IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE KOI NATION OF NORTHERN CALIFORNIA, Plaintiff, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Defendants.	)	No.: 1:17-cv-01718-BAH

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants United States Department of the Interior, Ryan Zinke, Secretary of the Interior, and John Tahsuda III, Acting Assistant Secretary for Indian Affairs (collectively "Federal Defendants"), respectfully move for summary judgment pursuant to Federal Rules of Civil Procedure 56. Plaintiff Koi Nation of Northern California[1] essentially seeks a determination that it is entitled to conduct gaming under the Indian Gaming Regulatory Act's exception for "restored tribes." Plaintiff's challenge to Interior's 25 C.F.R. § 292.10 regulation fails for several reasons.

First, the statute of limitations has run on Plaintiff's facial challenge to Section 292.10, as Plaintiff knew that the regulation would bar it from gaming under the "restored lands" exception when the regulation was promulgated in 2008. Second, Plaintiff's challenge to Section 292.10 fails on the merits because in promulgating Section 292.10, Interior reasonably relied on Congressional limitations on tribal recognition passed as part of the Federally Recognized Tribes List Act of 1994. Third, Plaintiff's as-applied challenge to Section 292.10 cannot succeed because Plaintiff admits that Interior followed its own regulations in determining that Plaintiff cannot game under the IGRA's "restored lands" exception. Finally, Interior's permissible interpretation of the IGRA's "restored lands" exception did not diminish Plaintiff's privileges and immunities. This Court should therefore grant Federal Defendants' motion for summary judgment.

[1] Plaintiff was previously known as Lower Lake Rancheria. In order to minimize confusion, Federal Defendants generally refer to Plaintiff as "Plaintiff" rather than "Koi" or "Lower Lake."

FACTUAL BACKGROUND

On December 29, 2000, Assistant Secretary for Indian Affairs Kevin Gover issued a memorandum reaffirming federal recognition of three Indian tribes, including Plaintiff, which was known as Lower Lake Rancheria at that time. AR0460. Secretary Gover's memorandum determined that the three tribes were not "required to go through the federal acknowledgment process outlined in" 25 C.F.R. Part 83 "because their government-to-government relationship continued." *Id.* Specifically, Secretary Gover found that the "acknowledgment regulation does not apply to Indian tribes whose government-to-government relationship was never severed." *Id.*

BIA's January 3, 2001 press release similarly confirmed that, although Plaintiff had "been officially overlooked," the "government-to-government relationship" between Plaintiff and the United States "has never been severed." Assistant Sec. Gover Reaffirms Federal Trust Relationship for the King Salmon Tribe and Shoonaq' Tribe of Kodiak in Alaska and the Lower Lake Rancheria in California, AR0458 (Jan. 3, 2001).

Plaintiff then submitted a gaming ordinance to NIGC for approval on March 17, 2008. Letter from P. Hogan, NIGC, to D. Beltran, Lower Lake Rancheria Koi Nation at AR0394 (Oct. 7, 2008). AR0394. Plaintiff's "ordinance sought a determination . . . that [Plaintiff] was a restored tribe with the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii)." *Id*. NIGC's chairman disapproved the ordinance on June 13, 2008. *Id*. at AR0395. Plaintiff administratively appealed that disapproval. *Id*. On October 7, 2008, the full Commission issued a decision affirming the Chairman's disapproval. *Id* at AR0394. NIGC found that Plaintiff's argument that it was a restored tribe was "contrary to Mr. Gover's assertion in his December 2000 letter that the United States continually recognized" Plaintiff. *Id*. at AR0401; AR0407-10. Plaintiff "was not restored within the meaning of IGRA because it was never terminated." *Id*. at AR0401.

On April 28, 2014, Plaintiff sought a determination from Interior that it "qualifies as a 'restored tribe' for purposes of the Indian Gaming Regulatory Act" from BIA. Letter from L. Roberts, BIA, to Chairman Beltran, Koi Nation, AR0001 (Jan. 19, 2017) ("Roberts letter"). In issuing its determination, found that its regulations did not permit Interior to treat Plaintiff as a restored tribe under the IGRA. *Id*. at AR0006. Essentially, Interior determined that Plaintiff did not qualify as a "restored tribe" under the IGRA because it was not recognized by one of the three ways in which Congress permits an unrecognized tribe to obtain recognition, thereby restoring its status as a federally recognized Indian tribe.

STATUTORY AND REGULATORY BACKGROUND

I. STATUTORY FRAMEWORK

A. The Administrative Procedure Act

Plaintiff alleges that the Court has jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-706, ("APA") Am. Compl. ¶ 4.[2] The APA provides a waiver of sovereign immunity, in that it provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. This waiver of sovereign immunity contains several limitations, however, including that some claims may be time barred due to the statute of

[2] Plaintiff also alleges that the Court has jurisdiction in this action pursuant to 28 U.S.C. §§ 1331 and 1362, the Indian Reorganization Act, the Indian Gaming Regulatory Act, and the Declaratory Judgment Act. However, neither Section 1331 nor the Declaratory Judgment Act provide a waiver of sovereign immunity. *Reading v. United States*, 506 F. Supp. 2d 13, 20 (D.D.C. 2007). 28 U.S.C. § 1362 similarly provides no waiver of sovereign immunity. The section of the Indian Reorganization Act Plaintiff relies upon 25 U.S.C. § 5123(f) also provides neither a cause of action nor a waiver of sovereign immunity. *See Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008) (courts "review only the APA claim because § 476(h) offers no private cause of action"); 25 U.S.C. § 5123(d)(2). And the Declaratory Judgment Act provides no waiver of sovereign immunity. *McIntyre v. District of Columbia*, 716 F. Supp. 2d 7, 10-11 (D.D.C. 2010). Consequently, subject matter jurisdiction can only be conferred pursuant to the APA.

limitations. *United States v. Mottaz*, 476 U.S. 834, 841 (1986) (quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1983)) ("A statute of limitations 'constitutes a condition on the waiver of sovereign immunity.'"). Thus, if a claim is not filed against the United States within the applicable limitations period, the court lacks subject matter jurisdiction to review and adjudicate the claim.

B. The Indian Gaming Regulatory Act

Congress enacted the IGRA, 25 U.S.C. §§ 2701 *et seq.*, in 1988 to provide a statutory basis for the operation and regulation of Indian gaming, finding that existing federal law did not "provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). *See, e.g.*, *United States v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991), 500 U.S. 941 (1991) ("The congressionally declared purpose of the IGRA is to promote tribal economic development and self-sufficiency in addition to shielding the tribes from the influences of organized crime through the enactment of the statutory scheme regulating the operation of gaming by Indian tribes."); *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1019 (11th Cir. 1994) ("In an attempt to supply some much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the [IGRA].").

Section 20 of the IGRA ("Section 20") prohibits gaming on trust lands acquired after October 17, 1988, unless various exceptions apply. *See* 25 U.S.C. § 2719. One exception, the "restored lands" exception, provides that the IGRA's general prohibition on gaming does not apply when "lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to federal recognition." *Id.* § 2719(b)(1)(B)(iii) .

The IGRA established the National Indian Gaming Commission ("NIGC"), 25 U.S.C. § 2704(a), and set forth the NIGC's powers and responsibilities. The IGRA also vested the Secretary of the Interior ("Secretary") with certain authorities and responsibilities. Both the Secretary, at 25 C.F.R. Parts 290-93, and the NIGC, at 25 C.F.R. Subchapters A-C, E, and G, have promulgated regulations under the IGRA.

C. The Indian Reorganization Act

Congress's enactment of the Indian Reorganization Act ("IRA") in 1934 "marked a shift away 'from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture.'" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 180 n.8 (2011) (citation omitted). The IRA marked a return to "principles of tribal self-determination and self-governance" for Indian tribes. *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992). To revitalize tribal governments, Congress ended the allotment process, 25 U.S.C. § 5101, authorized Interior to purchase land to take into trust for tribes, 25 U.S.C. § 5108, and authorized loans for economic development, 25 U.S.C. § 5113. The IRA also authorized tribes to reorganize, 25 U.S.C. § 5123, and, in some circumstances, form corporate entities, 25 U.S.C. § 5124.

On May 31, 1994, Congress amended what is now 25 U.S.C. § 5123[3] of the IRA to provide that "agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the [IRA] . . . or any other act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of

[3] Section 5123 was previously codified at 25 U.S.C. § 476.

their status as Indian tribes." Act to Make Certain Technical Corrections § 5(b), 103 P.L. 263, 108 Stat. 707 (May 31, 1994).

D. The Federally Recognized Tribes List Act

Congress passed the Federally Recognized Indian Tribe List Act of 1994 ("List Act") on November 2, 1994. The List Act provides three options for tribal recognition. Pub. L. No. 103-454, 108 Stat. 4791, § 103 (1994). "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court." *Id*.

II. REGULATORY FRAMEWORK

A. 25 C.F.R. Part 292 Regulations

On September 14, 2000, the Secretary published proposed regulations in the Federal Register to establish procedures that an Indian tribe must follow when seeking a "Secretarial Determination" under Section 20 that a gaming establishment would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. 65 Fed. Reg. 55471. Subsequently, the comment period for these proposed regulations was extended twice, to March 27, 2002, but no further action was taken to publish the final rule because the Department determined that the rule should encompass all the exceptions contained in Section 20 of IGRA. *See* 73 Fed. Reg. 29354 (May 20, 2008). On October 5, 2006, the Secretary published a new proposed rule (71 Fed. Reg. 58769) to establish procedures for federally recognized Indian tribes to conduct gaming on lands acquired in trust after October 17, 1988.

The United States then engaged in an extensive consultation process with tribal governments. Plaintiff, among other tribes, provided comments on the proposed regulations on February 1, 2007. Comments to Proposed Rule 25 C.F.R. Part 292, Gaming on Trust Lands

Acquired After October 17, 1988, AR0445-56. Plaintiff's 2007 comments acknowledged that "the proposed rule is intended to formally establish criteria for the Department of the Interior to determine whether land acquired in trust after October 17, 1998 qualifies under [IGRA's] exceptions" and stated that it had "significant concerns with the proposed regulations." *Id*. at AR0445. Plaintiff stated that under the proposed regulations it "would be precluded the opportunity to game on their initial reservation." *Id*. at AR0446.

Interior considered Plaintiff's comment suggesting that the regulations interpreting the Initial Reservation exception "inappropriately restricts the scope of the 'Federal acknowledgment process' to the regulatory procedures in 25 CFR part 83."

> Response: The Department does not accept the recommendation to apply these regulations more broadly to recognition by means other than that through 25 CFR part 83. The plain meaning of the statute suggests that it applies to tribes acknowledged by this process and no others.

73 FR 29354, 29360.

On May 20, 2008, the Secretary published Interior's Final Rule interpreting Section 20 of IGRA, 25 U.S.C. § 2719. "Gaming on Trust Lands Acquired After October 17, 1988," 73 Fed. Reg. 29354 (May 20, 2008).[4] Those regulations, codified at 25 C.F.R. Part 292, went into effect on August 25, 2008. 73 Fed. Reg. 35579. The regulations implementing the "restored lands" exception are set forth at 25 C.F.R. §§ 292.7 - 292.12.

The Part 292 regulations implement Section 20 of the IGRA by articulating standards that the Department "will follow in interpreting the various exceptions to" IGRA's general prohibition on gaming on lands acquired after October 17, 1988. 73 Fed. Reg. 29354. Section

[4] The Secretary published a correction to the final rule on June 24, 2008. 73 Fed. Reg. 35579-80.

292.7 sets forth "[w]hat must be demonstrated to meet the 'restored lands' exception." 25 C.F.R. § 292.7. It provides that:

> Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:
> - (a) The tribe at one time was federally recognized, as evidenced by its meeting the criteria in § 292.8;
> - (b) The tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;
> - (c) At a time after the tribe lost its government-to-government relationship, the tribe was restored to Federal recognition by one of the means specified in § 292.10; and
> - (d) The newly acquired lands meet the criteria of "restored lands" in § 292.11.

Id. And Section 292.12 further requires a tribe to establish modern, historical, and temporal connections to specific newly-acquired lands in order to qualify for the restored lands exception. 25 C.F.R. § 292.12.

B. 25 C.F.R. Part 83 Regulations

In 1978, the Interior Department promulgated regulations governing tribal recognition. 43 Fed. Reg. 39361 (Sept. 5, 1978). Federal recognition was determined "in an ad hoc manner" until Interior promulgated its Part 83 Regulations. *Mackinac Tribe v. Jewell*, 829 F.3d 754, 755 (D.C. Cir. 2016). The Part 83 Regulations:

> set out uniform procedures through which Indian groups could seek formal recognition. A group seeking recognition under Part 83 must submit a petition to Interior documenting certain criteria, including whether it has been identified as an American Indian entity on a "substantially continuous basis" since 1900; whether it comprises a "distinct community;" whether it has historically maintained "political influence or authority over its members;" and whether its membership "consists of individuals who descend from a historical Indian tribe."

Id. at 756. A tribe must pursue the Part 83 process "even if the tribe claims . . . that it has previously been recognized by the federal government." *Id*. at 757. Under 25 C.F.R. § 83.8, petitioners who demonstrate previous federal acknowledgment enjoy special "fast tracking provisions." *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79

(D.D.C. 2002). These provisions relax the burden placed upon the petitioner to satisfy the criteria for recognition. 25 C.F.R. §§ 83.8(d)(1-4). Nonetheless, the Federal acknowledgment process can be lengthy and costly. *See* 80 Fed. Reg. 37862, 37864 (July 1, 2015) (describing criticisms of and challenges of administering the acknowledgment process and noting that "[o]f the 17 tribes that have been recognized since this process began 37 years ago, only 11 have obtained land in trust, a process regulated by an additional, separate set of regulations 25 C.F.R. part 151), and only 9 of these currently engage in Indian gaming."); *Mackinac Tribe*, 829 F.3d at 758 (Brown, J., concurring).[5]

STANDARD OF REVIEW

I. SUBJECT MATTER JURISDICTION

Federal courts lack jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). Furthermore, because "federal courts are courts of limited jurisdiction . . . there is a general presumption against federal court review, and the burden of establishing the contrary rests on the party asserting jurisdiction." *Kokkonnen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

"The Federal Government cannot be sued without its consent," *United States v. Navajo Nation*, 556 U.S. 287 (2009), and it is thus axiomatic that, absent a waiver of sovereign immunity, the United States cannot be sued in any court. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983). Plaintiff must "establish the jurisdiction necessary" to "overcome the defense of sovereign immunity." *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) (citing *Tri–State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003). The D.C. Circuit

[5] Federal Defendants do not agree with the specific estimates of the time and money necessary to complete the acknowledgement process identified in the law review articles cited in Circuit Judge Brown's concurring opinion.

has explicitly held that Section 2401(a) "creates 'a jurisdictional condition attached to the government's waiver of sovereign immunity.'" *Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 130 n.21 (D.D.C. 2017) (quoting *Hardin v. Jackson*, 625 F.3d 739, 740 n.1 (D.C. Cir. 2010)).

II. SUMMARY JUDGMENT

Because the IGRA does not provide a private right of action, judicial review of an IGRA claim is governed by the APA, 5 U.S.C. §§ 701-06. ECF No. 14-1 at 8, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the federal agencies acted in a manner that was "arbitrary, capricious, an abuse of discretion or contrary to law." 5 U.S.C. § 706(2)(A); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

In interpreting an agency's construction of a statute, a Court must "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). If the Court determines that the statute at issue is ambiguous, it "may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011) (citation omitted).

A court is only to assess whether the agency's decision is "within the bounds of reasoned decisionmaking." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983). "The agency . . . is required to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made,' and [courts] in turn must review that explanation, considering 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of

judgment." *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). A reviewing court may not substitute its own judgment for that of the agency. *Id*.

ARGUMENT

I. Plaintiff's challenge to the legitimacy of the Interior Department's Part 292 Regulations is barred by the statute of limitations.

Plaintiff's claims that the Interior Department's Part 292 Regulations are arbitrary and capricious are barred because Plaintiff has brought this lawsuit years after the statute of limitations expired. Interior promulgated its Part 292 regulations on May 20, 2008. AR0417. Plaintiff filed its Complaint on August 23, 2017. ECF No. 1. Plaintiff's facial challenge to regulations promulgated more than nine years before Plaintiff filed its Complaint are barred by the statute of limitations.

"[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401. "[F]acial challenges to agency regulations, like any other civil action filed against the United States, are subject to § 2401(a)'s six-year limitations period." *P&V Enters. v. United States Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 142-43 (D.D.C. 2006), *aff'd, P&V Enters. v. United States Army Corps of Eng'rs*, 516 F.3d 1021, 1026-27 (D.C. Cir. 2008) (affirming dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction). Claims accrue when a Plaintiff "knew or should have known" about the material facts giving rise to its claim. *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013); *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984) (Statutes of limitations therefore accrue where "Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim."). Challenges to the "facial validity" of federal regulations

therefore accrue when those regulations are "adopted and published." *Alaska v. USDA*, 932 F. Supp. 2d 30, 33 (D.D.C. 2013), *rev'd on other grounds, Alaska v. United States Dep't of Agric.*, 772 F.3d 899, 900 (D.C. Cir. 2014) ("Alaska had six years from the time of the rule's [judicial] reinstatement in 2006.").

Plaintiff's Count I is a facial challenge to the 2008 Part 292 Regulations. Plaintiff contends that "Section 292.10 is invalid and a violation of IGRA as a result of this exclusion." Compl. ¶ 95. Count II is similarly a facial challenge to Section 292.10, which Plaintiff contends "unlawfully diminish[es] the Koi Nation's privileges and immunities." Compl. ¶ 106. And while Plaintiff's Memorandum appears to characterize Plaintiff's claims somewhat differently, ECF No. 14-1 at 8-9, it is clear that a significant portion of Plaintiff's argument is a facial challenge to Section 292.10. *e.g.* ECF 14-1 at 31 ("25 C.F.R. § 292.10(b) is invalid."); 33 ("The Part 292 regulations violate unambiguous federal law.").

Plaintiff not only should have known in 2008 that the Part 292 regulations excluded Plaintiff from the definition of "restored tribe," it actually knew that the regulations excluded it from the definition of "restored tribe." Plaintiff commented on the draft regulations on February 1, 2007. Comments to Proposed Rule 25 CFR Part 292, Gaming on Trust Lands Acquired After October 17, 1988, AR0445-56. Plaintiff's comments explicitly acknowledged that under the proposed regulations Koi "would be precluded the opportunity to game on their initial reservation." *Id*. at AR0446. And Plaintiff highlighted the exact issue that is at the center of Counts I and II, complaining that the proposed regulation "unfairly limits [recognition through] executive action to recognition gained through the Federal Acknowledgement Process." AR0451. So, as of May 20, 2008, Plaintiff knew the only fact necessary to cause the statute of

limitations on its facial challenge to the Part 292 regulations to commence running – that those regulations barred Plaintiff from being considered a "restored tribe."

Lest there be any doubt that Plaintiff understood the significance of the 2008 regulations, Plaintiff proposed modifications to 25 C.F.R. § 292.10 aimed at increasing the number of avenues through which a tribe could qualify as having been restored to Federal Recognition. *Id*. AR0451. Interior considered Plaintiff's comment suggesting that the Initial Reservation exception be broadened to include "executive re-affirmation or executive restoration" in addition to recognition through the formal Part 83 acknowledgment regulations. Specifically, Plaintiff proposed the following addition to Section 292.10:

> (b) Recognition through the administrative Federal Acknowledgement Process under 25 CFR 83.8**, through specific waiver of the regulation or through executive re-affirmation or executive restoration which was granted prior to the issuance of these regulations contained in this part;**

AR0541 (Bold emphasis added to identify proposed additions. Underline in original.) Plaintiff's was one of several comments suggesting that Section 292.10 "include administrative actions of restoration, recognition, and reaffirmation that are outside the Federal acknowledgment process." 73 FR 29354, 29363. Interior declined to modify its definition of "restored tribes" under the IGRA and provided a lengthy response addressing the comments. Plaintiff admits to "its shock upon receiving the Final Rule." ECF No. 14-1 at 19.

While there is no dispute that Interior promulgated Section 292.10 pursuant to notice and comment rulemaking – which is sufficient by itself to cause the statute of limitations for a facial challenge to accrue – it is clear that Plaintiff not only should have known, but actually knew, that Section 292.10 barred it from gaming under IGRA's "restored lands" on the day those regulations were promulgated. The statute of limitations for Plaintiff's claim that the Part 292

regulations inappropriately define "restored tribes" accrued on May 20, 2008. The Court's analysis need proceed no farther.

Plaintiff's knowledge of all facts necessary for its current claims to accrue is further established by an October 7, 2008 National Indian Gaming Commission decision disapproving Plaintiff's proposed gaming ordinance. Letter from P. Hogan, NIGC, to D. Beltran, Lower Lake Rancheria Koi Nation (Oct. 7, 2008) (AR0393-416). Plaintiff submitted a gaming ordinance to NIGC for approval on March 17, 2008. AR0394. Plaintiff's "ordinance sought a determination . . . that [Plaintiff] was a restored tribe with the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii)." AR0395. NIGC's opinion hinged on interpreting Secretary Gover's 2000 letter. NIGC found that Plaintiff's argument that it was a restored tribe was "contrary to Mr. Gover's assertion in his December 2000 letter that the United States continually recognized" Plaintiff. AR0401; AR0407-10. Plaintiff "was not restored within the meaning of IGRA because it was never terminated." *Id*. at AR0401.

The NIGC decision also determined that Plaintiff's request to be declared a restored tribe was unripe, in part because that request was untethered to any land. AR0412. Plaintiff still lacks land. Compl. at 1 ("The Koi Nation is a landless federally recognized Indian tribe."). Plaintiff therefore makes the same facial challenge that it could have made on May 20, 2018 – that the Part 292 regulations define "restored tribe" in an unreasonably narrow manner. That facial challenge should have been made within the six-year statute of limitations.

II. The Interior Department's 25 C.F.R. 292.10 regulation appropriately interprets the IGRA.

Even assuming Plaintiff's claims were properly before this Court, Interior's interpretation of the IGRA's ambiguous restored lands exception is entirely appropriate and should be upheld. "[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of

authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* ("*Nat'l Cable*"), 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66). "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.*; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (court "must respect the agency's construction of the statute so long as it is permissible."). Interior is accorded Chevron deference in interpreting the IGRA. *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007)

Because IGRA's restored lands exception is ambiguous, the sole question for the Court is whether the limitations imposed by the regulations at issue reflect a permissible construction of the statute. *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 54. *See also Oregon v. Norton*, 271 F. Supp. 2d 1270, 1277 (D. Or. 2003) ("I find [IGRA's] language ambiguous and turn to the question of whether the Secretary's interpretation is based on a permissible construction of the statute."). And Interior's interpretation reasonably defines "restored tribe" to exclude tribes, such as Plaintiff, who were never terminated and therefore could not be restored. Assuming that Plaintiff's challenge to Section 292.10 is timely, it nonetheless fails on the merits.

The IGRA's exception to its general prohibition on gaming for "the restoration of lands for an Indian tribe that is restored to Federal recognition" requires Interior to determine which tribes are restored to Federal recognition. 25 U.S.C. § 2719(b)(1)(B)(iii). The term "restored to Federal recognition" is ambiguous.

"The definition of 'recognition' has evolved over time but historically the United States recognized tribes through treaties, executive orders, and acts of Congress. *Mackinac Tribe*, 829 F.3d at 755 (D.C. Cir. 2016). Federal recognition was determined "in an ad hoc manner" until Interior promulgated its 25 C.F.R. Part 83 Regulations in 1978. Those regulations

> set out uniform procedures through which Indian groups could seek formal recognition. A group seeking recognition under Part 83 must submit a petition to Interior documenting certain criteria, including whether it has been identified as an American Indian entity on a "substantially continuous basis" since 1900; whether it comprises a "distinct community;" whether it has historically maintained "political influence or authority over its members;" and whether its membership 'consists of individuals who descend from a historical Indian tribe."

Mackinac Tribe, 829 F.3d 756.

The IGRA similarly left for Interior the responsibility to determine whether a tribe was restored to federal recognition. 25 U.S.C. § 2719(b)(1)(B). As Interior noted in its Part 292 regulations, "[n]either the express language of IGRA nor its legislative history defines restored tribe for the purposes of section 2719(b)(1)(B)(iii)." 73 FR at 29363.

Interior's interpretation of the "restored lands" exception through 25 C.F.R. §§ 292.2 and 292.7-12, was reasonable and consistent with congressional intent. Plaintiff specifically challenges only the provisions that determine which tribes are "restored to federal recognition." *See Compl*. at ¶¶ 2-4.

Section 292.10 provides that:

> For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:
> (a) Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe (required for tribes terminated by Congressional action);
> (b) Recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter; or
> (c) A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

Interior set forth the reasoning behind its interpretation of the "restored lands" exception in its Part 292 regulations. Interior's lengthy response to Plaintiff's comment set forth a reasonable basis for Interior's 25 C.F.R. § 292.10 regulation:

> We can safely infer that [when it passed IGRA in 1988] Congress understood that a list of federally recognized tribes existed and authorized on-reservation, or on former reservation, gaming for those tribes. We must, therefore, provide meaning to Congress's creation of an exception for gaming on lands acquired into trust ''as part of the restoration of lands for an Indian tribe restored to Federal recognition.'' 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. 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. 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. *See* Notes following 25 U.S.C. 479a. The only acceptable means under the regulations for qualifying as a restored tribe under IGRA are by Congressional enactment, recognition through the Federal acknowledgment process under 25 CFR 83.8, or Federal court determination in which the United States is a party and concerning actions by the U.S. purporting to terminate the relationship or a court-approved settlement agreement entered into by the United States concerning the effect of purported termination actions. While past reaffirmations were administered under this section, they were done to correct particular errors. Omitting any other avenues of administrative acknowledgment is consistent with the notes accompanying the List Act that reference only the part 83 regulatory process as the applicable administrative process.

73 Fed. Reg. 29363 (AR0427).[6] This explanation reasonably interpreted Section 2719(b)'s exceptions to gaming within a broader statutory framework.

[6] Plaintiff's assertion, ECF No. 14-1 at 43, that the "Part 292 regulations form the only basis for" Interior's treatment of Plaintiff is inaccurate or misleading. The Part 292 Regulations

Specifically, Interior focused on the 1994 List Act, which provides only three options for recognition. Pub. L. No. 103-454, 108 Stat. 4791 § 103 (1994). "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;' or by a decision of a United States court." *Id*. Interior incorporated Congress's demarcation in 1994 of acceptable pathways to recognition into Section 292.10. *See Citizens Exposing Truth About Casinos*, 492 F.3d at 469 (Interior reasonably "incorporate[d] regulations promulgated under the IRA into IGRA . . . view[ing] the two statutes in tandem"). Put another way, Interior reasonably resolved the "restored lands" exception's ambiguity by adopting the List Act's limitation of the ways in which tribes can be recognized.

Ultimately, Congress left the interpretation of the "restored lands" exception to the implementing agency, and Interior's interpretation must be upheld so long as it is reasonable. *Nat'l Cable*, 545 U.S. at 981. It was reasonable for Interior to incorporate Congress's 1994 channelization of tribal recognition into its 2008 regulations interpreting the IGRA's restored lands exception. At a minimum, Interior's construction of IGRA's "restored lands" exception was permissible. The Court's analysis need proceed no farther.

III. The challenged regulation should be upheld regardless of whether it represents a change in Interior's interpretation of the IGRA.

Interior may change its interpretation of a statute. *Nat'l Cable*, 545 U.S. at 981 ("An initial agency interpretation is not instantly carved in stone.") (citation omitted). Plaintiff nonetheless contends that Section 292.10 is arbitrary and capricious because it represents a change in Interior's decade-old pre-regulation interpretation of IGRA's "restored lands"

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are part of a complex statutory and regulatory scheme and are based upon, among other things, the 1994 List Act.

exception – which allowed the Ione Band of Miwok Indians ("Ione") to game under the "restored lands" exception despite not going through the Part 83 process. ECF No. 14-1 at 29-30, 34-41. The challenged regulation should be upheld, regardless of whether it conflicts with judicial or agency opinions issued prior to its promulgation, because Interior interpreted IGRA's restored lands exception in a permissible manner.

Plaintiff is correct that Ione was grandfathered into the new regulations as a restored tribe under the IGRA. But Plaintiff misapplies the Ninth Circuit's recent decision upholding Interior's determination that Ione was eligible for gaming under the "restored lands" exception to suggest that Interior cannot modify its interpretation of that exception through notice and comment rulemaking. ECF No. 14-1 at 29-31 (citing *Cty. of Amador v. U.S. Dep't. of the Interior*, 872 F.3d 1012 (9th Cir. 2017)), *cert. docketed*, No. 17-1432 (U.S. Apr 13, 2018). As the Ninth Circuit recognized, "Congress left a statutory ambiguity for Interior to resolve, and Interior reasonably could have determined that a tribe could be 'restored' to Federal recognition outside the Part 83 process, at least in certain circumstances." *Cty. of Amador*, 872 F.3d at 1030. The Ninth Circuit did nothing more than find that Interior reasonably applied the IGRA's "restored lands" exception to Ione before promulgating its Part 292 Regulations. But Interior's reasonable determination prior to promulgating its Part 292 Regulations that Ione was restored to federal recognition regulations did not require Interior to maintain its pre-regulatory interpretation of the IGRA's "restored lands" exception for all time. *Amador* simply does not address whether Interior could modify its interpretation of the "restored lands" exception.

Plaintiff's contention that the challenged regulation is invalid because it departs from prior agency interpretation is meritless. *Nat'l Cable*, 545 U.S. at 981; *Chevron*, 467 U.S. at 863-4 ("that the agency has . . . changed its interpretation of the term 'source' does not . . . lead us to

conclude that no deference should be accorded the agency's interpretation of the statute"); *Rancheria v. Jewell*, 776 F.3d 706, 714 (9th Cir. 2015) ("an agency is permitted to change its policy so long as it provides some minimal explanation for the change" and finding sufficient Interior's explanation for 25 C.F.R. § 292.12). That an agency may modify its interpretation of a statute is commanded by the APA, as an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64. "That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy." *Nat'l Cable*, 545 U.S. at 981-82. And as discussed *supra*, Interior provided a reasoned explanation setting out its reasoning as to why it interpreted the "restored lands" exception in the manner that it did. That is all that is necessary for APA purposes.

The Supreme Court clarified that an agency regulation that departs from prior agency interpretation is subject to the same standard of review as any regulation. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513-14 (2009) ("[O]ur opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance."). Agencies do not need to "make clear 'why the original reasons for adopting the [displaced] rule or policy are no longer dispositive'" as well as 'why the new rule effectuates the statute as well as or better than the old rule.'" *Id*. (citation omitted). Therefore, whether the challenged regulation deviates from prior agency interpretation of the "restored lands" exception provides no independent basis for overturning the regulations.

A "'court is not to substitute its judgment for that of the agency,' . . . and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,'" *Fox TV*

Stations, Inc., 556 U.S. at 513-14 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). Plaintiff is correct that agency action should be held lawful if it rests on a consideration of the relevant factors. ECF No. 14-1 at 22-23 (citing *Fox TV Stations, Inc*., 556 U.S. at 513). Section 292.10 meets that test. Interior articulated a sufficient basis for adopting the regulations implementing IGRA's "restored lands" exception. As discussed in Section II, above, Interior responded to Plaintiff's proposed modification to Section 292.10 with a lengthy explanation of how Interior crafted Section 292.10 to be consistent with the List Act. Interior only needed only to articulate a sufficient basis for decision to promulgate regulations aligning its restored lands exception with the 1994 List Act. It satisfied this standard.

IV. The Indian canon of construction does not overrule Interior's permissible interpretation of the restored lands exception.

Plaintiff is incorrect to the extent that it suggests, ECF No. 14-1 at 22, that the Indian canon of construction, under which statutes are sometimes read in favor of tribes and their interests, compels this Court to strike down Section 292.10. First, the Indian canon should not apply here because "[a]n interpretation of the restored lands exception that would benefit this particular tribe, by allowing unlimited use of restored land for gaming purposes, would not necessarily benefit other tribes also engaged in gaming. It might well work to their disadvantage." *Rancheria*, 776 F.3d at 713; *cf. City of Roseville,* 348 F.3d at 1032 (applying Indian canon to uphold Interior's determination that certain land acquired pursuant to Congressional Act explicitly restoring a tribe constituted "restored lands"). Second, Plaintiff's citation to a 2001 decision in the *Cobell* litigation misses the mark. ECF 14-1 at 22 (citing *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001)). More recent decisions in the *Cobell* litigation confirm that "deference does not disappear from the process of reviewing an agency's interpretation of those statutes it is trusted to administer for the benefit of the Indians, although

that deference applies with muted effect." *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009). Plaintiff is incorrect that ambiguous provisions must be interpreted to its benefit. Interior's reasonable interpretation of the ambiguous "restored lands" exception should be upheld.

V. Agency action that follows the agency's regulations cannot be arbitrary or capricious.

Plaintiff's as-applied challenge also fails to the extent that it rests on the assertion that Interior was arbitrary or capricious in following its own regulations. ECF 14-1 at 39, 42 ("the Department has determined that the Koi Nation cannot be a 'restored' tribe under IGRA because the Part 292 Regulations do not allow it to make that determination"). An agency is not free to disregard its own regulations. *Am. Fed'n of Gov't Emps. v. Donovan*, 683 F.2d 511, 516 (D.C. Cir. 1982) ("Having promulgated these regulations . . ., the Assistant Secretary must abide by them."). *See also United States v. Caceres*, 440 U.S. 741, 754 (1979) ("some of our most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA"); *Am. Canoe Ass'n v. United States EPA*, 30 F. Supp. 2d 908, 919 (E.D. Va. 1998) ("discretion does not permit agencies to disregard their own regulations."); *Kassem v. United States*, No. 02-CV-0546E(F), 2003 U.S. Dist. LEXIS 25127, at *15 (W.D.N.Y. Apr. 15, 2003) ("The USDA's sanction was not arbitrary and capricious because the USDA was simply following the applicable regulations in imposing permanent disqualification."). Simply put, it cannot be arbitrary or capricious for an agency to follow its own regulations.[7]

[7] It is of course possible to bring a timely challenge to regulations based upon the premise that those regulations are arbitrary or capricious. As set forth above, the regulation was properly enacted and fully compliant with IGRA and, in any event, Plaintiff failed to challenge the regulation despite admitting in 2007 that it had the same concerns with the regulation that it is expressing in the suit.

Interior's application of its regulations fully supports any asserted distinction from Ione. *See* Section II, above. Plaintiff asserts that the Interior offered an insufficient explanation for why it treated those two tribes differently. ECF No. 14-1 at 23. But the explanation is that Interior: (1) recognized Ione as a restored tribe prior to the 2008 enactment of the Part 292 Regulations; (2) promulgated its Part 292 Regulations through notice and comment rulemaking that set out Interior's evolved view on what constitutes a "restored tribe;" and (3) reasonably applied Section 292.10 to determine that Plaintiff cannot game under the IGRA's "restored lands" exception. Roberts letter at AR0001-6. Plaintiff's admission that Interior followed its own regulations is fatal to its as-applied challenge. This Court should therefore grant summary judgment to the Federal Defendants on Counts III and IV of the Complaint.

VI. Interior's implicit waiver of the Part 83 regulations in 2000 does not allow, much less mandate, that Interior deviate from its Part 292 regulations today.

Plaintiff is incorrect, ECF No. 14-1 at 25-28, that it was restored pursuant to a waiver of Interior's Part 83 tribal recognition regulations. Interior does not dispute that it impliedly waived the Part 83 regulations for Plaintiff in 2000 for the purposes of putting Koi on the list of federally recognized tribes. But that waiver supports Federal Defendant's position in this case. The Part 83 regulations governing Interior's recognition of tribes that lack a current government-to-government relationship did not apply to Plaintiff. Put another way, Interior impliedly waived the Part 83 regulations for Plaintiff because Plaintiff: 1) had not been terminated and 2) did not need to be restored.

At no point has Plaintiff's reaffirmation ever been equated with restoration under the IGRA. To the contrary, Plaintiff's reaffirmation outside of the Part 83 process was premised on the fact that Plaintiff was never terminated. Secretary Gover's 2000 letter found that Plaintiff "should not be required to go through the Federal acknowledgment process . . . because [its]

government-to-government relationship continued. The acknowledgement regulation does not apply to Indian tribes whose . . . relationship was never severed." AR0460.[8] NIGC relatedly found that Plaintiff's argument that it was a restored tribe was "contrary to Mr. Gover's assertion in his December 2000 letter that the United States continually recognized" Plaintiff. AR0401. Plaintiff "was not restored . . . because it was never terminated." *Id*. NIGC found that Plaintiff's argument that it was a restored tribe was "contrary to Mr. Gover's assertion in his December 2000 letter that the United States continually recognized" Plaintiff. AR0401; AR0407-10. Plaintiff "was not restored within the meaning of IGRA because it was never terminated." *Id*. at 401. Completion of the Part 83 recognition process means that a tribe that previously lacked recognition achieved restoration. Interior's implied waiver of its Part 83 regulations for a tribe that was never terminated is therefore wholly consistent with Section 292.10.[9]

Plaintiff's selective citation to an explanatory memorandum supplementing the Administrative Record in *Muwekma Ohlone Tribe v. Kempthorne* is unavailing. Plaintiff is correct that Interior impliedly waived the Part 83 process as part of its reaffirmation of Koi and Ione. But the memorandum makes clear that the Part 83 process applies only to tribes "that had

[8] Plaintiff's citations do not support its allegations, ECF No. 14-1 at 16-17 that Interior direction "dramatically change[d]" Koi's approach and "changed Koi's petition strategy" of pursuing recognition through the Part 83 regulations. *See* Roberts Letter at AR0004 ("In 1995, the Advisory Council on California Indian Policy recommended that the Department acknowledge the Tribe as a Federally recognized tribe."; Letter from P. Girvin, Advisory Council on California Indian Policy, to A. Deer, Bureau of Indian Affairs, at AR0313, AR0319 AR0464 (June 21, 1995); Memorandum re: Administrative Reaffirmation of Federal Recognition – Lower Lake Rancheria, AR0082 (Sept. 14, 2000). The formal recognition process under Part 83 is time consuming and costly. *See* 80 Fed. Reg. 37862, 37864. Interior recognized that Plaintiff derived some benefit from its reaffirmation "without litigation or utilizing the Part 83 acknowledgment process." Roberts letter at AR0006.

[9] While Interior referred to an "implicit waiver" of Part 83, its actions were more accurately described as a determination that Plaintiff's tribal status had never been terminated and thus Part 83 did not apply to the tribe.

previously been acknowledged, but whose relationship with the Federal Government had not continued to exist." Explanation to Supplement the Admin. R., *Muwekma Ohlone Tribe v. Kempthorne*, No. 1:03CV1231 (D.D.C. Nov. 27, 2006) ECF No. 55-1 at 3 ("Muwekma Memorandum"). The Muwekma Memorandum explains that Plaintiff was not required to complete the Part 83 process in order to be placed on the list of Federally recognized tribes because its "Government to Government relationship continued." *Id*. (quoting 2000 Gover Mem.). Specifically, Secretary "Gover's 'reaffirmation' of [Plaintiff] was based on his finding that its relationship with the United States had neither lapsed nor been administratively terminated." *Id*. And he "emphasized that [Plaintiff] had continuing recognition, not just past recognition." *Id*. at 4. Finally, Plaintiff "was 'reaffirmed' rather than reviewed under the acknowledgment process because . . . its government-to-government relationship with the United States continued to exist." *Id.* at 6. Plaintiff's reaffirmation was predicated on Interior's determination that Plaintiff's government-to-government relationship with the United States never ended. As NIGC noted, Plaintiff "was not restored within the meaning of IGRA because it was never terminated." AR0401. It was not arbitrary for Interior to promulgate regulations that are consistent with the logical proposition that Plaintiff cannot be restored if it was never terminated.

VII. Plaintiff's privileges and immunities have not been diminished.

Even assuming that the "privileges" addressed in 25 U.S.C. § 5123(f) include the opportunity to participate in statutory programs and benefits like gaming under IGRA, Plaintiff's argument that Section 292.10 violates the Indian Reorganization Act's privileges and immunities

clause misapplies the clause.[10] Plaintiff contends that Section 292.10 violates the privileges and immunities' clause's direction that agencies shall not pass a regulation that "classifies, enhances, or diminishes the privileges and immunities available to [an] Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." ECF No. 14-1 at 41-45. First, Plaintiff's argument fails because Congress required Interior to apply the IGRA's "restored lands" exception and determine which subset of tribes qualify for that exception. Interior cannot violate the privileges and immunities clause's provisions regarding classifying tribes when Congress required Interior to classify tribes. Second, Plaintiff does not allege that it has been deprived of any privilege or immunity possessed by tribes who – like Plaintiff – were neither terminated nor restored. Put another way, Plaintiff's privileges and immunities argument misses the mark because it hinges on Plaintiff's argument that it is a restored tribe and should be granted privileges and immunities beyond those granted to tribes who were never terminated.

Congress's statutory scheme requires Interior to determine which tribes qualify for the "restored lands" exception – recognizing that some tribes are not eligible to game under the "restored lands" exception. 25 U.S.C. § 2719(b)(1)(A). Congress left to Interior with the

[10] It is far from clear that the Indian Reorganization Act's privileges and immunities clause addresses anything beyond tribes' powers of self-governance. *See Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe*, 370 F.2d 529, 531 (8th Cir. 1967) (Indian Reorganization Act has typically been interpreted as having a "limited scope" providing only "the authority and procedures whereby an Indian tribe may organize itself and adopt a tribal constitution and bylaws."). Neither the text nor the history of the IRA's so-called privileges and immunities clause mandates that Plaintiff be treated as a restored tribe, or be provided statutory benefits of any kind. Plaintiff is correct, ECF No. 14-1 at 43, that the Indian Reorganization Act was amended in 1994 to correct Interior's disparate treatment of two categories of tribes. But the distinction addressed by the amendments was as to the governmental powers of two "categories" of tribes, and therefore was directly relevant to the subject matter of Section 5123(f) of the Indian Reorganization Act, which is tribal self-government. Plaintiff falls far short of establishing that the ability to conduct gaming under the "restored tribes" exception is a "privilege or immunity" addressed by Section 5123(f) of the Indian Reorganization Act.

responsibility to interpret ambiguous language that unavoidably required differentiating between tribes. It cannot violate the privileges and immunities clause for Interior to implement a statutory scheme that distinguishes between tribes that are eligible for the "restored lands" exception and tribes that are not so eligible. Plaintiff effectively concedes that Interior does not violate the privileges and immunities clause by differentiating between restored tribes and tribes that have not been restored. ECF No. 14-1 at 42-43. Plaintiff's complaint is that Interior drew that line incorrectly. But as established above, Interior's regulations appropriately interpret the IGRA's "restored lands" exception.

To the extent that Plaintiff argues that the privileges and immunities clause requires Interior to provide all Indian tribes with an equal opportunity to game, ECF No. 14-1 at 22-25, its argument does not withstand scrutiny. The IGRA recognizes that Interior will have to recognize distinctions between Indian tribes and authorizes Interior to approve certain gaming on newly acquired lands and disapprove other gaming on newly acquired lands. The IGRA itself does not afford every tribe a right to game and does not allow Interior to provide every tribe with an identical opportunity to game. Interior's Part 292 regulations therefore cannot be struck down on the basis that they deprive tribes of an opportunity to game equally.[11]

Plaintiff tellingly misapplies *Stand Up for California! v. Dept. of the Interior*, 919 F. Supp. 2d 51 (D.D.C. 2013) , asserting that it "endorsed the view that IGRA was intended to allow Indian tribes to engage in gaming on a level playing field." ECF No. 14-1 at 35. As

[11] Indeed, the IGRA recognizes many distinctions between tribes. It treats tribes differently based upon whether they had or lacked reservations at the time of IGRA's passage. 25 U.S.C. §§ 2719(a)(1)-(2). It treats tribes differently based upon whether they are located in Oklahoma or other states. 25 U.S.C. § 2719(a)(2). And the IGRA requires Interior in certain circumstances to confer with "State and local officials, including officials of other nearby Indian tribes" to determine whether gaming on newly acquired lands would be "detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1).

Interior recognized, "courts have ruled that IGRA's exceptions should be read broadly to ensure that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." Roberts letter at AR0004-5 (quoting *City of Roseville*, 348 F.3d at 1031. *See also Butte Cty. v. Chaudhuri*, 887 F.3d 501, 503 (D.C. Cir. 2018) (the "exception for 'restored lands' helps ensure 'that tribes lacking reservations when [the Act] was enacted are not disadvantaged relative to more established ones'"). But this Court's finding that "The IGRA was intended to allow Indian tribes like the North Fork 'to engage in [g]aming on par with other tribes'" referred to Interior's taking land into trust for gaming purposes under 25 U.S.C. § 2719(b)(1)(A), and was not a general statement concerning the entirety of IGRA generally. *Stand Up for Cal.!*, 919 F. Supp. 2d at 77 (D.D.C. 2013); *see also, id.* at 71 (referring to 25 C.F.R. § 292.13, the implementing regulation for acquiring lands that do not fall within an IGRA exception); *Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. California*, 163 F. Supp. 3d 769, 772 (E.D. Cal. 2016) (land eligible for gaming under Section 2719(b)(1)(A)). To be clear, the IGRA affords Plaintiff the same opportunity to game that North Fork successfully pursued – the opportunity to obtain a Secretarial Determination permitting gaming. 25 U.S.C. § 2719(b)(1)(A). *See also Estom Yumeka Maidu Tribe*, 163 F. Supp. 3d at 779 (California obligated to negotiate in good faith regarding Class III gaming compacts). Plaintiff therefore falls far short of establishing that it has a privilege to be declared a restored tribe or to have land taken into trust for gaming purposes pursuant to any IGRA exception.

Plaintiff's reliance on *Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013), ECF No. 14-1 at 42-43 is misplaced for at least three reasons. First, the *Akiachak* court granted Interior's motion for reconsideration and substantially narrowed its previous

decision. *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1, 5 (D.D.C. 2013).[12] Second, as discussed above, Section 292.10 interprets a statutory term that requires Interior to distinguish between tribes that are restored and those that are not. Even if it was correctly decided, which it was not, the *Akiachak* opinion Plaintiff relies upon does not apply to a case where Interior was required to classify, or distinguish between, tribes. Any conceivable interpretation of the restored lands exception would leave two types of tribes – tribes that qualified for the restored lands exception and tribes that did not. In contrast, it is possible for Interior to interpret its land into trust authority in a manner that does not differentiate between tribes. *See Akiachak Native Cmty.*, 935 F. Supp. 2d at 210. Third, the regulation addressed in *Akiachak* clearly and completely barred Alaskan tribes from having any land taken into trust "by providing that the Secretary will not consider their petitions." *Akiachak Native Cmty.*, 935 F. Supp. 2d at 210. Section 292.10, in contrast, does not bar Plaintiff from gaming. *See* 25 U.S.C. § 2719(b)(1)(A).

Moreover, as discussed above, Plaintiff's arguments based upon its assertion that it is a restored tribe fail because Interior reasonably determined that Plaintiff was never terminated and therefore has not been restored. Plaintiff's privileges and immunities claims must be reviewed, if at all, under the APA's deferential standard of review. *See Cal. Valley Miwok Tribe*, 515 F.3d at 1266 (courts "review only the APA claim because § 476(h) [now codified as § 5123] offers no

[12] Even this decision was vacated as moot, making Plaintiff's reliance on *Akiachak* doubly inappopriate. *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 115 (D.C. Cir. 2016) ("This brings us, finally, to the question of whether we should vacate the district court's decision. All parties urge us to do so, and we agree. . . . Because Alaska is 'the party seeking relief from the judgment below,' *id.* and has been prevented from appealing the district court's decision for reasons outside its control, vacatur is appropriate to 'clear[ ] the path for future relitigation of the issues ... and eliminate[ ] a judgment, review of which was prevented through happenstance.'") (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)). "[I]t is elementary that a vacated decision is not binding precedent and should not be cited as such." *NRDC v. Hodel*, 865 F. 2d 288, 317 n.31 (D.C. Cir. 1985).

private cause of action"). Interior reasonably applied reasonable regulations to treat Plaintiff as a continuously recognized tribe. Even if the IGRA granted tribes any privileges and immunities, which it does not, Plaintiff indisputably has any privileges and immunities available to such tribes under the IGRA. Plaintiff's claim fails on this basis as well.

CONCLUSION

As set forth above, Plaintiff's motion for summary judgment should be denied and Federal Defendants' motion for summary judgment should be granted because: (1) the statute of limitations has run on Plaintiff's facial challenge to Section 292.10; (2) Plaintiff's challenge to Section 292.10 fails on the merits Interior reasonably relied on Congressional limitations on tribal recognition passed as part of the Federally Recognized Tribes List Act of 1994; (3) Interior followed its own regulations in determining that Plaintiff cannot game under the IGRA's "restored lands" exception; and (4) Interior did not classify Plaintiff in a manner that diminished its privileges and immunities.

Respectfully submitted this 31st day of May 31, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on the 31st day of May, 2018, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Matthew Marinelli
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