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 THE INTERIOR, *et al.*,**
*Defendants – Appellees,*

*and*

**IONE BAND OF MIWOK INDIANS,**
*Intervenor-Defendant – Appellee*

## RESPONSE OF IONE BAND OF MIWOK INDIANS TO AMADOR COUNTY'S PETITION FOR REHEARING *EN BANC*

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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IONE BAND OF MIWOK INDIANS

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## I. OPPOSITION TO *EN BANC* REVIEW PETITION

Plaintiff-Appellant County of Amador, California ("County") has challenged under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA") a trust land acquisition determination for the Ione Band of Miwok Indians ("Ione" or "Tribe"), most recently before a three-judge Panel of this Court. The Panel issued a rational, record-based Opinion affirming the district court's granting of summary judgment to the U.S. Department of the Interior and the Interior officials named as Defendants-Appellees (collectively, the "Department") and to Intervenor-Defendant-Appellee Tribe. (Docket Entry 65-1 at 4.)[1] That Opinion upheld the Department's May 2012 record of decision ("ROD"). (PO at 4.) The County filed a petition for rehearing *en banc* on November 20, 2017. (Docket Entry 67-1 ("County Petition").) The County's case is not appropriate for *en banc* review and should not be reheard.

In the ROD the Acting Assistant Secretary-Indian Affairs ("AS-IA") determined that Ione, a federally recognized Indian tribe, was "under Federal jurisdiction" in 1934 for purposes of the Indian

[1] The Panel's Opinion, Docket Entry 65-1, is cited hereafter as "PO."

Reorganization Act, 25 U.S.C. §§ 5101 *et seq.* ("IRA"), meaning the Secretary is authorized to carry out the intended acquisition in trust of approximately 228 acres of land located in Amador County ("Plymouth Parcels") for the Tribe pursuant to Section 5 of the IRA.[2] (PO at 13-14.) The AS-IA also determined that once taken into trust the Plymouth Parcels would be eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"), pursuant to the exception to the general ban of gaming on trust lands acquired after October 17, 1988, when the acquisition is part of the "restoration of lands for an Indian tribe that is restored to Federal recognition" (25 U.S.C. § 2719(b)(1)(B)(iii)) (the "Restored Tribe Exception"). (PO at 11, 13-14.)

The County Petition should be denied because the Panel's Opinion upholding the ROD does not conflict with decisions of the U.S. Supreme Court or this Court, and thus there is no lack of uniformity in this Court's decisions necessitating rehearing *en banc*. Fed. R. App. Proc.

[2] The IRA, originally codified at 25 U.S.C. §§ 461 *et seq.*, has been reclassified. Its Section 5 trust land acquisition authorization, originally codified at 25 U.S.C. § 465, is now at 25 U.S.C. § 5108. Its Section 19 definition of "Indian," originally codified at 25 U.S.C. § 479, is now at 25 U.S.C. § 5129.

35(a)(1), 35(b)(1)(A). Furthermore, this case does not present any issues of exceptional import to warrant *en banc* review. Fed. R. App. Proc. 35(a)(2), 35(b)(1)(B). The Panel's Opinion is consistent with Congress's intent in adopting the IRA and IGRA and with U.S. Supreme Court, Ninth Circuit, and other circuit court precedent.

In sum, the AS-IA lawfully determined to acquire land in trust for Ione pursuant to IRA Section 5 by applying the rational two-step inquiry developed by the Department to determine whether a tribe was "under Federal jurisdiction" in 1934, as set forth in the ROD and subsequently memorialized in the Solicitor's Opinion M-37029 (the "UFJ Opinion").[3] The Department also properly issued and applied its regulations at 25 C.F.R. Part 292 ("Part 292"), pertaining to Indian land gaming eligibility, to grandfather Ione's Indian lands determination under those regulations. As both the district court and the Panel properly concluded, those Departmental actions were validly carried out

[3] This M-Opinion, as referenced by the Panel (PO at 26), is dated March 12, 2014. It post-dated the administrative record but may be found at https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf (last visited December 21, 2017).

and fully supported by the administrative record in this case, as required by the APA. The County Petition should be denied.

## II. ARGUMENT

### A. The Panel's Opinion Correctly Upheld The Department's Interpretation Of The IRA Phrase "Under Federal Jurisdiction" In A Manner Consistent With The Supreme Court's *Carcieri* Decision And D.C. Circuit Court of Appeals Precedent

IRA Section 5 states as to trust land acquisitions, "The Secretary of the Interior is authorized, in his discretion, to acquire … any interest in lands … for the purpose of providing land for Indians." IRA Section 19 contains three definitions of "Indian" that may be applied in Section 5, the first of which includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction[.]"

In examining these two provisions, the Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*"), held that a tribe must have been "under Federal jurisdiction" at the time of IRA enactment in 1934 in order to have land taken into trust under IRA Section 5. *Id.* at 395. The opinion, however, did not give meaning to the undefined phrase "under Federal jurisdiction" as used in 1934. (PO at 16.)

The ROD laid out the Department's two-part inquiry for interpreting the phrase "under Federal jurisdiction." (PO at 24-25; PER144-145.)[4] It would be subsequently memorialized in the UFJ Opinion as the Department's binding interpretation.

The Panel gave "great respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and its progeny to the Department's interpretation of the ambiguous statutory phrase "under Federal jurisdiction." (PO at 26-27, 29.) The Panel rightfully held that "Interior did not err in adopting that interpretation for purposes of deciding whether the Ione Band was 'under Federal jurisdiction' as of 1934." (PO at 29.)

The County Petition's arguments to the contrary are refuted in order below. In doing so, the APA standards for agency review must be kept in mind. A reviewing court may set aside an agency's findings, conclusions of law, or actions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). The court is to determine whether, as a matter of law, the

[4] The abbreviations used to reference the parties' materials previously filed with the Court are as follows: "PER" – Plaintiff's Excerpts of Record; "AA" – County's Appendix of Authorities; "ISER" – Intervenor's Supplemental Excerpts of Record; and "AR" – Administrative Record.

evidence in the administrative record permitted the agency to make its decision, with deference given to the agency in cases of conflicting record evidence, especially in areas of its expertise. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1251 (9th Cir. 2013); *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Agency action is presumed to be valid as long as a reasonable basis exists for it. *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048, 1057-1058 (9th Cir. 2013). A reasonable basis exists if the agency considered the relevant factors, articulated a rational connection between the facts found and the choices made, and has not made a clear error of judgment. *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 788, 795 (9th Cir. 2012).

The County repeatedly refers to the "open-ended, standardless nature of [the Department's] interpretation," purportedly designed as an "end-run around the IRA that does not comport with *Carcieri*." (County Petition at 11-14.) But such characterizations (i) ignore the pre-IRA case law acknowledging the expansive nature of federal powers over Indian tribes that necessarily pervades "under Federal jurisdiction" (*see, e.g.*, *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913); *United States v. Kagama*, 118 U.S. 375, 384-385 (1886)); (ii) fail

to acknowledge tribes such as the one in *Carcieri* that the Supreme Court, on the record before it, deemed to have been under state rather than federal jurisdiction in 1934 (*Carcieri* at 383-384, 395-396); and (iii) imply an interpretation of "under Federal jurisdiction" to be taken from *Carcieri* which the Court never provided.

Furthermore, contrary to the County's contentions (County Petition at 12), Ione satisfied the Department's two-part inquiry based on the ROD's rational examination of the Tribe's entire history, including the federal government's continuous efforts for over 25 years, starting in 1915 under Tribal leader Captain Charlie Maximo until approximately 1941, to establish a reservation for Ione. (PO at 29-30; PER145-151; ISER0172, ISER0564-0568, ISER0641-645.) The ROD's two-part inquiry specifically states that the evidence used to show federal jurisdictional acts towards a tribe may include the three types alleged by the County to be lacking for Ione – a ratified treaty,[5] provision of federal services, and approval of contracts – but that it "is

[5] The ROD in fact acknowledges that the "Band is a successor in interest to the signatories of Treaty J, one of 18 unratified treaties negotiated by the Federal Government with California Indians in the mid-1800s." (PER 146).

certainly not limited" to those types. (County Petition at 12; PER 144.) And the County's claim that a lack of federal jurisdiction over Ione can be shown by it not voting on the IRA soon after enactment (County Petition at 12-13) is belied by the language of the cited IRA Section 18, 25 U.S.C. § 5125. That provision required a vote to determine the law's application "to any reservation" where the vote occurred. Id. Ione "did not live on a federally-established reservation in 1934" (PER146), so the lack of a vote is not surprising.

The congressional testimony attributed by the County to Deputy Secretary James Cason as to his views on the UFJ Opinion (County Petition at 14-15) is without consequence here because that M-Opinion is still binding on the entire Department. *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 277 at n.8 (2nd Cir. 2015). It has not been withdrawn or modified since issuance.

The County further claims that "federal jurisdiction" was understood at the time of IRA enactment "to apply only to tribes with a reservation set aside on its behalf (at least absent a specific treaty or legislation)." (County Petition at 15.) The IRA's legislative history, however, shows that one of the law's prominent purposes was to acquire

land for completely landless Indians, both tribes and individuals. *See, e.g.*, 78 Cong. Rec. 11727, 11728, 11730 (June 15, 1934) (ISER0009-0014); *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 798-799 (8th Cir. 2005) (citing 1934 congressional reports).

The County's discussion of a 1925 Comptroller General opinion and an August 1933 letter by Sacramento Indian Agency Superintendent Lipps (County Petition at 15-16; PER339-340; AA75-76), does not further its jurisdiction argument. The County cites no authority to show that a Comptroller Indian ward classification is coextensive with being "under Federal jurisdiction" or that the latter requires the former. Other record evidence clearly shows that federal operatives acknowledged the exercise of their jurisdiction over the Band near the time of IRA enactment. (*See, e.g.*, ISER0771 (1933 Superintendent Lipps referencing the homeless Ione Indians within "this jurisdiction[.]"); ISER0730-0731 (1927 Superintendent Dorrington including Ione among the "detailed bands" in Amador County).)

The three examples of a 1934 jurisdictional relationship mentioned in Justice Breyer's *Carcieri* concurrence – a treaty with the U.S., a congressional appropriation, or enrollment with the Indian

Office – were not intended to limit the possible types of such relationships, as contended by the County. (County Petition at 16; *Carcieri* at 399 (Breyer, J., concurring).) And in fact Ione came under the auspices of federal appropriations legislation. (ISER0172) (Office of Indian Affairs' "Authority" form showing homeless Indian land acquisition monies from FY 1916 appropriations for Ione.)

Finally, there is no circuit conflict as to the Department's "under Federal jurisdiction" interpretation. The two-step inquiry approach upheld by the Panel also has been affirmed by the D.C. Circuit Court of Appeals. *Confederated Tribes of Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 563-566 (D.C. Cir. 2016) ("Grand Ronde"), *cert. denied*, 137 S.Ct. 1433 (2017).

### B. The Panel Validly Interpreted The Phrase "Recognized Tribe" As Used In IRA Section 19 So As Not to Require Recognition In 1934, Consistent With The D.C. Circuit Court Of Appeals

The IRA Section 19 definition of "Indian" requires that a tribe be "a recognized tribe now under Federal jurisdiction." *Carcieri* did not address whether a tribe had to be "recognized" in 1934 as well as "under Federal jurisdiction." (PO at 16.) The Panel, after a thorough analysis,

correctly held that a tribe qualifies under IRA Section 19 if recognized at the time the IRA benefit decision is made (PO at 23-24.)

The County asserts a tribe must have been both recognized and "under Federal jurisdiction" in 1934, on the basis that "the temporal limitation of the modifying term ('now under Federal jurisdiction') necessarily applies to the modified term ('recognized Indian tribe')." (County Petition at 18.)[6] None of the separately-written concurring and dissenting opinions of *Carcieri* agreed with this interpretation. *Id.* at 398-399, 400, 407-408. And nothing grammatically compels the County's result, which has been rejected as a "results-oriented approach" to reading IRA Section 19. *Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, 75 F.Supp.3d 387, 398-399 (D.D.C. 2014), *aff'd* 830 F.3d 552 (D.C. Cir. 2016), *cert. denied*, 137 S.Ct. 1433 (2017).

The County proclaims that "every [pre-*Carcieri*] court to address this issue [of recognition timing] concluded" the IRA required 1934

[6] The ROD never characterizes Commissioner Bruce's 1972 letter as the first act of recognition for Ione, as the County alludes. (County Petition at 17). In fact, Bruce's letter acknowledges Ione's earlier federal recognition at the time of the land purchase efforts. (AR544-545.)

recognition. (County Petition at 18-19). But the cited courts never actually ruled on the issue. *See United States v. John*, 437 U.S. 634, 635, 647-650 (1978) (single, unexplained parenthetical reference to recognition "in 1934", which the Panel said at most constitutes "unreasoned dicta that [is] entitled to little weight" (PO at 17)); *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975) (determining that the plaintiff and his relatives did not have "any tribal designation, organization, or reservation" in 1934, meaning at most they did not belong to a tribe); *United States v. State Tax Commission of Mississippi*, 505 F.2d 633, 642 (5th Cir. 1974) (same); *City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 160 (D.D.C. 1980) (only assuming *arguendo* that the IRA requires recognition in 1934).

The County next argues that not limiting tribal recognition to 1934 renders "recognized" meaningless so as to no longer qualify the word "tribe," because a "decision by the government to accept land into trust would effectively recognize the tribe." (County Petition at 19.) This overlooks how "recognized" distinguishes a "recognized tribe" from a group of persons of Indian descent that is <u>not</u> recognized by the government. It also ignores IRA Section 19's precondition that a tribe be

recognized in order to authorize such an acquisition under IRA Section 5.

The County then references 1934 congressional hearings to conclude that "[a]ll this discussion preceded Commissioner Collier's proposal to add the language 'now under federal jurisdiction,' [citation omitted] meaning the temporal limitation was understood to be implicit in the notion of a 'recognized tribe' even before 'now' was added to the statute." (County Petition at 20). Once again nothing compels the County's conclusion because, for example, "now under Federal jurisdiction" could have been added to address the temporal concerns expressed in the congressional hearings when "recognized" failed to do so. (The lack of clarity in those hearings makes it impossible to ascertain exactly why the jurisdictional phrase was added (PER163-167) but it is a possibility.) Furthermore, if the temporal limitation on "recognized tribe" implicitly existed prior to the addition of "now," then it necessarily would have existed implicitly also as to "under Federal jurisdiction" when added. Yet the drafters felt it necessary to add "now" before the latter phrase but not the former.

Just as with the Department's "under Federal jurisdiction" interpretation, the D.C. Circuit Court of Appeals has upheld the Department's interpretation of "recognized tribe" so as not to require recognition in 1934. *Grand Ronde* at 559-563. The County's arguments for *en banc* review are not sustainable and rehearing is not warranted.

### C. The Department Validly Issued The Part 292 Regulations And Grandfathered Ione's 2006 Indian Lands Determination

The County challenges the Department's adoption, by means of the grandfathering provision in 25 C.F.R. § 292.26(b) ("Grandfathering Provision"), of Ione's 2006 Indian lands determination ("ILD"), which concluded that Ione and the Plymouth Parcels if taken into trust would qualify under IGRA's Restored Tribe Exception. (PO at 31.) The County argues that Congress in IGRA clearly intended to exclude from restored tribes those whose recognition was not administratively restored by means of the 25 C.F.R. Part 83 regulations and that grandfathering such tribes by regulation, without meeting the case law criteria cited by the County, is unlawful. (County Petition at 22-23.) The County asserts the Department did not meet that criteria in applying the Grandfathering Provision to Ione and therefore violated the APA. (Id.)

The County's premise is flawed: "Congress did not clearly intend to exclude from the 'restored tribe' exception those tribes administratively restored to recognition outside the Part 83 process … 'Neither the express language of IGRA nor its legislative history defines restored tribe.' " (PO at 36.)[7] Without clear congressional intent to contravene, grandfathering non-Part 83 administratively restored tribes is permissible and the County's cited case law is inapplicable. The Department lawfully adopted Ione's ILD in the ROD.

## III. CONCLUSION

For the foregoing reasons, the County Petition should be denied.

Respectfully submitted this 22nd day of December, 2017.

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IONE BAND OF MIWOK INDIANS

[7] At minimum, the Department did not believe Congress intended restored tribes to include tribes administratively restored prior to Part 83 enactment. (County Petition at 22, bold language.) Those regulations were enacted in 1978, but Ione's recognition was restored in 1994 (PO at 10-11), meaning Ione falls outside of any intended exclusion.