No. 15-17189

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

NO CASINO IN PLYMOUTH
and CITIZENS EQUAL RIGHTS ALLIANCE

Plaintiffs-Appellants

v.

SALLY JEWELL, Secretary; KEVIN WASHBURN, Assistant-Secretary; DONALD LAVERDURE, Acting Assistant-Secretary; BUREAU OF INDIAN AFFAIRS; AMY DUTSCHKE, BIA Reg. Dir.; JOHN RYDZIK, BIA Env. Div.; PAULA HART, OIG Chair; TRACIE STEVENS, NIGC Chair; NATIONAL INDIAN GAMING COMMISSION; and U.S. DEPARTMENT OF INTERIOR

Defendants-Appellees

and

IONE BAND OF MIWOK INDIANS

Intervener-Appellee

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:12-cv-01748 TLN-CMK
Honorable Troy L. Nunley, District Judge

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Appellants, No Casino in Plymouth and Citizens Equal Rights Alliance (NCIP/CERA) are community, citizen groups challenging a Record of Decision (ROD) to take land into trust for a major Indian casino in quiet and rural Plymouth, California. NCIP/CERA is appealing the district court's denial of their motions for judgment on the pleadings and summary judgment on the first claim for relief. The ROD was issued in violation of the Appointments Clause and is contrary to the Indian Reorganization Act of 1934. The district court's decision should be reversed

NCIP/CERA submits this brief in reply to the federal Appellees' Answering Brief (FAB). Federal Appellees include: (1) Sally Jewell, Secretary of Interior, (2) Kevin Washburn, Assistant Secretary, (3) Donald Laverdure, "acting" Assistant Secretary, (4) Amy Dutschke, Bureau of Indian Affairs (BIA), Regional Director, (5) John Rydzik, BIA, Environmental Director, (6) Paula Hart, Chair of the Office of Indian Gaming (OIG), (7) Tracie Stevens, Chair of the National Indian Gaming Commission (NIGC), (8) BIA, (9) NIGC, and (10) Department of Interior (DOI).

This brief is also in reply to the Answering Brief of Ione Band (IAB) which is the BIA-created Indian group that was permitted to intervene in this case.

NCIP filed Excerpts of the Record (ER) with its Opening Brief (OB). And, with this reply, NCIP/CERA is submitting Supplemental Excerpts of the Record (SER).

INTRODUCTION

For at least the last 180 years, it has been an undeniable axiom of Indian law that Congress - not the BIA or the federal bureaucracy - has "plenary power" over Indian tribes as "the wards of the nation . . . *dependent* on the United States." *United States v. Kagama*, 118 U.S. 375, 383-384 (1886). "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004).

This appeal involves the Indian Reorganization Act (IRA) passed by Congress in 1934 pursuant to its "plenary and exclusive" authority over Indian tribes. 25 U.S.C. §§ 465 et seq. The Congressional mandates and directives in the IRA to the Secretary of Interior regarding the authority to acquire trust land for the benefit of tribes that were federally recognized in 1934 are clear, unambiguous and direct. *Carcieri v. Salazar*, 122 S.Ct 1058 (2009).

The IRA specifically authorizes the Secretary of Interior, and only the Secretary of Interior, as a Principal Officer of the United States, to acquire land, and hold it in trust, "for the purpose of providing land for Indians." 25 U.S.C. § 465. Furthermore, the fee-to-trust benefits of the IRA do not apply to groups of Indians (such as the Ione Indians) which have never been federally recognized as

tribes. Instead, the Supreme Court has recently confirmed that this benefit is specifically limited to "members of any recognized tribe now under federal jurisdiction" in 1934. 25 U.S.C. § 479; *Carcieri v. Salazar,* 129 S.Ct at 1060.

The Supreme Court also held that the phrase "recognized tribe now under federal jurisdiction" in 1934 is not ambiguous and does not require interpretation by the federal agencies. It is just another way of saying "federally recognized tribe" in 1934; both phrases are "one and the same." *Carcieri,* 129 S.Ct at 1071 (Justice Souter's partial dissent). As stated by Justice Thomas in the *Carcieri* majority opinion: "Congress left no gap in 25 U.S.C. § 479 for the agency to fill." *Carcieri*, 129 S.Ct at 1066 (emphasis added).

Appellees, in their answering briefs, urge this Court to ignore *Carcieri* and return to the status-quo ante before the Supreme Court rejected their incorrect interpretation of the IRA that would give unfettered power to any BIA employee to take any lands out of State jurisdiction and into trust for any group of Indians recognized at any time. Specifically, in this case Appellees are reasserting their pre-2009 misinterpretation of the IRA that, in their view, allowed them to take land into trust for a group of Indians which did not exist, and was not a federally recognized Indian tribe, in 1934. Instead, the Ione Indians were classified by Appellees, the federal government, as "non-ward" and "landless, nonreservation" Indians in 1934.

Furthermore, this Court need not guess about the non-ward, non-tribal and non-reservation status of the Indians living near Ione, California, in 1934. In August 1933, while the IRA was working its way through Congress, O.H. Lipps, the Sacramento Field Superintendent for the DOI, in a letter to the Commissioner of Indian Affairs, accurately described the Ione Indians as follows:

> "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 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 Rancheria, and none of them have allotments in their own right held in trust by the Government. They are living on a tract of land on the outskirts of the town of Ione." (SER 1065; emphasis added.)

The "non-ward" status of these Indians was confirmed by John Collier, the architect of the IRA, in a letter written to Frank Bell, an Ione Indian, dated August 21, 1933. (SER 1066.) Mr. Collier confirmed that the Ione Indians were a "group of Indians classed as non-wards in Amador County." (Id.; emphasis added.) Mr. Collier want to find a way to assist these non-ward Indians and suggested to Superintendent Lipps (on the cc) that he consider "the public works program" in which "Wards and non-wards are entitled to share equally." (Id.)

Also, the issue of whether Ione Indians were a federally recognized tribe was fully litigated between 1990 and 1996 in Ione Band v. Burris (and the United States). (OB 27-36; ER 192-417). The Appellees (United States and Ione Band) here where the also parties in that case – albeit on different sides of the issues.

In 1991, the United States filed a motion for summary judgment that the Ione Band was never was a federally recognized tribe and that they have failed to seek federal recognition through the regulatory process (25 CFR Part 83). (ER 273-362.) The Ione Band, as they do here, countered that they had been recognized through informal, non-regulatory processes (including a 1972 letter). In 1992, District Court Judge Karlton rejected Appellee, Ione Band's contention and ruled:

> "Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the ['non-regulatory'] mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA [Part 83] acknowledgement process, the United States motion for summary judgment on these claims must be **GRANTED**."
>
> (ER 380; emphasis added.)

Final judgment was entered in Ione Band v. Burris in September 1996. (ER 407-410.) It was not appealed and is binding on Appellees here. The judgment established that the Ione Band was not a federally recognized tribe prior to 1996, much less in 1934, and, therefore, is not entitled to fee-to-trust benefits of the IRA.

Six years after the judgment, in 2002, the Sacramento BIA Regional Office reorganized the Ione Band and expanded its voter rolls to include Defendant Dutschke and members of her family. (SER 1097, 1108, 1158.) The BIA also authorized an election for new leadership of the Ione Band replacing the Villa leadership (plaintiffs in Ione Band v. Burris) with an interim tribal council. (Id.)

In 2003, this new Ione Band announced that, pursuant to the Indian Gaming Regulatory Act (IGRA), it would apply to build an Indian casino on private property in Plymouth, California. And in 2004 they asked the NIGC, for an Indian Lands Determination (ILD) that it was a "restored tribe" and that the land in Plymouth would be "restored land" eligible for gambling under IGRA. (SER 1213.) Despite the 1996 judgment in Ione Band v. Burris, the Ione Band has never applied for federal recognition under 25 CFR Part 83.

Furthermore, until he resigned in April 2012, Assistant-Secretary Echohawk did not issue a Rod for Ione; apparently maintaining the United States position, endorsed by Solicitor Bernhardt, that the Ione Band was never a federally recognized tribe (nor a restored tribe) prior to 1996. But that changed quickly when Donald Laverdure, a DOI employee, was designated as an "acting" Assistant-Secretary until a replacement could be appointed by the President and confirmed by the Senate. In May 2012, one month after he began his 5-month interim position, Defendant Laverdure reversed the United States position and issued the illicit Record of Decision (ROD; ER 174-191) that is being challenged in this case. And, contrary to *Carcieri*, Mr. Laverdure concluded that the Ione Band was a federally recognized tribe eligible for a fee-to-trust transfer under the IRA.

Defendant Laverdure was not appointed by the President nor confirmed by the Senate. He was not a Principle Officer of the United States Government and he

was not authorized to acquire land under the IRA for the Ione Band. Additionally, the Ione Band was not federally recognized in 1934 and was not eligible for a fee-to-trust transfer under the IRA. Instead, in 1934 the Ione Indians were classified as "non-ward" and "landless, non-reservation" Indians. Laverdure's approval of the ROD was not only issued and without authority; it was arbitrary, capricious and contrary to federal law that limits fee-to-trust transfers to tribes federally recognized in 1934. Laverdeure's unauthorized approval of the ROD was an abuse of his limited, interim role. As a result, the ROD is void and should be vacated.

PROCEDURAL BACKGROUND

NCIP/CERA filed their First Amended Complaint – the operative complaint - on October 1, 2012 (ER 50-77). Plaintiffs named several federal officials, and the DOI and BIA, who were involved in approving the ROD and the fee-to-trust transfer in favor of the Ione Band.

NCIP/CERA also named federal officials at the OIG and NIGC, who are responsible for issuing Indian lands determinations (ILD) pursuant to the IGRA. But, when the Administrative Record (AR) was finally filed a year after the lawsuit was filed, it was revealed that, although there were different Solicitor opinions about a potential "restored lands" determination, it did not include a final ILD approved by NIGC as required by IGRA. 25 U.S.C. §2703(4) and §2719.

NCIP/CERA filed a motion for judgment on the pleadings on their first claim in February 2014 based on the pleadings in Ione Band v. Burris. (ER 192-417). The court denied this motion in August 2014. (ER 40-49.) The court directed NCIP to file a motion for summary judgment on their first claim instead. (Id.)

Per the court's directive, NCIP/CERA filed a motion for summary judgment on its first claim in October 2014. And, in support of its motion, as required by Local Rule 260, NCIP/CERA filed separate statements of undisputed facts (SER 1021-1034) which were not refuted by Appellees. Nor did Appellees file statements of undisputed facts in support of their motions. The court denied NCIP/CERA's motion for summary judgment in September 2015. (ER 6-39.) And NCIP is appealing the denial of both motions. (ER 1-5.)

HISTORICAL CONTEXT

A. Spanish Empire – 1769 to 1823.

It is generally accepted that Indians lived in what is now called California for three to five thousand years before it was "discovered" by the Spanish. After they occupied California, the Spanish established a chain of Missions along the coast. However, the reach of the Mission system did not extend into central California or to the Indians living near Plymouth and Ione.

B. Mexican Republic – 1821 to 1846.

One of the charter documents of the Mexican Republic was the Plan of Iguala, enacted in 1821, which included an important emancipation proclamation:

> "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of the monarchy, with the right to be employed in any post, according to their merits and virtues."
>
> (Quoted in *U.S. v. Ritchie* 58 U.S, 525, 538 (1854); emphasis added.)

Thus, all California Indians became citizens of the Mexico in 1821. Indian citizens in Mexico were considered competent and had the right to own land. *Id*.

C. U.S. Military Rule – 1846 to 1850.

In 1846, the U.S. Military occupied portions of the Mexican Republic, including California. The Mexican-American War ended in 1848 with the signing of the Treaty of Guadalupe Hildago which required the United States recognize and protect property rights of all former Mexican citizens including all Indians. (9 Stat. 922 (1848).) Military control continued until Statehood and there is no evidence that Indians at Ione, if any, were affected by the Military governance.

D. California Statehood – 1850 to the Present.

California became a State on September 9, 1850, on an equal footing with all previously admitted States. Regulatory jurisdiction over the lands and citizens of the State was immediately transferred to California. And, as required by the Treaty

of Guadulupe Hildago, all Mexican citizens, including Indians, became California citizens with the same rights "as any other citizen."

In 1851, Congress passed the California Land Claims Act (9 Stat. 631 (1851).) That Act required every person (including Indians) who claimed land in California to present that claim to the board within two years. Any land not claimed within two years was deemed to be part of the public domain of the United States and available for sale. The failure to file a timely claim extinguished any "aboriginal title" any Indian may have had as of 1850. *Barker v. Harvey*, 181 U.S. 481 (1901); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986).

Also, in 1853, federal agents negotiated 18 treaties with some California Indians which were never ratified by the U.S. Senate. These unratified treaties have "no legal effect" and are "legal nullit[ies]." *Robinson v. Jewell*, 790 F.3d 910, 917 (9th Cir. 2015). They "granted no land rights, did not create any other enforceable rights, as [they were] never ratified and thus [are] a legal nullity." Id.

Nor is there any evidence that there was any Ione Indian tribal government in existence in 1853 capable of signing a treaty with the United States. In fact, as stated by Professor A.L. Kroeber in his seminal 1923 book, "The California Indians" (page 27):

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

The court in *Acosta* held that, since there was no recognized tribal government on the reservation, there was no federal guardian-ward relationship that precluded the County from providing welfare to Ms. Acosta. California Indians "*sui juris*, and are not in a technical sense, 'ward of the [federal] Government'." Instead of being federal wards, California Indians "are citizens and residents of the State with the same rights and obligations of other citizens of the State." *Acosta v. San Diego*, 126 Cal. App. 2d at 465.

Likewise the Indians at Ione have always been citizens of California and, before Statehood, they were citizens of the Mexican Republic. The Ione Indians have never been "wards" of the federal government. Instead, as outlined above, they have been consistently classified as "non-wards" by the federal government. They have never been dependent on, or under the jurisdiction of, the federal government. As a consequence, although Ione Indians have all the rights and obligations of any other California citizen, they are not a recognized tribe or federal wards entitled to the benefits or racial preferences in the IRA. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

RELEVANT FACTS

The AR in this case was prepared and lodged with the court in 2013 (ECF) - a year after Defendant Laverdure issued the ROD. Obviously Laverdure did not have the AR before he issued the ROD in May 2012. Instead the AR was prepared, after-the-fact, and after Laverdure was gone, to justify the already approved ROD.

Regardless, the AR does not support the ROD; just the opposite is true. The AR supports the undeniable fact that the Indians at Ione in 1934 were a small family group of landless Indians that were classified as "non-wards" by the federal government. It is extremely significant that there is no correspondence in the AR, prior to 1972, written to or received from the Ione Band as a separate tribal entity.

There is no dispute that there were various landless, non-reservation Indians living in Amador County early in the twentieth century. Lists of these Indians were prepared in 1905 and 1915 by Indian Agent C.E. Kelsey and his successor John Terrell. And there is no dispute that Mr. Terrell, and others, tried to acquire 40 acres of land for some of these various landless, non-ward, Indians between 1915 and 1930. (ER 418-425.)

Also, between 1919 and 1920, DOI Superintendent O.H. Lipps and Special Supervisor L.F. Michael surveyed California Indians and prepared a report on the "Landless Nonreservation Indians of California." (SER 1047-1062.) With respect

to Amador County, they state: "The Indian population is scattered over the county and the majority are of mixed blood." And: "The Ione group consists of 5 families – 19 people." (SER 1060.) Thus this report concludes that, as of 1920, the Ione Indians were "landless, nonreservation" Indians. It also supports the conclusions (quoted above) in the letters that that Superintendent Lipps and Commissioner Collier sent 13 years later, in 1933, classifying Ione Indians as "non-ward" Indians without a reservation. (SER 1064-1069.)

This "non-ward" "landless, non-reservation" classification is confirmed by the fact that the Indians at Ione were not invited by the Secretary of Interior to vote, and did not voter, on the IRA. (SER 1070, 1078-1087, 1090.) They were not within the "jurisdiction" of the IRA because they were neither a tribe nor living on a reservation. (SER 1090.) Instead it is clear from the record that the Ione Indians were a group of individuals acting in their own self-interest. For example, in December 1933, Superintendent Lipps wrote another to the Commissioner outlining efforts to purchase land for "the proposed Indian Colony for the homeless Indians near Ione in Amador County." (SER 1068-1069.) It is clear from the letter that the Ione Indians were not a tribal group and were not interested in a "proposed Indian Colony." Instead, according Superintendent Lipps, the Indians living near Ione "are looking forward to a large cash per capita payment. This, of course, they will not receive." (Id.) And in July 1934, Superintendent Lipps wrote a another

letter to the Commissioner confirming that the "only groups [within his jurisdiction] that might now be ready and willing to organize and apply for a charter are those living on the Tule Reservation and at Fort Bidwell." (SER 1070-1071.) There is no mention of the Ione Indians or much less any indication that they are "ready and willing to organize" under the IRA. And Commissioner Collier responded to Superintendent Lipps indicating that, except for Tule Reservation and Fort Bidwell, he need not submit an IRA questionnaire to the other Indian groups "in the absence of any tribal or other organization among these people." (SER 1072.)

In 1941, Assistant Commissioner, William Zimmerman Jr., wrote a letter to Congressman Englebright regarding a petition to "acquire land for the Indians of Ione Valley." (SER 1095.) Zimmerman informs the Congressman that there are no funds to acquire land and, in any event, the DOI "have very little information concerning the Indians of the Ione Valley and their land needs." Zimmerman does not identify the Ione Indians as a federally recognized tribe. Instead, they are generically identified as individual "Indians of the Ione Valley."

The next document (31 years later) in the AR is a 1972 letter from Commissioner Bruce to Nicholas Villa (Sr.). (ER 428-429.) In that letter, Mr. Bruce makes the equivocal, unsubstantiated statement that: "Federal recognition was evidently extended to the Ione Band of Indians at the time that the Ione land

purchase was contemplated." (ER 429; emphasis added.) This conclusion was not only wrong, it was corrected in 1973 when the Ione Band was notified that their proposed recognition was under review. (ER 430-433; SER 1210-1211.) This review continued until 1978 when the Ione Band were notified that they would not be included on the list of federally recognized tribes (but they were considered to have a pending petition). (AR 000592.)

In February 1990, DOI wrote a letter to Glenn Villa, confirming that the Ione Band knew it "was not recognized as an Indian tribe within the meaning of federal law" and that to achieve federal recognition it had to complete the Part 83 process. (ER 443-447.) The Ione Band has never filed a petition for recognition under 25 CFR Part 83.

ARGUMENT

A. Defendant Laverdure was not a Principal Officer of the United States authorized to take 228 acres in Plymouth into trust for Ione Indians.

Defendant Laverdure was not the Secretary of Interior. He was not appointed by the President and not confirmed by the Senate under the Appointments Clause of the Constitution. US Const. Art. II, § 2, cl. 2. (OB 17-22.) Consequently, he was not a Principal Officer of the United States and he had no authority to take land into trust pursuant to the IRA. 25 U.S.C. § 465; *Buckley v. Vallejo,* 424 U.S. 1, 132 (1972). This is especially true here where, although

Assistant-Secretary Echohawk had resigned, Interior Secretary Jewell had not resigned and remained available and responsible for approving all off-reservation fee-to-trust transfers under the IRA.

The district court briefly discusses the issue of Mr. Laverdure's authority to issue the ROD. (ER 24-25.) The court found that he had the authority under 25 U.S.C 1a which allows for a delegation to the Commissioner of Indian Affairs (a different federal official) from "time to time" in specified "individual cases." As summarized in NCIP/CERA's Opening Brief, Section 1a does not even purport to delegate the authority to the Commissioner to take land into trust under the IRA. (OB 17-22.)

More significantly, the district court did not cite or discuss the Appointments Clause or the undisputed fact that Defendant Laverdure was not a Principal Officer – not appointed by the President, not confirmed by the Senate, and not authorized to take land into trust under the IRA. Appellees do not cite or discuss the Appointments Clause either. This is not an oversight. Instead, as is apparent from their answering brief, federal Appellees do not consider the Constitution's Appointments Clause to be a limit on their expansive view of their authority to take land into trust.

Specifically, Appellees assert that, regardless of the Appointments Clause, the Interior Secretary has "broad authority" to re-delegate her Congressional authority to take land into trust under the IRA to any "officer, agency or employee" of the DOI. The basis for Appellees claim of "broad authority" is a generic phrase in Section 2 of the DOI Reorganization Plan No. 3 of 1950 which provides that the Secretary "may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Interior of any function of the Secretary." 5 U.S.C. App. 1, Sec. 2 (emphasis added). There are at least two obvious problems with this assertion of unlimited federal bureaucratic power.

First, there is no evidence that the Secretary of Interior ever exercised this alleged power to delegate authority to Defendant Laverdure – as an "acting" Assistant Secretary - to take land into trust or to issue the ROD one month after he assumed his interim administrative role. Appellees reference to the Interior Departmental Manuel (DM) is not helpful to their position. The DM requires a written delegation in specific cases, and there is no such document vis-à-vis Mr. Laverdure. And none of the DM provisions referenced by Appellees mention the IRA or allow for the delegation Secretary's fee-to-trust authority from an Assistant Secretary to an "acting" Assistant Secretary or to any other DOI "officer, agency or

employee." Nor would such a delegation have been necessary or appropriate while the Secretary of Interior was still in office.

Second – and more importantly - the claim that there is "broad authority" to delegate the authority to take land into trust under the IRA to any DOI officer, agency or employee is directly contrary to the purpose and restrictions of the Appointments Clause. "The purpose of the Appointments Clause is to limit congressional discretion to disperse the power *to appoint,* and thereby preserve the Constitution's structural integrity." *United States v. Boeing Company,* 9 F.3d 743, 757 (9th Cir. 1993) "[P]ersons who are not appointed by a body with proper appointment authority, and who therefore cannot be considered 'Officers of the United States' may not discharge functions that are properly discharged only by 'officers'." *Id.* citing *Buckley v. Vallejo,* 424 U.S. at 140. "The Appointments Clause serves as a guard against one branch aggrandizing its power at the expense of another branch, and preserves constitutional integrity by preventing the diffusion of appointment power." *Confederated Tribes of Siletz Indians v. United States,* 110 F.3d 688, 696 (9th Cir. 1997) (emphasis added; quoting *Freytag v. Commissioner of Internal Revenue,* 501 U.S.868, 878 (1991).

Appellees claim that there is "broad authority" for any DOI "officer" "agency" or "employee" to take land into trust under the IRA, is precisely the abusive "diffusion of appointment power" that the Constitution prohibits.

Congress, when it enacted the IRA in 1934, delegated the authority to take land into trust for the benefit of a federally recognized tribe exclusively to the Secretary of Interior. 25 U.S.C. §465. And, even this Congressional delegation to the Secretary has been narrowly interpreted and only upheld "because the statute places adequate limits on the Secretary's discretion." *South Dakota v. Secretary of Interior,* 423 F.3d 790, 797 (8th Cir. 2005). Appellees attempt to diffuse and expand this limited authority that Congress gave exclusively to the Secretary to allow any DOI officer agency or employee to take land into trust and remove it from State jurisdiction is nothing more than an attempt "aggrandize" the power of DOI federal bureaucracy. It is prohibited by the Appointments Clause and should be rejected.

B. The group of "non-ward" Ione Indians were not a federally recognized tribe in 1934 eligible for fee-to-trust transfer of 228 acres in Plymouth.

The test outlined in the *Carcieri* decision for determining which tribes are entitled to a fee-to-trust transfer under the IRA is not complicated. Justice Thomas, writing for the five Justice majority, held that the Secretary of Interior's authority under the IRA to take lands into trust is limited to "recognized tribes . . . under federal jurisdiction" (aka "federally recognized tribe") in 1934.

Also, it is useful to know that the Supreme Court reached this conclusion by rejecting both the District Court's and Court of Appeal's interpretation of Section 479 of the IRA. The District Court had found that the IRA defines Indians to

include tribes under federal jurisdiction in 1934, but did not require a tribe to have been federally recognized in 1934. *Carcieri v. Norton*, 290 F. Supp. 2d 167, 179-181 (D.R.I. 2003). The First Circuit held that the IRA was ambiguous and, therefore, deferred to the DOI's interpretation. *Carcieri v. Norton*, 497 F.3d 15, 27-28 (C.A. 1st 2007.) The Supreme Court held that the IRA was not ambiguous and there was no need to defer to the DOI's interpretation. And the Supreme Court found that a tribe must be both recognized and under federal jurisdiction in 1934 to qualify for the fee-to-trust benefits of the IRA.

The *Carcieri* test should have been easy to apply in this case. As summarized above, the historical documents in the AR clearly demonstrate that Ione Indians were "non-ward" and "landless, nonreservation" Indians in 1934 and were not a "recognized tribe under federal jurisdiction" in 1934. And, therefore, the Ione Indians are not entitled to the fee-to-trust benefits of the IRA. Furthermore nowhere in the ROD does the DOI claim that the Ione Band was a federally recognized tribe in 1934. Instead, the ROD claims that the Ione Band was first recognized in 1972, not 1934. (ER 185-187; ROD 57-59.)

Despite these facts, and ignoring the majority opinion in *Carcieri*, the district court found that 25 U.S.C. section 479 was ambiguous and accepted Appellees' argument that – because of this ambiguity – the DOI's new two-part test to evaluate the phrase "recognized tribe now under federal jurisdiction" is

entitled to deference. (ER 27.) In fact, the DOI's new "two-part inquiry" creates even more ambiguity that – of course – only the DOI can evaluate. This two-part inquiry is nothing more than an attempt by the DOI bureaucracy to try to recapture the power they interpreted that they had before *Carcieri.* It is directly contrary to Justice Thomas' clear conclusion that: "Congress left no gap in 25 U.S.C. § 479 for the agency to fill." *Carcieri,* 129 S.Ct at 1066.

Appellees acknowledge that their new interpretation of the IRA is not supported by the majority opinion in *Carcieri.* Instead, they concede that they developed this interpretation by "[a]dopting the concurring opinions of Justices" Breyer and Souter. (FAB 33.) But, to reach this conclusion, Appellees had to ignore the holding of Justice Thomas' majority opinion, mischaracterize Justice Breyer's concurrence and ignore the focus of Justice Souter's partial dissent.

Justice Breyer agreed with the majority that the DOI's pre-2009 expansive interpretation of the IRA was not entitled to deference. And he agreed with the majority that, to qualify for the fee-to-trust benefits of the IRA, a tribe must have been both recognized and under federal jurisdiction in 1934. And Justice Breyer also suggested that there may be situations when a tribe was recognized in 1934 but, for some reason, was not on the list of 258 recognized tribes compiled shortly after the IRA was enacted in 1934.

Contrary to Appellees' contention, Justice Breyer did not agree that the phrase "recognized Indian tribe now under federal jurisdiction" in 1934 could be separated into two tests, "recognition" and "under federal jurisdiction" each with separate content. Instead, Justice Breyer agreed with the *Carcieri* majority opinion that the "recognition" and "under federal jurisdiction" are "one in the same."

On the other hand, Justice Souter dissented in part because (unlike the majority and Justice Breyer) he felt that it was a possibility "that the two concepts, recognition and jurisdiction, may be given separate content." Thus, Justice Souter contends that, to qualify for the IRA fee-to-trust benefits, a tribe could be either "Federally recognized" or "under Federal jurisdiction" in 1934. This "two concept-separate content" idea was rejected by both the majority opinion and Justice Breyer's concurring opinion. In fact, Justice Souter candidly admits that his disagreement with the majority or Justice Breyer on this issue is why his vote must be in the dissenting column. *Carcieri,* 129 S.Ct at 1071.

Justice Breyer, and the 5 Justice majority in *Carcieri,* adopted the one concept/one content interpretation of the phrase "recognized Indian tribe under federal jurisdiction" in 1934. And the same six Justices held that, because this phrase is not ambiguous, the DOI's interpretation is not entitled to deference.

Appellees contend that the phrase "recognized tribe now under federal jurisdiction" can be separated into two parts and that their interpretation of "under federal jurisdiction" is entitled to deference. This argument – although consistent with Justice Souter's dissent - is directly contrary to Justice Thomas' majority opinion and Justice Breyer's concurrence that the phrase is not ambiguous and that to qualify for a fee to trust transfer a tribe must have been federally recognized in 1934. The Ione Band was not a federally recognized tribe in 1934 and is not entitled to the fee-to-trust transfer under the IRA.

C. The 1996 final judgment in Ione Band v. Burris that the Ione Band was not a federally recognized tribe prior to 1992 is binding on Appellees.

With respect to the binding effect of the final 1996 judgment in Ione Band v. Burris, the district court reached two opposite conclusions.

First the court found that "[a]rguably the facts have changed since Judge Karlton's Order, so as to make inapplicable the doctrine of collateral estoppel." (ER 30-31.) But, incredibly, two of the "changed" facts listed by the court occurred while the Ione Band v. Burris case was still pending and, indeed, are part of the court record in that case. (SER 1035-1044.)

In 1994, Ada Deer, an Assistant Secretary, wrote a letter directly to Judge Nowinski the Magistrate Judge who was working with Judge Karlton in Ione Band

v. Burris. Ms. Deer does not mention Judge Karlton's 1992 Order that the Ione Band was not a federally recognized tribe and has not applied for federal recognition under Part 83. Instead, Ms. Deer simply declares that "the Ione Band of Miwok Indians is a federally recognized Tribe." (SER 1035.) And in 1995, Scott Keep, a DOI Assistant Solicitor filed an amicus brief in the Ione Band v. Burris case. (SER 1036-1042.) Mr. Keep also asserted, without referencing the earlier findings of the court, that: "The Band is considered to be a federally recognized Indian tribe." (SER 1036.)

If the goal of Ms. Deer and Mr. Keep was to convince Judge Nowinski and Judge Karlton to change their conclusion that the Ione Band was not a federally recognized tribe, they were not successful. Judge Nowinski submitted findings and recommendations to Judge Karlton in May 1996. (ER 390-394.) Judge Nowinski recommended dismissal because the Ione Band had not obtained federal recognition and, consequently, "there was no tribal government authorized to pursue the tribe's claims." (Id.) Judge Karlton adopted the findings and recommendations "insofar as it recommends dismissal of all of the plaintiff's [Ione Band's] claims." (ER 395-401.) Judge Karlton held that "the magistrate judge's conclusion that there is no tribal government is clearly correct." (Id.) Judgment was entered on September 4, 1996. (ER 408.) And, despite their claimed change of positon in a 1994 letter and 1995 amicus brief filed with court during the litigation,

neither the Ione Band not the United States appealed the judgment. And it became final and binding on the Ione Band and United States.

Second, as an alternate analysis, the district court candidly states that: "As an interesting counterpoint to this would be that all relevant 'facts' actually occurred sometime prior to June 1934 when the IRA was enacted. . . . The main issue here is whether, actually, the Ione Band was under federal jurisdiction in 1934, not whether the government's actions in the 1990s and afterwards now make it easier to construe the Ione Band as being under federal jurisdiction. (ER 31, n. 16.) This "counterpoint" is actually the more correct analysis. The underlying facts have not changed since the judgement was entered in Ione Band v. Burris in 1996.

The historic facts that were presented to Judge Karlton in 1991 by the United States in the five memoranda and expert declarations submitted in support of its motion for summary judgment have not, and could not be, changed. (ER 192-418) The same 1934 historic facts that were adjudicated by Judge Karlton in 1992, when he decided that the Ione Band was not a federally recognized tribe and had not sought federal recognition under Part 83, are being offered by the Ione Band in the case. (ER 275-281.) Judge Karlton's determination was confirmed by a judgment. And as suggested by Judge Nunley's "counterpoint," the Ione Band v. Burris is binding and conclusive on Appellees regardless of their "actions in the 90s."

The preclusive effect of a prior decision and judgment is a question of law for the court to decide. *In re Jenson* 980 F.2d 1254 (9th Cir. 1992.). Five threshold requirements must be satisfied before the doctrine of preclusion or collateral estoppel to apply: (1) the issue to be precluded must be the same that was decided in the prior lawsuit; (2) the issue must have been actually litigated in the prior lawsuit; (3) it must have been necessarily decided in the prior lawsuit; (4) the decision in the prior lawsuit must be final and on the merits; and (5) the party against whom preclusion is sought must be the same or in privity with the party in the prior lawsuit. *Baldwin v. Kilpatrick* 249 F.2d 912, 917-918 (9th Cir. 2001).

All five threshold requirements to apply the preclusive effect of Ione Band v. Burris are present here. First, the issue is the same in both cases: whether or not the Ione Band was or is a federally recognized tribe. Second, as summarized above, this issue was fully litigated in Ione Band v. Burris. Third, the issue was necessarily decided by Judge Karlton who determined, after reviewing all the same facts that are involved in this case, that the Ione Band was not a federally recognized tribe and had not sought federal recognition under Part 83. Fourth, the decision in the Ione Band v. Burris is final. Judgment was entered and it was not appealed by any party. And, finally Appellees in this case are the same as the parties in the prior case including the United States and the Ione Band.

Furthermore, admissions made in the course of litigation are judicial admissions which conclusively establish the matter. *American Title Ins. Co. v. Lacelaw Corp.* 861 F.2d 224, 226 (9th Cir. 1988). "Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Id.* citing *In re Fordson Engineering Corp.*, 25 B.R. 506, 509 (Bankr.E.D. Mich. 1982.) Factual assertions in the pleadings are conclusively binding on the party who made them. *Id.*

As is summarized in NCIP's Opening Brief, the United States consistently asserted that the Ione Band is not a federally recognized tribe during the Ione Band v. Burris litigation. This position is embodied in the one sentence statement made by the United States at the outset of the Ione Band v. Burris case:

> **"The [United States] government denies that the Ione Band of Miwok Indians has ever been a federally recognized tribe."**
>
> (ER 265; emphasis added.)

The position of the United States, which was accepted by Judge Karlton, was that the Ione Band was not a federally recognized tribe and has not sought federal recognition pursuant to Part 83. Furthermore, despite the position they are asserting here on behalf of Ione Indians organized in 2002 by the Sacramento Regional BIA, the United States is taking the same position it took over 20 years ago in Ione Band v. Burris in separate lawsuit recently filed by the Villa faction against Ms. Dutschke

once again seeking federal recognition outside the Part 83 process. Villa v. Jewell, (USDC ED CA No. 2:16-cv-0503 KJM-KJN).

The Villa faction of Ione Indians (plaintiffs in Ione Band v. Burris) initially sought, and was granted, permission by the district court to participate in this lawsuit. (ECF Nos. 74-87.) It should be noted that this faction was led by Nicholas Villa Jr. - who was the recipient of Ada Deer's 1994 letter (ER 1208-1209) which supposedly reaffirmed Commissioner Bruce's 1972 letter (ER 428-429). However, the Dutschke faction of Ione Indians (permissive intervenors in this case) was relying on the same 1994 Ada Deer letter to support its claim of recognition. Mr. Villa's presence in this lawsuit would have undermined the claims of the Dutschke faction. Consequently, they moved to strike all documents filed by the Villa faction and to set aside the Order granting the pro-hac vice application of Mr. Villa's attorney. The court, although conceding that the documents filed by Mr. Villa were helpful, granted the motion to strike in the final Memorandum and Order in this case. (ER 17-23.)

As a result of being precluded from participating in this case, in 2016 the Villa faction filed another lawsuit once again seeking federal recognition from the federal government. And on August 5, 2016, the federal defendants in the new Villa lawsuit filed a notice of related cases connecting the new Villa lawsuit with this case. (SER 1215-1216.) The federal defendants also filed a motion to dismiss the new Villa lawsuit. (SER 1217-1228.) Incredibly, the federal defendants (as they did in Ione

Band v. Burris) argue that, because the Villa Band has not sought federal recognition under Part 83, they are not a federally recognized tribe. (SER 1225-1226.) In fact, the federal defendants cite Ione Band v. Burris to support this argument. The federal Appellees are estopped from taking a different position here.

Neither the Villa faction, nor the Dutschke faction, of Ione Indians is a federally recognized tribe pursuant to a ratified treaty, an Act of Congress, a Section 83 petition. Or any other legal means. And, as held by Judge Karlton over 20 years ago, neither faction is entitled to be treated as a federally recognized tribe or receive the benefits of the IRA unless and until they complete the Part 83 process, which the Appellees stated in 1990 was the exclusive administrative method available to the Ione Indians for recognition. In fact, the never ending disputes and lawsuits between the competing factions of Ione Indians only emphasize the importance of the Part 83 process to establish which faction of Ione Indians, if any, is entitled to federal recognition and to form a legitimate tribal government. *Mackinac Tribe v. Jewell*, 2016 U.S. App. LEXIS 13140 (D.C. Cir. July 19, 2016). (Part 83 federal recognition is required before a group of Indians is entitled to receive the benefits of the IRA.)

D. The District Court correctly determined that NCIP/CERA had standing to sue and challenge the DOI's approval of the fee-to-trust in the ROD.

The district court, after reviewing the record and considering the arguments made by the parties, found that NCIP/CERA had standing to sue. (ER 17 n. 7.) The

overwhelming evidence in the AR (SER 1096-1207), and the undisputed facts before the district court on the motions for summary judgment (SER 1025; SUF 9-10), support the court's conclusion. Appellants are non-profit organizations who have members who own homes and operate businesses that will be adversely impacted if the fee-to-trust transfer in the ROD is upheld. Although Appellees did not appeal the court's conclusion that NCIP/CERA had standing, they raised this issue in their answering brief. (FAB 26-28.) Appellees' contention that NCIP lacks standing is without merit.

Standing is a judicially created doctrine that is an essential to the Court's evaluation of the case-or-controversy requirement of Article III of the Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In response to a summary judgment motion, to establish standing a plaintiff "must 'set forth' by affidavit or other evidence 'specific facts' . . . which for the purposes of the summary judgment motion will be taken as true." *Lujan v. Defenders of Wildlife*, 505 U.S. at 561 (emphasis added). Appellees claim that: "NCIP has failed to set forth, at any time, the requisite specific facts by affidavit or other evidence to establish standing to sue." (FAB 26.) Appellees ignore all the evidence in the AR that clearly established that NCIP/CERA has been actively involved in the administrative processes over the past 13 years as a prerequisite to initiating this lawsuit challenging the ROD. (SER 1096-1207.)

In the *Lujan* case, the Defenders of Wildlife had challenged a rule promulgated by the Secretary of Interior interpreting the Endangered Species Act. The Supreme Court held that when challenging "unlawful regulation (or lack of regulation) of *someone else"* standing depends on "whether the plaintiff himself [is] an object" of the regulation. (*Id.* at 561-562.) Plaintiffs in a regulatory challenge case cannot rely entirely on the allegations in their complaint. Instead, a declaration is often needed to demonstrate a "separate concrete interest" sufficient for standing injury in a regulatory challenge because there is usually no administrative record and the validity of the regulation often depends on "unfettered choices made by independent actors not before the courts." (*Lujan v. Defenders of Wildlife,* 505 U.S. at 562 and 572.)

In this case, NCIP/CERA are not challenging a federal regulation that applies to third parties not before the Court. Instead, after actively participating in administrative processes, NCIP/CERA initiated this lawsuit challenging the ROD pursuant to the Administrative Procedure Act based on the administrative record. 25 USC § 701 et seq. NCIP/CERA have been actively involved in the administrative process since 2003 in an effort to its members' homes, businesses and rural community from the adverse negative impacts that would result from the construction of major Indian casino in Plymouth. In fact, NCIP/CERA – like all

interested parties – was required to, and did, exhaust administrative remedies as a prerequisite to filing this lawsuit. 43 CFR §4.314 .

Thus, unlike a regulatory challenge, the interest of a potential plaintiff is set out in the evidence in the record in an APA challenge. And establishing standing under the APA to challenge a fee-to-trust transfer "is not meant to be especially demanding." *Match-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S.Ct. 2199, 2210 (2012). See also *Preservation of Los Olivos v. Department of Interior,* 635 F.Supp.2d 1070 (CD Cal. 2008) (community group was an "interested party" in the administrative process and had standing to challenge a fee-to-trust decision by the DOI.)

Finally, Appellees ignore *Bond v. United States,* 131 S.Ct. 2355 (2011) which held that citizens "can assert injury from governmental action taken in excess of the authority that federalism defines. [Their] rights in this regard do not belong to a State." (Id. at 2363-2364.) NCIP/CERA have standing to pursue their federalism challenge to Appellees actions to give preferences to Ione Indians as though they were a recognized tribe. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 220 (1995) and *Hawaii v. Office of Hawaiian Affairs,* 129 S.Ct. 1436 (2009).

There is ample evidence the administrative record establishing that NCIP/CERA has standing to challenge the ROD in court. The district court's decision that NCIP has standing is correct and should be upheld.

E. The NIGC has not approved the proposed Indian Lands Determination; there is no final agency action by the NIGC ripe for review.

It is undisputed that, in 2004, the Ione Band requested that the NIGC issue an ILD that the Plymouth properties are "restored lands" eligible for gaming under IGRA. (SER 1213.) And, as noted above, the IGRA claim alleged in NCIP/CERA's complaint was alleged as precautionary matter on the possibility that the NIGC had responded to this request and made an ILD that these lands are eligible for gaming. But, after the AR and supplemental AR were finally filed by the Appellees – over a year after NCIP filed its lawsuit - it became apparent that the NIGC had not issued an ILD. Thus the "restored lands/restored tribe" proposal is not ripe for judicial review because the NIGC has not issued a final ILD that the properties are eligible for gaming under IGRA.

The APA requires that there be a "final agency action" before that agency's actions and activities can be challenged. 5 U.S.C. § 701 et seq. And IGRA delegates to the NIGC to determine whether or not property is "Indian lands" eligible for gaming under IGRA. 25 U.S.C. § 2701 et seq. And only ILDs and related determinations made by the NIGC pursuant to IGRA are final agency decisions APA and judicial review purposes. 25 U.S.C. § 2714. Despite the Ione Band's request, the NIGC has not issued an ILD and, consequently, there is no final agency decision that the Plymouth properties are "restored" Indian land eligible for gaming under IGRA.

It is true that there are several competing legal opinions from the Solicitor's Office in the AR taking opposite positions on the "restored land" issue. (ER 465-486.) Indeed, the opinion of Solicitor's Office has changed several times over the last 10 years. But it is equally true that the NIGC has yet adopted any one of these opinions or approved an ILD.

Opinion letters of counsel are not final agency actions. *Christensen v. Harris County,* 529 U.S. 576, 586-587 (2000). They are not binding and – as is evident in this case - can be modified by legal counsel at any time prior to their adoption by the NIGC. Legal opinions are not final decisions subject to review under the APA. *Citizens Against Casino Gambling v. Kempthorne,* 471 F.Supp. 2d 295, 327-328 (W.D.N.Y. 2007.) None of the competing opinions of the Solicitor has been adopted by the NIGC. And unless and until it is adopted by the NIGC as a final agency decision, it is not ripe for judicial review. 25 U.S.C. § 2714.

Appellees also claim that in a 2006 Memorandum of Agreement, federal counsel agreed that the DOI Solicitor, and not the NIGC, is authorized to issue an ILD. (FAB 15, n. 4.) This is a mischaracterization. The undisputed and uncontroverted facts presented to the court state: "In May 2006, the NIGC and DOI entered into a memorandum agreement which provides that, if a tribe requested a lands determination, it would be drafted by DOI's [Solicitor] and then reviewed by the NIGC." (SER 1027; SUF 34; emphasis added.) Thus, the parties

agreed that a DOI Solicitor first issues an opinion which is then reviewed by the NIGC when making a final ILD. And, although there have been at least three Solicitor opinions in this case, none have been adopted by the NIGC in a final decision that is ripe for judicial review.

Finally, it is important to note that these issues may never be ripe for adjudication. If NCIP/CERA's appeal is successful, then the ROD will be vacated and there will be no basis for the NIGC to issue an ILD that the land is eligible for gaming under IGRA. But, if the district court's decision is not reversed, then NCIP/CERA request that this case be remanded so they can litigate the remaining claims – including any approval of an ILD, and any related NEPA and regulatory compliance, by the NIGC.

CONCLUSION

NCIP/CERA respectfully request that this Court reverse the district court's denial of their two motions for a judgment on their first claim and that this Court vacate the related judgment.

Dated: October 26, 2016

Respectfully submitted,

/s/ Kenneth R. Williams
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Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on October 26, 2016.

I certify that Counsel for all the parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 26, 2016.

Respectfully submitted,

/s/Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief responds to both answering briefs and, consequently, per Circuit Rule 32-2 is limited to a maximum of 8400 words. This brief uses a proportional typeface and a 14-point font and contains 8384 words (excluding the signature block) and 8400 words (including the signature block).

Dated: October 26, 2016.

Respectfully submitted,

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