DOCKET NO. 14-56909

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TIFFANY AGUAYO, et al.

Plaintiffs/Appellants

v.

SALLY JEWEL, et al.

Defendants/Respondents.

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Appeal from the District Court Order and Judgment
United States District Court, Southern District, California
Honorable Cynthia Bashant, Judge
Case No. 3:13-cv-01435-BAS-KSC

APPELLANTS' REPLY BRIEF

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REPLY ARGUMENT

Respondents argue that the Band *adopted* the Constitution in 1994. (RB at pp. 48, 51)[1] This is an incorrect statement of the Band's actions. The Band itself states that the 1994 election vote was a vote to *begin* "the process of replacing the Articles of Association with the Constitution..."[2] [ER 331, fn. 14]

As argued herein, there was *no* majority vote held to adopt the 1997 Constitution. No referendum election was held. A fundamental principle is that enforcement of tribal laws requires consent of the governed. For the following reasons, enforcement of a void constitution and void ordinance against appellants, who are federally enrolled tribal members, exceeds the bounds of both tribal and federal governmental authority. See, *Duro v. Reina*, 495 U.S. 676, 693, 110 S. Ct. 2053, 109 L. Ed. 2d 693.

I. THIS COURT HAS JURISDICTION TO REVIEW THE CASE.

Respondents argue that this Court lacks jurisdiction to review appellants' appeal of the AS-IA decision. (RB p. 26) Appellants disagree. The Administrative Procedures Act creates a "strong presumption that Congress intends judicial

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[1] "RB" refers to respondents' brief.

[2] The agency record also corroborates that the Band did not pass the Constitution in 1994. The November 19, 1997 meeting minutes demonstrate that the Executive Committee had been working on the Constitution. [ER 199]

review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986).

Moreover, there is a distinction between *applicants* and federally enrolled tribal members rights. Indeed, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) and *Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y*, 163 F.3d 1150 (10th Cir. 1998) cited by respondents (RB 28-30) involve *applicants*. For example, in *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. 49, the legal challenge involved children *applicants* seeking membership in the Santa Clara tribe because they were excluded as children born of female tribal members. Likewise, in *Lewis v. Norton*, *supra*, 424 F. 3d 959, two sibling *applicants* sought membership in the Table Mountain Rancheria. *Ordinance 59 Ass'n v. U.S. Dep't of Interior Sec'y, supra*, 163 F.3d 1150, 1151, involved 43 individual *applicants* who applied for tribal membership in the Eastern Shoshone Tribe.

The BIA's website also acknowledges the legal distinction for federally acknowledged tribal members. "The rights, protections and services provided by the United States to individual American Indians...flow...because he or she is a member of a recognized tribe." [ER 443] With regard to the legal relationship between a tribal government and an "applicant" for enrollment, all federal duties

flow toward the tribal government. However, the rights of federally recognized tribal members invoke an entirely different set of relationships. "The federal government has the duty to protect [enrolled] individual tribal members even from their own government." [ER 227, ER 444]

Appellants are federally recognized tribal members [ER 145, #2] subject to federal and tribal benefits as a result of their Indian status on the federally acknowledged tribal roll. Cf., 25 U.S.C. § 13, 25 U.S.C. § 479, 25 C.F.R. § 290.2, § 290.14. Respondents have a corresponding trust responsibility in this case. "A cornerstone of [the trust] obligation is to promote a tribe's political integrity, which includes ensuring that the will of the tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008).

A. The reasoning in *Alto v. Black,* 738 F. 3d 1111 (9th Cir. 2013) is applicable to appellants' case.

Respondents argue, "unable to bring a direct action to enforce tribal law against the Pala Band or the Pala officials, the Aguayo Plaintiffs petitioned for agency intervention and then filed the present suit to compel agency enforcement against the Pala Band." (RB p. 31) Not so. In appellants' case, the Pala Band's EC *invited* agency examination of the Band's governing documents by its letter

dated February 3, 2012, instructing appellants to "appeal" the EC's action to BIA. [ER 353] Appellants filed their appeal and challenged the governing documents. [ER 340-438] The Pala Band participated in the appeal. [ER 317-339]

While the agency appeal was pending, appellants brought a district court action, (Aguayo I) Case No. 12-cv-0551-WQH against respondents seeking to preserve their status quo.[3] After BIA Regional's June 7, 2012 decision, respondents moved for dismissal in district court arguing that appellants had not exhausted their administrative remedy appealing the June 7, 2012 inaction to the AS-IA.

Appellants filed a second district court case, Case No. 13-cv-705-WQH (Aguayo II), requesting a temporary restraining order and injunctive relief, when no date certain for AS-IA review was ordered, and to preserve their status quo pending agency review. The second case was dismissed pursuant to the parties' agreement that appellants remain federally acknowledged tribal members. [ER 144-145]

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[3] This Court may take judicial notice of prior court records in this action. Evidence Rule 201 allows courts to take notice of matters of record in other court proceedings "both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo*, 971 F.2d 244, 248 (9th Cir. 1992).

The Band thereafter participated in the AS-IA's review of their governing documents and the issue of the 1989 AS-IA decision. [ER 203-210] The AS-IA rendered a decision in his management and adjudicatory role and found that because the Pala Band's 1997 Constitution was validly adopted, the "2009 enrollment ordinance applies." [ER 162] The AS-IA also found it had no duty to enforce the 1989 final decision. [ER 164] Appellants exhausted administrative review. The AS-IA decision was final for the Interior Department. See, *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983) The IBIA claims it has no jurisdiction over the matter. *Aguayo v. Acting Regional Director*, 55 IBIA 192, 194 (2012) citing 43 C.F.R. § 4.330.

"Judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). APA agency "action" includes the failure to act. See 5 U.S. C. § 551(13). Appellants are seeking APA review of an adjudicatory decision in which the Band *invited* and *participated* in review. The AS-IA performed an adjudicatory function (5 U.S.C. § 551(7)) in his management role as manager of Indian affairs under 25 U.S.C. § 2.

Under these facts, the Band is not a required party. If review is proper under the APA, the District Court has jurisdiction under 28 USC § 1331. *Bowen*

v. Massachusetts, 487 U.S. 879, 891 n. 16, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988); see also *Sharkey v. Quarantillo*, 541 F.3d 75, 83-84 (2d Cir.2008) (holding that § 1331 confers jurisdiction over a suit that 'arises under' a 'right of action' created by the APA). The federal question for § 1331 purposes is whether the BIA violated the APA. That it is claimed to have done so in a case involving application of tribal law does not matter, any more than it would matter to § 1331 jurisdiction over an APA case involving an issue of state law. Accordingly, *Alto v. Black*, *supra*, 738 F.3d 1111, 1123, 1124 should be followed.

B. A non-IRA tribe must obtain Secretarial approval of a new constitution under the Indian Reorganization Act (IRA), 25 U.S.C. Section 476(h).

Respondents have submitted supplemental excerpts in support of their brief. Appellants *do not object* to the supplemental excerpts being considered by the Court. Evidently, prior to Regional's retroactive approval of the 1997 constitution, a Regional solicitor *opined* that the Band's constitution did not require BIA review or approval. [SER 29][4]

Relying on the Regional solicitor's opinion that no agency review and approval was required [SER 29], respondents now contend that the Pala Band is a

[4] "SER" refers to Supplemental Excerpts of Record submitted by Respondent.

non-IRA tribe, and therefore, the Band did not need agency approval to adopt the 1997 Constitution. (See RB pp. 6, 34, 35) Respondents' contention is not supported by law and should be rejected. The BIA has a discrete legal duty to ensure that the Pala Band's constitution was adopted by the Band as a whole.

Furthermore, case law suggests that Secretarial approval was required to recognize the Band's new constitution. The new constitution was not an "amendment" to the Band's Articles of Association. (See RB p. 9; SER 51) The Band reorganized its government under the new constitution. The new constitution transferred virtually most tribal government power from the Band as a whole, to a six member committee. [ER 194-195, ¶ 8] The BIA's duty to review and recognize a tribal constitution adopted by the Band as a whole is justified under its trust responsibility. See *Milam v. US Dep't of the Interior*, 10 ILR 3013, 3015 (1982).

In *California Valley Miwok Tribe v. United States*, *supra*, 515 F.3d 1262, 1264, the court recognized that "Section 476 of the Act [IRA] provides two ways a tribe may receive the Secretary's approval for its constitution." Under section 476(h), a tribe may adopt a constitution using procedures of its own making. Respondents argue that Section 476(h) was a "technical amendment" to the IRA clarifying that the Band was free to adopt its own constitution. (RB p. 6, fn. 3)

While the Band is free to adopt its own constitutional language, this does not mean that a non-IRA tribe does not need to obtain the Secretary's approval for organizing its government under an entirely new constitution. The authority of a tribe to adopt a constitution and bylaws was made subject to the authorization of the Secretary of Interior. 25 U.S.C. § 476; *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087 (8th Cir. 1985) (noting that IRA places the Secretary in a regulatory position over these processes).

In *CVMT*, 515 F.3d 1262, 1265, the court found:

> *Section 476(h) provides a second way to seek the Secretary's approval* for a proposed constitution. Unlike the extensive procedural requirements of § 476(a), under § 476(h) a tribe may adopt a constitution using procedures of its own making:
>
> Notwithstanding any other provision of this Act each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section[.]
>
> 25 U.S.C. § 476(h)(1). But this greater. flexibility in process comes, with a cost. Section 476(h) does not provide a safe harbor.

Emphasis added. "[T]he Secretary has a duty 'to promote a tribe's political integrity." *California Valley Miwok Tribe v. Jewell*, 5 F. Supp. 3d 86, 97 (2013). See also, *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942). Indeed, the Band's Articles of Association recognize that in order to have *the tribe federally recognized* by the federal government, its

governing document is subject to the Commissioner's approval. [ER 361] As required to recognize a constitution from a non-IRA tribe, the Commissioner provided approval for the Band's Articles of Association on November 27, 1973.[5] [ER 373] In order to replace its Articles of Association with a whole new governing document, the 1997 constitution required Secretarial approval as well as approval from the Band as a whole.

C. Failure of the Band to ratify the new constitution which replaced the Articles of Association requires the BIA to rescind Regional's approval of the 1997 Constitution.

Here, as emphasized, the new constitution transferred virtually most of the tribal power from the Band's General Council to six individuals who comprise of the Band's "Executive Committee." [ER 194-195, ¶ 8] According to the agency record, BIA employee Elsie Lucero states that the constitution was never ratified. [ER 195, ¶ 14] Nonetheless, despite Ms. Lucero's declaration, respondents now argue that "a determination that the Pala Band *failed* to ratify the 1997 Constitution in conformity with tribal law would not necessarily require a withdrawal of federal approval." (RB p. 34) Appellants disagree. See *Ranson v. Babbitt*, 69 F.Supp.2d 141, 153 (D.D.C. 1999) (the Secretary was "derelict in [her]

[5] The Commissioner's approval has since been delegated to the Assistant Secretary. See 25 U.S.C. § 1a.

responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe.").

In *Ranson v. Babbitt*, *supra*, 69 F. Supp. 2d 141, the Saint Regis Mohawk Tribe held a referendum election to determine whether the tribe would adopt a tribal constitution creating three branches of tribal government. The ballots that supported the ratification were less that 51 percent of eligible voters. Although not the required amount of votes, the tribal clerk certified that a majority of those present and casting valid ballots voted in favor of adopting the tribal constitution. There were a series of referendums. The BIA rejected a challenge to the constitution and emphasized that the principles of tribal self-government required it to recognize the tribe's constitution. *Id*. at p. 143-146. On APA review the district court set aside the agency's action under 5 U.S.C. § 706 (2)(A) as an arbitrary decision. Based upon the simple application of mathematics, the district court found that the Tribe never ratified the constitution. *Id*. at p. 151.

The APA empowers this Court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The AS-IA's decision must be set aside because the department cannot *recognize* a tribal constitution which was not adopted by the Band as a whole. *Morris v. Watt*, 640

F.2d 404, 415 (D.C.Cir.1981) (noting that tribal governments must "fully and fairly involve the tribal members").

Appellants asked the AS-IA to rescind Regional's "retroactive" approval of the void 1997 constitution. [ER 175] See *NLRB Union v. FLRA*, 834 F.2d 191,196. (D.C. Cir. 1987); *Pit River Home & Agr. Cooperative Ass'n v. United States*, 30 F.3d 1088, 1093 (9th Cir. 1994) (discussing that the Secretary REVOKED approval of the Council's constitution citing *Pit River Home and Agric. Coop. Ass'n v. United States*, No. S-75-505 (E.D.Cal. filed Dec. 20, 1985); *Moapa Band of Paiute Ind. v. US Dept. of Inter.*, 747 F.2d 563, 564-566 (9th Cir. 1984) (rescission of BIA approved ordinance); see also, *Feezor v. Babbitt*, 953 F. Supp. 1, 7 (D.D.C. 1996) (remanded to district court where federal court presumed that BIA review of a tribal ordinance under tribal law requires consideration of whether the ordinance was properly enacted.)

Federal court jurisdiction is not barred. The issue of whether respondents have given retroactive approval and recognized void tribal governing documents against federally recognized tribal members raises a Fifth Amendment right to due process question and is reviewable. See *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989) ("in some cases enforcement of a tribe's ordinance against its own members may raise federal issues of tribal power").

D. The Indian Civil Rights Act (ICRA) binds the Interior Department in its federal supervisory action over the tribe.

Respondents argue that ICRA violations cannot be reviewed by the AS-IA [see ER 164-165] or the federal courts. Relying again on *Lewis v. Norton*, *supra*, 424 F.3d 959, 963, respondents contend that there is "no such action against the 'agencies responsible for the regulation of tribal affairs.'" (RB p. 29) Appellants disagree. *Lewis* involved two *applicant* siblings attempting to enroll in a tribe. Case law is clear that *applicants* have no ability to impose any duty to act on either the Tribe or the Interior Department. However, in contrast, appellants are federally enrolled tribal members. The AS-IA has exercised federal supervisory action and taken an adjudicatory role and held that the challenged constitution and 2009 enrollment ordinance are the Band's effective governing documents. The IBIA and a federal court have previously held that ICRA, 25 U.S.C. § 1302, binds the Interior Department in its *federal supervisory action* over tribes. *United Keetowah Band v. Muskogee Area Director*, 22 IBIA 75, 83 (1992); *Ranson v. Babbitt*, *supra*, 69 F.Supp.2d 141, 153.

E. Respondents' discretionary label of the AS-IA's decision should be rejected. Respondents have a discrete legal duty which is reviewable under APA standards.

Respondents contend that the decision to recognize the 1997 Constitution as

the Band's governing document is a discretionary act which cannot be reviewed by this Court. (RB pp. 1, 2, 4, 23, 31-35, 59) Appellants disagree. Purely discretionary decisions involve situations in which there is no law to apply. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971). Here there is both federal and tribal law which applies.

In performing the agency's management duty, and as here, in undertaking an adjudicatory role, the BIA "must sometimes make an independent determination concerning whether tribal actions were taken in accordance with tribal law when it is required to carry out its responsibilities under Federal and/or tribal law." *Villalobos v. Sacramento Area Director, Bureau of Indian Affairs*, 17 IBIA 241, 246 (1989). The Ninth Circuit is in accord. "[T]hat the substantive law to be applied in [a] case is tribal law does not effect...jurisdiction over an APA challenge to the BIA's decision." *Alto v. Black*, *supra*, 738 F.3d 1111, 1124.

In *Moapa Band of Paiute Ind. v. US Dept. of Inter.*, *supra*, 747 F. 2d 563, 565, the Secretary rescinded a tribal ordinance and then argued on appeal that the agency's action was *discretionary* and unreviewable. The *Moapa* court found that the discretionary exception is very narrow, and is applicable only where statutes are drawn so broadly that there is no law to apply. *Ibid*. There is both federal and tribal law that applies to the AS-IA's decision.

F. Appellants are aggrieved by the AS-IA's decision.

The enrollment dispute, in part, centers on "whether the 1997 Constitutional and the 2009 enrollment ordinance" are the Band's effective governing documents. [ER 157, 413] Respondents recognition of void governing documents creates a situation from which legal consequences will flow. Similarly, appellants are aggrieved by the AS-IA's decision that only a "recommendation" could be made. Pursuant to a 1989 AS-IA final and binding decision the Band gave up any sovereign right to determine appellants' membership based on Margarita Britten's blood quantum. The issue of whether the BIA was required to honor and enforce the final decision is properly before this Court. As argued *infra*, the AS-IA has authority to issue a memorandum order and must do so in this case. Failure to enforce a binding and final agency decision in an adjudicatory action in which relief has been requested creates a situation from which legal consequences will flow.

G. Appellants' complaint sufficiently states facts to grant relief on the agency action withheld, the enforcement of the prior binding 1989 final AS-IA decision.

Respondents also argue that this Court lacks jurisdiction to grant relief on appellants' collateral estoppel/res judicata claim because it is agency action *withheld* (the AS-IA only adopted Regional's "recommendation"). Respondents'

complain that appellants did not plead a 5 U.S.C. § 706(1) claim (RB p. 7), and therefore, this Court lacks jurisdiction. Appellants disagree. The AS-IA stated he was exercising jurisdiction because the IBIA did not have "jurisdiction to decide appeals from BIA officials' *inaction*." [ER 149, emphasis added] The fact that the AS-IA upheld Regional's recommendation does not preclude review. APA agency "action" includes the failure to act. See 5 U.S. C. § 551(13).

Further, appellants' complaint alleged that the AS-IA was required to honor the final and binding 1989 AS-IA decision. [ER 50, ¶ 68] Appellants argued that the BIA was required to enforce the 1989 final decision. [ER 96, 121] In fact, appellants cited to 5 U.S.C. section 706(1) in moving papers. [ER 122, fn. 5] "Under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory." *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir.1990) (holding that a plaintiff "is not required to state the statutory or constitutional basis for his claim, only the facts underlying it").

For all the above reasons, federal court review is appropriate. This Court has jurisdiction to perform APA review.

/ / /

II. THE AS-IA'S DECISION TO RECOGNIZE A VOID ENROLLMENT ORDINANCE ENACTED PURSUANT TO AUTHORITY IN A CONSTITUTION WHICH WAS NEVER RATIFIED BY THE BAND AS A WHOLE VIOLATES THE AS-IA'S TRUST RESPONSIBILITY.

A. The AS-IA cannot make an implicit finding that the ratification requirements were satisfied by Resolution No. 97-36 in light of Elsie Lucero's declaration and the November 19, 1997 meeting minutes which are part of the agency record.

Respondents concede that "the Regional Director did not then specifically *confirm* the Pala Band's compliance with ratification procedures in tribal law." (RB p. 36, emphasis added) To overcome this flaw, respondents now argue that Regional's retroactive approval amounted to "an *implicit* determination that any ratification requirements in addition to BIA approval) had been satisfied. (RB p. 36, emphasis added.) Appellants' disagree. The agency record included a declaration from BIA employee Elsie Lucero. The supplemental excerpts of record corroborate that Ms. Lucero met with the Pala Tribal Council on November 21, 1996 to "finalize the new constitution." [SER 26, #7]

Ms. Lucero states that she was familiar with the Band's actions in adopting the new constitution. [ER 194, ¶ 8] Furthermore, Ms. Lucero states "election" means tribal members are allowed to vote in a noticed, balloted election. An election would have required the Pala Band to submit "an agenda, [and] meeting

minutes of an election committee which adopted the revised Constitution...rules regarding how each voting member was to cast their votes, including absentee ballots for tribal members who do not live on the reservation." [ER 195-196, ¶ 15] Ms. Lucero states that the Band never ratified the constitution voting in a duly called election. [ER 195-196, ¶¶¶ 11, 14, 15] Ms. Lucero states that in 1997, a vote at a General Council meeting, of a vote of "27 For" and "0 Against" was "not a majority of voters." [ER 195, ¶ 12]

The AS-IA's decision does not discuss Ms. Lucero's declaration at all. [See ER 147-162] An agency decision is arbitrary if the agency entirely fails to consider an important aspect of the case. *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

B. The six year statute of limitations bar, 28 U.S.C. § 2401a, does not apply in appellants' case because the Pala Band's 1997 Constitution is *void ab initio*.

As argued, a constitution that has not been voted on by the Band as a whole, has not been "effectively" adopted. Moreover, the Band's failure to hold an "election" as required under Article IX of the proposed constitution, as argued *infra*, renders the constitution void. Nonetheless, respondents try to distinguish the facts in this case from *Cabazon Band of Mission Indians v. City of Indio*, 694 F.2d 634, 637 (9th Cir. 1982). (See RB pp. 38-39) However, the facts in this case

are similar to the City of Indio's argument that the annexation became valid despite the city's failure to obtain federal approval.

Here, in order for the new constitution to become "effective," Article IX of the constitution required a duly called "election" when the BIA approved the constitution. [ER 399] The meeting minutes note: "The Executive Committee has been working on the Constitution for the past two (2) years and feels that what we are presenting to the General Council is something that will work for the Tribe." [ER 199] Ms. Lucero states that Resolution No. 97-36 would be interpreted as a "vote" of approval to send the revised Constitution to the Southern California agency director for review and comments. [ER 196, ¶ 17]

Contrary to respondents' argument, Resolution No. 97-36 does not and cannot manifest the intention to adopt the Pala Band Constitution. (RB p. 42) Tribal constitutions are not adopted, amended or repealed by implication. See *Ransom v. Babbitt*, *supra*, 69 F. Supp. 2d 141, 151, where the district court observed "[c]onstitutions are never amended or repealed by implication of any kind." *Id*. at p. 152. As noted by the Eighth Circuit in *Nichols v. Rysavy*, 809 F. 2d 1317, 1325, citing *Mottaz v. United States*, 753 F.2d 71 (8th Cir.1985),"[n]o cause of action [can] accrue on a void transaction."

/ / /

C. There is nothing in the record to establish that all of the Band adult voting members were given a copy of the retroactively approved new constitution.

Respondents argue that the limitations bar applies in this case because tribal leaders offered amendments to the constitution in 2003, and the General Council passed a resolution directing that tribal members should receive a copy when they reach the age of 18. (RB pp. 37-38) Respondents argue that based on these facts, appellants had "constructive notice" of Regional's approval and should have brought a challenge to the constitution at an earlier date. Respondents' suggestion that these facts provide "notice" should be rejected.

First, respondents' inference of "constructive" notice should be rejected because the Band made no such claim that the 2003 amendments or the resolution passed to provide minors with constitutions when they became adult members provided constructive notice of Regional's approval. [See ER 329-331, 203-210] Second, respondents ask the Court to engage in speculation when they suggest that when the amendments were proposed to the challenged constitution, a copy of the constitution was given to *all* adult voting members. The supplemental agency record does not establish this fact. [See SER 16-17] Respondents have provided no *proof* that all adult voters were subsequently notified of Regional's retroactive approval. [See SER]

Additionally, providing a copy of the constitution *to minors* who turn age 18 at some later date is not the same as providing a copy of the proposed constitution to *all* adult voting members and providing *all* adult voting tribal members (including those who live off the reservation) an opportunity to vote on whether the constitution should replace the existing Articles of Association. Constructive notice should not be found based on these facts.

D. Under the circumstances of appellants' case, the statute of limitations, 28 U.S.C. Section 2401a, does not apply.

Shiny Rock Mining Corp v. United States, 906 F.2d 1362, 1365 (9th Cir. 1990) is not on point. In that case, the Court found a lack of actual injury was not a prerequisite to the running of the limitations period because the government published "formal notice to the world" in the Federal Register. *Id*. at p. 1366. In contrast, Regional's "retroactive" approval was not broadcast to the world. Indeed, in 2012, the Band's own public website stated that the "Tribe is organized under the Articles of Association." [ER 178, 355-356]

Wind River Mining Corp v. United States, 946 F.2d 710, 715 (9th Cir. 1991) is applicable to appellants' case. In *Wind River*, the Court reasoned:

> ....no one was likely to have discovered that the BLM's 1979 designation of this particular WSA was beyond the agency's authority until someone actually took an interest in that particular piece of property, which only happened when Wind River staked its mining claims. The government

> should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before anyone discovered the true state of affairs.

Respondent concedes that *Wind River* "holds that when an agency applies a rule or decision in a manner substantively 'exceeding constitutional or statutory authority' the limitations period for the as-applied challenge runs from the 'date of the adverse application... to the challenger." (See RB p. 39) In appellants' case, the AS-IA recognized and enforced void governing documents, the 1997 Constitution, which was not ratified by the Band as a whole and did not have Secretarial approval, and the 2009 enrollment ordinance which derives its sole authority from the 1997 constitution. [ER 162, 413] This exceeded the agency's authority. (25 U.S.C § 2; 25 U.S.C. § 476)

Under these circumstances, the six year statute of limitations should not apply. "[T]he challenge to the initial action accrues when an agency issues a decision applying the initial action to the challenged party." *Conner v. U.S. Dept. of the Interior*, 73 F.Supp.2d 1215, 1219 (D. Nev. 1999).

E. Article IX of the Pala Constitution required an "election" after the BIA's approval in order for the Constitution to become "effective."

Article IX specifically requires approval by a majority vote of the voters voting at a duly called election upon BIA approval. [ER 399] Respondent argues

that the plain language of Article IX which unequivocally requires an "election" does not require a vote distinct from a general council meeting. Respondents' proffered constitutional interpretations supporting the AS-IA's obscured interpretation of the word "election" should be rejected. (RB pp. 43-45)

Applying the plain meaning rule, the AS-IA was required to give the word "election" its ordinary meaning. *Gila River Indian Community v. U.S.*, 729 F.3d 1139, 1148 (9th Cir. 2013); *Hopi Indian Tribe v. Commr*, 4 IBIA 134, 140-141 (1975). Its ordinary meaning means "election." In both the Articles of Association and the challenged 1997 Constitution, there are clearly defined provisions for "Elections" and "Meetings." [ER 362, 365, 392, 394] Consequently, the AS-IA's interpretation of the word "election" is arbitrary under the plain meaning rule. A "vote" at a general council meeting does not suffice for a "vote" in a duly called "election."

F. Appellants raised the issue of the Band's lack of "meeting" notice only in light of the AS-IA's finding that a "meeting" could substitute for an "election" and that this was the Band's custom and tradition.

The AS-IA found that it was the Band's custom and practice to substitute "meetings" for "elections." [ER 159-160, see also n. 43] The Band itself never raised this fact in the agency proceedings. [See ER 329-331, 203-210]

Appellants raised the issue of lack of "notice" in the district court complaint only in light of the AS-IA's reasoning that the Band's constitution was effectively adopted at the 1997 general council meeting. Appellants submitted the November 12, 1997 meeting minutes with King Freeman's declaration because the AS-IA speculated that the Band had a practice of using "meetings" and "elections" interchangeably. [ER 159, fn. 43]

In making his assumption, the AS-IA failed to make a reasonable inquiry. King Freeman, who was vice-chairman, states:

> It is not the Band's custom and tradition to use the terms "elections" and "meetings" interchangeably."
>
> [ER 56, ¶ 9]
>
> When a tribal "election" is held, ballots are sent to all eligible voters including those who reside off the reservation, and who then can then return their ballots by mail. This is important because many eligible tribal member voters reside off the reservation and are unable to attend General Council meetings.
>
> [ER 56, ¶ 12]

King Freeman signed Resolution No. 97-36. He states that Resolution No. 97-36 was not meant to replace a future referendum election. [ER 57, ¶ 11] Furthermore, the November 12, 1997 meeting minutes show that only an "announcement" was made at that meeting that there would be a special general

council meeting held on November 19, 1997, regarding the "Articles of Association." [ER 58, ¶ 14; ER 72] The November 12, 1997 meeting minutes demonstrate that the Band did not comply with its own "meeting" requirements.

Although the district court considered King Freeman's declaration but rejected it [ER 17, 20], respondents argue that Freeman's declaration need not be considered. (RB p. 47, fn. 16) Appellants disagree. A reviewing court can and should consider supplemental evidence in determining whether the agency failed to consider an important aspect of the case. *Kettle Range Conservation Group v. U.S. Forest Service*, 148 F.Supp.2d 1107, 1115 (E.D. Wash 2001); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986).

As demonstrated by King Freeman's declaration, the AS-IA's reasoning was speculative. The AS-IA did not make a reasonable inquiry into an important aspect of the case before arriving at his conclusion that a "meeting" would suffice for an "election." In light of respondents' admission that "the Regional Director did not then specifically *confirm* the Pala Band's compliance with ratification procedures in tribal law" (RB p. 36), the AS-IA's decision should be remanded for further consideration of the two meeting minutes discussed by King Freeman is his declaration. See *Feezor v. Babbitt*, *supra*, 953 F. Supp. 1, 2.

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III. THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIES.[6] RESPONDENTS CAN ENFORCE THE 1989 FINAL DECISION BY ISSUING A MEMORANDUM.

In 1989, Washington Central directed the agency to correct the blood degree of all of the descendants of Margarita Britten based on the AS-IA's final decision that Margarita Britten was 4/4 Cupa Indian. [ER 213-214, 215; ER 321-325] The Band abided and implemented the final 1989 decision by enrolling appellants, descendants of Margarita Britten. [ER 324] In 2011 and 2012, the Band's six member EC *reduced* Margarita Britten's blood quantum from 4/4 to 1/2 which they claimed correspondingly reduced appellants' blood quantum, making appellants ineligible for tribal membership. [ER 325] The EC claimed it was exercising its sovereign right to make an independent determination of Margarita Britten's blood quantum under the new 2009 enrollment ordinance, and that the Bureau could only issue a recommendation to the Executive Committee regarding appellants' eligibility for enrollment in the Band. [ER 325-327]

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[6] Respondents' brief does not address the correctness of the district court's decision (which was not briefed by the parties) finding there was a "change in controlling law." [ER 28; See Appellants' brief, pp. 47-49.]

A. The EC's 2011 and 2012 actions were *ultra vires*. The EC no longer possessed any sovereign interest to make a membership decision based on Margarita Britten's descendants' blood quantum because the Band relinquished that right to the AS-IA in 1989.

Respondents argue that there were "compelling reasons for the Pala Executive Committee to honor the Assistant Secretary's 1989 finding." (RB 54) However respondents contend that the res judicata/collateral estoppel determination belongs to the Pala Band, and therefore, respondents can only issue a "recommendation." (See RB pp. 53-54.) Appellants disagree. Respondents have a discrete legal duty to appellants because the Band *delegated* its authority to the Secretary to review and make a final membership decision in 1989 based on Margarita Britten's blood quantum for purposes of tribal membership. [ER 382] Importantly, since the 1989 final decision was made, and appellants were *enrolled* pursuant to the binding agency decision, not any misrepresentation, the Band's EC had *no* legal authority to redetermine appellants' membership based on Margarita Britten's blood quantum. That decision was vested with the AS-IA in 1989 and was final. Indeed, the Band's EC could not exercise a right which it *no longer possessed*.

There is no competing res judicata interests involved (appellants' right to have the 1989 decision enforced verses the sovereign immunity claim by the Band

to determine its membership). (RB pp. 58-59) The Band's EC does not possess a sovereign right to reduce Margarita Britten's blood quantum because that right was unequivocally and conclusively given up to the AS-IA in 1989. The 1989 final decision that Margarita Britten was 4/4 Cupa Indian was not appealed. Respondents are now required to enforce the 1989 final AS-IA decision as a matter of federal law. *United States v. Utah Const. Co.*, 384 U.S. 391, 421-422, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966); *Plaine v. McCabe*, 797 F.2d 713, 720 (9th Cir. 1986); *Astoria Federal S & L. Assn. v. Solimino*, 501 U.S. 104, 107, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991).

B. Respondents owe a legal duty to appellants to enforce the 1989 final AS-IA decision.

Both the Band's Articles of Association and the putative constitution have an ICRA provision. [ER 367, 398] In fact, the AS-IA's 1989 final decision was enforced between governments until June 2011 and February 2012, when the EC arbitrarily decided to reduce approximately 154 enrolled members' blood quantum based on Margarita Britten's blood quantum. Although the EC's *ultra vires* action affected appellants' tribal voting rights, rights to federal benefits, and appellants' right to share in the Band's per capita gaming revenues[7], respondents claim ICRA

[7] Per capita must be paid to enrolled tribal members equally under federal law. (25 CFR § 290.2)

is inapplicable; that respondents do not owe a legal duty to appellants. (RB at p. 57) Appellants disagree. This case is similar to *Seminole Nation v. United States*, *supra*, 316 U.S. 286, 297, 62 S. Ct. 1049, 86 L. Ed. 1480.

Respondents cannot turn a blind eye to violations of tribal and federal law, particularly where as here, the agency has oversight jurisdiction and intervention was exercised at the Band's invitation. As emphasized, ICRA binds the Interior Department in its *federal supervisory actions* over tribes.[8] *United Keetowah Band v. Muskogee Area Director*, *supra*, 22 IBIA 75, 83 (1992); *Ranson v. Babbitt*, *supra*, 69 F.Supp.2d 141, 153. Where the BIA *exercises jurisdiction*, ICRA permits the BIA to scrutinize tribal action. Cf., *Welmas, et al. v. Sacramento Area Director*, 24 IBIA 264, 272 (1993). The BIA's authority to review alleged ICRA violations is dependent upon BIA having a separate source of authority to act on a matter, the resolution of which implicates the alleged ICRA violation. If a matter arises that requires or warrants BIA action in the exercise of its government-to-government relationship with a tribe, and if an alleged ICRA

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[8] The Supreme Court has also suggested that aggrieved tribal members, in addition to pursuing tribal remedies, may be able to seek relief from the Department of the Interior. *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. 49, 66, fn 22. Cohen's Handbook on Indian Law (2005) § 4.01[2][b] at p. 213 also recognizes that the Bureau of Indian Affairs may have a legal duty for approving actions which violate ICRA.

violation is relevant to BIA taking action on such a matter, it is then proper for BIA to address the ICRA violation. See *Hazard v. Eastern Regional Director Bureau of Indian Affairs,* 59, IBIA 322, 325 (2015).

C. On remand, the AS-IA can issue a memorandum order enforcing the final agency decision, as was done in 1989, and as the AS-IA did in the *Alto* case.

Respondents also argue that appellants have not addressed how the court can craft relief without the Band as a party. (See RB p. 55) The Band is not a required party because the Band cannot exercise a right it gave up to the AS-IA in 1989. Here, once the Band relinquished its right, the Band has no right to exercise it. Indeed, the Band adhered to the 1989 final agency decision, enrolled appellants as descendants of Margarita Britten, and provided tribal membership benefits required by tribal and federal law. It is the AS-IA's *inaction* in failing to enforce the 1989 final decision that is at issue. No joinder is required. The AS-IA must follow federal law.

Furthermore, enforcement of the 1989 final agency decision is not left to agency "discretion." The federal defendants are legally bound to enforce the final agency decision as a matter of federal law. As emphasized, the AS-IA's application of Section 6 of the 2009 enrollment ordinance had no applicability in appellants' case. The EC's action to reduce Margarita Britten's blood quantum

was an *ultra vires* act since the EC could not lawfully exercise a right the Band no longer possessed.

On remand, the AS-IA has authority (25 U.S.C. § 2) to issue a memorandum order directive that advises the Band that pursuant to the final 1989 AS-IA decision of Margarita Britten's 4/4 blood quantum, the EC's change of Margarita Britten's 4/4 blood quantum to 1/2 blood quantum cannot be sustained. A similar directive was issued in 1989 to implement the AS-IA's final decision. [ER 213-214] The AS-IA also issued a Memorandum Order in the *Alto* case. "The legal obligations to which [a] Memorandum Order refers stem not from the coercive power of the court or from the BIA's authority over the Band, but rather from separate federal laws and regulations, as well as from tribal governing documents." Cf. *Alto v. Black*, *supra*, 738 F.3d 1111, 1121 (AS-IA Echohawk issued a Memorandum Order between governments, 25 U.S.C. § 2).

IV. THE AS-IA'S DECISION DECLINING TO JOIN THE TWO MINOR CHILDREN OF APPELLANT, PATRICIA WALSH, WAS ARBITRARY. ON REMAND, THE AS-IA SHOULD BE REQUIRED TO JOIN THE MINORS, WHO ARE SIMILARLY SITUATED.

As emphasized in appellants' opening brief, both the Pala Band and Regional lodged no objection to the AS-IA joining the two minor children of appellant, Patricia Walsh, who were disenrolled for the same reasons one year

later. Appellants submitted evidence that an appeal was served on the Pala Band, Regional, and the AS-IA, by overnight mail delivery. The Walsh minors' appeal remains sitting in Regional's Office. [ER 171, 191] The AS-IA should be ordered to join the minors to the case upon remand since the minors' appeal involves the same facts and legal issues.

* * *

CONCLUSION

The AS-IA was derelict in his responsibility to recognize appellants' rights as federally enrolled tribal members, forcing appellants to litigate this case for over three years. Accordingly, this Court can and should set aside the AS-IA's June 12, 2013 decision and remand with instructions.

Dated: July 23, 2015.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Appellants' Reply Brief for the Aguayo Appellants is proportionately spaced, has a typeface of 14 points, and contains 6,908 words, as counted by WordPerfect.

Dated: July 23, 2015.

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