IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE KOI NATION OF NORTHERN CALIFORNIA, a federally recognized Indian tribe, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, and RYAN ZINKE, in his official capacity as the United States Secretary of the Interior, and, MICHAEL BLACK, in his official capacity as the Acting Assistant Secretary of the Interior for Indian Affairs, Defendants.	Case No.: 1:17-cv-01718-BAH The Honorable Beryl A. Howell **PLAINTIFF KOI NATION'S MEMORANDUM OF POINTS AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW Plaintiff Koi Nation, by and through its undersigned attorney of record, and respectfully submits Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment. For the reasons set forth below and based upon the Administrative Record of the challenged agency action, the Court should grant the Plaintiff's Motion for Summary Judgment on all claims.

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I. INTRODUCTION

Plaintiff Koi Nation is a federally recognized Indian tribe based in northern California. Unlike almost every other tribe in the United States, the Koi Nation does not have any lands on which to house its members and reestablish a community; and, it does not generate the revenues necessary to acquire lands in California's expensive real estate market. The Koi Nation's tribal government does what it can to preserve its culture and provide important governmental services to its tribal members.

From its first contact with the United States until 1956, the Koi Nation enjoyed a relationship with the Federal Government as an American Indian tribe. Congress enacted legislation in 1956 to terminate the reservation status of the Koi Nation's lands to allow for the construction of a local airport. By its own admission, the Department of the Interior used this legislation as a basis to erroneously terminate federal relations with the Koi Nation. For the next half century, the Department of the Interior unlawfully denied services to the Koi Nation that it routinely provides to other Indian tribes and refused to acquire lands in trust status for the Koi Nation. In 2000, the Assistant Secretary of the Interior for Indian Affairs ("ASIA") acknowledged the government's error and restored the federal relationship between the United States and the Koi Nation.

The Koi Nation has sought to conduct gaming activities under the Indian Gaming Regulatory Act pursuant to its special provisions for Indian tribes that were terminated and later restored to federal recognition. Like many other tribes that had their government-to-government relationship with the United States terminated and restored, the Koi Nation seeks to use gaming as a means to restore some of its lands, reconstitute its community, and provide important governmental services.

The Defendants do not dispute that the Federal Government unlawfully terminated the Koi Nation's government-to-government relationship with the United States. The Defendants do not dispute that the Department of the Interior restored that relationship in 2000 through a lawful administrative process. The Defendants do not dispute that the Koi Nation is a federally recognized Indian tribe entitled to the privileges and immunities available to all other federally recognized Indian tribes. And, finally, the Defendants do not dispute that other similarly situated Indian tribes have been classified as "restored" tribes that are allowed to conduct gaming activities pursuant to the Indian Gaming Regulatory Act's special provisions for "restored" tribes.

Nevertheless, the Defendants issued a final determination on January 19, 2017 stating that the Koi Nation does not constitute a "restored" Indian tribe under the Indian Gaming Regulatory Act. The Defendants based their determination on regulations published two decades after IGRA's enactment and in contravention to legal positions Defendants took before this Court in 2010.

Plaintiff challenges the Defendants' January 19, 2017 decision, and seeks a determination from this Court that it should be placed on equal footing with other federally recognized Indian tribes restored under federal law.

II. STATEMENT OF THE CASE

The Administrative Record forms the basis for Plaintiff's arguments to the Court.

A. Challenge to DOI's January 19, 2017 Decision

This is a challenge to a final agency action issued to the Koi Nation of California ("Nation" or "Tribe") by the United States Department of the Interior ("DOI" or "Department"

or "Interior") on January 19, 2017.[1] AR-0001 – AR-0007. In its January 19, 2017 decision letter to the Nation, signed by DOI Principal Deputy Assistant Secretary–Indian Affairs ("ASIA") Lawrence S. Roberts, ("DOI Decision"), DOI denied the Nation's request for a determination that it is "an Indian tribe that is restored to Federal recognition" for purposes of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. AR-0007. The DOI Decision further added that the Nation is not a "restored tribe" as that term is defined by the Department's regulations implementing IGRA at 25 C.F.R. §§ 292 et seq. ("25 C.F.R. Part 292"), and thus is not eligible to conduct gaming under IGRA's provisions applicable to Indian tribes that have been restored to federal recognition. AR-0007. DOI was clear in stating: "This decision constitutes a final agency action under the Administrative Procedures Act." AR-0002.

The DOI Decision was the culmination of an informal agency process that began on April 28, 2014, when the Koi Nation submitted to the Assistant Secretary—Indian Affairs a request for determination that the Tribe qualifies as a "restored tribe" for purposes of IGRA and the regulations implementing IGRA at 25 C.F.R. Part 292. AR-0326-AR-0336. A positive determination would have allowed the Koi Nation to begin the process of seeking to acquire land for the purposes of gaming under IGRA's "restored tribe" and "restored lands" process. 25 U.S.C. § 2719(b)(1)(B)(iii). Without this determination, the Nation would need to acquire land in trust and then begin the more complicated 'two-part" off-reservation process for the land to be eligible for gaming. 25 U.S.C. § 2719(b)(1)(A). The two-part process applies to land considered to be off-reservation and requires DOI to obtain concurrence from the Governor in the state

[1] The Koi Nation was previously known as the "Lower Lake Rancheria." Certain administrative statements and judicial opinions refer to the Tribe as the "Lower Lake Rancheria."

where the Tribe resides. *Id*. By contrast, a restored tribe that acquires land eligible for gaming under IGRA as "restored lands" does not need to obtain gubernatorial approval.

A positive determination also would have allowed DOI to provide equity to the Koi Nation after decades of unlawfully treating the Tribe as though it had been terminated. See AR-0003. By DOI's own admission, it mistakenly interpreted the Lower Lake Act (70 Stat. 596, Pub. L. 84-751 (July 20, 1956)), authorizing the sale of the Nation's Rancheria, as a termination of the Nation itself. AR-0003. As a result, the Nation was repeatedly denied federal services available to federally recognized Indian tribes from 1956 until 2000, when the termination was officially reversed. AR-0003. DOI's *de facto* termination of the Nation from 1956 until 2000 prevented the Nation from acquiring reservation or trust land. AR-0003. As a result, the Nation, unlike so many other restored tribes in California, has not been able to operate a gaming facility and has been denied the ability to participate in the largest economic boom for Indian tribes in the modern era.

B. Plaintiff's Four Challenges

Plaintiff is seeking a declaration that it qualifies as an Indian tribe "restored to federal recognition" under IGRA pursuant to 25 U.S.C. § 2719 and 25 C.F.R. § 292.10(b). Plaintiff is seeking an order to set aside the DOI Decision because it was arbitrary, capricious, and not in accordance with the law pursuant to 5 U.S.C. § 706(2).

First, the DOI Decision failed to recognize that the Koi Nation satisfied the requirements of 25 C.F.R. § 292.10(b) as a tribe reaffirmed and recognized under the ambit of 25 C.F.R. Part 83, the regulations that govern DOI's process for acknowledging federal Indian tribes. Second, Plaintiff seeks a declaration that DOI's regulation at 25 C.F.R. § 292.10 is invalid as applied to the Nation because it violates IGRA by invalidly narrowing the statutory scope of the phrase

"restored to federal recognition." Third, Plaintiff contends 25 C.F.R. § 292.10(b), as it was applied by the DOI Decision, diminishes the privileges and immunities of the Koi Nation in violation of 25 U.S.C. § 5123(f), particularly with respect to its dissimilar treatment of the Ione Band of Miwok Indians. Fourth, Plaintiff asserts that 25 C.F.R. § 292.10(b) invalidly diminishes the privileges and immunities of the Koi Nation relative to other federally recognized tribes in violation of 25 U.S.C. § 5123(f) by excluding Indian tribes restored to administrative reaffirmation from classification as a "tribe that is restored to Federal recognition" under IGRA.

Plaintiff is also seeking injunctive relief from the DOI Decision that Koi Nation does not constitute a tribe "restored to Federal recognition" pursuant to 25 U.S.C. § 2719.

C. Statutory Background

Plaintiff's challenge involves the application of a number of Federal Indian law statutes and regulations, as described below.

i. The Indian Gaming Regulatory Act

Congress enacted IGRA on October 17, 1988 for the purpose of, *inter alia*, providing statutory limitations on the operation of gaming facilities by Indian tribes on Indian lands by limiting the locations where Indian tribes may conduct gaming. 25 U.S.C. §§ 2701 *et seq*.

Under IGRA, an Indian tribe may only conduct gaming activities on eligible "Indian lands." See, 25 U.S.C. § 2710(b). IGRA defines "Indian lands" as those "lands that as of October 17, 1988, were – (A). . . lands within the limits of any Indian reservation; and, (B) . . . lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4),

IGRA generally prohibits Indian tribes from conducting gaming activities on lands acquired after IGRA's enactment on October 17, 1988, except in specific situations identified in Section 20 of the Act, 25 U.S.C. § 2719. One such exception allows Indian tribes that were "restored" to federal recognition to conduct gaming on lands that are acquired after October 17, 1988 as part of the restoration of an Indian tribe. IGRA states:

> (a) Prohibition on lands acquired in trust by Secretary
> Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless…
> (b) Exceptions
> (1) Subsection (a) of this section will not apply when…
> (B) lands are taken into trust as part of…
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719.

ii. DOI Restored Tribe Regulations at 25 C.F.R. Part 292

Over the course of the two decades following IGRA's enactment, the Department developed an interpretation of IGRA's "restored" tribe" and "restored lands" provisions through a series of administrative decisions. Those interpretations were routinely upheld by the federal courts. *See e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western District of Michigan,* 369 F.3d 960 (6th Cir. 2004).

Then, in 2008, the Department promulgated regulations to implement the exceptions to IGRA's prohibition against gaming on lands acquired in trust after October 17, 1988. Those regulations are codified at 25 C.F.R. § 292. *See* 73 Fed. Reg. 29354 (May 20, 2008).

The Part 292 regulations attempted to clarify which Indian tribes could be considered "restored" tribes under IGRA. 25 C.F.R. § 292.10 is titled "How does a tribe qualify as having been restored to Federal recognition," and states:

> 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
>
> A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

The Part 292 regulations limited the scope of the term "Indian tribe that is restored to Federal recognition" in a narrower fashion than had previously been applied under IGRA. Specifically, the text of § 292.10(b) appears to exclude Indian tribes – like the Koi Nation – that were wrongfully treated by the United States as though they were lawfully terminated, and that were later restored to federal recognition by administrative action.

The preamble to the Part 292 regulations states, "Neither the express language of IGRA nor its legislative history defines restored tribe for the purposes of 2719(b)(1)(B)(iii). … We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the Part 83 regulations." 73 Fed. Reg. at 29363.

The Preamble also states: "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 C.F.R. § 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." *Id.* at 29363.

The Part 292 regulations included a "grandfather clause" for final agency actions issued prior to the promulgation of Part 292, as well as "written opinion[s]" issued prior to the effective date of the regulations, but which do not constitute final agency actions. *See* 25 C.F.R. § 292.26.

iii. DOI Federal Acknowledgment Regulations at 25 C.F.R. Part 83

The Department of the Interior has promulgated Federal Acknowledgment regulations known as "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe," 25 C.F.R. Part 83.[2] The Department's regulations are intended to apply to groups that can establish a substantially continuous tribal existence and that have functioned as autonomous entities throughout history until the present. When the Department acknowledges an Indian tribe, it is acknowledging that it continues to exist as an inherently sovereign entity.

iv. The Indian Reorganization Act

The Indian Reorganization Act, 25 U.S.C. §§ 5123 et seq., was enacted in 1934 and serves as the cornerstone for modern statutory law governing Indian affairs. Congress amended the Indian Reorganization Act in 1994 to stop the Department from discriminating amongst federally recognized Indian tribes based upon how they came to be recognized. Pub. L. No. 103-263, 25 U.S.C. § 5123(f)-(g). As amended, the Indian Reorganization Act states:

> (f) Privileges and immunities of Indian tribes; prohibition on new regulations
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 as amended, or any other Act of

[2] The rule governing the administrative Federal Acknowledgment Process initially was promulgated at 25 C.F.R. Part 54, 43 Fed. Reg. 39361 (Sept. 5, 1978), and was redesignated to Part 83 in 1982. 47 Fed. Reg. 13326 (Mar. 30, 1982). The rule was revised in 1994, 59 Fed. Reg. 13326 (Feb. 25, 1994), and again in 2015. 80 Fed. Reg. 37862 (July l, 2015). All citations in this Memorandum to Part 83 are to the 1994 version, which was in effect at the time Koi Nation made its request to DOI.

> 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 their status as Indian tribes.

The privileges and immunities clause of the Indian Reorganization Act prohibits the Department from adopting regulations, and making decisions, that discriminate amongst federally recognized Indian tribes.

v. Indian Tribe List Act

In 1994, Congress enacted legislation designed to annually publish a list of federally recognized Indian tribes. The Act provided in part:

> This title may be cited as the ``Federally Recognized Indian Tribe List Act of 1994".
>
> The Congress finds that—
>
> (3) 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;
>
> (4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
>
> (5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, §§ 101-104, 108 Stat. 4791, 4791-4792 (1994).

D. Factual Background

DOI's Decision letter contains an accurate summary of the legislative history and mistaken termination of the Koi Nation and is summarized here as background. The Koi Nation is a federally recognized Indian tribe with its headquarters located in Santa Rosa, California.

The United States does not presently hold any lands in trust for the Koi Nation, nor does the Koi Nation have an Indian reservation. The Koi Nation traces its origins to the Village of Koi, which was located on an island in Clear Lake in northern California. AR-0002. The members of the Koi Nation have continuously resided in northern California for more than 17,000 years, in territory ranging from the northern edge of the San Francisco Bay to Clear Lake.

On January 25, 1916, the United States purchased a tract of approximately 141 acres in Lake County, California, which became the Tribe's Rancheria. AR-0002. On June 5, 1935, the Bureau of Indian Affairs (the "BIA") certified a list of twenty Rancheria residents eligible to vote in elections conducted pursuant to the Indian Reorganization Act. AR-0002.

i. Legislation to Terminate Koi's Land Status

In early 1951, the Lake County, California ("Lake County") Board of Supervisors ("Board") contacted the BIA about the possibility of acquiring the Rancheria for use as a municipal airport. AR-0002. The BIA advised the Board that any purchase of the Rancheria, or of any part of the Rancheria, would require the approval of Congress. AR-0002. Legislation to effectuate the transfer was enacted on March 29, 1956 and July 20, 1956. 70 Stat. 58, 70 Stat. 596. These Acts (together, the "Lower Lake Act") authorized the Secretary to complete the sale of the Rancheria to Lake County (AR-0002), but collectively were for sale of the Rancheria only and did not address or authorize termination of the Tribe's status as a federally recognized Indian tribe. The Koi Nation has been without trust land or a reservation since that time. AR-0003.

ii. Koi's Treatment as a Terminated Tribe

Following the passage of the Lower Lake Act and the Rancheria Act, the United States ceased government-to-government relations with the Koi Nation and treated the Koi Nation as though Congress had terminated its status as a federally recognized Indian tribe. AR-0003.

From 1956 to 2000, the United States did not provide any services, and in fact denied services, to the Koi Nation that are typically provided to Indian tribes because of their status as Indians; nor did the United States perform any of the fiduciary duties for the Koi Nation which are typically performed for federally recognized Indian tribes. See AR-0003. Between 1958 and 2000, the United States consistently omitted the Koi Nation from published lists identifying Indian tribes recognized by the United States, including lists mandated by the Federally Recognized Tribes List Act of 1994. Pub. L. No. 103-454, §§ 101-104, 108 Stat. 4791, 4791-4792 (1994).

The United States' *de facto* termination of the Koi Nation after the Lower Lake Act prevented the Tribe from establishing a reservation or acquiring lands in trust by the time Congress enacted IGRA in 1988. See AR-0003. Examples of the Koi Nation's *de facto* termination include but are not limited to: a February 1, 1975 BIA Division of Law Enforcement publication listing the Koi Nation (at the time, the "Lower Lake Rancheria") as having been terminated in 1956. AR-0003, AR-0089, AR-0090.

Later, on October 21, 1980, an official in the BIA issued a letter to the Director of the BIA's Sacramento Area Office seeking approval to place the Koi Nation on the list of federally recognized Indian tribes and added that such approval should "include [the] date restored." *See* AR-0396. The BIA ultimately declined to include the Koi Nation on the list of federally recognized Indian tribes. *See* AR-0377 – AR-0379.

On November 20, 1995, the BIA issued a letter to the Koi Nation (the "Brafford Letter") denying a request for tribal government grant funding and explaining that the Koi Nation was not a federally recognized Indian tribe. AR-0003, AR-0095. The Brafford Letter also provided Koi Nation contact information for the BIA's regulatory process for federal acknowledgment of Indian tribes. AR-0095.

On December 18, 1995, the United States Department of Housing and Urban Development issued a letter to the Koi Nation in which it stated that it could not provide services to the Koi Nation because it was "not recognized as an Indian tribe." *See* AR-0398.

iii. Koi Nation's Initiation of the Federal Acknowledgment Process and DOI's Change in Strategy

As a result of Koi Nation's many denied requests for federal assistance, on June 21, 1995, the Advisory Council on California Indian Policy wrote to Assistant Secretary Ada Deer on behalf of the Koi Nation stating that Koi Nation qualifies for administrative recognition under the criteria enumerated in 25 C.F.R. § 83.8 – Previous Federal Acknowledgment. AR-0003, AR-0313, AR-0319, AR-0464. Section 83.8 provides in part:

> § 83.8 Previous Federal acknowledgment.
>
> (a) Unambiguous previous Federal acknowledgment is acceptable evidence of the tribal character of a petitioner to the date of the last such previous acknowledgment. If a petitioner provides substantial evidence of unambiguous Federal acknowledgment, the petitioner will then only be required to demonstrate that it meets the requirements of § 83.7 to the extent required by this section.

Importantly, and critical to this case, the BIA convened a meeting in Healdsburg, California with Koi Nation officials (including the Koi Nation's Chairman) on November 19, 1999 to dramatically change Koi Nation's and DOI's approach to Koi Nation's federal recognition. The meeting is summarized in a September 14, 2000 Memorandum from the Central California Agency to the BIA Pacific Region. AR-0082. Among other BIA officials, the Chief of the Branch of Acknowledgement and Research attended the meeting. AR-0082. The Branch of Acknowledgment and Research was the DOI office that reviewed federal recognition petitions at that time. The meeting resulted in an "understanding" among the attendees that should additional research suggest that Koi should not be considered as terminated,

administrative reaffirmation of the Tribe's federal recognition would be sought. AR-0083. Ultimately, in 2000, that was the result and the Assistant Secretary – Indian Affairs reaffirmed the federal recognition of the Koi Nation. AR-0320.

Also in 2000, but prior to the reaffirmation, Superintendent for the BIA's Central California Agency issued a memorandum to the Director of the BIA's Pacific Region (the "Superintendent's 2000 Memo") stating that "the Lower Lake Rancheria is presently considered terminated" by the BIA. AR-0309. The Superintendent's 2000 Memo noted that "it would be unconscionable for the BIA to continue to consider the [Koi Nation] as terminated." AR-0311. The Memo also noted that Koi Nation provided copies of their roll of tribal members and other documents supporting preparation of a roll to the Director of the Branch of Acknowledgment and Research. AR-0310.

iv. Koi Nation is Reaffirmed

On December 29, 2000, the ASIA issued a letter to the Koi Nation "reaffirming the Federal recognition of the Lower Lake Rancheria," and stating that the Koi Nation would be included on the BIA's annual list of federally recognized Indian tribes. AR-0291. The letter was styled as an update to an earlier meeting between Koi Nation and DOI staff in October 1999. AR-0291.

On that same day, December 29, 2000, the ASIA issued a memorandum to various officials within the BIA stating that the United States erred in refusing to provide services to the Koi Nation and in not placing it on the list of federally recognized Indian tribes. AR-0293. The ASIA observed that the Koi Nation's "tribal status has been continuously maintained by the tribal members." AR-0295. He added "for reasons not clearly understood, [the Tribe was] simply ignored as the BIA went through fundamental and philosophical changes. …" AR-0295.

He described the Tribe's omission from the list of federally recognized tribes as "an unfortunate part of the Bureau's legacy," (AR-0293) and described his own action in reaffirming the Tribe as "correct[ing] this egregious oversight." AR-0293.

E. Koi Nation Initiates Its Decades Long Quest to Become Eligible for Gaming

i. Defendants Failed to Provide the Koi Nation with a "Grandfather Opinion"

Koi Nation initiated a number of requests to DOI for a restored tribe determination under 25 U.S.C. § 2719(b) prior to the promulgation of the Part 292 regulations in 2008. If DOI would have answered positively to one of these requests, Koi Nation could have been "grandfathered" in as a "restored tribe," since Part 292 eventually provided for such an exception in 25 C.F.R. § 292.26(b). On March 29, 2006, Koi Nation through its attorneys made such a request to the Secretary of Interior. AR-0500 – AR-0501. The record does not contain a response by DOI. The lack of a response by the Nation's Trustee eliminated the possibility that the Part 292 grandfather clause could be applied to the Koi Nation.

In stark contrast to Koi Nation's treatment, on September 19, 2006, an Associate Solicitor for the Department of the Interior concluded that the Ione Band of Miwok Indians constituted a tribe "restored to federal recognition" under IGRA, stating:

> The positions taken by the Department in Federal court and before [the] IBIA against the Band are wholly inconsistent with that position and as such manifest a termination of the recognized relationship. Assistant Secretary Deer's review of the matter and reaffirmation of Commissioner Bruce's position amounts to a restoration of the Band's status as a recognized Band. Under the unique history of its relationship with the United States, the Band should be considered a restored tribe within the meaning of IGRA.

No Casino in Plymouth, et al. v. Jewell, 136 F. Supp. 3d 1166, 1177 (E.D. Cal. 2015) (quoting the September 19, 2006 Associate Solicitor opinion).

In his September 19, 2006 opinion, the Associate Solicitor also noted that the Department

was developing the Part 292 regulations, which include 25 C.F.R. § 292.10, at the time it was considering the Ione Band of Miwok Indians' status under IGRA. Several years later, on May 24, 2012, the Department of the Interior issued a Record of Decision (ROD) indicating that it would acquire land in trust for the Ione Band, and that the Band could engage in gaming activities on those lands because it was a tribe "restored to federal recognition" under IGRA. *See No Casino in Plymouth*, 136 F. Supp. 3d at 1170. In its ROD, the Defendants noted they were relying on the Associate Solicitor's 2006 opinion, pursuant to the "grandfather clause" contained in the Part 292 regulations at 25 C.F.R. § 292.26.

In the end, even though DOI had pending requests from both Ione and Koi in 2006, DOI failed to answer Koi's request. This failure eliminated the possibility of Koi receiving a grandfather opinion prior to the 2008 regulations becoming final.

ii. DOI Publishes the Part 292 Final Rule

In its October 7, 2009 "Request for a 'Restored Tribe' Determination for Purposes of Section 20 of the Indian Gaming Regulatory Act," (AR-0491 – AR-0499) the Nation expressed its shock upon receiving the Final Rule on Part 292.

> In May 2008 the BIA promulgated final regulations implementing Section 20 of IGRA. In the months before the final rule's promulgation, Lower Lake met repeatedly with officials of the BIA, the NIGC, the Department of Justice, and the Office of Management and Budget to ensure that Part 292's definition of "restored tribe" encompassed tribes reaffirmed by Secretarial action. Indeed, as the rule was being concluded, Lower Lake sought and received informal assurances that a reaffirmation standard would be included in the final regulation. However, as published 25 C.F.R. Part 292 does not expressly include reaffirmed tribes as being considered "restored" under IGRA. This development came as a shock to the Tribe. The final rule therefore potentially strips Lower Lake of the right to rely on the "restored lands" exception.

AR-0493.

Koi Nation continued its efforts to be classified as a restored tribe, even after the 2008 regulations at 25 C.F.R. Part 292 were promulgated. Koi Nation finally received a positive determination from the BIA Regional Office on December 23, 2010 when the Director of the BIA's Pacific Region issued a memorandum to the ASIA stating:

> Today, Lower Lake requests consideration as a restored tribe under [25 C.F.R.] Part 292 due to the unusual circumstances that brought them to this point in time. Consistent with case law and our relationship with the Lower Lake Rancheria we believe that they should be considered a "restored tribe" under Section 20 of the Indian Gaming Regulatory Act. Documentation shows that the United States for all intensive [sic] purposes considered Lower Lake terminated until they were restored to recognition.

AR-0386.

While Koi Nation was elated by this decision, the Regional Director's determination was never ratified by the Secretary or the ASIA. The ultimate DOI Decision failed to address or distinguish this earlier positive determination from Interior.

F. DOI's January 19, 2017 Decision

On January 19, 2017, Principal Deputy ASIA Lawrence Roberts issued a letter to Koi Nation Chairman Darin Beltran stating that the Koi Nation did not constitute a tribe that had been "restored to Federal recognition" under 25 U.S.C. § 2719(b)(1)(B)(iii). In issuing the decision, the Acting Assistant Secretary stated, "[t]his decision constitutes a final agency action under the Administrative Procedures Act." AR-0002.

The DOI Decision makes it clear that it was applying the Department's own regulations to the Koi Nation's request, and that "the Department's regulation on this particular point, as written, does not allow us to treat Koi similarly to tribes restored through, for example, a court approved settlement." AR-0006. The DOI Decision explained that, "[t]he Department's regulations constrain the restored tribe exception to those tribes which were acknowledged

through the part 83 process, a court, or by Congress only." AR-0005.

According to the Department, the Koi Nation was not acknowledged through the Federal Acknowledgement Process under 25 C.F.R. Part 83, as required by the Department's regulations implementing IGRA's provisions relating to restored tribes. AR-0006. The Department conceded that it had determined a similarly situated Indian tribe to be qualified as a "restored" tribe for purposes of IGRA, because it reached that determination before its Part 292 Regulations were final. AR-0006. In fact, the Department explained, "[t]he only distinction [between the Koi Nation and the Ione Band] is that Ione received an Indian lands determination from the Department prior to the promulgation of Part 292, thus it was 'grandfathered in' under 25 C.F.R. § 292.26." AR-0006 (footnote).

Accordingly, under the Department's imperfect reasoning, Plaintiff's request for a determination that it is an "Indian tribe restored to Federal recognition" for purposes of IGRA was denied. AR-0007.

III. STANDARD OF REVIEW

A. Application of Part 292 to exclude Koi is "Not in accordance with the law"

The Administrative Procedure Act ("APA") requires a reviewing court to set aside final agency action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Confederated Tribes of Coos, Lower Umpqua & Suislaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 158 (D.D.C. 2000) (quoting 5 U.S.C. § 706(2)(A)). An agency's regulation may be struck down if its language is not in accordance with statutory law. See, *Cement Kiln Recycling Coalition v. Environmental Protection Agency*, 493 F.3d 207, 217 (D.C. Cir. 2007) ("… we may overturn the regulation only if we find that it is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law") (quoting 5 U.S.C. § 706(2)(A)).

The Department's application of the Part 292 regulations to prevent the Koi Nation from gaming despite its status as a "tribe that is restored to Federal recognition" is contrary to the plain meaning of IGRA. 25 U.S.C. § 2719(b)(1)(B)(iii). While an agency's regulations implementing the terms of an ambiguous statute are ordinarily entitled to deference from the courts, *See Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this principle does not apply with full force in cases involving ambiguous statutes applicable to Indian tribes. *See e.g., Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001); and *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, n.8 (D.C. Cir. 1988) (explaining that the Courts will give careful consideration to an agency's interpretation of ambiguous statutes applicable to Indian tribes without affording deference to that interpretation). As the D.C. Circuit has explained, "The governing canon of construction requires that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cobell*, 240 F.3d at 1101 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985)).

B. Application of Part 292 to Exclude Koi is "Arbitrary, Capricious, and an Abuse of Discretion"

An agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mflrs. Assn. v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). The Court's role in inspecting for "arbitrary" or "capricious" actions is to "insist that the agency examine the relevant data and articulate a satisfactory explanation for

its action." *FCC v. Fox Television Stations*, Inc., 556 U.S. 502, 513 (2009) (quoting *State Farm*). Agency action is lawful only if it rests "on a consideration of the relevant factors. …" *State Farm,* 463 U.S. at 42-43.

Although agencies have flexibility in statutory interpretation, "an agency may not 'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707, 192 L. Ed. 2d 674 (2015) (quoting *State Farm*). The Department failed to adequately consider several important aspects of the Koi Nation's history and restoration to federal recognition and as a result the DOI Decision was arbitrary and capricious.

This Court is called upon to determine whether the DOI Decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See e.g., Lubow v. U.S. Dep't of State,* 783 F.3d 877, 887 (D.C. Cir. 2015). The DOI Decision is clearly arbitrary because the Department considered two factors that are irrelevant under IGRA—the mechanism by which the Nation was restored to federal recognition and the point after restoration at which the Nation received an opinion from the Department on the question of the Nation's "restored tribe" status. Whether a tribe has been restored to federal recognition cannot rationally depend on whether that tribe received a post-restoration determination before or after a particular date. The D.C. Circuit recently stated, "agency action is arbitrary and capricious if 'the agency offers insufficient reasons for treating similar situations differently.'" *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) (quoting *Cnty. of Los Angeles v. Shalala,* 192 F.3d 1005, 1022 (D.C. Cir. 1999) with marks and brackets omitted). "'If [an] agency makes an exception in one case, then it must either make an exception in a similar

case or point to a relevant distinction between the two cases.'" *Id.* at 216 (quoting *Westar Energy, Inc. v. FERC,* 473 F.3d 1239, 1241 (D.C. Cir. 2007)).

Furthermore, it is capricious for the Department to unilaterally waive the 25 C.F.R. Part 83 procedures and then use that unilateral waiver as a basis for concluding that the Nation does not satisfy the restored tribe exception under IGRA. This Circuit has refused to uphold agency determinations when inconsistencies in an agency's analysis become apparent. *See Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987). ("Because the [federal Commission's] analysis…is internally inconsistent and inadequately explained, we find its ultimate conclusion…to be arbitrary and capricious and not supported by substantial evidence on the record considered as a whole."). The Ninth Circuit has also relied on this reasoning to overturn agency decisions afflicted by inconsistencies. *See National Parks Conservation Ass'n v. E.P.A.*, 788 F.3d 1134, 1141 (9th Cir. 2015). "Seeming inconsistency in [an agency's] determinations…is, absent explanation, 'the hallmark of arbitrary action.'" *Id.* at 1145 (quoting *Sierra Club v. E.P.A.*, 719 F.2d 436, 459 (D.C. Cir. 1983)).

If the Department is permitted to apply its analysis that allegedly allows it to grant waivers of 25 C.F.R. Part 83 to restore tribes to federal recognition, and then subsequently deny those same tribes "restored" status under 25 C.F.R. § 292.10(b)—as it has Koi—Defendants could prevent any tribe from satisfying the restored lands exception simply by administratively acknowledging a tribe through a Part 83 waiver rather than through the entire Part 83 process. Such a result is undoubtedly counter to congressional intent.

C. Application of Part 292 to Exclude Koi is in Violation of the Privileges and Immunities Clause of the Indian Reorganization Act

Federal law prohibits all agencies of the United States from taking any action "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." 25 U.S.C. § 5123(f). The IRA prohibits Defendants from "making distinctions among those Indian tribes that have attained federal recognition." *United Houma Nation v. Babbitt*, No. CIV. A. 96-2095 (JHG, 1997 WL 403425, at *7, n.11 (D.D.C. July 8, 1997). "In 'mak[ing] any decision or determination ... with respect to a federally recognized Indian tribe,' the Secretary could not subclassify a tribe by denying it privileges and immunities available to other federally recognized tribes." *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 198 (D.C. Cir. 2010). The DOI Decision violates this statute by treating the Nation differently than other federally recognized tribes. The Koi Nation is the only tribe that was not federally recognized when IGRA passed and subsequently restored to federal recognition that the Department has determined is not a "restored tribe" for purposes of IGRA. The DOI Decision deprives the Nation of rights available to all other restored tribes.

IV. ARGUMENT

A. The Koi Nation was Restored Pursuant to a Waiver of 25 C.F.R. Part 83

On April 28, 2014, the Koi Nation issued a letter to then Assistant Secretary – Indian Affairs Kevin Washburn requesting a determination that the Koi Nation qualifies as a tribe "restored to Federal recognition" under IGRA and its implementing regulations at 25 C.F.R. § Part 292 (the "Koi Nation Request"). AR-0326 – AR-0336. The Koi Nation specifically requested that the Defendants issue a decision that Koi Nation met the criteria for a tribe restored to federal recognition under 25 C.F.R. Part 292 due to its being recognized through the administrative Federal Acknowledgement Process under 25 C.F.R. § 83.8 (previous federal acknowledgment). AR-0327.

The Koi Nation added that it had initiated its restoration process with the Department in

1995 by requesting previous acknowledgment status through 25 C.F.R. § 83.8. AR-0237. As noted, *supra*, it was DOI that changed Koi's petition strategy under 25 C.F.R. § 83.8. Koi relied upon DOI's counsel. The Koi Nation request also argued that, while not expressly recognizing the Koi Nation through the acknowledgment process, the Department utilized its Part 83 standards and supplemented it with a separate finding that Koi Nation's government-to-government relationship was never legally terminated – even though BIA treated it as a terminated tribe. AR-0330.

The Koi Nation further argued that the import of Assistant Secretary Gover's December 29, 2000 decision was to give final effect to the 1995 request filed on Koi's behalf by the California Advisory Council for a previous federal acknowledgment under 25 C.F.R. § 83.8. AR-0330. Unlike many administrative record challenges, this case is unique in that the D.C. Circuit has already examined many of the key issues Koi Nation has raised here. Specifically, this court addressed the process by which Koi was restored to federal recognition in *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170 (D.D.C. 2011). The D.C. Circuit Court of Appeals subsequently examined it in *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013).

In discussing the Koi Nation (Lower Lake in the decision), the D.C. Circuit explained that the Part 83 process allows the Department to "apply its expertise … and correct its own errors." *Muwekma*, 708 F.3d at 218. In the *Muwekma* litigation, this court ordered the Interior Department to supplement the Administrative Record with an explanation of the process by which Koi Nation and the Ione Band of Miwok Indians were restored to federal recognition. *See Muwekma*, 708 F.3d at 214; *See also* AR-0006. The Secretary's supplemental submission explained that the Secretary may waive any of the Department's regulations relating to Indian tribes when he determines that it is in the "best interests of the Indians." Explanation to Suppl.

the Admin. R. at 17, *Muwekma*, *supra*, 813 F. Supp. 2d 170 (No. 1:03-cv-01231-RBW), ECF No. 55; *See also* 25 C.F.R. § 1.2.

In *Muwekma*, the Principal Deputy ASIA explained to this Court:

> In the case of the Ione and the "reaffirmations" done at the end of 2000, the Assistant Secretary did not expressly waive the regulations nor expressly make an exception to them. Nor did the Assistant Secretary articulate a finding that a waiver or no exception was in the best interests of the Indians. The failure to make an express waiver or exception in the regulations in handling Ione and [the Koi Nation] and articulate a finding of the best interests of the Indians has caused some confusion. We believe, however that the underlying record implied that a waiver of regulations was made to grant the Ione Band and the [Koi Nation] community recognition and placement on the Federal Register list of Indian entities. The implied waivers of the regulations for Ione and [the Koi Nation] were much broader than other waivers but were justified by the course of dealings to acquire and hold land in trust for them.

Explanation to Suppl. the Admin. R., *Muwekma*, *supra* at 19.

DOI's own Decision in referencing *Muwekma* notes that the "court described the Tribe's reaffirmation as a waiver of Part 83." AR-0006. Therefore, it is the height of arbitrary and capricious conduct for DOI to disavow a position it has already taken before this Circuit. Moreover, construing Koi's restoration as a waiver under Part 83 is the only logical method for Koi to have been placed on the annual list of federally recognized tribes published pursuant to the Tribal List Act, Pub. L. No. 103-454, §§ 101-104, 108 Stat. 4791, 4791-4792 (1994).

Since the List Act only provided three methods for tribes to become recognized after 1994—by an Act of Congress, through Part 83 or a court settlement—Koi Nation would presumably have to meet one of these standards to be placed on the List as the Assistant Secretary – Indian Affairs directed. AR-0463. Koi Nation did not enter into a judicial settlement with the United States, so it cannot qualify as a restored tribe under that provision of Part 292.

Conceivably DOI could have meant Koi was restored by an Act of Congress, since the IRA allowed Koi to organize in 1934, but the record contains no discussion of this rationale. However, what is discussed and offered as the legal authority for Koi's recognition is a waiver under Part 83. Since DOI earlier agreed Koi Nation was reaffirmed as a waiver of Part 83, it is arbitrary and capricious for DOI to now determine that Koi fails to qualify as a tribe restored to federal recognition. The inconsistency of DOI's correct position to this court in *Muwekma* cannot be reconciled with its erroneous 2017 Decision where DOI stated Koi's reaffirmation was "not within the confines of Part 83. …" AR-0006.

B. Congress Did Not Prohibit Tribes Reaffirmed Through an Administrative Process from Being Considered "Restored" Under IGRA and DOI Arbitrarily Narrowed this Statutory Term.

On December 20, 2016, the Koi Nation's attorneys issued a letter to Acting Assistant Secretary Lawrence Roberts making the following five points: First, the plain language of the term "restored" in IGRA compels treating Koi Nation as a restored tribe; second, Congress in IGRA gave no indication that it intended to limit the universe of restored tribes to congressionally restored tribes as opposed to administratively recognized tribes; third, DOI's treatment as a restored tribe of another tribe recognized under an affirmative restoration process, the Ione Band of Miwok Indians, compels the same treatment for Koi Nation; fourth, it would be a violation of the Koi Nation's "privileges and immunities" under 25 U.S.C. § 5123(f) if Koi was not determined to be restored as was the Ione Band of Miwoks and similarly situated tribes; and, fifth, the DC Circuit's decision in *Muwekma*, 708 F.3d 209 (D.C. Cir. 2013), provides further support for treating Koi as a restored tribe under IGRA and for being subject to an implied waiver of 25 C.F.R. Part 83.

IGRA established a comprehensive scheme for the regulation of gaming activities on

Indian land. Among other things, Section 20 of IGRA generally prohibits gaming "conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 …" 25 U.S.C. § 2719(a). One of the exceptions is at the core of this Motion for Summary Judgment. Under § 2719(b)(1)(B)(iii) of IGRA, Indian lands are exempt from the general prohibition if such "lands are taken in trust as part of…the restoration of lands for an Indian tribe that is restored to Federal recognition." § 2719(b)(1)(B)(iii).

Prior to promulgation of the Part 292 regulations, the broad scope of the term "restored" in IGRA was considered in *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western District of Michigan*, 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999) (*Grand Traverse I*) as follows:

> Congress itself has used the words restore and restoration interchangeably with reaffirm and recognize in the course of its actions to restore recognition of previously recognized tribes. The government has pointed to no standard, accepted and exclusive Congressional use of the words restore and restoration. Instead, Congressional use of the words appears to have occurred in a descriptive sense only, in conjunction with action taken by Congress to accomplish a purpose consistent with the ordinary meaning of the words. In no sense has a proprietary use of restore and restoration been shown to have occurred.

Grand Traverse I, 46 F. Supp. 2d at 698.

In other words, reaffirmed tribes were not excluded from the IGRA restored tribe category. Indeed, even in the DOI Decision, Defendants recognized that in the absence of Part 292.10(b) a reaffirmed tribe could be restored for purposes of IGRA. AR-0006. The Defendants defended that position too, in a case involving the Ione Band of Miwok Indians of California. AR-0006. *County of Amador v. U.S. Dept. of the Interior*, 872 F.3d 1012 (9th Cir. 2017). Regrettably, therefore, it appears from DOI's own analysis that in the absence of the unduly

restrictive Part 292 regulations, the Koi Nation would have been considered "restored" under IGRA.

Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988). Accordingly, the Koi Nation, whether it was described as reaffirmed or recognized, should be considered a tribe "restored to Federal recognition" under IGRA.

Two recent Circuit Court of Appeals cases are instructive on the construction of the term "restored" tribe and the application of the Part 292 regulations. The D.C. Circuit *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013) directly addressed the restoration of the Ione Miwok Tribe of California and Koi Nation in the context of a lawsuit by an unrecognized Indian entity named the Muwekma Ohlone. In another case, the Ninth Circuit interpreted the phrase "restored" as applied to the Ione Band, and upheld DOI's decision to classify the Ione Band as a restored tribe under IGRA. *County of Amador v. U.S. Dept. of the Interior*, 872 F.3d 1012 (9th Cir. 2017).

The Ninth Circuit noted that IGRA does not define the phrase Indian tribe that is "restored to Federal recognition." *Id.* at 1028. Interpretation of this phrase initially fell to the agencies that implement IGRA and to the courts. However, Congress did not expressly exclude from the "restored tribe" exception those tribes administratively restored to federal recognition outside the Part 83 process. *Id.* at 1030.

The Ninth Circuit stated:

> As Interior recognized in its 2008 rulemaking, "[n]either the express language of IGRA nor its legislative history defines restored tribe." Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. at 29,363. "Restored to Federal recognition" certainly could mean "restored via the Part 83 process, legislation, or a court order," as the 25 C.F.R. part 292

> regulations reflect. But if Congress wanted to exclude those tribes that were administratively re-recognized outside the Part 83 process, it could have done so by explicitly referring to that process, as it did in the exception immediately preceding the restored lands exception. See 25 U.S.C. § 2719(b)(1)(B)(ii) ("Subsection (a) of this section will not apply when . . . lands are taken into trust as part of . . . the initial reservation of an Indian tribe acknowledged . . . under the Federal acknowledgment process[.]" (emphasis added)). Instead, Congress used the undefined term "restored." Furthermore, Congress used that undefined term knowing that some tribes had been re-recognized outside the Part 83 process. See *Interstate Commerce Comm'n v. Texas*, 479 U.S. 450, 458 (1987) ("Presumably, in enacting [the statute], Congress was aware of the [implementing agency's] consistent practice of regulating railroads as 'rail carriers' even when they performed Plan II intermodal service."). Given those indicators of congressional intent, we conclude that Congress did not clearly intend for the "restored lands" exception to be unavailable to those tribes administratively re-recognized outside the Part 83 process. Rather, 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.

Id.

Plaintiff agrees with the Ninth Circuit analysis that tribes reaffirmed outside the formal Part 83 process could have been considered "restored" under IGRA. Plaintiff disagrees however that DOI has the discretionary authority to eliminate reaffirmed tribes from this definition. DOI's preamble contains no rational analysis justifying the exclusion of reaffirmed tribes. For this reason, 25 C.F.R. § 292.10(b) is invalid. *See Cement Kiln Recycling Coalition*, supra.

Notwithstanding the broad scope of IGRA's restored tribe definition and DOI's past description of Koi's reaffirmation as a waiver of Part 83, on January 19, 2017, the Defendants issued the DOI Decision, which rejected the Koi Nation's 2014 request, as supplemented. *See* AR-0001 – AR-0007. Specifically, the DOI Decision found that while IGRA's restored lands exception does not define the term "restored tribe," and the Department has treated tribes that

entered into court approved settlements as "restored," the Part 292 Regulations recognize only three ways that a tribe may qualify as "an Indian tribe that is restored to Federal recognition" – by Congress, by court order, or by Part 83 acknowledgement. It added that the Koi Nation's reaffirmation does not fall into any of those three categories set forth in the regulation. *See* AR-0005 – AR-0007. The DOI Decision was a collective response to the Koi Nation's submissions to the Defendants, which included correspondence dated April 28, 2014, December 18, 2014, January 20, 2015, July 15, 2016, September 9, 2016 and December 20, 2016.

In summary, in promulgating 25 C.F.R. § 292.10, the Defendants invalidly narrowed the broad statutory term "restored to Federal recognition" by excluding American Indian and Alaska Native tribes recognized by the Defendants' reaffirmation process. Section 292.10 is invalid and a violation of IGRA as a result of this exclusion. The specific subsections (a), (b) and (c) in Section 292.10 are not the subject of this challenge, rather Plaintiff's challenge is limited to the invalid exclusion as "restored" of those tribes that were reaffirmed in a similar manner to Plaintiffs.

Plaintiffs do not seek a new 25 CFR § 292.10 rulemaking but instead seek an Order from the Court that § 292.10 may not be applied to exclude tribes like Plaintiff who were reaffirmed by Defendants.[3]

C. The Part 292 Regulations Diminish the Koi Nation's Privileges and Immunities Relative to Other Indian Tribes in Violation of Federal Law.

The Defendants readily acknowledge that, for all purposes, the United States did not recognize the Koi Nation's existence for a half-century. AR-0003. The Defendants also

[3] Section 292.10(c) also provides authority for a tribe to be restored by a "Federal court determination in which the United States is a party or court-approved agreement entered into by the United States."

acknowledge that the United States restored the Koi Nation to federal recognition in 2000. AR-0004. The Defendants acknowledge that other Indian tribes that were subjected to the same treatment by the Federal Government have been classified as "tribes restored to federal recognition" under IGRA. AR-0003. As explained in the DOI Decision, the promulgation of the Part 292 regulations is the only basis for treating the Koi Nation differently than those other tribes. AR-0006. The Part 292 regulations violate unambiguous federal law.

Congress amended the Indian Reorganization Act in 1994 to stop the Department from discriminating amongst federally recognized Indian tribes based upon how they came to be recognized. 25 U.S.C. § 5123(f), *supra*. The statute explicitly prohibits federal agencies from promulgating "any regulation…that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe *relative to other federally recognized Indian tribes* by virtue of their status as Indian tribes." 25 U.S.C. § 5123(f) (emphasis added).

The Solicitor General explained this provision in a brief to the Supreme Court as follows:

> "In 1994, Congress amended the IRA to add two new subsections, both of which expressly articulate a principle of equality among recognized tribes. 25 U.S.C. 476(f) and (g). …Those subsections expressly mandate a principle of administrative equality and non-discrimination that extends to all federally recognized tribes, without regard to whether they were "under Federal jurisdiction" on June 18, 1934. …

Brief for Respondents at 37, *Carcieri v. Salazar*, 555 U.S. 379 (2009) (No. 07-526) (Jan. 28, 2005). Moreover, the Solicitor General noted: "The List Act contemplates that federal benefits ex tend equally to all tribes on the list, without regard to when that tribe attained federal recognition. *Id.* at 38.

The Part 292 Regulations are not in accordance with this law, because they unlawfully diminish the privileges and immunities of those Indian tribes who were subjected to de facto termination and restored to federal recognition through an administrative process.

i. Between IGRA's enactment in 1988 and the promulgation of the Part 292 Regulations in 2008, the Department considered tribes like the Koi Nation to be "restored" for purposes of IGRA.

Congress enacted IGRA in 1988 to establish a framework for the regulation of gaming on Indian lands. See, 25 U.S.C. § 2702. IGRA generally prohibits Indian tribes from conducting gaming activities on lands acquired in trust after October 17, 1988. 25 U.S.C. § 2719(a). Congress understood that the Federal Government would recognize other Indian tribes or restore other Indian tribes to federal recognition after October 17, 1988, and thus created exceptions that would allow those tribes to conduct gaming activities on lands acquired after that date. See 25 U.S.C. § 2719(b)(1)(B). IGRA authorizes tribes to conduct gaming on lands acquired in trust after October 17, 1988 where "[the] lands are taken into trust as 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 Department has explained that these exceptions were intended to place restored and recently-recognized Indian tribes on an equal footing with those tribes that were recognized prior to October 17, 1988 – going so far as to label these exceptions the "Equal Footing Exceptions." *See* Memorandum from Hon. Ken Salazar, Secretary of the Interior, to Larry Echo Hawk, Assistant Secretary – Indian Affairs at 2 (June 18, 2010) ("Lands that are taken into trust…as restoration of lands for a tribe that is restored to federal recognition are also excepted from the IGRA prohibition in order to place certain tribes ***on equal footing***.") (emphasis added) (available at: https://perma.cc/9XWP-V3CU) (last accessed on April 11, 2018); and, *Assistant Secretary Echo Hawk Issues Four Decisions on Tribal Gaming Applications*, Release of the Department of

the Interior (September 2, 2011) ("The 'equal footing exception' was intended to ensure that a number of tribes had an equal opportunity to pursue Indian gaming on their own lands as those tribes that had lands eligible for gaming in 1988.") (available at: https://www.doi.gov/news/pressreleases/Assistant-Secretary-Echo-Hawk-Issues-Four-Decisions-on-Tribal-Gaming-Applications) (last accessed on April 11, 2018). Even DOI's January 19, 2017 Decision emphasizes this point, stating "the 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." AR-0004 – AR-0005. (quoting *City of Roseville v. Norton*, 348 F.3d 1020, 1031 (D.C. Cir. 2003)). This Court has also endorsed the view that IGRA was intended to allow Indian tribes to engage in gaming on a level playing field. *See Stand Up for California! v. Department of the Interior*, 919 F.Supp.2d 51, 77 (D.D.C. 2013) ("The IGRA was intended to allow Indian tribes like the North Fork to engage in gaming on par with other tribes…") (quoting *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007)).

Before it promulgated the Part 292 regulations, the Department and the National Indian Gaming Commission (the "NIGC") developed a framework for the Restored Tribe Exception that was consistently upheld by the courts. That framework examined similar factors as those now required under the regulations. *See* Letter from Kevin Washburn, NIGC General Counsel, to Hon. Douglas Hillman, U.S. District Court Judge (August 31, 2001) Available at: https://www.nigc.gov/images/uploads/indianlands/16_grndtrvrsebndotawachippewaindns.pdf (last accessed on February 3, 2018) (the "Washburn Opinion"). The central question in determining whether an Indian tribe had been "restored," for purposes of IGRA, was whether the Tribe had previously been recognized by the Federal Government, lost that status through legal

or *de facto* termination, and then regained its federal recognition. That framework placed all restored tribes on an equal footing regardless of the manner in which a tribe was restored.

For instance, in the Washburn Opinion, the NIGC determined that the Grand Traverse Band of Ottawa and Chippewa Indians (the "Grand Traverse Band") had been "restored" under IGRA because the Department recognized the Grand Traverse Band more than a century after it had unlawfully terminated the Tribe through administrative action. *See* Washburn Opinion at 9. The Washburn Opinion stated, "The clear import of acknowledgment of the [Band] under federal acknowledgment procedures was to 'undo' the effect of the improper administrative action and to resume a proper government-to-government relationship between [the Band] and the federal government." *Id*. at 10. These facts made it "difficult to argue that the [Band] is not a 'restored tribe.'" *Id*.

The Washburn Opinion emphasized the need to treat the Grand Traverse Band similarly to other Michigan tribes that had been restored to federal recognition by Congress. *Id*. at 15. In emphasizing this point, the Washburn Opinion relied on the IRA Privileges and Immunities Clause, stating, "Congress has imposed a duty to treat Indian tribes with uniformity and to avoid distinctions where legislation does not clearly create such distinctions." *Id.* at 14 (citing 25 U.S.C. § 476(f)) (recodified at 25 U.S.C. § 5123(f)).

The Washburn Opinion was upheld by the U.S. District Court for the Western District of Michigan and the Sixth Circuit. See, *Grand Traverse I*, 198 F. Supp. 2d 920 (W.D. Mich. 2002) (explaining that a Tribe that was administratively terminated by the Bureau of Indian Affairs and later re-recognized by administrative action constitutes a "restored" tribe under IGRA), *aff'd*, *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western District of Michigan,* 369 F.3d 960 (6th Cir. 2004) (*Grand Traverse II*). The Sixth Circuit noted that the

analysis under the Restored Tribe exception should not elevate form over substance. Instead, the Court explained, the key question is whether the tribe was previously recognized, terminated, and then restored to federal recognition by the Federal Government:

> Since the Secretary of the Interior had the power to terminate the Band's federal recognition, he also had the power to restore that recognition. That is exactly what the Secretary did in 1980 through the newly-promulgated acknowledgment process, which "applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department" of the Interior and who have not been subject to federal legislation that expressly terminated the federal relationship. 25 C.F.R. §§ 83.3(a), 83.3(e), 83.7(g). The result of this administrative acknowledgment was a restoration of federal recognition, a necessary component of which includes the resumption of the government's political relationship with the Band. Contrary to the State's position, the restoration of federal recognition was not contingent on Congressional action, because it was administrative action that terminated the recognition in the first place. On the facts of this case, a tribe like the Band, which was administratively "acknowledged," also is a "restored" tribe.

Grand Traverse Band II, 369 F.3d at 969.

Shortly after the Court's decision in *Grand Traverse II*, the Department determined that the Ione Band was a "restored" tribe under IGRA's equal footing exceptions. Memorandum from Carl Artman, Associate Solicitor, to James Cason, Associate Deputy Secretary (September 19, 2006) (AR-363, AR-0367 – AR-0370) (the "Ione Opinion"). Like the Koi Nation, the Ione Band is located in California and had its status as a federally recognized Indian tribe reaffirmed in the exact same manner as the Koi Nation. The Ione Opinion described the elements of a "restored" tribe analysis as follows: "To be a restored tribe, the Band must establish that it was once recognized by the Federal government, that [the] Federal government subsequently did not recognize it and that, ultimately, the Federal government restored its recognition of the Band." AR-0367.

The Department noted the Ione Band had been a federally recognized tribe as recently as 1972, but that the Department later "took the position that the [Ione] Band was not yet recognized and had to proceed through the newly established acknowledgment process…." AR-0368. The Ione Opinion expressly noted that "the Department terminated the relationship" with the Ione Band. AR-0369. It also noted that the Department "reaffirmed" the Ione Band's status as a federally recognized Indian tribe in 1994. AR-0369. The Ione Opinion concluded, "[u]nder the unique history of its relationship with the United States, the Band should be considered a restored tribe within the meaning of IGRA." AR-0369.

The Department approved the Ione Band's application to have land acquired in trust for gaming purposes in 2012 – after promulgation of the Part 292 Regulations. AR-0303. The Department reaffirmed its position that the Ione Band was a "restored" tribe under IGRA. In a public statement accompanying the decision, the Department stated: "In 1994 the Department reaffirmed that the Ione Band of Miwok Indians was federally recognized, renewing the government-to-government relationship with the tribe. This action 'restored' the tribe for purposes under IGRA." AR-0299.

The Department's analysis was once again upheld by the Courts, which noted, "[t]he general elements – recognition, followed by termination, followed by recognition again – which had been identified by the Department prior to the Part 292 regulations, are present in this case." *County of Amador v. U.S. Dep't of the Interior*, 136 F. Supp. 3d 1193, 1227 (E.D. Cal., 2015); *aff'd* by *County of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012 (9th Cir. 2017) ("Congress did not clearly intend to exclude from the "restored tribe" exception those tribes administratively restored to recognition outside the Part 83 [acknowledgment] process.").

ii. The Part 292 Regulations are the Sole Basis for the Department's Decision to Diminish the Koi Nation's Status under IGRA.

a. The Part 292 Regulations' Criteria

The Department published the Part 292 regulations in 2008 to implement the exceptions to IGRA's general prohibition against gaming on lands acquired after its enactment. Part 292 guides the Department's determinations regarding the Equal Footing Exceptions – including restored tribe determinations – as well as the Two-Part Determination Exception.

To qualify as a restored tribe under Part 292, a tribe must demonstrate that: (1) It was federally recognized at one point in history; (2) It lost its government-to-government relationship with the United States at a later point in history; and, (3) It later had its government-to-government relationship with the United States, and its federally recognized status, restored. 25 C.F.R. § 292.7. Part 292 includes separate criteria necessary to demonstrate each of these factors.

In order to demonstrate that a tribe lost its government-to-government relationship with the United States, a tribe must show that its relationship was terminated by one of the following means: (1) Congressional legislation; (2) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe, or taking action to end the relationship; or, (3) Congressional legislation restoring the tribe that recognizes the existence of a previous government-to-government relationship. 25 C.F.R. § 292.9. The second criterion would include tribes like the Koi Nation, which were subject to *de facto* termination as a result of administrative action, notwithstanding the absence of legal termination.

Under Part 292, a tribe may only demonstrate that it has been restored to Federal recognition by one of three methods: (1) Congressional legislation recognizing, acknowledging,

affirming, reaffirming, or restoring the relationship between the tribe and the United States; (2) Recognition through the Federal Acknowledgment Process under 25 C.F.R. § 83.8; or, (3) Federal court determination, in which the United States is a party, or a court-approved settlement agreement entered into by the United States. 25 C.F.R. § 292.10. This particular section does not expressly include those tribes that were wrongfully treated as though they had been terminated, and for which the United States later reaffirmed their federally recognized status.

Part 292 excludes other methods by which the United States may recognize Indian tribes, including the methods the Department used to recognize the Nation and the Ione Band – which were affirmed by this Court in *Muwekma*. This language almost appears intended to exclude the small handful of tribes like the Koi Nation from being placed on an equal footing with those tribes that were recognized by the Department prior to IGRA's enactment.

b. The Department Treated Similarly Situated Tribes as "Restored" Prior to the Part 292 Regulations.

The DOI Decision all but concedes that the Part 292 Regulations, rather than IGRA's own language, prevent the Department from treating the Nation in the same manner as similar tribes: "the regulations leave me no choice but to conclude that the [Nation's] reaffirmation…does not constitute recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter." AR-0001. The DOI Decision makes this concession while also acknowledging that the Department "has treated Ione [Band]…as restored. …" AR-0006.

In fact, under the Defendant's view, the Ione Band Indian Lands Determination issued in 2006 would not have been possible under Part 292, because Ione's status as a federally recognized tribe was reaffirmed by a letter from the ASIA in 1994, outside of any of the formal

processes described in the Part 292 Regulations. AR-0367. Associate Solicitor Carl Artman explained:

> Accordingly, the Band cannot establish that it is a newly acknowledged tribe under the Secretary's acknowledgment process. Thus, the only way that the Band can conduct gaming on the lands it seeks to acquire in trust without a two part determination is if it can that the lands are restored lands for a restored tribe (sic).

Id.

Notwithstanding this, the Department relied upon its prior determination to approve the acquisition of land in trust on behalf of the Ione Band for gaming purposes in 2012.[4]

iii. The Part 292 Regulations violate the Indian Reorganization Act's Privileges & Immunities Clause.

Congress amended the Indian Reorganization Act in 1994 to prohibit federal agencies from diminishing the rights of Indian tribes vis-à-vis other federally recognized Indian tribes.

The statute reads:

> (f) Privileges and immunities of Indian tribes; prohibition on new regulations
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, 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 their status as Indian tribes.

25 U.S.C. § 5123(f).

[4] The Nation does not assert that the Department's 2012 decision to acquire land in trust on behalf of the Ione Band was improper. To the contrary, the Nation asserts that this decision was proper, and was consistent with the Department's longstanding understanding of IGRA's Equal Footing Exceptions.

This court has previously determined that this statutory text is clear and unambiguous. *See Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013) (rejecting the Secretary of the Interior's interpretation on the grounds that the statute is clear).

Akiachak involved a challenge to the Department of the Interior's regulations governing the process by which land is placed into trust (reservation) status for Indian tribes. Those regulations prohibited the Department from placing land into trust for Indian tribes in Alaska, while allowing land to be placed into trust for Indian tribes outside of Alaska. The Court determined that the Department's regulations violated § 5123 because they "diminish[ed] the privileges available to tribes of Alaska Natives (except for the Metlakatlans) relative to the privileges…available to all other federally recognized tribes by virtue of their status as Indian tribes." *Id*. at 211 (ellipsis in original).[5]

The Part 292 regulations plainly violate § 5123(f) because they diminish the privileges and immunities available to the Koi Nation relative to other Indian tribes that have been restored to federal recognition. The Department has determined that tribes like the Grand Traverse Band and the Ione Band, which were subject to a period of *de facto* termination and restored to federal recognition by the Department, are "restored" tribes under IGRA; whereas, 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. See, AR-0001 – AR-0007.

[5] 25 U.S.C. § 5123 was previously codified at 25 U.S.C. § 476. Section 5123 includes two separate subsections prohibiting the Department from diminishing the privileges and immunities of Indian tribes relative to other Indian tribes – (f) and (g). Section 5123(f) applies to new regulations promulgated after Congress adopted the statutory language; and, section 5123(g) applied to regulations in place prior to the enactment of the statutory language. This Court's decision in *Akiachak* was based on § 5123(g), because the challenged regulations were in place prior to the enactment of the statutory language.

There was no intervening act of Congress that further limited which Indian tribes could qualify as "restored" tribes under IGRA. On one day, the Department considered tribes like the Ione Band to be a "restored" tribe; and, the next day, the Department simply decided that such tribes could not be a "restored" tribe. The Department does not (and cannot) argue that there is a relevant factual distinction between the Ione Band and the Koi Nation. DOI conceded this fact at the conclusion of its January 19, 2017 Decision, stating, "[***t]he only distinction*** is that Ione received an Indian lands determination from the Department prior to the promulgation of Part 292, thus it was 'grandfathered in' under 25 C.F.R. § 292.26." AR-0006 at n. 46 (emphasis added). The only relevant distinction between the two tribes is when they sought a determination from the Department regarding their status as "restored" tribes under IGRA.

The Part 292 regulations form the only basis for the disparate treatment of the Koi Nation. This bureaucratic diminishment of the Koi Nation's privileges and immunities is precisely the type of conduct prohibited by the plain language of § 5123(f). *See* 140 Cong. Rec. S. 6147 (May 19, 1994) ("Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. ***This is true without regard to the manner in which the Indian tribe became recognized by the United States***…") (emphasis added).

In *Akiachak*, this Court held that a tribe does not have to demonstrate that its privileges and immunities have been diminished relative to "similarly situated" tribes in order for § 5123 to apply. *See Akiachak Native Community v. Salazar*, 935 F. Supp. 2d 195 (D.D.C. 2013) ("But 'similarly situated' appears nowhere in the statutory text, and the Secretary cannot invent a limitation on the statute…"). Nevertheless, it bears emphasizing here that the Department has

acknowledged that the Koi Nation and the Ione Band are similarly situated; yet, it considers only the Ione Band to be a "restored" tribe under IGRA.

In the *Muwekma* litigation in this court, the Department argued (at length) that the Ione Band and the Koi Nation shared a nearly identical experience of *de facto* termination and administrative restoration. See, *Muwekma*, *supra,* 813 F.Supp.2d at 185 ("…the Department explained that 'the Ione and Lower Lake decisions justified action on behalf of those groups that Muwekma did not share.'"). The Department's argument that Ione and the Koi Nation were similarly situated was the crux of its successful argument in the *Muwekma* litigation that the Muwekma Ohlone were not similarly situated with both the Ione Band and the Koi Nation. *Id*. The D.C. Circuit further relied on this position. *Muwekma*, 708 F.3d at 215-216.

The Department's only justification for treating the Koi Nation differently than the Ione Band under IGRA is Part 292. This is patently prohibited by the clear language of § 5123. Therefore, the Part 292 Regulations are not in accordance with the law.

D. The Defendant's Application of the Part 292 Regulations Diminishes the Koi Nation's Privileges and Immunities Relative to Other Indian Tribes in Violation of Federal Law.

The Indian Reorganization Act's privileges and immunities clause also prohibits the Department from "mak[ing] any decision or determination pursuant to…Any other act of Congress" that diminishes the privileges and immunities available to other federally recognized Indian tribes. 25 U.S.C. § 5123(f).

It is beyond dispute that DOI's January 19, 2017 decision is a "decision or determination" within the meaning of § 5123(f). AR-0002 ("This decision constitutes a final agency action under the Administrative Procedures Act."). It cannot plausibly be argued that the DOI Decision does not diminish the Koi Nation's privileges under IGRA relative to other

restored Indian tribes. DOI has explained to this Court that the Koi Nation is similarly situated to the Ione Band; yet, it considers only the Ione Band to be a "restored" tribe under IGRA. [6]

Even if the Department's regulations withstand scrutiny under § 5123(f), its decision to exclude the Koi Nation from the scope of IGRA's restored tribe provisions does not. Therefore, the January 19, 2017 Decision is not in accordance with the law and must be reversed.

V. CONCLUSION

For the foregoing reasons, the Koi Nation should be granted summary judgment on all of its claims.

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Respectfully Submitted,

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[6] Section 5123 of the Indian Reorganization Act prohibits a broader scope of discriminatory conduct than the Equal Protection Clause of the United States Constitution, because there is no requirement that a Plaintiff must demonstrate that it is subject to different treatment than "similarly situated" tribes. *See Akiachak*, *supra*. Nevertheless, the Department also violated the Constitution's Equal Protection Clause in issuing the January 19, 2017 Decision because it: 1) engaged in disparate treatment of similarly situated tribes like the Koi Nation and the Ione Band; and, 2) offer no rational explanation for this disparate treatment. *See Muwekma*, *supra,* 813 F. Supp. 2d at 196 (explaining that a challenge under the Equal Protection Clause requires the plaintiff to show that it is treated differently than similarly situated entities and that the agency has not offered an explanation that satisfies the relevant level of scrutiny).