR16034-52 (traffic and transportation), and AR16053-54 (public safety); AR 16135-404 (water and wastewater feasibility study), AR16405-533 (well quality study), AR16536-75 (geotechnical report on wastewater facility), AR16600-36 (drainage study), AR17023-422 (traffic study), AR17691-864 (air quality modeling), AR18083-122 (streambed analysis).

The only other impacts Plaintiffs claim the FEIS failed to analyze are "regulatory, jurisdictional, and tax revenue problems," (FAC ¶¶4 (lines 21-25), 96 (lines 14-18)), but in fact the FEIS did analyze the project's fiscal impact, its effect on revenue to local governments, and the mitigation measures necessary to eliminate any significant impacts. AR15821-23, 15952-53, 10088, 16033-34.

Other aspects of Plaintiffs' NEPA claim simply repeat Plaintiffs' previous arguments that the agencies acted improperly in approving the fee-to-trust transfer. FAC ¶¶92, 96-98. For reasons already explained, the agencies' findings were fully supported by the record and adopted in accordance with law.

The agencies' obligation to take a "hard look" at environmental impacts does not, as Plaintiffs argue, prohibit the agencies from approving a project that might have significant impacts. FAC ¶4 (lines 14-21). In this case, the agencies reasonably concluded that impacts could be reduced to a less than significant level by appropriate mitigation measures. AR10075. But even if that were not the case, "NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate the substantive results of agency decision making." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). Plaintiffs may disagree with the agencies' decisions or with their analyses, but the record makes clear that the agencies followed all of NEPA's procedures and conducted a more than thorough environmental review.

2. **The BIA Appropriately Served as Lead Agency**

Plaintiffs argue that, because BIA is responsible for processing fee-to-trust applications, it is "impossible" for BIA to take a "hard look" at the environmental impacts of approving a FTT. FAC ¶95. Plaintiffs suggest that an agency considering an approval cannot also conduct the environmental review of that approval. *Id.* That is precisely the opposite of how NEPA works, because "under NEPA, federal agencies are directed to prepare an EIS to analyze the environmental consequences of *their proposed actions*." *Alliance for the Wild Rockies v. U.S. Dep't of Agric.*, ___ F.3d ___, No. 13-35253, 2014 WL 6480352, at *12 (9th Cir. Nov. 20, 2014) (emphasis added). Not only is an agency *permitted* to prepare the EIS for an approval it is

charged with considering, federal regulations actually *require* the agency with the greatest involvement with a project, and the greatest authority over an approval, to be the "lead agency" in conducting environmental review. 40 C.F.R. § 1501.5(c); *see also San Luis & Delta-Mendota Water Auth. v. Salazar*, 686 F. Supp. 2d 1026, 1041-44 (E.D. Cal. 2009).

There is no support in the record for Plaintiffs' bald assertion that the BIA "wrongfully assumed that non-Indian interests did not require equal consideration against the interests of the Ione Indians" or that "the BIA only represents the interests of a group of Indians claiming to be a tribe." FAC ¶¶4, 95. The BIA, like any other federal agency, has a specific mission, but this does not make it ineligible to fulfill its broader duties as a lead agency under NEPA.

3. **There Was No NEPA Error with Regard to the "Restored Tribe" Determination**

Plaintiffs also argue that the NIGC violated NEPA by failing "to prepare an EIS for its 'restored tribe' and 'restored lands' determinations." FAC ¶90; *see also* FAC ¶¶4 (lines 6-12), 99. This claim is entirely dependent on Plaintiffs' mistaken belief that the NIGC is required to make an ILD that is separate from DOI's determination in the ROD. But Plaintiffs fail to provide any basis for this requirement, and IGRA and case law contradict it as shown above.

Moreover, even assuming the NIGC were required to make a separate "restored tribe" determination (which it is not), no separate NEPA review would be required. NEPA review is only required for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c); *see also California Wilderness Coal. v. U.S. Dep't of Energy,* 631 F.3d 1072, 1099 (9th Cir. 2011) ("To be challenged under NEPA, a final agency action "'must (1) be federal, (2) 'major', and (3) have a significant environmental impact.'") (quotation omitted). Another judge of this district already analyzed this specific issue and held that the "restored tribe" determination is only an "intermediate step of Ione's trust application." *County of Amador v. Dep't of Interior*, No. Civ S-07-527 LKK/GGH, 2007 WL 4390499, at *4 (E.D. Cal. Dec. 13, 2007). Even when the relevant agency makes a "final decision with respect to whether gaming is permissible on the Plymouth Parcels under IGRA, that decision has no effect upon the parties unless the decision is first made to take the Plymouth Parcels into federal

trust." *Id.* As an intermediate legal conclusion, the "restored tribe" determination is not a separate "final agency action" distinct from the ROD. The only pertinent effect of the "restored tribe" determination is to make the tribe eligible for a gaming-related trust acquisition, and the effects of approving the trust application were thoroughly disclosed in the FEIS.

Plaintiffs provide no basis, let alone a basis sufficient to meet the "highly deferential" standard of review, upon which this Court could find that the agencies acted arbitrarily or capriciously in conducting the environmental review of this project. The Tribe is entitled to summary judgment on Plaintiffs' NEPA claim.

VI. CONCLUSION

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

Dated: December 15, 2014

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