IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR
CROSS-MOTION FOR SUMMARY JUDGMENT

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Regulations**



**Other Authorities**

## INTRODUCTION

Plaintiff's Opposition erases any doubt that Plaintiff's challenge to Interior's 25 C.F.R. § 292.10 regulation fails for four reasons. First, Plaintiff's 2017 challenge to regulations promulgated in 2008 is barred by the statute of limitations because Plaintiff knew that Section 292.10 would bar it from gaming under the Indian Gaming Regulatory Act's ("IGRA") "restored lands" exception at the time of promulgation in 2008. Second, Plaintiff's claim fails on the merits because Interior reasonably based Section 292.10 on the Federally Recognized Tribes List Act of 1994. Third, Plaintiff's Opposition misinterprets the Indian Reorganization Act's ("IRA") limited prohibition on classifying federally recognized Indian tribes to instead require that Interior classify tribes in a manner that is unsupported by the Act. Finally, Plaintiff's Opposition helpfully clarifies Plaintiff's claims by contending that Interior "cannot hide behind the plain text" of 25 C.F.R. § 292.10. Plaintiff's admission that Interior followed the plain text of the governing regulation defeats its as-applied challenge. This Court should therefore grant Federal Defendants' motion for summary judgment.

## ARGUMENT

### I. Plaintiff's facial challenge to the legitimacy of the Interior Department's 25 C.F.R. § 292.10 regulation is barred by the statute of limitations.

As Federal Defendants established in their Memorandum, the statute of limitations bars Plaintiff's facial challenge to regulations promulgated in 2008 – nine years before Plaintiff's Complaint. Defs.' Resp. Mot. for Summ. J. & Cross-Mot. for Summ. J. 11-14, ECF No. 15-1. Plaintiff's Opposition confirms that this case is a facial challenge to Section 292.10. Plaintiff's claims are therefore barred by the statute of limitations.

Plaintiff's claims are time-barred because they were not filed within six years of Section 292.10's promulgation in 2008. Even if Interior "guid[ed] Koi away from the regulatory process

for federal recognition" in 2000, Plaintiff cannot challenge actions that Interior took almost two decades ago. *See* Pl.'s Reply in Opp'n to Defs.' Mot. for Summ. J. 6, ECF No. 18 (recognizing that Interior's actions were "beneficial to Koi . . . in 2000"). And Plaintiff's contention, *id.*, that Federal Defendants "have not provided any evidence in the Administrative Record that" Plaintiff's 2006 request to be considered a restored tribe "was answered in a timely manner or at all," even if true, does not excuse Plaintiff's failure to file this case until 2017. *Id.*

Plaintiff admits that it brings a facial challenge to Section 292.10. It "asserts that the Part 292 Regulations, themselves, violate 25 U.S.C. § 5123(f)." ECF No. 18 at 9. Plaintiff was aware that Section 292.10 would bar it from gaming under the "restored lands" exception when the regulation was promulgated. *See* ECF No. 15-1 at 6-7, 12-13; Comments to Proposed Rule 25 C.F.R. Pt. 292, Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,360 (May 20, 2008); AR-0456 (recognizing that "under the current provisions of the proposed rule, and despite recent precedent set by the Department with regard to the Ione Band of Miwok," Koi would not be eligible for the restored lands exception.). Plaintiff could have brought its facial challenge to Section 292.10 between 2008 and 2014. It did not. The Court's analysis should end there.

The cases Plaintiff cites, ECF No. 18 at 9-13, confirm that Plaintiff's facial challenge to regulations promulgated in 2008 is untimely. For example, *Functional Music, Inc. v. FCC* held that "the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule." 274 F.2d 543, 546 (D.C. Cir. 1958). The statute of limitations therefore did "not foreclose subsequent examination of a rule" through a proper as-applied challenge, so as not to "deny many parties ultimately affected by a rule an opportunity to question its validity." *Id.* at 546. If a party could question a rule's validity

at the time of promulgation, it had to bring such a challenge within six years. *See Mont. v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984) (A party "who could have but did not seek review, may not create the basis for a reviewable order by unilaterally petitioning for repeal or amendment of a regulation. To permit any complainant to restart the limitations period . . . would eviscerate the congressional concern for finality embodied in time limitations on review."); *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (distinguishing *Functional Music* and holding that "[w]hen, as here, plaintiffs bring a facial challenge to an agency ruling . . . 'the limitations period begins to run when the agency publishes the regulation.'") (citations omitted). Plaintiff does not seriously contest that it could have challenged Section 292.10 at the time of promulgation.[1] Indeed, Plaintiff's comments to the proposed rule make clear that it knew in 2008 that Section 292.10 would bar it from relying on the "restored lands" exception.

Plaintiff's reliance on *NLRB Union v. Federal Labor Relations Authority* is similarly misplaced. Plaintiff's suggestion that it "may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority," ECF No. 18 at 10-11 (citing *NLRB*, 834 F.2d 191, 195 (D.C. Cir. 1987)), is undermined by the remainder of the paragraph Plaintiff relies upon.[2] The D.C. Circuit's example for when such a tardy challenge may be raised, "by

[1] Plaintiff may suggest that its claim would not have been ripe at the time of Section 292.10's promulgation. ECF No. 18 at 13 (citing *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998) and describing challenge as not "timely" prior to Interior's 2017 decision). Plaintiff's reference to *Ohio Forestry*'s ripeness doctrine would, if taken to its logical conclusion, render the current challenge unripe. The "restored lands" exception provides for gaming on specific "newly acquired lands" rather than generally allowing gaming by "restored tribes." 25 C.F.R. §§ 292.11 – 292.12. Interior cannot determine whether the "restored lands" exception applies until a Tribe obtains a specific parcel of land and seeks to have that land taken into trust for gaming. Plaintiff's claim is just as ripe today as it was in 2008 – as Section 292.10 has barred Plaintiff from taking advantage of the "restored lands" exception since its promulgation. *Id.*

[2] *NLRB* addresses a "second method of obtaining judicial review of agency regulations once the limitations period has run." *Id*. at 196. That method requires a party "to petition the

way of defense in an enforcement proceeding" is readily distinguishable. *NLRB*, 834 F.2d at 195. *NLRB* stands for the proposition that a defendant should have "an opportunity to question [a rule's] validity." *Id*. at 196 (quoting *Functional Music*, 274 F.2d at 546). *Cf. Genuine Parts Co. v. EPA*, 890 F.3d 304, 316 (D.C. Cir. 2018) (allowing challenge where agency applied regulation to "Superfund" site based on post-promulgation factual development); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 508 (D.C. Cir. 2003) (allowing challenge "following enforcement of the disputed regulation"). *NLRB* is inapposite because Plaintiff challenges Section 292.10's application in the very manner that Plaintiff anticipated in 2008.

Plaintiff's discussion of *P & V Enterprises v. United States Army Corps of Engineers* fares no better. 466 F. Supp. 2d 134 (D.D.C. 2006), *aff'd*, 516 F.3d 1021 (D.C. Cir. 2008) Plaintiff does not deny, ECF No. 18 at 11, that "[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.*, 466 F. Supp. 2d at 142-43 (affirming dismissal under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction). Nor does Plaintiff deny that its challenge is a facial challenge. Plaintiff instead notes that *P & V Enterprises* permits certain as-applied challenges. ECF No. 18 at 11. But *P & V Enterprises* suggested that a party might challenge a regulation to defend against Clean Water Act "enforcement penalties." *P & V Enters.*, 516 F.3d at 1023, 1026. *P & V Enterprises* therefore stands for the unremarkable proposition that a party may challenge the substantive validity of regulations when they are enforced because the enforcement proceeding is its only opportunity to challenge the regulation's validity. As discussed above, Plaintiff, unlike the defendant in an enforcement action, knew that Section

agency for amendment or rescission of the regulations and then appeal the agency's decision." *Id.* Plaintiff does not invoke this exception and identifies no petition for amendment or rescission. ECF No. 18 at 11 n.2.

292.10 would bar it from gaming under the "restored lands" exception. Plaintiff fails to establish the applicability of *P & V Enterprises*' exceptions to the general rule that facial challenges to regulations are barred by 28 U.S.C. § 2401(a) after six years.

28 U.S.C. § 2401(a)'s statute of limitations is jurisdictional. *Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 185 (D.D.C. 2017) (barring facial challenge to agency regulations). Plaintiff does not contest that it explicitly acknowledged in 2008 that it would not be eligible for the "restored lands" exception. AR-0445-56; ECF No. 18 at 12. Plaintiff contends that it "sought to avoid litigation" by attempting to resolve its differences with Interior. ECF No. 18 at 12 (citing AR-0471, Letter to Deputy Solicitor Kunesh). But the letter makes clear that Plaintiff sought a waiver of the Part 292 regulations, thereby offering another admission that Plaintiff knew Section 292.10 barred it from gaming as a restored tribe well before the statute of limitations expired. AR-0476.[3]

Plaintiff's claim that Section 292.10 inappropriately limits the definition of "restored tribes" accrued on May 20, 2008. The statute of limitations bars Plaintiff's facial challenge filed on August 3, 2017. Compl., ECF No. 1. The Court's analysis need proceed no farther.

## II. Section 292.10 reasonably interpreted IGRA and did not violate the Indian Reorganization Act's privileges and immunities clause.

Plaintiff does not contest that Section 292.10 must be upheld if it reflects a permissible construction of IGRA, 25 U.S.C. §§ 2701 *et seq*. ECF No. 15-1 at 15 (citing *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011)). Plaintiff's substantive

[3] Plaintiff's brief suggestion that *NextWave Personal Communications, Inc. v. FCC* excuses its tardy challenge, ECF No. 18 at 13, is similarly unavailing. 254 F.3d 130, 142 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003). In *NextWave*, the FCC's filings in *NextWave*'s bankruptcy proceedings "suggest[ed] that the Commission believed NextWave's licenses had not canceled" automatically. *Id.* Plaintiff does not, and cannot, identify an Interior determination that might have suspended the applicable statute of limitations.

challenge instead contends that Section 292.10 "is prohibited by the unambiguous language of" the IRA's privileges and immunities clause. ECF No. 18 at 18 (citing 25 U.S.C. § 5123(f)). Plaintiff's Opposition highlights that Section 292.10 did not violate the IRA by acknowledging that IGRA compels Interior to distinguish between tribes that are and are not eligible for the "restored lands" exception. The privileges and immunities clause therefore does not apply to IGRA, much less prohibit Interior from reasonably interpreting the "restored lands" exception.

Plaintiff's original privileges and immunities argument asserted that Section 292.10 was facially invalid because "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 tribes* by virtue of their status as Indian tribes." Pl.'s Mot. for Summ. J. 33, ECF No. 14-1 at 33 (quoting 25 U.S.C. § 5123(f)). Plaintiff's response essentially admits that its original argument is untenable because IGRA requires Interior to, among other things, determine the subset of tribes who qualify for the "restored lands" exception. ECF No. 18 at 15 ("Defendants are correct" that every tribe does not have an "equal right to be classified as a 'restored tribe' under IGRA"). In other words, Interior must classify tribes under IGRA. Some of those tribes are able to game under the "restored lands" exception while other tribes are unable to do so. The privileges and immunities clause does not prohibit such classification.

Plaintiff's argument that the IRA's prohibition on classifying tribes actually explicitly requires Plaintiff to be classified as a "restored" tribe would turn the IRA on its head. Plaintiff contends that the IRA compels the creation of a class of Ione, Grand Traverse and other unidentified "tribes that were deemed to be 'restored' under IGRA despite never officially having been terminated." *Id*. Plaintiff's interpretation is, at a minimum, not explicitly required

by the IRA. The IRA's prohibition on classifying tribes cannot compel classification, including creation of Plaintiff's proposed class of "restored tribes" with unique gaming rights. ECF No. 15-1 at 27; 25 U.S.C. § 5123(f). Regardless, tribal gaming eligibility is determined by IGRA, whereas the IRA's privileges and immunities clause's applies to self-governance.[4] Plaintiff's claim that Section 292.10 explicitly violates IGRA must fail because IGRA cannot be read to require that any tribe be categorized in any manner that accords it particular gaming rights.

Plaintiff's privileges and immunities argument therefore collapses into an argument that Section 292.10 impermissibly applies the "restored lands" exception. But to the extent that Plaintiff's arguments regarding its alleged privileges and immunities can be interpreted as an argument that Section 292.10 impermissibly interprets IGRA, that argument fails on the merits. Interior reasonably resolved the "restored lands" exception's ambiguity by adopting the Federally Recognized Tribes List Act's ("List Act") limitation of the ways in which tribes can be recognized. ECF No. 15-1 at 14-18 (citing Pub. L. No. 103-454, 108 Stat. 4791). Plaintiff's only references to the List Act in its Opposition, ECF No. 18 at 7, 19, 22, do not seriously attempt to contest Section 292.10's reasonableness.

[4] Congress enacted § 5123(f)'s predecessor to correct Interior's policy of distinguishing between "historic" and "created" tribes. Under that policy, Interior viewed some tribes, which it considered to have been "created" by the IRA, as lacking certain inherent powers of self-government relative to other "historic" tribes. *See* 140 Cong. Rec. S6147 (Technical Corrections Act of 1994) (Section 16 of the IRA merely provides "a mechanism for the tribes to interact with other governments . . . through tribal adoption and Secretarial approval of tribal constitutions."). Senator Inouye, one of sponsors, explained that these provisions were needed because § 16 "does not authorize or require the Secretary to establish classifications between tribes or to categorize them based on their powers of self-governance." *Id.* The clause is best understood as requiring that "each federally recognized Indian tribe has the same governmental status as other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States." *Id*. Plaintiff's suggestion that this provision compels classification of certain tribes as "restored tribes" is, at best, unsupported. At worst, Plaintiff would flip the IRA on its head to require that tribes be classified in a way that grants certain tribes superior gaming rights. *See* ECF No. 15-1 at 26 n.10, 28-29.

## III. The Interior Department adequately explained its 25 C.F.R. § 292.10 regulation.

As Federal Defendants set forth in their Memorandum, Interior reasonably considered and rejected Plaintiff's comments to the proposed Section 292.10. ECF No. 15-1 at 14-18. Plaintiff's Opposition asserts that, while Interior generally has discretion to modify its interpretation of IGRA, Interior did not adequately explain Section 292.10's modification of the "restored lands" exception. ECF No. 18 at 18-20. Plaintiff is incorrect. Interior's explanation of its Section 292.10 regulation was more than sufficient.

Plaintiff's suggestion that Section 292.10 should be struck down because it modified Interior's interpretation of the "restored lands" exception *sub silentio*, ECF No. 18 at 19 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)), fails for two reasons. First, Plaintiff acknowledges that Section 292.10 "possibly" indicates that Interior was modifying past policy by stating that "[w]hile past reaffirmations were administered under this section, they were done to correct particular errors." *Id*. at 19 (quoting 73 Fed. Reg. at 29,363). Interior's analysis of the initial Section 292.10 regulations clearly states that "while past reaffirmations" may have been administered under the restored lands exception's *ad hoc* application, future affirmations would not be similarly administered. And the next sentence of Part 292's preamble makes clear that the regulations narrow Interior's prior interpretation of "restored lands" by stating that "[o]mitting 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. at 29,363.[5] Moreover, Plaintiff repeatedly

[5] The preamble also addressed the *Grand Traverse* case by stating that, "[t]his recommendation was adopted in so far as we followed the *Grand Traverse* standard that **if the tribe is acknowledged under 25 CFR 83.8**, and already has an initial reservation proclaimed after October 17, 1988, the tribe may game on newly acquired lands under the restored lands exception provided that it is not gaming on any other land." 73 Fed. Reg. at 29,366 (emphasis added). *See*

interpreted the Section 292.10 regulation to changed Interior's interpretation, recognizing that "under the current provisions of the proposed rule, and despite recent precedent set by the Department with regard to the Ione Band of Miwok," Koi would not be eligible for the "restored lands" exception. AR-0446; AR-0451. Second, Plaintiff acknowledges that the Part 292 Regulations included a "'grandfather' provision" and that Plaintiff attempted to take advantage of that provision. ECF NO. 18 at 18-19. Such a grandfather provision would have no meaning absent a modification in Interior's position.

Plaintiff's suggestion, ECF No. 18 at 18, that Interior must provide a more detailed explanation for Section 292.10 is both unsupported and unpersuasive. First, Plaintiff is incorrect that *Fox* requires Interior to provide a more "detailed justification" for Section 292.10. *Fox* suggested only that an agency cannot wholly disregard a formal policy. 556 U.S. at 515-16. Interior's pre-regulatory application of the "restored lands" exception was substantially less formal than a rulemaking or adjudication. Interior's shift from a "case-by-case application . . . to a rule-based application" of IGRA does not trigger any heightened scrutiny. *See Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1119 (N.D. Cal. 2012), *aff'd in part, rev'd in part by Rancheria v. Jewell*, 776 F.3d. 706 (9th Cir. 2015). The 2008 regulations do not reverse formal Interior policy because they represent an initial use of formal rulemaking to create a new policy on a relatively blank slate. In *Fox*, the agency's prior policies had been formalized by several formal adjudications. 556 U.S. at 506-09. Such formal adjudication or rulemaking, such as Interior's promulgation of its Part 292 regulations, carry the "force of law" and are generally entitled to a very high level of deference. *United States v. Mead Corp*. 533 U.S. 218, 221, 229-31 (2001).

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*also*, *id*. at 29,372 (Through grandfathering, "the Federal Government may be able to follow through with its prior legal opinions and take final agency actions consistent with those opinions, even if these regulations now have created a conflict.").

Less formal determinations such as Interior's application of the "restored lands" exception to Ione or Plaintiff, while accorded substantial deference under the Administrative Procedure Act's arbitrary and capricious review, do not carry the same force of law as formal rulemakings. Second, *Fox's* provision that certain modifications to agency policies require "a more detailed justification" is limited to circumstances where a prior policy "engendered serious reliance interests." 556 U.S. at 515-16. Plaintiff notably identifies no action that Interior took that would reasonably induce reliance. Nor does Plaintiff identify any action it took in reliance upon Interior's actions. In short, Plaintiff fails to establish any reliance, much less the type of "serious reliance interest" suggested in *Fox*. *Id*.

Plaintiff's misses the mark by focusing on the reasonableness of Interior's past decisions, ECF No. 18 at 19-20, rather than whether the Section 292.10 regulation reasonably interprets the "restored lands" exception. Judicial "review of an agency's exercise of its rulemaking authority is narrow. Judicial review exists to ensure that agency actions are the 'product of reasoned decisionmaking.'" *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 266 (D. C. Cir. 2014) (quoting *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012)). Section 292.10 should be upheld because it reasonably resolved the "restored lands" exception's ambiguity by adopting the List Act's limitation of the ways in which Tribes can be recognized. ECF No. 15-1 at 17-20.

## IV. The Interior Department reasonably applied its Section 292.10 regulations

Plaintiff remarkably contends that Interior "cannot hide behind the plain text of its regulations." ECF No. 18 at 20. To be clear, the Parties agree that Interior is applying the plain text of Section 292.10 in the only manner permitted by that text. The Court's analysis of Plaintiff's as-applied challenge need proceed no further.

Plaintiff identifies no way in which Interior could have applied Section 292.10 to permit Plaintiff to game under the "restored lands" exception. Plaintiff instead contends that Interior's application of Section 292.10 to Plaintiff is arbitrary and capricious because Interior treated Ione and Plaintiff differently without justification. Plaintiff makes three significant admissions that defeat any such as-applied challenge:

1) That Section 292.10 would permit neither Ione nor Plaintiff to game under the "restored lands" exception;

2) That Ione obtained an opinion in 2006, two years prior to Section 292.10's promulgation, that satisfied 25 C.F.R. § 292.26's grandfather provision; and

3) That Interior applied Section 292.10 in the only manner permitted by the regulation's text, to determine that Plaintiff does not qualify for the "restored lands" exception.

ECF No. 18 at 19-20. Interior determined that Ione could game under the "restored lands" exception before undertaking formal notice and comment rulemaking that allowed it to fully consider the "restored lands" exception.

Plaintiff's focus on a relevant distinction between Ione and Koi – that Ione received a "grandfather" opinion under 25 C.F.R. § 292.26 before Interior promulgated Section 292.10 – is unavailing. ECF No. 18 at 20. Plaintiff glosses over the distinctions between the two tribes' applications. Plaintiff sought a grandfather exception for poorly specified allegedly "restored lands" in 2006. AR-0500-01 (Letter from D. Beltran to G. Norton (Mar. 29, 2006)). Ione, in contrast, applied to take a specific parcel of land taken into trust in 2004. AR-0363 (Mem. from C. Artman to J. Cason re: Ione Band Indian Lands Determination (Sept. 19, 2006)). Interior promulgated regulations in 2008. And it faithfully applied those regulations to determine that Plaintiff does not qualify for the "restored lands" exception.

Interior's formal rulemaking and promulgation of the Part 292 Regulations provides a more than sufficient justification for Interior's decision. Plaintiff's argument, if accepted, would

lead to the absurd conclusion that Interior could not apply its regulations to parties if the regulations would lead Interior to change its policies regarding similarly situated parties. Plaintiff does not contest that an agency may modify its interpretation of a statute is commanded. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) ("agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005). If an agency was unable to apply its newly-promulgated regulations, the new regulations would be rendered useless.[6]

To the extent that Plaintiff argues, ECF No. 18 at 20-21, that Interior's decision applying "the plain text" of its regulations is arbitrary because it is inconsistent with a pre-regulatory decision, Plaintiff's argument is unsupportable. Agencies may change how they implement statutes by promulgating regulations. *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*, 776 F.3d at 714 ("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). Plaintiff's apparent proposal that Interior disregard the plain text of its regulations, ECF No. 15-1 at 19-20, is illogical and fails as a matter of law.

[6] To the extent that Plaintiff suggests that Interior should have provided it with a grandfather opinion because Ione received one, ECF No. 18 at 20, Plaintiff fails to carry its burden. First, Plaintiff does not seek any such relief in its Complaint. Second, a party arguing that it should have received a waiver "not only bears the burden of convincing the agency that it should depart from the rules, but, on judicial appeal, the applicant must show that the agency's reasons for declining the waiver were 'so insubstantial as to render that denial an abuse of discretion.'" *Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983).

## V. Interior's implicit waiver of the Part 83 regulations in 2000 does not require that Interior deviate from its Part 292 regulations today.

Plaintiff's reply brief rests in part upon Plaintiff's assertion that Interior waived its Part 83 regulations to place Plaintiff on the list of federally recognized tribes. Plaintiff argues that by impliedly waiving its Part 83 regulations in 2000, Interior conceded that those regulations apply to Plaintiff. ECF No. 18 at 21. Plaintiff's waiver argument is incorrect.

Plaintiff's argument rests on a misreading of Section 292.10's clear language. Plaintiff appears to argue that it qualifies for the "restored lands" exception under 25 C.F.R. § 292.10(b) because Interior impliedly waived its Part 83 regulations to reaffirm Plaintiff. ECF No. 18 at 21. Section 292.10(b) provides that a tribe can qualify as restored if it shows "[r]ecognition **through** the administrative Federal Acknowledgment Process under § 83.8." 25 C.F.R. § 292.10(b) (emphasis added). Plaintiff cannot reasonably contend that it was recognized through the acknowledgment process. AR-0446 (under the proposed regulations Plaintiff "would be precluded the opportunity to game on their initial reservation."); AR-0451 (proposing qualification through "executive re-affirmation or executive restoration"); Compl. ¶ 64 ("Department ultimately recognized Koi Nation without requiring the Nation to complete the full petition process"). Neither Interior nor this Court can disregard Section 292.10's clear language, which does not allow "implicit waiver" of the acknowledgement regulations as means of qualifying for the "restored lands" exception.

Interior's position – that the Part 83 regulations did not apply to Plaintiff because Plaintiff was not terminated – is logically consistent. Interior argued in *Muwekma* that Koi and Ione both were "reaffirmed **outside** the Part 83 process." *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 214 (D.C. Cir. 2013)) (emphasis added). And Plaintiff does not address, much less refute, the fact that Interior's 2000 decision 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." AR-0460. *See* ECF No. 15-1 at 23-24; ECF No. 18 at 16. Plaintiff's reaffirmation outside of the Part 83 process was premised on the fact that Plaintiff was never terminated. AR-0401 (Plaintiff "was not restored . . . because it was never terminated."). Interior waived the Part 83 regulations for Plaintiff because Plaintiff: 1) had not been terminated and 2) did not need to be restored.

Plaintiff is incorrect that Interior's implicit waiver of its Part 83 regulations for Plaintiff rests on a "post-hoc rationalization." ECF No. 18 at 22. Plaintiff's contention is based upon a misreading, as the Muwekma memorandum makes clear that the Part 83 process applies only to tribes "that had previously been acknowledged, but whose relationship with the Federal Government had not continued to exist." Explanation to Supp. the Admin. Record, *Muwekma Ohlone Tribe v. Kempthorne*, No. 03-cv-1231 (RBW) (D.D.C. Nov. 27, 2006) ECF No. 55-1 at 3 ("Muwekma Memorandum"). And the Muwekma Memorandum distinguished Muwekma by finding that Plaintiff's "relationship with the United States had neither lapsed nor been administratively terminated." *Id*.; ECF No. 15-1 at 24-25. Plaintiff points to no language stating that Interior's waiver of the Part 83 process somehow applied that process. *Muwekma*, 708 F.3d at 214 (Plaintiff and Ione were "summarily recognize[ed] . . . outside the Part 83 process"). Moreover, the Muwekma Memorandum was written prior to Section 292.10's promulgation. It did not address any issues posed by Section 292.10's promulgation and cannot be read to prohibit that regulation's promulgation or use. Interior's decision to apply its regulations is not a post-hoc rationalization.

Plaintiff's reliance on a pre-regulatory Sixth Circuit case is misplaced for several reasons. ECF No. 18 at 22-23 (citing *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Att'y for W. Dist. of Mich.*, 369 F.3d 960 (6th Cir. 2004)). Most significantly, *Grand Traverse* does not address, much less establish, Interior's regulatory effort to harmonize the IGRA and List Act. *Grand Traverse* upheld the Grand Traverse Band's gaming under the "restored lands" exception after going through the Part 83 Federal Acknowledgment Process. *Id*. at 969 (Grand Traverse restored through "newly-promulgated acknowledgment process."). Plaintiff's effort to rely on a statute explicitly restoring the Pokagon Tribe only highlights that Plaintiff was not restored by statute. *Id*. (citing An Act to Restore Fed. Servs. to the Pokagon Band of Potawatomi Indians, 108 Stat. 2152 (Sept. 21, 1994)). *Grand Traverse* did not address whether tribes such as Plaintiff could qualify for the "restored lands" exception, much less circumscribe Interior's ability to implement the exception.

Plaintiff is incorrect, ECF No. 18 at 24, that a letter from BIA's Pacific Regional Director stating her belief that Plaintiff should be considered a "restored tribe" provides evidence of "inconsistent treatment." AR-0386 (Letter to Assistant Secretary – Indian Affairs (Dec. 23, 2010)). The Principal Deputy Assistant Secretary – Indian Affairs, exercised the delegated powers of the Assistant Secretary – Indian Affairs to make Interior's only decision regarding whether Plaintiff could game under the "restored lands" exception. AR-0007 (Letter from L. Roberts to D. Beltran (Jan. 19, 2017)); *Irving v. United States*, 162 F.3d 154, 166 (1st Cir. 1998) (courts customarily defer to the statements of the official policymaker, not others, to determine agency policy even though the others may occupy important agency positions.). Plaintiff identifies neither an inconsistency nor a basis for overturning Interior's reasonable application of its regulations.

## CONCLUSION

For the reasons set forth above, Plaintiff's motion for summary judgment should be denied and Federal Defendant's motion for summary judgment should be granted.

Respectfully submitted this 3rd day of August, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on the 3rd day of August, 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*
Matthew Marinelli