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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY L. (HAYES) AGUAYO, et al., Plaintiffs, vs. S.M.R. JEWELL, the Secretary of the Department of the Interior et al., Defendants.	Case Number: 13-CV-1435-WQH-KSC FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT Hon. Judge William Q. Hayes Briefing Schedule Set By Court Order NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

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FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This suit arises from a dispute within the Pala Band of Mission Indians ("Band" or "Pala Band") concerning eligibility for tribal membership. Plaintiffs, Tiffany Aguayo and other descendants of Margarita Britten ("Plaintiffs"), were disenrolled by the Band in February 2012. Pursuant to the Band's laws, Plaintiffs appealed this decision to the Regional Director of the Bureau of Indian Affairs ("BIA"), who issued a nonbinding recommendation to the Band's Executive Committee that the Plaintiffs remain enrolled. After litigation and administrative appeals, Kevin K. Washburn, in his official capacity as Assistant Secretary – Indian Affairs ("Assistant Secretary") affirmed the recommendation of the Regional Director in a 23-page Decision dated June 12, 2013 ("Decision"). Plaintiffs bring this action against the Department of the Interior, the Assistant Secretary, and other federal officials ("Federal Defendants"), seeking to set aside the Assistant Secretary's Decision.

The Department's involvement in this membership dispute is a result of the Band's Constitution and 2009 enrollment ordinance, which confer upon the Regional Director certain obligations and authority over the Band's enrollment decisions. In issuing the June 12 Decision, the Assistant Secretary examined the Band's governing documents and tribal laws to determine the extent of that authority—specifically whether the Regional Director was empowered not only to make recommendations, but also to set aside enrollment decisions made by the Band. The Assistant Secretary reviewed these tribal documents and reasonably concluded that the Band's current governing document and tribal laws allowed the Regional Director only to make a recommendation as to tribal membership, consistent with membership being a fundamental aspect of tribal self-government and sovereignty. The Assistant Secretary reasonably interpreted the applicable laws and appropriately deferred to the Band's interpretation of its own tribal law and governing documents.

Plaintiffs argue the Band's original 1960s Articles of Association—rather than the more recent Constitution—is the Band's actual governing document, and under this document (and a prior enrollment ordinance), Federal Defendants have the final word on tribal membership. This conclusion is premised on Plaintiffs' argument that the Band's adoption and BIA's 2000 approval of a new Constitution were procedurally defective. The Assistant Secretary, however, reasonably interpreted the Band's laws, deferred to the Band's interpretation of its governing document, and explained his conclusion that the 1997 Constitution was properly adopted and effective—and even if there were procedural violations, they occurred outside the statute of limitations period. Therefore, the Assistant Secretary concluded that the 1997 Constitution and ensuing 2009 enrollment ordinance were in force at the time of the disenrollments and thus, the Regional Director could only issue a recommendation as to who was enrolled in the Band. Because these conclusions are reasonable and supported by the administrative record before the Assistant Secretary at the time, Plaintiffs' Motion for Summary Judgment should be denied, and Federal Defendants' Cross Motion for Summary Judgment should be granted.[1]

II. BACKGROUND

A. Tribal Sovereignty and Self Government

"For nearly two centuries," federal law has "recognized Indian tribes as 'distinct, independent political communities,'" *Plains Commerce Bank v. Long Family Land and Cattle*, 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)), "qualified to

[1] Plaintiffs have included a separate "statement of facts and conclusions of law" in support of their motion. ECF No. 54-2. Local rule 7.1(f) provides for a separate statement of material facts to be provided "[w]here appropriate," but does not require such a separate statement. Because this is an Administrative Procedure Act case, the relevant facts are contained within the record, and a separate statement is not called for. *San Joaquin River Grp. Auth. v. Nat'l Marine Fisheries Serv.*, 819 F. Supp. 2d 1077, 1083–84 (E.D. Cal. 2011) ("In APA cases, such statements are generally redundant because all relevant facts are contained in the agency's administrative record."); *accord Pinnacle Armor, Inc. v. United States*, 1:07-CV-01655 LJO DLB, 2013 WL 5947340, at *6 (E.D. Cal. Nov. 4, 2013). Federal Defendants therefore respond to the arguments contained in Plaintiffs' Statement in the Section IV, *infra*, and provide relevant facts in the following section. Of note, a significant number of Plaintiffs' "facts" are legal conclusions, which are inappropriate in a Statement of Facts.

exercise many of the powers and prerogatives of self-government[.]" *Id*. (citing *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978)). Because tribes operate within and subject to the sovereignty of the United States, tribal sovereignty "is of a unique and limited character." *Wheeler*, 435 U.S. at 323. Nevertheless, tribes retain all attributes of sovereignty that have not been "divested . . . by federal law" or by "necessary implication of their dependent status." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (citation omitted);); *see also Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998).

These inherent powers include the authority to determine membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-72 (1978). As stated by the Supreme Court, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id*. at 72, n. 32 (citations omitted); *see also Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) ("An Indian Tribe has the power to define membership as it chooses[.]").

B. The Band's Governing Documents and Enrollment Ordinances

In 1934, Congress enacted the Indian Reorganization Act ("IRA"), providing any Indian tribe "the right to organize for its common welfare" and to adopt a constitution and bylaws. Pursuant to the IRA, the Pala Band adopted its first governing document, the Articles of Association, in 1960. AR 04; AR 2096-104.[2] The Band enacted an original enrollment ordinance governing membership in 1961. AR 04; AR 2116-2119. This ordinance provides that the Band's Executive Committee would review each application for enrollment and submit all applications, whether approved or disapproved, to BIA's Area Director (now known as the Regional Director). *Id.* Section 4 of the ordinance provided that the Area Director "determine the applicants who are eligible for enrollment . . . ." AR 2117. If the Area Director found an

[2] Citations to the administrative record are include the prefix "AR" followed by the bates stamped page number. Pursuant to the Court's Order of January 15, an appendix of the cited portions of the Administrative Record will be provided to the Court following briefing. ECF No. 56.

individual to be eligible for enrollment, they were to notify the Band, and this notification "constitute[d] authority for the Committee to enter the applicant's name on the membership roll." *Id.* The subsequent provision authorized a rejected applicant to appeal to the Commissioner of Indian Affairs and then to the Secretary, who could find an individual to be eligible for enrollment. *Id.* The decision of the Secretary was "final" and any changes to the membership were to be submitted to the Area Director for approval. *Id.*

In 1994, the Band began the process of adopting a Constitution "to supersede the Articles of Association.'" AR 04; AR 2121. At tribal elections on November 22, 1994, the Band voted on a new Constitution, which was approved by a vote of 131 in favor and 65 opposed. AR 2121. The Band sent a certification of the election results to BIA, informing the BIA that "it was voted to accept the new Constitution for the Pala Band." *Id.* At that time, BIA withheld its recommendation for approval. AR 2123. In November 1997, "at a duly call[ed] meeting of the . . . General Council" of the Band, the Band passed a resolution stating they officially "adopt[ed] the Pala Tribal Constitution to supersede the Articles of Association" by a vote of 27 in favor, 0 opposed. AR 2137. They sent this resolution and the Constitution of the Pala Band (Revised) to the Acting Regional Director, and in 2000, the Acting Regional Director approved the Constitution. AR 2139-2141. Article IX, Section 1 of the Constitution provides that it "shall become effective immediately after its approval by a majority vote of the voters in a duly-called elections [sic] at which this Constitution is approved by the Bureau of Indian Affairs." AR 2322. Neither the Plaintiffs nor any other party challenged the BIA's approval or the Band's action in adopting the new Constitution at that time.

With adoption of the Constitution, the Band delegated the authority to amend and/or adopt tribal law governing enrollment to the Executive Committee ("EC"). AR 2314. Pursuant to that authority, the EC adopted a revised version of the enrollment ordinance, Ordinance No. 1, on July 22, 2009. AR 2324-2333. Section 6 of this ordinance provides that if the Band's EC finds that a person "misrepresented or omitted facts that might have made him/her ineligibile [sic] for enrollment, his/her application shall be reevaluated . . . . " AR 2329-30. Upon

reevaluation, the ordinance allows for the EC to remove an individual from the Band's roll, which is maintained by the EC (not the BIA). AR 2330, § 9, AR 2331. Section 8[3] provides for appeals to BIA of decisions of the EC to remove an individual from the roll. Specifically, this section provides for BIA to provide a recommendation to the EC:

> A person whose application has been rejected shall have 30 days from the date of the mailing of the notice to him to file with the [Bureau's] Pacific Regional Director an appeal from the rejection of his application for enrollment along with a written statement specifying why he/she believes that the decision was incorrect. The Pacific Regional Director shall review the decision of the Executive Committee and the written appeals statement submitted by the applicant and make a recommendation to the Executive Committee as to whether it should uphold or change its decision and stating the reasons for the recommendation . . . . Within thirty days of receipt of the recommendation of the Director, the Executive Committee shall meet and consider that recommendation and make a final decision on the appeal of decision. The decision of the Executive Committee shall be final.

AR 2330 (emphasis added). The section provides for a recommendation to the EC, but it is clear that it is *nonbinding* on the EC, as the EC will "consider" the recommendation, make a decision, and its decision, not the BIA's recommendation, is "final."

C. Procedural History

The genesis of this dispute was a duly-called Special Meeting held on February 1, 2012, by the Band's EC with a quorum present. At this meeting, the EC reviewed enrollment information and decided to disenroll the Plaintiffs. AR 1284-1285; 1385. On February 3, 2012, the Committee sent a letter to the Plaintiffs informing them of the decision, and advising them that they had 30 days to appeal to the Pacific Regional Director, per the ordinance above. *Id.* On February 21, 2012, Plaintiffs sent a notice of appeal to the Pacific Regional Director. AR 2075-2189.

On March 5, 2012, Plaintiffs filed a complaint and motion for temporary restraining order, which the Court dismissed on March 29, 2012. *Aguayo v. Salazar*, 12-CV-00551-WQH-KSC, 2012 WL 1069018 (S.D. Cal. Mar. 29, 2012) ("*Aguayo I*"). On June 7, 2012, the Regional Director sent a letter to Plaintiffs, in response to their appeal. AR 1284. In that letter, the

[3] Though labeled as "Section 8" this section is preceded by "Section 6" – there is no "Section 7."

Regional Director noted that she had no authority to decide enrollment appeals, but recommended that the Plaintiffs remain enrolled in the Pala Band. *Id.* A similar letter was sent directly to the Band. AR 1286. On June 11, 2012 Plaintiffs filed an Amended Complaint ("Complaint") against Federal Defendants, asserting two claims for "declaratory relief in Plaintiffs' favor that the DOI/BIA action in finding the Band's Constitution and revised membership ordinance valid is arbitrary and capricious…." *Aguayo I*, at ECF No. 37.

Plaintiffs then appealed within the Department of the Interior, first to the Interior Board of Indian Appeals ("IBIA") and then to the Assistant Secretary. AR 1188-1273. Plaintiffs then filed a second TRO and sought emergency relief from the Ninth Circuit. *Aguayo I*, at ECF No. 26. Both the emergency relief and TRO were denied. *Aguayo I*, at ECF No. 32. Plaintiffs sought a third TRO on March 24, 2013, seeking to compel the Assistant Secretary to rule on the pending appeal. *Aguayo v. Salazar*, 13-cv-705 ("*Aguayo II*"). By Memorandum dated March 28, 2013, the Federal Defendants agreed to respond to the administrative appeal within a set period of time and Plaintiffs agreed to withdraw their complaint and motion for a TRO without prejudice. *Aguayo II* at ECF No. 12.

On April 26, 2013, the Assistant Secretary issued a notice of procedures to the parties concerning the forthcoming proceeding, requested the record from the Regional Director, allowed for motions to supplement the record, informed the parties that he would consider also the record before the IBIA and some additional specified documents previously submitted to the agency, and allowed for briefing on the issues raised in the consolidated appeals. AR 26-29. On June 12, 2013, the Assistant Secretary issued the Decision at issue here, affirming the Regional Director's recommendation that the individuals remain enrolled with the Band and the Regional Director's conclusion that the Department had no authority to decide the Band's membership. AR 1-25.

D. The Assistant Secretary's Decision

The Assistant Secretary's Decision included an overview of the Band's governing documents and enrollment ordinances, a summary of the 1989 determination of blood quantum of Margarita Britten, an ancestor of Plaintiffs, the Band's determination on membership, and the

Regional Director's 2012 recommendation. AR 1-6. The Decision summarized the arguments of the Aguayo appellants, other counsel, the Band and Regional Director. AR 6-11. The Assistant Secretary's Decision then included an analysis of the nature and extent of the Department's authority conferred upon the Regional Director by the Band. It discussed the finality of the amendments to the Band's governing document, reasoned that the statute of limitations precluded a challenge to the Constitution's effectiveness and applicability, AR 12, and rejected arguments that an "election" was required to amend the Articles of Association and to have the new Constitution be in effect. AR 13-16. The Assistant Secretary noted that "as a general matter, it is not appropriate for the Department to intervene in internal tribal disputes or procedural matters[,]" AR 13 (footnote omitted), and that "[i]t is also well established that the Department does not exercise jurisdiction over tribal disputes regarding the merits of a particular law passed by a tribe." AR 15 (footnote omitted). Finally, the decision addressed the Band's enrollment ordinance and the remaining arguments presented. AR 16-23. The decision concluded that "[t]ribal law limited the Regional Director to making a 'recommendation,' rather than actually deciding the enrollment appeals." AR 23. It concluded also that "the Department has no authority under Federal or tribal law to decide enrollment issues for the Band." *Id*.

E. The Instant Complaint

Following the Assistant Secretary's Decision, Plaintiffs filed the instant Complaint. Plaintiffs' Complaint For Declaratory Relief, ("Compl."), ECF No. 1. In it, they challenge the Assistant Secretary's Decision as arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. Compl. ¶ 38. Specifically, Plaintiffs bring four related causes of action all seeking declaratory relief. First, they challenge as arbitrary and capricious the Assistant Secretary's determination that they should have known of the approval of the Band's Constitution since at least by 2000. Compl. ¶¶ 42-48. Second, Plaintiffs seek to set aside the Assistant Secretary's decision to recognize the 1997 Constitution as the Band's governing document. Compl. ¶¶ 49-65. Third, Plaintiffs seek to set aside the Assistant Secretary's Decision to affirm the Regional Director's conclusion that the Department can only issue a

recommendation. Compl. ¶¶ 66-74. Finally, Plaintiffs seek to join individual minors Joseph and Kaley Ravago in the appeal. Compl. ¶¶ 75-80.

III. STANDARD OF REVIEW

Under the APA, any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" is entitled to judicial review of the action, 5 U.S.C. § 702, if the action is "final" and there is "no other adequate remedy in a court . . . ." *Id*. § 704. Here, the Plaintiffs claim to be "aggrieved by" and to "suffer . . . legal wrong" as a result of the Assistant Secretary's Decision.

A. Record review

The Court's review under the APA is based on the administrative record that was before the agency decision makers at the time of their decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); 5 U.S.C. § 706(2)(A). The APA requires only that the presented record be sufficient to explain the basis of the agency's decision and to allow for meaningful judicial review. *See, e.g.*, *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1308–09 (W.D. Wash. 1994) ("That additional documents might provide a fuller record makes no difference if the record as it exists is adequate . . . . Since the administrative record is legally sufficient, the absence of some documents that could have been included does not justify invalidating the agency action or changing the standard of review."), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996) (citations omitted).

Consistent with these principles of judicial review based upon an administrative record, consideration of extra-record evidence, such as post-decision declarations or discovery, is only allowed in exceptional circumstances. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (noting that although there are exceptions to the record-review rule, the exceptions are narrow "so that the exception does not undermine the general rule[]"). "Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, *de novo* rather than with the

proper deference to agency processes, expertise, and decision-making." *Id.* at 1030 (emphasis added).

In this Circuit, courts have allowed "expansion of the administrative record only in [ ] narrowly construed circumstances . . . ." *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (citing *Lands Council*, 395 F.3d at 1030). Going beyond the administrative record requires, as a threshold matter, a showing that the existing record is so inadequate as to frustrate judicial review. *Bair v. California State Dep't. of Transp.*, 867 F.Supp.2d 1058, 1067 (N.D. Cal. 2012) (citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988)). The burden is on Plaintiffs to demonstrate the record is inadequate, and that an exception applies. *See id; see, e.g., Pinnacle Armor, Inc. v. United States*, 923 F.Supp.2d 1226, 1245 (E.D. Cal. 2013).

B. Arbitrary and Capricious Standard

Based on the administrative record or those portions thereof, cited by the parties, courts may set aside an agency's decision under the APA only upon a finding that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law[.]" 5 U.S.C. § 706(2)(A). This standard is "'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). Under this standard "a court is not to substitute its judgment for that of the agency . . . especially [ ] where, . . . the challenged decision implicates substantial agency expertise." *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 556 (9th Cir. 2000) (citations omitted).

Agency action is generally valid if the agency "'considered the relevant factors and articulated a rational connection between the facts found and the choices made.'" *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir.2008) (citation omitted). "An agency decision is arbitrary and capricious if . . . it 'offered an explanation 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.'" *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012)

(citation omitted); *Protect Our Cmtys. Found. v. Ashe*, 12-CV-2212-GPC PCL, 2013 WL 6121421, at *3 (S.D. Cal. Nov. 20, 2013) (citation omitted).). The burden is on Plaintiff to show any decision or action was arbitrary and capricious. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

IV. ARGUMENT

The Assistant Secretary acted reasonably in issuing the Decision affirming the Regional Director's letters. He (1) issued a notice of procedures to the parties, (2) requested the record from the Regional Director, (3) allowed for motions to supplement the record, (4) informed the parties that he would consider also the record before the IBIA and some additional specified documents previously submitted to the agency, and (5) allowed for briefing on the issues raised in the consolidated appeals. AR 26-29. He reviewed the complete record, analyzed the arguments presented, the applicable laws and the Band's governing documents, and concluded that the Band's most recent documents—which gave the Regional Director only power to issue a recommendation—governed. Plaintiffs' arguments to the contrary do not demonstrate that the Assistant Secretary's analysis failed to consider relevant factors or was otherwise arbitrary and capricious.

A. The Assistant Secretary Reasonably Concluded the Band's 1997 Constitution Applied.

The Regional Director's letters relied upon the Band's 1997 Constitution, and thus provided a recommendation that Plaintiffs remain enrolled in the Band. In his Decision, the Assistant Secretary concurred. Plaintiffs' argument before the Assistant Secretary, and now before this Court, is that the 1997 Constitution was never properly adopted by the Band and thus, the older Articles of Association govern. To determine which documents govern, the Assistant Secretary reviewed the arguments of counsel for the plaintiffs, other counsel, the Band and Regional Director. AR 6-11. The Assistant Secretary parsed through the language of the Constitution and the prior Articles. AR 12-15. In considering the arguments, the Assistant Secretary "adhere[d] to the principle of giving deference to a tribe's interpretation of its own laws[]" and governing documents. AR 15 (footnote omitted); *Paula Brady v. Acting Phoenix*

Area Dir., 30 IBIA 294, 299 (1997)316443, ("It is well established that a tribe has the primary authority to interpret its own constitution and that BIA must defer to a reasonable interpretation put forth by the tribe.") (citations omitted). Here, the Band's view is that the Articles of Association were amended and superseded by the Constitution, which is the Band's current governing document. AR 9, 10, n.36; AR 1248-1252. The Assistant Secretary undertook a reasonable investigation of the Band's governing documents and agreed.

1. Applicable provisions of the Articles of Association

The Band's original governing document was the Articles of Association. These Articles provide that they "may be amended by a majority vote of the General Council and such amendment shall be in effect upon the approval of the Commissioner of the Indian Affairs." AR 2103. A meeting of the General Council is valid if attended by a quorum of 25 voters. AR 2101.

On November 22, 1994, the Band "voted to accept a new Constitution" to amend and supersede the Articles; it was approved at a tribal election by a vote of 131 in favor and 65 opposed. AR 2121. The Band transmitted "the new Constitution for the Pala Band" to the BIA by letter dated December 19, 1994. AR 2121, AR 2123. Subsequently, the Band transmitted the Constitution (Revised) to the Regional Director in November 1997. AR 2137. This transmittal-Resolution noted that in November 1994, "the Pala Band General Council in the General Election of the Tribe voted to revise the Pala Tribal Articles of Association into the Pala Tribal Constitution." AR 14; AR 2137 (emphasis omitted). The resolution also explicitly provided that the Band "exercising our inherent rights as a sovereign, federally-recognized Tribe, do hereby adopt the Pala Tribal Constitution to supersede the Articles of Association . . . ." AR 2137. This resolution was "passed at a duly call meeting of the Pala Band of Mission Indians General Council held on the 19 day of November, 1997, by a vote of 27 'For', 0 'Against[.]'" *Id.* The Superintendent, Southern California BIA, forwarded the Constitution (Revised) to the Area Director, BIA, for approval. AR 2139. Official notification regarding the approval of the Constitution was not sent, however, until October 4, 2000, and was made retroactive to

November 12, 1997. AR 2140-41. Thus, by the terms of the Articles of Association, they were properly amended and the amended document was in effect at that time.

As discussed in the Assistant Secretary's Decision, the Articles may be "'amended by a majority vote of the General Council and such amendment shall be in effect upon the approval of the Commissioner of Indian Affairs.'" AR 13. This provision does not specify whether the vote occurs at a meeting or at an election. In practice, however, the Articles were amended at both meetings and at elections, as long as a quorum of 25 was present. *Id.* The Assistant Secretary concluded, as did the Band, that an election was not required to adopt the Constitution, which was an amendment to the Articles as a substitute document. Nevertheless, there was both an election and a meeting regarding the Constitution. AR 13-16. The amendment of the Articles, that is, the new Constitution, became "in effect" as of BIA's approval in 2000. Based on the foregoing analysis, the Assistant Secretary was reasonable to find that the Articles were properly amended and in force as of this enrollment dispute at least eleven years later.

2. Applicable provisions of the Constitution

Plaintiffs specifically argue that under the terms of the *Constitution* (rather than the Articles), additional procedures were required for this document to come into force. The Constitution provides in Article IX Section 1 that it is effective "after its approval by a majority vote of the voters voting in a duly-called elections [sic] at which this Constitution is approved by the Bureau of Indian Affairs." AR 2322. Plaintiffs argue that because no "election," as they interpret it, occurred, the Constitution never actually came into effect, and the un-amended Articles still govern. Plaintiffs argue that the Constitution was not validly adopted because "elections" and "meetings" are defined differently in both the Articles of Association and the Constitution and no proper "election"—as called for in the Constitution—occurred. ECF No. 54-1 at 19. Plaintiffs focus on the 1997 Resolution and argue that this was insufficient to adopt the Constitution as it was not an "election." However, Plaintiffs ignore the evidence in the record that an election occurred occurred in 1994. *See* AR 2121, 2123, 2137; AR 14 (finding "[t]hus, even if an election were required to adopt the Constitution, an election occurred in

1994."). Such evidence of an election provides a reasonable basis for the Assistant Secretary's Decision even under Plaintiffs' theory— unsupported by the text of the Articles—that an election was necessary to amend the Articles and effectuate the Constitution.

Plaintiffs do not directly argue that the 1994 event was not an election, but a necessary premise of their argument is that an election did not occur, and that the 1997 vote on the resolution, passed at a general council meeting, was the only action taken to amend the Articles. They contend this enactment was procedurally deficient. Although evidence in the record provides otherwise, even if only the vote at this meeting occurred to amend the Articles, it was still reasonable for the Assistant Secretary to find the procedure sufficient under the Band's governing documents, and his Decision should be upheld.

First, the language in the Constitution does not support Plaintiffs' arguments. The Constitution does not define or provide procedures or explanation for the "duly-called election[]" at which "a majority of voters voting" in favor is sufficient to effectuate the document. AR 2322. This provision of the Constitution does not require ballots, polling places, etc. as assumed by Plaintiffs. Again, however, even if it did Plaintiffs' argument assumes that no general election occurred in 1994, despite the evidence in the record to the contrary. *E.g.*, AR 2121, 2123, 2137.

Further, "[a]s with most statutes and quasi-statutes, a provision particular to the conduct is usually more appropriate than a broader, more general provision not addressing the particular issue." *United States v. Huizar-Velazquez*, 720 F.3d 1189, 1192 (9th Cir. 2013) (footnote omitted). Here, the specific section governing how the Constitution is to be effectuated is Article IX Section 1, which should be read in context with the rest of the Constitution, including the section immediately following it.

The Constitution, in Article IX Section 1, does not define the "duly-called election[]" and only requires "a majority vote of the voters voting" in such an election. In contrast, Article IX Section 2, titled "Future Amendments," provides that the Constitution may be amended in the future by "a two-thirds (2/3) vote of the voting members of the Pala Band at an election duly-

called for this purpose in which not less than half of the eligible members of the Pala Band cast their ballots." It is a fundamental principle of construction that "'[w]here [a legislature] includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that [a legislature] acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). This principle applies with equal force to Indian laws. *See Hopi Indian Tribe v. Comm'r*, 4 IBIA 134, 140-41 (1975). Therefore, the Assistant Secretary was reasonable to conclude that "[t]he omission of this language in Section 1 must be given significance" such that its specific requirements in Section 2 should not be transmuted to Section 1. AR 15.

Plaintiffs also argue that the Assistant Secretary acted irrationally by "fail[ing] to . . . consider that the 27-member vote was not a majority of tribal members in 1997." ECF 54-1 at 20 (emphasis omitted). However, the Constitution by its text in Article IX Section 1 need only be approved by "a majority vote *of the voters voting*." AR 2135 (emphasis added). Again, even assuming no election occurred in 1994, the Resolution states that all 27 present members voted in favor of the Resolution and none voted against it, AR 2137; this is certainly a majority of "the voters voting."

3. Prior practice of the Band

Second, as the text of the Constitution Article IX Section 1 does not explain precisely how the Band is to make the Constitution effective—other than to suggest that the more specific requirements for future amendments were not required—the Assistant Secretary was reasonable to look to the prior practice of the Band when amending its governing documents. AR 15.

The section of the Articles governing elections discusses them in the context of electing officers, *see* AR 2098, AR 13, and not specifically about an election to effectuate a new governing document. Thus, the language in the Articles concerning elections did not require an election to adopt the amendment to the Articles. The Assistant Secretary noted also the Band's practice of amending the Articles through a majority vote of the General Council at a valid meeting, which was consistent with the lack of any requirement in the Articles to have an

election to amend the document. Indeed, the Articles were amended several times by the General Council at a meeting. *See* AR 13, n.43. This practice did not require that a majority of the Band to vote for such amendments, a requirement for amendment that was added to the Constitution Article IX Section 2, and that did not appear in the Articles. AR 15. Since an election was not required to adopt the amendment to the Articles, existing practice of the Band did not support Plaintiffs' interpretation of "election" in Article IX Section 1. It therefore would be inappropriate for the Assistant Secretary to impose a requirement in Article IX Section 1 that a majority of the Band vote that is not found in the Band's Constitution and would be inconsistent with the Band's existing practice of amending the Articles at general council meetings.

4. The Assistant Secretary considered all relevant factors

Plaintiffs' final argument in opposition to the Assistant Secretary's Decision concerning the applicability of the Constitution is that the Assistant Secretary "failed to consider an important aspect of the issue" and was thus arbitrary by not giving weight to the declaration of former BIA employee, Elsie Lucero ("Lucero"), attached to the brief in the administrative proceeding. AR 90-94. They further offer the extra-record declaration of former Band Chairman King Freeman to support their interpretation of the "election" that was required to effectuate the Constitution. ECF. No. 54-1 at 16-17; ECF No. 1-1 at 48-51.

First, Lucero's declaration does not show that the Assistant Secretary "failed to consider an important aspect of the issue." This declaration is in the administrative record and was considered by the Secretary. This declaration expresses the Declarant's opinion on Article IX of the Constitution, on the approval of the Constitution by the Regional Director, and on how she would interpret the term "election" in the Constitution. The declaration does not address the 1994 election. Clearly, the points in the declaration were addressed in the Assistant Secretary's Decision, which analyzed the language of the Constitution, the approval in 2000, and the use of the term "election" within the meaning of the Constitution and Articles. There is no requirement under the APA that every document in an administrative record be cited to show that it was

considered. The Assistant Secretary's Decision considered all factors, deferred to the Band's interpretation of its own governing documents, and is reasonable.

Second, it is inappropriate to consider the extra-record declaration of former Chairman Freeman, as this information was not before the Agency and is not part of the administrative record. *See* §III(B), *supra*. This declaration post-dates the Assistant Secretary's Decision. Plaintiffs have not met their burden of demonstrating that the existing administrative record is so inadequate so as to warrant looking outside it, nor have they identified a discrete exception to the record rule that would apply. *See, e.g.*, *Bair*, 867 F.Supp.2d at ,1067) (citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir.1988)). Therefore, this declaration should not be considered.

In sum, the Assistant Secretary appropriately parsed the language in the Band's governing documents, weighed the evidence in the record, and reasonably concluded that the 1997 Constitution was in force, rather than the Band's prior document, the 1960 Articles. However, he also concluded that even if there were procedural problems with the adoption of the amendment of the Articles in 1994-2000—more than 14 years ago—a reasonable statute of limitations period on such procedural challenges has long since passed.

B. The Assistant Secretary Was Reasonable in Concluding That the Time to Challenge the Approval of the Constitution Has Passed.

The Assistant Secretary was reasonable to conclude that "a self-governing entity must be able to amend its governing documents from time to time . . . [and] [a]t some point, if those changes are not lawfully challenged, they deserve finality." AR 12. The proceeding before the Assistant Secretary concerned appeals from letters of the Regional Director in response to enrollment appeals authorized by tribal law. AR 1. Although the approval of the Constitution in 2000 was not specifically appealed to the Regional Director, the validity of that Constitution and subsequent 2009 enrollment ordinance determined the scope of the authority and obligations of the Department in responding to the enrollment appeals authorized by the Band. AR 11. The Assistant Secretary found that a challenge to the BIA's 2000 approval of the Constitution would

be time barred; and though there is no direct tribal analogue, the same logic would apply to any challenge to the Band's enactment of the Constitution. AR 12-13.

The Assistant Secretary concluded that "the statute of limitations precludes a challenge to the [2000] approval of the document . . . and therefore precludes a challenge to the Constitution's effectiveness and applicability." AR 12. The Assistant Secretary found that the challenges on the basis of a procedural violation or a "policy-based facial challenge," as here, must be brought within six years. *Id.* In the alternative, the Assistant Secretary determined that the 2000 approval applied to Plaintiffs in 2000 as the Band operated under the Constitution since that time, including amending it in 2003. *Id.* The Assistant Secretary also determined it appropriate not to intrude unnecessarily in tribal self-governance. AR 13.

Plaintiffs argue that their procedural challenge to the Constitution would not be time barred and the Assistant Secretary was arbitrary for so finding for three reasons. First, the Plaintiffs argue that an action that is "void *ab initio*" has "no prescribed statutory time" in which Plaintiffs may bring a challenge. ECF No 54-1 at 14 (emphasis added). Second, they argue that the statute of limitations issue was decided in an earlier iteration of this lawsuit. Finally, Plaintiffs argue that they had no injury until 2012 when the Band (and BIA) applied the 2009 enrollment ordinance, adopted under the allegedly procedurally-deficient Constitution, to them. Each argument should be rejected, and the Assistant Secretary was appropriate to find that a Constitution approved in an election in 1994, again approved by the Band's General Council in a meeting in 1997, and approved by the BIA in 2000 should have been challenged before 2012.

First, Plaintiffs argue that because the Constitution was "void *ab initio*" (that is, void "from the beginning") no limitations period applies, citing *Cabazon Band of Mission Indians v. City of Indio, Cal.*, 694 F.2d 634, 637 (9th Cir. 1982). The *Cabazon* case does not stand for such a broad proposition and is factually distinguishable—indeed it has little or nothing to do with the case at bar. In *Cabazon*, defendant, City of Indio, sought to annex a portion of the Cabazon Band's reservation and to enforce local ordinances upon the reservation. The Cabazon Band sued for declaratory and injunctive relief to prohibit these actions. *Id.* at 635. The court found

that a statute mandated the consent by the United States as a condition precedent to the annexation because the legal title to the Reservation was held by the United States in trust for the Cabazon Band; therefore "failure to obtain such consent rendered Indio's annexation of the federally reserved land void *ab initio*." *Id*. at 637 (footnote omitted). The court found that there was no authority to act at all, not a "mere procedural defect." *Id.* at 638. In a sentence, the Court states that because the action was void *ab initio*, there is no limitations period. *Id.* In the next several paragraphs, the court relies upon the "well settled" proposition that "a state statute of limitations may not bar the assertion of federal Indian rights." *Id.* (citation omitted). The court quoted from *United States v. Minnesota*, 270 U.S. 181, 196 (1926), that state statutes of limitation neither bind nor have any application to the United States when suing to enforce a public right or to protect interests of its Indian wards. *Id.* at 638-39. The court applied this reasoning, "regardless of whether the case was brought by the United States as trustee . . . or by the tribe itself." *Id.* at 639 (citations omitted). This supremacy of the Unites States and a tribe in enforcing their rights is the primary reasoning behind the court's finding that a state statute of limitations period did not apply in that case.

This case does not apply here, first, because in *Cabazon*, the applicable limitation period was a state statute of limitations that conflicted with federal legislation and policy regarding Indian lands. *Id.* at 637-38. There is no such state statute in this case. Second, the court relied on a statutory mandate to find the action void, distinguishing it from a procedural error. Here, it is the Band's own law governing *procedures* for amending their governing documents that allegedly was not followed. Nothing in tribal law provides that an alleged procedural error makes a resulting action void. Third, Plaintiffs' reading of the case is overbroad. If this case stood for the proposition that any action with alleged procedural defects, no matter how minor, was "void *ab initio*" and thus never subject to the statute of limitations, this exception would swallow the rule. Fourth, *Cabazon* concerned the tribe bringing the action, not individuals as here. In sum, *Cabazon* provides no reason to allow a suit well outside the limitations period in this case.

Next, Plaintiffs are simply incorrect to argue "the statute of limitations issue was decided" in *Aguayo v. Salazar*, No. 12-cv-00551-WQH-KSC (S.D. Cal. Nov. 19, 2012) ("*Aguayo I*"). *See* ECF No. 54-1 at 14. In *Aguayo I*, Federal Defendants argued Plaintiffs were barred from challenging the BIA's July 26, 2000 approval of the revised Constitution on the grounds that the approval occurred outside the APA's statute of limitations period. *See Aguayo I*, Order, ECF No. 53 at 13, (citing ECF No. 41-1 at 19). Contrary to Plaintiffs' assertion, the Court did not find that "the statute of limitations did not bar Plaintiffs' challenge . . . ." ECF No. 54-1 at 14. In fact, the Court did not reach the statute of limitations question and held only that "[p]laintiffs have failed to allege the existence of a final agency action that is subject to judicial review under the APA at this time." *Aguayo I*, Order, ECF No. 53, at 16. Thus, the applicability of the statute of limitations was not expressly decided nor was it necessary by implication for the holding—a case may be barred by failure to exhaust regardless of whether it is barred on statute of limitations grounds. *See Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993) (For doctrine to apply, the issue in question "must have been decided either expressly or by necessary implication in [the] previous disposition.'") (citations and internal quotation marks omitted). Therefore, *Aguayo I* did not bar the applicability of the statute of limitations as one of the many grounds relied upon in the Assistant Secretary's Decision.

Finally, Plaintiffs argue that they had no injury stemming from the allegedly-illegally adopted 1997 Constitution (and the 2009 Ordinance passed pursuant to this Constitution) until the Band "applied the governing documents to them and [BIA] acknowledged the documents as legitimately enacted." ECF No. 54-1 at 15 (citation omitted) (parenthetical sentence omitted). Plaintiffs cite to *Wind River Mining Corp. v. United States*, which holds that a "*substantive challenge* to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger." 946 F.2d 710, 716 (9th Cir. 1991) (emphasis added). However, this case also held that "[i]f a person wishes to challenge a mere *procedural violation* . . ., the challenge must be brought within six years of the decision." *Id.* at 715 (emphasis added).

Plaintiffs' objection to the Constitution is procedural—namely, that it was not adopted through an "election" as they understood that term. AR 12. For this reason, it should have been brought within the limitations period. As the *Wind River* court reasoned:

> The grounds for [procedural] challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision; one does not need to have a preexisting mining claim in an affected territory in order to assess the wisdom of a governmental policy decision or to discover procedural errors in the adoption of a policy. The government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure.

946 F.2d at 715. The Assistant Secretary was reasonable to consider this interest in finality—both for the Band, and for the United States—when issuing his Decision. *See* AR 12-13. However, even if the Plaintiffs' claims are deemed to be not procedural, the Constitution still "applied," and was known to Plaintiffs well outside the outset of their suit in 2012.

An action generally accrues when the plaintiff knew or should have known of the wrong. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990). As Federal Defendants previously argued, *Aguayo I*, Federal Defendants' Brief, ECF No. 41-1, the time to challenge BIA's approval of the Constitution ended in 2006. Here, the wrong is the allegedly illegal adoption of the Constitution by the Band. That the Constitution replaced the Articles was far from secret—indeed the Constitution was even amended to provide that it be given out to all members of the Band over age 18. *See* AR 12. There is no reason to suspect that Plaintiffs did not know or could not have discovered that the Constitution governed the Band, or that the BIA had approved this document, a requirement stated in the Articles and Constitution itself.[4]

Similarly, the Constitution "applied" to Plaintiffs upon its approval by BIA in 2000, when it became effective. Just because the particular ordinance—passed by the EC with powers

[4] That the Band's website identified the Band as being governed by Articles rather than the Constitution is most likely simply an error (that has now been corrected) rather than an "admission" that the Band was in fact governed by the 1960 Articles of Association. *See* ECF No. 54-1 at 18. The Band's website does not have the power to amend actions of the Band—the Band's General Council has this power, and they have voted to adopt the Constitution. As for the Band's 1999 gaming ordinance referring to the Articles, *see id.*, a reasonable explanation is that the 1999 gaming ordinance predates the Constitution becoming effective upon BIA's approval in 2000.

delegated to it by the Constitution—was only applied to the Plaintiffs in 2009 does not mean that the Constitution in general did not apply to them before that time

C. The Assistant Secretary Reasonably Concluded the Band's Enrollment Ordinance Applied to Plaintiffs and Only Allowed for the Department to Provide a Non-binding "Recommendation."

Plaintiffs argue that the 2009 enrollment ordinance is invalid because the Constitution is procedurally defective and because a clause in the preamble of the ordinance may conflict with how it was applied. Neither argument provides a reason to find the Assistant Secretary's Decision was arbitrary. As discussed above, the Assistant Secretary was reasonable to find the Constitution applied notwithstanding alleged procedural errors in its adoption. The Assistant Secretary's finding that a clause preceding the operative sections of the ordinance did not substantively change the applicable text of that tribal law was also reasonable. AR 16.

The enrollment ordinance the Band used to disenroll Plaintiffs contains a clause in its preamble, stating that the ordinance did not intend to alter the membership status of individuals whose membership had been determined. An operative section of the ordinance, however, Section 6, conferred authority upon the EC to reevaluate membership applications. As the Decision concluded, "[t]he express language in the operative provision of the [O]rdinance controls over an introductory 'resolved' clause." AR 16 (citing *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) ("noting that a preamble or "whereas" clause[] [is] not part of the act and cannot enlarge or confer powers, nor control the words of the act . . . .)). This interpretation also was consistent with the Band's interpretation of its law. The Assistant Secretary's Decision is reasonable.

D. Collateral Estoppel Principles Are Not Relevant to the Assistant Secretary's Decision and to the Extent Plaintiffs Seek to Bind the Non-Party Band, They Cannot.

Plaintiffs argue that collateral estoppel and BIA's general management over Indian affairs[5] requires "BIA to honor and enforce" the Agency's 1989 conclusion regarding the blood quantum of their ancestor, Margarita Britten ("Ms. Britten"). ECF No. 54-1 at 9-10. First, BIA did "honor" its prior conclusion by recommending Ms. Britten's descendants remain enrolled in the Band. BIA has not changed its view or deviated in any way that could implicate a collateral estoppel doctrine. Further, the Assistant Secretary was correct to note that "[t]o the extent the argument is that the Band is bound by the 1989 Decision, it must be directed to the Band." AR 18.

The Plaintiffs appear to be arguing that BIA has some obligation to "enforce" the 1989 Decision upon the Band—and presumably that the Court should enforce such an obligation. There are a number of problems with this argument. First, Plaintiffs have sought only relief under the APA. The APA provides that a court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). The agency action here is the Secretary's 2013 Decision. Compl. ¶¶ 42-80. The means by which a court "sets aside" such decisions is by remanding them to the Agency for further consideration. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). A remand of the Secretary's Decision would not have the effect of changing the BIA's position (which again has been consistent over time) on Ms. Britten's blood quantum.[6]

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[5] 25 U.S.C. § 2 provides for BIA to have "have the management of all Indian affairs and of all matters arising out of Indian relations."

[6] APA section 706(1) does allow a Court to "compel agency action *unlawfully* withheld" however such a claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (emphasis in original). Plaintiff has not presented a 706(1) claim, nor shown any mandatory duty on behalf of BIA to bring an action against the Band. Regardless,

Third, to the extent Plaintiffs seek to compel *the Band* to abide by the 1989 Decision through this suit—either directly, or by seeking to compel BIA to, in turn, compel the Band—they cannot. The Band would be a necessary party to any such suit, but it cannot be joined because of sovereign immunity. Rule 19(a) requires joinder of "necessary" parties when feasible. *Id.* A party is "necessary" if (1) a "court cannot accord complete relief" in that party's absence; or (2) the party "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party]'s absence may . . . impair or impede the [party]'s ability to protect the interest[.]" FED. R. CIV. P. 19(a)(1)(A). If Plaintiffs seek to bind *the Band* to honor the 1989 blood quantum decision, then the Band is a necessary party because without being joined its leadership would not be able to "project the[ir] interest" in upholding their membership determinations. FED. R. CIV. P. 19(a)(1)(B)(i); *see also Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022-24 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000).

If a person is "necessary" under Rule 19(a)—that is, "required to be joined if feasible"—but cannot be joined, then the court must determine whether "in equity and good conscience" the action should proceed among the parties or be dismissed because the person is deemed indispensable. FED. R. CIV. P. 19(b). In the instant case, joinder of the Band is not feasible because the Band possesses sovereign immunity and therefore cannot be sued without its consent. Absent an unequivocal waiver of immunity, tribes are not subject to state or federal court jurisdiction.[7] *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). When the necessary party is immune from suit, "there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor."

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any such action would be one committed to agency discretion and not subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 828 (1985).

[7] All federally recognized tribes enjoy sovereign immunity from suit. *Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994); *see* 25 C.F.R. §§ 83.2, 83.5 (including Pala Band on list of federally recognized tribes).

Confederated Tribes of Chehalis, 928 F.2d at 1499. Therefore, to the extent the Plaintiffs seek to enforce the 1989 Decision against the Band, the action cannot proceed without the Band.

E. The Ravago Minors Were Properly Not Included in the Assistant Secretary's Decision Because They Had Not Appealed to the Regional Director.

Finally, Plaintiffs seek to include two minors, Joseph and Kaley Ravago, as parties to the Assistant Secretary's Decision. ECF No. 54-1 at 24. These minors did not appeal to the Regional Director in 2012 and were not included in the Regional Director's recommendations that were being reviewed in the administrative proceedings that resulted in the Assistant Secretary's 2013 decision under review. AR 1284. As the Decision explains, these minors were therefore not within the scope of the issues pending before the Assistant Secretary and were not added to the proceeding before the Assistant Secretary. AR 20-21. This conclusion is reasonable.

V. CONCLUSION

For the foregoing reasons, the Assistant Secretary's Decision was reasonable and should be upheld. Plaintiffs' Motion for Summary Judgment should be denied, and Federal Defendants' Cross-Motion for Summary Judgment should be granted.

Dated: February 24, 2014

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY L. (HAYES) AGUAYO, et al., Plaintiffs, vs. S.M.R. JEWELL, the Secretary of the Department of the Interior et al., Defendants.	Case Number: 13-CV-1435W CERTIFICATION OF SERVICE

I hereby certify that on February 24, 2014, I electronically filed the foregoing motion with the Clerk of the Court via the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Reuben S. Schifman
Reuben S. Schifman