Case No.: 15055245

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGARET MIRANDA; et. Al.,
Plaintiffs – Appellants,

v.

SALLY JEWELL, Secretary of the Interior
And UNITED STATES DEPARTMENT OF THE INTERIOR,
Defendants – Appellees.

Appeal from the
United States District Court
Central District of California
Honorable Virginia A. Phillips
District Court No.: 5:14-cv-00312-VAP-SP

APPELANTS' REPLY BRIEF

BRIAN C. UNITT
HOLSTEIN, TAYLOR AND UNITT
A Professional Corporation
4300 Latham Street, Suite 103
Riverside, California 92501
(951) 682-7030

JONATHAN VELIE
VELIE LAW FIRM
401 W. Main Street, Suite 300
Norman, Oklahoma 73069
(405) 310-4333

Attorneys for Plaintiffs - Appellants

Table of Contents

I. TABLE OF AUTHORITIES

Cases

II. INTRODUCTION

The Articles of Organization of the Santa Ynez Band of Mission Indians (hereinafter "SYB") entitles Appellants to enrollment as members. That document serves as the Tribal Constitution and establishes in Article III initial membership for those living persons whose names appear on the January 1, 1940 Census. Appellants' ancestor, Rosie Pace, is listed on that Census Roll as full-blooded Santa Ynez Indian. Descendants of initial members, such as Appellants, are entitled to membership provided that such descendants have one-fourth or more degree of Indian blood of the Band, i.e., the total percentage of Indian blood derived from an ancestor or ancestors who were listed on the Santa Ynez 1940 Census Roll.

By constitutional definition, the 1940 Census is the sole historical document establishing the benchmark for membership in the SYB and the sole document that should be used for inquiries into blood quanta, as the data listed in the 1940 Census are "constitutionally accepted facts." Appellants meet SYB membership standards when measured by the blood quantum listed for Rosie Pace on the 1940 Census Roll. Nonetheless, SYB denied Appellants' right to membership based on extrinsic evidence that contradicted the 1940 Census Roll. In doing so, the tribal Enrollment Committee's decision was in violation of the SYB Articles of Organization. Nonetheless, it was affirmed by the BIA, which was granted

reviewing authority by the tribe itself and has the duty to uphold tribal law in the course of its review.

Federal Defendants claim that the use of extrinsic evidence in membership determinations is permitted by SYB Ordinance No. 2. Tribal ordinances are subordinate to constitution-like Articles of Organization—so, even if that Ordinance did contain a requirement for applicants to prove the blood quantum of their ancestor (which it does not), such language would render the ordinance unconstitutional as it would plainly conflict with the language of the SYB Articles of Organization, which names the 1940 Census as the sole source of data for membership inquiries. As such, the only valid interpretation of Ordinance No. 2 is that it can only compel applicants to produce extrinsic evidence in order to demonstrate their lineal descent from a person listed on the 1940 Census, and not in order to prove the underlying facts that led to the entry of that person's name on the Census Roll.

Despite Federal Defendants' claim to the contrary, there is no ambiguity in Section III of the SYB Articles of Organization, and therefore deference should not be given to the unconstitutional decision of the Enrollment Committee. Section III of the Articles of Organization clearly states that membership determinations are to be based on the 1940 Census Roll, which states Rosa Pace is 4/4 Santa Ynez Indian by blood degree. The Enrollment Committee applied a tortured construction

of this clear mandate of tribal law and the BIA acted arbitrarily and capriciously in affirming such a decision by shirking its duty on the basis it should defer, namely to the tribal officials.

III. REPLY ARGUMENT

A. The SYB Articles of Organization incorporates the 1940 Census as the sole determinant of membership eligibility.

The SYB adopted the 1940 Census Roll as the sole determinant of membership eligibility when it expressly incorporated that roll into its foundational document, the SYB Articles of Organization. This constitutional mandate clearly refutes Federal Defendants' claim that the 1940 Census Roll is "only a starting point for Section 1.B membership." Defs.' Br. 12. Tribes base their membership eligibility on historical documents in order to give consistency and predictability to membership determinations. Case law demonstrates that where a tribe adopts a historical document as a basis for future membership decisions, the information in that document is considered sacrosanct and cannot be contradicted by extrinsic evidence.

The District Court for the District of North Dakota acknowledged the sanctity of historical documents for membership determinations in *Allery v. Swimmer*, 779 F.Supp. 126 (D. ND, 1991). There, a BIA disenrollment decision violated the APA when it attempted to alter the historical document upon which

that tribe based its membership decision. Federal Defendants diminish the importance of *Allery v. Swimmer* by stating the job of the BIA was different in *Allery* than it is here. They argue that the BIA is more restricted in this case than in *Allery* because in *Allery* the BIA was in charge of the roll, whereas here they only serve in a reviewing function. Defs.' Br. 13. Whether the BIA is "re-prepar[ing] the roll" or they are "review[ing] that decision for correctness," it is always required to follow tribal law in its actions. In the instant case, the BIA has been granted authority by the tribe to review membership determinations—this does not authorize them to reach conclusions through procedures inconsistent with SYB law. The respect for tribal law that the BIA must show is demonstrated in *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013). There, the Assistant Secretary of the BIA reviewed an enrollment dispute, consistent with the authority vested in him by the tribal constitution, and had to "apply the tribe's own enrollment criteria." *Id.* at 1124.

The concept applied in *Allery*—the "controlling effect" of a tribe's constitutionally adopted historic document—was endorsed by the U.S. Supreme Court in *United States v. Ferguson*, 247 U.S. 175, 178 (1918). The Court espoused the benefits of such a method for creating a "reliable evidentiary standard" that would be "accessible and enduring." *Id.* Federal Defendants attempt to dismiss the Supreme Court opinion because the *Ferguson* decision involved an Act of

Congress and this case involves a tribal constitution. Defs.' Br. 12. Federal Defendants miss the focal point of the *Ferguson* case. Both *Ferguson* and the case at hand reinforce the sanctity and importance of 1940 Census Rolls. The fact that the authority in *Ferguson* to exclude extrinsic evidence contradicting the Tribal Roll was statutory as opposed to the Tribe's own law is a distinction without a practical difference. Regardless of the source of the BIA's reviewing authority, their duty to uphold tribal law remains, as demonstrated in *Alto v. Black, supra.*

The inviolability of historical documents, such as the 1940 Census Roll, is further supported by the Tribal case of *LaHaye v. Enrollment Commission*, 2006 WL 63358356 (Little River Tribal Ct., 2006). There, a tribal court held that its constitutionally adopted historical document "establishes a base from which the commission may not deviate in its determinations of membership eligibility." *Id.* Federal Defendants claim that *LaHaye* is not applicable because there the Tribe had a law giving a presumption of full blood if the base roll did not list the member's blood quantum. Defs.' Br. 13. Federal Defendants are distracting from the main emphasis of the case—that a Tribe's constitutionally chosen base roll is sacrosanct and cannot be contradicted by an outside document. The *LaHaye* court still did not permit outside evidence to override the information provided in the base roll. Under the facts of *LaHaye,* if one were to provide extrinsic evidence showing that a person with a blank space provided for their blood quanta was not

in fact full blood, their efforts would be moot for the Tribe would not be able to come to a result that contradicts what the Base Roll states. The distinction of the "full-blooded presumption" is beside the point and a distraction from the emphasis the case places on the importance of a Tribe's base roll. These rolls provide a fixed reliable starting point from which Tribes can grow their membership.

LaHaye, *Allery*, and *Ferguson* all reinforce the position that no outside evidence should be allowed to distort or controvert the information found in constitutionally-adopted historical documents. Here, the Santa Ynez Band expressly incorporated into their Articles of Organization that the 1940 Census would serve as that historical document from which all membership inquiries would be based. That historical document, the 1940 Census, explicitly lists Ms. Pace's blood quantum as 4/4 Santa Ynez. The BIA has a duty to follow and uphold tribal law in its tribally-authorized review of enrollment decisions. The BIA derogated from SYB law when it approved a membership decision based on evidence outside of the 1940 Census. By affirming the Tribal officials' decision, it invalidated the facts contained in the historical document and put at issue the blood quanta listed on the 1940 Census for all members of the Tribe. It also forced the descendants of Ms. Pace to prove the blood quanta of the parents of the ancestor listed on the 1940 Census, which is beyond the duty required under SYB law.

B. Just as federal and State statutes must yield to federal and state constitutions, tribal ordinances must be interpreted in a manner that does not conflict with a tribe's supreme governing document.

The SYB Articles of Organization, which is essentially a tribal constitution, must be treated as supreme in relation to all other sources of SYB law. As such, all subordinate sources of SYB law must be interpreted so as not to conflict with the Articles of Organization. This doctrine of constitutional supremacy fully applies to tribal law, as demonstrated in *Lomeli v. Kelly*, wherein a tribal court held that "[a]n ordinance adopted by the Tribal Council under its delegated authority cannot trump the Constitution adopted by the Tribe's membership." 12 NICS App. 1 (January 2014). Conflicts between the Articles of Organization and lower sources of law should be resolved according to the standard set forth in *Zadvydas v. Davis*, where the Supreme Court held that "it is a cardinal principle of statutory interpretation [that when a statute] raises a serious doubt as to its constitutionality, [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." 533 U.S. 678, 689 (2001).

Federal Defendants claim that Ordinance No. 2 obligates consideration of evidence beyond the 1940 Census for membership determinations. Defs.' Br. 14-15. Such an interpretation offends the doctrine of constitutional supremacy because the BIA allowed the ordinance to supersede the SYB Articles of Organization, which lists the 1940 Census as the sole basis for membership

inquiries. Requiring applicants to prove their ancestor's blood quantum—information that is constitutionally accepted to be that in the 1940 Census Roll—violates the language and intent of the SYB Articles of Organization. There is no language in Ordinance No. 2 that would allow a redetermination of the content within the 1940 Census Roll. Consistent with the principle set forth in *Zadvydas, supra,* Ordinance No. 2 must be interpreted to harmonize with the Articles of Organization. The only acceptable interpretation of Ordinance No. 2 that would not supersede the SYB Articles of Organization is that extrinsic evidence can only be compelled where applicants must prove lineal descent from a person originally listed on the 1940 Census, not to re-determine the blood quantum listed in the 1940 Census. Any other interpretation of Ordinance No. 2 will render it void for being in violation of the SYB Articles of Organization. In this situation the 1940 Census lists the blood quantum of Ms. Pace as 4/4. Extrinsic evidence that may contradict this fact cannot be utilized. It is worth noting that Defendants referenced that some extrinsic evidence supported the fact that Ms. Pace was full-blooded, but is nonetheless irrelevant. See Defs.' Br. 6 ("Two documents from the 1990s identify Pace's father as bull-blood Santa Ynez Indian, but plaintiffs [sic] do not cite or rely on either of these documents"). Defendants' contention of Plaintiffs' oversight of this fact is misguided because Plaintiffs do not and cannot rely on this extrinsic

evidence. Further, it weakens the Defendants' position that Pace is not full blood Santa Ynez.

C. The ambiguity upon which the BIA relies in defense of their use of documents outside the 1940 census is non-existent, thus no logical reason exists for the BIA's actions, making them arbitrary and capricious.

Neither the Tribe nor the Federal Defendants should have turned to evidence other than the 1940 Census when making membership determinations. Both the Articles of Organization and Ordinance No. 2 clearly and plainly state that membership is to be derived solely from the 1940 Census Roll. When the Federal Defendants affirmed the Enrollment Committee's process—requiring research into outside evidence and then relying on that evidence to make their blood quantum determination—they acted inconsistently with SYB law and in an arbitrary and capricious manner.

Federal Defendants justify their actions by claiming that they are supposed to defer to the Band's reasonable interpretation of Tribal Laws when analyzing ambiguous language. Defs.' Br. 15-16. The Defendants' reasoning errs in two parts. First, no ambiguity can be found in the plain meaning of the Articles of Organization in regards to membership qualifications. Any confusion present is fabricated because the text is clear in that it lists the 1940 Census as the sole source of information for blood quantum inquiries. Next, the review authority granted to

the BIA does not entitle them to blindly affirm incorrect or unlawful decisions by the Enrollment Committee—lest their duty to review be rendered pointless and merely ceremonial. Federal Defendants acted arbitrarily and capriciously by deferring to the Tribal Official's interpretation of a non-existent ambiguity and upholding a decision that was substantively and procedurally improper under SYB law.

The issue at hand is a rare one where a Tribe has ceded part of its governing authority to the BIA so that they may have the final say in appealed membership determinations. This backstop was put in place to ensure that the official members of the Tribe followed SYB law and would not abuse their authority. The BIA is responsible for overseeing the Tribe's procedures and ensuring the Governing Officials are managing the Band properly at the Tribe's request. Federal Defendants failed to uphold their duties by deferring to the tribe's construction of a provision lacking ambiguity. Federal Defendants state that if the Band's laws governing membership are "ambiguous, the Bureau's decision must be affirmed," Defs.' Br. 16. Defendants fail to provide any evidence of this apparent ambiguity. Both Article III in the Articles of Organization and Ordinance No. 2 state that membership is determined by "the total percentage of Indian blood derived from an ancestor… listed on the Santa Inez 1940 Census Roll." SYB Ord. No. 2.

Defendants do not present any justification that the Tribe's Laws permit use of extrinsic evidence, nor do they show any ambiguity that would lead them to believe that the extrinsic evidence holds more weight than the information provided in the 1940 Census. In *South Carolina v. Catawba Indian Tribe*, the Supreme Court found that while it is acceptable to defer to the Tribal Government's interpretation of vague statutes, this ability, "does not permit reliance on ambiguities that do not exist[.]" 476 U.S. 498, 506-07 (1986). Having shown no basis in tribal law to justify reliance on evidence outside of the 1940 Census, a rational basis cannot be found for the BIA's approval of the Tribe's decision. Errors in judgment of this magnitude meet the APA standard of arbitrary and capricious.

Federal Defendants further state that "Plaintiffs' collateral attack on the Band's 50-year-old membership record is both time-barred and outside the scope of this APA suit." Defs.' Br. 17 (internal citation omitted). Plaintiffs are not attacking the 1965 Membership Roll, but rather Defendants' use of the 1965 Membership Roll (or any document other than the 1940 Census for that matter) in its review of Plaintiffs' membership application. Defendants attempt to supplant the 1940 Census with the Membership Roll as the device used to determine membership. The Tribe's governing law does not provide for the use of the 1965 Membership Roll in membership decisions, and that is the extent of Plaintiffs'

reference to that roll in the Opening Brief. In fact the Defendants attempt to confuse the Court by use of language that permits interpretation of the Roll, not the Census. Defs.' Br. 15, *citing* ER164.

IV. CONCLUSION

The BIA violated Appellants' rights under the APA by acting arbitrarily and capriciously in their review of the SYB Enrollment Committee's decision because there is no rational basis for upholding tribal actions that contravene the Tribe's fundamental governing document.

The framers of the Santa Ynez Band selected the 1940 Census as their constitutionally chosen historical document by incorporating that roll into the Articles of Organization. They did so to ensure that future membership decisions would have a reliable and accessible basis (*See Ferguson*, 247 U.S. at 178). Further, the tribe gave the BIA the duty to review decisions by the Enrollment Committee. The 1940 Census is thereby sacrosanct because of its inclusion in the Articles of Organization, to which all other tribal laws and regulations are subordinate (*See Zadvydas*, 533 U.S. at 689; *Lomeli*, 12 NICS App. 1). Appellants' ancestor, Rosa Pace, is listed on the 1940 Census roll as 4/4 Santa Ynez Indian by blood degree. The Enrollment Committee used improper interpretations of SYB law to justify the use of extrinsic evidence to contradict the

blood quantum listed for Rosa Pace in the 1940 Census. That decision ignored the data already present in the constitutionally accepted 1940 Census and also effectively allowed enrollment regulations to supersede the Articles of Organization, thereby violating tribal law. The BIA, in its tribally-granted duty to review enrollment decisions, must uphold tribal law (*See Alto v. Black*, 738 F.3d at 1124) and cannot defer to the tribe's decisions where there is no legal basis for that decision.

The cases discussed above endorse the use of historical documents and compel the conclusion that proper deference must be shown to the will of the framers of tribal constitutional documents. To the extent that tribal statutes or regulations are interpreted and applied by tribal functionaries in opposition to the tribe's constitutional mandates, the BIA must exercise its delegated authority to reject those interpretations and harmonize such laws with the constitutional purpose they are intended to serve. Here, the BIA failed to do so. The 1940 Census Roll listed Rosa Pace as full-blooded Santa Ynez Indian, yet the BIA upheld the tribe's decision based on extrinsic evidence that contradicted the 1940 Roll. That decision was contrary to SYB law, and no rational basis can be found for the BIA to support such action. Therefore, any resulting decision must be set aside under the APA as arbitrary and capricious.

For these reasons, Appellants respectfully ask this Court to reverse the District Court's judgment, and remand this matter for entry of an order granting Appellants' motion for summary judgment and denying BIA's motion. The District Court should then enter judgment for Appellants directing the BIA to instruct the SYB Enrollment Committee to place the Appellants' names on the SYB membership roll.

Dated: March 4, 2016

Respectfully submitted,

HOLSTEIN, TAYLOR and UNITT
A Professional Corporation

BY: /s/ Brian C. Unitt
BRIAN C. UNITT

VELIE LAW FIRM

BY: /s/ Jonathan Velie
JONATHAN VELIE

Attorneys for Plaintiffs - Appellants

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 3,143 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using *(state name and version of word processing program)* Word 2016
(state font size and name of type style) 14 point, Times New Roman, *or*

☐ this brief has been prepared in a monospaced spaced typeface using *(state name and version of word processing program)* _____
with *(state number of characters per inch and name of type style)*

_____.

Signature /s/ Brian C. Unitt

Attorney for Plaintiffs - Appellants

Date March 4, 2016

9th Circuit Case Number(s) 15-55245

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Mar 4, 2016 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Linda Bartman

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)