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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERT P. ALTO, et al.,

Plaintiffs,

v.

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

Defendants.

CASE NO. 11-cv-2276-MMA (BLM)

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

Judge: Hon. Michael M. Anello
Courtroom: 3A
Date: July 28, 2014
Time: 2:30 p.m.

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INTRODUCTION[1]

The background of this case is set forth in the district court's order and findings filed on December 19, 2011, granting the preliminary injunction. (ECF 24).

Plaintiffs are federally recognized tribal members pursuant to the April 10, 1995, AS-IA Ada Deer final decision which became binding between governments by operation of law. In 2003 and 2005, some tribal members, led by tribal member Diana Martinez, filed a challenge to the AS-IA's 1995 final decision, *Caylor v. Bureau of Indian Affairs*, 03cv1859-J(JFS); *Atilano v. Bureau of Indian Affairs*, 05cv1134-J (BLM), respectively. Both cases were dismissed.

The Alto family "disenrollment" action commenced after Alto family member, Angela McNeal (Ballon) became a complaining witness to the San Diego County District Attorney's embezzlement charges against EC Chair, Victoria Diaz. Both Diaz and EC member, Diana Martinez, who previously submitted two declarations against the Altos, refused to recuse themselves, and in taking action violated the Plaintiffs' civil rights. Unfortunately, the Assistant Secretary turned a blind eye to his trust responsibility and obligation to honor a final binding decision. In doing so, the AS-IA revisited issues that were long since litigated. By filing the instant summary judgment motion, Plaintiffs seek a declaratory relief order that the AS-IA's January 28, 2011 findings and decision be set aside and remanded with instructions.

REVIEW STANDARD

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

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[1] "ECF" refers to the electronic filing system. "AR"refers to the agency record. "AS-IA" refers to the Assistant Secretary- Indian Affairs. "BIA" refers to the Bureau of Indian Affairs. The term "the Band" refers to the San Pasqual Band of Mission Indians. "EC" refers to the San Pasqual's five member Enrollment Committee. "APA" refers to the Administrative Procedures Act. "EXH" refers to the Exhibits and excerpts of agency record filed in support of the Plaintiffs' Summary Judgment Motion.

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's findings can only be upheld if the agency articulates a rational connection between the facts found and the conclusions made. *Latino Issues Forum v. EPA*, 558 F. 3d 936, 941 (9th Cir. 2009); *Environmental Def. Ctr., Inc. v. EPA*, 344 F. 3d 832, 858 n.36 (9th Cir. 2003), cert. denied, 541 U. S. 1085 (2004). In other words, a reviewing court must 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); 5 U.S.C. §§ 701 et seq., 706(2)(A)**.** "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. 402, 416. A clear error of judgment exists when the agency's decision offers an explanation that runs counter to the evidence before the agency. *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 806 (9th Cir. 2005).

The above review standards apply to the Court's review of the AS-IA's findings of fact. The availability of collateral estoppel/res judicata preclusion is a mixed question of law and fact which the Court reviews de novo. *Plaine v. McCabe*, 797 F.2d 713, 718 (9th Cir.1986).

I. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE WITH INSTRUCTIONS THAT THE AS-IA IS LEGALLY BOUND TO HONOR THE APRIL 10, 1995 AS-IA ADA DEER FINAL DECISION.

The collateral estoppel doctrine and the BIA's management responsibility (25 U.S. C. § 2) requires the BIA to honor and enforce the April 10, 1995, AS-IA Ada Deer final decision. It is settled that the doctrine of collateral estoppel or issue

preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity. See *Astoria Federal S. & L. Assn. v. Solimino,* 501 U.S. 104, 107 (1991) (extending the doctrine to the final adjudications of both state and federal agencies); *United States v. Utah Constr. Co.*, 384 U.S. 394, 421-422 (1966). The doctrine of collateral estoppel, or issue preclusion, is firmly embedded in federal common law. See, *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986) finding the rule of federal common law applies the policy of the Full Faith and Credit Clause to state agency decisions. This doctrine is grounded on the premise that "once an issue has been resolved in a prior proceeding, there is no further fact-finding function to be performed." *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 336, fn. 23. Collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy, by preventing needless litigation. Id. at p. 326, fn. omitted.

Plaintiffs argued the April 10, 1995, AS-IA Ada Deer decision was final for the Department. That decision concluded Marcus Alto Sr. possessed 4/4 degree Indian blood of the Band. (EXH 15-AR 1719). Regional recognized the final agency decision stating:

> It is inappropriate for the Committee to continue to raise this issue of the validity of the inclusion of Mr. Alto and his descendants on the Band's membership roll or to attempt to disenroll his descendants and continue to seek remedy from the BIA. (EXH 14-AR 1473).

The collateral estoppel doctrine applies if: (1) the issue necessarily decided at the previous agency proceeding is identical to the one sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. *Plaine v. McCabe*, *supra*, 797 F.2d 713, 720.

The Alto family, including Marcus Alto Sr., provided enrollment applications to the Band. Under the existing regulations, 25 CFR Part 76, the BIA reviewed their enrollment applications and found the Marcus Alto descendants eligible for

enrollment in the Band. The Assistant Secretary had final authority to review enrollment appeals. "The decision of the Assistant Secretary on an appeal [was] final and conclusive...." (EXH 8-AR 1576).

United States v. Utah Construction & Mining Co., supra, 384 U.S. 394, 398, involved a contractual issue. The contract stated "all disputes concerning questions of fact arising under this contract" shall be decided by the contracting officer subject to written appeal to the head of the department, "whose decision shall be final and conclusive upon the parties thereto." Although that decision rested upon the agreement of the parties to have final and conclusive effect, the United States Supreme Court found it was harmonious with general principles of collateral estoppel. Id. at p. 421.

Since the endorsement of the proposition by the Supreme Court in *United States v. Utah Construction Co.*, *supra*, 384 U.S. 394, 421, courts have increasingly given res judicata and collateral estoppel effect to the determinations of administrative agencies acting in a judicial capacity. *United States v. Lasky*, 600 F. 2d 765, 768 (9th Cir. 1979). Here the Band's enrollment requirements were incorporated by CFRs (which is similar to a contract). The original regulation (Part 48) and the Band's 1995 regulation (Part 76) which required the Secretary's decision to be "final" and "conclusive."

The 1995 decision was adjudicatory in nature,[2] requiring the application of a rule of "fairness" to a specific set of facts. *Plaine v. McCabe*, *supra*, 797 F.2d 713, 720. The Band had a full opportunity to challenge the BIA's enrollment decision. In a letter dated June 13, 1991, the Band objected to the Alto family's enrollment alleging that although Marcus Alto Sr. was raised by tribal members, Jose and Maria (Duro) Alto, he was not their "blood" son. The Band relied on Maria Duro Alto's typewritten

[2] The term "adjudication" means the agency process for formulation of an order or decision. 5 U.S.C. § 551(7).

application for the California Indian judgment roll, #8685, to claim she had no children. The Band rejected the enrollment of Marcus Alto Sr. stating he was not related to a San Pasqual ancestor. (EXH 2-AR 592, 595).

Ms. Diana Martinez, Chairperson for the Band, received a letter dated September 5, 1991, from the BIA. In that letter, the BIA memorialized that on "May 23, 1991, we gave you our findings on all enrollment applications after review was completed." (EXH 3-AR 625). The BIA's letter advised the Band to submit any evidence pertinent within 30 days of notification. (EXH 3-AR 624).

On January 28, 1994, the BIA notified Alto family member Victoria Ballew that the BIA had decided that Marcus Alto Sr. and his descendants should be included on the Band's membership roll. (EXH 4-AR 753-754).

In a letter dated March 17, 1994, the Band's attorney, Eugene R. Madigral, wrote the BIA Regional asserting that there were errors made in the processing of the Altos' enrollment applications. Madrigal's letter further stated, "Now [three years later] having had the opportunity to examine the appeal documents, the Band is in a position to exercise its legal rights..." [¶] ..."failure to allow the Band to present its evidence would deny the Band its Due Process rights...and would thus be challengeable by federal court action." (EXH 5-AR 755-756, emphasis added.)

In a letter dated July 7, 1994, attorney Madrigal was notified by Regional that the Band's request for reconsideration was untimely and faulty. The Band's request for reconsideration was denied. (EXH 6-AR 761-762). The Band was also notified of their right to appeal that decision to the AS-IA. Id. at p. 761. On August 5, 1994, attorney Madigral, exercised that right and filed a notice of appeal. (EXH 7-AR 763). In a letter dated April 10, 1995, attorney Madigral was notified of AS-IA's Ada Deer's decision. (EXH 8-AR 775-776). The decision explained that all available documentation produced had been considered. The AS-IA reviewed both 1928 California Judgment Roll applications for Marcus Alto Sr. and Maria Duro. Based on the information, the AS-IA concluded that Jose Alto and Maria Duro were Marcus

Alto Sr.'s parents who were named on the Band's 1910 census. Although Marcus Alto Sr. had not previously been enrolled on January 1, 1959 (when the Band reorganized and submitted a roll), the AS-IA concluded that Marcus Alto Sr. was 4/4 San Pasqual Indian, and his descendants were eligible for enrollment. The Band was notified that the AS-IA decision was "final for the Department." Id. at 776.

The Band subsequently sat on its right to request reconsideration from the AS-IA by failing to submit further documentation for reconsideration. The Band also failed to seek APA review in federal court of the April 10, 1995, AS-IA Ada Deer final decision. 5. U.S.C. § 704. Instead the Band complied with the "final" decision and enrolled the Plaintiffs as tribal members. Plaintiffs' names were placed on the federally approved roll entitling them to Native American benefits based on their status as Indians on a federally acknowledged roll.

"Although some of the full benefits of court proceedings were not provided by the administrative procedure, these additional procedures are not required to give collateral estoppel effect to an administrative decision." *Plaine v. McCabe*, *supra*, 797 F.2d 713, 720. The April 10, 1995 decision was issued long after the U.S. Supreme Court decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Band could not sit on its right to challenge the AS-IA's enrollment decision. Assuming the Band had credible, relevant evidence (see Band's statement/affidavit evidence discussion, *infra*), there was a legal process, and a legal forum available to challenge the legal correctness of the AS-IA's final decision. *Goodface v. Grassrope*, 708 F.2d 335, 229 (8th Cir. 1983); *Baciarelli v. Morton*, 481 F.2d 610, 612 (9th Cir. 1973).

Because the Band chose not to challenge the 1995 enrollment decision further, the AS-IA's decision became binding and conclusive and created a final, nonappealable order/judgment by operation of law. See 28 U.S.C. Section 2401a. 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); *Plaine v. McCabe*, *supra*, 797 F.2d 713, 721. The issue

of a "full and fair" opportunity to litigate includes the possibility of a chain of appellate review. A losing party cannot obstruct the preclusive effect of a final administrative decision simply by foregoing the right to appeal. Cf., *Murray v. Alaska Airlines, Inc.*, 50 Cal.4th 860, 877 [237 P. 3d 565] (2010) (applying a preclusive effect to a state administrative decision); see also, *Miller v. County of Santa Cruz*, 39 F. 3d 1030, 1038 (9th Cir. 1994) an unreviewed agency determination is equivalent to a final judgment entitled to res judicata and collateral estoppel effect. "Any other result would render the administrative forum a place for meaningless dry runs." Ibid.

The availability of judicial review is a crucial factor in determining preclusive effect of administrative decisions. In the Band's case, there was no statute precluding APA judicial review of the AS-IA's final decision. See *Goodface v. Grassrope*, *supra*, 708 F. 2d 335, 338 ("We know of no statute precluding judicial review of BIA actions...."). Indeed, the Band's attorney acknowledged that the Band had the legal right to pursue an action against the BIA in federal court. The Band does not have a sovereign right to relitigate membership issues "conclusively" decided between the parties and between governments. If issue preclusion did not apply, Indian tribes around the nation could ignore final binding agency decisions and continually reopen issues long since concluded.

Likewise, the AS-IA could not ignore the legal effect of the final "conclusive" Ada Deer's decision which is binding on the Assistant Secretary's office. If this were the law, final agency decisions could routinely be changed when a new administration is in office at the whim of the office holder. The review of the Band's alleged "new" evidence here was whimsical. The AS-IA concluded that he could consider new evidence of affidavits executed in *Caylor v. the Bureau of Indian Affairs*, "having been executed nine-years after" the AS-IA's final decision regarding the enrollment of the Alto descendants." (EXH 1-AR 1151).

/ / /

However, in 2004, in *Caylor v. Bureau of Indian Affairs*, the district court entered a dismissal order based in part on federal statute of limitations grounds. The court ruled:

> The BIA issued a final administrative decision pertaining to the enrollment in the Band of Marcus Alto, Sr. and twenty-three of his named descendants on April 10, 1995. (Citation) The period to bring a suit based on this final action would have expired in 2001, six years later. Although Plaintiffs claim they only seek review of decisions made in the past six years, confusingly, they spend considerable space in their opposition arguing the error of the initial 1995 decision. (Citation) Any review of the 1995 administrative decision to admit Alto and the named descendants is clearly barred by the statute of limitations. (EXH 10-AR 810).

Here, the agency acted in an adjudicatory capacity in determining the blood degree of Marcus Alto Sr. and made a final decision that he was the son of Jose Alto and Maria Duro Alto, both named on the 1910 San Pasqual Indian census. 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 principles. See *Plaine v. McCabe*, *supra*, 797 F.2d 713, 720.

Plaintiffs' status as enrolled members flow because they are federally recognized tribal members subject to certain federal benefits as a result of their Indian status on the federally acknowledged roll. See 25 U.S.C. § 479.[3] The AS-IA has a trust responsibility to honor and enforce the final agency decision (which both Part 48 and Part 76 required to be given "conclusive" effect). See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). With regard to the relationship between a tribal government and an applicant for enrollment, all federal duties flow toward the tribal government. Conversely, the rights of federally recognized tribal members invoke an entirely different set of relationships. (EXH 1-AR 1146).

[3] Section 479 provides: "[T]he term 'Indian'... shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."

There is a distinctive obligation of trust which requires the AS-IA to honor its decision with "recognized" Indian tribal members. Under the broad authority granted in 25 U.S.C. Section 2, Congress has expressly vested in the Bureau of Indian Affairs the authority for the "management of all Indian affairs and of all matters arising out of Indian relations." *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 (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." *Milam v. United States Dep't of Interior*, *supra*,10 I.L.R. 3013, 3017, emphasis added. Therefore, this Court should set aside the January 28, 2011 AS-IA decision which terminated Plaintiffs' Indian status and tribal enrollment with instructions that the final 1995 decision must be upheld and enforced by the defendants.

While this Court can reverse the AS-IA's decision on the res judicata ground, this Court should review the agency record and Grabowski report which the AS-IA relied on in his decision. Review is important because it will put to rest any claim which could cause continued animosity among tribal members. As demonstrated by the agency record, the AS-IA's findings are severely flawed.

II. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE WITH INSTRUCTIONS FOR THE AS-IA TO CONSIDER WHETHER THE ENROLLMENT COMMITTEE'S ACTIONS VIOLATED THE PLAINTIFFS' DUE PROCESS RIGHT TO A FAIR DISENROLLMENT PROCEEDING.

The Alto family descendants advised the BIA that EC member Diana Martinez (who signed two statements) was a long time advocate of having the Alto plaintiffs excluded from the Band's membership. (EXH 15-AR 1717). The BIA was also informed by then Vice-Chairman and EC member Robert Phelps that Diana Martinez was asked to recuse herself from making any decision on the current enrollment challenge because she was a witness in the case, but she refused to recuse herself. (EXH-16 AR 1894).

The BIA was also advised by Phelps that Victoria Diaz had recently been indicted on embezzlement charges and an Alto family member was serving as a witness to the charges. Id. at 1895. The BIA was in possession of documents corroborating that EC Member Victoria Diaz was under criminal investigation. (EXH 18-AR 1833-1834). The BIA was also in possession of San Pasqual EC minutes which state: "For the Record...Joe Navarro stated that the Enrollment Committee failed to follow due process thereby violating the civil rights of the Alto family." (EXH 17-AR 2051).

Mr. Phelps further informed the BIA that at the EC meeting held on July 25, 2008, he and another committee member voiced concerns about the quality of the Band's anthropology expert's research and the validity of the report's conclusions. (EXH 16-AR 1893). Mr. Phelps claimed that during a conference call with Grabowski, he was not given an opportunity to question her. In the middle of being questioned by another committee member, EC Chair Victoria Diaz, hung up the phone to end any further examination. See, Id. at 1893-1894. Mr. Phelps also notified the BIA that the EC's "findings" were drafted by legal counsel the day before the EC's meeting, and arrived at his home via Federal Express only four hours after the meeting, Id. at 1894, indicating a lack of any meaningful deliberation.

The AS-IA acknowledged that "the Indian Civil Rights Act ("ICRA") requires disenrollments be conducted in a manner that provides tribal members with due process. 25 U.S.C. § 1302(a)(8). (EXH 1-AR 1146). However, despite being notified of this information, the AS-IA failed to rule on whether the EC's lack of recusal and actions violated the Plaintiffs' due process rights.

III. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE WITH INSTRUCTIONS FOR THE AS-IA TO CONSIDER HIS FINDING THAT THE 1907-1913 SAN PASQUAL CENSUSES SHOULD BE GIVEN "VERY WEIGHTY" EVIDENCE.

An agency must articulate a rational connection between the facts found and the choice made. *Seminole Nation of Oklahoma v. Norton*, *supra*, 223 F. Supp. 2d

122, 131. In this respect, a court's review of the agency record must be "searching and careful." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (citation omitted). "[W]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." *Ransom v. Babbitt*, 69 F. Supp.2d 141, 149 (D.D.C. 1999) (citation omitted).

It is undisputed that the San Pasqual tribal members did not live on the reservation. (EXH 1-AR 1139). The ages reported by the census taker on the Indian censuses, even as to Jose and Maria Alto's ages, show inaccuracies as follows:

1907
The June 30, 1907 Census (submitted by Amos R. Frank) states:
Jose Alto, age 50
Maria Alto, age 45

1908
The June 30, 1908 Census (submitted by Thomas M. Games) states:
Jose Alto, age 50 (***Jose is the same age as reported by A.R. Frank the previous year***)
Maria Alto, age 52 (***Maria is now seven years older***)

1909
The June 30, 1909 Census (submitted by Amos R. Frank) states:
Jose Alto, age 50 (***Jose is the same age as reported by A.R. Frank in 1907***)
Maria Alto, age 45 (***Maria is the same age as reported by A.R. Frank in 1907***)

1910
The June 30, 1910 Census (submitted by Amos R. Frank) states:
Jose Alto, age 50 (***Jose is the same age as reported by A.R. Frank in 1907***)
Maria Alto, age 45 (***Maria is the same age as reported by A.R. Frank in 1907***)

1911
The June 30, 1911 Census (submitted by Amos R. Frank) states:
Jose Alto, age 51 (***Jose is a year older than reported by A.R. Frank in 1907 and 1909***)
Maria Alto, age 45 (***Maria is the same age as reported by A.R. Frank in 1907***)

1912
The June 30, 1912 Census (submitted by Thomas M. Games) states:
Jose Alto, age 52 (***Games adds a year to Jose's 1911 age reported by A.R. Frank***)
Maria Alto, age 46 (***Maria is six years younger than reported by him in 1908***)

The Regional BIA found the fact that Marcus Alto Sr. was not listed on the 1907-1913 San Pasqual Indian censuses did not prove that he was not the son of Jose and Maria Alto. (EXH 14-AR 1470). The Defendants also concede that the San Pasqual 1907-1913 Indian census contain inaccuracies. (EXH 19-ECF 61 at 10).

Here, the AS-IA abused his discretion because he found it "particularly probative" that Marcus Alto Sr. was not identified on the early San Pasqual Censuses. (EXH 1- AR 1137) when the censuses as now acknowledged were inaccurate. The AS-IA further acted arbitrarily because he failed to address the Band's hired anthropology expert's evidence, at page 40, footnote 121 of the April 2010 report, which identifies several children born to other San Pasqual tribal members, between 1897 and 1903, who were NOT identified on the San Pasqual censuses either. (See EXH 20-AR 1048).

Further, the 1920 U.S. census identifies Marcus Alto Sr. as Maria and Jose Alto's son, and the Alto family household is identified as "Indian." (EXH 21-AR 2431). According to then Vice-Chair Robert Phelps, who is also a history professor, "adopted children were often listed in the census as 'adopted.'" (EXH 16 AR1896). Therefore, the AS-IA's decision failed to explain a rational connection between the finding that "the adoption theory" is the "most logical explanation" based upon the early 1907-1913 censuses (which are not accurate) and failed to reconcile it with the evidence that Marcus Alto Sr. was identified as the "Indian" son of Jose and Maria Duro Alto on the 1920 U.S. Census. (EXH 21-AR 2431).

IV. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE WITH INSTRUCTIONS TO THE AS-IA TO RECONSIDER THE SEVERAL AFFIDAVITS AND STATEMENTS HE FOUND "CREDIBLE."

Plaintiffs objected to the Band's submitted statements and affidavits from individuals as hearsay and because the statements lacked foundation and documentation. (EXH 15-AR 1717). However, the AS-IA's January 28, 2011 decision states in part:

> I find the testimonial evidence contained in affidavits by tribal elders, tribal enrollment committee members, close acquaintances of Maria Duro and Marcus Alto, and especially anthropologist Florence Shipek, to be very credible and probative respecting Marcus's status as biological or adoptive son of Jose and Maria Duro Alto. (EXH 1-AR 1138).

The "testimonial" evidence contain hearsay, lacks foundation and are contradicted by the Band's other evidence. For example, in an unsworn statement, Felie Quisquis states that he was born on April 22, 1907. (EXH 11-AR 2650). The AS-IA concluded that Marcus and Felie Quisquis had a close relationship and "were near the same age" (EXH 1-AR 1137) despite the Band's hired anthropology expert report identifying that Felie Quisquis was born in 1912. (EXH 20-AR 1051). This would make Felie Quisquis either 5 or 7 years younger than Marcus Alto Sr. Therefore, the AS-IA failed to articulate a rational connection between the facts found. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005) (citation omitted).

The AS-IA also found Mellie Duenas's affidavit credible.[4] Mellie Duenas stated that she moved next door to Maria Duro Alto in the 400 Block of Pennsylvania Avenue in Escondido in the early 1930's. (EXH 12-AR 2656). The AS-IA concluded that Duenas "lived next to Maria Alto in the early 1930's" (EXH 1-AR 1150) despite Escondido directory evidence that Maria Alto did NOT live on Pennsylvania Avenue during the early 30's (EXH 36-AR 464, 466), and despite Laura Guidry's affidavit that her family lived at 450 E. Pennsylvania, Escondido, for many years. (EXH 31-AR 2653).

Similarly, the AS-IA accepted as true Florence Shipek's hearsay statement that tribal elders, in particular, Sosten Alto, who was in charge of determining Band membership, told Shipek that Marcus Alto Sr. was adopted and "non-Indian."[5] (EXH 9 AR 2196). The AS-IA likewise accepted the statements of Sosten Alto's step-daughter Mary Arviso, and Sosten Alto's daughter Laura Guidry, despite the fact their

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[4] Mellie Duenas aka Amelia Contreras Villalobos (Tribal Member #219) is related to Diana Martinez.

[5] The Regional Director determined that the later hearsay reported to Shipek by Sosten Alto was not as probative as Marcus Alto Sr.'s Application for the California judgment roll dated November 14, 1930, which contained an affidavit in reference to Marcus Alto's ancestry. (EXH 12 AR 1471).

statements lacked any foundation as to how they were related to Jose and Maria Duro Alto.[6] Their statements are questionable in light of the Band's own evidence – the death certificate of Sosten Alto. Laura Guidry's mother, Pauline Damron-Alto was the "informant" when Sosten Alto died in September 1973. Pauline Alto states that Sosten Alto's parents' names and place of birth are "unknown." (EXH 32-AR 515).

When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. (See, Fed. R. Civ. P. 104(b).) The Defendants admit that neither Arviso nor Guidry provided evidence of their ancestry. (EXH 19-ECF 61 at 11). Therefore, the AS-IA's reliance on statements made by Shipek (relying on Sosten Alto's claim of Alto ancestry), Mary Arviso and Laura Guidry, is arbitrary and capricious. Likewise, Frances Jones identifies Maria Duro Alto, as her "great grandmother" but does not provide any foundational facts to identify her ancestors in common with Maria Duro Alto. (EXH 33-AR 801).

Helen Mendez's statement that it was "common knowledge" that Marcus Alto Sr. was non-Indian (EXH 35-AR 2658) lacks personal knowledge. Fed. R. Evid 602. Similarly, Mellie Duenas's statement that she was "told" that Marcus Alto Sr.'s father's name was Juan Garcia and he was Mexican (EXH 12-AR 2656) lacks personal knowledge. Gene Morales's statement that the "Garcia brothers" who hauled fertilizer in old San Pasqual Valley were "uncles" to Marcus Alto Sr. is devoid of foundational facts. (EXH 34-AR 2349). Indeed, his statement seems to be fabricated. Plaintiffs objected to Morales affidavit which asserts that he attended elementary school with Marcus Alto Sr. (EXH 15-AR 1718). Gene Morales could not have attended elementary school with Marcus Alto Sr. from 1st through 7th grade because Morales was born in 1911. (EXH 20-AR 1051; EXH 34-AR 2349).

[6] Mary Arviso is the ½ sister of Laura Guidry (daughter of Sosten Alto). Laura Guidry's son, Ron Mast (grandson of Sosten Alto) brought the enrollment challenge to the Alto ancestry despite the fact that his own grandfather's parentage is "unknown."

The Regional Director determined that the affidavit of Florence Shipek stating that Maria and Jose Alto had no children but had raised one belonging to a "non-Indian family" did not provide sufficient evidence to overcome the Plaintiffs' 1995 enrollment. (EXH 14-AR 1471).

V. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE BECAUSE THE AS-IA ARBITRARILY FAILED TO RECONCILE THE FACT THAT THE STATEMENTS THAT MARCUS ALTO SR. WAS "NON-INDIAN" WITH THE DNA EVIDENCE OF THE FAMILY'S NATIVE AMERICAN ANCESTRY.

The AS-IA acknowledged the affidavits gave credence to the "adoption theory" because they stated that Marcus Alto Sr. was "'Mexican, not Indian." (EXH 1-AR 1151). The AS-IA found that many "of the affidavits note that Marcus Alto was non-Indian and the child of a different family not just a different mother." (EXH 1-AR 1154, emphasis added). As emphasized, these statements were entitled to no weight and certainly not "substantial weight."

In finding the adoption theory probable, the AS-IA failed to give any weight to public record documents establishing that Marcus Alto Sr. publicly identified himself as "Indian" (EXH 21-AR 2431; EXH 24-AR 2635; EXH 25-AR 490; EXH 40-AR 1985; (EXH 43-AR 487, 473) and DNA evidence that establishes that Raymond E. Alto has 30-percent Native American ancestry. (EXH 30-AR 527).

VI. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE WITH INSTRUCTIONS BECAUSE THE AS-IA GAVE IMPROPER AND SIGNIFICANT WEIGHT TO THE TYPEWRITTEN "NO ISSUE" STATEMENT IN MARIA DURO'S APPLICATION #8685 WHICH ISSUE WAS ALREADY DECIDED.

The AS-IA acted arbitrarily in reconsidering the "no issue" typewritten statement in Maria Duro's Application #8685 because the evidence was already addressed, considered and rejected in the April 10, 1995 decision. (EXH 2-AR 592; EXH 8-AR 1516-1518). The AS-IA was barred from reconsidering this issue. *Stuckey v. Weinberger*, 488 F. 2d 904, 911 (9th Cir. 1973).

Notwithstanding, Application #8685 was typewritten and Maria Duro used a fingerprint indicating that she likely did not read or write English. (EXH 37-AR 1664). Therefore, even if the AS-IA could reconsider this evidence, the AS-IA gave improper and significant weight to the typewritten statement of "no issue" (EXH 1-AR 1137, 1147) without reconciling the Band's own contradictory evidence from Grabowski which concluded that Maria Duro had a son named Ferdinando. (EXH 27-AR 2080). Additionally, the AS-IA's decision concluded that Maria Alto had "no issue" despite acknowledging that there "three of the affiants claim blood relationship to Maria Duro Alto." (EXH 1-AR 1150). One affiant, Francis Jones, claimed that she is the great-granddaughter of Maria Alto. (EXH 33-AR 801). Therefore, the AS-IA failed to articulate a rational connection between the facts found that Maria Alto Duro had "no issue" and the choice made. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, *supra*, 415 F.3d 1078, 1093.

VII. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE WITH INSTRUCTIONS BECAUSE THE AS-IA'S FINDING THAT MARCUS ALTO SR. WAS BORN IN 1907 IS ARBITRARY AND CAPRICIOUS.

On October 29, 2009, the AS-IA specifically asked for Marcus Alto Sr.'s social security application (Item 11) noting that the original application was relevant. (EXH 41-AR 902). However, the AS-IA then ignored the original social security application and gave weight to the Band's submission of a "print-out" of the Social Security Index downloaded from Ancestry.com, which identifies Marcus Alto Sr.'s birth year as 1907. The AS-IA did not state why the original social security application dated December 12, 1936, which identifies Marcus Alto as "Indian," his D.O.B. as April 25, 1905, his parents as Joe and Mary Duro Alto, and his national origin as "Indian," had no relevance. (EXH 25-AR 490). In finding in favor of the "adoption theory," the AS-IA failed to identify why the Social Security Index from Ancestry.com, and the unsworn statement of Felie Quisquis were more probative evidence.

The AS-IA also ignored evidence of a 1997 prior decision by the United States Department of Interior, Probate No. P PH 1421 96, which found that Marcus Alto Sr.'s birth date was April 25, 1905. (EXH 40-AR 1985). The AS-IA gave this evidence no weight despite the fact there was no evidence that Marcus Alto Sr. ever acknowledged that his birth year was 1907. There was other corroborative evidence that predated the parties dispute about his birth year. For instance, Marcos Alto, Sr.'s driver's license (EXH 42-AR 492) and various Alto birth certificates. (EXH 43-AR 487, 473). The preponderance of the evidence standard contemplates the more convincing evidence. These documents existed long before any "controversy" as to Marcus Alto's birth year. The AS-IA's reliance on Felie Quisquis's unsworn affidavit to corroborate his finding that Marcus Alto Sr. was born in 1907 because Quisquis was a "childhood friend" and nearly the same age (EXH 1-AR 1149), was particularly erroneous because the Band's own expert, Grabowski, reported Felie Quisquis's birth year as 1912, not 1907. (EXH 20-AR 1051).

Furthermore, it was contested whether Marcus Alto's marriage certificate was "crossed out" from 19 to 18 or changed from 17 to 18. The Band's hired anthropology expert, Grabowski, claimed that Marcus Alto's age was changed from 17 to 18. (EXH 27 AR 2085). Plaintiffs asserted that Marcus Alto Sr. was 19 years-old when he married. (EXH 38 AR 1005). The 1930 U.S. Census supports Marcus Alto Sr.'s age as 19 when he married because it specifically identifies him as "19" years old in a "first married"[7] column on the census. However, the Band submitted Sosten Alto's 1930 census information identifying that it was Marcus Alto Sr.'s census information (Exhibit 69). Had the Band submitted the correct 1930 U.S. Census page for Marcus Alto Sr., it would have destroyed the AS-IA and Band's "adoption theory."

[7] Judicial notice should be granted because the Band's hired anthropology expert cited to the 1930 U.S. Census report identifying Marcus Alto (at p. 47) and stated that the census was Exhibit 69 (at p. 47, fn. 142), but the 1930 U.S. Census page for Sosten Alto was actually submitted. (EXH 39-AR 224).

VIII. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE WITH INSTRUCTIONS THAT THE AS-IA'S DETERMINATION THAT THE FRANK ALTO LETTER IS "CORROBORATIVE" IS ARBITRARY AND CAPRICIOUS.

The anthropologist submitted letters written by Frank Alto. One letter was dated February 23, 1910, addressed to Frank Amos. (EXH 44-AR 154). The letter identifies several adult tribal members living in Orange and Riverside Counties. Ibid. In determining the letter's relevance, the Regional Director stated, "we are unable to determine its relevance and it does not demonstrate Mr. Alto's enrollment was based on inaccurate information." (EXH 14-AR 1470).

On the other hand, the AS-IA found the Frank Alto letter was "corroborative" evidence that Marcus Alto Sr. was a non-tribal member raised by Jose and Maria Alto because the Frank Alto letter did not mention Marcus Alto Sr. as a family member. (EXH 1-AR 1154). However, the AS-IA and the Band's hired anthropologist expert speculated that Frank Alto was the son of Jose Alto without ever supplying any birth, death, baptismal or social security records to establish paternity. Surely if there were records for Marcus Alto Sr., there would be some records establishing that Frank Alto was the son of Jose Alto – there was no such evidence produced.

Furthermore, the AS-IA's decision to give the Frank Alto February 23, 1910 letter to Frank R. Amos corroborative weight is arbitrary and capricious because the BIA was in possession of two Frank Alto letters with different handwriting, and different signatures as catalogued in the agency record index. (EXH 44-AR 154; EXH 45-AR 2707; EXH 46). Given the substantially different signatures, the AS-IA abused his discretion in giving this evidence any weight.

IX. THE AS-IA'S JANUARY 28, 2011 DECISION MUST BE SET ASIDE BECAUSE THE AS-IA'S FINDING THAT JOSE ALTO IS NOT THE BIOLOGICAL FATHER OF MARCUS ALTO SR. IS ARBITRARY AND CAPRICIOUS.

According to the Band's expert, Grabowski, as reported in her June 2008 report at page 27, footnote 87, the baptismal record produced in the Mast enrollment

challenge dated April 19, 2007, deviates from a handwritten entry in the purported church baptismal record. (EXH 27-AR 2085). In the November 26, 2008 decision, the BIA Regional Director determined: "Assuming this baptism record is Mr. [Marcus] Alto's, this would prove that he is the son of Jose Alto...If this were the case Mr. Alto would still be eligible to be included on the San Pasqual membership roll as a descendant of Jose Alto" (EXH 14-AR 1470). The Regional's finding and decision was correct because the Ada Deer 1995 final decision states: "Although Marcus Sr., was not previously enrolled on the January 1, 1959, membership roll, **he possessed 4/4 degree Indian blood of the Band**...." (EXH 8-AR 1518, emphasis added). Here, because the 1995 final decision is binding between the parties and the government, the Marcus Alto Sr.'s descendants' degree of blood cannot be reduced. The doctrine of res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties. *United States v. Liquidators of European Federal Credit Bank*, 630 F. 3d 1139, 1150 (9th Cir. 2011).

The AS-IA's finding that "there were many Jose Altos" and that some other "Jose Alto" was Marcus Alto Sr.'s biological father (EXH 1-AR 1153) is arbitrary and capricious and must be set aside as a clear error in judgment and an abuse of discretion. The 1920 U.S. Census lists Marcus Alto Sr. as the "Indian" son of Jose and Maria Alto. (EXH 21-AR 2431). Marcus Alto Sr.'s marriage certificate stated he is "Indian," his father is Joseph Alto, his mother is Mary Duro, and both parents were born in "San Pasqual." (EXH 24-AR 2635). Marcus's 1936 Social Security application identifies his D.O.B. as April 25, 1905, his parents as Joe Alto and Mary Duro, and identifies himself as "Indian." (EXH 24 AR 490). Reginaldo Duro identified Marcus's father as "Joe Alto," but he listed Joe Alto as "Not Indian." (EXH 26-AR 1555). The 1995 AS-IA decision found that Maria Duro's application for inclusion in the judgment roll, #8685, states that her husband was full blooded Digueno Indian. (EXH 36-AR 1517). Jose Alto's ancestry is also corroborated by his 1921 death certificate which identifies him as "Indian," and his wife as "Maria." Jose Alto was buried in the San Pasqual

Indian cemetery. (EXH 47-AR 210). The AS-IA did not make a rational connection to the agency record evidence in concluding that some other "Jose Alto" was Marcus Alto Sr.'s biological father.

CONCLUSION

Terminating an individual's tribal membership is similar to terminating citizenship. It strips an individual of his or her identity, heritage, rights and federally funded benefits which flow from Indian status and federal recognition of membership on a federally recognized tribal roll. The termination of the Plaintiffs' tribal membership is akin to the federal government conducting deportation. To an Indian citizen, there is nothing more fundamental than one's heritage. The AS-IA's January 28, 2011, decision rewrote the Marcus Alto Sr.'s lineage by declaring Jose and Maria Alto were not the biological parents of their ancestor, identified the Marcus Alto Sr. descendants as "non-Indian," and struck down nearly a century of prior BIA rulings and actions.

The April 10, 1995, Ada Deer decision is final and binding under the Band's governing documents. It must be honored and recognized by the AS-IA as a matter of federal law. This Court is therefore asked to reverse the January 28, 2011, AS-IA decision with instructions that the Plaintiffs remain enrolled members pursuant to the 1989 final decision. In addition, this Court should issue a detailed ruling/order that the AS-IA's findings were arbitrary, lacked foundation and/or were contradicted by substantial evidence including the Band's anthropology expert report evidence, and remand the case for further reconsideration in light of the record.

Dated: April 25, 2014.

Respectfully submitted,

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