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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 ALBERT P. ALTO, et al., )

11 )  
12 Plaintiffs, )

13 v. )

14 KEN SALAZAR, Secretary of the Department )  
of Interior - United States of America, LARRY )  
15 ECHO HAWK, Assistant Secretary of the )  
Department of Interior-Indian Affairs - United )  
States of America, MICHAEL BLACK, )  
16 Director of the Bureau of Indian Affairs of )  
Department of Interior - United States of )  
17 America, and ROBERT EBEN, Superintendent )  
of the Department of Interior Indian Affairs, )  
18 Southern California Agency, in their official )  
capacity; and DOE Defendants, 1 through 10, )  
19 inclusive, )

20 Defendants. )  
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CASE NO. 11-cv-2276-IEG (BLM)

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF PLAINTIFFS' SUMMARY  
JUDGMENT MOTION**

JUDGE: Hon. Irma E. Gonzalez  
COURTROOM: 1  
DATE: August 17, 2012  
TIME: 10:30 a.m.

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## INTRODUCTION

This Court is familiar with the case so the extensive background/history will not be recited. Plaintiffs' tribal enrollment was subject to a final decision in April 1995 by Assistant Secretary Ada Deer. The Band's attorney could have appealed the Assistant Secretary's decision to federal district court within the six-year period following the decision, but did not bring any challenge. The decision was final and under government-to-government relations, is entitled to finality.

Since the Ada Deer decision, the Altos were enrolled tribal members, despite a challenge brought by Diana Martinez and some tribal members in *Caylor v. Bureau of Indian Affairs*, 03cv1859-J(JFS) wherein individual members of the San Pasqual Tribe sued the Department of the Interior, BIA, alleging the agency had wrongfully enrolled the descendants of Marcus Alto Sr., and again in *Atilano v. Bureau of Indian Affairs*, 05cv1134-J (BLM) wherein individual members of the San Pasqual Tribe sued the BIA. Both cases were dismissed.

The Enrollment Committee consists of 5 tribal members. The current Alto family disenrollment action began after an Alto family member became a complaining witness to the San Diego County District Attorney's embezzlement charges against Enrollment Committee Chair, Victoria Diaz. Another Enrollment Committee member, Diana Martinez, submitted two previous declarations against the Alto Plaintiffs' membership but refused to recuse herself. The vote to disenroll the Plaintiffs was 3-2. Two members advised the BIA that the manner in which the Altos were recommended for disenrollment violated their civil rights. Unfortunately, the Assistant Secretary turned a blind eye to his fiduciary duty to ensure that tribal members received due process in enrollment matters, and failed to resolve the Tribe's own conflicting evidence in making his determination that the Alto Plaintiffs should be removed from the federally approved tribal roll.

As demonstrated by the agency record, the Assistant Secretary's findings are arbitrary and without basis. Plaintiffs are vested members of the Tribe and thus Echo Hawk's decision is subject to heightened scrutiny. The Assistant Secretary's order terminating the Plaintiffs' long time tribal membership and recognition as San Pasqual Indians, was in violation of their constitutional right to due process and should be reversed.

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1 **AUTHORITY**

2 The Administrative Procedure Act, 5 U.S.C. § 706, provides that a court must hold unlawful  
3 and set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in  
4 accordance with law.” 5 U.S.C. §706 (2)(A). “To make this finding the court must consider whether  
5 the decision was based on a consideration of the relevant factors and whether there has been a clear  
6 error of judgment.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The  
7 agency must articulate a rational connection between the facts found and the conclusions made. See  
8 *Latino Issues Forum*, 558 F. 3d 936, 941 (9th Cir. 2009); *Environmental Def. Ctr., Inc. v. EPA*, 344  
9 F. 3d 832, 858 n.36 (9th Cir. 2003), cert. denied, 541 U. S. 1085 (2004).

10 **I. THE TRIBE’S ENROLLMENT COMMITTEE’S REPEATED LITIGATION**  
11 **OF WHETHER MARCUS ALTO SR. WAS ADOPTED, AND WHAT MARIA**  
12 **DURO’S 1928 TYPEWRITTEN APPLICATION STATING “NO ISSUE”**  
**MEANS, IS BARRED BY THE DOCTRINES OF RES JUDICATA AND/OR**  
**COLLATERAL ESTOPPEL.**

13 A. Collateral Estoppel. Collateral estoppel protects litigants from the burden of  
14 relitigating an identical issue with the same party or his privy and prevents repeated and needless  
15 litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

16 On June 13, 1991, the Tribe’s Enrollment Committee objected to the Alto descendants  
17 enrollment asserting that Maria Duro’s application for inclusion in the California Indian roll, #8685,  
18 stated that she had no children. (EXH 2 [AP 000592])

19 Thereafter, on April 10, 1995, Assistant Secretary Ada Deer resolved the “no issue”  
20 adversely against the Band. (EXH 5 [AP 001517-1518]) Thus, the doctrine of collateral estoppel  
21 precluded Echo Hawk from making a finding that Maria (Duro) Alto had “no issue” based upon her  
22 typewritten application for inclusion in the California Indian roll (EXH 1 [AR 001137, AR 001147])  
23 because the issue had been previously decided adversely in the 1994/1995 proceedings, and was  
24 entitled to collateral estoppel effect.

25 B. Res judicata. The doctrine of *res judicata* is applicable ““whenever there is (1) an  
26 identity of claims, (2) a final judgment on the merits, and (3) privity between parties.”” *United States*  
27 *v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011). *Res judicata*  
28 applies with equal force to administrative as well as judicial decisions “[w]hen an administrative

1 agency is acting in a judicial capacity . . . resolv[ing] disputed issues of fact properly before it.” *See*  
2 *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

3 It is undisputed that the statements of Mellie Duenas, Felie Quisquis and Florence Shippek  
4 were executed in February 1994, and were therefore available as evidence. Mellie Duenas stated that  
5 Marcus Alto Sr.’s parents were Mexican, his real mother’s name was “Venedita” who lived in  
6 Arlington, and Marcus Alto’s father’s real name was “Juan Garcia.” Felie Quisquis stated that it was  
7 a known fact that Marcus Alto Sr. was not the real son of Jose and Maria Duro, and that Marcus told  
8 Felie that he was on his way to Arlington to visit his mother. Florence Shippek stated that she learned  
9 from elder tribal members that Jose and Maria (Duro) Alto had no children but raised one belonging  
10 to a “non-Indian” family. (See EXHs 7, 8, 9, respectively)

11 There is a presumption that the statements of Mellie Duenas, Felie Quisquis, and Florence  
12 Shippek were reviewed by Assistant Secretary Ada Deer because her final decision states, “all  
13 available documentation involving this case has been thoroughly reviewed.” (EXH 5 [AR 001518])  
14 The doctrine of res judicata retains full force when applied to adjudications of past facts, where the  
15 second proceeding involves the same claim or the same transaction. *Stuckey v. Weinberger*, 488 F.  
16 2d 904, 911 (9th Cir. 1973). Additionally, there is a legal presumption that Assistant Secretary Ada  
17 Deer reviewed the February 1994 declarations of Mellie Duenas, Felie Quisquis and Florence Shippek  
18 because 25 CFR § 2.10 (a) required that the Band’s “appeal” provide a “statement of reasons” for the  
19 appeal and that it “be accompanied by or otherwise incorporate all supporting documents,” and that  
20 (c) the statement of reasons and supporting documents be filed within 30 days after the notice of  
21 appeal was filed (54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]) when the Band filed its  
22 notice of appeal in 1994. (EXH 6)

23 The Regional agency recognized that there was a final agency decision when it found:

24 It is inappropriate for the Committee to continue to raise this issue of the  
25 validity of the inclusion of Mr. Alto and his descendants on the the Band’s  
26 membership roll or to attempt to disenroll his descendants and continue to  
seek remedy from the BIA. (EXH 12 [AR 001473])

27 Echo Hawk nonetheless reconsidered the prior 1994 evidence, despite the presumption that  
28 the Tribe was required to present it in the 1994/1995 proceedings before Assistant Secretary Ada

1 Deer, and according to Diana Martinez's 2004 affidavit "the Band produced information confirming  
2 that Marcus Alto Sr. was not a blood descendant eligible for Band enrollment." (EXH 4 [AR  
3 000804])

4 Assistant Secretary Echo Hawk also concluded that he could consider new evidence of  
5 affidavits executed in *Caylor v. the Bureau of Indian Affairs*, "having been executed nine-years after  
6 the AS - IA issue her final decision respecting the enrollment of the Alto descendants." (EXH 1 [AR  
7 001151]) However, Echo Hawk failed to acknowledge that the Tribe was well aware of its right to  
8 appeal Ada Deer's decision as acknowledged by the Tribe's attorney's letter that stated: "failure to  
9 allow the Band to present its evidence would deny the Band its Due Process rights...and would thus  
10 be challengeable by federal court action." (EXH 3 [AR 002298])

11 In 2004, in *Caylor v. Bureau of Indian Affairs*, the district court entered a dismissal which  
12 order was based in part on statute of limitations grounds. The court ruled:

13 The BIA issued a final administrative decision pertaining to the enrollment in  
14 the Band of Marcus Alto, Sr. and twenty-three of his named descendants on  
15 April 10, 1995. (Citation) The period to bring a suit based on this final action  
16 would have expired in 2001, six years later. Although Plaintiffs claim they  
17 only seek review of decisions made in the past six years, confusingly, they  
18 spend considerable space in their opposition arguing the error of the initial  
19 1995 decision. (Citation) Any review of the 1995 administrative decision to  
20 admit Alto and the named descendants is clearly barred by the statute of  
21 limitations. (EXH 11 [AR 000810])

22 The Tribe's Enrollment Committee consists of 5 tribal members, and at any given time, the  
23 Enrollment Committee may be stacked to repeatedly litigate this issue. Litigation is highly stressful  
24 and costly to litigants. In this case, because of Echo Hawk's decision, some Alto family members  
25 were forced to leave their homes on the reservation. This Court should make it abundantly clear that  
26 the BIA erred when it reviewed the renewed enrollment challenge because the 1995 Ada Deer  
27 decision was final and binding – there is absolutely no reason explained why the "new" evidence and  
28 declarations could not have been found or presented during the 6-year period.

Final must mean final. In Plaintiffs' case, the Assistant Secretary was delegated authority to  
make a "final" and "conclusive" decision as to the Tribe's membership. The Tribe's Enrollment  
Committee failed to challenge the final 1995 agency decision within the six-year statute of limitation  
period. That decision became binding on both the Tribe and the Assistant Secretary under their

1 government-to-government relationship. To hold otherwise, would permit the Tribe to avoid the  
2 results of a final decision, and continually bring forth new declarations and manufactured evidence,  
3 such as the anthropology report of Christine Grabowski, PhD, and repeatedly litigate the same issue  
4 over and over – whether Marcus Alto Sr. was adopted.

5 **II. ECHO HAWK’S DECISION MUST BE REVERSED BECAUSE THE BIA**  
6 **NEVER MADE A DECISION ON WHETHER THE ENROLLMENT**  
7 **COMMITTEE VIOLATED THE PLAINTIFFS’ DUE PROCESS RIGHT**  
8 **TO A FAIR DISENROLLMENT PROCEEDING.**

9 The Alto family descendants advised the BIA that Enrollment Committee member Diana  
10 Martinez was a long time advocate of having the Plaintiffs’ family excluded from the Tribe. (EXH  
11 13 [AR 001717]) The BIA was also informed by Enrollment Committee member Robert Phelps that  
12 Diana Martinez was asked to recuse herself from making any decision on the current enrollment  
13 challenge because she was a witness in the case but she refused to recuse herself from the decision.  
14 (EXH 14 [AR 001894]) Additionally, the BIA was advised by Phelps that Enrollment Committee  
15 Chair, Victoria Diaz, had recently been indicted on embezzlement charges, and an Alto family  
16 member was serving as a witness to the charges. (EXH 14 [AR 001895]) The BIA was in  
17 possession of documents supporting Phelps’s and the family’s allegations of the criminal  
18 investigation against Diaz. (See BIA-PRO-002-015 [AR 001833-AR 001836])

19 The BIA was aware that two Enrollment Committee members had claimed that the Alto  
20 Plaintiffs were disenrolled without affording them a fair process. (EXH 14 [AR 001893]); (See also  
21 BIA-PRO-002-037 [AR 002051] “For the Record...Joe Navarro stated that the Enrollment  
22 Committee failed to follow due process thereby violating the civil rights of the Alto family.”) Mr.  
23 Phelps advised the BIA that at the enrollment committee meeting on July 25, 2008 to discuss the  
24 enrollment challenge, he and another committee member voiced concerns about the quality of the  
25 Tribe’s anthropology expert’s research and the validity of the report’s conclusions. (EXH 14 [AR  
26 001893]) Mr. Phelps further advised the BIA that during a conference call with Dr. Grabowski, he  
27 was not given opportunity to question the anthropology expert. In in the middle of being questioned  
28 by another committee member, the Committee Chair, Ms. Diaz, hung the phone up refusing to allow  
the examination of Dr. Grabowski to continue. (EXH 14 [AR 001893-AR 001894])



1 Mr. Phelps notified the BIA that the Enrollment Committee's "findings" were  
2 drafted by legal counsel the day before the Enrollment Committee's meeting, and arrived at his home  
3 via Federal Express only four hours after the meeting. (EXH 14 [AR 001894])

4 The Assistant Secretary's decision acknowledges that "the Indian Civil Rights Act ("ICRA")  
5 requires disenrollments be conducted in a manner that provides the tribal member with due process  
6 and ensures that member's equal protection under the law (25 U.S.C. § 1302(a)(8)). The federal  
7 government does not acknowledge or accept an action by a tribal government that violates ICRA.  
8 (EXH 1 [AR 001146]) The enrollment committee's "recommendation" to disenroll the Plaintiffs was  
9 based on a 3-2 vote where two-members participated in the vote had a major conflict of interest. If  
10 the BIA has no duty to ensure due process under ICRA, then the statute is meaningless.

11 Despite being provided relevant information by two enrollment committee members, and  
12 having an acknowledged duty to ensure procedural due process, the BIA failed to rule on whether the  
13 Enrollment Committee's actions and lack of recusal violated the Plaintiffs' due process rights.

14 **III. ECHO HAWK'S DECISION SHOULD BE REVERSED BECAUSE HIS**  
15 **FINDING THAT THE 1907-1913 SAN PASQUAL RESERVATION**  
16 **CENSUSES SHOULD BE GIVEN "VERY WEIGHTY" EVIDENCE IS NOT**  
17 **SUPPORTED BY THE AGENCY RECORD.**

18 An agency must articulate a rational connection between the facts found and the choice made.  
19 *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 131 (D.D.C. 2002). Although the  
20 court should not substitute its judgment for that of the agency, its review must be "searching and  
21 careful." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (citation omitted).  
22 "[W]here the agency has failed to provide a reasoned explanation, or where the record belies the  
23 agency's conclusion, we must undo its action." *Ransom v. Babbitt*, 69 F. Supp.2d 141, 149 (D.D.C.  
1999) (citation omitted).

24 The 1907-1913 San Pasqual Indian censuses contain various inaccurate ages of the members  
25 listed and are therefore not trustworthy. (See BIA-PRO-003-039 [Beginning with AR 002352])

26 It is undisputed that the San Pasqual tribal members did not live on the reservation. (EXH 1  
27 [AR 001139]) The ages reported by the census taker even as to the Alto family fluctuated from year  
28 to year as follows:

1 1907

The June 30, 1907 Census (submitted by Amos R. Frank) states:

2 Jose Alto, age 50

Maria Alto, age 45

3 Frank Alto, age 25

4 1908

The June 30, 1908 Census (submitted by Thomas M. Games) states:

5 Jose Alto, age 50 (*Jose is the same age as reported by A.R. Frank the previous year*)

Maria Alto, age 52 (*Maria is now seven years older*)

6 Frank Alto, age 24 (*Frank is now a year younger*)

7 1909

The June 30, 1909 Census (submitted by Amos R. Frank) states:

8 Jose Alto, age 50 (*Jose is the same age as reported by A.R. Frank in 1907*)

Maria Alto, age 45 (*Maria is the same age as reported by A.R. Frank in 1907*)

9 Frank Alto, age 26 (*Frank is a year older than the age reported by A.R. Frank in 1907*)

10 1910

The June 30, 1910 Census (submitted by Amos R. Frank) states:

11 Jose Alto, age 50 (*Jose is the same age as reported by A.R. Frank in 1907*)

Maria Alto, age 45 (*Maria is the same age as reported by A.R. Frank in 1907*)

12 Frank Alto, age 25 (*Frank is the same age as reported by A.R. Frank in 1907*)

13 1911

The June 30, 1911 Census (submitted by Amos R. Frank) states:

14 Jose Alto, age 51 (*Jose is a year older than reported by A.R. Frank in 1907 and 1909*)

Maria Alto, age 45 (*Maria is the same age as reported by A.R. Frank in 1907*)

15 Frank Alto, age 26 (*Frank is the same age as reported by A.R. Frank in 1909*)

16 1912

The June 30, 1912 Census (submitted by Thomas M. Games) states:

17 Jose Alto, age 52 (*Games adds a year to Jose's 1911 age reported by A.R. Frank*)

Maria Alto, age 46 (*Maria is six years younger than reported by him in 1908*)

18 Frank Alto, age 27 (*Games adds a year to Frank's 1911 age reported by A.R. Frank*)

19 The BIA (Regional) found the fact that Marcus Alto Sr. was not listed on the 1907-1913

20 San Pasqual Indian censuses did not prove that he was not the son of Jose and Maria Alto. (EXH 11

21 [AR 001470])

22 Contrary to the Regional Director's decision, Echo Hawk found it "particularly probative"

23 that Marcus Alto Sr. was not identified on the early San Pasqual Censuses. (EXH 1 [AR 001137])

24 In making this finding, Echo Hawk's order was arbitrary because it failed to address the Tribe's

25 anthropology expert's evidence, at page 40, footnote 121 of the April 2010 report, which identifies

26 several children born to other San Pasqual tribal members, between 1897 and 1903 who were NOT

27 identified on the San Pasqual censuses either. (See EXH 16 [001048])

28 ///

1 Furthermore, the 1920 U.S. census identifies Marcus Alto Sr. as Maria and Jose Alto's son  
2 and the entire family is identified as Indian. (EXH 17 [AR 002431]) According to then Enrollment  
3 Committee member Robert Phelps, who is also a history professor, "adopted children were often  
4 listed in the census as 'adopted.'" (EXH 14 [AR 001896])

5 Echo Hawk's order failed to explain a rational connection between his finding that "the  
6 adoption theory" is the "most logical explanation" based upon the early 1907-1913 censuses because  
7 Marcus Alto Sr. was identified and listed as the son of Jose and Maria Duro, and identified as Indian,  
8 on the 1920 U.S. Census and not listed as "adopted." The Defendants admit that the San Pasqual  
9 1907-1913 Indian censuses contain inaccuracies in Paragraph 76 of their Answer to First Amended  
10 Complaint. (EXH 15) Therefore, the 1907-1913 San Pasqual Indian censuses are not trustworthy,  
11 and Echo Hawk erred in giving the censuses "particularly probative" weight in favor of "the adoption  
12 theory."

13 **IV. ECHO HAWK'S DECISION SHOULD BE REVERSED BECAUSE HIS**  
14 **RULING WAS BASED ON SEVERAL AFFIDAVITS AND STATEMENTS**  
**WHICH LACKED FOUNDATION.**

15 Echo Hawk's order states:

16 I find the testimonial evidence contained in affidavits by tribal elders, tribal  
17 enrollment committee members, close acquaintances of Maria Duro and  
18 Marcus Alto, and especially anthropologist Florence Shipek, to be very  
credible and probative respecting Marcus's status as biological or adoptive son  
of Jose and Maria Duro Alto. (EXH 1 [AR 001138])

19 The order/decision should be reversed because many of the affidavits/statements contain  
20 unsupported statements which lack foundation or are contradicted by the Tribe's own evidence.

21 For example, in an unsworn statement, Felie Quisquis states that he was born on April 22,  
22 1907. (EXH 7 [AR 002650]) Echo Hawk concluded that Marcus and Felie Quisquis had a close  
23 relationship and "were near the same age" (EXH 1 [AR 001137]) despite the Band's anthropology  
24 expert's conflicting assertion that Felie Quisquis was born in 1912. (EXH 16 [AR 001051]) In  
25 reaching his conclusion that Felie Quisquis and Marcus Alto were the same age, Echo Hawk  
26 arbitrarily found the unsworn statement credible, while failing to recognize that the Tribe's  
27 anthropology expert found that Felie Quisquis was born in 1912. Therefore, Echo Hawk failed to  
28 articulate a rational connection between the facts found and the choices made. *Ranchers Cattlemen*

1 *Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1093 (9th  
2 Cir. 2005) (citation omitted).

3 Assistant Secretary Echo Hawk also found Mellie Duenas's affidavit credible, and concluded  
4 that Duenas "lived next to Maria Alto in the early 1930's" (EXH 1 [AR 001150]) despite Escondido  
5 directory evidence that Maria Alto did NOT live on Pennsylvania Avenue in Escondido during the  
6 early 30's (EXH 31 [AR 000464, AR 000466]), and despite Laura Guidry's affidavit that her family  
7 lived in the 400 block of Pennsylvania Avenue for many years. (EXH 26 [AR 002653])

8 Similarly, Echo Hawk accepted as true Shipek's hearsay statement that elders, and in  
9 particular, Sosten L. Alto, who was the original Chair of the San Pasqual Enrollment Committee and  
10 in charge of determining band membership, told Shipek that Marcus Alto was adopted and  
11 "non-Indian."<sup>1</sup> (EXH 9 [AR 002196])

12 The Assistant Secretary likewise accepted the statements of Sosten Alto's daughter Laura  
13 Guidry, and step-daughter Mary Arviso, that they were related to Jose and Maria Alto, even though  
14 no evidence was produced as to how the Sosten Alto family was blood-related to Jose Alto and  
15 Maria Duro Alto. Their credibility was questionable in light of the Tribe's own evidence – the death  
16 certificate of Sosten Alto. Laura Guidry's mother, Pauline Damron-Alto was married to Guidry's  
17 father, Sosten Alto for 30-years. Upon Sosten's death in September 1973, Pauline Damron-Alto,  
18 informed the authorities that Sosten Alto's ancestry, his parents' names and place of birth were  
19 "unknown." (EXH 27 [AR 000515]) Pauline Alto did not know who here husband's parents were,  
20 despite her daughter, Laura's claim that her aunt was Maria Alto. (EXH 26 [AR 002653])

21 When the relevance of evidence depends on whether a fact exists, proof must be introduced  
22 sufficient to support a finding that the fact does exist. (See, Fed. R. Civ. P. 104(b).) Frances Jones  
23 also identifies Maria Duro Alto, as her "great grandmother" but does not provide the names of her  
24 ancestors in common with Maria Duro Alto in her affidavit. (EXH 28 [AR 000801])

25 ///

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26  
27 <sup>1</sup> The Regional Director determined that the later hearsay reported to Shipek by Sosten Alto  
28 to be not as probative as Marcus Alto Sr.'s Application for the California judgment roll dated  
November 14, 1930, which contained an affidavit in reference to Marcus Alto's ancestry. (EXH 12  
[AR 001471])

1 Helen Mendez's statement that it was "common knowledge" that Marcus Alto Sr. was  
2 non-Indian lacks personal knowledge and is rebutted by the 1920 U.S. Census which identifies  
3 Marcus Alto Sr. as the Indian son of Jose and Maria Alto. (EXH 17 [AR 002431]) Similarly, Mellie  
4 Duenas's statement that she was told that Marcus Alto Sr.'s father was named Juan Garcia and was  
5 Mexican lacks personal knowledge and foundation. (EXH 8 [AR 002656]) Gene Morales'  
6 statement that the "Garcia brothers" who hauled fertilizer in old San Pasqual Valley were uncles to  
7 Marcus Alto Sr. also lacks foundation. (EXH 29 [AR 002349])

8 Gene Morales executed his affidavit in 2004 and claimed to have attended elementary school  
9 in Escondido with Marcus Sr. from 1<sup>st</sup> through 7<sup>th</sup> grade; an impossibility because he was born in  
10 1911 and was at least 4 to 6 years younger than Marcus Alto Sr. (EXH 29 [AR 002349])

11 Echo Hawk found the several affidavits/statements credible even though they are based on  
12 assumptions of fact without evidentiary support or foundation, and therefore have no evidentiary  
13 value.

14 The Regional Director determined that the affidavit of Florence Shipek stating that Maria  
15 Duro Alto and her husband Jose Alto had no children but had raised one belonging to a "non-Indian  
16 family" did not provide evidence to overcome the Plaintiffs' enrollment. (EXH 12 [AR 001471]) In  
17 contrast, Echo Hawk acknowledged the affidavits gave credence to the "adoption theory" because  
18 they stated that Marcus Alto Sr. was "'Mexican, not Indian.'" (EXH 1 [AR 001151]) In doing so,  
19 Echo Hawk also failed to give any weight to public record documents establishing that Marcus Alto  
20 Sr. was "Indian." (EXH 17 [AR 002431]; EXH 19 [AR 002635]; EXH 20 [AR 000490])

21 Plaintiffs' Statement of Facts and Conclusions of Law in Support of Plaintiffs' Summary  
22 Judgment Motion individually identifies the inconsistent and flawed affidavits in detail and provides  
23 a reasoned basis why the Tribe's affidavits should not have been given any weight.

24 **V. ECHO HAWK'S DECISION SHOULD BE REVERSED BECAUSE HE**  
25 **FAILED TO RECONCILE THE FACT THAT THE TRIBE'S AFFIDAVITS**  
26 **AND STATEMENTS THAT CLAIMED MARCUS ALTO SR. WAS**  
**"NON-INDIAN" WERE REBUTTED BY DNA EVIDENCE OF THE**  
**FAMILY'S NATIVE AMERICAN ANCESTRY.**

27 Assistant Secretary Echo Hawk's order is also arbitrary because he gave probative weight to  
28 affidavits executed many years after the fact, which contained hearsay statements, and failed to

1 reconcile the fact that Plaintiffs produced DNA evidence of their Native American ancestry.  
2 Echo Hawk found that many “of the affidavits note that Marcus Alto was non-Indian and the child of  
3 a different family not just a different mother.” (EXH 1 [AR 00 1154] emphasis added) The  
4 statements/affidavits were entitled to little or no weight, and certainly not “substantial weight” in  
5 light of the actual certified DNA test evidence of descendant Ray E. Alto, Marcus Alto Sr.’s  
6 grandson, which establishes that the descendants possess Native American ancestry. (EXH 25 [AR  
7 000527])

8 **VI. ECHO HAWK’S DECISION SHOULD BE REVERSED BECAUSE HE GAVE**  
9 **IMPROPER AND SIGNIFICANT WEIGHT TO THE TYPEWRITTEN “NO**  
10 **ISSUE” STATEMENT IN MARIA DURO’S APPLICATION FOR**  
11 **INCLUSION IN THE CALIFORNIA INDIAN JUDGMENT ROLL.**

12 Maria Duro’s 1928 application was typewritten for inclusion in the California Indian  
13 judgment roll and she signed it with a fingerprint indicating that she likely did not read or write  
14 English. (EXH 32 [AR 001664])

15 Echo Hawk gave improper and significant weight to the typewritten statement of “no issue”  
16 (EXH 1 [AR 001137, AR 001147]) and found that the typewritten words “no issue” were particularly  
17 probative, without reconciling the Tribe’s own contradictory evidence submitted by the Tribe’s  
18 anthropology expert which concluded that Maria Duro had a son named Ferdinando. (EXH 22 [AR  
19 002080]) The Assistant Secretary’s decision that Maria Alto had “no issue” was arbitrary because  
20 “three of the affiants claim blood relationship to Maria Duro Alto.” (EXH 1 (AR 001150)) One  
21 affiant, Francis Jones, claims that she is the great-granddaughter of Maria Duro Alto. (EXH 28 [AR  
22 000801]) Echo Hawk therefore failed to articulate a rational connection between the facts found of  
23 “no issue” and the choices made. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of*  
*Am. v. U.S. Dep’t of Agric.*, *supra*, 415 F.3d 1078, 1093.

24 **VII. ECHO HAWK’S DECISION SHOULD BE REVERSED BECAUSE HIS**  
25 **FINDING THAT MARCUS ALTO SR. WAS BORN IN 1907 IS**  
26 **UNREASONABLE AND UNSUPPORTABLE BASED ON THE AGENCY**  
27 **RECORD.**

28 The record shows that in a four-page interim ordered issued on October 29, 2009, Echo Hawk  
specifically asked for Marcus Alto Sr.’s social security application (Item 11) noting the original

1 application was relevant. (EXH 36 [AR 0000902]) However, in his decision, Echo Hawk gave  
2 weight to the Tribe's submission of a print-out of the Social Security Index downloaded from  
3 Ancestry.com which identifies Marcus Alto Sr.'s birth year as 1907<sup>2</sup>, while not stating why the  
4 original application, December 12, 1936, which identifies Marcus Alto as "Indian" and his birth date  
5 as April 25, 1905, and which identifies his parents as Joe and Mary Duro Alto, Indian, had no  
6 relevance. (EXH 20 [AR 000490])

7 Echo Hawk also had a 1997 prior decision by the United States Department of Interior,  
8 Probate No. P PH 1421 96, which decided that Marcus Alto Sr.'s birth date as April 25, 1905. (EXH  
9 35 [AR 001985]) Echo Hawk never gave this decision any weight despite the fact there was no  
10 evidence that Marcus Alto Sr. ever acknowledged that his birth year was 1907.

11 In making his decision favoring the "adoption theory" that Marcus Alto was born in 1907,  
12 Echo Hawk failed to identify why the Social Security Index from Ancestry.com and the unsworn  
13 statement of Felie Quisquis was more probative evidence than Marcus Alto's original social security  
14 application (EXH [AR 000490]), his driver's license (Agency Record - BIA-PX 19 [AR 000492]),  
15 the probate court's decision finding Marcus Alto Sr. was born in 1905 (EXH 35 [AR 001985]), and  
16 various birth certificates that identify Marcus Alto's age on them (See Agency Record - BIA-PX 18  
17 [AR 000487]; BIA-PX 18 [AR 000473]) had no bearing.

18 Echo Hawk's reliance on Felie Quisquis's unsworn affidavit to corroborate his finding that  
19 Marcus Alto Sr.'s birth year was 1907 because Quisquis was a "childhood friend" (EXH 1 [AR  
20 001149]) and nearly the same age, was particularly arbitrary because Echo Hawk never reconciled  
21 the fact that the Tribe's own anthropology expert, Christine Grabowski, PhD reported Quisquis's  
22 birth year as 1912, not 1907. (EXH 16 [AR 001051])

23 Notwithstanding, Plaintiffs ask this Court to take judicial notice of the 1930 U.S. Census  
24 wherein it also supports Marcus Alto Sr.'s birth year as 1905 and rebuts the Tribe's and Echo  
25

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26 <sup>2</sup> The order states: "The 1907 date on the proffered baptismal certificate appears to agree  
27 with the age first given on his marriage certificate, with the 1920 U.S. Census, and with the Federal  
28 Social Security Index." (EXH 1 [AR 001149]) The index cannot be relied upon because the original  
application clearly states his birth year is 1905. Additionally, Marcus Alto Sr.'s age and year  
married is listed on the 1930 U.S. Census.

1 Hawk's conclusion that Marcus Alto Sr.'s birth year was 1907 based on the marriage certificate.  
2 The 1930 U.S. Census record identifies Marcus Alto Sr. as "19" when first married.<sup>3</sup>

3 It was a contested issue as to whether the marriage certificate was crossed out from 19 to 18  
4 or 17 to 18. The Tribe's anthropology expert, Christine Grabowski, PhD, claims that Marcus Alto's  
5 age was changed from 17 to 18 on the marriage certificate. (EXH 22 [AR 002085]) Plaintiffs assert  
6 that Marcus Alto Sr. was 19 years-old when he was married (EXH 33 [AR 001005]) Plaintiffs  
7 request for judicial notice should be granted because the Tribe's anthropology expert cited to the  
8 1930 U.S. Census report identifying Marcus Alto (at p. 47) and stated that it was Exhibit 69 (at p. 47,  
9 fn. 142), but instead the Tribe submitted the 1930 U.S. Census page for Sosten Alto, not Marcus  
10 Alto Sr. (EXH 16 [AR 001055]; see also EXH 34) Had the Tribe submitted the correct 1930 U.S.  
11 Census page for Marcus Alto Sr., it would have destroyed their "adoption theory" based upon the age  
12 that was crossed-out in Marcus Alto Sr.'s marriage certificate.

13 **VIII. ECHO HAWK'S DECISION SHOULD BE REVERSED BECAUSE HE FOUND**  
14 **THAT THE FRANK ALTO LETTERS WERE "CORROBORATIVE"**  
15 **EVIDENCE OF THE ENROLLMENT COMMITTEE'S "ADOPTION**  
**THEORY" WHEN THE LETTERS SHOULD HAVE BEEN GIVEN NO**  
**WEIGHT.**

16 The Tribe submitted letters purportedly written by Frank Alto. One letter was dated February  
17 23, 1910, addressed to Frank Ames. The letter identifies several adult tribal members living in  
18 Orange and Riverside Counties. In determining the letter's relevance, the Regional Director's  
19 decision states, "we are unable to determine its relevance and it does not demonstrate Mr. Alto's  
20 enrollment was based on inaccurate information." (EXH 12 [AR 001470])

21 In contrast, Echo Hawk found the Frank Alto letters were "corroborative" evidence that  
22 Marcus Alto Sr. was a non-tribal member raised by Jose and Maria Alto because the letters did not  
23 mention Marcus Alto Sr. as a family member. (EXH 1 [AR 001154]) However, the Tribe's  
24 anthropology expert, Christine Grabowski, PhD, reports that there were several children born to  
25 tribal members and these children were not named in the San Pasqual 1907-1913 Indian Censuses or

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26  
27 <sup>3</sup> In her April 29, 2010 report, the Tribe's expert relies upon the 1930 U.S. Census to claim  
28 that Marcus Alto Sr. was living in Escondido and worked at the lemon-picking industry, but the  
actual Exhibit 69 as noted in footnote 142, is the 1930 U.S. Census page for Sosten Alto. (See  
Plaintiffs' Request for Judicial Notice)



1 mentioned in the Frank Alto letters either. (See EXH 16 [001048]) Thus, Echo Hawk failed to  
2 reconcile the evidence when he determined the Frank Alto letters should be given “corroborative”  
3 weight to the “adoption theory.”

4 Furthermore, the BIA was in possession of Frank Alto letters with different signatures. (EXH  
5 22 [AR 002079]; EXH 38, EXH 39 [AR 002707]) Given the substantially different signatures,  
6 Echo Hawk abused his discretion in giving the Frank Alto letters any weight, let alone  
7 “corroborative” weight.

8 **IX. ECHO HAWK’S DECISION SHOULD BE REVERSED BECAUSE OF HIS**  
9 **UNSUPPORTED FINDING THAT JOSE ALTO IS NOT THE BIOLOGICAL**  
10 **FATHER OF MARCUS ALTO SR.**

11 According to the Tribe’s expert, Christine Grabowski, PhD, in her June 2008 report at page  
12 27, footnote 87, the baptismal record (Enrollment Committee’s Exhibit 66), produced in the Mast  
13 enrollment challenge dated April 19, 2007, deviates from a handwritten entry in the purported church  
14 baptismal record. (EXH 22 [AR 002085]) The Plaintiffs dispute the baptismal entry, because the  
15 name, Roberto Marco Alto, is not the same nor is the birth year.

16 In the November 26, 2008 decision, the BIA Regional Director determined: “Assuming this  
17 baptism record is Mr. Alto’s, this would prove that he is the son of Jose Alto...If this were the case  
18 Mr. Alto would still be eligible to be included on the San Pasqual membership roll as a descendant of  
19 Jose Alto” (EXH 12 [AR 001470])

20 The Assistant Secretary arrived at his conclusion that the individual child described in the  
21 1907 baptismal record was Marcus Robert Alto, Plaintiffs’ ancestor, but that the child’s father, Jose  
22 Alto, identified in the baptismal record was not a San Pasqual tribal member because “there were  
23 many Jose Altos.” (EXH 1 [AR 001153]). This finding was arbitrary because the Tribe’s own  
24 anthropology expert, Christine Grabowski, PhD, concedes in her April 2010 report on page 37, that  
25 the child’s baptismal sponsors were San Pasqual related. (EXH 16 [AR 001045]) Therefore, Echo  
26 Hawk’s finding in footnote 17, and in Paragraph 12 on page 17 of his order, that “there were many  
27 Jose Altos” and that some other “Jose Alto” was Marcus Alto Sr.’s biological father (EXH 1 [AR  
28 001153]) is patently unreasonable.

///

1 Furthermore, the 1920 U.S. Census lists Marcus Alto Sr. as the “Indian” son of Jose and  
2 Maria Alto. (EXH 17 [AR 002431]) Marcus Alto Sr.’s marriage certificate identifies himself as  
3 “Indian,” his father as Joseph Alto, his mother as Mary Duro, and he states that both his parents were  
4 born in “San Pasqual.” (EXH 19 [AR 002635]) Marcus’s 1936 social security application identifies  
5 his date of birth as April 25, 1905, his parents as Joe Alto and Mary Duro, and himself as “Indian.”  
6 (EXH 20 [AR 000490]) Although Reginaldo Duro identified Marcus’s father as “Joe Alto,” he listed  
7 Jose Alto as “Not Indian.” (EXH 21 [AR 001555]) However this is rebutted by Maria Duro’s  
8 application for inclusion in the judgment roll which states that her husband was full blooded Digueno  
9 Indian. (EXH 5 [AR 001517]) Maria Duro’s claim that her husband was Digueno Indian is  
10 corroborated before her application was executed, because Jose Alto’s 1921 death certificate also  
11 states Jose Alto was an “Indian,” and his wife was “Maria.” Jose Alto was buried in the San Pasqual  
12 Indian cemetery. (EXH 40 [AR 000210]) In addition, the Tribe’s anthropology expert, Christine  
13 Grabowski, PhD, produced a bible page that confirms that Jose Alto was related to San Pasqual tribal  
14 members. (EVIDENCE: EXH 16 [AR 001055]; EXH 40 [AR 000211]) In addition, Jose Alto was  
15 identified as a tribal member on the 1910 San Pasqual Indian Census.

16 Accordingly, Echo Hawk did not reconcile the record and make a rational connection between  
17 the facts found and the choice made. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of*  
18 *Am. v. U.S. Dep’t of Agric., supra*, 415 F.3d 1078, 1093. He erred in arbitrarily finding that some  
19 other Jose Alto was Marcus Alto Sr.’s biological father.

### 20 CONCLUSION

21 There is nothing more fundamental than one’s family and heritage. Assistant Secretary’s  
22 decision/order rewrote the Alto family’s lineage, identified the family as “non-Indian” and struck  
23 down nearly a century of prior BIA rulings and actions regarding Marcus Alto Sr. including one on  
24 parity by Echo Hawk’s predecessor, Assistant Secretary Ada E. Deer, which is entitled to res judicata  
25 effect. As set forth in Plaintiffs’ Statement of Facts and Conclusions of Law in Support of Plaintiffs’

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1 Summary Judgment Motion, Echo Hawk's findings were arbitrary, lacked foundation or were  
2 contradicted by the Tribe's evidence, and should be reversed.

3 Dated: June 18, 2012.

Respectfully submitted,

4  
5 s/ Thor O. Emblem

Attorney for Plaintiffs

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