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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO CASINO IN PLYMOUTH and CITIZENS EQUAL RIGHTS ALLIANCE, Plaintiff(s), vs. S.M.R. JEWELL, in her official capacity as Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendant(s), vs. IONE BAND OF MIWOK INDIANS, Intervenor-Defendant.	Case No. 2:12-cv-01748-TLN-CMK **INTERVENOR-DEFENDANT IONE BAND OF MIWOK INDIANS' REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT** Date: March 26, 2015 Time: 2:00 p.m. Place: Courtroom No. 2 Judge: Honorable Troy L. Nunley

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I. INTRODUCTION

As with their previous briefs, Plaintiffs' Reply and Opposition briefing continues to misrepresent applicable case law and misstate facts. Notwithstanding Plaintiffs' tactics, the Tribe's arguments and cited documents in the administrative record ("AR") demonstrate that DOI's determinations in the ROD should be upheld as lawful and rationally based on that AR.

II. SUBSTANTIVE ARGUMENTS

a. *Carcieri* Held Only That a Tribe Must Have Been Under Federal Jurisdiction in 1934 to Benefit from the IRA, Not That It Must Have Been a "Recognized Indian Tribe" at that Time, and the ROD Rationally and Correctly Determined That Ione Satisfied That Requirement

Plaintiffs continue to misrepresent the Supreme Court's holding in *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058 (2009) ("*Carcieri*"). In interpreting the IRA's definition of "Indian," the Supreme Court stated (in the part of the opinion that Plaintiffs' Reply omits (Pls. Reply 4:13-21)):[1]

> We agree with petitioners and hold that, for purposes of § 479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land *to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934*. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust. *Id.* at 382-383, 1061 (italics added).

There are no other holdings in the case. Thus, the only requirement imposed by *Carcieri* for a tribe to qualify to have land taken into trust is that it have been "under Federal jurisdiction" in 1934. *Carcieri* did not hold that a tribe had to be "recognized" in 1934 to qualify for a trust acquisition.

Nonetheless, Plaintiffs repeatedly assert that *Carcieri* held that a tribe must have been federally *recognized* in 1934 in order for § 479 to apply. *See, e.g.*, Pls. Reply 2:9-11; 5:20-23. Based on this assertion, the Reply next asserts that *Carcieri* precludes the acquisition of trust land

[1] **The following short-hand citations are used in this brief:** (i) Plaintiffs' Notice of Motion and Motion for Summary Judgment (ECF 72, "**Plaintiffs' Notice**"); (ii) Plaintiffs Memorandum of Points and Authorities in Support of Motion for Summary Judgment (ECF 72-1, "**Plaintiffs' Memo**", cited as "**Pls. Memo**", and collectively with Plaintiffs Notice, "**Plaintiffs' MSJ**"); (iii) Intervenor-Defendant Ione Band of Miwok Indians' Notice of Motion and Cross-Motion for Summary Judgment (ECF 91, "**Tribe's Notice**"); (iv) Intervenor-Defendant's Memorandum of Points & Authorities in Support of Combined Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment (ECF 91-1, "**Tribe's Memo**", collectively with Tribe's Notice, "**Tribe's MSJ**"); (v) Plaintiffs' Reply Memorandum of Points and Authorities in Support of Motion for Summary Judgment on First Claim for Relief (ECF 93-2, "**Plaintiffs' Reply**", cited as "**Pls. Reply"**); (vi) Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment on Plaintiffs' Second, Third, Fourth and Fifth Claims for Relief (ECF 93, "**Plaintiffs' Opposition**", cited as "**Pls. Opp.**"); and First Amended Complaint for Declaratory and Injunctive Relief (ECF 10, "**FAC**").

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for Ione because the Tribe allegedly was not federally recognized in 1934. *See, e.g.*, Pls. Reply 2:12-14; 4:22-26. Both assertions are wrong.

The rationale Plaintiffs offer for suggesting that a tribe needed to be recognized in 1934 in order to qualify as an IRA "tribe" is based on the erroneous notion that "recognition" and being "under Federal jurisdiction" are one and the same. Pls. Reply 5:8-9. But recent case law refutes this contention, as it does the erroneous conclusion – that Ione had to prove that it was "recognized" in 1934 in order to have land taken into trust – that Plaintiffs draw from it. *See Confederated Tribes of the Grand Ronde Comty. of Or. v. Jewell*, No. 13-849 (BJR), 2014 U.S. Dist. LEXIS 172111 at *17-*21, *28-*29 (D.D.C. Dec. 12, 2014); *Stand Up for California! v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 66-70 (D.D.C. 2013). These cases hold that "recognized" and "under Federal jurisdiction" are distinct and cannot be read together to require pre-1934 tribal recognition.

Next, Plaintiffs wrongly argue that the *Carcieri* opinions written by Justices Thomas, Breyer, and Souter support the notion that the IRA requires that a tribe have been *recognized* in 1934 in order to qualify to have land taken into trust. Pls. Reply 6:5-9:20. First, they contend that Justice Thomas's majority opinion determined that a tribe being "recognized" and being "under Federal jurisdiction" are "one in [sic] the same." Pls. Reply 7:2-3. But Plaintiffs give no citations to *Carcieri* for this assertion, because none exists. The *Carcieri* majority did not discuss the term "recognized" or explain what it means for a tribe to be "under Federal jurisdiction," and it certainly did not adopt the position that these are equivalent concepts.

Plaintiffs further assert that Justice Breyer's concurring opinion made the following two determinations: (i) a tribe being "recognized" is equivalent to it being "under Federal jurisdiction" for IRA purposes and (ii) a tribe must have been federally recognized in 1934 to qualify for IRA benefits. Pls. Reply 6:9-10, 6:26-7:4. But Justice Breyer said neither. In fact, Justice Breyer concurred in the majority opinion because he agreed (for different reasons) that the temporal constraint of "now" as meaning 1934 applied only to "under Federal jurisdiction" (*Carcieri* at 397, 1069) and because he found nothing in the case briefs to suggest that the Narragansett Tribe could satisfy the 1934 federal jurisdiction requirement (*Carcieri* at 399-400, 1070-1071). But in contrast to the majority opinion that omitted any discussion of whether "recognized" and "under Federal

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jurisdiction" might be distinguishable, Justice Breyer expressly noted a distinction. He determined that unlike the temporal constraint which applied to a tribe being "under Federal jurisdiction," the IRA "imposes no time limit upon recognition."[2] *Carcieri* at 398, 1070.

Based on this distinction between the concepts of recognition and being under federal jurisdiction, Justice Breyer noted that there are some tribes who were under federal jurisdiction as of 1934, but who may have been recognized later. By way of example, Justice Breyer mentioned tribes that were wrongly omitted from the list of 258 tribes "covered by the Act," as compiled by DOI shortly after enactment of the IRA. *Carcieri* at 397-398, 1069-1070. Justice Breyer noted that some of these omitted tribes were recognized after 1934 on grounds that would have justified recognition in 1934, even though no such earlier recognition took place, and that later recognition based on earlier grounds could be sufficient to demonstrate that a tribe was "under Federal jurisdiction" in 1934. *Id*. In making this point, Justice Breyer never said he deemed "recognized" and "under Federal jurisdiction" to be equivalent or that both were required in 1934, as Plaintiffs argue; rather, he used distinctive language to point out that subsequent recognition based on earlier grounds was "sufficient to show" or "reflects" a tribe being under earlier Federal jurisdiction. *Carcieri* at 398-399, 1070. In other words, he maintained a distinction between recognition and under federal jurisdiction.

Next, Plaintiffs allege that Justice Souter (joined by Justice Ginsberg) was the only justice who made a distinction between "recognized" and "under Federal jurisdiction," and that this was the basis for his dissent. Pls. Reply 7:10-17. That is simply not true. Justice Breyer also distinguished between "recognized" and "under Federal jurisdiction," and Souter explicitly agreed: "As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time." *Carcieri* at 400, 1071. Thus, contrary to Plaintiffs' arguments, both Breyer and Souter believe there is a distinction between "recognized" and "under

[2] In this regard, Plaintiffs' assertion (Pls. Reply 9:1-4) that Justice Breyer understood § 479 to be the near-equivalent of the dicta in *United States v. John*, 437 U.S. 634, 650, 98 S.Ct. 2541, 2549 (1978) ("any recognized [in 1934] tribe now under Federal jurisdiction") is unfounded.

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Federal jurisdiction," with the former having no temporal constraints and the latter being confined to 1934.

Plaintiffs also wrongly assert that the phrase "recognized Indian tribe" is not ambiguous as to whether a tribe has to have been recognized as of 1934, and that the temporal requirement is manifest in the phrase itself. Pls. Reply 5:24-6:3. Plaintiffs assert this notwithstanding case law that holds the phrase "recognized Indian tribe" is ambiguous and that the Secretary of the Interior's interpretation of this term (made applicable in Ione's ROD) – under which the phrase "recognized Indian tribe" requires a showing that the tribe was recognized at some point in time, either before or after 1934 – is due deference. *Grand Ronde*, 2014 U.S. Dist. LEXIS 172111 at *19-*21, *28-*49; *Stand Up for California!*, 919 F. Supp. 2d at 69-70. *Carcieri* does not support the notion that "recognized Indian tribe" is unambiguous because that case only deemed the word "now" to be unambiguous; the Court made no such determinations as to any other word or phrase in the IRA. Tribe's Memo 17:18-18:7. Thus, the phrase "recognized Indian tribe" is ambiguous and the Secretary's interpretation of the phrase as not imposing a temporal limitation is due deference.

In short, there is no requirement in the IRA that a tribe demonstrate that it was recognized in 1934. However, even if the IRA did include such a requirement, Ione would have satisfied it. Courts have determined that in the early 20th century, federal law used "recognized" as applied to tribes in the "cognitive" or "quasi-anthropological" sense, in which the government "simply knew or realized that an Indian tribe existed"; only in the 1970s was the phrase imbued with a "more formal or 'jurisdictional'" meaning, to refer to a tribe as a governmental entity, comprised of Indians, that has a unique relationship with the United States. *Grand Ronde*, 2014 U.S. Dist. LEXIS 172111 at *17, *28; *see also Stand Up for California!*, 919 F. Supp. 2d at 69-70 (finding the IRA used "recognized" in the cognitive sense); Federal Defendants' Mem. in Sup. of Cross-Motion/MSJ and in Opp. to Plaintiffs' MSJ, ECF 90-1, 13:15-14:5 (applying analysis to Ione). That Ione was recognized in at least the cognitive sense in 1934 is evident from the federal government's dealings with the Tribe. *See* Tribe's Memo 19:11-25 and AR cites therein.

In addition, Justice Breyer's concurrence explained that it is possible for a tribe to have been "under Federal jurisdiction" in 1934 but not "recognized" at that time, and gave three non-

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exhaustive examples of how and why that might have occurred. *Carcieri* at 397-398, 1069-1070. Plaintiffs muddle Breyer's opinion by saying he "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." Pls. Reply 6:10-13 (underline added). And they further confuse matters when they characterize Breyer's examples as illustrative of "how tribe [sic] might be added to the 1934 list of 258 federally recognized tribes." Pls. Reply 6:19-22 (underline added). But the list of 258 tribes included tribes that were "covered by the Act," i.e., were under federal jurisdiction in 1934 and recognized before or after that time (*Carcieri* at 397-398, 1069-1070), and Breyer's examples demonstrate that tribes that were "under federal jurisdiction" in 1934 but not yet "recognized" at that time (and hence not on the list), could nonetheless qualify for land in trust. Plaintiffs' assertion that Ione's absence from the list means that Ione could never satisfy one of Breyer's examples (Pls. Reply 6:9-25) is thus based on an erroneous understanding of what the list includes.

Although not required by the IRA, the AR clearly demonstrates that Ione was a "recognized Indian tribe" in 1934 as that phrase is used in the IRA. *See* Tribe's Memo 19:15-24; *see also Grand Ronde*, 2014 U.S. Dist. LEXIS 172111 at *17-*18; *Stand Up for California!* 919 F. Supp. 2d at 69-70. The AR and case law also demonstrate that Ione would qualify under one of Breyer's examples as having a tribal-federal jurisdictional relationship in 1934 either by virtue of a pre-1934 congressional appropriation (AR 160, 500; *Stand Up for California!*, 919 F. Supp. 2d at 68) or as a successor in interest to a treaty negotiated with the U.S. (AR10107; *Stand Up for California!*, 919 F. Supp. 2d at 69 n.22). And even if these particular examples did not cover Ione, Ione would still qualify because Breyer's examples were not exhaustive of ways to demonstrate a jurisdictional relationship between a tribe and the federal government in 1934. *Carcieri* at 399, 1070. The AR demonstrates "a relationship … that could be described as jurisdictional" existing between Ione and the federal government before and in 1934, and the ROD rightfully determined so. *Id.* (quoting Breyer); AR10106-112; *see also* Tribe's Memo 19:15-24 and AR cites therein.

b. The Tribe's MSJ Should be Granted Because Plaintiffs Failed to Respond to or Counter the Tribe's Arguments as to Why Preclusion Doctrines Are Inapplicable

As they did in previous briefs, Plaintiffs again misleadingly assert that an order issued in the

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Burris litigation by Judge Karlton in 1992 (AR7763-88) is germane to this case. Instead of responding to the Tribe's and the Federal Defendants' arguments on this matter, Plaintiffs merely reiterate the arguments made in their MSJ and belabor the issue by repeating over several pages their (inaccurate) account of the *Burris* litigation and documents filed therein. Pls. Reply 10:1-17:22.[3] To the extent not argued below, the Tribe incorporates by this reference the arguments made in the Tribe's MSJ (ECF 91-1, 20-26) that nothing in the *Burris* litigation has preclusive effect, whether by collateral estoppel, judicial admission, or otherwise, as to the Tribe or the Federal Defendants in this case.

Plaintiffs' reliance on Judge Karlton's order (Pls. Reply 16:2-22) is inappropriate for several reasons. First, in that order Judge Karlton did not rule on the question of whether the federal government had ever dealt with, conferred rights upon, or otherwise been cognizant of the existence of the Tribe in 1934. He questioned only whether the federal government had ever formally conferred tribal recognition status on Ione. That inquiry has no bearing on our case, however, because there is no requirement in the IRA (nor could there be) that Ione demonstrate that it had formal recognized status in 1934. If the IRA requires a showing of formal status at all, such a showing is only required as of the time of a tribe's application for a trust transfer. Thus, even if the Karlton order established a lack of formal recognition prior to its issuance in 1992, such a ruling is immaterial for purposes of the IRA since there is no doubt that Ione had been formally recognized when it applied in 2005 for a trust land acquisition.

Second, Judge Karlton's order does not actually say that as of 1992 Ione lacked formal recognized status. It left this question open. Instead, the order merely says that since Ione had not applied for such status under the formal 25 C.F.R. Part 83 application process, the court lacked jurisdiction to adjudicate the Tribe's claims. AR7773-77, 7779-80. Judge Karlton never reached the question of whether Ione was correct in asserting that it had formal recognized status resulting from Commissioner Bruce's 1972 administrative action. Instead, he followed the D.C. Circuit's *James* case, which held that determinations of claims for tribal recognition "should be made in the

[3] The preclusion arguments in the Reply, like those in the MSJ, are based on documents Plaintiffs seek to enter into the record under a previously-filed request for judicial notice (ECF 62) to which the Tribe previously objected (ECF 66). To the extent the Court entertains the request now, the Tribe renews its objections on its previously-asserted grounds.

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first instance by the Department of the Interior" and that such claimants should first exhaust administrative remedies. AR7776-77.

Plaintiffs' reliance on the portion of Karlton's order pertaining to the statute of limitations ruling (Pls. Reply 16:15-22) fares no better. Contrary to Plaintiffs' argument, the statute of limitations ruling by Judge Karlton explicitly pertained to the Tribe's "facial challenge" to the Part 83 regulations, not to a determination of recognition. AR7779-80.

Third, the various declarations that Plaintiffs claim influenced Judge Karlton's decision (Pls. Reply 13:19-14:5) are similarly irrelevant because they too address Ione's formal recognized status and not its "recognition" as that term is used in the IRA. AR732-737; RJN 9[4]; AR20901-20903; RJN 10. Further, such declarations were neither a party's statements as to IRA recognition so as to constitute judicial admissions nor a final court judgment on the merits and therefore cannot have preclusive effect. *Id.*

Fourth, Plaintiffs' assertion that in the course of the *Burris* litigation the federal government asserted five times that Ione "is not and never has been a recognized Indian tribe under federal jurisdiction" is misleading. Pls. Reply 15:16-19; *see also* 11:26-12:4. It implies that the *Burris* litigation in general and the Karlton order in particular focused on the IRA's "recognized tribe now under Federal jurisdiction" language and concepts, and on determining whether Ione satisfied those requirements. But the *Burris* litigation and order did not focus on this matter at all, and Plaintiffs mislead this Court in implying that it did. That litigation and order focused on whether the Tribe was recognized in the formal, "jurisdictional" sense as of the 1990s, and by the end of the litigation both the government and the Court recognized that it did. AR1133, 1154 n.1.

Ione raised these and other arguments regarding the inapplicability of Judge Karlton's order in the Tribe's MSJ (Tribe's Memo 20-26), but Plaintiffs chose not to address them. Instead Plaintiffs reiterate their unsupported claims.

Plaintiffs now raise a new estoppel argument and again misrepresent court documents from the *Burris* litigation. Plaintiffs cite the Findings and Recommendation re Dismissal filed by Magistrate Judge Nowinski in May 1996 (Plaintiffs' RJN 17) and argue that Nowinski had

[4] Citations to the documents as to which Plaintiffs seek judicial notice are for rebuttal purposes only and do not affect the Tribe's previously filed opposition, reasserted herein, to such judicial notice.

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concluded that Ione had not obtained federal recognition. Pls. Reply 17:11-12. Ione hereby objects to inclusion of this document, as stated in the Tribe's Objection to Plaintiffs' Request for Judicial Notice, and to this Court's considering any arguments based thereon. ECF 66. And, in any case, Judge Nowinski never found or held that Ione had not obtained federal recognition. On the contrary, in the very same document cited by Plaintiffs, Judge Nowinski explicitly found that the tribe had in fact "obtained federal recognition." RJN 17:2-4. He recommended dismissal of the case not because the Tribe was not federally recognized, but rather because – as a federally-recognized tribe – it was required to operate under the auspices of a tribal government, whereas Ione was in the midst of a leadership dispute and unable to identify a single governing body. *See generally* RJN 17. The Nowinski findings and recommendations are thus unhelpful to Plaintiffs.

Similarly, the order which Judge Karlton issued adopting Nowinski's recommendations acknowledged that Ione had been federally recognized. RJN 18, AR1153-58 (*see in particular* AR1154 n.1). It dismissed Ione's case because, like Nowinski, Karlton found that – as a federally-recognized tribe – Ione was required to operate through a Tribal government which Ione had not named. Plaintiffs' assertion that Karlton's order – which acknowledged that Ione is a recognized tribe – precludes Ione from claiming that it is a recognized tribe is thus nonsensical.

Finally, Plaintiffs' Reply reiterates the invalid preclusion arguments made in their MSJ based on an Interior Board of Indian Appeals (IBIA) administrative decision from 1992 and a decision by this court in a case brought by Nicolas Villa, Jr. against Amador County in 1998. Pls. Reply 24:12-25:6. Not only have Plaintiffs failed to engage or rebut the Tribe's MSJ analyses that refuted these arguments (Tribe's Memo 24:4-9, 24:20-25:4), but Plaintiffs have literally copied their opening MSJ arguments verbatim into their Reply, but for a few non-substantive word changes and citations. *Compare* Pls. Memo 17:25-18:19, *with* Pls. Reply 24:12-25:6. Repeating an invalid argument does not miraculously make it valid, and it certainly does not overcome the Tribe's counter-arguments. The Court should reject Plaintiffs' arguments and grant the Tribe's motion.

c. Plaintiffs' Discussion of The Nature of Ione's Government is Immaterial Because IRA Sec. 479 Does Not Require That a Tribe Demonstrate Any Particular Form of Government in 1934

In discussing the nature of Ione's government (Pls. Reply 17:24-18:4) Plaintiffs imply that the IRA requires that a tribe demonstrate that it had a tribal government in 1934 in order to qualify

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to have land taken into trust under 25 U.S.C. § 479. This is wrong, and the entire discussion of this matter in Plaintiffs' brief is thus irrelevant. The IRA does not require that a tribe prove that it had a formal tribal government or any specific form of tribal government. In relevant part, the Act only requires that there be a "recognized Indian tribe," and it defines "tribe" to include "any Indian tribe" or "organized band." *Id*. As explained above, the term "recognized" evolved over time to the present-day formal, jurisdictional sense of a government-to-government relationship between tribal and federal governments, but the word "recognized" as used in the IRA in 1934 lacks any such connotation. The governing U.S. Supreme Court definition of a "tribe" or "band" at the time of IRA enactment is the more appropriate reference:

> By a 'tribe' we understand a body of Indian of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design. *Montoya v. United States*, 180 U.S. 261, 266, 21 S.Ct. 358, 359 (1901).[5]

Ione clearly qualified as a "tribe" or "band" as those terms were used in the IRA, as explained in detail in its cross-motion for summary judgment and opposition filed in the related case *County of Amador v. The U.S. Dept. of the Interior*, Case No. 2:12-cv-01710-TLN-CKD (E.D. Cal., complaint filed June 27, 2012) (*see* ECF 82 at 26:7-28:4; 30:18-31:3; 31:17-26; 32:21-33:7; 33:22-27), and the Tribe refers the Court to, and incorporates herein, those arguments and the host of AR documents cited therein. Those arguments and evidence plainly refute Plaintiffs' claim that the Tribe did not constitute a "tribe" – as that term is used in the IRA – in 1934. The ROD should be upheld as lawful and rationally based on the AR in this regard.

d. California Indians, Including the Ione Band, Were and Are Covered by the IRA

Plaintiffs describe the congressional colloquy leading to inclusion of the phrase "now under federal jurisdiction" in IRA section 479 as though it were a simple conversation between two people that unequivocally explains the phrase. Pls. Reply 18:4-17. This oversimplified description of what was in fact a lengthy and confusing conversation among numerous participants is grossly misleading, and Plaintiffs' astounding assertion that the congressional debate shows that "under

[5] *Montoya* defined "tribe" and "band" for purposes of the Indian Depredation Act of 1891, but its definitions have been used in other contexts. *See, e.g., United States v. Candelaria*, 271 U.S. 432, 441-442, 46 S.Ct. 561, 563 (1926); *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1028 (E.D. Cal. 2012).

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federal jurisdiction" was added to the IRA to exclude California Indians from the statute is wrong.

The Tribe fully briefed this matter in its reply in support of its cross-motion for summary judgment filed in the related *County of Amador* case. The Tribe refers the Court to such argument and incorporates it herein by reference. *County of Amador*, ECF 87, 17:5-19:11 In short, a simple reading of the exchange that led to inclusion of the phrase "now under federal jurisdiction" in Section 479 clarifies just how ambiguous that conversation was, as confirmed by the D.C. District Court in *Grand Ronde*, 2014 U.S. Dist. LEXIS 172111 at *23-*25, *33-*37. It also shows that Plaintiffs' fantastic conclusion – that IRA section 479 was intended to sweep aside California Indian tribes wholesale – is wrong. In fact, the colloquy involved discussions around many more tribes than just those in California; no reference was made to all "California Indians" as Plaintiffs apply so generally, or even to all California tribes; no reference was made as to whether California Indians were "federally recognized" or "organized as tribes" as Plaintiffs assert; and the colloquy in no way determined or even suggested that Commissioner Collier's addition would, as Plaintiffs assert, "exclude most California Indians and other Indians who were not federally recognized tribes before 1934." *County of Amador*, ECF 87, 17:5-19:11.

e. Ione Members' Citizenship or Residence Has No Bearing on the Ione Band's Eligibility to Have Land Taken Into Trust

Plaintiffs spend over five pages on what they claim is the "historical background" of all California Indians. Pls. Reply 17:23-23:5. This portion of the brief is irrelevant, virtually unsupported by legal authority (aside from one case, discussed below, which Plaintiffs misrepresent), and in many places inaccurate. Plaintiffs then assert that when the IRA was enacted in 1934, (i) individual California Indians had become citizens of the state, thereby purportedly removing themselves from federal jurisdiction and (ii) as a consequence, there were very few, if any, tribes in California. These arguments are both wrong in general and immaterial as to Ione.

First, Plaintiffs point to nothing in the AR to show that their theories apply to the Ione Band or its members in particular. Second, it is beyond comprehension how Plaintiffs could assert that there were few or no tribes in California at the time of enactment of the IRA, when the very list of 258 tribes who were covered by and voted on the IRA immediately after its enactment, referenced

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by Plaintiffs early in their brief (Pls. Reply 4:26-27), included dozens of California tribes. AR20776-778. Unless Plaintiffs are making the impossible assertion that all such tribes fall under the third prong of the IRA Section 479's definition of "Indian" by being half-blood communities, then by the mere fact of being subject to the IRA and on the compiled list, these California tribes by definition had to fall under one of the first two prongs, both of which require a recognized Indian tribe that was under federal jurisdiction in 1934.

Third, the citizenship or residence of individual Indians has nothing to do with the existence of a tribe or the question of whether that tribe is "recognized" or "under Federal jurisdiction" for IRA purposes, and Plaintiffs fail to prove otherwise. Neither the IRA nor the Supreme Court's *Montoya* definitions of a "tribe" and "band" cited earlier mention either citizenship or residence of tribal members as a relevant consideration. Plaintiffs' argument as to these concepts is a red herring for purposes of this case. Even if such concepts were relevant (which they are not), the case of *Acosta v. County of San Diego*, 126 Cal. App. 2d 455 (1954), which Plaintiffs assert holds that state citizenship/residence of individual California Indians and their tribe being "under Federal jurisdiction" are mutually exclusive, actually lends support to the opposite conclusion.

Acosta concerned a Mission Indian residing on the Pala Indian Reservation, located within the boundaries of San Diego County. *Id.* at 456-458. The court concluded that individual Indians are deemed to be residents of the state and county for purposes of receiving county-provided benefits (*id.* at 467) and that the federal government retains concurrent jurisdiction over them (*id.* at 462-463, 466). Thus, individual Indians were held to be under both state *and federal* jurisdiction.

In *Acosta*, the County had argued that poor reservation Indians were "wards" of the federal government (and therefore the County did not have to provide welfare benefits). The state court disagreed, holding that no strict "guardian-ward" relationship existed because (among other things) the individuals at issue were subject to state law off their reservations, could sue in their own names and serve as jurors, and were not considered "incompetent." *Id.* at 464-465. Misunderstanding what a strict "guardian-ward" relationship entails, Plaintiffs now assert that the fact that *Acosta* held that individual Indians are not "wards" of the federal government means, *ipso facto*, that "[b]asically, California Indians are not under federal jurisdiction." Pls. Reply 22:20-21. Obviously,

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Acosta dealt only with the status of individuals, not of tribes, and in any case it held that notwithstanding the absence of a strict "guardian-ward" relationship the federal government has concurrent jurisdiction. *Id.* at 462.

f. Plaintiffs Incorrectly Rely Upon and Interpret a 1933 Sacramento Indian Agency Letter

Plaintiffs extensively discuss a letter from the Sacramento Indian Agency Superintendent O.H. Lipps to the Commissioner of Indian Affairs ("August 1933 Letter") that the Federal Defendants allegedly "excluded" from the AR,[6] and claim that it shows that Ione was not a recognized tribe under federal jurisdiction in 1934, but merely a group of homeless Indians.[7] Pls. Reply 29:17-30:17 and Ex. 2; Pls. Opp. 2:21-3:14. Plaintiffs further assert that no evidence in the AR supports the Defendants' contention that the Ione Band satisfied these IRA requirements. Pls. Reply 27:26-29:10; 30:15-17. Plaintiffs are wrong on all points.

The August 1933 Letter has no bearing on the question of whether the Ione Band was recognized or under Federal jurisdiction in 1934 because its content is ambiguous. First, the portion of the Letter quoted in Plaintiffs' Reply does not say that the Indians at Ione were not a tribe; it says "they are not members of *any tribe having treaty relations with the Government*[.]"[8] (italics added.) Many tribes did not have treaty relations with the federal government, but saying that Ione lacked treaty relations proves nothing in relation to whether it was a recognized Indian tribe and/or under Federal jurisdiction in 1934. Second, the letter does not indicate, and Plaintiffs offer no other evidence to show, on what basis or for what purpose the Comptroller General classified the Ione Indians as non-wards. Plaintiffs also have not shown what exactly being "non-wards" means, or

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[6] In rebutting the August 1933 Letter, the Tribe does not concede that such document or any of the other documents Plaintiffs reference from the U.C. Davis Special Collection (without identifying or supplying a copy of those documents) should have been included in the AR initially or may be added by Plaintiffs at this late date. Such matters are left to the Federal Defendants to address, as the AR compilation in an APA proceeding is the federal agency's responsibility. Given that the letter is not part of the AR, the Tribe hereby objects to Plaintiffs' inclusion of, and reliance on, it.

[7] In so arguing, Plaintiffs completely ignore recent case law finding that the Secretary may consider the relationship between the federal government and individual Indians when determining whether a tribe was under federal jurisdiction. *Grand Ronde*, 2014 U.S. Dist. LEXIS 172111 at *33.

[8] Plaintiffs complain that Defendants' claimed that the Tribe had a treaty or "treaty relations" with the United States in 1851. Pls. Reply 30:18-31:3. But the Tribe's MSJ does not say this. It says that ancestors of present-day Ione Band members were among those who negotiated the 18 California Indian treaties. Tribe's Memo 4:27-5:4. And the ROD similarly says, "The Band is a successor in interest to the signatories of Treaty J, one of 18 unratified treaties negotiated by the Federal Government with California Indians in the mid-1800s." AR10107. A D.C. District Court has indicated that such treaty negotiations by a tribe's predecessors could reasonably indicate pre-1934 federal jurisdiction over the tribe. *Stand Up for California!*, 919 F. Supp. 2d at 69 n.2.

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that individual Indians being classified as "non-wards" is mutually exclusive to a tribe being recognized or under federal jurisdiction. If Plaintiffs are implying that the term "non-wards" indicates that the Ione Indians were outside the care or supervision of the federal government, that is refuted by *Acosta* and by the remainder of the letter indicating that DOI previously had approved a rancheria purchase for their use.

The letter proves nothing. A superintendent and other early 1900s federal operatives referred to Ione as a distinct band (s*ee, e.g.,* AR73, 137-138, 862-863, 942-944, 3490, 8129, 8139) and *Acosta* shows that even if individual Indians were "non-wards" of the federal government in the sense that they were competent and subject to state law, the federal government still maintained jurisdiction over them. In any case, early 1900s federal officials acknowledged the Ione Band's existence and that the federal government exercised jurisdiction over it, so that Plaintiffs' reliance on the letter is odd. *Id*; *see also* AR20752-53 (agency citing the Ione Indians in "this jurisdiction").

Plaintiffs' assertion that no evidence exists in the AR to support the ROD's finding that the Ione Band is a recognized tribe that was under federal jurisdiction in 1934, and that the documents cited by the Federal Defendants do not prove up that point, is flatly wrong. The AR contains substantial evidence to support upholding DOI's rational, lawful conclusion. *See, e.g.,* AR3543, 3539, 10107 (Treaty J); AR160 (Office of Indian Affairs' "Authority" form for the expenditure of FY1916 appropriated funds for land to be used by "101 homeless California Indians designated as the Ione Band[.]"); AR153-54 (government transmittal of a partially executed deed, abstract of title, and survey plat for land to be purchased for the "Ione band."); AR8138-39 (1927 letter from Supt. L.A. Dorrington, stating that "this jurisdiction" includes "Ione" among the "detailed bands" in Amador County); AR3490 (Terrell census listing 62 Ione Band members with chief Charlie Maximo, 10 Indians "at Jackson belonging to the Ione band" and 29 Indians "At Richey belonging to the Ione Band."); AR137-38 (1916 Office of Indian Affairs letter discussing purchase of 40 acres of land for the "Ione Indians" and identifying them as a "band."); AR10106-112 (ROD's federal jurisdiction analysis); AR544-45 (1972 recognition by BIA Commissioner Bruce); *see also* Tribe's Memo 19:16-25; 23:15-20; 24:6-9; 34:19-23; 35:17-22.

Plaintiffs further contend that the Defendants have not identified documents in the AR that

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support their motions for summary judgment. Pls. Reply 26:21-27:5. This assertion is wrong and also ironic because Plaintiffs cite *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), which holds – on the very same page Plaintiffs cite – that it is the responsibility of the non-moving party to cite evidence rebutting the moving party's contentions. As such, Plaintiffs were required to cite evidence that rebutted the Tribe's motion. In any case, the Tribe cited a host of AR documents to support its MSJ, contrary to the Plaintiffs' claims. *See, e.g.*, Tribe's Memo 19:16-25; 23:15-20; 24:6-9; 34:19-23; 35:17-22; *see generally* 4:13-10:3; 26:20-30:10; 37:5-38:19 (*passim).* The ROD should be upheld as rationally based on such AR documents and Plaintiffs' claims denied.

g. Plaintiffs' Arguments In Support of Their Second through Fifth Claims for Relief That Reiterate Portions of the Complaint and MSJ, to Which the Tribe Has Already Responded, Should be Denied

Plaintiffs' Opposition is mostly cobbled together from portions of their FAC, MSJ and Reply that have been cut and pasted nearly verbatim, with only a few non-substantive word and ordering changes.[9] Plaintiffs only put forth new material in connection with (a) their attempt to enlarge the administrative record (Pls. Opp. 8:9-9:23) (b) Acting Assistant Secretary Laverdure's authority to acquire land in trust (Pls. Opp. 9:24-12:28), and (c) an attempted rebuttal to the Federal Defendants' briefing as to Plaintiffs' lack of standing (Pls. Opp. 23:1-28).[10] Other than those three portions, the substance of Plaintiffs' Opposition as to the second, third, fourth, and fifth claims for relief is nothing more than the unsubstantiated allegations from their FAC, copied with some slight ordering changes.[11]

In light of the fact that the Tribe's MSJ previously provided argument as to all of the Plaintiffs' allegations in the FAC and Plaintiffs' Opposition has simply reiterated those allegations

[9] *Compare* Pls. Opp. 4:1-5:7 and 6:8-11, *with* Pls. Memo 8:1-9:10; *compare* Pls. Opp. 6:19-7:8, *with* Pls. Memo 3:1-18; *compare* Pls. Opp. 7:10-17, 19-28, *with* Pls. Reply 26:13-27:2; *also compare* Pls. Opp. 5:10-18, *with* Pls. Memo 5:11-20 (substantively the same but not verbatim).

[10] Plaintiffs' arguments as to their standing in this case is directed not at the Tribe's MSJ, but rather in rebuttal to the Federal Defendants' comprehensive arguments to the contrary. *See* Federal Defendants' Memo. in Sup. of Cross-Motion/MSJ and in Opp. to Plaintiffs' MSJ, ECF 90-1 at 5-7 and 27-28. The Tribe will not address this issue since the Federal Defendants have done so.

[11] *Compare* Pls. Opp. 13:12-15:17 (the ROD's purported non-compliance with the 25 C.F.R. Part 151 fee-to-trust regulations), *with* FAC ¶¶ 60-70; *compare* Pls. Opp.15:20-16:2 (purported violations of federalism principals), *with* FAC ¶¶ 76-77; *compare* Pls. Opp.16:5-16 (same), *with* FAC ¶¶ 7 and 78; *compare* Pls. Opp. 16:17-17:8 (same), *with* FAC ¶5; *compare* Pls. Opp. 17:9-18:6 (same), with FAC ¶¶72-75; *compare* Pls. Opp.18:24-19:25 (purported invalidity of "restored tribe" and "restored lands" determinations), *with* FAC ¶¶3 and 83-87; *compare* Pls. Opp. 20:3-22:25 (purported failure to comply with NEPA), *with* FAC ¶¶ 4, 90-91, 93-98.

as to the second, third, fourth, and fifth claims for relief, the Tribe will not repeat those arguments here. The Tribe directs the Court to the Tribe's MSJ for such arguments, which it incorporates here by reference. Tribe's Memo 26-40.

h. The Secretary of the Interior and Assistant Secretary – Indian Affairs Were Authorized to Take Land into Trust for the Ione Band

Plaintiffs assert that "[t]he Secretary of the Interior and Assistant Secretary – Indian Affairs [("AS-IA")] are 'principal officers' of the United States which require a Presidential appointment and a Senatorial confirmation" under the U.S. Constitution because they exercise "significant authority pursuant to the laws of the United States." Pls. Opp. 9:27-10:19. According to Plaintiffs, the taking of land into trust for the benefit of a tribe is the exercise of significant authority and can only be exercised by an officer appointed by the President and confirmed by the Senate. Pls. Opp. 10:16-11:3. Plaintiffs assert that Acting AS-IA Laverdure was not so appointed and confirmed and therefore did not have the authority to take land into trust for the Tribe. Pls. Opp. 11:3-7.

Plaintiffs' argument entirely overlooks applicable law. The Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d, provides that when an executive appointee is no longer able to perform his functions and duties, the first assistant to such officer or another person in the office or agency as the President directs, may fill the vacancy on a temporary basis. *Id.* In April 2012, Larry Echo Hawk resigned as AS-IA.[12] Mr. Laverdure held the position of Principal Deputy AS-IA and was made Acting AS-IA, fully in compliance with the Vacancies Reform Act. And AS-IA Laverdure executed the ROD solely in his capacity as Acting AS-IA. AR10116. Contrary to Plaintiffs' claims, he was fully authorized to do so.[13]

[12] *See* DOI Press Release, "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 (last visited March 20, 2015).

[13] Nothing in the AR supports Plaintiffs contention that AS-IA Echo Hawk "declined" to take the Plymouth Parcels into trust for the Tribe or that he did so based on a draft opinion by then DOI-Solicitor David Bernhardt, and indeed Plaintiffs cite to no such support. Pls. Opp. 11:11-12:1. Also, Plaintiffs' assertion that Laverdure "promoted" the Ione trust land application within the Department prior to serving as Acting AS-IA is also wrong. Pls. Opp. 11:20-23. None of the documents cited by Plaintiffs (Pls. Opp. 11:22-23) support that assertion; in fact, what they show is that Laverdure was knowledgeable about the Ione Band's application, based on his work at the Department prior to his appointment as Acting AS-IA.

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III. PROCEDURAL ARGUMENTS

a. Plaintiffs Deviated from the Briefing Schedule and Impermissibly Exceeded Page Limits

Plaintiffs play fast-and-loose with the ordered briefing schedule (ECF 71, 10:3-9) in apparent belief that briefing is to occur as scheduled by them (Pls. Opp. 1:27-28, 2:10-12) rather than as set by the Court. Although the Court ordered Plaintiffs to open the briefing in this action by filing "their motion for summary judgment" (ECF 71, 10:3), indicating that a single motion as to the entire case was warranted rather than the bifurcated motions Plaintiffs had advocated, Plaintiffs' MSJ sought relief only as to their first claim for relief. *See* Pls. Memo 1:20-24. Adhering to the Court's briefing schedule (ECF 71, 10:4-6), the Tribe then filed its combined opposition to Plaintiffs' MSJ and summary judgment cross-motion as to all claims asserted in the FAC (in compliance with the wording of the Court's Order and as allowed under Ninth Circuit case law). Tribe's Memo 2:5-14. At that point, Plaintiffs were required to file a reply in support of their MSJ on the first claim and an opposition to the Tribe's MSJ on *all* claims. Plaintiffs failed to do the latter, instead filing Plaintiffs' Opposition only as to claims 2-5, thereby again muddling the streamlined procedure mandated by the Court's Order to achieve efficiency. Furthermore, Plaintiffs exceeded permissible page limits without leave of court and the Court should disregard all pages that exceed such limits (e.g., pages 21-31 of the Plaintiffs' Reply)[14] and preclude Plaintiffs from filing additional briefs outside the pre-established briefing schedule.

b. Plaintiffs' Statements of Undisputed Facts Are Not Appropriate in an APA Case and Even if Considered Are Insufficient to Grant Plaintiffs' Motion

Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment (ECF 72-2, "MSJ Statement") and Statement of Undisputed Facts in Opposition to Defendants' Motions for Summary Judgment (ECF 93-1, "Opposition Statement") are inappropriate in an APA case because in such cases the record contains the relevant facts. Tribe's Memo 4:14-17.[15] As this

[14] Pursuant to this Court's Case Management Procedures – Standard Information, p. 2, oppositions are limited to 20 pages and replies are limited to 10, unless a party first seeks court approval to file lengthier documents. Plaintiffs did not seek the Court's permission. Thus, the 31-page Reply is 21 pages too long and the 24-page Opposition is 4 pages too long.

[15] The reasons a statement of undisputed facts is unnecessary in APA cases was recently explained in *Weichers v. Moore*, 2014 WL 1400843 at *7 (E.D. Cal. Apr. 10, 2014) (annotations in original):

> A court conducting APA judicial review may not resolve factual questions, but instead determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *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)). "[I]n

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Court's Order denying Plaintiffs' motion for judgment on the pleadings stated, "a court conducting APA judicial review 'is not required to resolve any facts in a review of an administrative proceeding,' but instead determines 'whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" ECF 71, 7:5-9 (internal citations omitted). A court "is to determine whether the DOI 'properly dealt with the facts under the deferential arbitrary and capricious standard of review,' rather than weighing or determining whether issues of fact are controverted in the pleadings." *Id. at* 7:22-24 (internal citations omitted). As such, Plaintiffs' Statements should be stricken and wholly disregarded.

Further, even if this Court considers Plaintiffs' MSJ Statement, the consideration given to the "facts" in that statement should be limited because it includes assertions that certain documents were filed in the *Burris* litigation and that certain statements were made within those documents. ECF 72-2. The only facts to be deemed undisputed pursuant to such a Statement, if any, are that (1) the cited documents were filed and (2) the documents actually contain the asserted statements. The truth of the statements in the documents cannot be deemed undisputed. Therefore, contrary to the arguments in Plaintiffs' Reply, Plaintiffs cannot be granted summary judgment solely on the basis of the "facts" alleged in Plaintiffs' MSJ Statement.

In addition, Plaintiffs' reliance on their "undisputed facts" is misleading in that such reliance is based on mischaracterization of those "facts." For example, Plaintiffs' Reply asserts that the primary issue in the *Burris* litigation included whether the Tribe was "under Federal jurisdiction" and stating or implying that certain assertions from the cited *Burris* documents are still currently true (e.g., "the U.S. has never extended federal recognition" to the Tribe; the U.S. maintains that the Tribe "is not" a federally recognized tribe; this Court determined that the Tribe "cannot demonstrate the they are entitled to federal recognition"). Pls. Reply 23:22-24:5 *contra* Plaintiffs' MSJ

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a case involving review of a final agency action under the [APA] ... the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record." *Id.* at 89. In this context, summary judgment becomes the "mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.* at 90. [¶] Eastern District of California Local Rule 260(e) directs that each motion for summary judgment shall be accompanied by a "Statement of Undisputed Facts" that shall enumerate each of the specific material facts on which the motion is based and cite the particular portions of any document relied upon to establish that fact. In APA cases, such statements are generally redundant because all relevant facts are contained in the agency's administrative record. *See San Joaquin River Grp. Auth. v. Nat'l Marine Fisheries Serv.*, 819 F. Supp. 2d 1077, 1083–84 (E.D. Cal. 2011).

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Statement. However, nothing in Plaintiffs' MSJ Statement supports those assertions, and in fact the AR demonstrates that they are untrue. AR1133.[16]

Finally, Plaintiffs' Opposition Statement should be disregarded because even if such a statement were required in this case (which the Tribe urges is inappropriate), such Statement fails to cite the particular evidence allegedly supporting its assertions. Local Rule 260(a) requires a party to enumerate the material facts supporting its motion and "cite the particular portions" of documentary evidence relied upon to establish that fact. None of the asserted undisputed facts in Plaintiffs' Opposition Statement are supported by citation to particular evidentiary documents to establish those facts.[17] Plaintiffs instead make the insufficient generalization that "these undisputed facts are supported by the administrative [record] and Plaintiffs First Amend[ed] Complaint for Declaratory and Injunctive Relief." Plaintiffs' Opposition Statement 1:19-21. Such lack of specific citation to evidence warrants this Court disregarding the Opposition Statement and the purported facts therein. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774-775 (9th Cir. 2002).

c. Intervenor-Defendant Is Not Required to File a Statement of Undisputed Facts in this APA Proceeding, and Plaintiffs Do Not Have Any Non-APA Rights of Action That Require One

Plaintiffs make much ado of the fact that Defendants did not file statements of undisputed facts. Pls. Reply 23:9-24:12, 25:13-23, 26:13-27:16; Pls. Opp. 7:27-8:8. But, as this Court has previously recognized in the formally-related APA case *County of Amador*,[18] such a statement is unnecessary in APA cases such as this in which review proceeds entirely on the administrative record. As explained above, the facts are contained in the entirety of the administrative record, making a separate statement redundant.

Plaintiffs try to get around this fact by arguing that their claims against the Tribe derive from (unidentified non-specific) legal sources outside the APA. Pls. Reply 26:5-9. Then Plaintiffs say that in light of these sources, the legal action against the Tribe is a non-APA declaratory and

[16] Furthermore, both of Plaintiffs' Statements should be stricken and disregarded to the extent they contain legal argument and conclusions. *See, e.g., Dean v. Gonzales*, No. 2:10-cv-1355, 2014 WL 2574902, at *3 (E.D. Cal. June 6, 2014) (magistrate judge order and findings and recommendations). The Court should not allow or consider such matters.

[17] The Opposition Statement contains a single citation to the ROD for its purported failure to mention a residential construction project. Plaintiffs' Opposition Statement 6:15-19. But the cited pages of the ROD do not mention any such project, and Plaintiffs fail to cite any other portions of the AR to establish that the casino project actually includes any such construction project.

[18] *See County of Amador v. The U.S. Dept. of the Interior*, Case No. 2:12-cv-017110-TLN-CKD, ECF 62 at 3:5-6, Amended Pretrial Scheduling Order filed Jan. 24, 2014.

injunctive relief case not governed by the APA standard, not limited to the AR, and (apparently) in which a statement of facts is necessary. Pls. Reply 25:28-27:16. These arguments manifest a misunderstanding of what it means for a party to intervene in a case.

When the Tribe intervened in the present action it merely inserted itself as a defendant into the lawsuit that had previously been filed against the Federal Defendants, to defend against the then-existing claims. *See* Fed. R. Civ. Pro. 24(b). The Tribe's intervention did not convert the action from an APA-based action (which is the only type of action available to Plaintiffs against the Federal Defendants) to an action based on unidentified non-APA claims, nor did it automatically give rise to any new non-APA claims. Plaintiffs' unsupported assertions to the contrary are nonsensical, and their resulting insistence that a statement of undisputed fact be filed is misguided.

Plaintiffs' papers belie their assertion of unidentified non-APA declaratory and injunctive relief claims against the Tribe. First, none of the claims or prayers for relief in the FAC request relief as against the Tribe but rather seek declaratory relief as to the Federal Defendants' process and authority in issuing the ROD and injunctive relief to prevent the Federal Defendants from approving or implementing it. FAC 26:14-28:2. Plaintiffs' case is against, and seeks relief from, the Federal Defendants, not the Tribe. Second, Plaintiffs' assertion that it has non-APA claims against the Tribe is contradicted by the FAC itself. Every claim for relief in the FAC cites the APA as the basis for relief by referencing 5 U.S.C. § 706 for the governing arbitrary and capricious standard. FAC ¶¶57-58 (first claim); FAC ¶70 (second claim); FAC ¶¶80-81 (third claim); FAC ¶88 (fourth claim); ¶¶99-100 (fifth claim). Third, as argued in the Tribe's Opposition to Plaintiffs' Motion for Judgment on the Pleadings (ECF 65, 11:10-13:13), Plaintiffs have failed to identify the basis for any non-APA rights of action in this case, and the Declaratory Judgment Act, federal question jurisdiction statute, and IRA statute mentioned in the FAC do not provide any such rights.

Fed. R. Civ. Pro. 65, providing for injunctive remedies, certainly does not create such a right. For injunctions sought in connection with a federal claim, the particular federal statute involved must be examined to determine whether injunctive relief is authorized. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1079 (9th Cir. 1986). Yet Plaintiffs have not identified any non-APA source of authority for the issuance of relief against the Tribe.

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Furthermore, a party seeking injunctive relief in federal court must first establish the court's subject matter jurisdiction. Fed. R. Civ. Pro. 65 merely provides the procedure for obtaining injunctive relief; it is not an independent basis for federal jurisdiction. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1109 (9th Cir. 1982). Without a non-APA statute to establish a private right of action or federal jurisdiction, Plaintiffs' alleged non-APA injunctive claims against the Tribe are unfounded.

In sum, without a non-APA private right of action, Plaintiffs may not proceed in this case outside of an APA action against the Federal Defendants. And as noted previously, in the APA context generally a separate statement of undisputed facts is inappropriate.

Finally, Plaintiffs wrongly assert that the facts in their MSJ and Opposition Statements must be deemed undisputed and their MSJ must be granted because Defendants have not filed statements of undisputed facts. Pls. Reply 23:9-24:12, 25:13-23, 26:13-27:16; Pls. Opp. 7:27-8:8. Even if a statement of facts were required of Defendants (which the Tribe asserts was not), if a court deems that a party has not properly addressed another party's assertion of facts in a motion for summary judgment, Fed. R. Civ. Pro. 56(e) provides the court with options on how to proceed, including giving a party the opportunity to address the assertions.[19] To the extent this Court should determine that a separate statement of facts is necessary – notwithstanding the Tribe's assertion that no such statement is necessary because this case is solely an APA proceeding to be determined upon record review – the Tribe requests an opportunity to submit one and reserves the right to do so.

For all of the foregoing reasons, the Tribe's MSJ should be granted and Plaintiffs' MSJ denied as to all of Plaintiffs' claims for relief, and judgment entered for the Defendants.

Dated: March 23, 2015

HOLLAND & KNIGHT LLP

By: /s/ Jerome L. Levine
Jerome L. Levine
Timothy Q. Evans
Zehava Zevit

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Ione Band of Miwok Indians

[19] *See also* Fed. R. Civ. Pro. 56 – Advisory Committee Notes (2010) ("[S]ubdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred step. … And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.")