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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiffs, **v.** SALLY JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior, *et al.* Defendants.	Case No. 2:12-cv-01748-TLN-CMK **PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON FIRST CLAIMF FOR RELIEF** Date: March 26, 2015 Time: 2:00 p.m. Place: Courtroom No. 2 Judge: Honorable Troy L. Nunley

INTRODUCTION

Plaintiffs respectfully submit this reply memorandum of points and authorities in support of their motion for summary judgment on the first claim for relief in its first amended complaint.[1] In their first claim for relief, Plaintiffs allege that the Federal Defendants do not have the

[1] This reply memorandum is in response to the oppositions to Plaintiffs' motion for summary judgment filed by the Defendants. The Defendants combined their opposition to Plaintiffs motion on the first claim for relief with a cross-motion on the Plaintiff's remaining claims for relief. Plaintiff will file a separate opposition to the Defendants' cross-motion.

authority to take land into trust for the Ione Band because it was not a "recognized tribe now under federal jurisdiction" in 1934 when the Indian Reorganization Act (25 U.S.C. §§ 461-479; IRA) was enacted. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

The Record of Decision (ROD) in this case was issued on May 24, 2012. (Administrative Record (AR) 10049-10116.)[2] The ROD states that it is based on Section 5 of the IRA of 1934. This statement is then used to support the decision "to acquire in trust the 228.04 acre Plymouth Parcels in Amador County, California, for the Tribe [Ione Band]." (*Id*.)

But the ROD ignores the fact that only three years earlier, in 2009, the Supreme Court held that the IRA fee-to-trust provisions applied only to tribes that were federally recognized in 1934. *Carcieri v. Salazar, supra.* As Plaintiffs stated in their moving papers, this holding of the Supreme Court in *Carcieri* is straight forward and uncomplicated. And it precludes the fee-to-trust application of the Ione Band here because it was not a federally recognized tribe in 1934.[3]

The Ione Indians resided on private land near Ione California in 1934. They were not a tribe, much less a federally recognized tribe, in 1934. This much was decided by Judge Karlton in *Ione Band v. Burris.* The arguments and contentions which Defendants assert here, were all presented to this Court and rejected by Judge Karlton. The final judgment in *Ione Band v. Burris* was entered in 1996. It was not appealed by the Federal Defendants or the Ione Band; it is binding on them here. The undisputed facts in the AR, confirmed in *Ione Band v. Burris*, demonstrate that, based on *Carcieri*, Plaintiffs are entitled to judgment on their first claim for relief.

[2] By referencing the AR lodged with the Court by the Federal Defendants, plaintiff do not concede that it is the entirety of the administrative record that was available when the ROD was issued. Copies of many key documents in the administrative record that were excluded from the AR are located at the University of California, Davis Special Collections Library.

[3] The ROD was signed by interim action Assistant Secretary Laverdure. Mr. Laverdure is an attorney and he knows the import and impact of the *Carcieri* decision on this case. In fact, he testified many times before Congress about the importance of a *Carcieri* fix. In fact, he testifies on September 13, 2012, on the "negative impacts" of *Carcieri.* (See attached Exhbit 1.)

CARCIERI v. Salazar

The Defendants in this case would have the Court return to the status-quo ante before the Supreme Court in *Carcieri* rejected the Department of Interior's expansive interpretation of the IRA that gave the Secretary of Interior unlimited power to take any lands into trust for any tribe or any group of Indians at any time. At the hearing, the Justices expressed concern about the expansive interpretation of the IRA by the Secretary of Interior. Justice Scalia incredulously stated: "I can't believe that the statute [IRA] was meant to be that expansive, to let the Secretary buy land for whomever he wanted." (Official Supreme Court Transcript of Oral Argument, November 3, 2008,(SC Tr.) at 30.) And Chief Justice Roberts questioned it:

> "This is - - we are talking about an extraordinary assertion of power. The Secretary gets to take land and give it whole different jurisdictional status apart from State law and all - - wouldn't you normally regard these types of definitions in restrictive way to limit that power instead of saying whenever he wants to recognize it, then he gets the authority to say this is no longer under Rhode Island jurisdiction; it is now under my jurisdiction?" (SC Tr. at 36.)

The Supreme Court decision in *Carcieri* limited the power of the Secretary of Interior to take lands into trust, and out of State jurisdiction. Specifically, as suggested by Chief Justice Roberts, the IRA was interpreted in a restrictive way to limit the Secretary's authority to take land into trust only for tribes that were federally recognized in 1934. The Supreme Court held that the Secretary's expansive interpretation of the IRA is wrong and is not entitled to deference.

In this case, the Federal Defendant are attempting to reassert their expansive interpretation of the IRA to take land into trust for a group of Indians, named the Ione Band, which did not exist and was not a tribe or a Federally recognized Indian tribe in 1934. As is outlined below, instead of following the majority opinion in *Carcieri,* the Defendants rely on Justice Souter's dissent to reassert a broad interpretation of the IRA and to create a two part "under federal jurisdiction" test which they argue is entitled to deference. Defendants' reliance on a dissent, and claim of deference, are directly contrary to the *Carcieri* majority decision and should be rejected.

A. Majority Opinion by Justice Thomas.

Justice Thomas' majority opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy and Alioto. This five-Justice majority decision is binding and controlling regardless of the concurring disagreement by Justice Breyer and the dissents by Justices Souter and Stevens.

Although the parcel involved is smaller, the fact pattern in *Carcieri* is basically the same as fact pattern here. There, in 1998 the Secretary of Interior notified the State of Rhode Island and other interested parties that he intended to take 31 acres into trust for the Narragansett Tribe. The Secretary claimed that he had the authority to take the land under the IRA. 25 U.S.C. § 465. Governor Carcieri challenged that authority arguing that the Narragansett Tribe was not a "recognized Indian tribe . . . under federal jurisdiction" in 1934 and therefore not entitled to the fee-to-trust benefits of the IRA. 25 U.S.C. § 479.

Justice Thomas described the issue, the positions of the parties and the decision of the Court in a paragraph at the outset of the decision as follows:

> "[W]e 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 be reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are 'under Federal jurisdiction' at the time the land is accepted into trust. We agree with the petitioners . . ."
>
> *(Carcieri v. Salazar,* 129 S.Ct . at 1061; emphasis added.)

The Plaintiffs' position in this case is identical to the position of the Petitioners in *Carcieri*. The Ione Band, like the Narragansett Tribe, was not a *recognized tribe* under federal jurisdiction in 1934 and is therefore not entitled under the IRA to have the land taken into trust on its behalf. Specifically, the Ione Band was not on the list of 258 recognized tribes compiled by the Secretary in 1934. This Court should follow the Supreme Court's lead and vacate the ROD because the Secretary does not have the power to take parcel in trust for the Ione Band.

Furthermore, despite the position of the Defendants here, in *Carcieri* they agreed that to receive trust land a tribe had to be "federally recognized" tribe. The only issue was whether a tribe had to be federally recognized in 1934 or on the date that the land was taken into trust. Three times during the Supreme Court hearing Ms. Maynard, counsel for the respondents asserted that, when discussing tribes, "recognized" and "under Federal jurisdiction" are "one and the same:" (SC Tr. at 35, 41, and 42.) Thus the Federal Respondents did not see the two concepts as separate. "Recognized Indian tribe under Federal jurisdiction" is basically another way of saying "Federally recognized Indian Tribe."

Also, as noted by the Court, the Respondents did not contest the assertion that the Narragansett tribe was not a federally recognized tribe under federal jurisdiction in 1934. Instead, the Respondents' in *Carcieri* claimed that a tribe need only be a federally recognized tribe at the time the land is taken into trust. This is the same argument that the Federal Defendants make here. But, unfortunately for them, it was rejected by the Supreme Court majority in *Carcieri*

As summarized by Justice Thomas: "The parties are in agreement, as we are, that that the Secretary's authority to take the parcel in question into trust depends on whether the Narragansett are members of a 'recognized Indian Tribe now under Federal jurisdiction'." The only issue there was whether the tribe had to be "recognized under Federal jurisdiction" in 1998 when the Secretary made his decision or in 1934 when the IRA was enacted. The Supreme Court, in *Carcieri,* held that the tribe had to be federally recognized in 1934 to be entitled to the IRA fee-to-trust benefits. This Court should reach the same conclusion here.

Equally important was the Supreme Court's majority's decision to reverse the Court of Appeal's conclusion that the statute was ambiguous and therefore the Secretary of Interior interpretation of the IRA that a tribe need not be recognized in 1934, was not entitled to deference. Instead, the Supreme Court concluded that the statute "unambiguously" refers to those

tribes that were federally recognized in 1934 when the IRA was enacted. The Supreme Court rejected several suggestions by the Respondents and amicus curiae that would "nullify the plain meaning" of the IRA. Likewise the Defendants attempt to ignore and nullify the restrictions in the IRA, as confirmed by the majority opinion in *Carcieri*, should be rejected.

B. Concurring Opinion by Justice Breyer.

Justice Breyer concurred with the majority opinion, but qualified his concurrence slightly. He agreed with the majority that the Secretary of Interior's expansive interpretation of the IRA is not entitled to deference. And he agreed with the majority that, to qualify for the fee-to-trust benefits of the IRA, a tribe must have been federally recognized in 1934. But Justice Breyer suggested that there may be situations when a tribe was recognized in 1934 but was not on the list of 258 tribes compiled shortly after the IRA was enacted in 1934. Justice Breyer suggests three possibilities in this regard: (1) a tribe with a treaty with the United States that was in effect in 1934, (2) a pre-1934 Congressional appropriation for a specific tribe, or (3) tribal enrollment, as of 1934, with the Indian Office. From Justice Breyer's perspective, if a tribe was not on the list, there might still be some connection in 1934 between a tribe and the Federal government for a tribe to be added to the 1934 list of 258 tribes eligible for the fee-to-trust benefits of the IRA.

Justice Breyer's three suggestions as to how tribe might be added to the 1934 list of 258 federally recognized tribes was not part of the majority opinion and, thus, does not even qualify as dicta. But, for the record, the Ione Band was not a recognized tribe in 1934 and was not on the list of 258 tribes in 1934. Nor did the Ione Band qualify for any the three alternatives suggested by Justice Breyer. It did not have a treaty with the U.S in 1934; it did not receive any pre-1934 Congressional appropriations; and no enrollment was not on file with the Indian office in 1934.

Contrary to the assertions of the Defendants and those made in the ROD, Justice Breyer did not agree that the phrase "recognized Indian tribe under federal jurisdiction" in 1934 could be

separated into two tests, "recognition" and "under federal jurisdiction" each with separate content. Instead, Justice Breyer agreed with the *Carcieri* majority opinion that the "recognition" and "under federal jurisdiction" are "one in the same." The "two concept-separate content" idea came from Justice Souter and is the reason he filed a dissent instead of a concurrence.

C. Dissenting Opinion by Justice Souter.

Justice Souter wrote a separate dissenting opinion which he opens as follows:

> "Save as to one point, I agree with Justice BREYER's concurring opinion, which in turn concurs with the opinion of the Court, subject to three qualifications Justice BREYER explains. I have, however, a further reservation that puts me in the dissenting column."

Justice Souter dissented, instead of concurring because (unlike the majority and Justice Breyer) he felt that it was a possibility "that the two concepts, recognition and jurisdiction, may be given separate content." Thus Justice Souter contends that, to qualify for the IRA fee-to-trust benefits, a tribe could be either "Federally recognized" **OR** "under Federal jurisdiction" in 1934. This "two concept-separate content" idea was precluded by both the majority opinion and Justice Breyer's concurring opinion. In fact, it is the reason that Justice Souter candidly admits that he does not agree with Justice Breyer and is in the dissenting column.

Justice Souter's dissent, and not Justice Breyer's concurrence, is the only possible source of the Defendants' new broad interpretation of the IRA and revived claim of deference. Specifically, Defendants agreed with Justice Souter that the two concepts – "recognition" and "jurisdiction" – have separate content. To the Souter's "separate content" idea, the Federal Defendants claim that, once it is separated from the federal recognition requirement, the phrase "under federal jurisdiction" is ambiguous. They next argue that the Secretary of Interior's interpretation of this "ambiguous" phrase and, therefore, its attempt to resolve the ambiguity with its bogus two part test, are entitled to deference. This is nothing more than an overly clever and desperate attempt by the Federal Defendants to recapture what they lost with *Carcieri* decision.

The only problem with the Federal Defendants' scheme is that it is based on Souter's dissent and not on the majority opinion or Breyer's concurrence. Neither Justice Breyer, nor the majority, endorsed the two concept/separate content idea in Justice Souter's dissent. In fact just the opposite is true; six Justices adopted the one concept/one content interpretation of the unambiguous phrase "recognized Indian tribe under federal jurisdiction" in 1934. And six Justices held that this phrase is not ambiguous and Secretary's interpretation is not entitled to deference

This fatal flaw should have ended the Defendants two concept/separate content theory because it is based on a non-binding dissent and is contrary to the majority opinion. But, instead of dropping the "two concepts/separate content" idea, Defendants' solution was to misrepresent the source of the "two concept/separate content" idea as coming from Justice Breyer's concurrence instead of Justice Souter's dissent. Specifically, in this case, both the Federal Defendants and Intervenor-Defendant – without mentioning Justice Souter's dissent - attribute the Justice Breyer's concurrence as the source of the two concept/separate content theory. (ECF No. 90-1 at 19; ECF No. 91-1 at 24.) The Federal Defendants claim that Justice Breyer said that a tribe could qualify if it is federally recognized today and was under federal jurisdiction in 1934. This simply is not true. Justice Breyer held that tribe could be a qualified applicant if it was recognized in 1934 or if there was a comparable government connection with the United States in 1934 evidencing recognition such as treaty "in effect in 1934"; a "pre-1934" congressional appropriation, or enrollment "as of 1934" with the Indian Office.

Justice Breyer acknowledged that the word "now" is not defined in 25 U.S.C. § 479. But Justice Breyer, like the majority, decided that the statute was not ambiguous and the Secretary's interpretation was not entitled to deference. Instead, Justice Breyer was "persuaded that 'now' means 'in 1934' not only for the reasons the Court [majority] give but also because an examination of the provision's legislative history convinces me Congress so intended."

Thus Justice Breyer read the operative phrase in Section 479 as: "recognized Indian tribe [in 1934] under federal jurisdiction." This is almost identical to the way that a unanimous the Supreme Court read the phrase in 1978 in *United States v. John*, 437 U.S.634, 650 (1978).

It was Justice Souter, not Justice Breyer, who separated the two concepts and took the position that a tribal applicant could be recognized today and under federal jurisdiction in 1934. This is directly contrary to the *Carcieri* majority – which is not surprising because Justice Souter dissented from the majority. What is surprising is the attempt by Defendants to give their theory credibility by trying to link it to Breyers' concurrence instead of Souter's dissent. It is hard to imagine a more blatant misrepresentation and attempt at judicial deception. It should be rejected.

Indeed, Justice Souter dissented from Justice Breyer's concurrence because he disagreed with Justice Breyer and the majority's one concept/one content holding. And that specific disagreement is the reason Justice Souter put himself in the dissenting column. And Defendants reliance on Souter's dissent discredits their claims of ambiguity and deference.

Defendants are trying to use the Souter dissent to create an exception that they hope will swallow the *Carcieri* majority rule outlined above. The Defendants reliance on Justice Souter's dissent, while ignoring the *Carcieri* majority rule, is arbitrary and capricious as a matter of law. The ROD is based on this illicit interpretation and should be declared void and vacated.

D. Dissenting Opinion by Justice Stevens.

Justice Stevens' dissent focused on individual Indians not tribes. He notes that the IRA was enacted to provide special protections and benefits to individual "Indians" as defined in the IRA. Justice Stevens argued that the plain text of the IRA authorizes the Secretary to take land into trust for tribes or individual Indians and that there is no temporal limitation on the definition on Indian tribe or on taking lands into trust. Justice Stevens's dissent is contrary to the *Carcieri* majority decision and is not applicable or controlling here.

IONE BAND OF MIWOK INDIANS v. BURRIS/UNITED STATES

The Plaintiffs are entitled to summary judgment on their first claim for relief because the issue of whether or not the Ione Band of Miwok Indians was a recognized Indian tribe under Federal jurisdiction in 1934 was decided by Judge Karlton of this Court in Ione Band of Miwok Indians et al. v. Harold Burris et al. (including the United States) (USDC ED Cal. No. CIV-S-90-0993). Specifically, in the Ione v. Burris case, which involved the same parties and the same federal recognition issues that are involved here, Judge Karlton determined that the Ione Band was not a recognized tribe and did not have a government. (See AR7763-7788; RJN Nos. 16, 17, 18, 19 and 20.) Furthermore, Judge Karlton reached this conclusion at the urging of the United States and members of a separate faction of the Ione Band of Miwok Indians. A final judgment on these issues was entered in 1996 and was not appealed. It is binding on Defendants here.

As summarized in Plaintiffs' motion, most of the pertinent pleading in the *Ione Band v. Burris* are in the AR. The Federal Defendants acknowledged that the files in the *Ione Band v. Burris* case are already part of the AR in this case. And the Federal Defendants unilaterally added many of the *Ione Band v. Burris* pleadings in the AR when they unilaterally filed a supplement to the AR. Ironically, but not surprisingly, the most important pleading from the *Ione Band v. Burris* case, Judge Karlton's 1992 Order was put in the record by the Amador County not the Federal Defendants. (AR7757-7788.) In any event, this should resolve the Court's concern that its review of the federal agencies actions should be based on AR. All the pleadings in the *Ione Band v. Burris* case are, or should be part of the AR and support Plaintiffs' MSJ.[4]

[4] Also, Plaintiffs had previously asked the Court to take judicial notice of the most pertinent documents from the *Ione Band v. Burris* case in support of its earlier motion for judgment on the pleadings. (ECF No. 62.) The RJN is submitted in supports Plaintiffs' MSJ too, The Request for Judicial Notice (RJN) includes some pertinent pleadings from the *Ione Band v. Burris* case which were not included in the AR. The Plaintiffs will reference RJN Exhibits it the pleading is not in the AR and for the convenience of the Court and parties. The entire *Ione Band v. Burris* court file is, and should be, part of the administrative record,

1. The Ione Band of Miwok Indians' Complaint.

The Ione Band of Miwok Indians (Ione Band) filed its Complaint for Declaratory Relief, Quiet Title, Breach of Trust and to Compel Agency Unlawfully Withheld against the United States on August 1, 1990. (RJN No, 1.) In Paragraph 3 of the complaint, the Ione Band alleges that it "has been recognized by the United States as being under federal jurisdiction." This allegation tracks the language in the IRA and was the focus of the case for the next six years.

The Ione Band includes similar allegations throughout the complaint. For example, in Paragraph 9 they allege that the Ione Band "has repeatedly been identified as an Indian Tribe by federal authorities." In Paragraph 10 the Ione Band contends that "federal authorities have identified the Ione Band of Miwok Indians as an American Indian Tribe." In Paragraph 12 they alleged that "the Ione Band of Miwok Indians have been viewed as California Indians under federal jurisdiction," In Paragraph 14 they allege that "the Ione Band of Miwok Indians were (sic) recognized as a tribe by the federal government."

Furthermore, the Complaint identifies the historical documents that support the Ione Band's claim that it is a recognized Indian tribe under Federal jurisdiction. The central document that the Ione Band alleged supported their claim was the October 18, 1972 letter form BIA Commissioner Bruce a copy of which was attached to the Complaint. (Complaint ¶ 20.) The Ione Band lists historical letters and documents that it claimed supported its contention that it was a recognized Indian tribe under federal jurisdiction. (Complaint ¶ 24.) The Bruce letter and many of the historical letters referenced in the Complaint are included in the Administrative Record in this case and are once again being offered by the Ione Band to support its contention here that it is a recognized Indian tribe under Federal jurisdiction.

The Ione Band made ten claims for relief and sought a declaration from this Court that the Ione Band has been and remains a recognized tribe under federal jurisdiction with all the rights

and sovereignty enjoyed by other Indian tribes. This claim made by the Ione Band in 1990 is identical to the claim made by the Ione Band in this case. It was rejected by Judge Karlton and should be rejected here.

2. The United States' Answer to the Complaint.

The United States filed its Answer in *Ione Band v. Burris* on September 28, 1990 and denied all the contentions of the Ione Band including the contention that it was a federally recognized tribe. (RJN No. 2.) In Paragraph 18 of its Answer the United States affirmatively states that "the group that calls itself the Ione Band of Miwok Indians have been advised that to obtain federal recognition, the procedures set forth at 25 C.F.R. Part 83 must be followed." In Paragraph 20 of its Answer the United States "affirmatively avers that Ione Band of Miwok Indians is not and has not been federally recognized."

3. The Burris faction of the Ione Band's Answer to the Complaint.

The Burris faction of the Ione Band filed their Answer on October 22, 1990, and also denied that the Ione Band is a federally recognized tribe. (RJN No. 3.) In Paragraph 18 of its Answer, the Burris faction of the Ione Band affirmatively states that "the group that calls itself the Ione Band of Miwok Indians [Plaintiffs] have been advised that to obtain federal recognition, the procedures set forth at 25 C.F.R. Part 83 must be followed." In Paragraph 20 of its Answer the Burris faction of the Ione Band "affirmatively avers that Ione Band of Miwok Indians [Plaintiff] is not and has not been federally recognized."

4. Initial Status Conference Reports.

The parties in the *Ione Band v. Burris* lawsuit filed separate Status Reports on January 7, 1991, stating their position with respect to the allegations in the Complaint. Plaintiffs outlined their claims in detail including a contention that the U.S. breached its fiduciary obligations to the Ione Band by failing to acknowledge and recognize its sovereign status as a tribe. (RJN No. 4.)

Consistent with its Answer to the Ione Band's Complaint, the United States makes the following judicial admission in its Status Report: "The [United States] government denies that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (RJN No. 5; emphasis added.) And the Burris faction of the Ione Band makes the same important assertion and judicial admission in their Status Report: "Defendants [Ione Indians] deny that the Ione Band of Miwok Indians has ever been a federally-recognized tribe." (RJN 6; emphasis added.)

5. United States' Motion for Summary Judgment.

As anticipated in its Status Conference Report, the United States filed a Motion for Summary Judgment in February 1991. (RJN No. 7.) The Burris faction of the Ione Band joined that motion. (RJN No. 8.) The United States motion was based on the fact that the Ione Band was notified in 1979 that they were not a federally recognized tribe and that, if they wanted to become a federally recognized tribe, they had to complete an application for federal recognition pursuant to 25 CFR Part 83. In addition, the Ione Band did not challenge the 1979 decision of the federal government that they were not a recognized tribe within the 6 years allowed by the APA. Nor did the Ione Band complete the Part 83 process. The U.S. argued that the Ione Band's lawsuit was barred by the statute of limitation and a failure to exhaust administrative remedies under Part 83.

A key declaration offered in support of the United States' motion was submitted Michael L. Lawson, Ph.D., a respected historian with many years of experience with the Bureau of Indian Affairs (BIA). (AR732-737; RJN No. 9). After reviewing all of the BIA's historical records, Dr. Lawson concluded that: "the United States has never extended federal recognition to the Ione Bank of Miwok Indians as an Indian tribe." (RJN No. 9 at 2: 16-18; emphasis added)

Another important declaration filed in support of the United States motion for summary judgment was by Arthur G. Barber, an employee of the BIA, who discussed the federal recognition issue with the two factions of the Ione Band in 1989. (SAR20901–20903; RJN No.

10.) Mr. Barber told representatives of the Villa faction that the Ione Band was not a federally recognized tribe and that they should apply for federal recognition under Part 83 in order to receive federal services from the BIA. In contrast, representatives of the Burris faction told Mr. Barber they and "other members of Ione Band did not wish to be federally recognized." (*Id.*)

The Plaintiff faction of the Ione Band opposed the United States motion for summary judgment and the United States filed a reply brief. (AR738-767; RJN No. 11.) In its detailed reply brief, the United States addressed all the legal and factual arguments raised by the Ione Band in support of their claim that they were, and are, a federally recognized tribe. The United States reasserted its contention that the Ione Band was not a federally recognized tribe and that they were specifically notified in 1979 that they were not a federally recognized tribe. Thus, their claim that they were a federally recognized tribe was barred by the statute of limitations.

The United States filed a Supplemental Brief (AR771-775; RJN No. 12) and supporting declaration (RJN No. 13) in support of its motion for summary judgment in March 1991. The purpose of this supplemental brief was to bring to the Court's additional information that the Ione Band knew that they were not a federally recognized tribe as early as 1973. The United States also provided information that undermined and discredited the plaintiffs' reliance on the 1972 BIA letter from Commissioner Bruce to support its claim of federal recognition. (RJN No. 13.)

Pursuant to Judge Karlton's request, in October 1991, the United States submitted a second supplemental brief on whether or not the Part 83 regulations were the exclusive means to obtain tribal recognition. (SAR 20910-20922; RJN No. 14.) The United States argued that the Part 83 process was not the exclusive means to obtain tribal recognition. Congress retained the authority to recognize tribes by legislative means. In addition there are "treaty" tribes which are recognized tribes that were signatories to a treaty with the United States, ratified by the United States Senate. The United States confirmed that the Ione Band was not recognized by an Act of

Congress or by a treaty. But, tribal recognition is available to the Ione Band administratively only through the Part 83 processes. The U.S. asked Judge Karlton to dismiss the Ione Band's complaint "for failure to timely challenge the government's determination that plaintiff Ione Band of Miwok Indians is not a federally recognized tribe." (*Id.*)

In its reply brief the United States addressed the final "absurd argument" of the Ione Band based on the settlement of unrelated litigation involving other California tribes that were terminated by legislation. (RJN No. 15.) This settlement did not apply to the Ione Band because they conceded that they were not affected by the termination legislation. Also, the United States disputed the Ione Band's contention that it could be recognized administratively outside the Part 83 process: "The government's position has been and remains that the acknowledgement regulations [Part 83] constitute the exclusive administrative means of obtaining full . . . federal tribal recognition." (RJN No. 15, p. 2 fn. 1; emphasis in the original.) And the United States again urged the Ione Band to avail themselves of the Part 83 process. (*Id.*)

In summary, in less than a year, the United States submitted five (5) briefs in support of its motion for summary judgment. (RJN Nos. 7, 11, 12, 14, & 15.) In each of these briefs the United States consistently reasserted its position that the Ione Band of Miwok Indians is not and never has been a recognized Indian tribe under Federal jurisdiction. The Villa faction of the Ione Band of Miwok Indians opposed every brief and claimed that, although they did not follow the Part 83 or any other tribal recognition mechanism, they were recognized as a tribe through an administrative process unrelated to Part 83. In contrast, the Burris faction of the Ione Band of Miwok Indians supported the United States motion and denied that the Ione Band was ever a federally recognized tribe. Thus the legal and factual issues regarding the federal recognition status of the Ione Band were fully briefed by all the parties and the United States motion for summary judgment was submitted to Judge Karlton for decision. And Judge Karlton agreed with

the United States and the Burris faction that the Ione Band was not a federally recognized tribe.

6. Judge Karlton's Decision Granting the Motion for Summary Judgment.

Judge Karlton issued his decision granting the United States motion for summary judgment on April 2, 1992. (AR7763-7788; RJN No. 16.) Judge Karlton outlined, in detail the procedural and factual history of the case and the Ione Band's effort to compel the U.S. to recognize them as a tribe. Judge Karlton summarized all the alternative recognition mechanisms that had been presented and discussed by the United States and the Ione Band, and concluded:

> "Plaintiffs' [Ione Band's] argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that 'the Secretary may acknowledge tribal entities outside the regulatory process,' . . . and that the court, therefore, should accept jurisdiction over plaintiff' claims compelling such recognition. **I cannot agree. Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the above mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA acknowledgement process, the United States motion for summary judgment on these claims must be GRANTED.**" (AR7779; RJN No. 16 at 17; emphasis added.)

Judge Karlton also found that the challenge by the Ione Band was time barred because they failed to challenge the 1979 determination by the United States that the Ione Band was not a federally recognized tribe within the allowed six-years and, therefore, was placed on the list of unrecognized tribes. The Court found that any injury suffered by the Ione Band was **"the same as that suffered by all unrecognized tribes at the time the regulations were promulgated"**. Thus the Ione Band's challenge to the regulations was "barred by the six-year statute of limitation applicable to claims against the government." (RJN No. 16 at 18; emphasis added.)

7. Department of Interior filings with the Court.

Although summary judgment was issued in favor of the United States in 1992, the case continued between the factions of the Ione Band and other non-federal defendants for four more years. The County of Amador was added as a defendant. The Ione Band tried several more times to assert that it had received federal recognition through an informal (not Part 83) administrative

process by the Bureau of Indian Affairs.

The litigation became intense as the Ione Band divided itself into three competing factions ("Villa", "Burris" and "Hill" factions). There were over 400 separate docket entries in Ione Band v, Burris between 1992, when Judge Karlton granted the United States' motion (CD No. 73; RJN No. 16) and 1996 when Judge Karlton issued his final Order and Judgment in the case. (CD Nos. 500 &501; RJN Nos. 19 & 20.) But this additional and intense litigation did not change the outcome or the Court's conclusion that the Ione Band was not a recognized tribe.

8. Judge Karlton's dismissal of the lawsuit and entry of judgment.

Magistrate Judge Nowinski submitted Findings and Recommendation re Dismissal in May 1996. (RJN No. 17.) Judge Nowinski recommended dismissal because the Ione Band had not obtained federal recognition and, consequently, "there was no tribal government authorized to pursue the tribe's claims." (RJN No. 17 at 2.) Judge Karlton adopted Magistrate Judge Nowinski's findings and recommendations "insofar as it recommends dismissal of all of the plaintiff's [Ione Band's] claims." (RJN No. 18 at 6.) Judge Karlton held that "the magistrate judge's conclusion that there is no tribal government is clearly correct." (RJN No. 18 at 4.) Judge Karlton also found that the Ione lacked standing to claim that their land was Indian Country because it was not a "duly recognized tribal government." (RJN No. 19 at 2.) Judgment was entered on September 4, 1996. (RJN No. 20.) It was not appealed by any party and is binding on all the parties in that case and this case.

CALIFORNIA INDIANS – HISTORICAL BACKGROUND

The Administrative Record (AR) in this case includes all the same letters and historical documents that were submitted to Judge Karlton in the *Ione Band v. Burris* case. There are no historical (pre-1970) documents in the AR or in the *Ione Band v. Burris* Court file that mention an Ione Band tribal government. There are no historical letters addressed to, or from, the Ione Band

as a tribal government. There are no letters referencing the Ione Band in the 19th century. And the historical letters from the first half of the 20th century are all between federal governmental entities or third parties seeking a humane solution for homeless Indians living near Ione.

This absence of evidence of a tribal government for the Ione Band is not surprising given the history of the Indians in California. In fact, this unique non-tribal status of the California Indians in 1934 when the IRA was enacted was apparently the reason that the word "now" was inserted in the phrase "recognized Indian tribe now under Federal jurisdiction" that was interpreted by the Supreme Court in *Carcieri.* Indeed the California Indian issue, and its connection with the IRA were discussed at the 2009 Supreme Court hearing in *Carcieri.* It was noted that, during a hearing before the IRA was enacted, Senator Wheeler and Mr. Collier had a discussion regarding the California Indians. Senator Wheeler expressed concern that California Indians, who were not federally recognized or organized as tribes, would receive the fee-to-trust benefits of the IRA. Commissioner Collier's solution was to add the phrase "recognized tribe now under federal jurisdiction" and that would exclude most California Indians and other Indians who were not federally recognized as tribes before 1934. Scat Tr. at 14-16 and 25-28.

A brief overview of the history of the California Indians will put the Ione Band's situation and the absence of any reference to the Ione Band as a tribe or tribal government in context.

A. Prior to Spanish Contact – Pre-1769.

Although there are different estimates, it is generally accepted that Indians lived in what is now called California three to five thousand years before it was "discovered" or "conquered" by the Spanish. Although they may have segregated themselves into linguistic groups, there is no evidence that Indians in Central California were organized as a tribe like the east coast tribes.

B. The Spanish Empire – 1769 to 1823.

As is well known, after the Spanish occupation of California, the Spanish Franciscans

established the mission system along the west coast of California. In exchange the Spanish and Franciscans managed the property around the Missions "not as owner, but at tutors for their primitive charges."[5] In many ways, the tutelage arrangement resembled a benevolent autocracy. However, as time passed, the relationship began to resemble a master-slave, abusive relationship to the point that many west coast Indians escaped to the Central Valley of California. Others joined the Mexican revolution and helped the fight for independence.

C. The Mexican Republic – 1823 to 1846.

Although the revolution of Mexico against Spain began in 1810, independence was not completely achieved until 1823. One of the charter documents of the Mexican Republic was the Plan of Iguala enacted February 4, 1821. This remarkable document included the following emancipated:

> "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of the monarchy, with the right to be employed in any post, according to their merits and virtues." (Emphasis added.)

Thus all California Indians under the jurisdiction of Mexico, including the Miwok Indians, became full citizens of the Republic of Mexico in 1821. Also in the Mexican Republic, Indians were citizens of Mexico (not a separate tribe) who had the right to own land and, subject to a property qualification, could vote. Tribes that may have existed in 1821 disappeared.

D. United States Occupation and Military Rule – 1846 to 1850.

In 1846, the United States Military occupied portions of the Mexican Republic, including the land that was to become the State of California. The United States Military claimed a paternalistic – ward/guardian – relationship with California Indians. The first military Governor of California was Brigadier-General S.W. Kearny. Kearny appointed John Sutter and Don

[5] See Chauncy Shafter Goodrich, The Legal Status of the California Indian (19)14 Cal. Law Rev. Issue 2 p 83 at 87.

Vallejo, two individuals known to be trusted by the Indians of California, as United States Sub-Agents for Indian Affairs. And, in his instructions to these two new Sub-Agents, Kearny stated:

> "I wish you to explain to the Indians the changes in the administration of public affairs in this territory; that they must now look to the President of the United States as their great father; [and] that he takes care of his children."
>
> Letter from Kearny, Monterey to Sutter, New Helvetia, April 7, 1847.

The three Commissioners were tasked with negotiating treaties with the Indians and to use the largesse of the United States to entice the Indians to sign such treaties. The Commissioners negotiated 18 treaties which were never ratified by the Senate because, despite the expansive statements of some of the signatories, the treaties did not bind most of the California Indians. It is not known how much the three Commissioners knew about the political and social structure of California Indians. They seemed to think California Indians were divided into structural tribal governments like tribes are on the East Coast. In any event, the Commissioners erred in assuming that any named group represented an entire tribe. (See Heizer, Robert F. 1972, The Eighteen Unratified Treaties of 1851-1852.) . The "tribes' which signed the treaties are now known to be separate Indian "villages" and the listed "chiefs" were a head of a village not of a tribe. *Id.*

The Mexican-American War ended in 1848 with the signing of the Treaty of Guadalupe Hildago. Pursuant to that treaty, the United States was required to recognize and protect property rights of all former Mexican citizens which, since 1821, included all of the Indians. (9 Stat. 922 (1848). The Military Occupation of the territory of California continued until 1850 when California became a State.

E. California Statehood – 1850 to the Present.

California became a State on September 9, 1850, on an equal footing with all previously admitted States. And, at that point, all jurisdiction, authority and regulatory control over the lands

and citizens of the State of California were immediately transferred from the United States to California. At the time of Statehood, the Miwok Indians were former citizens of the Republic of Mexico whose property and citizenship rights were guaranteed under the Treaty of Guadalupe Hildago. After California became a State, all Indians became California citizens with the same rights "as any other citizen" of California.

Another legacy of the Plan of Iguala and Indian emancipation and citizenship in the Republic of Mexico is that, at the time of Statehood there were very few, if any, tribes in California. Instead there was a 30 year heritage of individual rights (including land ownership) and citizenship (including voting rights) that were conferred upon everyone, including the California Indians, by the Republic of Mexico in 1821. Under the Treaty of Guadalupe Hidalgo, individual California Indians retained these rights after California became a State

The result of this unique history is that the Ione Band of Miwok Indians, like most California Indians were not members of an organized tribe, much less a federally recognized Indian tribe, in 1934 when the Indian Reorganization Act was enacted. As succinctly stated by Professor A.L. Kroeber in his 1925 book, "The California Indians" on page 27:

> "Tribes did not exist in California in the sense in which that word is properly applicable to the greater part of the North American continent. When the term is used [in relation to California Indians] it must therefore be understood as synonymous with 'ethnic group' rather than denoting a political entity."
>
> (Quoted in *Acosta v. San Diego* 126 Cal. App. 2d 455, 465 (1954).)

The *Acosta* decision outlines the unique history of California Indians and its implications. In that case the Plaintiff, Rosalie Acosta, an Indian residing on the Pala reservation. She was seeking welfare and other assistance from the County of San Diego. The County argued that it did not have an obligation to provide Welfare and other social relief to needy Indians living on federal "reservations" in the County. Their contention was that the County did not have

jurisdiction over the Pala reservation – which was supposedly under the exclusive jurisdiction of the Federal government. The County argued that it would be an illegal gift of public funds to provide welfare and services to Indians outside its jurisdiction. Instead the County claimed that Federal government, as part of its guardian-ward relationship with reservation Indians, is required to provide for needy Indians on a reservation.

The County lost in the trial court. The trial held, in part, that the Pala Band was not recognized as a tribe by the federal government and, consequently, there was no exclusive guardian-ward relationship between the plaintiff and the federal government that precludes the County from providing welfare and services to her like any other citizen. The County appealed. And it is noteworthy that Felix S. Cohen, a known expert on Federal Indian law was one of the amici on the respondents' behalf.

The Court of Appeal affirmed the trial court's decision and rejected the County's contention that California Indian "are wards of the federal government because they had a tribal form of government." The Court held that the County's contention was not supported by the anthropologists like Professor A.L.Kroeber (quoted above). California Indians "are *sui juris,* and are not, in a technical sense, 'wards of the Government'." In the absence of the existence of a tribe or tribal government "[i]t is clear that the ordinary guardian-ward relationship does not exist between the United States and the Indians." Basically, California Indians are not under federal jurisdiction. Instead, Indians in California are under State jurisdiction and "are citizens and residents of the State with the same rights and obligations of other citizens of the State. *Acosta v. San Diego,* 126 Cal. App. 2d at 465.

This history explains why the historical documents in the AR and the *Ione Band v. Burris* Court file do not reference a Ione Band tribal government in 1934 or before because it did not exist as a tribe in 1934. Instead, the Indians at Ione were a group of Indians which infrequently

and inconsistently requested through various individuals assistance from the Federal government; assistance they never received because they were not recognized or under federal jurisdiction. Instead, the Ione Indians were considered by the Federal government to be "non-ward Indians" meaning they were never under federal jurisdiction.

ARGUMENT

1. **Plaintiffs' motion for summary judgment on the first claim should be granted based on this Court's decision in Ione Band v. Burris that conclusively established that the Ione Band was not a recognized Indian tribe under Federal jurisdiction in 1934.**

The Plaintiffs, as required by Local Rule 260, filed Plaintiffs' Statement of Undisputed Facts in Support of its Motion for Summary Judgment which listed as undisputed, the key admissions of the parties and determinations of Judge Karlton in *Ione Band v. Burris* case. (ECF No. .) The Defendants did not did not oppose the Plaintiffs Statement of Undisputed Facts in a separate statement as required by Local Rule 260(b). Consequently, the Defendants are "deemed to have admitted the validity of the facts contained in the [movant's] Statement." *Martinez v. Columbia Sportswear USA Corp.*, 859 F.Supp. 2d 1174, 1178 (ED Cal. 2012) quoting the United States Supreme Court in *Beard v. Banks*, 548 U.S. 521, 527 (2006).

The undisputed facts submitted by the Plaintiffs, and admitted by the Defendants, included several statements of fact with specific citations to documents in the *Ione Band v. Burris* case and the Administrative Record. Those undisputed facts include:

- The primary issue in the 1990 *Ione Band v. Burris* case was whether the Ione Band of Indians was a recognized Indian tribe under Federal jurisdiction. (SUF Nos.1 through 12.)
- The United States has never extended federal recognition to the Ione Band of Miwok Indians as an Indian tribe. (SUF Nos. 7 and 8.)
- The position of the United States is that the Ione Band of Miwok Indians is not, and has never been, a federally recognized tribe. (SUF. Nos. 2, 4, 7, 8, 9, 10, 11, and 12.)

- The position of the Burris faction of the Ione Band is Ione Band of Miwok Indians is not, and has never been a federally recognized tribe. (SUF. Nos. 3 and 5.)
- This Court, in *Ione Band v. Burris*, determined that the Ione Band of Miwok Indians has not and "cannot demonstrate that they are entitled to federal recognition." (SUF No. 13.)

These undisputed facts, admitted by the Defendants are sufficient to grant summary judgment in Plaintiff's favor on their first claim for relief. As summarize above, the majority opinion in *Carcieri* evaluated the plain language of the IRA and confirmed that it applied only to recognized Indian tribes that were under federal jurisdiction in 1934. The undisputed facts in this case establish that the Ione Band was not a recognized Indian tribe under federal jurisdiction in 1934. Thus, plaintiffs are entitled to summary judgment on their first claim for relief.

Furthermore, the binding impact of the *Ione Band v. Burris* decision has already been applied and confirmed in at least two subsequent cases. First, on May 11, 1992, the Regional Director of the BIA declined to review the economic development agreement between the Ione Band and a private development company on the grounds that the Ione Band was not a federally recognized tribe. The Ione Band appealed to the BIA's decision to the Interior Board of Indian Appeals (IBIA). The IBIA upheld the BIA's decision based on Judge Karlton's order granting the United States motion for summary judgment in Ione Band v. Burris. (RJN No. 21.) The IBIA, like Judge Karlton, held that the Ione Band was not a federally recognized tribe. The Ione Band did not challenge the IBIA's decision in Court. It has been more than six years; the IBIA decision is final and binding on the Ione Band and the Federal Defendants.

Second, in 1997, the Ione Band of Miwok Indians initiated another lawsuit against the County of Amador. (*Nicolas Villa, Jr.[Ione Band Chief] et. al v. County of Amador et. al* USDC ED Cal. No. CIV-S-97-0531 DFL JFM.) The Ione Band sought to restrain Amador County from invoking regulatory jurisdiction over their property based on the claim that it was Indian Country.

Judge Levi, denied the Ione Band's request for injunctive relief against Amador County. (RJN No. 22.) Judge Levi, quoted Judge Karlton, and held that, because the Ione Band did not introduce any evidence showing that they are a federally recognized tribe, it was precluded from contesting Amador County's jurisdiction over fee owned land. (RJN No. 22 at 3.) This decision was not appealed and it is binding on the parties.

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

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

The Ione Band of Miwok Indians has litigated and lost their claim of federal recognition three times, twice in this Court and once in the Interior Board of Indian Appeals. They should be estopped from litigating it further here – especially given the admitted undisputed facts listed above. By admitting the undisputed facts, the Defendants have reaffirmed their judicial admissions in *Ione Band v. Burris.* Judge Karlton agreed with these admissions and, at Defendants request, ruled that prior to 1996 the Ione Band of Miwok Indians was not a recognized Indian tribe under federal jurisdiction. Thus, based on the Supreme Court's majority decision in *Carcieri,* the Ione Band is not entitled to a fee-to-trust transfer under the IRA. The ROD approving the fee-to-trust transfer in favor of the Ione Band is void and should be reversed and vacated. Plaintiffs are entitled to summary judgment in their favor on the first claim for relief.

2. Defendants' cross-motion for summary judgment on the first claim should be denied because the AR demonstrates that the Ione Band was a group of landless Indian and was not a tribe or a recognized Indian tribe under federal jurisdiction in 1934.

On August 11, 2014, the Court denied the Plaintiffs Motion for Judgment on the Pleadings on their first claim for relief and directed the Plaintiffs to file a motion for summary judgment instead. (ECF No. 71.) The court considered the summary judgment procedures as being more

conducive to deciding an Administrative Procedures Act (APA) case against the Federal Agencies which requires the Court to limit its review to the Administrative Record (AR). Plaintiffs had argued that the motion for judgment on the pleadings procedures were also appropriate where the Court could take judicial notice of all the pertinent documents already in this Court's *Ione Band v. Burris* file. The Plaintiffs also argued that this case is not just an APA case and is not limited to the AR. It is also a declaratory and injunctive relief case against the Intervenor-Defendant that is not limited to the AR and is not governed by the arbitrary and capricious standard of the APA.

Without specifically addressing Plaintiffs contentions about these non-APA issues, the Court set a briefing schedule. Plaintiff was directed to file their motion for summary judgment within 60 days of the Order – which Plaintiffs did. The Defendants had 60 days to file an opposition and cross-motion on the first claim for relief – which Defendants have done. But the Defendants failed to comply with the summary judgment procedures and did not file a Statement of Undisputed Facts (SUF) in support of their motions. (Fed. R. Civ. Proc. 56 and L.R. 260.) The Federal Defendants claim that it is not usually necessary to file an SUF in an APA case but they did not ask the Court for a waiver or the Plaintiffs for a stipulation waiving the requirement. The Intervenor-Defendant acknowledged that a SUF is usually required in non-APA cases and reserved the right to do so latter. They should be required to do so now.

The Defendants have failed to identify which documents in the AR support their motions for summary judgment. Instead, they claim their motions are supported by the entire AR. But the Plaintiffs and the Court should not be required to scour the 20,000 page AR to determine which evidence contradicts phantom documents not referenced by the Defendants. *Keenan v. Allan,* 91 F.3d 1275,1279 (9th Cir. 1996). The Court is entitled to limit its review to the documents submitted for the purposes of summary judgment and those parts of the record specifically

identified in the motion for summary judgment. *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). This is especially true in this case there are few, if any, documents in the AR which support the Defendants' claim that the Ione Band was a recognized tribe in 1934.

The Defendants' cross-motions for summary judgment should be denied without prejudice to their being refiled. And the Defendants should be directed to refile their motions and, this time, submit Statements of Undisputed Facts (SUF) with their motions. Consistent with the Administrative Procedures Act (APA), the SUF filed by the Federal Defendants should be limited to the AR and should include specific references to the AR. The claims against the Intervenor-Defendant are for declaratory and injunctive relief which is not governed by the APA limitations. So the Intervenor-Defendant's SUF need not be limited to the AR. Their SUF could also include references to the supporting evidence so there is a fair opportunity for Plaintiffs to respond and a basis for the Court to evaluate the contentions of the parties regarding the undisputed facts. With this caveat, Plaintiffs respond to the documents that were referenced in the opposition briefs.

The Defendants do not want to submit an SUF with specific references documents in the AR that support their claims, because there are no documents in the AR that support their contention that the Ione Band was a recognized Indian tribe under Federal jurisdiction in 1934. In fact there are not documents in the AR that describe the Ione Band as a tribe prior to 1972. There are no letters addressed to or from the Ione Band as a tribe or tribal government. The letters between third parties that mention the Ione Indians always describe them as a group of landless Indians in need of assistance. The complete lack of evidence of a tribal government in 1934 is apparent from documents referenced by the Defendants in their opposition briefs.

The Federal Defendants cite four documents from the 20,000 page AR that it contends support their motion for summary judgment and claim that the Ione Band was a "recognized

Indian tribe under Federal jurisdiction" in 1934. (ECF No. 90-1 at 21-23.) First the Federal Defendants cite the 1906 C. E. Kelsey Report entitled "A Special U.S. Study on the Plight of California Indians." (AR 003757-003773.) Although it does not mention the Ione Band, it is an interesting historical report that is consistent with the short history of California Indians outlined above. Kelsey describes California Indians as residing in villages. "Each California village was independent of all others, and there seem to have been little idea of tribal organization." (AR 003759.) Attached to the Kelsey Report (not specifically referenced by Defendants) is his Census of Non-Reservation Californian Indian 1905-1906. (AR 003774-003777.) It lists 36 landless Indians living near Ione. (AR 0003776.) Kelsey does not call them a band or tribe.

The Federal Defendants next reference a Census of Ione and Vicinity Indians" prepare on May 11, 1915, by John Terrell. (AR 000073.) The Federal Defendants do not mention the cover letter by Mr. Terrell describing the reason for the census. (AR 000069-000072.) He describes them as "homeless Indians near Ione in Amador County." Mr. Terrell is writing the Indian Commissioner in Washington D.C. asking for money to buy land for these landless Indians. Mr. Terrell does not describe them as a tribe or a tribal government. The Federal Defendants next cite letter dated May 2, 1916 from the Commissioner to the Secretary which the Federal Defendants claim is "unequivocal" in its determination to buy land "for the Tribe." (AR 000153-000154.) But this is a mischaracterization. The purpose of the letter was to seek permission from the Secretary to purchase land "for the use of 101 homeless California Indians" which Commissioner Hauke "designated as the Ione Band." There is no evidence in the letter, or otherwise, that the "101 homeless California Indians" called themselves the Ione Band or that they had any form of tribal government. On May4, 1916, funding "to purchase land for homeless Indians" was authorized to be taken from the "Fund for Purchase of Lands for Landless Indians in California." (AR 000156.) The Department of Interior authorized the purchase on May 18, 1916. (AR 000160.)

Furthermore the proposed acquisition was not approved by the Secretary. Purchasing land for a group of landless or homeless Indians does not make them a tribal government. The Intervenor-Defendant would have the Court review all Mr. Terrell's correspondence regarding the purchase of land for Ione homeless Indians between 1915 and 1927. (AR 000068- 000420.) But they are all indicate the same thing – Mr. Terrell was trying to acquire land for homeless California Indians near Ione. None of the correspondence refers to the Ione Band as a tribe or tribal government. None of the correspondence to effectuate the land purchase was to or from the Ione Band as a tribal government. The Ione Band was not listed as a cc on any of these letters.

According to the AR, Mr. Terrell tried to complete the purchase of the land for the Ione Indians between 1915 and 1927, (AR 000068-000420.) Then, suddenly after 1927, the AR is almost devoid of any correspondence until the 1970s. It is hard to believe that there was not more correspondence especially during the 1930s when the IRA was passed and implemented. We now know that there was a great deal of activity in the 1930s in the Department of Interior regarding the Ione Indians that was not included or reflected in the AR.

On November 26, 2014, Mr. Kallenbach, Counsel for the Historic Ione Band of Miwok Indians filed a declaration in this case (ECF No. 83) that has led to the discovery of many important Department of Interior documents from the 1930s that the Federal Defendants excluded from the AR. Specifically, Exhibit A attached to Mr. Kallenbach's Declaration, is a list of Boxes of historical documents collected by Professor Slagle on file with the University of California, Davis Special Collections. Many of the Boxes include historic Department of Interior documents regarding the Ione Indians. Plaintiffs have reviewed some of the documents in the UC Davis Slagle collection. Those documents accurately supplement the AR and further demonstrate that the Ione Band was not considered by the Federal Government to be a recognized Indian tribe under federal jurisdiction in 1934.

One letter (copy attached as Exhibit 2) in UC Davis Special Collection, and which should have been in the AR, concisely summarizes the non-tribal status of the Ione Indians in mid-1930s. It is dated August 15, 1933 from the Superintendent of the Sacramento Indian Agency to the Commissioner of Indian Affairs in Washington DC. It was sent by the Superintendent to provide information about the status of 93 homeless Indians near Ione: and describe them as follows

> The situation of this group of [Ione] Indians is similar to that of many others in this Central Valley area. They are classified as non-wards under the rulings of the Comptroller Geneeral because they are not members of any tribe having treaty relations with the Government, they do not live on an Indian reservation or rancheria and none of them have allotments in their own right held in trust by the Government.

There is no dispute that, as was the situation in many locations in California, there were homeless Indians living near Ione in Amador County in the first half of the twentieth century. And there is no dispute that Mr. Terrell tried to acquire land for these homeless Indians between 1915 and 1927. These facts are in the AR. But the homeless Indians were not a recognized Indian tribe in 1934. There is absolutely no evidence in the AR to support the Defendants assertion that the homeless California Indians near Ione were a recognized Indian tribe under federal jurisdiction in 1934 as defined in the IRA and the Supreme Court in *Carcieri.*

Finally the Federal Defendants and Intervenor-Defendant also repeat the unsubstantiated statement made in the ROD claiming that the Ione Band had a treaty or "treaty relations" with the United States in 1851. This is a complete fabrication. The Ione Band did not exist in 1851 and there is no evidence in the record that any Ione Indian signed any treaty with the United States in 1851 or anytime thereafter.. Also, although the Federal Defendants mention "Treaty J" it is not a ratified treaty and is, therefore, meaningless and of no legal effect. In fact, the Attorney for the Ione Band, in an opinion letter in 2004 outlined these concerns and concluded that "village chiefs" who signed the treaties, did not have the authority to bind Ione Indians or sign the treaties on their behalf. (AR 001429-001433.) Defendants cannot claim the Ione Band was represented

in the treaty negotiations while at the same time claiming that the negotiators lacked authority to negotiate on their behalf. The Ione Band did not exist and was not involved in treaty negotiations in 1851. Nor have they ever negotiated a treaty with the United States.

CONCLUSION

Five years ago, in 2009, the Supreme Court held that the fee-to-trust benefits of the IRA are limited to recognized Indian tribes under federal jurisdiction in 1934. *Carcieri v. Salazar, supra.* See also *United States v. John*, 437 U.S. 634, 650 (1978).

Twenty years ago, Judge Karlton, in *Ione Band v. Burris,* decided that the Ione Band was not a recognized Indian tribe under federal jurisdiction in 1934. (AR007763-AR007788). The *Ione Band v. Burris* judgment was endorsed and enforced by the BIA and upheld by the IBIA. (AR000811-AR000813). Furthermore, Judge Karlton's decision was endorsed and applied by Judge Levi of this Court in a related case in 1998. (AR00171-AR001174.)

The contention in the ROD that the Ione Band qualifies for a fee-to-trust transfer under the IRA even though it was not a "recognized Indian tribe under federal jurisdiction" in 1934 is contrary to this Court's decision in *Ione Band v. Burris* and the Supreme Court's decision in *Carcieri*. Therefore the ROD is arbitrary, capricious and contrary to law. It should be vacated and summary judgment should be granted in Plaintiffs' favor on their first claim for relief.

Dated: February 17, 2014

Respectfully Submitted,

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