SAM HIRSCH
Acting Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

KENNETH D. ROONEY
REUBEN S. SCHIFMAN
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone (202) 305-4224
Facsimile: (202) 305-0506
Kenneth.Rooney@usdoj.gov
Reuben.Schifman@usdoj.gov

LAURA E. DUFFY
United States Attorney

GEORGE V. MANAHAN
Assistant U.S. Attorney
California State Bar No. 239130
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-5610
Facsimile: (619) 546-7751

Attorneys for Defendants

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

ALBERT P. ALTO, ET AL., Plaintiffs, vs. S.M.R. Jewell, Secretary of the Department of the Interior – United States of America, et al,[1] Defendants.	Case Number: 13:11-cv-2276 – BAS (BLM) **FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

[1] Pursuant to Fed. R. Civ. P. 25(d), the current Secretary of the Interior, Sally Jewell, is substituted for the former Secretary Ken Salazar, and the current Assistant Secretary of Indian Affairs ("AS-IA"), Kevin Washburn is substituted for the former AS-IA, Larry Echo Hawk.

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I. INTRODUCTION

Plaintiffs, Albert P. Alto and other descendants of Marcus R. Alto, Sr. (hereinafter "Marcus" and collectively "Plaintiffs"), brought this action against the Department of the Interior Assistant Secretary – Indian Affairs ("AS-IA") and other federal officials ("Federal Defendants"), seeking declaratory and injunctive relief from a January 28, 2011, order by the AS-IA (hereinafter, the "2011 Decision"), which approved a recommendation from the Enrollment Committee of the San Pasqual Band of Diegueño Mission Indians (the "Band") to remove the Plaintiffs from the Band's membership roll. The burden rests on Plaintiffs to demonstrate that the agency's rationale is arbitrary and capricious, which they have not done.

Plaintiffs' argument that the 2011 Decision is arbitrary and capricious challenges the Bureau of Indian Affairs' resolution of complex historical and anthropological issues. Indeed, Plaintiffs' selective citations to expert reports and prior administrative decisions is a misguided effort to create unreasonableness where there is none. At best, this challenge is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1576 (9th Cir. 1993). On such issues, the reviewing court must accord the agency's decision considerable deference. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989); *Nat'l Ass'n of Homebuilders v. Norton*, 340 F.3d 835, 843-44 (9th Cir. 2003). So long as the agency's decision was a reasonable one it must be upheld. *Id.* That is the case here.

II. BACKGROUND[2]

A. Initial Enrollment in the Band

1. A history of the Band

The Band traces its heritage to Indians who occupied the San Pasqual Valley (east of present-day San Diego) from before the arrival of European settlers. AS-IA Order, Jan. 28, 2011 ("2011 Decision"), AR001138. In 1910, the United States prepared a census roll of San Pasqual Indians and took land into trust to create a reservation for them. Due to an error, however, the subject land was several miles away from the San Pasqual Indians' traditional territory. *Id.*

In the 1950s, Indians claiming descent from the San Pasqual Indians began organizing under the Indian Reorganization Act for purposes of reclaiming the San Pasqual Reservation. 2011 Decision, AR001139. In 1959, to assist these Indians in resolving membership disputes, the Department of the Interior ("DOI") published proposed regulations to "govern the preparation of a roll of the San Pasqual Band of Mission Indians in California." 24 Fed. Reg. 6,053 (July 29,

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[2] Plaintiffs have included a separate "statement of facts and conclusions of law" in support of their motion. ECF No. 103-1. In an APA case, this Court does not resolve disputes of issues of fact, nor does this Court conduct its own fact finding; rather, this Courts occupies a role akin to that of an appellate judge. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). Indeed, "[i]n APA cases, such statements [of fact] are generally redundant because all relevant facts are contained in the agency's administrative record." *San Joaquin River Grp. Auth. v. Nat'l Marine Fisheries Serv.*, 819 F.Supp.2d 1077, 1083–84 (E.D.Cal.2011); *accord Pinnacle Armor, Inc. v. United States*, 1:07-CV-01655 LJO, 2013 WL 5947340 (E.D. Cal. Nov. 4, 2013). The only issue is whether there is substantial evidence in the administrative record to support the agency's determinations or factual findings. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014). Federal Defendants therefore respond to the arguments contained in Plaintiffs' Statement in the Section IV, infra, and provide relevant facts in the following section. Of note, a significant number of Plaintiffs' "facts" are legal conclusions, inappropriate in a Statement of Fact.

1959). After considering comments from interested persons, DOI issued a final enrollment regulation in 1960. 25 Fed. Reg. 1,829 (March 12, 1960).

2. The 1960 Regulations that govern enrollment

The 1960 Regulations addressed four issues: (a) enrollment criteria, 25 C.F.R. § 48.5 (1960); (b) the process for completing an initial roll, *id.* §§ 48.3-48.4, 48.6-13; (c) the procedures for keeping the initial roll current, *id.* § 48.14; and (d) the purposes for which the roll was to be used. *Id.* § 48.15; *see also* ER II:126-129 (complete regulations).

The 1960 Regulations limited enrollment to persons in the following categories who were not already enrolled or affiliated with another tribe or band:

> (a) Indians whose names appear[ed] as members on the [1910] Census Roll,
> (b) Descendants of Indians whose names appear[ed] as members of the Band on the [1910] Census Roll, provided such descendants possess[ed] one-eighth (⅛) or more degree of Indian blood of the Band, [and]
> (c) Indians [who could otherwise] furnish sufficient proof to establish that they [were] ⅛ or more degree Indian blood of the Band.

25 C.F.R. §§ 48.5(a)-(c) (1960); *see also id.* §§ 48.5(e)-(f) (exclusions for persons enrolled or affiliated with other tribal groups). The Regulations placed the burden of proof on applicants to establish that they possessed the required degree of Indian blood of the Band. *Id.* § 48.5(d).

Under the 1960 Regulations, applicants were required to timely submit written applications to a local BIA official, *id.* § 48.4, who was directed to refer the applications to a tribal "Enrollment Committee" established by the Regulations. *Id.* § 48.7. Any person who "believe[d]" that he or she was a member of the Band had the right to participate in an election of the Enrollment Committee, but eligibility to serve on the Committee was limited to persons whose names appeared on the 1910 Census Roll. *Id.* § 48.6. The Enrollment Committee was authorized to review applications for enrollment, to request additional information from applicants, and to file all applications with the Area Director of the Sacramento

Area Office of BIA (now Regional Director) "together with a report stating reasons for disapproving any applications." *Id.* § 48.7.

The Regulations directed the Regional Director to "prepare and submit for approval by the Secretary a [final] roll of the members of the [San Pasqual] Band." 25 C.F.R. §§ 48.3. Specifically, the Regulations directed the Regional Director to "review the reports and recommendations of the Enrollment Committee and . . . determine the applicants who are eligible for enrollment in accordance with [the criteria set out in the Regulations]." *Id.* § 48.8. If the Regional Director declared any applicant ineligible, the applicant had a right to appeal first to the Commissioner of Indian Affairs [now AS-IA] and then to the Secretary. *Id.* §§ 48.9-48.10. The 1960 Regulations specified that "[t]he decision of the Secretary on an appeal shall be final and conclusive." *Id.* §48.11.

The 1960 Regulations provided that the "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary." 25 C.F.R. § 48.14(d).

3. 1966 Roll and Constitution

Federal and tribal officials completed an enrollment under the 1960 regulations in 1966. 2011 Decision, AR001139. In 1970, the duly enrolled members of the Band adopted a constitution, which was subsequently approved by the Department of the Interior. *See* Constitution and Bylaws of the San Pasqual Band of Mission Indians ("Tribe's Constitution"), AR001591. Article III, Section 2 states that "[a]ll membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 [the 1960 Regulations] and an enrollment ordinance which shall be approved by the Secretary of the Interior." *Id.*

B. Subsequent Enrollment

In November 1983, the United States Claims Court issued a monetary judgment in favor of the San Pasqual Band in an action styled "Docket 80-A." *See* 52 Fed. Reg. 31,391 (Aug. 20, 1987) (describing history). Pursuant to the Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. § 1401 *et seq.*, the United States prepared a distribution plan, which called for a portion of the award to be distributed to tribal members as *per capita* payments. 52 Fed. Reg. 31,391. To enable such distribution, DOI promulgated new enrollment regulations for the San Pasqual Band, which were published at 25 C.F.R., Part 76, and became effective on September 1987. *Id.* DOI explained that, although the 1960 Regulations contained procedures for maintaining a current membership roll, no final enrollment actions had taken place since the initial enrollment under the 1960 Regulations. *Id.* The 1987 regulations were designed to bring the roll current. *Id.*

In 1996, after the enrollment process was completed and judgment funds were distributed, DOI removed Part 76 from the Code of Federal Regulations.

C. Enrollment Dispute Relating to Marcus R. Alto, Sr.

1. Plaintiffs' Enrollment

Marcus Alto, Sr. was not included on the 1910 Census. 2011 Decision, AR001151. Marcus did not apply for enrollment in the San Pasqual Band under the 1960 Regulations, but he and many of his descendants did apply for enrollment under the 1987 regulations that were created for purposes of distributing the 1983 Claims Court judgment. *Id.*, AR001141. Marcus died in June 1988, before his application was decided. *Id.* However, the BIA continued to process his descendants' applications. In 1991, the Superintendant of BIA's Southern California Agency notified those descendants that they were eligible for membership by virtue of their relationship to Mr. Alto. *Id.* The Band disputed the determination and appealed, first to the Regional Director and then the AS-IA. *Id.*

In April 1995, AS-IA Ada Deer issued a decision letter, finding that Marcus was a full-blood Diegueño Indian. AR000774-76.

2. The AS-IA's 2011 Decision

In August 2008, the Band's Enrollment Committee submitted a request to the Regional Director of BIA's Pacific Region to approve the disenrollment of the descendants of Marcus. 2011 Decision, AR001142. The Enrollment Committee cited the provision of the 1960 Regulation—incorporated into the Band's constitution—that authorizes the deletion of the names of persons found to have been enrolled on inaccurate information. *Id.* (citing 25 C.F.R. § 48.14(d)). The Enrollment Committee relied on new evidence providing "substantial and convincing proof that Marcus, [was] not the biological son of Maria Duro Alto, and [thus] that the information provided on the 1987 membership application of Marcus, . . . was inaccurate and incomplete." AR002013.

On November 26, 2008, the Regional Director denied the Enrollment Committee's request to process the disenrollment action, *see* AR002017. Two months later, the Enrollment Committee filed an appeal of the Regional Director's decision with the AS-IA. AR001430-38. On October 29, 2009, the AS-IA requested that the parties locate and submit additional materials for the administrative record, and they did. AR000900-40. Reviewing the extensive documentary evidence, the AS-IA determined that the Enrollment Committee had demonstrated, by a preponderance of the evidence, that the information supporting the Plaintiffs' enrollment was inaccurate and that the Plaintiffs did not meet tribal eligibility criteria. Accordingly, the AS-IA concluded that the Plaintiffs' names "must be deleted from the Band's roll." AR001156.

D. The Instant Complaint

The Plaintiffs filed the present case on September 30, 2011, stating four causes of action. (ECF No. 1). The Plaintiffs added a fifth cause of action *via* an amended complaint filed on March 13, 2012. (ECF No. 50). The first three

causes of action allege: (1) that the AS-IA (Echo Hawk) erred in declining to treat the 1995 decision by his predecessor (Deer) as binding on the question of Marcus' parentage and eligibility for membership, (2) that the AS-IA violated the Plaintiffs' due process rights by allegedly failing to provide the Plaintiffs sufficient opportunity to participate in the administrative proceedings; and (3) that the AS-IA's factual findings are arbitrary and capricious. *Id.* at 14-29. In their prayer for relief, the Plaintiffs ask the district court to declare the AS-IA's action unlawful and to set aside the Disenrollment Order based on the alleged violations. *Id.* at 32-33. In their fourth and fifth causes of action, the Plaintiffs seek additional injunctive relief relating to the Band's delivery of membership benefits.

E. Procedural History

1. District Court injunction.

Simultaneously with the filing of their September 30, 2011, complaint, the Plaintiffs moved for a preliminary injunction and moved *ex parte* for a temporary restraining order ("TRO"). (ECF Nos. 1, 3-4). The district court granted a TRO enjoining the Federal Defendants from implementing the Disenrollment Order, pending a hearing and ruling on the Plaintiffs' motion for preliminary injunction. ECF No. 5.

The Federal Defendants filed a response to the motion for preliminary injunction on October 11, 2011. ECF No. 7. On the same day, the Band sought leave to appear in the action for the limited purpose of filing a motion to dismiss under Federal Rule of Civil Procedure 19, based on the Band's interest and sovereign immunity. ECF No. 10. The district court denied the Band's motion to specially appear but accepted the Band's memorandum of law as an *amicus curiae* filing, and directed the parties to submit responses to the Band's Rule 19 argument. ECF No. 11. In a response filed on October 28, 2011, the Federal Defendants

asserted that the AS-IA's Disenrollment Order was subject to judicial review under the APA, notwithstanding the Band's absence and sovereign immunity.

On December 19, 2011, the district court issued an order granting a preliminary injunction and declining to dismiss under Rule 19. ECF No. 24. With respect to Rule 19, the district court reasoned that it could grant complete relief to the Plaintiffs on their APA claims notwithstanding the Band's absence and that the Band's interests would not be impaired because they would be adequately represented by the Federal Defendants. *Id.* 22-26. As for preliminary injunctive relief, the district court determined that, while it lacked jurisdiction over the Band, it had power to direct the Federal Defendants to preserve the *status quo*. *Id.* The court enjoined the Federal defendants from "removing [the Plaintiffs] from the San Pasqual Tribe's membership roll and from taking any further action to implement the [Disenrollment Order]." *Id.* at 32-33. And the court directed the AS-IA to issue various "interim order[s]" "for the duration of [the] lawsuit," that would allow Plaintiffs to, among other things, continue to vote as members of the Band, access Indian Health Care services, and required the Band to make per capita gaming revenue distributions to the same extent such benefits are provided to other enrolled members. *Id.*[3]

On January 19, 2012, the Federal Defendants filed a "Report of Compliance with Preliminary Injunction," ECF No. 26, with an attached memorandum order issued by the AS-IA on January 12, 2012. In the memorandum order, the AS-IA observed that he lacked "legal authority . . . to . . . compel the Band to comply with all aspects of the orders, *exactly as phrased* by the [district] court" (emphasis

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[3] The findings of fact and conclusion of law that a court reaches in issuing a preliminary injunction are not binding as to its consideration of the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Southern Or. Barter Fair v. Jackson County, Or.*, 372 F.3d 1128, 1137 (9th Cir. 2004).

added), but that he had authority, including as vested under the Band's constitution, to "give effect to the court's injunction in substance." ECF No. 26, Ex. 1. Accordingly, for the duration of the suit, the AS-IA directed that no employee of the Department of the Interior was to take action in furtherance of the 2011 Decision, and further notified Indian Health Services that Plaintiffs were to be deemed members.

On March 26, 2012, the San Pasqual Band filed a motion to intervene for the limited purpose of filing motions to dissolve the injunction and dismiss the action for lack of subject-matter jurisdiction and nonjoinder of the Band under Rule 19. ECF No. 60. The district court granted limited intervention on May 9, 2012, ECF No. 67, and gave Plaintiffs and Federal Defendants an opportunity to respond. By order dated June 13, 2012, the district court adopted the arguments of Federal Defendants, denied the Band's motion to dissolve the injunction, denied the motion to dismiss as to causes of action 1-3, and deferred judgment on dismissal as to causes of action 4 and 5. *Alto v. Salazar*, 11-cv-2276-IEG BLM, 2012 WL 2152054 (S.D. Cal. June 13, 2012). The Band subsequently filed an interlocutory appeal.

2. Ninth Circuit's decision in *Alto v. Black*.

On December 26, 2013, the Ninth Circuit affirmed the district court's holding that the district court has jurisdiction to review the AS-IA's disenrollment decision and that the San Pasqual Band is not an indispensable party to the APA claims (that is, those claims seeking to set aside the AS-IA's decision). *Alto v. Black*, 738 F.3d 1111, 1131 (9th Cir. 2013). The Ninth Circuit also remanded for the purpose of allowing this Court to "clarify the original injunction to conform to the understanding of the now-operative injunction we have just articulated—namely, as suspending the Disenrollment Order while this suit is pending and as directing the BIA to implement that suspension by advising the parties of its

impact." Thereafter, the parties filed a Joint Motion to Amend the Preliminary Injunction in Accordance with the Ninth Circuit's Remand, which this Court granted on May 1, 2014. ECF No. 105.

III. STANDARD OF REVIEW

A. Record review

The Court's review under the APA is based on the administrative record that was before the agency decision makers at the time they made their decision. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971); 5 U.S.C. § 706(2)(A). The APA requires only that the record presented be sufficient to explain the basis of the agency's decision and to allow for meaningful judicial review. *See, e.g.*, *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1308–09 (W.D. Wash. 1994) *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

Consistent with these principles of judicial review based upon an administrative record, consideration of extra-record evidence, such as post-decision declarations or discovery is only allowed in exceptional circumstances. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (noting that although there are exceptions to the record-review rule, the exceptions are narrow "so that the exception does not undermine the general rule"). The burden is on Plaintiffs to demonstrate the record is inadequate and that an exception applies. *See Bair v. California State Dept. of Transp.*, 867 F.Supp.2d 1058, 1067 (N.D. Cal. 2012) (citing *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1437 (9th Cir.1988)); *see, e.g.*, *Pinnacle Armor, Inc. v. United States*, 1:07-CV-01655 LJO, 2013 WL 509047 (E.D. Cal. Feb. 12, 2013).

B. Arbitrary and Capricious standard

Based on the administrative record or those portions thereof cited by the parties, courts may set aside an agency's decision under the APA only upon a

finding that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

This standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). Under this standard "a court is not to substitute its judgment for that of the agency . . . [especially where] the challenged decision implicates substantial agency expertise." *Friends of Clearwater v. Dombek*, 222 F.3d 552, 556 (9th Cir. 2000) (citations omitted).

The APA does not require "regulatory agencies [to] establish rules of conduct to last forever." *State Farm*, 463 U.S. at 42 (quoting *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967)). Instead, under the APA, a court must uphold an agency's revised policy so long as the agency has given a reasoned explanation for the change. *See Anna Jaques Hosp. v. Sebelius*, 583F.3d 1, 224 (D.C. Cir. 2009). While courts may require "a more detailed justification" when its prior position has engendered serious reliance interests, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), it remains Plaintiffs' burden to prove that these criteria have not been met and that the agency's decision was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Agency action is generally valid if the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir.2008) (citations omitted). "An agency decision is arbitrary and capricious if . . . it 'offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053

(9th Cir.2012) (citation omitted); *Protect Our Communities Found. v. Ashe*, 12-CV-2212-GPC PCL, 2013 WL 6121421 (S.D. Cal. Nov. 20, 2013). The burden is on Plaintiff to show any decision or action was arbitrary and capricious. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

IV. ARGUMENT

A. Neither claim preclusion nor issue preclusion principles bar reevaluation of prior enrollment decisions.[4]

Plaintiffs argue that the AS-IA's 2011 decision is not in accord with law and must be set aside because claim preclusion and issue preclusion doctrines prohibits revisiting an enrollment decision based on information subsequently determined to be inaccurate. Pls.' Mot. (ECF No. 103-2) at 2. This argument ignores the 1960 regulations governing Tribal enrollment, incorporated into the Tribe's Constitution, that expressly allow for reconsideration of enrollment decisions. 25 CFR § 48.14(d); Tribe's Constitution, art. III, § 2, AR001591-1600. Because the regulations and the Tribe's Constitution expressly allow for such reconsideration, it was entirely appropriate for the AS-IA to abide by these laws, and neither issue preclusion nor claim preclusion demonstrate his decision to be arbitrary.

The related doctrines of claim and issue preclusion limit litigants' ability to relitigate matters. *Montana v. United States,* 440 U.S. 147, 153 (1979). Under the doctrine of claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Claim preclusion bars all claims actually raised in the initial litigation as well as any additional ground for recovery that could have been raised in the initial litigation. *Montana,*

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[4] For clarity, our brief will use the terms claim preclusion instead of res judicata and issue preclusion instead of collateral estoppel. *See Gonzales v. Cal. Dep't. of Corrections*, 739 F.3d 1226, 1230 n.3 (9th Cir. 2014).

440 U.S. at 153; *Gonzales,* 782 F.Supp.2d at 838. As a result, a "plaintiff cannot avoid the bar of claim preclusion merely by alleging conduct by the defendant not alleged in the prior action, or by pleading a new legal theory." *Id.* An action is barred under claim preclusion where: (1) the prior litigation involved the same parties or their privities, (2) the prior litigation was terminated by final judgment on the merits, and (3) the prior litigation involved the same "claim" or "cause of action" as the later suit. *Hydranautics v. FilmTec Corp.*, 204 F. 3d 880, 888 (9th Cir. 2000).

Under the doctrine of issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen*, 449 U.S. at 94. In order for issue preclusion to apply, (1) the issue necessarily decided at the previous proceeding must be 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 issue preclusion is asserted was a party or in privity with a party in the first proceeding. *Hydranautics v. FilmTec Corp.*, 204 F. 3d 880, 885 (9th Cir. 2000).

Importantly, the proceeding Plaintiffs reference when invoking these doctrines was not a prior district court case. Rather, it was an administrative proceeding. The doctrines of issue and claim preclusion apply "flexibly" in the administrative setting and are not necessarily binding in this context. *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1324 n.7 (9th Cir. 2006); *see also Maldonado v. U.S. Attorney Gen.*, 664 F.3d 1369, 1377 (11th Cir. 2011) (collecting cases).

The specific administrative proceeding that Plaintiffs argue is binding upon the AS-IA was an April 1995 decision by AS-IA Deer affirming the Regional Director's determination that Marcus, was a full-blood Diegueño Indian.

AR000774-76. This proceeding was governed by 25 CFR part 76 and was for the purposes of distributing funds awarded by the United States Court of Claims. *Id.*

The clearest reason why issue preclusion principles do not demonstrate the AS-IA's 2011 decision to be incorrect in light of AS-IA Deer's earlier determination is that the type of reconsideration Assistant Secretary Echo Hawk undertook is *explicitly contemplated* by the 1960 regulations and Tribe's Constitution. Thus—particularly in the administrative context where issue preclusion applies flexibly and is non-binding—it would be inappropriate and contrary to controlling Tribal law to bar the AS-IA from revisiting this matter in light of new evidence.

Tribal enrollment is governed by regulations that have been incorporated into the Tribe's Constitution. *See supra* Section II.A.2; 25 CFR § 48.4 - 48.11; Const. & Bylaws of the San Pasqual Band of Mission Indians, art. III, § 2 (AR001591-1600). As discussed above, these regulations establish the application process, the criteria for enrollment, review of applications by the Tribe's Enrollment Committee, the determination of eligibility and enrollment by the Regional Director, and appeals of decisions by the Director and the final decision of the Secretary. Specifically, Section 48.14 establishes a mechanism for keeping the Tribe's membership roll current and accurate. This section explicitly provides that the "names of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary." *Id.*

Section 48.14(d), by its clear text, authorizes the review and reversal of a prior final enrollment decision and requires that the Secretary have the authority to reopen a prior, final enrollment decision to: (i) determine if the enrollment was based on the information subsequently determined to be inaccurate; (ii) consider such evidence as may be necessary to make that determination; and (iii) delete names from the roll if their enrollment was based on inaccurate information.

If claim preclusion applied strictly to final enrollment decisions, the AS-IA would be unable to approve the deletion of a name from the roll upon a finding that the original enrollment decision was based on inaccurate or even fraudulent evidence. And if issue preclusion applied to issues relevant to the applicant's satisfaction of the enrollment criteria, the AS-IA would be unable to determine if enrollments were based on inaccurate information. In either case, a strict application of issue or claim preclusion would read section 48.14(d) out of the regulations—and the Tribe's Constitution—entirely.

It is clear that the intent of the regulations was to allow the AS-IA the power to do exactly as he did here: revisit a person's presence on the roll to determine if it was based on inaccurate information. This is so even if the Agency had previously determined that that individual should be on the roll.[5] In analogous situations, courts have found legislative intent sufficient to supersede the default application of claim preclusion and issue preclusion. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (There is an exception to normal application of preclusion "when a statutory purpose to the contrary is evident."); *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986) (Examining "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting [the statute]" and finding it was not in that case.).

Courts in this circuit have found that issue and claim preclusion need not be strictly applied where a law or regulation provides for revisiting prior administrative decisions. For example, in *Stuckey v. Weinberger*, the Ninth Circuit considered regulations promulgated to govern the review of claims for social security disability insurance benefits, which permit reopening of prior, final factual determinations for "good cause" in certain cases. 488 F. 2d 904, 911 (9th Cir.

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[5] Indeed, a necessary precondition for the AS-IA to review an individual's membership status is that the BIA had previously approved their inclusion on the roll.

1973). Although the court noted that such regulations may not be fully consistent with strict claim preclusion principles, the court found that they were appropriate. *Id*. The same result should be found here.

A final, and related, reason that claim preclusion or issue preclusion principles should not apply here is because it would conflict with Tribal law. Section 48.14(d) has been incorporated in to the Tribe's Constitution; it is a component of how the Tribe desires to determine its membership. "'[A] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.'" *Alto v. Black*, 738 F.3d 1111, 1115 (9th Cir. 2013) (quoting *Cahto Tribe of Laytonville Rancheria v. Dutschke,* 715 F.3d 1225, 1226 (9th Cir. 2013)). Therefore it was appropriate for the AS-IA to apply this section and respect the Tribe's choices and laws concerning enrollment.

The Tribe has adopted a procedure for membership that allows decisions to be revisited to determine if the enrollment was based on the information subsequently determined to be inaccurate. This procedure supersedes the strict application of claim preclusion and issue preclusion urged by the Plaintiffs, because such an application would render this critical aspect of the Tribe's law superfluous and deny the Tribe the ability to correct its rolls as intended in the Tribe's Constitution. *See Wheeler v. U.S. Department of Interior*, 811 F.2d 549, 553 (10th Cir. 1987) ("[W]hile the Department may be required by statute or tribal law to act in intratribal matters, it should act so as to avoid any unnecessary interference with a tribe's right to self-government."); *see also Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director*, 38 IBIA 244, 246-47 (2002).

Because the AS-IA found that the enrollment of the Alto Sr. descendants was based on information subsequently determined to be inaccurate, he was expressly authorized to approve removal of their names from the Tribe's membership roll. Plaintiffs may disagree with tribal law that provides for the

correction of the membership roll, but that is the Tribe's law and it must be given effect.

B. The Band's Enrollment Committees' Alleged Violation of Plaintiffs' Due Process Rights Does Not Render the AS-IA's Decision Arbitrary.

Plaintiffs argue that the Band violated their due process rights by including biased individuals on the Band's enrollment committee, not recusing other individuals from the committee, not allowing opportunities for Plaintiffs to testify, and for a variety of other reasons. Pls. Mot. 9-10. Even taking all these claims as true on their face, they do not demonstrate that the Defendant in this suit—the United States—acted in any way to violate Plaintiffs' due process rights. Nor have Plaintiffs shown that anything about the Band's alleged due process violations demonstrate the AS-IA's decision—which was de novo, and did not defer to the Band's enrollment committee—is arbitrary.

Tribal membership is protected under the Indian Civil Rights Act (ICRA), and cannot be revoked without due process. *See U.K.B. v. Area Director*, 1992 I.D. LEXIS 82, *19; 22 IBIA 75 (IBIA 1992). "Due process" requires notice and an opportunity to be heard before any deprivation can take place. *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950); *Cleveland Bd. of Ed.* v. *Loudermill,* 470 U.S. 532, 542 (1985); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). Plaintiffs' claimed violation fails for a number of reasons, however.

As an initial matter, Plaintiffs do not address in their motion for summary judgment the actual basis for the second cause of action set out in plaintiffs' first amended complaint—an alleged denial of "procedural due process" by the AS-IA for failure to get additional/rebuttal evidence from Plaintiffs. Instead, in their Motion for Summary Judgment, Plaintiffs have replaced the second cause of action with an entirely new theory that alleges the *Band's Enrollment Committee* denied the Plaintiffs due process. Plaintiffs' first cause of action should be dismissed

because it has been abandoned. *See Jenkins v. County of Riverside*, 398 F.3d 1093, 1095 n. 4 (9th Cir.2005) (plaintiff abandoned two claims by not raising them in summary judgment briefing). And Plaintiffs' newly-minted due process claim against the Tribe is not grounded in their Complaint and cannot be considered by this Court. *See also Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir.2006) (noting that plaintiff could not raise new factual allegations at summary judgment because allegations not included in the complaint failed to "give the defendant fair notice of what the plaintiff's claim [were] and the grounds upon which [they] rest[ed]."); *see Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir.2000)

In any event, the due process claim set out in the Plaintiffs' Motion fails to state a claim, since the federal government cannot be answerable for alleged misdeeds of a tribal government, and the United States provided ample process in this case. The administrative process provided by the Band's Enrollment Committee is also not at issue in this suit. Nor could it be, as the Band's internal administrative proceedings are not within the jurisdiction of federal courts. *Alto*, 738 F.3d at 1123 n.9 ("[The] resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court.") (quoting *Runs After v. United States*, 766 F.2d 347, 351 (8th Cir.1985)).

And even if Plaintiffs had argued they were entitled to summary judgment on the second claim of the First Amended Complaint, nothing in the record supports Plaintiffs' allegation that the AS-IA's review of the case was in any way tainted by the alleged denial of due process by the Band. The AS-IA's review was governed by the procedures set out in 25 CFR § 62.11, which provide that the AS-IA will consider the record as presented, together with such additional information as may be considered pertinent. That is what occurred.

The Plaintiffs were provided adequate due process in the administrative proceedings before the BIA, and they had a full and fair opportunity to provide relevant evidence and argument at each stage of the proceeding. During the Regional Director's review, the Plaintiffs submitted evidence and argument that was included in the record of the Regional Director's decision. *See* AR001861 and AR001866. In addition, on the recommendation of experts in the Office of Federal Acknowledgment, the AS-IA requested additional documentation. After his office conducted an initial assessment of the record, *see* AR000886, the AS-IA sent a letter to both parties requesting research and documentation on several questions or topics, providing six months for the necessary review. AR000900. Both parties provided evidence in response to each inquiry, as well as argument regarding the significance of the evidence to the issues in the disenrollment. *See* AR000995, 001008, 101069; AR000997. Plaintiffs objected to additional argument submitted by the Tribe responding to the Plaintiffs' evidence and argument, but were not precluded from submitting their own counterargument.

In sum: Plaintiffs were provided ample notice and opportunity to be heard; they were not denied due process by the federal defendants; and the AS-IA's decision was reasonable. Therefore, even if the Court considers Plaintiffs' second cause of action set out in the Plaintiffs' motion for summary judgment (which is different than the claim set forth in the First Amended Complaint), the Court should grant the Federal Defendants' motion for summary judgment on that claim.

C. The AS-IA's conclusion that Marcus Alto did not qualify for membership was reasonable and rationally based on the evidence in the record.

The merits of this case are far more straightforward than Plaintiffs' brief suggests. The question resolved by the AS-IA was whether or not Marcus was an adopted child. Indeed, the parties do not dispute that the Tribe's Constitution limits tribal membership to persons who were either named as a member of the

Band on the 1910 San Pasqual census, or those who descended from a person who was named on the 1910 census. The parties also do not disagree that the couple who raised Marcus—Jose Alto and Maria Duro Alto—were full-blood members of the band and listed on the 1910 census. And Plaintiffs concede that Marcus was not listed as a member on the 1910 census. Thus, the only question for this Court to consider is whether the AS-IA's conclusion that Marcus was an adopted child and not a lineal descendent of a member of the Tribe was supported by substantial evidence. *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 581. It was.

The AS-IA, with assistance from anthropologists and historians within the BIA, rested his conclusion on: 1) Marcus' absence from the 1910 census that served as the Band's first base roll; 2) Maria's application for enrollment; 3) Marcus' 1987 application for enrollment; 4) Marcus' baptismal certificate that listed Venedita Barrios as his mother; 5) and corroborative affidavit testimony spanning several decades. Plaintiffs' tangential criticism of the evidence relied upon is insufficient to carry their heavy burden. As discussed below, the AS-IA's review of the documentary evidence was thorough and deserving of deference. His conclusion was a rational one that neither runs contrary to the totality of the evidence nor is so implausible that it must be reversed.

1. Marcus' absence from the 1910 census.

The AS-IA reasonably attributed great weight to the fact that Marcus was not included in the 1910 BIA census of San Pasqual Indians, nor any other census from 1907 to 1913, even though both his putative parents and his step-brother were included. AR002313. The significance of the 1910 census cannot be overstated. The BIA determined that the 1910 census of the Band would constitute the "base roll" because that was the year the reservation was trust patented. AR002066. Thus, the Tribe's basic enrollment criteria—the cornerstone of lineal descendancy in this Tribe—is based on persons named on the 1910 roll. And Marcus' name

nowhere appears, even though Jose's son from another marriage, Frank Alto, does appear. 2011 Decision, AR001151.

There is no dispute that Marcus was alive in 1910. Nor is there any dispute that Marcus lived with Jose and Maria during the period when the BIA census was conducted. AR001154. And Plaintiffs do not disagree Marcus' step-brother Frank was included on the census. Plaintiffs' instead criticize the censuses taken from 1907 to 1913 (none of which mention Marcus) as unreliable because of discrepancies in Maria's and Jose's listed age. Pls.' Mot. at 11-12. Plaintiffs miss the point. The absence of an individual from a census that lists his own step-brother is a consideration separate and apart from minor discrepancies as to the exact age of the individuals that are listed. Marcus' noticeable absence from the census that ultimately formed the basis of the Tribe's first membership roll, in conjunction with his step-brother's presence, is powerful evidence that Marcus was not a blood member of the Tribe.

Plaintiffs counter, however, that the AS-IA's reliance on the census evidence was arbitrary because several children born to other San Pasqual tribal members were likewise not identified on the San Pasqual censuses. Pls.' Mot. 12. Plaintiffs' argument fails for two reasons. First, Plaintiffs mischaracterize the Band's expert report on which they base their criticism. That report does not demonstrate that other children were not included on the censuses, as Plaintiffs suggest, and instead refers to baptismal records from 1897 to 1903. Indeed, the cited footnote in the expert report nowhere mentions the census information, nor does it cross-reference the census to affirm the absence of these children.

Second, the inclusion of some children and not others from different families is again beside the point. Jose's son from another marriage appeared on the census, while Marcus did not. That Jose and Maria would include a son from

another marriage and not their own son is telling evidence that the AS-IA could reasonably give substantial weight. AR00151.

Lastly, Plaintiffs contest the AS-IA's conclusion that adoption provides "the most logical explanation" for the fact that Alto Sr. is not listed with his parents on the Indian censuses from 1907 to 1913, but does appear identified as an Indian on the 1920 census. Plaintiffs reason that adopted children were sometimes listed as "adopted" on censuses, and that Marcus' status was not qualified as "adopted" on the 1920 census. Pls.' Mot. at 12. But Plaintiffs do not identify a single child that was listed as "adopted" on the 1920 census. And even assuming that some children may have been noted as "adopted" on the 1920 federal censuses, the AS-IA reasonably gave greater weight to the 1910 census. In the end, Plaintiffs' arguments do not show that the AS-IA's decision was so implausible that it requires this decision to be reversed.

2. Maria Duro's application for inclusion on the 1933 roll of California Indians

The AS-IA found persuasive that Maria's application for inclusion on the 1933 Roll of California Indians included the statement that she had "no issue," made in response to a request to identify living children. Plaintiffs counter Maria's admission on a number of fronts: 1) That this statement was considered and rejected in 1995 and AS-IA was therefore barred from reconsidering this issue; 2) that Maria did not read or write English and could not appreciate the significance of this particular term of art; 3) there exists contradictory evidence that Maria had a son, Ferdinando, and 4) three of the affiants claimed a "blood relationship" with Maria. Pls.' Mot. 16. Nothing Plaintiffs provide, however, vitiates the AS-IA's reliance on Maria Duro Alto's sworn statement.

First, Maria's application was not "addressed, considered and rejected" in the 1995 decision, as Plaintiffs claim, Pls.' Mot. at 15-16. The 1995 decision nowhere mentions Maria's statement, and the AS-IA was therefore free to address

the only document in the record "containing a definitive statement by a person who undisputably [sic] knew the facts of the matter," AR00152.

Second, the AS-IA addressed the Plaintiffs' claim that Maria would not have understood the significance of the legal term "issue." As noted in the 2011 Decision, the 1920 census indicates that Maria spoke English. 2011 Decision, AR00152-53 (the census form listed whether the individuals were "[a]ble to speak English," and next to Maria's name is a "yes."). Thus, she would have understood the straightforward request included in the form: "[State] the full names, ages, sex, and dates of birth of yourself and your children living on May 18, 1928," to which Maria responded with her name, and in the line below (presumably where one would include their offspring), "No issue." AR002631. This was not a multiple choice test with opaque terms of art; the request was simple and straightforward, and Maria (or the person who transcribed her response) affirmatively responded with "no issue." Indeed, Maria's statement that she had no children finds further support in the affidavit of her witnesses that was attached to her application. There again, the affidavit states these witnesses personally knew Maria, and that "the facts stated with reference to her ancestors, *the parentage of* ----- *children* . . . are true." *Id.* (emphasis added). It is also no surprise that Maria did not mention her son Ferdinando in her application, as the form requested Maria to provide the full name of "children living on May 18, 1928." Ferdinando had passed away thirty years earlier in 1898. AR002080-81.

Finally, while three of the affiants affirmed that they had a "blood relationship" with Maria, that does not establish that Maria had children, let alone that Marcus was Maria's child. Laura Guidry states that Maria Alto was her "aunt." *See* Pls.' Mot. ECF No. 103-5, Ex. 31, ¶ 3. And Mary Alto Arviso only claimed that her family is "related" to Maria and Jose Alto. *See id*. at Ex. 29. While Plaintiffs are correct that Frances Alto stated Maria was her great grandmother, Frances observed in the very next sentence, that Marcus's biological

mother, Benedita, "left him as an infant with Maria and her husband." *Id.* at Ex. 33.

Frances's statement that Maria was her great grandmother is not irreconcilable with Maria's statement that she had "no issue." Frances may have been descended from a child of Maria's who was not alive in 1928. Frances may also have been using the term "great grandmother" in a sense other than biological, as indeed Marcus referred to Maria as his mother throughout his life. In any event, Frances's mother is irrelevant–the issue is whether Maria is Marcus' mother. Plaintiffs have not identified a single document in the record to support the conclusion that Maria was less than forthright and truthful in claiming she had no surviving issue when she made the statement under oath on the 1928 application.

3. Marcus' 1987 application for enrollment

It is well settled that Marcus was not included in the 1910 BIA census of San Pasqual Indians. Marcus did not apply for membership and was not included on the Tribe's initial roll approved in 1966 under the regulations at 25 C.F.R. Part 48. In 1987, the BIA amended the federal regulations at 25 C.F.R. Part 48, to bring the roll current for purposes of per capita distribution of judgment funds awarded to the Tribe by the U.S. Court of Claims, Docket 80-A. Marcus filed an application for inclusion on a judgment fund distribution roll on November 15, 1987, three days before the filing deadline.

The AS-IA observed that Marcus' 1987 application for enrollment—a document that was not considered by the AS-IA in 1994—included a handwritten paragraph, which states:

> Marcus was an only child to the above [Jose and Maria]. He was given to the above on the 3rd day after his birth . . . He was the above named persons' son in every sense of the [word] and never knew any others as parents.

AR001151. Moreover, that same application *required* applicants to state whether the "applicant [is] an adopted person." AR001153. Marcus chose not to answer

the question, leaving the answer blank, instead. On these key issues Plaintiffs' brief is silent, but the AS-IA reasonably found the evidence from the 1987 application corroborated other evidence in the record that showed Marcus was not the biological son of Jose and Maria, disqualifying him for membership in the Tribe.

4. Affidavits and testimonial evidence.

The AS-IA also reviewed testimonial evidence contained in affidavits by tribal elders, tribal enrollment committee members, close acquaintances of Maria and Marcus Alto, and anthropologist Dr. Florence Shipek, finding this evidence to be "credible and probative respecting [Alto Sr.'s] status as biological or adoptive son of Jose and Maria Duro Alto." Decision at 2; AR001138. In addition, the AS-IA found additional corroborative evidence in two letters drafted in 1910 by Marcus' step-brother, Frank, that identify Jose, Maria, and himself as members but make no mention of Marcus. The AS-IA reasonably relied on these individuals who either personally knew the relevant facts, or researched the facts at about the time the first membership roll was assembled.

For example, Dr. Florence Shipek worked with the then-newly constituted San Pasqual Enrollment Committee in the late 1950s and early 1960s to assist in their efforts to establish an initial membership roll. AR002195-96. As detailed in her sworn affidavit, Dr. Shipek worked closely with tribal elders around the age of 70 to 80 who were alive in 1958 and 1959 to determine band membership. Because the initial enrollment was to be based on direct descent, Dr. Shipek insisted on knowing bloodlines and which families had children who would be applying as direct descendants. In the course of examining the genealogical charts that she had prepared, "each elder maintained that Maria Duro Alto and her husband Jose Alto had no children but raised one belonging to a non-Indian family." AR002196.

Plaintiffs fail in their attempt to dismiss and minimize Dr. Shipek's sworn affidavit as hearsay. Pls.' Mot. 14. As an initial matter, it is a well-settled rule that agencies "are not bound by strict rules of evidence in cases brought under the Administrative Procedure Act." *Villegas-Valenzuela v. INS*, 103 F.3d 805, 812 (9th Cir. 1996). Additionally, Plaintiffs did not object to the admission of hearsay statements in the administrative proceeding. The affidavits should be afforded their natural probative effect and may constitute substantial evidence to support the AS-IA's decision. *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980). Moreover, trial courts are accorded wide latitude to receive hearsay evidence as it sees fit, which is particularly true for civil bench trials. *Id.* ("Perhaps the classic exception to strict rules of evidence in the administrative context concerns hearsay evidence . . . the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability."); *Cobell v. Norton*, 224 F.R.D. 1, 6 (D.D.C. 2004).

Dr. Shipek's conclusion that Marcus Alto was not the biological son of the Altos is further corroborated by additional affidavits relied upon by the AS-IA. Indeed, the key, consistent element in affidavits provided by Laura Guidry, Mary Arviso, Felie S. Quisquis, Mellie Duenas, Gene Morales, and Helen Lucy Alto Mendez is the identification of Marcus as the adopted son of Jose and Maria Duro Alto, and the biological son of Venedita Barrios who did not possess San Pasqual ancestry. AR001149-50.

Plaintiffs do not offer any evidence to counter the affiants' claims to know Maria Duro Alto, or their understanding that it was common knowledge that Marcus was raised by Jose and Maria but was not their biological child. Instead, Plaintiffs criticize the declarations as unreliable because they fail to establish "foundational facts," that relate to the affiants' ancestry. Pls.' Mot. at 14. But the affiants' ancestry is wholly unrelated to heart of the matter, that is, whether Marcus was the biological son of the Altos. Beyond the minor ambiguity as to how the

affiants characterized their relationship with Maria Duro Alto, their statements are consistent with the evidence of Marcus' status in the San Pasqual community, and they were signed, sworn and related to matters of personal knowledge. The affidavits are thus probative and contain indicia of reliability, and the AS-IA was not in error to rely on them.

Lastly, the AS-IA reasonably gave some weight to two letters written by Frank Alto in 1910, that state "[m]y family are as follows Maria Duro[,] Antonio Duro[,] Joe Alto[,] Frank Alto," making no mention of Marcus. AR002706. Plaintiffs' speculation that Frank was not, in fact, the son of Jose and Maria: 1) is a bare conclusion, unsupported by any citation to the record; 2) is contrary to the various censuses taken from 1907 to 1913 that list Frank as the son of Jose and Maria; and 3) entirely avoids addressing why one of the few contemporaneous documents in existence does not list Marcus as a San Pasqual Indian. Likewise, Plaintiffs' conjecture that Frank's signature was forged does not withstand scrutiny. *Compare* January 7, 1910 (002702) *with* February 23, 2010 (002705).

5. Blood quantum and DNA evidence

Plaintiffs' mistakenly rely on DNA testing that shows a descendant of the Alto family "has 30-percent Native American ancestry," possible only if Marcus was a full-blood Indian as Plaintiffs theorize. Pls.' Mot. 15. First, the Office of Federal Acknowledgement ("OFA") within the BIA reviewed Plaintiffs' claim and explained that the particular type of genetic testing that the Alto descendants utilized does not provide accurate data on the proportion of Indian ancestry. According to the OFA, the test Plaintiffs rely upon cannot track with any mathematical precision the amount of DNA markers passed from parent to child. AR01155. By way of an example, the child of a father that is 50 percent Native American and a mother that is not Native American would not show up as 25 percent Native American. *Id.* Thus, the test result of 30 percent Native American that Plaintiffs produce does not guarantee that this individual's father or mother

was 60 percent or even 100 percent Native American.[6] The BIA is entitled to rely on the opinions of its own experts, and its decision on technical matters within its area of expertise are entitled to substantial deference. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992); *Marsh*, 490 U.S. at 377; *Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1029 (E.D. Cal. 2012).

Plaintiffs' argument also rests on the logical fallacy that any percentage of Native American ancestry necessarily means that person is of San Pasqual descent. Put differently, while all San Pasqual Indians are Native American, not all Native Americans are of San Pasqual ancestry. Thus, the AS-IA reasonably concluded that even assuming Marcus was a full-blood Indian, it did not necessarily follow that Jose and Maria were his parents or that his parents were San Pasqual Indians. AR001155.

6. Marcus' Baptismal Certificate

Plaintiffs have not produced a birth certificate for Marcus, and there does not appear to be one in existence. Aside from Frank Alto's letters from 1910, the only contemporary document from that time is a baptismal certificate from Saint Frances de Sales Church, dated April 15, 1907, for a "Roberto Marco Alto," identified as the child of "Jose Alto" and "Benedita Barrios." AR001730. While the baptismal certificate is from 1907, the AS-IA observed that the record includes conflicting evidence as to the year of Alto Sr.'s birth, and that a number of documents indicate different birth years from 1903 through 1907. Decision at 12, AR001148. Regardless, the AS-IA concluded that the baptismal certificate was that of Marcus because the birth date (April 25) matched other documents in the record, and because 1907 is the year most consistent with other evidence in the

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[6] Plaintiffs' one-page exhibit sheds no further light on lineage. *See* Pls.' Mot. Ex. 33. The results simply provide an "estimate" of 30% "Native American" and 70% "European" ancestry, with 0% Sub-Saharan African and East Asian ancestry. AR00527.

record, including the 1920 census, the federal Social Security death index and the age Alto Sr. first gave on his marriage certificate. *See* Decision at 12-13. The AS-IA concluded, however, that in light of the totality of the evidence, that the baptismal certificate did not prove a biologic relationship between Jose Alto and Marcus.

Plaintiffs do not seriously dispute the AS-IA's conclusion that the baptismal certificate is that for Marcus, other than indirectly claiming the year of 1907 is inconsistent with other documents that list 1905 as a his year of birth. Indeed, Plaintiffs then rely on that same baptismal certificate to assert that Jose Alto is Marcus' birth parent, even if Maria Duro Alto is not. *See* Pls.' Mot. 30-31.

The AS-IA rationally rejected Plaintiffs' theory that Jose was Marcus' biological father.[7] In particular, the AS-IA found that the "most telling evidence in the record rebutting Jose as Marcus' biological father" was the early censuses that invariably identified Jose, Maria, and Jose's son from another marriage, Frank, as tribal members, while making no mention of Marcus. AR001154.[8] As the AS-IA observed, Marcus' absence was not mere "oversight;" the entire purpose of the 1910 census in particular was to establish a base roll of members for the Tribe. Indeed, aside from the adoption theory, it makes little sense why Jose Alto would list one biological son from another marriage as a tribal member (Frank), while

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[7] Plaintiffs contend that claim preclusion bars any reconsideration of the baptismal certificate. As discussed in Section IV.A., the principle of claim preclusion does not apply.

[8] The AS-IA did not conclude, as Plaintiffs suggest, that "some other 'Jose Alto' was Marcus' biological father." Pls'. Mot. 20. Rather, the AS-IA identified two plausible explanations as to why the Jose named on the certificate might not be Marcus' biological father: It was plausible that the baptismal certificate referred to a different Jose Alto, as there were at least nine other Jose Altos living at that time. It was also possible that the baptismal certificate referred to the Jose Alto that raised Marcus, but that Jose's name on the baptismal certificate did not prove paternity. AR001153 n.17.

entirely ignoring the other son (Marcus). The adoption theory is a very plausible one that addresses this inconsistency, while Plaintiffs' arguments as to extraneous issues shed no further light on this issue.

For example, Plaintiffs devote most of their attention to the age of Marcus at the time of his marriage, contending that that reliance on "correct" 1930 census that lists Marcus as 19 years of age would have somehow "destroyed" the AS-IA's theory that Marcus was adopted. Pls.' Mot. 17.[9] This makes no sense. Even assuming that reliance on the 1930 census would somehow call into question the authenticity of the baptismal certificate, all that Plaintiffs would accomplish would be to undermine the only contemporaneous document that supports their theory that Marcus was Jose's biological son from another marriage.

While Plaintiffs' dissatisfaction with the 2011 Decision is clear, the AS-IA is entitled to rely on the reasonable opinions of his own experts, particularly so when there exists conflicting evidence. Plaintiffs have not met their heavy burden to demonstrate that the AS-IA's conclusion ran counter to the evidence or was so implausible that it must be overturned.

V. CONCLUSION

For the foregoing reasons, the AS-IA'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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[9] Plaintiffs failed to attach the 1930 census page to which they refer. In any event, the 1930 census is extra-record evidence that Plaintiffs had every opportunity to provide the AS-IA, but they did not. Plaintiffs have failed to what exception to record review applies and this Court's review beyond the administrative record is justified. *See supra* Section III.A.

Dated: May 22, 2014

SAM HIRSCH
Acting Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

/s/ Kenneth D. Rooney
KENNETH D. ROONEY
REUBEN S. SCHIFMAN
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone (202) 305-4224
Facsimile: (202) 305-0506
Kenneth.Rooney@usdoj.gov
Reuben.Schifman@usdoj.gov

LAURA E. DUFFY
United States Attorney

GEORGE V. MANAHAN
Assistant U.S. Attorney
California State Bar No. 239130
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-5610
Facsimile: (619) 546-7751

Attorneys for Defendants

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

ALBERT P. ALTO, ET AL., Plaintiffs, vs. S.M.R. Jewell, Secretary of the Department of the Interior – United States of America, et al., Defendants.	Case Number: 13:11-cv-2276 – BAS (BLM) CERTIFICATION OF SERVICE

I hereby certify that on May 22, 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/ Kenneth D. Rooney
Kenneth D. Rooney