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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY L. (HAYES) AGUAYO, et al.,

Plaintiffs,

v.

SALLY JEWELL, et al.,

Defendants.

Case No. 3:13-cv-01435-WQH-KSC

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' SUMMARY JUDGMENT MOTION AND IN SUPPORT OF OPPOSITION TO DEFENDANT'S SUMMARY JUDGMENT MOTION

DEPT: 13 A
JUDGE: William Q. Hayes

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PLAINTIFFS submit the following Reply Memorandum in support of their Summary Judgment Motion and in Opposition to Defendant's Summary Judgment Motion.

PRELIMINARY CONSIDERATIONS

A. REVIEW STANDARD. The defendants' memorandum repeatedly asks this Court to apply a deferential standard of review. While an agency decision is entitled to a presumption of regularity, "that presumption is not to shield [the] action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401, U.S. 402, 415 (1971). Administrative review must ensure that the agency's decision is founded on a reasoned evaluation of "relevant factors." *Wilderness Watch, Inc. v. U.S. Fish and Wildlife Service*, 629 F.3d 1024, 1032 (9th Cir. 2010); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003).

An agency case cannot be determined in a vacuum with the decision-maker picking out one fact to support a theory. Rather, a reviewing court must review the entire record and hold unlawful and set aside agency findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Sohappy v. Hodel*, 911 F.2d 1312, 1317 (9th Cir. 1990). A court conducting APA judicial review determines "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 90 (D.D.C.2006) (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.1985)).

B. PLAINTIFFS' SEPARATE STATEMENT OF FACTS AND CONCLUSIONS OF LAW.

APA review involves the administrative record as a whole, weighing both the evidence that supports the agency's determination as well as the evidence that detracts from it. See *De la Fuente v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003); *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001). Plaintiffs' Separate

Statement of Facts and Conclusions of Law are appropriate to assist the court to identify facts in the agency record supporting each claim and whether summary judgment should be granted as a matter of law. See Fed. R. Civ. P. 56, Local Rule 7.1(f).

I. THE BIA IS LEGALLY BOUND TO HONOR THE 1989 FINAL AS-IA DECISION.

The defendants argue that relief on plaintiffs' collateral estoppel claim cannot be granted because plaintiffs have not presented a 706(1) claim. (ECF 58-1 at 28, fn. 6). Plaintiffs disagree. Plaintiffs argued collateral estoppel applied to the September 1989 final AS-IA decision. (AR 2083-2084). The Band argued that plaintiffs did not establish collateral estoppel under federal law. (AR 9, 105, 1525-1527). Plaintiffs further addressed their collateral estoppel claim to the AS-IA. (AR 78-80, 81). Pursuant to the Pala Band's original enrollment ordinance no. 1, Section 5, Appeals, the 1989 AS-IA's decision was "final and conclusive." (AR 2118). It is undisputed that the Band did not appeal the 1989 AS-IA decision.

Under the disputed 2009 revised enrollment ordinance, the plain language states:

> BE IT FURTHER RESOLVED, that the Executive Committee of the Pala Band, by adoption of this revised Ordinance does not intend to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the membership roll of the Pala Band of Mission Indians. (AR 2150).

The defendants argue that Regional acted appropriately because all it could give is a "non-binding recommendation." (ECF 58-1 at 27). Not so. The plain language rule must be applied. Where words have a clear and unambiguous meaning, the words must be given their ordinary meaning. *Gila River Indian Community v. U.S.*, 729 F.3d 1139, 1148 (9th Cir. 2013). This rule applies in interpreting tribal governing documents. See *Hopi Indian Tribe v. Commr*, 4 IBIA 134, 140-141 (1975). Here, the plain language stated that the ordinance was not intended to apply

retroactively to those members currently listed on the Pala Band's membership roll, i.e., the plaintiffs. As argued infra, the agency has a management duty to enforce the judgment. (25 U.S.C. § 2).

Notwithstanding, the agency record establishes that plaintiffs argued that the AS-IA has legal authority as arbiter to issue a declaratory relief order under 5 U.S.C. §§§§ 551 (6), (7), (11)(A) and (11)(B). (AR 81). Plaintiffs have established a prima facie case for collateral estoppel issue preclusion. (AR 93, 331, 1512, 2118, 2164-2166, 2168-2169, 2173). Therefore, this Court can issue instructions as a matter of law because the AS-IA decision also refers to the fact that "[a]ppellants seek to have the Department enforce its 1989 decision against the Band...." (AR 18). A remand with instructions would be consistent in granting relief by requiring the agency to take action as requested in the appeal and decision. (See AR 18, 86).

In any event, the Complaint asks to remand the cause to the AS-IA with instructions as the Court deems proper. (ECF 1 at 19). The Complaint reserves the right to seek leave to amend if necessary in order for this Court to grant relief which is just and proper. (ECF 1 at 20). A party may move the Court at any time, even after judgment, and amend the pleadings to conform to evidence. See, Fed. R. Civ. P. 15(b)(1) and (b)(2). A court can freely allow amendment if it serves the presentation of the action and the objecting party would not be prejudiced. See Fed. R. Civ. P. 15 (b)(1); *Foskey v. United States*, 490 F. Supp. 1047, 1059 (D.R.I 1979). Since this is an APA case, and the Court is reviewing the agency record, there is no prejudice to amending the case to issue an order which conforms to the evidence and law. Further, the defendants have not offered factual argument countering plaintiffs' prima facie claim that the agency record establishes the elements of collateral estoppel. (See ECF 48-1 at 27-30). Instead, the defendants argue that the requirement to honor the 1989 final AS-IA decision is "committed to agency discretion and is not subject to judicial review." (ECF 58-1 at 28, 29, fn. 6). Plaintiffs disagree. There is no agency

discretion involved here. The time has long since passed for reconsideration of Margarita Britten's descendants blood quantum. The Band's own document required the decision to be binding and conclusive. The 1989 AS-IA decision was not challenged by the Band pursuant to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and therefore became binding between governments by operation of law. An unreviewed agency determination is equivalent to a final judgment entitled to res judicata and collateral estoppel effect. *Miller v. County of Santa Cruz*, 39 F. 3d 1030, 1038 (9th Cir. 1994).

Defendants further miss the point that a remand will not effect the plaintiffs' case or change the BIA's position of Margarita Britten's blood quantum. The crux of the issue before the agency was that there was a final binding judgment which had to be enforced, even under the challenged EC's enrollment ordinance. (See AR 81). Therefore, this Court can reverse the AS-IA decision which fails to appropriately apply the collateral estoppel doctrine or enforce it.[1] If review is proper under the APA, the District Court has jurisdiction to set aside the order with instructions under 28 USC § 1331. *Bowen v. Massachusetts*, 487 U.S. 879, 891 n. 16 (1988); see also *Sharkey v. Quarantillo*, 541 F.3d 75, 83–84 (2d Cir.2008) (holding that § 1331 confers jurisdiction over a suit that "arises under" a "right of action" created by the APA).

The AS-IA's decision should be set aside with instructions as a matter of law. When an administrative agency acts in a adjudicatory capacity and resolves disputed issues of fact properly before it, which the parties have had an adequate opportunity to address, courts have not hesitated to apply res judicata and collateral estoppel

[1] 5 U.S.C. § 701(1) and (2) "rule", "order", "relief", and "agency action" have the meanings given them by §551; a remand with instructions is appropriate providing the order specify the federal officer responsible for compliance, 5 U.S.C. § 702; the Court can decide relevant questions of law and compel agency action unlawfully withheld pursuant to 5 U.S.C. § 706(1); the Court can 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).

principles. *Astoria Federal S. & L. Assn. v. Solimino*, 501 U.S. 104, 107 (1991); *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979), *United States v. Utah Constr. & Mining Co.* 384 U.S. 394 (1966), *Plaine v. McCabe*, 797 F.2d 713, 720 (9th Cir. 1986). There is no discretionary act involved. AS-IA Washburn cannot legally ignore the legal effect of the final 1989 AS-IA decision which is binding on his office in his official capacity. The Ninth Circuit accords preclusive effect where judicial review of the administrative decision is available whether or not sought. *Wehrli v. County of Orange*, 175 F. 3d 692, 694, 695 (9th Cir. 1999).

The defendants' claim that this case must be dismissed because the Band is a required party under Fed. R. Civ. P. 19 (ECF 58-1 at pp. 28-30) should also be rejected. That issue was recently rejected in *Alto v. Black*, 738 F.3d 1111 (9th Cir.2013). A federal court has jurisdiction to review the AS-IA's final decision under the APA even when the agency applies tribal law. Id. at p. 1123. In *Alto v. Black*, *supra*, the San Pasqual Band of Mission Indians sought to intervene to challenge plaintiff tribal members' res judicata claim against the Assistant Secretary, asserting the band was a required party. Id. at p. 1118, 1120. The *Alto* court disagreed. All that is required is "meaningful relief as between the parties." Id. at p. 1125.

The Ninth Circuit found:

> Ruling for the Altos on any or all of their first three claims would mean vacating the Disenrollment Order and, unless determined to be barred by res judicata (as the Altos maintain in their first claim for relief), remanding to the BIA for redetermination of the Altos' enrollment status. That relief is "meaningful" as between the Alto descendants and the BIA, even if it does not bind the Tribe directly. Ibid.

As to the second factor argued by the defendants, that the Pala Band's absence may impede its ability to protect its interest,"[a]s a practical matter, an absent party's ability to protect its own interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit."

Washington v. Daley, 173 F.3d 1158, 1167 (9th Cir.1999). Here, the Band participated in the agency proceedings below, and made known its collateral estoppel argument. (AR 9, 1525-1527). The defendants share the Pala Band's same interest in vigorously defending the AS-IA's decision. Because the issue of collateral estoppel is based on the agency record, and is a legal ruling made as a matter of law, the Band would not be able to offer any new evidence or argument. Therefore, the Band's presence and participation in this litigation is not required because complete relief can be afforded between the parties in the Band's absence. See *Alto v. Black*, *supra*, 738 F.3d 1111, 1129.

The defendants have not rebutted plaintiffs' factual contention that the agency record establishes the collateral estoppel doctrine applies. (AR 331, 1512, 2118, 2164-2166, 2168-2169, 2173). The BIA is required to honor the 1989 AS-IA final decision under the BIA's broad management responsibility(25 U.S. C. § 2) because the 1989 final decision was made in a judicial or quasi-judicial capacity. *Astoria Federal S. & L. Assn. v. Solimino, supra*, 501 U.S. 104, 107 [extending the doctrine to the final adjudications of both state and federal agencies]; *United States v. Utah Constr. Co.*, *supra*, 384 U.S. 394, 421-422. Collateral estoppel applies as a matter of federal common law -- it is not a procedure left to agency "discretion." Consequently, this Court can and should reverse the AS-IA's finding regarding application of the collateral estoppel doctrine with instructions to enforce the 1989 AS-IA decision as a matter of law.

II. THE 6-YEAR STATUTE OF LIMITATIONS, 28 U.S.C. SECTION 2401a, DOES NOT APPLY TO PLAINTIFFS.

Contrary to defendants' argument, it was unreasonable for the AS-IA who was a party to Case No. 3:12 cv-00551-WQH-KSC, to apply the 6-year statute of limitations. (See ECF 58-1 at 22-26.)

Aguayo I. In Case No. 3:12-cv-00551-WQH-KSC, the defendants raised the statute of limitations issue and argued that plaintiffs knew of should have known of

Regional's approval on the very same facts (the constitution's approval and subsequent amendments) as argued in their current memorandum. (See Id., ECF 41-1 at 19-22.) Plaintiffs argued that the statute of limitation, 28 U.S.C. § 2401(a), does not apply. (See Id., ECF 45 at 19-21.) The defendants also filed a reply memorandum. (See Id., ECF 49 at 8-9). The November 19, 2012 order cites *Wind River Min. Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) for the proposition that "the Ninth Circuit held 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." (Id., ECF 53 at 15). The issue was decided by necessary implication. The defendants did not appeal. Therefore, the AS-IA's statute of limitations finding in its June 12, 2013 decision was arbitrary.

The revised enrollment ordinance was not drafted by the Band until July 22, 2009. (AR 2149). As a result, plaintiffs could not have reasonably made or sustained a legal challenge. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (the plaintiff must have suffered an "injury in fact"— an invasion of a legally protected interest which is concrete and particularized.) Although plaintiffs do not waive their *void ab initio* argument, this Court need not reach the merits of that legal argument because *Wind River Min. Corp. v. United States*, *supra*, 946 F.2d 710, 716 applies.

The Band's EC invited the plaintiffs to appeal the EC's action to Regional, and therefore invited the federal government's action. (AR 2089). Indeed, the February 3, 2012 letter directed the plaintiffs to file their appeal "with the Pacific Regional Director and not the Enrollment Committee." Ibid, emphasis added. The EC's authority to revise the enrollment ordinance derives its authority from the challenged constitution which was approved by Regional retroactively. "[T]he challenge to the initial action accrues when an agency issues a decision applying the initial action to the challenged party." *Conner v. U.S. Dept. of the Interior*, 73 F.Supp.2d 1215, 1219 (D. Nev. 1999). Therefore the challenged action accrued upon Regional's action

acknowledging the void ordinance and void constitution when Regional applied the 2009 revised enrollment ordinance against the plaintiffs' interest on June 7, 2012[2] causing plaintiffs to suffer an injury in fact.

III. THIS COURT SHOULD SET ASIDE THE AS-IA'S DECISION TO RECOGNIZE THE PALA BAND'S 1997 CONSTITUTION AS EFFECTIVELY ADOPTED.

The AS-IA's "Custom and Practice Theory." The AS-IA relied on conjecture to assume that the Pala Band used the terms "elections" and "meetings" interchangeably. (AR 13, 15). Contrary to the defendants' argument (ECF 58-1 at 32), this Court should consider former Chairman King Freeman's Declaration (Complaint, Exhibit 9) explaining the Band's action on the attached exhibits because the AS-IA engaged in speculation and failed to consider all relevant factors in ruling it was the Band's custom and practice to use the terms, meetings and elections, interchangeably. An administrative record can be supplemented by extra-record materials when the court needs to "determine whether the agency has considered all relevant factors and has explained its decision." *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1231 (E.D. Cal. 2013). See *Kettle Range Conservation Group v. U.S. Forest Service*, 148 F.Supp.2d 1107, 1115 (E.D.Wash.2001) [Allen's declaration and the attachments to it bear directly on whether the agency considered all of the relevant factors and therefore the court will consider its contents]. See also, ; *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir.1986). Because the Pala Band itself did not argue either to Regional or the AS-IA that the terms "elections" and "meetings" were used interchangeably in the Articles of Association and Constitution. (See AR 106-108, 1511-1524). Because the issue was proffered solely by the AS-IA (AR 13, 15), this Court should consider Freeman's declaration for the limited purpose of determining whether the AS-IA considered all relevant factors, and if he did not, remand the case with instructions.

[2] See Aguayo I, ECF 53 at 14.

The AS-IA's 1994 Constitution Theory. The EC enacted enrollment ordinances do not identify a 1994 Constitution. (See AR 90, 91, 2143, 2149). These ordinances were adopted after BIA employee Elsie Lucero, who was responsible for interpreting the Pala Band's tribal membership documents, retired from the BIA in 2005. In late February 2012 or early March 2012, after plaintiffs appealed to Regional with evidence establishing that the Band's website acknowledged its Articles of Association as the Band's governing document, the Band changed its website. This admission on the Band's website was years after the Band's purported 1994 or 1997 constitution was allegedly adopted.

Notwithstanding, the Band actually took the position that the Articles of Association were superceded when the Constitution was enacted in 1997. (See AR 1520). Indeed, there was no mention whatsoever that the Band adopted a 1994 Constitution by election in its briefing. (See AR 1522). The Band did not pass a 1994 Constitution in a balloted tribal election.[3] The 1994 "election" certification, which defendants rely upon merely states a vote was called to "accept" a new constitution. (AR 2121). Tribal Resolution 97-36 states that the Band's 1994 election vote was to "revise the Articles of Association into the Pala Tribal Constitution." (AR 2137). The AS-IA ignored relevant evidence – the meeting minutes indicate that "because the Articles of Association ...need to be updated and revised the Executive Committee is 'recommending' that they (Articles) be changed to a Constitution." (AR 96).

Furthermore, the November 19, 1997 meeting minutes state that "because the Articles of Association of the Tribe need to be updated and revised the Executive Committee is recommending that they (the Articles of Association) be changed to a Constitution." (AR 96, emphasis added). Even without reviewing King Freeman's statements which are made under penalty of perjury, the agency record before the AS-

[3] The Band's public website photographed and downloaded on February 16, 2012, long after Regional's approval of the constitution publicly admitted: "The Tribe is organized under Articles of Association...." (AR 75, 1217-1218; 2091-2092).

IA established that the Band's EC was working on drafting a constitution; at the same time, the EC was also working on revising the Band's Articles of Association; and that the Band did not pass a 1994 constitution by the Band's own admission. (AR 96, 1520, 2123). Consequently, the record establishes that the AS-IA abused his discretion in finding "an election occurred in 1994." (AR 14).

The AS-IA's Articles of Association Theory. As a fallback theory, the defendants also argue that the Band's Articles of Association allow amendment of the Articles by a majority vote of the General Council, voting at a General Council meeting. (ECF 58-1 at 18). First and foremost, the Articles of Association were not amended by the 1997 minority vote. Rather than approve a revision of the Band's Articles of Association, what Regional actually did was approve a completely new governing document retroactively. Furthermore, all General Council meetings (whether general or special) to be legally recognized were required to be publicly noticed for fourteen (14) days prior to the meetings. (AR 2101, emphasis added). Consequently, the record establishes that the AS-IA abused his discretion in applying the Articles of Association theory because there was no evidence that the 14-day notice provision was complied with. Indeed the evidence is to the contrary.

To reach its decision the AS-IA has to disregard the plain meaning rule in interpreting the language of Article IX. The defendants' theory is that because the provisions in Article IX, Section 2 refer to ballots and polling places and Section 1 does not, the Band did not intend that the Constitution be adopted by a majority of voters voting in a duly called election, only that a vote take place at a General Council "meeting." (See ECF 58-1 at 20). In arguing the Band's 1997 Constitution merely needed approval by "a majority vote of the voters voting," in their memorandum, the defendants omit critical language – to wit: the phrase "in a duly called elections (sic) at which this constitution is approved by the Bureau of Indian Affairs." (AR 2135). As a result, the defendants have engaged in a speculative and

strained interpretation when both the Pala Band's Articles of Association and the Pala Band's challenged Constitution have separate provisions defining "meetings" and "elections." (See AR 2098, 2101, 2129, 2130). The word "elections" in Article IX, Section 1 must be given its ordinary meaning according to the "election" provision in the same document. Since a "meeting" is not an "election," the AS-IA failed to make a rational connection between the facts found and the choice made. See *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am v. U.S. Dep't of Agric.*, 415 F. 3d 1078, 1093 (9th Cir. 2005).

Even assuming the word "election" in Section 1 meant voting at a General Council meeting as defendants now argue, such a meeting would have had to have been reasonably noticed to the entire Band after the Regional approved the Band's Constitution. As emphasized, reasonable notice has not been established in the record. The AS-IA's decision is arbitrary and capricious because his decision offers an explanation that runs counter to the evidence before the agency. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The AS-IA's decision should be set aside with instructions.

Moreover, Congress has delegated to the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians. See, 25 U.S.C. § 1A; see also *Udall v. Littell*, 366 F.2d 668, 672 (D.C.Cir.1966); *CVMT II*, *supra*, 515 F.3d at 1267 (noting that the Secretary "has the power to manage all Indian affairs, and all matters arising out of Indian relations.") *United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA 75, 76, 83 (1992); *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 138 (D.D.C. 2002) (discussing *Milam v. United States Dept of Interior*, 10 I.L.R. 3013, 3015, 3017 (1982))"The Secretary of the Interior is charged not only with the duty to protect the rights of the tribe, but also the rights of individual members."

The AS-IA violated its trust responsibility to plaintiff tribal members and Band as a whole, because there was evidence that the Band's Constitution had not been adopted. Elsie Lucero, the responsible Southern California Agency BIA employee during that period states that in 1997, 27 votes was not a majority of the eligible adult voters. (AR 92, ¶ 12). Under the AS-IA's management responsibility, the AS-IA has an obligation to ensure that in adopting governing documents, the procedures used by the Band were "designed to make the vote a meaningful and fully informed one." *Morris v. Watt*, 640 F.2d 404, 415 (D.C.Cir.1981). Here, Regional "retroactively" approved a completely new governing document with substantial changes from the Articles of Association. When it comes to constitutional reform "[T]ribal governments should 'fully and fairly involve the tribal members in the proceedings leading to constitutional reform.'" *California Valley Miwok Tribe v. U.S.,* 515 F.3d 1262, 1268 (D.C. Cir. 2008)(CVMTII) citing *Morris v. Watt*, supra, 640 F.2d 404, 414. See *Ransom v. Babbitt*, 69 F.Supp.2d 141, 153 (D.D.C.1999) (the Secretary was "derelict in [her] responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe"). This principle is codified in the Department's own criteria required to maintain federal recognition as an Indian Tribe. See, 25 C.F.R. 83 § 7(c)(1)(3): A tribe must have "widespread knowledge, communication and involvement in political processes...."

Accordingly, in plaintiffs' case, the agency record establishes a prima facie violation of the federal government's trust responsibility because Regional and the AS-IA recognized and applied void tribal governing documents against plaintiffs who are federally enrolled tribal members subject to a final binding agency decision.[4] 28

[4] The defendants assert that the Band maintains the roll. (ECF 58-1 at11, line 2). While the Band may maintain a copy of the membership roll, the BIA also has a certified membership roll which is required to be maintained for federal recognition as an Indian Tribe. The official roll identifies those tribal members eligible to receive certain services as a result of their Indian status on the federally certified roll. Even under the challenged 2009 EC revised enrollment ordinance, the certified roll maintained by defendants is to be used for all official purposes. (See AR 2157).

U.S.C. § 1331 and/or 5 U.S.C. §§ 702, 704, 706(2). *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

IV. THE RAVAGO MINORS SHOULD HAVE BEEN JOINED AS PARTIES IN THE AS-IA DECISION BECAUSE THEY ARE SIMILARLY SITUATED.

The defendants argue that the AS-IA's decision rejecting joinder of the Ravago minors (children of Plaintiff Patricia Walsh) was reasonable. (ECF 58-1 at 30). Plaintiffs disagree. The Pala Band and Regional lodged no objection to the AS-IA joining the Ravago minors. (See AR 30-38, 100-108, see also 2642). Plaintiffs argued and submitted evidence that the Ravago appeal was served on the Pala Band, Regional and the AS-IA by overnight mail delivery. (AR 68, 88). Despite having evidence of the Ravago appeal, the AS-IA made no reasonable inquiry as to whether an appeal by the Ravago minors was served on Regional. The Ravago minors' mother, Patricia Walsh, is a plaintiff herein and her children are logically similarly situated. Where the record belies the agency's conclusion, the district court has the responsibility to undo errant agency action. See, *Petroleum Communications, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir.1994).

CONCLUSION

The Secretary of the Department of Interior, the Assistant Secretary of Indian Affairs and the Bureau of Indian Affairs has legal and fiduciary obligations to manage Indian Affairs. Unfortunately, the current "administration" has taken a "hands off" approach when it comes to its legal obligation in this case and similar cases around the country. The AS-IA has known of the urgency of the situation resulting in extreme hardships to plaintiffs, federally enrolled members, since February 2012. Plaintiffs had to file a second lawsuit to force the AS-IA to keep plaintiffs on the federally maintained roll and make the AS-IA decide plaintiffs' appeal in a time certain. (See Case No. 3:13-cv-00705, ECF 12 at 2.)

Sadly in Indian cases around the nation, the current administration has turned a blind eye to violations of tribal constitutions, civil rights and federal law. When the Assistant Secretary and BIA sit silent and take no action, it sparks unnecessary violence on reservations around the nation.[5] The issue is one of fundamental fairness which requires agency officials to perform their official duties under their trust and management responsibility and to follow federal law. Here, the AS-IA avoided making an objective decision by ignoring relevant factors, including probative evidence in the record, and by ignoring clearly established federal law, while engaging in conjecture and unsound theories to support his decision. As emphasized, the AS-IA's decision is arbitrary, not in accordance with the law, and does not articulate a rational connection between the facts found by the AS-IA and the conclusions made.

This Court can remedy the situation by ordering the AS-IA to honor the 1989 final decision pursuant to its legal obligation to do so and remand the case with instructions.

DATED: March 3, 2014.

Respectfully submitted,

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[5] See (Modoc Tribe)
http://news.yahoo.com/victim-feared-tribal-evictions-could-turn-violent-195536720.html

New York Times (Chukchansi Tribe)
http://www.nytimes.com/2012/02/29/us/chukchansi-indian-tribe-dispute-heats-up-in-california.html?_r=0