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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

NO CASINO IN PLYMOUTH, *et al.*, Plaintiffs, v. S.M.R. JEWELL, Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, Federal Defendants IONE BAND OF MIWOK INDIANS, Intervenor-Defendant.	No. 2:12-cv-01748-TLN-CMK FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION/MOTION FOR SUMMARY JUDGMENT Date: March 26, 2015 Time: 2:00 p.m. Courtroom No. 2 Hon. Troy L. Nunley

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Federal Defendants hereby reply to Plaintiffs' combined opposition and reply to Defendants' cross-motions for summary judgment on Plaintiffs' first claim for relief, ECF No. 93-2 (Pls.' Opp'n. & Reply), and to Plaintiffs' opposition to Defendants' motions for summary judgment on Plaintiffs' second through fifth claims for relief, ECF No. 93 (Pls.' Opp'n.).[1] As set forth below, Plaintiffs have not met their burden under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), and the challenged Record of Decision ("ROD") must be upheld.

I. Federal Defendants' Cross-Motion for Summary Judgment on Claim 1 and Motion for Summary Judgment on Claims 2-5 Is Procedurally Proper and Appropriately Grounded in the Administrative Record that Was Before the Agency

Plaintiffs' opposition and reply papers contain numerous mischaracterizations of the procedural posture of this lawsuit, the Court's August 11, 2014 Order establishing the briefing schedule for cross motions for summary judgment, ECF No. 71, and the standard and scope of review under the APA. Plaintiffs' various requests made in conjunction with these mischaracterizations must be rejected.

A. Federal Defendants' Cross-Motion/Motion for Summary Judgment is Consistent with the Court's Order

Plaintiffs erroneously contend that Defendants filed their summary judgment motions "outside of sequence" and in a manner disallowed by the Court. Pls.' Opp'n. at 1. In fact, by filing a combined cross-motion (on Plaintiffs' first claim for relief) and motion (on the balance of their claims), Federal Defendants sought to defend the challenged ROD comprehensively rather than piecemeal, or serially, as they believe best serves the interests of judicial economy.

Plaintiffs appear to believe that they, and not the Court, are entitled to "schedule" the timing and scope of the motions for summary judgment contemplated in the various Joint Status Reports and the Court's Order. They go so far as to protest that a "scheduling sequence [cross motions solely on Plaintiffs' first claim for relief] was "established" by Plaintiffs. Pls.' Opp'n. at 2. Contrary to Plaintiffs' suggestion, the Court did not "instruct" Plaintiffs to move solely on their first claim, nor prohibit Federal Defendants from moving for summary judgment on all claims. Instead, the Order contemplates cross-

[1] For the Court's convenience Federal Defendants have combined their two ten-page reply opportunities into one document.

motions for summary judgment and specifically notes its harmony with the schedule in the related *County of Amador v. Dep't. of Interior et al.* case, Case No. 2:12-cv-01710-TLN-CKD ("County case"), in which cross-motions on *all* claims had been set for briefing. Order 10 n.5, ECF No. 71.[2] Federal Defendants did not "go beyond" the Court's Order nor "conflate issues" and Plaintiffs point to no language in the Order blessing their piecemeal approach or prohibiting Federal Defendants' comprehensive approach. Thus, there is no merit to Plaintiffs' request that the Court "reschedule" Federal Defendants' motion on Plaintiffs' claims two through five. Pls.' Opp'n. at 3, 6. The request should be denied.

Indeed, it is Plaintiffs who persist in failing to prosecute their own case. If Plaintiffs required more time to brief their claims they could have sought concurrence from Defendants and requested an enlargement from the Court. They did not. Instead, they now belatedly protest that they had insufficient time to file a cross-motion on their second through fifth claims, yet fail to make any showing in support of this assertion. Pls.' Opp'n. at 6. If sixty days were insufficient, that circumstance should have been addressed long ago. Plaintiffs should not now be allowed to "reserve the right" to cross-move at some later date on the basis of their unfounded reading of the Court's Order. Such allowance would only unnecessarily protract this matter. *Id*. That request also should be denied.[3]

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[2] Federal Defendants have made clear their intent to defend against all claims at once in the various Joint Status Reports ("JSR") and in their Opposition to Plaintiffs' rejected motion for judgment on the pleadings. *See, e.g.*, Updated JSR, ECF No. 58 at 6-7; Fed. Defs.' Mem. in Opp'n. to Rule 12(c) Mot. at 8-9, ECF No. 64.

[3]As discussed in Federal Defendants' opening brief, Plaintiffs waived the claims set forth in Counts II through V of their First Amended Complaint by not timely moving for summary judgment on those claims as the Court directed. Fed. Defs.' Mem. at 22–23. And, even if Plaintiffs did not waive the claims then, they certainly have done so now by not substantively responding to Federal Defendants' motion on those claims. Plaintiffs only repeat the allegations in their First Amended Complaint and state that they"[did] not have sufficient time to file cross-motions on the second, third, fourth and fifth cross-motions for summary [sic] and related replies before the March 27, 2015 hearing." Pls.' Opp'n. at 6. As discussed above, Plaintiffs could have attempted to obtain more time—or, better yet, could have moved for summary judgment on all claims at the outset pursuant to the Court's scheduling order—but neglected to do so. Plaintiffs purport to "reserve the right" to cross-move on the abandoned claims at a later date. But their intent or desire for a future cross-motion, even if timely and compliant with the Court's scheduling order, does not absolve them of their need to respond to Federal Defendants' motion. Plaintiffs have been afforded every opportunity to prosecute these claims and they have declined to do so. Judgment should be entered in favor of Federal Defendants on Claims II through V.

B. Statements of Undisputed Facts Are Not Required in this APA Record-Review Case

Plaintiffs also fundamentally misperceive the scope and standard of APA record-review and entirely ignore the relevant case law set forth in Federal Defendants' briefing. The case law makes clear that the Court does *not* sit as a fact finder in APA cases, but instead conducts review of the challenged agency decision in an appellate capacity and against the Administrative Record ("AR") that was before the agency. *See* Fed. Defs' Mem at 4, ECF No. 90-1, Fed. Defs.' Mem. In Opp'n. to Rule 12(c). Mot., at 4-7, 9 n.7. The Court's task 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." *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir.1988) (emphasis added); *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985); *Weichers v. Moore*, 2014 WL 1400843 at *7 (E.D. Cal. Apr. 10, 2014). As such, the statement of undisputed facts ("SUF") feature of Federal Rule 56 and Local Rule 260 is discordant, if not in direct tension, with APA review.

Contrary to Plaintiffs' portrait, Federal Defendants alerted the Court and the parties to their position that, while Fed. R. Civ. P. 56 provides an appropriate *mechanism* to resolve APA record-review cases, the Rule's standard of review is not appropriate. Fed. Defs.' Mem. In Opp'n to Rule 12(c) Mot. at 9 n.7; Fed. Defs.' Mem., at 4, n.3. Again, under the APA, a reviewing court does not resolve factual issues but instead determines whether, as a matter of law and based on the administrative record, the agency was permitted "to make the decision it did." *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d. 766, 769 (9th Cir. 1985). *See also Ranchers Cattlemen Action Legal Fund v. U.S. Dep't. of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 868 (E.D. Cal. 2010) (describing summary judgment as a mechanism for determining whether agency action is supported by the administrative record and otherwise consistent with the APA review standard). From the initial stages of this litigation, Federal Defendants stated their intent to lodge and serve the certified AR of the ROD. *See* Parties' JSRs ECF Nos. 15 & 30 at 2-3. It is against that Administrative Record that the Court must evaluate the challenged ROD, not SUFs.

Nonetheless, Plaintiffs not only contend that Federal Defendants "failed to comply with the

summary judgment procedures" by not filing a SUF, but that they should be deemed to have admitted to the validity of the facts in their SUF. Pls.' Opp'n. at 7; Pls.' Opp'n. & Reply at 23, 26.[4] Notably, Plaintiffs cite a *non*-APA case, *Martinez v. Columbia Sportswear USA Corp*., 859 F. Supp. 2d 1174, 1178 (E.D. Cal. 2012), for this erroneous proposition. Federal Defendants have not admitted to anything in connection with Plaintiffs' SUF, including their various legal characterizations proffered as "facts" that are undisputed. *See* Pls.' Opp'n. & Reply at 23-24. Whether Plaintiffs consider various facts to be undisputed and/or "supported by the AR," Pls.' Opp'n. at 8, is simply irrelevant to this Court's review. Instead, consistent with the APA, Federal Defendants lodged and served the AR in which their cross-motion/motion for summary judgment is properly and thoroughly grounded. Plaintiffs' suggestion that Federal Defendants' cross-motion/motion should be denied and refiled with a SUF, must be rejected. Pls.' Opp'n. at 7; Pls.' Opp'n. & Reply at 27.

C. The Administrative Record Is Comprehensive and Federal Defendants' Briefing in Support of the ROD Is Properly Grounded in Its Contents

Plaintiffs make various assertions concerning the AR and the proper "record" now before the Court. These contentions lack merit and should be rejected. First, in an attempt to side-track the Court over unnecessary statements of "undisputed facts," Plaintiffs take aim at the proper backdrop for the Court's review -- the AR-- and contend that Federal Defendants "fail[ ] to identify which documents in the AR support their motion[ ]." Pls.' Opp'n. at 7; Opp'n. & Reply at 26. This bald assertion is belied by Federal Defendants' memorandum in support, *see*, ECF 90-1, which is replete with AR citations. It is Plaintiffs' papers that are lacking in this regard, especially their opposition which references the AR in only one of the fifteen pages of its argument section.

Plaintiffs also ignore that the APA limits the scope of judicial review to the administrative record that was before the agency. The "focal point" for judicial review is "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142

[4] The Federal Rules specifically acknowledge the unique scope of review entailed in challenges brought pursuant to the APA. *See, e.g.*, Fed. R. Civ. P. 26(a)(1) and (B)(i) (exempting "an action for review on an administrative record" from initial disclosures).

(1973). The Ninth Circuit has repeatedly articulated and enforced this "record rule." *See, e.g.*, *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (affirming district court's limitation on the scope of its review to the administrative record and barring discovery); *Animal Def. Council*, 840 F.2d at 1436 ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court") (quoting *Camp*, 411 U.S. at 142)); *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir.2006)("administrative review disfavors consideration of extra-record evidence"); *Black Constr. Corp. v. Immigration and Naturalization Serv.*, 746 F.2d 503, 505 (9th Cir. 1984) ("It is well-settled [in the Ninth Circuit] that judicial review of agency action is limited to a review of the administrative record").

The Court should have before it neither more nor less information than did the agency when it made its decision. *Thompson v. U.S. Dep't. of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The agency, moreover, is not obligated to include every potentially relevant document existing within the agency in an administrative record. *See Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 (D.D.C. 2003) (noting that judicial review would be rendered meaningless by an interpretation of "before the agency" that included any potentially relevant document in the possession of an agency or "in the hands of a third party"). Where, as here, the administrative record has been certified, ECF Nos. 33-1 & 63-1, there is a presumption that the agency properly designated the administrative record. *Cook Inletkeeper v. U.S. E.P.A.*, 400 F. App'x 239, 240 (9th Cir. 2010) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)).

Plaintiffs not only ignore these bed-rock principles of APA record review, they also inappropriately attempt to unilaterally augment the AR. Overcoming this presumption of regularity to supplement the administrative record requires Plaintiffs to demonstrate that augmentation of the record is warranted. *Cal. Coastal Comm'n v. U.S. Dep't of the Navy*, No. 13-1084, 2014 U.S. Dist. LEXIS 1084, at *7-9 (S.D. Cal. Jan. 6, 2014). To do so requires that "concrete evidence" be put forth to show that the record is incomplete. *California v. U.S. Dep't of Labor*, 2014 U.S. Dist. LEXIS 57520, at *12-13 (E.D. Cal. Apr. 24, 2014) (citing *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of*

Eng'rs, 448 F. Supp. 2d 1, 6 (D.D.C. 2006)). Meeting this burden requires more than merely "asserting that the documents are relevant, were before or in front of the [agency] at the time it made its decision, and were inadequately considered." *Pac. Shores*, 448 F. Supp. 2d at 6; *Winnemem Wintu Tribe v. USFS*, 2014 U.S. Dist. LEXIS 101467, *29 (E.D. Cal. July 24, 2014) ("Relevance to a claim does not necessarily correlate with whether a document was 'directly or indirectly considered.'"). Rather, Plaintiffs "must identify reasonable, non-speculative grounds for [their] belief that the documents were considered by the agency and not included in the record." They must also "identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents and data that are 'likely' to exist as a result of other documents that are included in the administrative record." *City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 288 (D.D.C. 2013).

The Parties' Joint Status Reports encapsulated these concepts, *see* ECF Nos. 15 & 30, making clear Federal Defendants' expectation that any party could seek to supplement the AR, provided such amendment was consistent with the APA. Plaintiffs have been in possession of the AR for almost two years, and pursuant to Federal Defendants' proposed schedule included in the Parties' last Joint Status Report, ECF No. 58 at 7, could have raised any issues they had with the AR long ago. They did not.[5] Instead of reviewing the AR in a timely manner and requesting supplementation, they now argue that documents *not* included in the AR and/or *not* contained in the Department's files of the challenged decision, are part of the "record." Pls.' Opp'n. at 8; Pls.' Opp'n. & Reply at 29. Contrary to Plaintiffs' bald assertion, such documents are not part of the certified Administrative Record of this case, they are extra-record and improper. Plaintiffs' bid to put before the Court the entirety of the *Ione Band of Miwok Indians v. Burris*, (E.D. Cal. No. Civ-S-90-0993, closed Sept. 4, 1996), litigation docket, Pls.' Opp'n. at 8; Pls.' Opp'n. & Reply at 10 n.4, and a collection of unknown and unidentified documents allegedly

[5] In that January 21, 2014 JSR Plaintiffs represented that "[i]f the Administrative Record is supplemented or modified in the related County case, by stipulation or court order, Plaintiffs will notify the Court and Defendants in this case whether they agree to the same supplement or modification in this case." ECF No. 58 at 8.

kept in the UC Davis Library, Pls.' Opp'n. at 9; Pls.' Opp'n. & Reply at 29, utterly fail to meet their burden to demonstrate that such documents should be part of the AR and should be rejected.

Likewise, Plaintiffs' personal version of California History, Pls.' Opp'n. & Reply at 17-23, and their SUF, ECF No. 93-1, are similarly outside of the AR and irrelevant. Plaintiffs' assertions that documents alleged to be maintained by an organization outside of the Department, were nonetheless "clearly considered" and "deleted from the record/or AR before it was filed with the Court," Pls.' Opp'n. at 8-9, are logically impossible and extraordinary accusations based upon rank supposition. They should be disregarded. *See Pac. Shores*, 448 F. Supp. 2d at 6. Bald pronouncements unsupported by evidence cannot overcome the AR's presumption of regularity. *California v. U.S. Dep't of Labor*, 2014 U.S. Dist. LEXIS 57520, at *13 (E.D. Cal. Apr. 24, 2014). The ROD must be evaluated against the certified AR that was before the agency.[6]

Rather than grapple with the AR, Plaintiffs first assail it as too voluminous, and then as somehow incomplete. Pls.' Opp'n. at 8-9; Pls.' Opp'n. & Reply at 2 n.2. The AR here consists of over 20,000 pages, but contrary to Plaintiffs' aspersions, those pages are not a "random" collection of documents or a "post-hoc rationalization."[7] Pls.' Opp'n. at 8. This case implicates more than a century of dealings

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[6] Notably, while Plaintiffs claim to know of "a great deal of correspondence in the 1930's and later in the DOI's files," and make the baseless assertion that such documents "were deleted [from] the record and/or AR before it was filed with the Court," Pls.' Opp'n. at 9, they produce only *one* document from this alleged UC Davis collection, ECF No. 93-3 at 9-10. This extra-record document is improperly proffered in connection with their Reply in support of their first claim for relief concerning the Ione Band's eligibility to have the land acquired in trust consistent with the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Notwithstanding that this document is not part of the AR, it is not in any event, the "smoking gun" Plaintiffs paint it to be. To the extent the document concerns the Ione Band, from the face of the document it is evident that the Superintendent was requesting a solution to assist the Indians referenced, which is consistent with the conclusions in the ROD. The letter does not identify the actions under consideration by the Department, nor what "rulings" of the Comptroller General were being referenced. Moreover, whatever views the Comptroller General took before the enactment of the IRA, does not answer the question of whether the Ione Band are "Indians" within the scope of the IRA such that they are entitled to trust acquisitions pursuant to that statute. The letter also says nothing about the land acquisition the Department had already approved for the Ione Band. Accordingly, even if it were properly before this Court, which it is not, the document could not carry Plaintiffs' burden to demonstrate that the ROD was arbitrary, capricious, or contrary to law.

[7] All documents contained in the AR were generated on or before the date of the ROD. That the AR was assembled, transferred onto a CD and certified subsequent to the date of the challenged ROD, does not (Footnote continued)

between the Federal Government and the Ione Band. It should be no surprise that the AR is voluminous. The documents included in the AR have been maintained in the Department's official files and reflect matters that were considered either directly or indirectly by the agency in arriving at its decision. They are not random.

II. Plaintiffs Have Failed to Meet Their Burdens and The ROD Should be Upheld

A. Plaintiffs Have Failed to Establish Standing for Any of Their Claims

Federal Defendants previously set forth Plaintiffs' failure to establish their standing to pursue this challenge. Fed. Defs.' Mem. at 5-7, 27-28. For the reasons below, Plaintiffs' response to Federal Defendants' standing arguments lack merit and must be rejected.

Plaintiffs still have not proffered any evidence of the injury (to themselves or their members), causation, or redressability necessary to establish Article III standing. That fact alone is fatal to their case. "A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)). Such a case must be dismissed. *Id*.

"Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010); accord *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 624 F.3d 1043, 1049 (9th Cir. 2010). *See also Confederated Tribes of the Grand Ronde Cmty. of Or. et al. v. Jewell et al.*, No. 13-849, 2014 U.S. Dist. LEXIS 172111, at *69-75 (D.D.C. Dec. 12, 2014) (holding that tribal plaintiff had not demonstrated a concrete and particularized harm sufficient to establish standing to challenge land-into-trust decision on NEPA grounds). The

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mean that the AR equates to post-hoc rationalization. Agencies keep files and records, they do not necessarily maintain anticipatory, litigation-ready administrative records in connection with all decisionmaking. *See also*, Fed. Defs.' Mem. at 17 n.16.

burden is on the plaintiff to make the necessary showing, *Lujan*, 504 U.S. at 561, and mere conclusory allegations, unsupported by particularized facts, will not suffice, *Summers*, 555 U.S. at 499.

Plaintiffs' arguments further fail because in addition to the constitutional requirements of Article III, courts seek to prevent a plaintiff "from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975)). To that end, "the plaintiff's complaint [must] fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge*, 454 U.S. at 475 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). In cases arising under the APA, this requirement is inherent in the limitations of 5 U.S.C. § 702, which "grants standing to a person 'aggrieved by agency action *within the meaning of a relevant statute*.'" *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153 (citing 5 U.S.C § 702) (emphasis added); *see, e.g., Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939–40 (9th Cir. 2005) (plaintiff alleging purely financial injury not within zone of interests of NEPA).

Contrary to their conclusory contentions in response, Pls.' Opp'n. at 23, mere citation to *Bond v. United States*, 131 S.Ct. 2355 (2011), *Match-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012) ("*Patchak*"), and *Preservation of Los Olivos v. Department of Interior*, 635 F. Supp. 2d 1076 (C.D. Cal. 2008), does not suffice to overcome the requirements discussed above. In *Bond* the Supreme Court found that a criminal defendant challenging the validity of the federal statute under which she was indicted met Article III standing such that in challenging the statute on federalism grounds she sought to vindicate her own constitutional interests. *Bond* 131 S. Ct. at 2363-64. Thus, unlike Plaintiffs here, who seek to vindicate the State of California's federalism interests and not their own, Bond's circumstances (the concrete injury of incarceration, the causation of a conviction and redressability in a potential reversal) left no doubt as to her Article III standing.[8] *Patchak*, on the other

[8] Plaintiffs continue to fail to satisfy both the "close relationship" and "hindrance" requirements (Footnote continued)

hand, only concerned an individual citizen's prudential standing to sue under the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479, based on the harm that a particular individual alleged in connection with the land acquisition at issue in that case. It did not address Article III or organizational standing under the IRA, or standing to bring NEPA, IGRA, or federalism claims at all, which, again, Plaintiffs have failed to establish they have. And lastly, contrary to Plaintiffs' patent mischaracterization of *Preservation of Los Olivos*, that case did not hold that the citizen groups there had standing to challenge a fee-to-trust decision. Pls.' Opp'n. at 23. Rather, than actually confer standing, as Plaintiffs contend, the case held that the Interior Board of Indian Appeals ("IBIA") had failed to sufficiently articulate its reasons for dismissing their administrative appeal on standing grounds and thus directed the IBIA to *reconsider* its standing determination. *See Pres. of Los Olivos*, 635 F. Supp. 2d at 1096 (underscoring that "this Court is not empowered to decide the administrative standing issue *de novo*, regardless of whether the IBIA will likely reach the same result").

As organizations, Plaintiffs must establish their standing to sue based upon particularized criteria.[9] *Summers*, 555 U.S. at 494. Further, "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Plaintiffs seek to allege federalism claims that can only be advanced

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applicable whenever a party seeks to pursue the alleged rights of others. They lack a "close relationship" with the State of California, and the Supreme Court insists on "daunting" barriers or "insurmountable procedural obstacles" to support a finding of hindrance, *Miller v. Albright*, 523 U.S. 420, 449-50 (1998) (O'Connor, J., concurring).

[9] "An association only has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members[.]" *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013). As previously noted, Plaintiffs have not only failed to demonstrate any injury to their members, they have also failed to even allege that the "interests [they] seek to protect are germane to" their purpose. *See* First Amended Complaint ("FAC") ¶¶ 13–14 (identifying the plaintiff groups as non-profits but making no averments about their purposes). By failing to articulate an interest in this lawsuit that is germane to their purposes, Plaintiffs fail to satisfy the threshold requirements of organizational standing, whether on behalf of their members or on their own behalf. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482–83 (9th Cir. 2011); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088-89 (9th Cir. 2010).

by the State of California and, as to their other claims, have not made any attempt to establish injury either to their organizations or their members sufficient to support standing.[10] Even assuming Plaintiffs' assertions in their FAC were supported by competent evidence, they would not be sufficient for standing purposes. Plaintiffs have merely alleged that their members own property or reside near the proposed Project area, not that they will suffer any actual harm from the proposed Project. Plaintiffs discuss potential harms only in terms of impacts to "Plymouth, Amador County and the State of California"—FAC ¶ 92—or to "this small, rural community"—*id*. ¶ 93—and not as impacts to NCIP or CERA, or any of their individual members. As such, they offer only generalized grievances that cannot establish standing to sue. *See Lujan*, 504 U.S. at 575 (holding that a plaintiff must demonstrate a "direct injury" to establish standing, and that "it is not sufficient that he has merely a general interest common to all members of the public.") (quoting *Ex parte Lévitt*, 302 U.S. 633, 634 (1937)).

Plaintiffs have not established injury to support their standing for any of their claims under Article III of the United States Constitution, their prudential standing to assert federalism claims, or how they fall within the zone of interests of IGRA, NEPA, or the IRA. In the absence of these standing requisites, this Court lacks jurisdiction to hear their claims.

B. Plaintiffs' Contention that Acting Assistant Secretary – Indian Affairs Donald E. Laverdure Lacked Authority to Issue the ROD is Meritless and Must be Rejected

Consistent with the Federal Vacancies Reform Act of 1988, Pub. L. No. 105-277, codified at 5 U.S.C. §§ 3345-3349d, as well as Department policies, 200 DM 1; 209 DM 8,[11] Assistant Secretary – Indian Affairs Larry Echo Hawk put in place a succession plan in the event that he should die, resign, or

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[10] Again, Plaintiffs vaguely allege that NCIP "has members who own homes and operate business in and around the areas that are included in the ROD" and the CERA "has members in 22 states including members throughout California and in an [sic] around the areas included in the ROD." FAC ¶¶ 13–14. They add to these inadequate allegations only that "[o]ne CERA board member owns property in California. One board member resides in Amador County near the subject Parcels." *Id*. Plaintiffs' bare allegations of standing are facially insufficient. They have not submitted competent evidence establishing their standing at the summary judgment stage. *Lujan*, 504 U.S. at 561. *See also Ashcroft v. Iqbal*, 556 U.S. 662, 681(2009) ("the allegations [that] are conclusory [are] and not entitled to be assumed true") (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007).

[11] Available at: http://elips.doi.gov/ELIPS/Welcome.aspx.

otherwise become unable to perform the duties of his office.[12] Such succession plan designated the Principal Deputy Assistant Secretary – Indian Affairs as his successor in the event of his resignation. Mr. Echo Hawk resigned from his position as Assistant Secretary – Indian Affairs in April 2012. At the time, Mr. Laverdure held the position of Principal Deputy Assistant Secretary – Indian Affairs and, accordingly, was made Acting Assistant Secretary – Indian Affairs when Mr. Echo Hawk resigned. This routine action was lawful and necessary to continue the operations of the office of the Assistant Secretary – Indian Affairs. Plaintiffs' opinion about what authority should or should not be delegated from the Secretary or the Assistant Secretary – Indian Affairs to other Department officials, Pls.' Opp'n. at 9-12, has no relevance to the Department's actual policies or operations. Plaintiffs do not refute that the Assistant Secretary – Indian Affairs possesses the requisite authority to issue a decision to acquire land in trust for an Indian tribe under the IRA. Mr. Laverdure, as temporary successor to Mr. Echo Hawk, possessed the same authority that Mr. Echo Hawk had when he served as Assistant Secretary for the Department. Thus, Mr. Laverdure had the necessary authority to issue the ROD.

Plaintiffs' characterizations concerning Mr. Echo Hawk's review of the ROD have previously been refuted. *See* Fed. Defs.' Mem. at 12 n.12. Because Mr. Echo Hawk did not render any decision on the fee-to-trust application, Mr. Laverdure could not have "reversed" Mr. Echo Hawk as contended by Plaintiffs. Pls.' Opp'n. at 11. Indeed, the Tribe's fee-to-trust application had been pending since 2005 and the AR demonstrates considerable activity leading up to the issuance of the ROD involving many people. Plaintiffs' further attempt to cast Mr. Laverdure as some sort of rogue actor bears no relationship to the actual course of events over the years leading up to the ROD.[13] It is nothing more than unfounded

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[12] *See*, Press Release, U.S. Department of the Interior, Assistant Secretary of Indian Affairs Larry Echo Hawk to Conclude Successful Tenure at Interior (Apr. 9, 2012) *available at*: http://www.doi.gov/news/pressreleases/Assistant-Secretary-of-Indian-Affairs-Larry-Echo-Hawk-to-Conclude-Successful-Tenure-at-Interior.cfm.

[13] That Mr. Laverdure may have worked on the Ione Band's application to acquire the Parcels in trust in his role as Principal Deputy Assistant Secretary – Indian Affairs is not a basis to invalidate the ROD. Plaintiffs point to a handful of emails that Mr. Laverdure received or sent concerning the application prior to his appointment as Acting Assistant Secretary – Indian Affairs, but do not explain why these emails demonstrate that the ROD should not be upheld. Pls.' Opp'n. at 11. There is no basis to argue that Mr. Laverdure could not issue the ROD in his Acting capacity because he may have worked on the (Footnote continued)

and irrelevant supposition.

C. The ROD's Determination that the Ione Band was Under Federal Jurisdiction in 1934 is Entitled to Deference and Should be Upheld

Consistent with their disregard for the APA standards and scope of review, Plaintiffs persist in their attempt to avoid the Secretary's considered framework for interpreting the question left unanswered by the Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379, 384 (2009), namely how a tribe might demonstrate that it was "under Federal jurisdiction" in 1934. *See Stand Up for Calif.! v. U.S. Dep't. of Interior* 919 F. Supp. 2d 51, 66 (D.D.C. 2013) (noting that "[t]he first and most pressing question left open by *Carcieri* is what it means to have been 'under Federal jurisdiction' in 1934").

Ignoring the actual language of the *Carcieri* decision, the Secretary's framework set forth in the ROD,[14] and the *Stand Up!* and *Grand Ronde* decisions that have reviewed the framework and accorded it deference,[15] Plaintiffs accuse Federal Defendants of flouting the *Carcieri* majority opinion by seeking to acquire 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." Pls.' Opp'n. & Reply at 3.[16] Conspicuously absent from Plaintiffs' allegation is the only statutory phrase the majority opinion actually grappled with, and the only word within that phrase that was actually interpreted: the word "now" in the phrase "now under Federal jurisdiction" in the IRA's first definition of Indian. *Carcieri*, 555 U.S. at 395. Simply put, "now" was interpreted to mean 1934 in *Carcieri*, and the Supreme Court offered no further interpretation of the rest of the definition. Plaintiffs' statements to the contrary, in support of their inadequate efforts to overcome the ROD should be rejected.

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application while it was pending. Such line of argument does not satisfy Plaintiffs' burden here.

[14] As previously noted, this framework has been memorialized in a formal published Solicitor's Opinion found at: http://www.doi.gov/solicitor/opinions/M-37029.pdf.

[15] In upholding a trust acquisition decision for the Cowlitz Indian Tribe, the District Court for the District of Columbia found Interior's *Carcieri* analysis and framework reasonable and entitled to deference. *Grand Ronde* 2014 U.S. Dist. LEXIS 172111, at *29-36. *See also Stand Up for Calif.!*, 919 F. Supp. 2d, 69-70 (D.D.C. 2013) (reaching same conclusion in the context of a motion for preliminary injunction).

[16] Setting aside the illogic of asserting that a named entity – the "Ione Band" – did not exist, Plaintiffs' contentions lack any support and at best, reflect mere disagreement with the ROD's conclusions, which is insufficient for meeting their burden under the APA.

1. Plaintiffs' Misrepresentations about the *Carcieri* Decision Fail to Overcome the Analysis in the ROD

As Federal Defendants previously explained, *Carcieri* did *not*, as contended by Plaintiffs, Pls.' Opp'n. & Reply at 3, "limit the Secretary's authority to take land into trust only for tribes that were federally recognized in 1934." *See* Fed. Defs.' Mem. at 12-14. This same misreading was rejected by the District Court for the District of Columbia. *See Grand Ronde Cmty. of Or.* 2014 U.S. Dist. LEXIS 172111, at *19-20 (noting that *Carcieri* held *only* "that the phrase 'now under Federal jurisdiction' . . . mean tribes recognized in 1934," and that the majority opinion made "*no* attempt to interpret what the word 'recognized' means") (emphasis added). In furtherance of this diversionary tactic, Plaintiffs set forth at great length their readings of the various opinions of the Justices in *Carcieri*. Pls.' Opp'n. & Reply at 4-9. These opinions speak for themselves and Plaintiffs' interpretations of them are not at issue.[17] Plaintiffs must mischaracterize the majority opinion in order to mount their claim that, post-*Carcieri*, the Secretary invalidly focused on interpreting "under Federal jurisdiction" – the very words the United States District Court for the District of Columbia found were *not* interpreted by the Supreme Court. *Stand Up!*, 919 F. Supp. 2d at 66. Despite the lack of support for their position, Plaintiffs pronounce that the Supreme Court "held" that a tribe "had to be federally recognized in 1934" to be eligible for the IRA's land acquisition provisions. Pls.' Opp'n. & Reply at 5. They are wrong. The majority opinion only held that the word "now" in the phrase "now under Federal jurisdiction" meant 1934.

2. The Secretary's Interpretation of "Under Federal Jurisdiction" Should be Upheld

The Supreme Court in *Carcieri* did not elaborate how an "under Federal jurisdiction" showing

[17] To this end, Plaintiffs discuss, Pls.' Opp'n. & Reply at 6, Justice Breyer's reference to a "list of 258 Tribes" compiled by the Department "following the [IRA's] enactment." *Carcieri*, 555 U.S. at 398. The ROD assumed, AR010106, that such list was a reference to a report prepared by DOI official Theodore Haas in 1947 entitled "Ten Years of Tribal Government Under I.R.A." *See* SuppAR020759. As previously argued in the related County case, even though the Ione Band was not included in the list of reservations where the Secretary, pursuant to Section 18 of the IRA, held elections to provide the opportunity to opt out of the IRA, the Ione Band was still under federal jurisdiction in 1934. *See* Fed Defs.' Mem. at 24-25, ECF No. 84-1; Fed Defs.' Reply at 20, ECF No. 86. To the extent Plaintiffs reference some other list, their contention that, "for the record, the Ione Band . . . was not on the list" is unsupported by any evidence in the AR and must be rejected.

might be demonstrated, and so the Department, in order for the Secretary to carry out her delegated responsibilities under the IRA, had to apply its expertise to the question. AR010105. *See also* Fed. Defs.' Mem. at 7-10. The resulting interpretation was reasonable and is therefore entitled to deference. *Grand Ronde Cmty. of Or.*, 2014 U.S. Dist. LEXIS 172111, at *36.

Plaintiffs challenge the source of the Secretary's two-part framework for determining whether a group was under Federal jurisdiction, purporting to know that it derived from Justice Souter's dissent[18] rather than Justice Breyer's concurrence. Pls.' Opp'n. & Reply at 7. Federal Defendants note that the *Grand Ronde* court has already found that it was reasonable for the Department to look to the Breyer concurring opinion. *Grand Ronde*, 2014 U.S. Dist. LEXIS 172111, at *20-21.

In any event, the Secretary's conclusion that "recognized Indian tribe" has a meaning distinct from "under Federal jurisdiction," is reasonably based upon consideration of Justice Breyer's concurring opinion. Justice Breyer observed that there is no temporal requirement for recognition, and that a tribe may have been under federal jurisdiction even if the government was not clear on the point at the time. *Carcieri*, 555 U.S. at 397-98; AR010106.[19] While the IRA "imposes no time limit upon recognition," *Carcieri*, 555 U.S. at 398, the *Carcieri* decision did not evaluate what it meant to be "under Federal jurisdiction" in 1934; accordingly, that undertaking was left to the Secretary. Apart from making unsupported assertions that federal recognition in 1934 is required by the *Carcieri* decision, Plaintiffs ignore the Secretary's interpretation, which has been accorded deference in two cases. Plaintiffs' mischaracterization concerning the *Carcieri* decision is not enough to meet their burden under the APA to demonstrate that the Secretary's two-part framework is not reasoned and entitled to deference.

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[18] Justice Souter in fact concurred in part, and dissented in part. *Carcieri*, 555 U.S. at 400-401.

[19] Plaintiffs quote from the *Carcieri* oral argument, Pls.' Opp'n & Reply at 5, to bolster their argument that the phrases "recognized Indian tribe" and "under Federal jurisdiction" in 25 U.S.C. § 479 are "one and the same," but such support is fleeting. First, regardless of the Department's prior position, the *Carcieri* decision concluded that a temporal restriction applied to the phrase "under Federal jurisdiction," but not to the phrase "recognized Indian tribe," demonstrating the distinction between them. 555 U.S. at 398 ("The statute, after all, imposes no time limit upon recognition."). Second, despite the limited persuasive weight to be extended to statements in oral argument, notably absent from Plaintiffs' memorandum is mention of Justice Scalia's view that the two phrases were distinct. *See* Transcript of Oral Argument at 46-47, *Carcieri*, 555 U.S. 379 (2009) (No. 07-526).

3. The ROD's Conclusion that the Ione Band was Under Federal Jurisdiction in 1934 Should be Upheld

As explained in prior briefing, Fed. Defs.' Mem. at 10-12, the AR supports the ROD's conclusion that the Ione Band was under federal jurisdiction prior to 1934, and that this status remained intact in 1934. The AR demonstrates that a purchase of land as a collective asset for the Band was approved at the highest levels of the Interior Department prior to 1934. Indeed, the May 2, 1916 letter of the Acting Assistant Commissioner to the Secretary, expressed in unequivocal terms the intent to purchase a 40-acre tract for the "*Ione Band*," which tract is described as "the ancient village site of these Indians." AR00153-54. On May 4, 1916, the Chief of Interior's Land Division requested approval to expend $2,000 of Interior appropriations to purchase land for the "*Ione Band*." AR00156. The May 18, 1916 "Authorization" document executed by the Assistant Secretary specifically approved and designated the land purchase for the "*Ione Band*," not mere miscellaneous and unaffiliated homeless Indians as characterized by Plaintiffs. AR000160. The February 6, 1992 research report prepared by Mr. Lawson, AR000784, discusses the documentary evidence of the government's efforts between 1915 and 1935 to purchase land for the Ione Band. AR000783. Plaintiffs further ignore that the AR includes documentation of Captain Charlie Maximo as having been "recently elected Chief of the *Band*." AR000073; SAR020905. The Department's efforts to acquire trust lands for the Ione Band persisted for two decades, through and after 1934, but due to title issues that prevented the acquisition, the decision ultimately could not be implemented. AR000506-07.

Plaintiffs attempt, anemically, to take on the analysis in the ROD and the historical documents in the AR supporting the determination that the Ione Band was under Federal jurisdiction in 1934. Pls.' Opp'n. & Reply at 27-30. They do so by partially addressing select documents, and either misconstruing them or simply disagreeing with their significance. Their analysis of these select documents is built on their mischaracterization of the *Carcieri* decision. As with their attempt to import an interpretation of "recognized" into the decision, Plaintiffs appear to be importing their own view of what a "tribe" was prior to the IRA. The *Carcieri* decision did not interpret this term either, and as much as Plaintiffs stress that AR documents reveal that the Ione were "homeless" or "landless," such conditions do not prove that they were not a tribe. Nor do Plaintiffs refute key historical documents reflecting that the Band was a

recognized tribe as understood at the time, even though the *Carcieri* decision does not require such demonstration. *See* Fed Defs.' Mem. at 13-14; Fed Defs.' Mem. at 25-26, ECF No. 84-1; Fed Defs.' Reply at 15-17, ECF No. 86. Ignoring, misconstruing, or simply disagreeing with the evidence in the AR does not result in the invalidation of that evidence.

Hence, Plaintiffs' claim that "[t]here is absolutely no evidence in the AR to support 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*," not only repeats their misstatement of the *Carcieri* holding as it imports "recognized Indian tribe" into what was addressed by the Supreme Court, but disregards critical AR documents that support the *relevant*, "now [1934] under Federal jurisdiction" inquiry. Plaintiffs' mere disagreement with the Secretary concerning the significance of certain historical facts and documents fails to establish that the Secretary's determination is arbitrary.[20] Although Plaintiffs may wish otherwise, the Court does not substitute its or the Plaintiffs' judgment for that of the agency in an APA case. Plaintiffs have failed to meet their heavy burden of establishing that the ROD's conclusion that the Secretary possesses the requisite authority to acquire land in trust for the Ione Band pursuant to the IRA was arbitrary, capricious, or otherwise contrary to law. The ROD should be upheld.

D. The *Burris* Litigation Did Not Concern the "Under Federal Jurisdiction" Inquiry

As Federal Defendants previously explained, until Assistant Secretary Deer's 1994 confirmation of the Ione Band's federally recognized status, the Department took the position that to secure such confirmation, the Band had to proceed through the regulatory process set forth at 25 C.F.R. Part 83. That erroneous position, corrected by Deer, was pressed in the early stages of the *Ione Band of Miwok Indians v. Burris*, (E.D. Cal. No. CIV-S-90-0993, closed Sept. 4, 1996) ("*Burris* litigation"), and constituted a period of *de facto* administrative termination for purposes of the Indian Gaming Regulatory

[20] Plaintiffs' conclusory and unsubstantiated disagreements with the ROD's reference to the Band having a connection to signatories to Treaty J, AR010107, likewise does meet their burden. Despite Plaintiffs contention to the contrary, Pls. Reply at 30, the ROD does not state that Treaty J was a ratified treaty. Instead, it simply reports that it was one of "18 unratified treaties negotiated by the Federal Government with the California Indians in the mid-1800s." AR010107.

Act's ("IGRA") restored lands exception. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). The *Burris* related documents contained in the AR reflect both the period of administrative error and its correction as regards the Band's recognized status. Plaintiffs' address to the *Burris* litigation (and improper effort to unilaterally deluge the Court with extra-record documents from it) focuses entirely on the period of error (*de facto* administrative termination) with no acknowledgment, whatsoever, of the Department's corrective restoration of the Band's prior recognized status. AR001056; 60 Fed. Reg. 9250, 9252 (Feb. 16, 1995) (including the Ione Band on the *Federal Register* list of federally recognized Indian tribes).

No matter how much Plaintiffs cite to and quote from various *Burris* pleadings, they cannot transform that litigation into something it was not. Nonetheless, Plaintiffs press their mischaracterization of the *Burris* litigation to marry it up with their mischaracterization of the *Carcieri* decision as having interpreted and applied a temporal requirement on the term "recognized." By their logic, *Burris* settled that the Band was not federally recognized in 1934 (which it did not), *ergo*, the Band could not have been under Federal jurisdiction in 1934. Two mischaracterizations do not make a right, they just compound the wrongs: the IRA as interpreted by the Supreme Court in *Carcieri* does not require federal recognition in 1934, and neither the *Burris* litigation nor the *Carcieri* decision evaluated the question of the meaning of "under Federal jurisdiction" in 1934.

Plaintiffs' misrepresentation of the issues, pleadings, and Court orders in the *Burris* litigation cannot overcome this reality, and cannot carry Plaintiffs' heavy burden.[21] And, as set forth above, contrary to Plaintiffs' fanciful notions in disregard of APA record-review, Federal Defendants have in no way "admitted" to the contentions that Plaintiffs have packaged as "undisputed facts." Pls.' Opp'n & Reply at 23, 25. No matter how many pages Plaintiffs devote to cataloguing phases of the *Burris* litigation[22] (they devote eight), the "primary issue" in the *Burris* litigation was not "whether the Ione

[21] Particularly egregious are Plaintiffs' persistent misrepresentations of the findings of Magistrate Judge Nowinski and orders of Judge Karlton and Judge Levi. *See* Fed. Defs.' Mem. in Opp'n. to Rule 12(c) Mot., at 12 n.11; Fed. Defs.' Mem., at 18-19, 21-22 (explaining these mischaracterizations repeated in Pls.' Opp'n. & Reply, at 17, 24-25). They are a disservice to this Court.

[22] That is, all but the phase in which the Department submitted its amicus brief explaining that in 1994 Assistant Secretary Deer had corrected the Department's error in not including the Ione Band on the (Footnote continued)

Band was a recognized Indian tribe under Federal jurisdiction." *Id.* at 23. Rather, the litigation sought to have the court direct the Department to include the Ione Band on the *Federal Register* list of federally recognized Indian tribes, and the Department, in defense, insisted that the Band had to proceed through the Part 83 process (i.e. exhaust its administrative remedies) to accomplish that end. By 1995, however, the Department had formally notified the *Burris* court of its correction of that erroneous position in an *amicus curiae* brief to that court. AR001133-1140.

Federal Defendants previously refuted, point by point, all of Plaintiffs' *Burris* based arguments (and material omissions) in their prior briefs, *see* Fed. Defs.' Mem. in Opp'n. to Rule 12(c) Mot., at 11-13; Fed. Defs.' Mem., at 15-22, and will not retread that ground here. Notably, Plaintiffs do not respond at all to Federal Defendants' counter to Plaintiffs' assertion that estoppel should apply against the Department. Federal Defendants are not estopped by the *Burris* litigation, nor is that litigation relevant to the ROD's determination that the Ione Band was under Federal jurisdiction in 1934. Plaintiffs' reliance on *Burris* is misplaced and the ROD should be upheld.

E. Plaintiffs Fail to Respond to Federal Defendants' Motion for Summary Judgment on Claims 2-5

Plaintiffs' opposition to Federal Defendants' motion for summary judgment on Plaintiffs' second through fifth claims is almost entirely a reprise of the allegations in their First Amended Complaint. They do not grapple at all with Federal Defendants' responses to those claims, or with Federal Defendants' citation to the AR in support of their motion. *See* Fed. Defs.' Mem. at 23-44.

In connection with Federal Defendants' arguments confirming the Secretary's compliance with 25 C.F.R. Part 151, Plaintiffs assert the Secretary was required to furnish title evidence for "public review and comment," Pls.' Opp'n. at 13. There is simply no such statutory or regulatory requirement. Title examination prior to the conveyance of the subject property into trust is a statutory requirement, 40 U.S.C. § 3111, for which the United States Department of Justice has issued guidelines.[23] Title

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Secretary's first, 1979 list of federally recognized tribes, by reaffirming the Bands' prior recognition and including the Band on the official Federal Register list of recognized tribes. AR001133-1140.

[23] *See* Department of Justice Title Standards (2001) available at: http://www.justice.gov/enrd/ENRD_Assets/Title_Standards_2001_508.pdf.

examination is undertaken to protect the United States, as landowner, against liability that could arise from accepting title to property burdened by encumbrances or other defects.

Contrary to Plaintiffs' apparent misunderstanding, 25 C.F.R. § 151.13 does not require that the title examination work be completed at the time of the decision.[24] Instead, the title examination process necessarily continues after the decision is issued, because the Department reviews all pertinent title information available at the time of the actual conveyance of the property into trust. Notably, while Plaintiffs have not established that they have standing to challenge the ROD under § 151.13, they ignore the documentation in the AR demonstrating that title evidence was examined prior to the issuance of the decision. *See*, *e.g.*, AR009989 (Preliminary Title Opinion). Plaintiffs' confused argument concerning § 151.13 should be rejected.

As to their third through fifth claims, Plaintiffs merely repeat the allegations made in their First Amended Complaint. Those allegations have been thoroughly addressed and refuted in Federal Defendants' memorandum in support of cross-motion/motion for summary judgment, and Federal Defendants need not repeat those refutations here. *See* Fed. Defs.' Mem. at 28-44.

CONCLUSION

Plaintiffs have entirely failed to establish their standing to challenge the ROD, and their arguments in support of their claims falls far short of what is required for the Court to conclude that the ROD was arbitrary, capricious, or otherwise contrary to law under the APA. Here, the Secretary complied with all applicable statutory and regulatory requirements when issuing the ROD. She reasonably concluded that she had authority to acquire the Parcels in trust for the Ione Band, and that the Parcels would be gaming-eligible under IGRA once acquired in trust. Both determinations are supported by the AR and entitled to deference. Moreover, the Secretary complied with 25 C.F.R. Part 151 and NEPA, and she did not offend federalism principles in the process. The Court should deny Plaintiffs' Motion for Summary Judgment, and grant Federal Defendants' Cross-Motion/Motion for Summary Judgment on all claims.

[24] Accordingly, Plaintiffs' contention that the *Federal Register* notice announcing the issuance of the ROD, 77 Fed. Reg. 31,871 (May 30, 2012) was "premature," Pls.' Opp'n. at 13, lacks merit.

Respectfully submitted,

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