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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' REPLY IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT AND 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' REPLY IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs' Reply, ECF No. 59, does not demonstrate that the Assistant Secretary – Indian Affairs' 2013 Decision ("Decision") to affirm the Regional Directors' letters was arbitrary and capricious. This well-reasoned Decision found that, at the time of the Plaintiffs' disenrollments, the Pala Band of Mission Indians' ("Band") 1997 Constitution was in force, having been voted on at a tribal election and subsequent meeting, then approved by the Bureau of Indian Affairs ("BIA" or "Bureau"). Plaintiffs object that the votes on the Constitution were procedurally deficient; however, the Assistant Secretary reasonably found that they were not—and regardless any procedural challenge was not brought within the six year statute of limitations period.

As a result, under the Band's Constitution, the Regional Director of the BIA had only power to make recommendations regarding the Band's membership decisions. BIA's recommendation—consistent with the Bureau's blood quantum determination regarding Plaintiffs' ancestor Margarita Britten in 1989—was that the Plaintiffs remain enrolled in the Band. But the ultimate tribal membership decision simply is not for BIA to make. Rather, the Band has the final word on membership, and the Band disenrolled the Plaintiffs. Neither collateral estoppel, the United States' trust responsibility, nor any other doctrine Plaintiffs have identified require the United States to overrule the membership decisions of the sovereign Band or bring an "enforcement" action against the Band in this case. The Assistant Secretary's Decision in this case was reasonable, in accordance with law, and should be upheld.

II. ARGUMENT

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

Plaintiffs raise three primary arguments to attempt to show the Assistant Secretary acted arbitrarily and capriciously in finding the Band's 1997 Constitution applied at the time of the

disenrollment dispute. First, Plaintiffs seek to introduce extra-record evidence and argue that the Assistant Secretary relied only upon "conjecture" to determine that the Band had previously amended their documents in both elections and general counsel meetings. Pls.' Reply In Support of Pls.' Mot. for Summ. J., ECF No. 59 at 8. Second, Plaintiffs argue that the Band did not vote on a 1994 Constitution, despite the presence in the record of at least two documents from 1994 and 1995 referring to tribal elections and adoption of the new Constitution by ballot vote. *Id.* at 10; AR 2121, AR 2123. Finally, Plaintiffs disregard the Band's interpretation as well as Federal Defendants' textual arguments about the Band's governing documents and argue that the Constitution never came into force. ECF No. 59 at 10-11. None of these arguments show the Assistant Secretary was arbitrary or capricious or acted contrary to law.

First, the Assistant Secretary did not rely on "conjecture" to determine that the Band's custom and practice had been to adopt and amend governing documents in both "meetings" and "elections." Rather, the Assistant Secretary analyzed the language of the Constitution and the predecessor Articles of Association and documented not only that the original Articles were adopted "at a 'general tribal meeting'" rather than at an "election," but also specified the amendments to the governing document that the Band adopted at "meetings." AR 13-15; 13 n.43. The Assistant Secretary was reasonable also when he deferred to the Band's interpretation of tribal law that the 1997 Constitution was its governing document. AR 9, 10 n.36, 15.

Plaintiffs then attempt to introduce extra-record evidence in the form of a declaration by King Freeman to further elaborate their argument. ECF No. 59 at 14. As Federal Defendants previously argued, Plaintiffs bear the burden of showing the existing administrative record is so inadequate so as to frustrate judicial review and justify invoking the exceptions to the record review rule. *See* Defs.' Cross Mot. for Summ. J. and Resp. in Opp'n to Pls.' Mot. for Summ. J., ECF No. 58-1 at 8-9. Plaintiffs have not met this burden; they assert that the Assistant Secretary did not consider all the relevant factors, but do not identify what factor was not considered. ECF

No. 59 at 8. Plaintiffs briefed the issues before the Regional Director and before the Assistant Secretary. To offer a declaration now is merely to have the court engage in extra-record review.[1]

Second, Plaintiffs claim that there was no 1994 Constitution and that the Assistant Secretary acted arbitrarily when he found that the Band voted on such a document. The record supports the Assistant Secretary's conclusion: it contains an official correspondence from the Band's election Committee to the BIA, stating that "on November 22, 1994 at the Tribal elections for the Pala Band of Mission Indians, it was voted to accept the new Constitution for the Pala Band. The vote was Yes 131, No 65." AR 2121; AR 14. The record also documents the BIA understanding that this revised document "was adopted through ballot vote" on that date. AR 2123. Despite this evidence contemporaneous to the event, Plaintiffs assert that the Band "did not pass a 1994 Constitution in a balloted tribal election" but provide no support for this claim or (as will be discussed below) show why an election would be necessary. ECF No. 59 at 9. Plaintiffs cite to tribal meeting minutes a few days before the election in which the Executive Committee recommended that the Articles be changed "to a Constitution." *Id.* They argue that the election vote was to "accept" a new Constitution, and revise the Articles "into" the Constitution, but apparently not to "adopt" it. *Id.* This argument is belied by the Band's and BIA's interpretation in 1994 and 1995, and is inconsistent with the Band's subsequent submission of the Constitution (Revised), which included underlining, in 1997. The Band's transmittal Resolution specifically used the word "adopt." AR 2137.

In addition, Plaintiffs rely on an erroneous website entry to apparently argue that no Constitution was ever adopted. ECF No. 59 at 9 n.3. But an erroneous or outdated webpage is a

[1] Regardless, Mr. Freeman's declaration itself recognizes that the Articles of Association were amended at both "elections" and "meetings." He provides that *after* the Band adopted its Articles and *after* it adopted its first amendment, the Band's "custom and tradition" was to hold elections "when there were to be *major* amendments" or "*substantial* changes" to the governing document. Decl., ECF No. 1-1, ¶ 6 (emphasis added). He provides also that the amendment to the Articles to include a Bill of Rights was adopted at a "meeting." Decl. ¶ 7. This declaration is consistent with the ballot vote and election in 1994, and subsequent vote at a meeting and submission of a Constitution (Revised) in 1997. The declaration thus supports the analysis in the Assistant Secretary's Decision that the 1997 Constitution was the Band's governing document.

common occurrence[2] and not sufficient reason for the Assistant Secretary to disregard the information in the record showing that the Band "exercising … inherent rights as a sovereign, federally-recognized Tribe, do hereby adopt the Pala Tribal Constitution to supersede the Articles of Association . . . ." AR 2137.

Finally, Plaintiffs argue that the 1997 vote on the Constitution was not valid; this time their objection is that it was not properly noticed. ECF No. 59 at 10. Plaintiffs' assertion that this meeting was not noticed is not supported by the record. There is no affirmative evidence that the Band failed to give notice of the meeting, and the record shows that in 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 (emphasis added). The adjective "duly" implies that the meeting complied with tribal law, including notice requirements. *See* Black's Law Dictionary (9th Ed. 2009) (Duly: "In a proper manner; in accordance with legal requirements."). Regardless, this argument is one about procedure that should have been raised within the six year limitations period as will be discussed in section II(B) below.[3]

Plaintiffs also advance arguments that take issue with the Assistant Secretary (and the Band's) reading of their governing documents. As Federal Defendants explained in their opening brief, the Band voted to amend their governing document (originally called the Articles

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[2] *See, e.g.*, Adam Liptak, In Supreme Court Opinions, Web Links to Nowhere, N.Y. Times, (September 23, 2013), *available at*, http://www.nytimes.com/2013/09/24/us/politics/in-supreme-court-opinions-clicks-that-lead-nowhere.html (last visited March 21, 2014). The Band admits that the website entry was an error and has since been corrected. AR 1520.

[3] Indeed, the difficulty in finding evidence of how a tribal election was noticed more than fifteen after the fact later illustrate the policy reasons that animate limitations statutes. Such statutes are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348–49 (1944)).

of Association, then called the Constitution). AR 2121; ECF No. 58-1 at 10-15. The original 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 Indian Affairs." AR 2103. A meeting of the General Council is valid if attended by a quorum of 25 voters. AR 2101. Therefore either the 1994 vote to amend, or if not that then certainly the 1997 vote, see AR 2137, easily satisfy this requirement. Upon BIA's approval in 2000, then, the Articles by their own terms were properly amended. AR 12-16.

The question, then, is whether the Constitution imposes additional requirements before it may come into effect. The Constitution's provisions regarding its effective date are poorly drafted, providing that it "shall become effective immediately 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 (Article IX, Section 1 of the Constitution). Federal Defendants' reasonable interpretation is that the Constitution "shall become effective immediately" after two conditions have been satisfied: first, approval by a majority vote of the voters in an election (as the Band understood and used that term) and second, approval by BIA. These conditions were both satisfied. The second was clearly satisfied when BIA approved the Constitution. AR 2139-2141. The first was satisfied by the Band's 1994 election, AR 2121, or even if not by that election by the subsequent majority vote of the general council to adopt the Constitution in 1997. AR 2137.

Plaintiffs' interpretation is there are additional unstated conditions embedded in this section of the Constitution. In Plaintiffs' view, to be effective under Article IX, Section 1, the Constitution also requires procedures not contained in this section, but rather in Section 2, titled "Future Amendments." This Section contrasts with the original adoption provision of the Constitution in Section 1, and 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."

AR 2322. Plaintiffs argue these procedures must apply to Section 1, as well.[4] However, they never respond to Federal Defendants' arguments from the text and textual canons. ECF No. 58-1 at 13-14.

Federal Defendants' argument is that by omitting the requirements that were expressly adopted for Section 2, the Band did not intend to apply them to Section 1. *Id.* The Band, when drafting the Constitution, made a choice to require different procedures to enact future amendments than those required to initially effectuate the document. Plaintiffs have advanced no argument from the text or any other authority that shows that the Assistant Secretary's Decision was anything other than reasonable in respecting this choice.

The Assistant Secretary was reasonable to defer to the Band's judgment when drafting its governing documents, and not to impose additional conditions that are not present in the text. *See* AR 15 ("[W]e adhere to the principle of giving deference to a tribe's interpretation of its own laws.") (footnote omitted). However, even if these procedures were required upon the Constitution's original enactment in 1997, the Assistant Secretary was still reasonable to conclude that the time to challenge this Constitution had passed.

B. The Assistant Secretary Reasonably Concluded That the Time to Challenge the Approval of the Constitution Has Passed.

The Assistant Secretary was reasonable to conclude that any procedural challenge to the Band's 1997 adoption of its Constitution—and BIA's 2000 approval—should have occurred within the general six year statute of limitations, 28 U.S.C. § 2401(a). AR 12-13. Plaintiffs abandon their argument based on *Cabazon Band of Mission Indians v. City of Indio, California* but advance two other arguments. 694 F.2d 634 (9th Cir. 1982). First, they assert that this Court previously decided the statute of limitations issue in *Aguayo I*, Case No. 3:12-cv-00551-WQH-

[4] Plaintiffs also argue that the vote would have had to occur *after* BIA's approval of the Constitution. ECF 59 at 11. However there is no mention in Section 1 of what order the conditions (BIA's approval and the vote) must occur.

KSC. Second, they argue that under *Wind RiverMining Corp.* v. *United States*, their challenge can be brought outside the limitations period. 946 F.2d 710 (9th Cir. 1991).

First, Plaintiffs assert—without a quotation from the opinion or any other evidence—that this Court previously ruled in their favor on the statute of limitations issue. *See* ECF No. 59 at 7. Not so. Though the Court did discuss the statute of limitations issue, the Court's holding is limited to the exhaustion issue. *Aguayo I*, Order, ECF No. 53, at 16. Plaintiffs assert that this issue was decided by "necessary implication," but make no argument in support of this assertion. Administrative exhaustion and the statute of limitations are both jurisdictional issues and the Court may rule on either one in any order. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 111 (1998) (Breyer, J., concurring in part and concurring in judgment) (no "order of operations" for deciding jurisdictional issues). A decision on exhaustion grounds does not require or imply a decision on statute of limitations grounds, and no such decision occurred in *Aguayo I*.

Second, Plaintiffs argue "[t]he 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 [until after then]." ECF 59 at 7. This argument ignores the distinction between the enrollment ordinance and the Constitution. To the extent Plaintiffs challenge BIA's 2013 recommendation issued based on the enrollment ordinance, Federal Defendants do not argue the challenge is outside of the limitations period. Indeed, this very suit is evidence of that. However, Plaintiffs argument is that the enrollment ordinance (and presumably, *ever other act* under the allegedly-procedurally flawed Constitution) is invalid because the Constitution itself was adopted in an allegedly procedurally flawed manner. ECF 59 at 7 (the authority of the Enrollment Committee to revise the enrollment ordinance "derives . . . from the challenged constitution").

The problem with this argument is that the Constitution was approved by BIA in 2000, and at some point it is appropriate for the Band and BIA to be assured of its finality without the specter that this act and every subsequent act based thereon will be subject to challenge. This

need for finality is one reason why the statute of limitations exists—so that one procedural violation cannot allow indefinite challenge of any additional action stemming therefrom. "Allowing tolling to continue beyond the point at which a . . . plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable* and inconsistent with the general purpose of statutes of limitations: 'to protect defendants against stale or unduly delayed claims.'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012) (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008)). To the extent Plaintiffs allege a procedural violation with the adoption of the Constitution—and BIA's 2000 approval thereof—that challenge must have been raised within the general six year statute of limitations, but was not. The Secretary was reasonable to so find. AR 12-13.

Wind River is not to the contrary. Plaintiffs cite to this case again in their Reply, but they do not dispute Federal Defendants' argument that this case's reasoning makes clear that while *substantive* challenges may in some cases be raised outside the limitations period, *procedural* challenges will not. *See* ECF No. 58-1 at 18-19. "The grounds for [procedural] challenges will usually be apparent to any interested citizen within a six-year period following promulgation of the decision. . . .." 946 F.2d at 715. Plaintiffs have not shown how their suit—which at its heart is an argument that the Constitution was *procedurally* invalid because it was approved at a meeting—is somehow a substantive challenge within the reasoning of *Wind River*.[5] Nor have they shown that the Band's adoption of the Constitution (and any alleged procedural defects associated with this adoption) were not reasonably known to them. The Constitution was voted on and even subsequently amended in tribal elections and indeed was even distributed to each

[5] The only other case on this point that Plaintiffs cite in their Reply, *Conner v. U.S. Department of the Interior*, supports the Federal Defendants' position. 73 F. Supp. 2d 1215, 1218 (D. Nev. 1999). In that case, the court found that plaintiffs, who challenged the 1991 application of a 1970 agency decision, were time-barred because "the challenge essentially alleges a procedural violation in the decision. . . . Plaintiffs argue the applicable regulations required certain notifications and publications, yet BLM failed to comply with these regulations. Given this *procedural challenge*, the court finds plaintiffs were required to bring their action within six years. . . . ." 73 F. Supp. 2d at 1218 (emphasis added).

member of the Band. If Plaintiffs wished to challenge the adoption of the Constitution, the time to do so was within six years of 2000, at the latest. The Assistant Secretary was reasonable to so conclude. AR 12.

C. Collateral Estoppel Principles Do Not Obligate An Enforcement Action Against the Band.

Plaintiffs continue to argue that collateral estoppel somehow obligates "BIA to honor and enforce" the Agency's 1989 conclusion regarding the blood quantum of their ancestor, Margarita Britten ("Ms. Britten"), and that the Court can issue instructions that the Federal Defendants "enforce" its 1989 decision against the Band. ECF No. 59 at 2, 3; Pls.' Summ. J. Mot., ECF No. 54-1 at 9-10. Nothing in this doctrine requires the BIA to take affirmative action to enforce the 1989 decision against the Band. Further, the BIA has remained consistent with the earlier determination: based on the 1989 blood quantum determination of Ms. Britten, the BIA recommended that these Britten-descendants remain enrolled in the Band. What Plaintiffs appear to take issue with is that *the Band* has a different view. But BIA lacks authority to force the Band to adopt BIA's opinion on tribal membership—and this Court cannot order such relief under the APA. If the relief Plaintiffs seek is an order compelling the Band to alter their membership determinations, then the Band must be joined as a party, yet it cannot be under Federal Rule of Civil Procedure 19.

The 1989 documents that Plaintiffs seek to have BIA "enforce" comprise a letter from BIA to an individual, Cheryl Freeman Majel, who sought membership in the Band, but who the Band found did not qualify, and the subsequent September 11, 1989 letter, in response to the Band's appeal, that upheld the determinations in the May letter. AR 1336-38; AR 1339-40. Pursuant to the Band's 1960 Articles, see ECF No. 58-1 at 3-4, at that time appeals of such membership determinations went to the Assistant Secretary – Indian Affairs, who had the final word. In the September 1989 letter, the Assistant Secretary sustained the appeal and found that Ms. Majel possessed 1/16 degree Cupa blood, based on her ancestor Margarita Britten being full-blood, and thus Ms. Majel was entitled to enrollment. AR 1338.

Plaintiffs invoke the doctrine of collateral estoppel, or issue preclusion, and argue that this document is binding on BIA in the instant dispute. The doctrine does not apply here. Collateral estoppel prevents re-litigation of issues determined in a prior legal proceeding between the same parties, or their privies. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). Specifically, it bars relitigation of issues if three requirements are met: (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privy with a party at the first proceeding. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006). The doctrine applies "flexibly" in the administrative setting and is not necessarily binding in this context. *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1324 (9th Cir. 2006); *see Maldonado v. U.S. Attorney Gen.*, 664 F.3d 1369, 1377 (11th Cir. 2011) (collecting cases).

There are numerous reasons this doctrine does not apply here. The first is that the issue decided at the previous preceding is not "identical" to the issue in this suit, or that was at issue in the Regional Director's letters. In the earlier preceding, the Band's 1960 Articles applied and explicitly gave the Assistant Secretary the final word on membership appeals—unlike the Band's current governing documents. *See* ECF No. 58-1 at 3-4. But most significantly, even if the doctrine did apply, the Department has remained entirely consistent with the 1989 blood quantum determination of Ms. Britten in recommending that these descendants should remain enrolled in the Band. The Assistant Secretary "honored" that decision. Further, since the Band's governing documents were revised after the 1989 decision and the BIA no longer has final authority, or any "enforcement" power, over membership determinations, the Assistant Secretary did not act arbitrarily by not "enforc[ing]" the Agency's 1989 determination.

D. To the Extent Plaintiffs Seek to Bind the Non-Party Band in This Suit They Cannot.

What Plaintiffs appear to seek is a decision compelling the Band to comply with the BIA's 1989 conclusion. However, as the Assistant Secretary noted "[t]o the extent the argument

is that the Band is bound by the 1989 [D]ecision, it must be directed to the Band." AR 18. If Plaintiffs seek to compel the Band to amend their final membership determination based on issue preclusion or any other theory, they cannot do so through the instant suit.

There are three reasons that this suit does not provide a vehicle for relief against the Band itself. First, the APA provides for only limited relief, namely it allows a court to "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 means by which a court "set[s] 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). Plaintiffs argue, however, that "this Court can reverse the [Assistant Secretary's] decision which fails to appropriately apply the collateral estoppel doctrine or enforce it." ECF 59 at 4. Plaintiffs are exceptionally vague about what it means for the BIA to "enforce" the collateral estoppel doctrine in the context of the instant APA suit. BIA cannot logically enforce this doctrine upon itself as it is acting consistent with the 1989 decisions. The only entity upon which Plaintiffs could seek for BIA to "enforce" this doctrine, therefore, is the Band, which is indeed what Plaintiffs appear to seek. But an order that BIA take affirmative action to "enforce" BIA's 1989 view of Margarita Britten's blood quantum against the Band cannot reasonably be said to be a form of "set[ting] aside" or remanding the Assistant Secretary's decisions. *Cf. Alto v. Black*, 738 F.3d 1111, 1127 (9th Cir. 2013) (observing that the relief available in an APA case is limited to "affirmation, reversal[,] or remand of the agency action . . ."). Finally, even if this relief was somehow otherwise within the ambit of the APA, this law does not allow for review of discretionary action, 5 U.S.C. § 701(a)(1), and agency decisions to prosecute or enforce are committed to an agency's "absolute discretion" *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). As such, if Plaintiffs seek to force BIA to "enforce" its view on the Band, this is outside of the type of relief that can be granted in this APA case.

Next, to the extent Plaintiffs seek the non-APA relief of requiring the Band to alter its view of Ms. Britten's blood quantum (or to have BIA somehow "enforce" its view upon the

Band) they also cannot succeed for the simple reason that the Band is not a party to this suit. If this Court were to grant relief that would alter the Band's membership determinations, the Band would need to be a party as they have a strong interest in their sovereignty and membership determinations. *See* ECF No. 58-1 at 22-23; AR 1511; *see, e.g.*, *Timbisha Shoshone Tribe v. Bureau of Indian Affairs*, No. 03-404, 2003 WL 25897083, at *5 (E.D. Cal. Apr. 10, 2003) (Membership dispute "raise[d] questions about compliance with the Tribe's Constitution and Election Ordinance, questions in which the Tribe as a whole has a clear interest."). Plaintiffs have two responses to this argument. First, they misread *Alto*, 738 F.3d at 1127 to suggest the Band would not be a required party in such a case. Second Plaintiffs argue that the Band's interests are adequately represented by the United States. The arguments are related and neither is persuasive.

Alto, like this case, concerned an intra-tribal disenrollment dispute. But a crucial difference is that the governing document of the Tribe (the San Pasqual Band) in *Alto* gave the Assistant Secretary "final authority over tribal enrollment decisions." 738 F.3d at 1116. Thus, rather than giving a recommendation as in the instant case, in *Alto*, the Assistant Secretary made the final enrollment decision. This decision can then be reviewed by a federal court under the APA and, if arbitrary, remanded to the agency resulting in relief for the plaintiffs. *Id.* at 1127 ("[T]he injury complained of in the first three causes of action is the BIA's violation of the APA in carrying out a responsibility delegated to it by the Band, under the Band's own Constitution. The injury resulted from the Secretary's actions in ruling the Altos ineligible for tribal membership. . . . Vacating or reversing the Disenrollment Order, and remanding if necessary for rehearing, would afford the Altos complete relief. . . .").

Thus in *Alto*, both the Tribe and the United States shared an interest in upholding the Assistant Secretary's decision as reasonable under the APA; the United States could adequately represent the Tribe's interests and the Tribe did not need to be joined. *Id.* at 1128. Here, however, the tribal law differs and the Assistant Secretary and the Band have differing interests. In contrast to *Alto*, the BIA in this case has authority only to make recommendations on

enrollment to the Band and the Band retains decision making authority. To the extent Plaintiffs seek to have the Band alter its membership decisions (not merely for the Assistant Secretary's decision finding the Regional Director's recommendations to be upheld) this relief cannot be granted without the Band present to represent its interests. *Id.* at 1129 ("The [plaintiffs] do not seek to alter the Band's rights vis-à-vis enrollment decisions. Any attempt to do so in the Band's absence would clearly be impermissible."). The reasons under Rule 19 are manifold. *See* ECF No. 58-1 at 22-23. Most obviously, on the status of Ms. Britten and her descendants' blood quantum the United States and Band are *not* aligned. The United States believes that based on Ms. Britten's blood quantum, these descendants—Plaintiffs—should remain in the Band, but the Band disagrees. *See, e.g.*, *Alto*, 738 F.3d at 1128 ("To be sure, conflicts can arise between the United States and an Indian tribe; when they do, the government cannot adequately represent the tribe's interests."); *see also Timbisha Shoshone Tribe v. U.S. Dep't of the Interior*, 290 F.R.D. 589, 598 (E.D. Cal. 2013). Thus, as *Alto* recognized, if Plaintiffs indeed seek to have the Band alter their membership determinations, prior cases have "held it impossible to afford complete relief [where] the court's judgment would not bind the absent tribe." *Alto*, 738 at 1126 (citing *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155–56 (9th Cir. 2002); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991)).

E. The Assistant Secretary's Decision Does Not Violate the United States' Trust Responsibility.

Finally, Plaintiffs argue that the Federal Defendants have violated the Federal Government's trust responsibility to Indian tribes. ECF No. 59 at 12. A general trust relationship exists between the United States and Indian Nations. *See, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*"). However that trust is not the same as a common law trust and is defined and governed by statutes rather than the common law. *See United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*") ("[T]he analysis must train on specific rights-

creating or duty-imposing statutory or regulatory prescriptions"); *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011).

Thus to show a breach of trust, generally Plaintiffs must show a violation of the applicable statutes and regulations. *See, e.g.*, *Navajo I.*[6] Here the only relevant statute that Plaintiffs appear to rely on direct is 25 U.S.C. § 2 ("The Commissioner of Indian Affairs shall . . . have the management of all Indian affairs and of all matters arising out of Indian relations."). This language is extremely broad and certainly not sufficient to create a specific trust duty to take a particular action in this case. As many courts have recognized, the management of Indian tribes generally is "left, under the acts of Congress, to the discretion of the Executive Department." *Heckman v. United States*, 224 U.S. 413, 446 (1912). To the extent Plaintiffs argue the Assistant Secretary acted arbitrarily by breaching a trust duty in this case, this argument should be rejected.

F. The Ravago minors

Last, the clear reason that the Assistant Secretary's decision did not apply to the Ravago minors is that they did not appeal to the Regional Director in 2012 and were not included in the Regional Director's recommendations. Regardless of whether the Band objected or not, the Assistant Secretary's decision simply did not address parties that were not subject to the Regional Director's recommendation and were therefore neither within the scope of the issues pending before the Assistant Secretary nor added to the proceeding before the Assistant Secretary. AR 20-21. This conclusion is reasonable.

III. 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.

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[6] Similarly, as Defendants previously argued, to the extent Plaintiffs argue that they are advancing a 706(1) failure to act claim, it cannot succeed because they have not identified a mandatory duty in any law or regulation that would compel BIA to act in this case. *See* ECF No. 58-1 at 22 n.6.

Dated: March 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 March 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