Case No. 15-17253

In the United States Court of Appeal
For the Ninth Circuit

COUNTY OF AMADOR, CALIFORNIA
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR, *et al.*,
Defendants - Appellees,

IONE BAND OF MIWOK INDIANS,
Intervener/Defendant - Appellee.

COUNTY OF AMADOR'S REPLY BRIEF

On Appeal from the United States District Court
for the Eastern District of California
The Honorable Troy L. Nunley, Presiding
District Court Case No. 2:12-cv-01710-TLN-CKD

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GLOSSARY/RECORD CITATIONS

The following abbreviations are used in citations to the Record and other pleadings throughout this Brief:

"PER": Plaintiff's Excerpts of Record, filed on April 1, 2016, pursuant to 9th Circuit Rule 30-1 (9th Cir. Dkt. Nos. 16-1 to 16-5). Citations to the Excerpts are in the form "(PER[Page#]-[Page#].)"

"AR": Citations to portions of the Administrative Record in this case that are not included in Plaintiffs' Excerpts of Record. Citations to the Administrative Record are in the form "(AR[Page#]-[Page#].)"

"AA": Appendix of Authorities, filed on April 1, 2016, pursuant to Fed. R. App. Proc. 28(f) (9th Cir. Dkt. No. 15-4). Citations to the Appendix of Authorities are in the form "(AA[Page#]-[Page#].)"

"FDSE": Federal Defendants' Supplemental Excerpts of Record, filed on August 1, 2016 (9th Cir. Dkt. No. 30). Citations to the Federal Defendants' Supplemental Excerpts are in the form "(FDSE[Page#]-[Page#].)"

"IBSE": Ione Band's Supplemental Excerpts of Record, filed on August 1, 2016 (9th Cir. Dkt. No. 27). Citations to the Ione Band's Supplemental Excerpts are in the form "(IBSE[Page#]-[Page#].)"

"FDAB": Federal Defendants' Answering Brief, filed on August 1, 2016 (9th Cir. Dkt. No. 29)

"IBAB": Ione Band's Answering Brief, filed August 1, 2016 (9th Cir. Dkt. No. 26)

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I.

INTRODUCTION.

This appeal challenges agency action that is the product of transparently unprincipled, results-oriented decision-making and agency disregard for controlling statutes and established regulations, of the type that makes citizens cynical about their government.

In 1972, Commissioner Louis Bruce flouted established agency procedures for recognizing Indian tribes, and made no effort to apply the "Department's informal standard for recognition from 1942 to 1978," in purportedly agreeing to take land into trust for the Band. (PER347, 477.)

Fortunately, because the Bruce letter sidestepped the normal administrative process and standards it was treated as non-binding at the time by the Department, which repeatedly urged the Band to seek recognition through established procedures. The Band refused to do so, instead suing to gain recognition based on the Bruce letter. In 1992, the Department argued, and the district court held, that the Band was never a tribe and could *only* be "recognized" through the Department's federal acknowledgment regulations.

Then in 1994, Secretary Ada Deer again ignored departmental regulations and procedures. Bowing to political pressure from members of

Congress, she reversed course, recognizing the Band as a tribe outside of the acknowledgment regulations. Like Bruce, she bypassed normal administrative channels for such decision-making (PER350 & 514), and, like Bruce, she undertook no analysis of the Band's entitlement to recognition, though the Part 83 regulations required it. She also provided no reasoned explanation of her about-face on the exclusivity of those regulations.

In 2006, the Department issued an Indian Lands Determination ("ILD") concluding that the Band could be treated as a "restored tribe" for purposes of IGRA. When Amador County tried to challenge the ILD, the Department successfully had the challenge dismissed on the ground that the ILD was purely advisory—non-binding advice by the Solicitor's office—and that there would be no final agency action unless the Secretary agreed to take land into trust for the Band.

Thereafter, the Secretary of Interior "promulgated a series of rules ... to 'explain to the public how the Department interprets' IGRA's various exceptions and exemptions, including the restored lands exception. 73 Fed. Reg. 29,354." *Rancheria v. Jewell*, 776 F.3d 706, 710 (9th Cir. 2015). In so doing, the Secretary *expressly* determined that Congress did not intend to permit tribes that were administratively recognized outside the Department's Part 83 acknowledgment regulations to be treated as a

"restored tribe." 25 C.F.R. § 292.10. Those regulations should have foreclosed treating the Band as a "restored" tribe, and in 2009 the Solicitor's office actually withdrew the Band's ILD.

But the Department reversed course yet again in 2012, re-adopting and giving binding legal effect to the ILD that it previously characterized as "preliminary" and merely "advisory."

Simply put, this case demonstrates a pattern by the Department of flip-flopping and ignoring its own regulations and procedures when it suits Department officials. That is bad enough, but it is the most recent example—the decision to ignore *Congress's* intent in enacting IGRA—that truly cannot stand. Under the framework articulated by the D.C. Circuit, and adopted by this Court, the Secretary must abide by congressional intent unless certain conditions—not present here—exist. Contrary to the position of Federal Defendants and the Ione Band (collectively "Appellees"), the Secretary's determination to ignore Congress's acknowledged intent warrants no deference.

In similar vein, it is clear that in adopting the Indian Reorganization Act Congress intended that its requirement that land only be taken into trust for a "recognized tribe now under federal jurisdiction" would be a meaningful limitation on the ability of the Department to obtain federal land for Indians.

But following the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"), which the Department opposes and has actively resisted,[1] the Department has started interpreting the terms "recognized" and "under federal jurisdiction" so generously as to eviscerate the limits Congress intended.

This case provides a clear example. The only interactions between the federal government and the Band's ancestors at the time the IRA was adopted were (1) *unsuccessful* efforts to obtain land for Ione-area Indians under a land-purchase program designed for landless California Indians "without regard to the possible tribal affiliation of the members of the group" (PER605); (2) a claim that some members of the Band are descendants of Indians who negotiated an *unratified* treaty with government in the 1800s; and (3) inclusion of several Band-members' ancestors on a list of non-tribe-specific Ione-area Indians in 1906. If these facts constitute "recognition"—or especially "jurisdiction"—those terms are meaningless, and virtually any would-be tribe will qualify for land under the IRA. Which appears to be the point.[2] But that is the very result Congress sought to avoid. As Justice Breyer noted, concurring in *Carcieri*, the legislative record shows that "Congress did

[1] *See* AOB at 65 n.31.
[2] *Id*.

not intend to delegate interpretive authority to the Department" as to the definition of "Indian" at issue herein, and "[c]onsequently, its interpretation is not entitled to *Chevron* deference...." 555 U.S. at 396-97 (emphasis added).

The ROD is should be overturned.

II.

HAVING ACKNOWLEDGED THAT CONGRESS DID NOT INTEND FOR TRIBES LIKE THE IONE BAND—INFORMALLY RECOGNIZED OUTSIDE THE FEDERAL ACKNOWLEDGMENT REGULATIONS—TO BE "RESTORED" TRIBES UNDER IGRA, THE DEPARTMENT ACTED ARBITRARILY & CAPRICIOUSLY IN "GRANDFATHERING" THE 2006 INDIAN LANDS DETERMINATION.

"To define and place reasonable limits on the exceptions [in Section 20 of IGRA for gaming on lands acquired after 1988], the Secretary of the Interior, in 2008, promulgated a series of rules implementing section 2719 of IGRA. [Citation.] The purpose of these rules was to 'explain to the public how the Department interprets' IGRA's various exceptions and exemptions, including the restored lands exception." *Rancheria*, 776 F.3d at 710.

Under the interpretation embodied in the Secretary's regulations, a tribe is "restored to federal recognition" within the meaning of IGRA if it is (1) congressionally re-recognized, (2) re-recognized through a court judgment or settlement to which the United States is a party; or (3) re-

recognized "through the administrative Federal Acknowledgment Process under § 83.8 of this chapter [Part 83]." 25 C.F.R. § 292.10. It is undisputed that the Band does not fit within any of the foregoing provisions; instead the ROD asserts the Band was *informally* re-recognized by Ada Deer in 1994 *outside* of the "Federal Acknowledgement Process under § 83.8." (AR007156, AR010100-02.) Thus, it is undisputed that—but for 25 C.F.R. § 292.26(b)—the Band could not qualify as a "restored" tribe under IGRA.

That latter provision purports to "grandfather" tribes who received a (purely advisory, non-binding, non-final) ILD prior to enactment of the regulations, *even when no final agency action had yet been taken in reliance on that ILD*, as in this case. Relying on the Band's 2006 ILD, the ROD purports to relieve the Band of the need to comply with Congress's intention in adopting IGRA, reflected in 25 C.F.R. § 292.10's requirement that an administratively "restored" tribe be one re-recognized through the Part 83 process.

The ROD's reliance on the grandfather clause was arbitrary, capricious and contrary to law. This Court has "adopted the framework" articulated by the D.C. Circuit in *Natural Res. Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) (hereafter "*NRDC*"), and *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail Union*"),

for determining when an agency may "grandfather" past administrative practices that run contrary to congressional intent. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2013) (en banc). That framework does not permit the "grandfathering" of the Band's ILD in this case.

A. THE GRANDFATHER CLAUSE CONFLICTS WITH THE SECRETARY'S RECOGNITION OF CONGRESS'S INTENT, REFLECTED IN 25 C.F.R. § 292.10, AND WARRANTS NO DEFERENCE.

Though Appellees try to deny it, in adopting the Part 292 regulations the Secretary acknowledged Congress's intent to limit administrative re-recognition to tribes proceeding through the Part 83 regulations. She expressly rejected proposals to permit tribes to qualify as "restored" tribes based on administrative restoration *outside* the Part 83 regulations, stating, "We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations." 73 Fed. Reg. 29354, 29363 (May 20, 2008) (emphasis added). The Secretary further elaborated thus:

> In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process. The part 83 regulations were adopted in 1978. These regulations govern the determination of which groups of Indian descendants were entitled to be acknowledged as continuing to exist as Indian tribes. *The regulations were*

> *adopted because prior to their adoption the Department had made ad hoc determinations of tribal status and it needed to have a uniform process for making such determinations in the future. We believe that in 1988 Congress did not intend to include within the restored tribe exception these pre-1979 ad hoc determination.* [sic] *Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified only the part 83 procedures as the process for administrative recognition.*

Id. (emphasis added).

Appellees' claims that the Department's grandfather clause nevertheless deserves deference are meritless.

First, this Court's precedents hold that no deference is due an agency's decision regarding whether to apply new administrative standards retroactively. *Oil, Chemical & Atomic Workers Int'l Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1144 (9th Cir. 1988); *Garfias-Rodriguez*, 702 F.3d at 515 (en banc); *see also Retail Union*, 466 F.2d at 390. Neither Appellee addresses these holdings.

Moreover, even if the foregoing cases had not rejected deference to grandfathering categorically, deference would not be warranted on the facts of this case.

Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984), requires judicial deference to an agency's "reasonable interpretation" of a statute it is tasked with administering where Congress

has not "directly spoken to the precise question at issue." *Id*. at 842-44. In this case, the Secretary's "reasonable interpretation" of Congress's intent in enacting IGRA is not reflected in the grandfather clause—it is reflected in Regulation 292.10, which limits "restoration" to tribes restored through the Part 83 regulations. The grandfather clause purports to allow certain tribes to undertake gaming under the "restored lands" exception *despite* Congress's acknowledged contrary intent.

While an agency is entitled to change its interpretation of a statute, it cannot maintain two inconsistent interpretations of the statute *simultaneously*. When agencies contemporaneously "set forth two inconsistent interpretations of the very same statutory term," as the Department is doing, they act arbitrarily and capriciously. *United States Dep't of the Treas. IRS Office of Chief Counsel Wash., D.C. v. Fed. Lab. Rel. Auth.*, 739 F.3d 13, 21 (D.C. Cir. 2014). In such circumstances, the agency's interpretation is not "reasonable," and *Chevron* deference is not warranted. *See id.*; *Port of Seattle v. FERC,* 499 F.3d 1016, 1034 (9th Cir. 2007).

B. APPELLEES' EFFORTS TO EXPLAIN AWAY THE SECRETARY'S EXPLICIT ACKNOWLEDGEMENT THAT CONGRESS INTENDED TO LIMIT THE "RESTORED LANDS" EXCEPTION ONLY TO TRIBES THAT WERE RE-RECOGNIZED THROUGH THE PART 83 REGULATIONS ARE MERITLESS.

Appellees latch onto references in the *Federal Register* that Congress meant to reject "pre-1979 *ad hoc* determinations" and argue that the Secretary's statements were not meant to apply to the Band because it was informally re-recognized by Ada Deer in a post-1979 *ad hoc* determination. This defies reason, most of all because the *entire purpose* of the Part 83 regulations was to end *ad hoc* recognition determinations after 1979. As the government argued in the *Ione Band Litigation* (*see* AR000691-000731, AR000738-000767), and as the district court in that case held (AR007779)—the Part 83 regulations were to be the *exclusive* administrative means of being recognized after that date.

Moreover, this argument is inconsistent with the actual language of Regulation 292.10. If the Secretary truly believed Congress intended to allow a post-1979 *ad hoc* administrative determination to constitute "restoration," it is inexplicable that Section 292.10 does not so provide. But the Secretary *rejected* proposals to allow administratively recognized tribes to qualify under the regulations, *without any temporal qualification*. The ROD did not allow gaming on the Plymouth Parcels because the Band's administrative

recognition came after 1979, *but because its ILD came before 2008*. Absent that ILD, the exact same band, re-recognized at the exact same time, in the exact same way could not be "restored."

Appellees' argument is also inconsistent with the government's basic position that Ada Deer's actions were a "reaffirmation"[3] of the 1972 (*i.e.*, pre-1979) actions of Louis Bruce.

Ultimately, Appellees' position requires this Court to accept the convoluted notion that Congress intended (and that the Secretary's statements revealed a belief that Congress intended):

1. to preclude *pre*-1979 *ad hoc* determinations from being treated as permissible "restorations" under IGRA, but
2. to allow *post*-1979 *ad hoc* determinations to be treated as "restorations," when such determinations were understood, at the time IGRA was enacted, not to be permitted anymore.

As the Secretary recognized, "In 1988, Congress clearly understood the part 83 process because it created an exception for tribes acknowledged through the part 83 process." *See* 73 Fed. Reg. 29354, 29363 (May 20, 2008). Given that fact and Congress's presumed familiarity[4] with the rule that "[a]n

[3] *See* FDAB, p. 14.
[4] *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184 (1988).

agency is bound by its regulations so long as they remain operative...,"[5] Appellees' position is bizarre. Congress cannot have intended that the agency would be able to "restore" a tribe by ignoring its own exclusive regulations (as Ada Deer improperly did).

In enacting IGRA, Congress intended to permit tribes that were "restored" administratively through the Part 83 regulations to take advantage of the "restored lands of a restored tribe" exception contained in that statute; Congress did not intend for tribes that were administratively re-recognized outside of that process to do so, *as the Secretary expressly acknowledged in adopting the Part 292 regulations*. The application of the grandfather clause in 25 C.F.R. § 292.26(b) to nevertheless thwart Congress's intent must be overturned.

C. THE BAND'S ATTEMPT TO SHOW THAT THERE WAS A PRE-EXISTING PRACTICE THAT IT RELIED UPON DEMONSTRATES JUST HOW WEAK THEIR CLAIM OF RELIANCE IS.

The Band contends that, prior to enactment of the Part 292 regulations, the Department had a policy for "20 years" of treating informally acknowledged tribes like the Band as "restored" tribes under IGRA. The materials cited to support this claim, however, demonstrate just how weak the Band's claim of "reliance" is.

[5] *Romeiro De Silva v. Smith*, 773 F.2d 1012, 1025 (9th Cir. 1985).

The Band cites three pages of the Administrative Record (IBAB, p. 28), none of which remotely demonstrate a long-standing policy of treating informally re-recognized tribes as "restored." *See* AR001382 (2004 Amador County letter to Band, making no mention of "restoration"); AR001404 (2004 letter from Band's lawyer to Band); AR002808 (2005 list of Band's options to purchase Plymouth Parcels, contained in Band's ILD application).

Then the Band cites three examples of Department actions that, it contends, demonstrate that long-standing policy (IBAB, pp. 29-30). None does.

The 2008 NIGC determination regarding the Poarch Band (ISER0022), notes that the Poarch Band was recognized "through the federal acknowledgement process." (ISER0041.) Thus, the language quoted by the Band about "administrative recognition" supporting "restoration" was irrelevant to the decision. Moreover, the dicta is only supported by citations to *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Atty.*, 369 F.3d 960 (6th Cir. 2004), which also dealt with a tribe restored through the Part 83 regulations (*id.* at 962), *and the Ione Band's own 2006 ILD*, meaning it could not have been relied on by the Band. (ISER0041.)

The agency's decision regarding the Sault Ste. Marie Tribe of Chippewa Indians *rejected* a request for gaming under the "restored lands" exception.

(ISER0050.) Further, it was issued in 2006, less than two months before the Band's own ILD, so they cannot plausibly claim extensive reliance on it.

And finally, the Karuk decision, discussed by the district court, did not issue until 2012, so cannot have been the basis of reliance by the Band. And the fact that the NIGC purported to apply 25 C.F.R. § 292.26(b) to the Karuk Tribe says nothing about whether that application was *legal*.

If these examples are the best the Band can cite in support of its claim of a "long-standing" policy of treating informally re-recognized tribes as "restored," it shows how feeble that claim is.

D. THE *NRDC* FACTORS DO APPLY HERE.

It is black-letter law that administrative agencies must apply statutes consistently with congressional intent. *Chevron*, 467 U.S. at 843 n.9. However, courts have held that, in some narrow circumstances, past practices that were inconsistent with congressional intent can be "grandfathered" for equitable reasons. In *NRDC*, the D.C. Circuit articulated the following "considerations governing an agency's duty to apply a rule retroactively" to implement congressional intent:

> (1) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (2) the extent to which the party against whom the new rule is applied relied on the formed [sic] rule, (3) the degree of the burden which a retroactive order imposes on a

> party, and (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

838 F.2d at 1244 (quoting *Retail Union*, 466 F.2d at 390).

The district court held that the *NRDC* factors were inapplicable because it believed: (1) *NRDC* only applies to cases where the agency "refused to provide any grandfathering," rather than cases like this one where it chose to do so (PER48); and (2) it was proper to "afford[] deference to the Department in its decision to promulgate the grandfathering provision as part of the Part 292 regulations." (*Id.*) As explained in Amador County's opening brief (at 29, 35-37), both determinations were wrong as a matter of law, and—tellingly—neither Appellee has explicitly tried to defend the district court's reasoning.

Instead, Federal Defendants argue that *NRDC* addressed a "specialized circumstance," that they "have found no other cases that have applied the *NRDC* analysis," and that it is distinguishable because the EPA had a "duty" to implement the Clean Air Act. (FDAB, pp. 32-33.)

As for the first two points, Federal Defendants' effort to characterize *NRDC* as an anomaly are disingenuous. First, they simply ignore *Sierra Club v. EPA*, 719 F.2d 436, 467 (D.C. Cir. 1983) ("*Sierra Club*"), cited in Amador County's Opening Brief, which applied the *NRDC* factors to overturn an EPA rule that grandfathered-in stack heights. Second, *NRDC* relied upon

principles articulated in the earlier D.C. Circuit case of *Retail Union*, and this Court has also "adopted the framework set forth by the D.C. Circuit in *Retail Union*." *Garfias-Rodriguez*, 702 F.3d at 518 (en banc). Thus, the implication that *NRDC* is somehow anomalous and foreign to this Circuit's jurisprudence is false.

In a single footnote, Federal Defendants dismiss this Court's *en banc* decision in *Garfias-Rodriguez* as being about "whether the Court could apply an agency's statutory interpretation retroactively" (FDAB, p. 33 n.9); likewise, the Band dismisses *Garfias-Rodriguez* as applying when an agency *chooses* to apply a new rule retroactively, as opposed to when it chooses not to (IBAB, p. 41). But while that was the specific procedural posture of the case, they present no basis for concluding that the Court's adoption of the *Retail Union/NRDC* test was meant to apply only to a *refusal* to grandfather, when *Retail Union* has long been understood to apply equally to an agency's decision to permit grandfathering. *See Sierra Club*, 719 F.2d at 467 ("We think that these considerations are also suggestive of the outlines of an agency's duty to apply a rule retroactively..."); *NRDC*, 838 F.2d at 1244 (same).

Regarding Appellees' contention that the agency in *NRDC* and *Sierra Club* had a statutory "duty" to apply its regulations retroactively (*see* FDAB,

pp. 32-33; IBAB, pp. 40-41), that is right as far as it goes. Agencies *always* have a duty to adhere to congressionally-approved statutes (at least unless the four-factor test set forth in the *NRDC* decision warrants a limited exemption). And this case is no exception. But if Appellees are implying there was some unique statutory provision that explicitly mandated retroactivity in *NRDC* or *Sierra Club*, distinguishing it from this case, they are wrong. Both cases found a "duty" existed *by applying the four factors listed above*. *NRDC*, 838 F.2d at 1244; *Sierra Club*, 719 F.2d at 467.

Federal Defendants rely on a different *Sierra Club* case—*Sierra Club v. USEPA*, 762 F.3d 971 (9th Cir. 2014)—to suggest that where grandfathering is "explicitly built into the new regulations" it is *per se* permissible. (FDAB, p. 32.) That case does not stand for that proposition. *Sierra Club* rejected the EPA's grandfathering in that case, holding that *absent* regulations, agencies cannot "grandfather" on an *ad hoc* basis. *Id*. at 983. But this Court stated that it did not "express any opinion on" the EPA's authority to grandfather when it does so by regulation. *Id*. at 982 n.7.

The Band relies on *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 835 (9th Cir. 1997), which in turn relies on *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204 (1988), for the proposition that retroactive application of administrative rules is not required unless Congress affirmatively says so,

and is in fact disfavored. (IBAB, p. 39.) The Band's reliance on *Bowen* (and *Covey*) is misplaced. *Bowen* and *NRDC* deal with two different *kinds* of "retroactivity."

Bowen addresses the standard for deciding whether new agency rules are to be applied retroactively to acts that have already taken place, *i.e.*, *final* agency actions; *NRDC*, by contrast, addresses the standard for deciding whether new administrative rules must be applied to *pending* agency actions. *NRDC* itself distinguished *Bowen* on this ground. 838 F.2d at 1244.

Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006)—quoted, ironically, by the Band—emphasizes this: "Statutes are disfavored as retroactive when their application 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions *already completed*.'" 548 U.S. at 37 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (emphasis added)). Here, the Band's trust application was not "already completed" when the Part 292 regulations were adopted.[6]

Regulation 292.26 itself reflects this distinction. That regulation contains two subparts. Subsection (a), not challenged here, grandfathers

[6] Justice Scalia further elaborated upon this distinction in his *Bowen* concurrence. 488 U.S. at 219-20.

"final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations." Subsection (b), however, purports to exempt agency actions "taken after the effective date of these regulations" when the Department has merely taken a preliminary, non-binding step toward agency action, which—under the terms of the regulation itself—is subject to withdrawal at any time (as, in fact, took place here). With respect to subsection (a), *Bowen* applies; with respect to actions that fall into subsection (b)—like the ROD—*NRDC* applies.

The Band's land-to-trust application was merely pending when the Part 292 regulations were adopted. There was no final agency action on that application—as the County learned the hard way, when it tried to challenge the 2006 ILD. *County of Amador v. United States DOI*, 2007 U.S. Dist. LEXIS 95715 (E.D. Cal. Dec. 13, 2007). Thus, the Secretary had a duty under *NRDC* to apply the definition of "restored tribe" adopted in those regulations to "future actions" of the agency, including the 2012 decision to take land into trust for gaming on behalf of the Band.

E. THE GRANDFATHER RULE CONTAINED IN 25 C.F.R. § 292.26(B) CANNOT SURVIVE APPLICATION OF THE *NRDC* FACTORS UNDER THE FACTS OF THIS CASE.

The four-factor *NRDC* test does not support an exception for the Band here. Tellingly, Federal Defendants make no real effort to argue otherwise,

simply resting on their mistaken contention that *NRDC* does not apply. The Band's efforts to apply those factors fall short.

1. Any assertion of reasonable reliance is unsupported by the facts and law.

Of four *NRDC* factors, the Secretary addressed only one in adopting the grandfathering rule in 25 C.F.R. § 292.26(b): reliance.[7] But that provision adopts a blanket exemption on the premise that a "tribe and perhaps other parties may have relied on the" ILD, violating the rule that when an agency seeks to grandfather prior actions that are contrary to congressional purpose—as here—the rule must require a showing of "actual"[8] and "justifiable"[9] reliance by the affected party.

The Band merely contends that it has incurred costs in applying for the ILD and to have the Plymouth Parcels taken into account. (IBAB, pp. 43-44.) This is inadequate to establish reliance.

First, insofar as the Band claims reliance on a "long-standing policy," from which the regulations were an "abrupt departure," that spurious argument is addressed above.

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[7] 73 Fed. Reg. 29354, 29372.

[8] *Sierra Club*, 719 F.2d at 467; *NRDC*, 838 F.2d at 1248.

[9] *Williams Natural Gas Co. v. FERC*, 943 F.2d 1320, 1343 (D.C. Cir. 1991).

Second, 25 C.F.R. § 292.26(b), and the Secretary's discussion thereof, are based on presumed reliance on the ILD *itself*. Thus, costs incurred prior to the ILD's issuance in September 2006—essentially all of the costs that the Band points to in its brief—are irrelevant.

Third, reliance on the 2006 ILD was not justified either, because the initial proposal to adopt the Part 292 regulations was issued just days after that memorandum was issued, and that proposal (1) already included the provision limiting administrative restoration to those actions taking place under the Part 83 regulations, and (2) contained no proposal for a grandfather provision. *See* 71 Fed. Reg. 58769, 58774 (Oct. 5, 2006).

The Band's response—that the Department expressed an intention to modify those regulations a few months later—does not withstand scrutiny.

First, the *Federal Register* notice cited by the Band was merely a brief, very general notice re-opening public comment on the draft regulations. It states generically that comments were received "that may result in modification of the proposed rule," but gives no indication that the "restored tribe" provision specifically might be amended (of the 24 sections initially proposed), or that any amendment was anything but a mere possibility. 72 Fed. Reg. 1954 (Jan. 17, 2007).

Moreover, the Band glosses over other contemporaneous events discussed in the AOB (*see* pp. 41-44) that would have made reliance on the 2006 ILD unjustified by January 2007, including the fact that by then Amador County had challenged that decision as unlawful and expressed its intention to renew the challenge when a "final agency" action was taken.

Also, any claim of reliance by the Band conflicts with the Band's own characterizations of the ILD in the 2007 litigation: "as a *preliminary* assessment"[10]; as an "interim," "interlocutory," and merely "advisory" opinion[11]; and as a document that "standing alone has no legal force or practical legal implications" unless the fee-to-trust application was approved.[12] *See Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 438 (D.C. Cir. 1986) ("an agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review."). Now, however, the Band wishes to reverse course and give the ILD the type of legal effect it previously disclaimed.

Finally, the Band's incursion of the costs of these applications is indistinguishable from the applicant in *WRT Energy Corp. v. FERC*, 107

[10] PER280 (emphasis added).
[11] PER272, PER279, PER295.
[12] PER295.

F.3d 314 (5th Cir. 1997). In that case, the Louisiana Office of Conservation—which had initial decision-making power, subject to review by FERC, issued a determination that a natural gas well qualified as producing high-cost natural gas. In apparent "reliance" on the LOC determination, and while the issue was pending with FERC, WRT installed the same technology on the other four wells. FERC subsequently reversed the LOC's determination. In rejecting WRT's challenge to the FERC determination, the Fifth Circuit stated, "we note that WRT apparently relied, perhaps imprudently, on the affirmative LOC determination as to the first well when it subsequently installed the new technology on its other four wells, prior to receiving a final determination from the FERC as to that first well." *Id*. at 321. In the process, the Court rejected a claim by WRT that the FERC's ruling was impermissibly retroactive in light of its reliance. *Id*.[13] Likewise here, the Band's "reliance" on an interim ILD was "imprudent," rather than "reasonable."

The Band tries to distinguish *WRT* on the ground that the agency in that case sought retroactive application and WRT opposed it, but, as

[13] *See also DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (rejecting claim that, because petitioner had expended millions of dollars in reliance on prior regulatory scheme, anti-retroactivity principles should apply to exempt petitioner from new regulation).

discussed above, the *NRDC* factors apply equally to an agency's decision to grandfather and its refusal to do so.

2. None of the other *NRDC* factors support grandfathering either, because (a) an administrative action can only be upheld based on the rationale given by the agency, and (b) they do not support grandfathering on the merits.

Because the Secretary only considered reliance in adopting and applying the grandfather provision, that is the only basis on which the ROD can be upheld. *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("*Chenery*") (a court may not affirm the action of an administrative agency on grounds that the agency itself did not articulate).

But even so, the Band's attempts to address the other *NRDC* factors fail on the merits.

The notion that the Part 292 Regulations represented an "abrupt departure" from a long-standing prior practice is addressed above. No such "long-standing practice" existed.

As for the degree of the burden retroactive application would impose, the Band claims "retroactive application of the Section 292.10's exclusion of administratively reaffirmed tribes would be extreme and require that the Tribe forego over a decade of effort and expense incurred for its trust land and economic development efforts." (IBAB, p. 45.) Not so. The Band would simply have to obtain the concurrence of the Secretary and California's

Governor, after consulting with affected interests (including the County) *just as Congress intended*.

And finally, the statutory interest in applying IGRA section 20 is substantial. Congress clearly meant to avoid the danger of forum-shopping and the abuse of IGRA by flatly prohibiting gaming on lands acquired after October 1988, *see* 25 U.S.C. § 2719(a). Congress then adopted certain exceptions, but those exceptions cannot and should not be read so broadly as to frustrate Congress's underlying purpose. That is what grandfathering would do here.

F. THE DISTRICT COURT RIGHTLY CONCLUDED THAT THE COMPLAINT ADEQUATELY CHALLENGED THE ROD'S APPLICATION OF THE GRANDFATHERING CLAUSE.

Briefly, Federal Defendants contend that this Court should ignore the County's challenge to the improper grandfathering of the ILD, because the Complaint purportedly failed to allege that challenge. (FDAB at 27-28.)[14] The district court rightly rejected this contention:

> [P]aragraph 25, footnote 2 of the complaint states: " ... the ROD's conclusion that the 2006 Artman determination is "grandfathered," and is not subject to the regulations adopted in 2008 (*see* 25 C.F.R., Part 292), is arbitrary, capricious, and contrary to law." The Complaint also makes numerous arguments regarding the ROD's determination that the Plymouth parcels qualified as restored lands for a restored Indian tribe under the IGRA; section 292.26(b) functions in the

[14] Appellees have abandoned their contention, rejected by the district court, that the statute of limitations bars this claim.

> ROD to permit the Secretary to make the determination that the restored lands exception is met.

(PER19.)

The first allegation alone satisfies the pleading requirements of Rule 8,[15] but—as the district court recognized—because the ROD relies exclusively on 25 C.F.R. § 292.26(b), and contains a detailed discussion thereof, it would have been clear that the County challenged the Department's use of that regulatory provision to exempt the Band from the application of 25 C.F.R. § 292.10.

Certainly, Appellees have not been prevented from responding fully to the County's challenge—each has devoted multiple pages of their briefs to responding, both in the district court and this Court.

III.

THE BAND IS INELIGIBLE FOR TRUST LANDS UNDER THE INDIAN REORGANIZATION ACT.

A. THE IONE BAND IS NOT A "RECOGNIZED INDIAN TRIBE" WITHIN THE MEANING OF THE IRA.

The ROD repeatedly states that the Band was first "recognized" by the government as a tribe in 1972. (*See, e.g.*, PER141, 149, 151.) Appellees are bound by these statements. *See Chenery*, 318 U.S. at 87. Because the IRA

[15] *See San Luis & Delta-Mendota Water Auth. v. Dept. of Interior*, 236 F.R.D. 491, 500 (E.D. Cal. 2006).

requires that a "tribe" be formally "recognized" (in a political sense) in 1934, the Secretary is not authorized to take land into trust on the Band's behalf.

1. The IRA requires "recognition" in 1934.

The Secretary's contention that a tribe can be "recognized" 60 years after the IRA's enactment is not a plausible interpretation of that Act.

Textually, it would make the term "recognized" essentially meaningless, in violation of the well-established rule that courts "are obliged to give effect, if possible, to every word Congress used." *Carcieri*, 555 U.S. at 391. If the language of Section 19 (25 U.S.C. § 479)[16] were understood to permit "recognition" at any subsequent time, the word "recognized" would not, in any way, qualify the word "tribe," because the mere decision by the government to accept land into trust would, effectively, recognize that tribe. Thus, Section 19 would be no different if it simply read, "The term 'Indian' ... shall include all persons of Indian descent who are members of any Indian tribe now under Federal jurisdiction."

The legislative history confirms that no such temporally open-ended meaning was intended. The IRA's first definition of "Indian" originally included *only* the "recognized Indian tribe" requirement, and not the phrase "now under federal jurisdiction." Yet, addressing that original version, the

[16] The IRA was recently recodified at 25 U.S.C. §§ 5101 *et seq*., but to be consistent with the AOB, Appellant continues citing the previous sections.

IRA's Senate sponsor stated that the IRA was being enacted "to take care of the Indians *that are taken care of at the present time*." (PER163.) He also averred that Indians of "less than half blood" would not qualify as "Indian" "unless they are enrolled [with the Indian Office] at the present time." (PER164.) Commissioner Collier stated that Indians would not qualify unless they "are actually residing within the present boundaries of an Indian reservation at the present time." (*Id.*) And the IRA's House sponsor explained that the IRA's "definition of 'Indian'" "recognizes the status quo of the present reservation Indians."[17] Tellingly, all of this discussion preceded Commissioner Collier's proposal to add "now under federal jurisdiction" (PER166), meaning that the temporal limitation was understood to be implicit in the notion of a "recognized tribe" even before "now" was added to the statute.

Turning to judicial interpretations, before 2009 (*i.e.*, before the Department had an incentive to avoid the effect of *Carcieri*),[18] every court to address Section 19 held that a tribe had to be "recognized" in 1934. In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court explained that "[t]he

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[17] *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1220 n.10 (D. Haw. 2002), *aff'd*, 386 F.3d 1271 (9th Cir. 2004) (quoting congressional debate on Wheeler-Howard Bill (1934) in THE AM. INDIAN AND THE UNITED STATES, Vol. III. (Random House 1973)) (emphasis in original).

[18] *See* note 1, *supra*.

1934 Act defined 'Indians' ... as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" *Id.* (quoting 25 U.S.C. § 479) (brackets in original). Numerous other cases, cited in the County's opening brief, support this reading as well. *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975) (plaintiff not an "Indian" under the first or second definition in § 479, because "neither Maynor nor his relatives had any tribal designation, organization, or reservation *at that time*," *i.e.*, 1934); *United States v. State Tax Commission of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974) ("[t]he language of Section 19 positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words 'any recognized Indian tribe now under Federal jurisdiction' and the additional language to like effect."); *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 161 n.6 (D.D.C. 1980) ("the IRA was intended to benefit only those Indians federally recognized at the time of passage.").

Appellees, parroting the decision in *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552 (D.C. Cir. July 29, 2016), dismiss the *John* case on the ground that it was not cited in *Carcieri*. But *Carcieri* did not disapprove *John*, which means it remains binding precedent. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Moreover, the *Carcieri* decision was focused on "federal

jurisdiction," whereas *John* addressed recognition, so there is no inconsistency between the two.

As for the clear, unambiguous holding in *State Tax Commission of Mississippi*, Federal Defendants rely on an *unpublished* opinion of the Eleventh Circuit, *Poarch Band of Creek Indians v. Hildreth*, 2016 U.S. App. LEXIS 12666 (11th Cir. July 11, 2016), for the premise that the holding was "akin to dicta," and was "subsequently eroded" by *John* (which the Appellees otherwise dismiss as irrelevant). But (1) as an unpublished decision, *Poarch Band* has no precedential value; (2) for the *Poarch Band* decision to accuse the Fifth Circuit of engaging in unnecessary dicta is highly ironic, given its own holding that the challenge to the Secretary's decades-old trust decisions was untimely under the APA (*id*. at *11)—a dispositive holding that relieved that court of the need to even consider *State Tax Commission*; and (3) *John* rejected the *factual* premise in *State Tax Commission*—that the Choctaws did not have tribal status in 1934—not the decision's legal analysis.

There is no basis, in either the text, legislative history, or prior judicial constructions for concluding that Congress meant to give unfettered discretion to the Secretary in defining "Indians," and every reason instead to conclude that Congress adopted the language it did to limit that term to "Indians that are taken care of at the present time."

Finally, Federal Defendants' heavy reliance on the holding in G*rand Ronde* that "recognition" need not come in 1934 is misplaced. That court reached its conclusion by giving *Chevron* deference to the Secretary's interpretation of the word "recognized," *see* 830 F.3d at 558-59, but such deference is contrary to the precedents of this Court. (Additionally, a petition for certiorari was filed in the *Grand Ronde* case on October 27, 2016—Docket No. TBD.)

The Department's interpretation of the word "recognized" as lacking a temporal element is not embodied in a formal regulation, adopted after notice-and-comment, but in one tribe's land-to-trust determination (the 2013 Cowlitz ROD), and a subsequent opinion of the Department's Solicitor. (*See* FDAB, p. 19 and Addendum, pp. ADD037-38.) In *Wilderness Society v. United States FWS*, 353 F.3d 1051, 1068 (9th Cir. 2003) (en banc), an en banc panel of this Circuit expressly refused to give Solicitor's opinions *Chevron* deference, relying on *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and

enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").[19]

Ignoring *Wilderness Society*, Federal Defendants misleadingly cite *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc), to suggest that Solicitor's opinions are entitled to *Chevron* deference, but *Marmolejo-Campos* dealt with formal adjudicatory decisions by the Board of Immigration Appeals, not Solicitor's opinions. *Wilderness Society*, which is a binding *en banc* precedent in this Circuit, and which is on point, controls.

In light of *Wilderness Society*, Appellees' reliance on the D.C. Circuit decision in *Grand Ronde* is misplaced.

2. Cognitive, rather than "political" recognition is insufficient to meet the requirements of the IRA, and any suggestion to the contrary conflicts with the ROD, the Secretary's regulations, and this Court's precedents.

As an obvious hedge against the prospect that this Court will conclude that recognition was required in 1934, Appellees present a fallback argument: the Band was "recognized" in 1934, because "recognition" can be understood in a cognitive or quasi-anthropological sense, in terms of knowing a tribe exists, rather than a formal, political sense, and that the Department's choice between these two meanings deserves deference. But

[19] Neither Appellee claims the Cowlitz ROD is the type of agency action due *Chevron* deference.

this fallback argument is inconsistent with (1) the ROD; (2) the Secretary's own regulations, which uniformly treat "recognition" as a political, rather than cognitive, concept; and (3) prior decisions of this Court, which also recognize the political component of "recognition."

First, the ROD clearly uses the term "recognized" in a political sense, rather than a "cognitive, quasi-anthropological" one. It concludes that the Band was "recognized" in 1972—a determination that would make little sense if the term "recognized" were used in a non-political way, given the Department's claimed knowledge that the Band existed before that. And the ROD does not claim the Secretary is entitled to take land into trust for the Band based on the Department's "cognitive" recognition of the Band. The agency cannot now supply an alternative rationale for upholding the ROD that it did not adopt at the time. *Chenery*, 318 U.S. at 87.

Second, the Secretary's own regulations consistently treat "recognition" in a formal, political sense. The Part 83 acknowledgment regulations—"promulgated ... under the IRA"[20]—provide: "Federally recognized Indian tribe means an entity listed on the Department of the Interior's list under the Federally Recognized Indian Tribe List Act of 1994,

[20] *See Mackinac Tribe v. Jewell*, 829 F.3d 754, 755 (D.C. Cir. July 19, 2016).

which the Secretary currently acknowledges as an Indian tribe *and with which the United States maintains a government-to-government relationship*." 25 C.F.R. § 83.1 (emphasis added). In adopting those regulations in 1978, the Secretary emphasized that to be recognized, "Maintenance of tribal relations—a political relationship—is indispensable." *See* "Procedures for Establishing that An American Indian Group Exists As An Indian Tribe," 43 Fed. Reg. 39361, 39361-62 (Sept. 5, 1978).

In the same vein, for purposes of applying the "restored lands" exception, the Part 292 regulations provide:

> For a tribe to qualify as having been at one time federally recognized for purposes of § 292.7, one of the following must be true:
>
> (a) The United States at one time entered into treaty negotiations with the tribe;
>
> (b) The Department determined that the tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act;
>
> (c) Congress enacted legislation specific to, or naming, the tribe *indicating that a government-to-government relationship existed*;
>
> (d) The United States at one time acquired land for the tribe's benefit; or
>
> (e) Some other evidence demonstrates the existence of a *government-to-government relationship* between the tribe and the United States.

25 C.F.R. § 292.8 (emphasis added).

They further provide, "Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary *as having a government-to-government relationship with the United States* ..." 25 C.F.R. § 292.2 (emphasis added).

None of this is consistent with merely "cognitive" or "anthropological" recognition. It all requires formal, political recognition. Indeed, if the term "recognized" in the IRA were properly interpreted to mean "cognitive" recognition, the Part 83 regulations—and their insistence on a government-to-government relationship—would be inconsistent with Congress's apparent intent in adopting that statute. There would be no basis for the Secretary to refuse to accept lands into trust on behalf of a "tribe" that has not been formally acknowledged under the Part 83 regulations, nor to permit such a tribe to seek an election under the IRA. *But see Mackinac Tribe*, 829 F.3d at 755 (upholding government's contention that tribe must seek recognition under Part 83 regulations before it could insist on IRA election); *Ione Band of Miwok Indians v. Burris*, No. S-90-0993-LKK/EM (E.D. Cal.) (PER634-659) (dismissing Band's complaint demanding to have land taken into trust, because not a formally recognized tribe). Here again, the Department seeks to simultaneously maintain two different interpretations of the same statutory term.

Finally, an en banc panel of this Court has held that "[f]ederal recognition 'is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.'" *United States v. Zepeda*, 792 F.3d 1103, 1114 (9th Cir. 2015) (en banc) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 134-35 (2012 ed.)).[21]

Neither Appellee makes any mention of this Court's case law to this effect. Instead both rely on out-of-Circuit district court opinions: *Stand Up for California! v. United States DOI*, 919 F. Supp. 2d 51 (D.D.C. 2013), and *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, 2015 U.S. Dist. LEXIS 38719 (N.D.N.Y. Mar. 26, 2015), for the proposition that a tribe could be "recognized" for purposes of the IRA in a merely "cognitive" sense. But the facts reflecting "recognition" in those cases were not merely—as suggested—that "federal officials simply knew or realized that an Indian tribe existed." *Id.* at 69. In

[21] *See also* H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., 2 (1994) (cited by COHEN'S HANDBOOK) ("'Recognized' is more than a simple adjective; it is a legal term of art. It means that the government acknowledges as a matter of law that a particular Native American group is a tribe by conferring a specific legal status on that group, thus bringing it within Congress legislative powers. ... A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe ....").

both, there was an historical, formal, government-to-government relationship, predating the enactment of the IRA.

In *Stand Up for California!*, the government had *actually* purchased reservation lands for the North Fork tribe, in 1916 (as opposed to merely considering such a purchase). 919 F. Supp. 2d at 58. And—unlike the Ione Band—the North Fork tribe was invited by the Secretary to, and did, conduct an election on whether to organize under the IRA in 1935. *Id*. These facts, far from suggesting mere "cognitive" recognition—reflect an actual political relationship.

Central N.Y. Fair Business Association also did not hold that "cognitive" recognition *alone* suffices. Rather, the court held that the government had "recognized" the Oneida Indian Nation during the 1800s *by entering treaties with it*—a formal, government-to-government relationship if ever there was one. Moreover, that case is currently pending on appeal before the 2d Circuit. (Appeal No. 16-53, filed Jan. 7, 2016).

Final judgment has not yet been entered in *Stand Up for California!*, but if it is appealed that decision will go to the D.C. Circuit, which recently stated that recognition is a "formal political act," in *Mackinac Tribe*, 829 F.3d at 755. And it did so in affirming a district court opinion that held:

> Federal "recognition" of an Indian tribe is a term of art that conveys a tribe's legal status vis-à-vis the United States—it is *not*

> an anthropological determination of the authenticity of a Native American Indian group. ... Federal recognition specifically denotes "the federal government's decision to establish a government-to-government relationship by recognizing a group of Indians as a dependent tribe under its guardianship[,]" [citation], and such recognition "is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes by virtue of their status as tribes," 25 C.F.R. § 83.2.

Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127, 131 (D.D.C. 2015).

Federal Defendants (though not the Band) also claim that the D.C. Circuit has rejected the notion that "recognition" refers to a tribe's political status, in *Grand Ronde*. Not so. That case ultimately turned on the temporal aspect of recognition, discussed above (1934 vs. anytime). While the decision noted the cognitive vs. political issue, it was not ultimately presented by the case because the Secretary had declined to take a position as to which definition was correct in that case, having concluded that formal "political" recognition in 2002 was sufficient. *See* 830 F.3d at 559-60. Moreover, the *Grand Ronde* decision does not even cite—much less distinguish—the *Mackinac Tribe* case, decided ten days earlier, which held that "recognition" is a "formal political act."

Despite Appellees' claims to the contrary, no case has ever held that a tribe was "recognized" for purposes of the IRA based solely on the fact that the Department "knows" the tribe exists.

3. Federal Defendants' claim that this argument was waived is frivolous.

Federal Defendants assert Amador County waived any claim that the Band was required to be "recognized" in 1934, because—purportedly—this argument was not raised in the Complaint or the district court. This is frivolous.

The Complaint contains dozens of allegations that the Band was not a recognized tribe in 1934. *See, e.g.*, Complaint, ¶ 84 ("there is no record evidence that the Ione Band were organized as a *tribe*—federally-recognized or otherwise—in June 1934." (emphasis in original)), ¶ 86 ("The ROD cites no evidence that the Ione Band existed as a 'tribe' in 1934—a sovereign entity exercising governmental powers over its members—rather than a handful of landless Indians."), Heading A, p. 8 ("The Ione Band Was Never Recognized By The United States..."), ¶ 31 ("the Ione Band has was never federally recognized and has never established a historic tribal identity that would justify federal recognition.").

Likewise, in the district court Amador County argued, "The Ione Band was not a distinct 'tribal' entity in 1934, and the administrative record does not support the conclusion that it was." (Dkt. #65 [Motion for Summary Judgment], p. 28.) The County argued, "The Government Is Judicially Estopped, And The Ione Band Is Collaterally Estopped, From Arguing That

The Band Was Recognized Prior To 1991." (*Id*. at 36.) It argued, "the United States took the position in the *Ione Band Litigation* ... that the Band was never federally-recognized, and that the Bruce letter did not alter that fact. The facts presented to the Department by the County bear that conclusion out." (*Id*. at 40-41.) And it argued, "UNDER *CARCIERI V. SALAZAR*, THE IONE BAND IS NOT ELIGIBLE TO HAVE LANDS TAKEN INTO TRUST UNDER THE INDIAN REORGANIZATION ACT, BECAUSE IT WAS NOT A 'RECOGNIZED TRIBE' THAT WAS 'UNDER FEDERAL JURISDICTION' IN 1934." (Dkt. #85 [County's MSJ Reply], p. 28.).

B. BECAUSE THE IONE BAND DID NOT LIVE ON FEDERALLY-RESERVED LAND AND DID NOT HAVE A TREATY, EXECUTIVE ORDER, OR LEGISLATION, IT WAS NOT "UNDER FEDERAL JURISDICTION" IN 1934.

1. Deferring to the Department's interpretation of "under federal jurisdiction" is contrary to *Carcieri* and settled principles of administrative law.

The chief refrain of the Band and, especially, Federal Defendants is a familiar one: deference, deference, deference. The statute is (purportedly) ambiguous, so the Court must defer to the Department's action.

But in *Carcieri*, the Court majority declined to give *Chevron* deference to the Secretary's interpretation of § 479, holding that it was unambiguous and that "Congress left no gap in 25 U.S.C. § 479 for the agency to fill" when

"it explicitly and comprehensively defined the term [Indian] by including only three discrete definitions." 555 U.S. at 391.

Equally significant is Justice Breyer's concurrence, given the Department's and Band's heavy reliance thereon. Appellees cherry-pick certain portions of that concurrence to suggest ambiguity, but ignore the fact that Justice Breyer held that "the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying difficulty," and that "[t]hese circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, *despite linguistic ambiguity*." *Id. at* 396-97 (Breyer, J., concurring) (emphasis added).

Ironically, in support of this latter point—that *even if* linguistic ambiguity existed, it would not entitle the Department to deference—Justice Breyer cited the very case Federal Defendants rely on: *United States v. Mead Corp.*, 533 U.S. 218, 227, 229-230 (2001). In *Mead*, the Court held that the courts must give *Chevron* deference to an agency's reasonable interpretation of an ambiguous statute *only when circumstances suggest that Congress intended to delegate to the agency the power to fill gaps*. *Id.*

When, however, circumstances do not suggest that Congress meant to delegate specific interpretive authority to the agency, such as when Congress has specifically focused on a given issue (as here), an agency's interpretation is only persuasive so far as it is well-reasoned and consistent with earlier pronouncements. *Carcieri*, 555 U.S. at 397 (Breyer, J. concurring) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). As Justice Breyer recognized, that is the case with respect to the phrase "now under federal jurisdiction" in Section 479.

Again, *Chevron* deference is particularly inappropriate here, where the Department's interpretation of "under federal jurisdiction" is not embodied in a formal regulation, but in the 2013 Cowlitz ROD and subsequent Solicitor's opinion. *See Wilderness Society*, 353 F.3d at 1068; *Christensen*, 529 U.S. at 587. For this reason again, Appellees' reliance on the D.C. Circuit decision in *Grand Ronde* is misplaced, and all the more so as that decision did not even discuss Justice Breyer's analysis of "under federal jurisdiction."

2. There is no merit to Appellees' efforts to separate "federal jurisdiction" over an Indian tribe from federally-held land in the absence of a treaty or tribe-specific legislation or executive order.

As reflected in the IRA's legislative history, the specific "underlying difficulty" Congress thought it was resolving by adding the phrase "now under federal jurisdiction" was to prevent Indian "tribes" (other than treaty

tribes) from taking advantage of the act "unless they are enrolled [with the Indian Office] at the present time,"[22] or were "actually residing within the present boundaries of an Indian reservation at the present time..."[23] In other words, they specifically sought to preclude groups like the Ione Band—which was not a treaty tribe, and was not comprised of Indians enrolled with the Indian Office or living on reservation land—from taking advantage of the provisions of the IRA. As the IRA's House sponsor observed, "For purposes of this act, [§ 479] defines the persons who shall be classed as Indian. *In essence, it recognizes the status quo of the present reservation Indians* and further includes all other persons of one-fourth Indian blood...."[24]

The Band strings together disconnected snippets of the Congressional Record to suggest that Representative Howard's opinion was broader (IBAB, pp. 65-66), but a careful review of his testimony from that day reveals his belief that "[a]ny lands acquired under this bill may be added to existing reservations, but no Indian who is not a member of or enrolled on such reservation or entitled to such enrollment may use such lands." 78 Cong. Rec. 11730 (June 15, 1934).

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[22] PER164.
[23] PER165
[24] *See* note 17, *supra*.

Ample case law, discussed in the AOB, also supports this well-recognized distinction between "federal jurisdiction" and "reservations" or other federally-held lands on the one hand, and state jurisdiction over Indians off the reservation on the other.[25]

And finally, the contemporaneous administrative practice of the Bureau of Indian Affairs supports the conclusion that "under jurisdiction" meant a treaty or residence on federally-held land, especially:

- The Comptroller General's 1925 opinion concluding that "There exists no relation of guardian and ward between the Federal Government and Indians who have no property held in trust by the United States, have never lived on an Indian reservation, belong to no tribe with which there is an existing treaty, and have adopted the habits of civilized life and become citizens of the United States by virtue of an act of Congress." (AA75.)
- The 1933 letter from then-Superintendent of the Sacramento Indian Agency, O.H. Lipps, to then-Commissioner of Indian Affairs John Collier, describing the Indians near Ione thus: "The situation of this group of Indians is similar to that of many others in this Central California area. They are classified as non-wards

[25] *See* AOB at 53-55.

under the rulings of the Comptroller General because they are not members of any tribe having treaty relations with the Government, *they do not live on an Indian reservation or rancheri*a, and none of them have allotments in their own right held in trust by the Government. They are living on a tract of land located on the outskirts of the town of Ione." (PER339-340 [emphasis added].)[26]

- Superintendent Lipps' August 15, 1934 letter to Commissioner Collier, listing the various Indian communities under the "jurisdiction" of the Sacramento Agency, which then included Amador County. (PER716-720.) The stated purpose of that letter was to respond to the Commissioner's request for information about Indian communities within the Sacramento Agency's jurisdiction, for the purpose of putting into effect the IRA. (PER717.) Two "tribes" in Amador County—the Jackson Rancheria Indians and the Buena Vista Rancheria Indians—were listed; the Ione Band was not.

[26] In its brief, the Band strategically quotes the portion of this passage relating to treaties, while omitting the discussion of living on an Indian reservation or rancheria. (IBAB, p. 59.)

- The invitation by the Secretary for Jackson and Buena Vista to conduct an election on whether to organize under the IRA (PER738), while declining to extend such an offer to the Ione Band. (PER482, PER716-768.)

Appellees respond that the notion of "jurisdiction" has no meaningful content that can be discerned (an obvious bid for deference, which is unavailing for the reasons cited above), but that its meaning is exceedingly broad and not limited to tribes that lived on land held in trust for them by the federal government. But the chief cases Appellees cite—*United States v. Kagama*, 118 U.S. 375 (1886), and *United States v. Sandoval*, 231 U.S. 28 (1913)—both dealt with federal jurisdiction over crimes committed on federally-superintended *Indian lands*. *See Kagama*, 118 U.S. at 383 (murder of one Indian by another "committed within the limits of the reservation"); *Sandoval*, 231 U.S. at 36 ("criminal prosecution for introducing intoxicating liquor into the Indian country"); *see also Am. Vantage Cos. v. Table Mt. Rancheria*, 292 F.3d 1091 (9th Cir. 2002) (cited by Federal Defendants) (discussing "traditional view that 'state law has no force and effect, except as granted by federal law, within the territory of an Indian tribe in matters

affecting Indians' ... Thus, for instance, states possess limited power to assert jurisdiction *on Indian land* and to tax and regulate Indian affairs.").[27]

Appellees also make a textual argument that if the County's interpretation were correct, Congress would have used the term "in Indian Country" rather than "under federal jurisdiction" in enacting the IRA, as it did in other places. And, relatedly, the Band argues that accepting that interpretation would mean that no landless tribe could ever get land under the IRA, thereby frustrating the purpose of the IRA.

But these arguments attack a straw man, mischaracterizing the County's position as rigidly contending that living on federal lands was the *exclusive* way for a tribe to be "under federal jurisdiction" in 1934. In fact, the County's opening brief argued that "because the Ione Band did not live on federally-reserved land *and did not have a treaty, executive order, or legislation*, it was not 'under federal jurisdiction' in 1934." (AOB, p. 52; emphasis added.) The County does not deny that a landless tribe could be "under federal jurisdiction"—and entitled to land under the IRA—if one of

[27] As even Federal Defendants acknowledge (FDAB at 45), interpreting "under federal jurisdiction" as referring generically to Congress's "plenary power" over Indians would sweep too broadly. The language was clearly meant to *limit* land acquisitions.

those formal actions created such jurisdiction, prior to 1934, instead.[28] That being the case, the use of "under federal jurisdiction" rather than "in Indian Country" makes perfect sense.

Here, however, there is no (ratified) treaty. There is no legislation or pre-1934 executive order that expressly established a government-to-government relationship with the Band. And there is no land.

Federal Defendants also argue that the inclusion of a residency requirement in Section 19's second definition of "Indian"—"descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and its omission from the first part, show that "federal jurisdiction" did not require land ownership. And—as noted above—that is true with respect to treaty tribes and those recognized by specific legislation or executive order. But also, the second definition covers the case where multiple "recognized tribes" might reside on the same reservation, so for those cases this wording in the IRA permitted those tribes to organize on their own, or to consolidate as a single "tribe" so long as they resided on the same reservation.

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[28] *See, e.g., City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (where tribe had sold its land in the 1800s, but remained under treaty with the federal government, Section 5 of the IRA "provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.").

Finally, Appellees' attempt to explain away the Comptroller General opinion and Lipps/Collier correspondence is unpersuasive. As to the former, which held that "There exists no relation of guardian and ward between the Federal Government and Indians" absent a treaty or reservation, Federal Defendants dismiss it as only about "indigent Indians." (FDAB, p. 55.) But ample case law—including *Kagama* and *Sandoval*—establish that this guardian/ward relationship is fundamental to the exercise of federal jurisdiction over Indians. *See, e.g.*, *Kagama*, 118 U.S. at 383. Thus, Superintendent Lipps's 1933 characterization of the Ione Indians as "non-wards under the rulings of the Comptroller General" was a critical, *contemporaneous* indication that they were not under federal jurisdiction. *See Carcieri*, 555 U.S. at 396 (Breyer, J., concurring) (Secretary's current interpretation of "now under federal jurisdiction" not even entitled to *Skidmore* deference because contradictory to interpretation at the time of IRA's enactment).

The County acknowledges that certain formal actions by the government—notably, a treaty, tribe-specific legislation or executive order, or enrollment with the Bureau—could establish federal jurisdiction over a landless tribe in 1934. But none of these actions was present with respect to the Band.

The ROD's conclusion that federal jurisdiction existed over the Band in 1934 stretches the notion of "jurisdiction" beyond the breaking point, as demonstrated by a comparison between the facts relied upon here—*failed* attempts to purchase land, under a program designed for landless California Indians "without regard to the possible tribal affiliation of the members of the group" (PER605)—with the specific examples of "a 1934 relationship between the Tribe and Federal Government that could be described as jurisdictional" that Justice Breyer lists in his concurrence: "for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." Like the legislative history, case law, and administrative practice, this concurrence anticipates that the Indians must have been formal wards of the federal government in 1934.

3. Even Appellees acknowledge that neither failed treaty negotiations nor inclusion of individual Indians living near Ione on a list of landless, non-reservation Indians can establish a tribe was under "federal jurisdiction."

Both Appellees grudgingly acknowledge that failed treaty negotiations cannot, standing alone, demonstrate federal jurisdiction, and that the ROD did not conclude otherwise. (*See* FDAB, p. 55; IBAB, p. 69.) They cannot deny this Court's prior holding that an unratified treaty "carries no legal effect" and is "a legal nullity." *Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015).

Thus, treaty *negotiations* cannot establish duties or obligations on the part of the United States that would give rise to "federal jurisdiction"; only an *executed* treaty establishes any obligation on the part of the United States.

Likewise, both Appellees grudgingly acknowledge that the inclusion of individual Indians living near Ione on a list of landless, non-reservation Indians in 1906 is not itself sufficient to show federal jurisdiction over a tribe.

Appellees nevertheless argue that these facts—which the ROD did not rely on—demonstrate a "course of dealing" between the Band and the government that bolster the claim that failed land acquisition efforts reflect an assertion of federal jurisdiction. In essence, they seek to take one factor that is insufficient and rescue it by focusing on two additional facts that are also insufficient.

In support of this approach, both Appellees cite *Stand Up for California!*, but—again—that case does not support their position. For one thing, in *Stand Up for California!*, the Secretary's ROD concluded that "that he had the authority to acquire land for the North Fork Tribe, based solely on the IRA election" by the Tribe in 1935. 919 F. Supp. 2d at 67. The Ione Band, by contrast, was not invited to—and did not—have an IRA election. (Nor, unlike the North Fork, did the Ione Band actually live on a federally-owned rancheria in 1934.)

Second, to the extent that the district court discussed other factors that it believed might have further suggested the existence of federal jurisdiction, that discussion is pure dicta in light of the black-letter rule that courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

And finally, the cited footnote did not base the court's decision on treaty negotiations. It merely noted that fact amongst a host of other historical facts cited by—but explicitly not relied on in—the ROD. Again, to the extent the court suggested that these historical facts "could reasonably indicate" federal jurisdiction, the discussion is pure dicta.

The D.C. Circuit decision in *Grand Ronde* also did not hold that failed treaty negotiations suffice to establish federal jurisdiction. That Court's statement that "it makes sense to take treaty negotiations into account" is qualified by "the context within which the particular negotiations at issue occurred." 830 F.3d at 564-65. In that case, the proposed treaty for cession of Cowlitz lands: (1) was rejected by the tribe, not by the Senate; (2) was with the actual tribe in question (not some ill-defined "successor-in-interest"); and (3) was effectively implemented anyway, when the federal government went ahead and sold the Cowlitz's land to settlers anyway, pursuant to an

1863 presidential proclamation by President Lincoln. As the court noted, "the fact that the government nevertheless took the Cowlitz land even after the tribe resisted the treaty corroborates that the government treated the Cowlitz as under its jurisdiction." *Id*. In this case, however, there is no record evidence that the federal government took and sold any land owned by the Ione Band. Again, it all comes back to federal control over *land*.

Nor is there evidence of any of the other facts present in *Grand Ronde*, such as "government provision of services into the 1900s," *id*. at *24, "allotments [on the Quinault Reservation] to eligible Cowlitz Indians during the period from 1905 to 1930" (federal control over land again), *id*. at *31, or "Interior's approval of an attorney contract for the Tribe in 1932, pursuant to a statute that required contracts between Indian tribes and attorneys be approved by the Commissioner of Indian Affairs and Secretary." *Id*. at *25. In this case, the record reflects no allotments of land to Band members; there were no services provided to Band members by the federal government (SAR20905); and the federal government disclaimed the right to approve tribal contracts for the Band (*see* AR000811-13).

The allotments are particularly significant. As the *Grand Ronde* district court noted:

> Some Cowlitz Indians also received allotments due to "the Act of March 4, 1911" which directed the Secretary to make allotments

> to members of tribes in the State of Washington "who are affiliated with the Quinaielt and Quileute tribes." [Citation] In its 1931 decision, *Halbert v. United States,* the Supreme Court determined that the Cowlitz members were entitled to such allotments. *Id.* (citing *Halbert v. United States,* 283 U.S. 753 (1931)).

Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 75 F. Supp. 3d 387, 405 (D.D.C. 2014). In this case, by contrast, the government did not (1) successfully acquire land on behalf of the Ione Indians, (2) acquire land *from* the Ione Indians, or (3) allot land to the Ione Indians prior to 1934.

In both *Stand Up for California!* and *Grand Ronde*, there was evidence of an *actual* jurisdictional relationship between the tribe and the federal government, consistent with the IRA's legislative history.

4. Appellees' other arguments fail as well.

The Band asserts that the Department's abortive approval to use congressional appropriations for "landless California Indians" to acquire land on behalf of Ione Indians establishes it was "under federal jurisdiction" because it "did in fact fall under the auspices of federal legislation." (IBAB, p. 60.) In support of this position, it claims that further claims that the "D.C. District Court has concluded that such use of a general appropriation for a particular tribe is "important, and likely dispositive in its own right, regarding whether the [tribe] was 'under Federal jurisdiction' in 1934," citing *Stand Up for California!* (*Id.* at 61.)

This is inconsistent with the ILD, which recognized that this land purchase program "attempted to purchase land wherever it could for landless California Indians *without regard to the possible tribal affiliation of the members of the group*." (PER605 [emphasis added]; *see also* PER376.)

Nor does *Stand Up for California!* hold otherwise. In that case, land *was actually purchased* for the North Fork Band. The court stated, "*[t]his purchase of land* is important, and likely dispositive in its own right, regarding whether the North Fork Tribe was 'under Federal jurisdiction' in 1934." 919 F. Supp. 2d at 68 (emphasis added). In this case, however, no land was actually purchased on behalf of the Band. Hence, the land purchase efforts were—at most—an unconsummated proposal to take the Band "under federal jurisdiction."

Finally, the Band cites several letters in the AR referring to the Band, which also refer to "the proposed Indian Colony for the homeless Indians near Ione in Amador County, this jurisidiction" (IBAB, p. 68) and state that "as this Office is aware, this jurisdiction includes the activities in forty-five counties of Northern and Central California." (*Id*.) This deliberately confuses two different meanings of the word "jurisdiction," one of which refers to "the

power or right to exercise govern or legislate," and the other of which refers to "the limits or territory within which authority may be exercised."[29]

"Jurisdiction" as used in the IRA unambiguously refers to the power of the federal government over Indian tribes. "Jurisdiction" as used in these letters merely refers to the territorial reach of one Indian office of the Bureau of Indian Affairs—the Sacramento Agency, of which O.H. Lipps was superintendent—as opposed to some neighboring agency. "Jurisdiction" as used in the cited letters is more akin to "venue." To thus interpret "jurisdiction" in the IRA would render its use in Section 19 meaningless, because it would mean that any tribe within the territorial limits of the U.S. would be eligible for land—a reading that is clearly foreclosed by the legislative history. Those letters have no bearing on what the understanding of Congress was regarding the power of the federal government over tribes and Indians.

[29] *See* Merriam Webster Dictionary, *online at m-w.com* (definition of "jurisdiction").

IV.

CONCLUSION.

The district court's judgment should be **OVERRULED**, and remanded for entry of judgment in Amador County's favor.

Respectfully submitted,

Dated: October 28, 2016

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