No: 17-16838

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS
OF THE PALA RESERVATION,
Plaintiff and Appellant,

vs.

MICHAEL BLACK, Acting Assistant Secretary of Indian Affairs, United States Department of the Interior (in his official capacity)
and DOES 1 through 10, inclusive
Defendant and Appellee

Appeal from the United States District Court for the
Eastern District of California
Civil Case No. 2:15-cv-02329-JAM-KJN
(Honorable John A. Mendez)

APPELLANT THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS OF THE PALA RESERVATION'S REPLY BRIEF

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THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS
OF THE PALA RESERVATION

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I. LEGAL ARGUMENT

A. Plaintiff Does *Not* Seek "an Order Compelling Defendant to Recognize the Cupeño Tribe."

Plaintiff has re-iterated countless times is *not* seeking federal recognition for the Cupeño. Instead Plaintiff seeks *correction of the List* based on a showing that the Cupeño's federal relationship *has never lapsed or been terminated* because the Cupeño has continued to reside on New Pala and because the United States has exhibited its awareness of the Cupeño's existence repeatedly from 1852 to the present. *See* Plaintiff's Opening Brief ("O.Brief") at 53-59; *compare* ER424 ("The treatment of Ione and Lower Lake were not based solely or even primarily on any claim of previous acknowledgement. Rather the decisions were based on continuous dealing and the existence of clearly defined communal land holdings.") *accord Muwekma Ohlone Tribe v. Salazar,* 708 F.3d 209, 214, 216 (D.C. Cir. 2013) (quoting the above-identified text and holding that the BIA's Muwekma Explanation "makes clear that…the Lower Lake and Ione tribes, unlike Muwekma, had multiple post-1927 government-to-government interactions with the United States" and supports the conclusion that the BIA viewed Lower Lake and Ione as tribes despite their not being Listed).

Defendant persists in miscasting Plaintiff's claims—contending that Plaintiff seeks to have the Court compel Defendant to recognize the Cupeño as a tribe. *See, e.g.*, Answering Brief ("A.Brief") at 19-23, 29, 34. Throughout his Brief, Defendant

places the word "correction" in quotation marks (*see, e.g.,* A.Brief at 2, 36) apparently to convey that Plaintiff has contrived "correction of error" as a euphemism to make an end run around Part 83 and attain federal recognition. But Plaintiff has shown that the "correction of error" is a doctrine *that the BIA itself created* and has repeatedly invoked to explain its Ione, Lower Lake, Tejon, and Muwekma decisions. *See* ER420, ER422 (second paragraph); ER471, & ER473; 73 Fed. Reg. 29363 (May 20, 2008) at comments re § 292.10. The BIA has identified and applied consistent criteria in those prior cases to determine whether a tribe's absence from the List is error. *See* ER414-ER424 (identifying the criteria in *Muwekma* in 2006); *compare* ER471-ER479 (applying those criteria to Tejon in 2012). And the federal courts have embraced those criteria. *See Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170, 198-199 (D.D.C. 2011) (applying the criteria); *see also Muwekma*, *supra* 708 F.3d at, 214, 216-217 (applying the criteria). Plaintiff submits that Defendant's application of consistent criteria to resolve a recurring legal question is precisely a "doctrine of a common law character" as contemplated by the court in *Miami*—i.e. "the kind of criteria that courts are capable of applying." *See* 255 F.3d at 348. Plaintiff respectfully submits that a court need not utter the word "doctrine" as an incantation to transform the BIA's prior decisions into controlling precedents. Our rule of law embracing principals of equal protection cannot operate any other way. *See, e.g., Muwekma,*

supra, 708 F.3d at 716 ("If an agency makes an exception in one case, then it must either make an exception in a similar case or point to a *relevant* distinction between the two cases.") (italics added).

And the BIA's reasoning in framing and employing its correction doctrine has (until this case) been sound—for how can Defendant fulfill his congressional mandate of maintaining an accurate List that "reflect[s] all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians " [108 Stat. 4791 § 103(6)-(8)] if he is unwilling to correct the List when he is alerted to facts showing that an un-Listed tribe has been residing on and enjoying the benefits of trust lands for over a century *like the Cupeño has*? The *correction of error* is the only appropriate action for Defendant to take under such circumstances. *See* ER484 ("Part 83 does not apply to Indian tribes whose government-to-government relationship was never severed." And "a fact intensive analysis must be conducted to determine whether the United States had a previous, unambiguous political relationship with a particular tribe in question that has not been severed or lapsed."); *see also* 25 C.F.R. § 83.3 (Part 83 does not apply to recognized tribes). Clearly, Defendant would prefer to defend a bare claim seeking a court order that Defendant recognize the Cupeño, but that is not what Plaintiff has sought in this case.

By re-framing Plaintiff's complaint to suit his preferred defense, Defendant continues to dodge the essential issues that control this case—namely (1) whether the Cupeño ever became federally recognized; (2) whether the Cupeño's government-to-government relationship thereafter lapsed; or (3) whether the Cupeño's federal relationship was ever terminated? *See* O.Brief at 31-33. Defendant's persistent refusal to address those controlling issues demonstrates that his refusal to correct the List lacks any reasoned basis. *See Cascadia Wildlands v.* BIA, 801 F.3d 1105, 1110 (9th Cir. 2015) ("we will reverse a decision as arbitrary and capricious…if the agency…entirely failed to consider an important aspect of the problem….").

B. Plaintiff Has Exhausted Administrative Remedies for Seeking a Correction of the List.

Having re-cast Plaintiff's case as a suit seeking federal recognition, Defendant argues at length that Plaintiff has not exhausted the administrative remedies available *for obtaining federal recognition*. *See* A.Brief at 19-25. Defendant cites a number of cases that Plaintiff has already distinguished. *See* O.Brief at 37, 40-41 (distinguishing *Miami Nation of Indians v. U.S. Dep't Interior, United Tribe of Shawnee Indians v. United States* and *James v. Dept. Health and Human Svcs.*)

Every new case that Defendant cites is inapposite for similar reasons. In *Mackinac Tribe v. Jewell*, the plaintiff tribe sought to compel Interior to convene an

election to allow it to organize under the IRA. *See* 829 F.3d 754 (D.C. Cir. 2016). Thus, as with Defendant's other authorities, the Mackinac Tribe sought a bare judicial declaration that it is a federally recognized tribe. *See id.* at 756-757. The court, unremarkably, held that a tribe *seeking federal recognition* must exhaust administrative remedies by petitioning under Part 83. *See id.* at 757; *see also Wyandot Nation of Kansas v. United States,* 858 F.3d 1392, 1396, 1398 (Fed. Cir. 2017) (tribe that had petitioned unsuccessfully under Part 83 sought an accounting of a trust fund claiming that Court could recognize tribe based on 1867 treaty); *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 55, 60-61 (2nd Cir. 1994) (action stayed in pre-FRTLA case where tribe had already filed a Part 83 petition, and while it was pending, sought a judicial determination that it was a tribe for purposes of the Nonintercourse Act); *Western Shoshone Bus. Council v. Babbit*, 1 F.3d 1052, 1054 (10th Cir. 1993) (Pre-FRTLA case seeking bare judicial declaration that plaintiff is a federally recognized tribe.)

In *Grand Traverse Band v. Office of U.S. Atty.*, 369 F.3d 960, 966 (6th Cir. 2004), the Court considered whether the Grand Traverse Band was a tribe "restored to federal recognition" for purposes of 25 U.S.C. § 2719. Subject to specific exceptions, section 2719 prohibits gaming on lands acquired in trust for an Indian tribe after October 17, 1988. One exception is for lands taken into trust as part of the "restoration of lands for an Indian tribe that is restored to Federal recognition."

See 25 U.S.C. ¶ 2719(b)(1)(B)(iii).

It was undisputed that the Grand Traverse Band was recognized until 1872 when Interior "improperly severed the government-to-government relationship between the United States and the Band." *See* 369 F.3d at 965, 967. In 1980, the Band successfully petitioned for federal recognition through the 25 C.F.R. Part 54 process (now Part 83). *See* 369 F.3d at 962. In the 1980s, Interior took land into trust for the band. *See id.* The Band established a gaming enterprise on that land and filed suit seeking a declaratory judgment that casino style gambling at the site was lawful under the Indian Gaming Regulatory Act ("IGRA"). *See* 369 F.3d at 963. The State of Michigan opposed the band arguing that, since only Congress has the power to terminate a tribe, and since the Band was only ever *unlawfully* terminated by the Secretary, the Band was never terminated *in fact*, and therefore, the tribe was not "restored to federal recognition" when its Part 54 petition was granted. *See id.* at 967. The court reasoned that, while the Secretary's termination of the Band was unlawful, it operated as a *de facto* termination nonetheless. *See id.* at 968-969 (analogizing to wrongful termination in the employment context). Accordingly, the *Grand Traverse* court did not hold that an un-terminated tribe must go through Part 83. It merely held that an unlawfully administratively-terminated tribe that successfully petitions under Part 83 may be considered "restored to recognition" for purposes of IGRA. *See id.*

Accordingly this case is fundamentally different from *Grand Traverse*. Defendant does not here contend (nor are there facts to support) that the Cupeño tribe has ever been terminated either by Congress or unlawfully by the BIA. Defendant has avoided the question of termination by equivocating on the more fundamental question of whether the Cupeño ever attained federal recognition. *See* ER661¶40; ER630¶40; ER665¶67; ER633¶67; ER668¶82; ER635¶82; ER685¶186; ER647¶186. It is Defendant's failure to examine that question, and Defendant's concomitant failure to examine whether or not the Cupeño's federal relationship ever lapsed or was terminated that render Defendant's actions in this case arbitrary, unreasonable, and unlawful. Thus, *Grand Traverse* does not support the conclusion that Plaintiff must exhaust Part 83 rather than seeking correction of the List.

The *Muwekma* cases are the only cases Plaintiff has found that actually address questions similar to those presented in this case. The Court in *Muwekma Ohlone Tribe v. Kempthorne*, 452 F.Supp.2d 105 (D.D.C. 2006) specifically held that the Department was required to provide a detailed explanation of why it required the Muwekma tribe to complete a Part 83 petition despite reaffirming Ione and Lower Lake outside of the Part 83 process. *See id.* at 124-125; *accord, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48-49 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner,…[Citations omitted]; and we reaffirm

this principle again today.") Plaintiff has shown that Defendant's conclusory, terse, factually-unsupported, and legally-baseless decision does not meet that standard. *See* O.Brief at 45-59.

C. The Cupeño Tribe Has Not "Faded Away"

Citing *Miami Nation of Indians, Inc. v. United States*, 255 F.3d 342, 346 (7th Cir. 2001), Defendant implies that the Cupeño tribe may have "faded away." *See* A.Brief at 21. *Miami* does not provide such authority in this case. The *Miami* court concluded that the Miami Nation ceased to exist between 1854, when it was recognized by treaty, and 1940 when the tribe "had no structure. It was a group of people united by nothing more than common descent, with no territory, no significant governance, and only the loosest of social ties." *Miami* at 350. The court observed that the Miami had no meaningful government from 1940 and only "bestirred itself to seek federal recognition" in 1979. *Id.* at 356. In short, the court concluded that the Miami Nation's federal relationship had "lapsed." *Compare* ER417 (describing how the Muwekma tribe lapsed "Because there is no evidence of any Federal dealings" with Muwekma.) The *Miami* court did not use the term "lapse," presumably because *Miami* was decided before the BIA articulated its correction doctrine in the *Muwekma* case in 2006 and before it applied that doctrine to the Tejon in 2012. Accordingly, the *Miami* court did not consider the facts or precedents at issue in this case, and therefore, *Miami* is not sound authority on the

question of whether the Cupeño's federal relationship lapsed or "faded away." Indeed, the *Miami* court's conclusion that a recognized tribe ceases to exist if it has no land and no meaningful governance for a period of 39 years (i.e. 1940 to 1979 *see Miami*, *supra*, at 350, 356) conflicts with the BIA's own reasoning as to both Lower Lake and Tejon. *See* ER436-437 (stating that Lower Lake had no land after 1955 and making no consideration as to whether Lower Lake had any meaningful governance at any time prior to 1995—i.e., 40 years without land or governance); *see also* ER478 (stating that Tejon had no land after 1962, and making no mention as to whether or when the Tejon had any governance, but re-affirming the Tejon in 2012—i.e., 50 years without land or governance.)

The Court should show deference *to the BIA's reasoning* expressed in its Ione, Lower Lake, and Tejon decisions as to when and how a federal relationship lapses--since Congress entrusted the BIA with the responsibility of maintaining an accurate and complete List, and by those decisions the BIA has developed and consistently applied criteria for determining whether a tribe's relationship has lapsed. *See* 25 U.S.C. §§ 2 & 9; *compare* ER471-ER479; ER414-ER424; & ER434-ER440; 108 Stat. 4791-4792 (1994) § 103.[1]

[1] Plaintiff cites to the FRTLA in the Statutes at Large rather than 25 U.S.C. § 5131 because the Statutes at Large provide the complete text of the FRTLA, whereas the Code omits section 103. The mandates listed in section 103 have the force of law. *See U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448

D. The Court May Not Seize upon 25 C.F.R. Section 83.12 as Justification for Defendant's Decision.

Plaintiff has pointed out that Defendant never cited 25 C.F.R. § 83.12 as grounds to refuse Plaintiff's request for correction of the List. *See* O.Brief at 41-42. By way of review, section 83.12 provides a streamlined petition process for previously recognized tribes that seek current *recognition*. As Plaintiff has pointed out, such tribes, must have lapsed (like the Muwekma, *see* ER418) Otherwise Part 83 does not apply to such previously recognized tribes. *See* 25 C.F.R. § 83.3; ER418; ER471; ER484-486.

Because Defendant did not invoke section 83.12, under *SEC v. Chenery Corporation*, 318 U.S. 80, 87 (1943), it was improper for the District Court (or even Defendant's attorneys) to cite section 83.12 to justify his decision. *See Philadelphia Gas Works v. F.E.R.C.*, 989 F.2d 1246, 1250 (D.C. Cir. 1993) (where the agency has not fully complied with its obligation set forth its "conclusions, and the reasons or basis therefor…. under *Chenery*, neither the agency's appellate counsel nor, *a fortiori,* appellate judges can cure that defect.")

(1993) ("Though the appearance of a provision in the current edition of the United States Code is '*prima facie*' evidence that the provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the 'legal evidence of laws,' § 112, and despite its omission from the Code [a section] remains on the books if the Statutes at Large so dictates."); *accord Stephan v. U.S.*, 319 U.S. 423, 426 (1943); *U.S. v. Weldon*, 377 U.S. 95, 98 n.4 (1964).

Defendant argues that his reliance on 25 C.F.R section 83.12 is necessarily implied in his decision. A.Brief at 24. No it isn't. By directing the Cupeño to Part 83, Defendant had to conclude either (1) that the Cupeño were never federally recognized; or (2) that the Cupeño's prior federal recognition lapsed. *See* 25 C.F.R. § 83.3; ER418; ER471; ER484. But no one knows what basis Defendant embraced to direct Plaintiff to Part 83 *because Defendant didn't explain—and that is precisely the problem this case presents*. Indeed, as Plaintiff has pointed out repeatedly, Defendant has *not even taken a position* as to whether the Cupeño were ever federally recognized, let alone provided any rebuttal to the evidence showing that the Cupeño's federal relationship has never lapsed. Accordingly, the only fair implication of Defendant's decision is that he *did not* consider section 83.12, and that he arbitrarily referred Plaintiff to Part 83. *See* ER637¶98, ER638¶102-103 & ER671¶¶102-103, ER638¶105 & ER672¶105. The fact that the District Court felt compelled to seize upon a justification that Defendant never articulated demonstrates that Defendant's decision was not reasoned.

Defendant also contends that "*Chenery's* rational does not apply to questions of statutory *application* or interpretation." *See* A.Brief at 24 (italics added). That is simply wrong. Plaintiff does not dispute that the District Court, and this Court, are free to *interpret* section 83.12. Indeed, Plaintiff has already provided its argument as to how that section must be interpreted in light of section 83.3. *See* O.Brief at 41.

However, the Court may not *apply* section 83.12 as a justification for *Defendant's decision*—because Defendant himself made no determination as to whether the Cupeño was ever recognized, and therefore, did not even *impliedly* rely on section 83.12. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1089 n.10 (9th Cir. 2014) (conceding that "courts should not substitute their judgment for that of the agency when reviewing a decision *which the agency alone is authorized to make* and which it has not made."); *accord Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 977-978 (9th Cir. 2005); *Railway Labor Exec's. Assoc. v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986) (stating only that the court is not bound by *Chenery* when the issue in dispute is the *interpretation* of a federal statute).

Put simply, if Defendant wished to rely on 83.12 as justification for refusing to correct the List, he had to first concede that the Cupeño became federally recognized (*see* 25 C.F.R. § 83.12), and then provide a reasoned basis supporting a determination that the Cupeño's federal relationship lapsed. *See* 25 C.F.R. § 83.3; *see also* ER484. He did neither. The District Court should not have explained Defendant's decision for him.

E. Plaintiff's Claims Are Ripe.

As with most of Defendant's Answering Brief, Defendant's argument that Plaintiff's claims are not ripe is based upon his first re-casting Plaintiff's case as a suit seeking "a court order compelling Interior to recognize the Cupeño as an Indian

tribe…." A.Brief at 25. As explained above, that is not what Plaintiff seeks. In considering ripeness, the court evaluates "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbot Labs v. Gardner,* 387 U.S. 136, 149 (1967).

Plaintiff does not disagree with Defendant that in the administrative context, the ripeness doctrine prevents the courts from entangling themselves in abstract disagreements and protects agencies from judicial interference "until an administrative decision has been formalized and its effects felt by all parties." *See* A.Brief at 25 citing *Abbot Labs, supra,* 387 U.S. at 148. But in this case, Defendant formalized his decision refusing to correct the List on February 17, 2016. *See* ER488-ER490. Defendant's decision is now fit for review.

Defendant's only response to this simple point is that the BIA's policy purportedly "identifies the Part 83 process as the sole means by which a previously recognized tribe may get on the list." *See* A.Brief at 27-28. No it doesn't. Plaintiff has already shown that the July 2015 Policy Guidance by its plain language did not (and could not) eliminate Defendant's duty to add a tribe to the List to correct administrative error. *See* O.Brief at 45-48. The Policy guidance merely states that tribes *seeking federal recognition* must go through Part 83. It says nothing whatsoever about corrections to the List.

Moreover, as Plaintiff pointed out, *Defendant himself argued in the District*

Court that the 2015 Policy Guidance did not change BIA policy, but "merely reaffirm[ed] that the Part 83 regulations…would be applied without exception for all Indian groups seeking recognition, whether they are seeking federal recognition *for the first time or after a period of lapse.*" ER64:19-65:3 (emphasis added). That is exactly right. And since Plaintiff is not seeking federal recognition, and since Part 83 only applies to tribes who have never been federally recognized, or whose recognition has lapsed, Part 83 does not apply to the Cupeño. *See id.*; *see also, e.g.* ER471; ER473.

Since Defendant now re-advances the 2015 Policy Guidance as a change in the Law, Plaintiff is compelled to point out that, even if the 2015 Policy Guidance had expressed a change in policy, Defendant would not have the authority to retroactively apply it to the Cupeño. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (As a general matter, statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by express terms.) Plaintiff reiterated its request for correction of the List on June 16, 2015. *See* ER373-382. Ten days later Defendant issued the Policy Guidance. *See* ER412. Defendant can identify no express grant of authority to retroactively promulgate any rule or "policy guidance" to the Cupeño.

Since Part 83 does not apply to Plaintiff's request for correction, Plaintiff properly made the request for correction outside of the Part 83 process, just like

Tejon did. *See* ER471. Thereafter, Defendant was required to either correct the List or to provide a cogent explanation of (1) how the Cupeño were never federally recognized, or (2) how the Cupeño's government-to-government relationship lapsed, or (3) how the Cupeño were terminated. *See id.*; *Muwekma, supra,* 452 F.Supp.2d at 124-125; *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., supra* 463 U.S. at 48-49 (1983). He did not. *See* ER488-ER490*; see also* Section *I*, *infra*. And substantial legal consequences flow from his unreasoned and arbitrary decision—namely that Plaintiff is now relegated to the costly and time-consuming Part 83 process where it must start from the factually-baseless premise that the Cupeño was either never recognized or that its federal relationship has lapsed. *See* 25 C.F.R. § 83.3. Accordingly, Defendant's decision is ripe for review. *See Abbot Labs, supra*.

F. The Doctrine of Primary Jurisdiction Does Not Apply.

Defendant next contends that the doctrine of primary jurisdiction bars Plaintiff's case. A.Brief at 28. Defendant observes that the primary jurisdiction doctrine "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* quoting *United States v. Western Pac. Railroad Co.*, 352 U.S. 59, 63-64 (1956). Again, the questions that the BIA's regulatory scheme imposed upon Defendant in this case were (1) whether

the Cupeño was ever recognized; and if so (2) whether that federal relationship lapsed; or (3) whether the Cupeño's federal relationship was terminated. *See* 25 C.F.R. § 83.3; *see also* FRTLA 108 Stat. 4791 § 103 (repudiating termination of recognized tribes, and charging Defendant responsibility of keeping an accurate and complete list of recognized tribes.); *see also* ER484 (showing that Defendant's predecessor interpreted the regulatory scheme to require that, before applying Part 83, a "fact intensive analysis…to determine whether the United States had a previous, unambiguous political relationship with a particular tribe in question that has not been severed or lapsed.")

The doctrine of primary jurisdiction does not permit Defendant to issue a factually-unsupported decision that fails to adequately distinguish controlling precedents and then simply rely on the Court to shy away for fear of treading on agency expertise. The entire point of the Administrative Procedures Act is to check such capricious abuse of Defendant's authority. *See Com. of Va. ex rel. Virginia Dep't of Med. Assistance Servs. v. Bowen*, 680 F. Supp. 228, 234 (W.D. Va. 1988) ("Congress intended that the APA provide a judicial safety net for review, in those cases in which review is not otherwise precluded nor left to the agency.")

G. The FRTLA Requires Defendant to Correct the List.

Plaintiff has showed that Defendant is required to correct the List to add a tribe whose federal relationship has not lapsed or been terminated. *See* O.Brief at

33-36. Specifically, Plaintiff showed that, the FRTLA plainly requires annual publication of an accurate and complete List of all tribes eligible to receive benefits and services from the United States; that it is error to subject Defendants decision to APA review without considering the role Defendant's trust duty to the Cupeño plays in his administration of the List; and that any ambiguity in that statute must be construed to favor Plaintiff. *See id.* Plaintiff noted that the BIA's own past practice of correcting errors outside of the Part 83 process is consistent with Plaintiff's interpretation of the FRTLA. *See id.* Again, Defendant dodges these issues by first mischaracterizing Plaintiff's case as a lawsuit seeking federal recognition. *See* A.Brief at 29.

Relying on *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923 (9th. Cir. 2010); and *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004), Defendant then makes the absurd observation that "no statute or regulation places an 'unequivocal command' upon Interior officials to recognize any particular Indian tribe, much less do so outside of the Part 83 process." A.Brief at 30. Of course Plaintiff has never contended that the FRTLA specifically directs Defendant to recognize the Cupeño *in particular*. Rather, Plaintiff has shown that the FRTLA places an "unequivocal command" upon Defendant to keep an accurate and complete List of the tribes "eligible for the special programs and services provided by the Untied States to Indians because of their status as Indians." *See* 108

Stat. 4791 § 103(8); O.Brief at 35-36. It is that unequivocal command that imposes upon Defendant a legal duty to correct the List when presented with facts showing that a tribe that has resided on and benefited from trust lands for more than a century is not on the List. The Cupeño has shown that it is such a tribe. *See id.* at 2-16. Defendant has no response to those facts.

Defendant contends that the FRTLA's direction that the List "*should* be accurate, regularly updated, and regularly published…" and that it "*should* reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (italics added) does not constitute an "unequivocal command." *See* A.Brief at 31. This is purportedly because Congress stated that the List *should* be accurate and complete, rather than stating that the List *must* be accurate and complete. *See id.* Defendant's contention in that regard is rank sophistry. If the Court embraces Defendant's interpretation, it will render the entire FRLTA a transparent sham. Statutory language, "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). Here the overall statutory scheme of the FRTLA is to place a curb on the BIA's "disturbing tendency" to "de-recognize" tribes. *See* HR. Rep. No. 103-781, at 3 (1994), ER121.

Accordingly, Plaintiff respectfully submits that the only permissible interpretation of the FRTLA is that Congress employed the word "should" merely because it anticipated that errors might be made, and not (as Defendant would have it) to grant him discretionary authority to leave errors uncorrected. *See id.*; *see also Artichoke Joe's v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) (statute construed to favor tribal party even where such interpretation was not necessarily the better reading.)

Defendant also suggests that the FRTLA permits him to address inaccuracies on the List through the Part 83 process. *See* A.Brief at 31. No it doesn't. The plain language of the FRTLA requires Defendant to keep an accurate List of tribes recognized and eligible for services. *See* 108 Stat. 4791 § 103(5)-(8). Thus, if a tribe that has not been terminated and is enjoying trust lands, but is un-Listed, presents itself to Defendant, the FRTLA plainly requires Defendant to correct the List. It does not empower him to administratively terminate the tribe by sending it through the Part 83 process. *See* ER121. Indeed, as Plaintiff has pointed out, *Part 83 itself* specifically prohibits the use of Part 83 to correct errors on the List. *See* 25 C.F.R. § 83.3. And as Plaintiff has pointed out (and Defendant has persistently ignored) the BIA itself has repeatedly taken the position in public, *and in federal court*s, that Part 83 does not apply to instances of administrative error. *See, e.g.*, ER417; ER420; ER471; ER473; ER484; 73 Fed. Reg. 29363 (May 20, 2008) at comments re § 292.10.

Indeed, Defendant argued in the District Court *in this case* that the BIA "has always considered that Part 83 applies to Indian tribes that *have not previously been recognized or whose federally recognized status has lapsed*." ER64 n.16 (italics added). Defendant also stated that BIA policy has not changed as a result of the July 2015 Policy Guidance which "merely reaffirm[ed] that the Part 83 regulations, originally enacted in 1978, would be applied without exception for all Indian groups seeking federal recognition, whether they are seeking federal recognition *for the first time or after a period of lapse."* ER64:19-65:3. In other words, the absence from the List of a tribe that *has* been federally recognized, and whose status *has not* lapsed cannot be remedied through the Part 83 process. Instead, it is administrative error that must be remedied by correcting the List outside of Part 83. *See* ER484; 25 C.F.R. § 83.3.

Defendant contends that the Cupeño's absence from the List is sufficient to establish Part 83's applicability. He cites, *W. Shoshone Bus. Council*, 1 F.3d 1052, 1057 (10 Cir. 1993) and *Edwards, McCoy & Kennedy v. Acting Phoenix Area Dir., BIA,* 18 IBIA 454, 457 (1990). A.Brief at 44. But as the captions make obvious, both of those cases pre-date the 1994 enactment of the FRTLA and all of the law and precedents which control the correction of errors to the List thereafter. Accordingly, to the extent either case conflicts with the FRTLA and the BIA's precedents by holding that absence from the List mandates the application of Part

83, the Court should disregard both cases as superseded.

Defendant is wrong that the Court cannot order Defendant to correct the List to add the Cupeño under the APA. *See* A.Brief at 29-33. As set forth above, correcting the List is a discrete action that the FRTLA requires Defendant to take in this instance—where the facts show that the Cupeño Tribe was in a government-to-government relationship and Defendant cannot identify any instance in which the Cupeño was either terminated or facts supporting the conclusion that the Cupeño's government-to-government relationship lapsed. A contrary interpretation of the APA leads to the absurd result that the Court will only ever have jurisdiction to order the Defendant to 'try to explain himself again' leading to interminable litigation and, effectively, rendering the judiciary impotent as it permits Defendant to shirk his responsibilities under the FRLTA to the detriment of Plaintiff's rights in perpetuity. Plaintiff submitted its request with evidentiary support *See* ER373-ER383. Plaintiff had to sue to compel Defendant to respond to the request, *see* Dkt. No. 1; ER488. In his decision, and in extensive briefing before the District Court and this Court, Defendant has had the opportunity to provide factual and legal support for his decision. He has not—showing that his decision is groundless and indefensible. The Court should not restrain itself from compelling Defendant to correct the List as the FRTLA requires him to do.

H. Plaintiff's Claims Are Not Time Barred.

Defendant contends that Plaintiff's claims are barred by the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). *See* A.Brief at 36-38. That argument also misses the mark. Under the APA, "a claim accrues when a party can 'institute and maintain a suit in court' once it 'has exhausted all administrative remedies whose exhaustion is a prerequisite to suit.' " *Muwekma, supra*, 108 F.3d at 218, quoting *Spannaus v. U.S. Dep't of Justice,* 824 F.2d 52, 56-57 (D.C. Cir. 1987); *accord*, *Wind River Min. Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) ("The right to bring a civil suit challenging an agency action accrues "upon the completion of the administrative proceedings." By "act[ing] on the claim.")

In other words, an APA claim accrues when there is final agency action. "As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision-making process,—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,….' " *Bennet v. Spear,* 520 U.S. 154, 177-178 (1997); 5 U.S.C. § 704.

Defendant contends that Plaintiff seeks to challenge the erroneous List published in 1979. *See* A.Brief at 37. In fact Plaintiff has never expressed any interest in challenging the 1979 List. It is the *present* List and all prospective Lists

that should be corrected and include the Cupeño. And for his part, Defendant has never even suggested that the BIA's failure to List the Cupeño in 1979 (or at any time thereafter) had any adverse legal consequences for the Cupeño. So what right was implicated in 1979? What injury was inflicted, that triggered the running of any statute of limitations?

The fact is that the 1979 List, and every List thereafter, had no practical or legal consequences for the Cupeño. The Cupeño continued to reside on and benefit from its trust lands at New Pala—enjoying the benefits of its federal relationship, just like the Pala Luiseño at Old Pala, and just like each and every tribe on the List. Likewise, during this period the Cupeño enjoyed the benefits of an active federal relationship that Ione, Lower Lake, and Tejon did not enjoy during their own periods of absence from the List. *See* O.Brief at 53-59. However, in early 2016, when Defendant refused Plaintiff's request *to correct* the List, *see* ER488; replaced the Pala Luiseño on the List with the PBMI, *See* O.Brief at 14-15; stated that the PBMI is a federally-recognized tribe without requiring the PBMI to go through Part 83, *see id.*; and directed Plaintiff to petition for recognition through Part 83, Defendant, by implication, made a final determination (though wholly unreasoned, unsupported, and arbitrary) that the Cupeño either was never federally recognized, or that its federal relationship has lapsed. Legal consequences flow from that determination—namely the unlawful *de facto* termination of the Cupeño tribe.

Compare Grand Traverse, supra, 369 F.3d at 968-969. Plaintiff timely challenged that unreasoned, arbitrary, capricious, and legally-detrimental determination in this action when Plaintiff filed its First Amended Complaint on March 8, 2016—less than three weeks after Defendant issued his final determination refusing to correct the List.

I. Plaintiff Has Shown That Defendant's Decision Was Unreasoned, Arbitrary, and Capricious.

Plaintiff has shown that Defendant has a legal duty to correct the List if the Cupeño's federal relationship has never lapsed or been terminated. *See* Opening Brief at 31-33; section G, *supra*. Plaintiff has shown that Defendant has never considered the controlling questions, but instead, has persistently dodged them by re-casting Plaintiff's request as a demand for federal recognition. The Court should find his decision arbitrary, capricious, and irrational on that basis alone.

Plaintiff has pointed out that Defendant has no explanation for why the Cupeño's enjoyment of a government-to-government relationship with the United States through the auspices of an association of tribes (the PBMI) places it in a legally inferior position to the Ione, Lower Lake, and Tejon—which each enjoyed none of the benefits of federal recognition for decades before the BIA re-affirmed them outside of the Part 83 Process. *See* O.Brief at 49, 58-59. Defendant remains silent on that point. That is unacceptable. That is arbitrary decision-making.

Plaintiff also showed that Defendant's foundational contention that the PBMI

is a single federally recognized tribe is not supported by the record. *See* O.Brief at 48-53. Plaintiff pointed out that Defendant has awkwardly papered over the admitted distinction between the Pala Luiseño and the PBMI throughout this proceeding by referring to each of them exclusively, and both of them together, as the "Pala Band." *See* O.Brief at 50-51. *Defendant has nothing to say about that.* That is arbitrary and irrational decision-making.

Plaintiff has showed that since 1902 there have been (and still are) two reservations in the Pala Valley—Old Pala, and New Pala and that the Pala Luiseño and the Cupeño have distinct rights in those two unequal reservations. *See* O.Brief at 52-53. Defendant cites *Stand Up for California v. United States Dep't. of Interior*, 879 F.3d 1177, 1181-1183 (D.C. Cir. 2018) as purported support for an outrageous argument that, because the BIA *unilaterally* treated Old Pala and New Pala as one reservation, passage of the Indian Reorganization Act in 1934 transformed the Indians at Old Pala and New Pala into a single "tribe" as a matter of federal law. *See* A.Brief at 43. Ostensibly this would be because the IRA defines "tribe" to include "the Indians residing on *one* reservation." *See* 25 U.S.C. § 5129 (italics added); *see also Stand Up* at 1182 (citing 5129 to find a "tribe" existed for purposes of the IRA in 1934). Defendant's argument in this regard is a sickening illustration of the caprice with which the BIA, and now Defendant, have administered the United States' trust duty to the Indians at both Old and New Pala.

The BIA's unilateral treatment of Old Pala and New Pala as one reservation *did not* transform the two reservations into one. As Plaintiff showed in its Opening Brief, since 1927 *only Congress* has had the authority to unify Old and New Pala because Old Pala is an executive Order reservation. *See* 25 U.S.C. § 398d. Accordingly, it is both ridiculous and offensive that Defendant would now ask the Court to shoehorn the BIA's unilateral and unlawful treatment of Pala as "one reservation" into the IRA and find that detrimental legal consequences to Cupeño sovereignty arise therefrom. The BIA's erroneous and unlawful treatment of Old Pala and New Pala has no legal consequences whatsoever for the boundaries of the Pala reservations. They are separate as a matter of federal statute. *See id.*; *Cabazon Band of Mission Indians v. City of Indio, Cal.*, 694 F2d 634, 637 (9th Cir. 1982) ("Under federal law an act occurring in violation of a statutory mandate is void ab initio.")

Moreover, the definition of "tribe" identified in section 5129 is for purposes of the IRA only. *See id.* (restricting definition to "wherever used in this Act"). Thus, under the plain language of section 5129, even if Old Pala and New Pala *were* one reservation (which they aren't) the Indians at Old and New Pala would only be a "tribe" for purposes of the IRA *in 1934* and not, as Defendant contends, "as a matter of federal law" thereafter. *See* 25 U.S.C. § 5129.

Unsurprisingly, *Stand Up for California* provides no contrary authority.

Indeed the court made explicit that there was no dispute in that case that there was only one reservation. *See* 879 F.3d at 1182. Thus, *Stand Up* is exactly the opposite of this case—where Plaintiff has shown that under federal statutory law there were (and still are) two reservations at Pala. Moreover, the Court in *Stand Up*, merely concluded that "for purposes of the IRA" the Indians voting in the 1934 election were a tribe in 1934. It did not, as Defendant implies, hold that the IRA transformed those Indians into a tribe "under federal law." *See id.* at 1181 (observing that North Fork's present status as a federally recognized tribe was uncontested, and that the dispute was as to whether the North Fork Indians were a recognized Indian tribe under federal jurisdiction *in 1934*).

Defendant contends that, even if his decision is irrational and capricious, it is uncontestable under 5 U.S.C. § 701(a)(2) because the decision whether to "make an exception to the Part 83 process" is purportedly committed to Defendant's discretion by law. Section 701(a)(2) creates a "very narrow" bar to APA review which is applicable only where statutes are drawn so broadly "that there is no law to apply." *See* A.Brief at 36 citing *Moapa Band of Paiute Indians v. U.S. Dep't of the Interior*, 747 F.2d 563, 565 (9th Cir. 1984). As shown above, the FRTLA mandates Defendant's annual publication of an accurate and complete List, and does not leave him with discretion to refuse to correct errors. Section G, *supra*. Since the FRTLA does not leave publication of an accurate List to Defendant's

discretion, the narrow bar set forth in 701(a) plainly does not apply in this case. *See Moapa Band, supra*; *see also Barlow v. Collins*, 397 U.S. 159, 166-67 (1970). ("(J)udicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.")

Therefore, Defendant ignores the FRTLA and contends that 25 U.S.C. § 2 (which delegates him broad authority over the federal government's management of Indian affairs) grants him unreviewable discretion in this case because it is drafted too broadly for judicial review under the APA. *See* A.Brief at 35. The Court should reject that expansive argument. If the broad grant of authority set forth in 25 US.C. § 2 were read to permit un-reviewable discretion as to Defendant's exercise of authority granted under more specific statutes such as the FRTLA, then, APA review would never be available for any action Defendant takes. That plainly is not the law and Defendant knows it. *See, e.g., Aguayo v. Jewell*, 827 F.3d 1213, 1224 (9th Cir. 2016) (rejecting BIA's argument that its power in Indian affairs under 25 U.S.C. § 2 is so broad that its decision not to intervene in tribal enrollment matters is committed to agency discretion by law).

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II. CONCLUSION

For all of the foregoing reasons, Plaintiff and Appellant, respectfully requests that the Court reverse District Court's decision and remand this case with instructions to grant Plaintiff's Motion for Summary Judgment.

DATED: April 9, 2018 Respectfully submitted.

THE LAW OFFICE OF
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*/s/ Andrew W. Twietmeyer*_____
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Local 32-1 because this brief contains exactly 6,999 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word version 14.7.7.

DATED: April 9, 2018 Respectfully submitted,

THE LAW OFFICE OF
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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10537 Santa Monica Blvd. Suite 240, Los Angeles, California 90025.

On April 9, 2018, I served the foregoing documents described as **APPELLANT THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS OF THE PALA RESERVATION'S REPLY BRIEF** on Counsel for Respondents, Amarveer S. Brar

[X] By Electronic Service: Pursuant to Circuit Rule 25-5, the above referenced document was electronically filed and thus served upon all interested parties via a "Notice of Electronic Filing" ("NEF") that is automatically generated by the CM/ECF system and sent by email to all CM/ECF Users who have consented to receive service through the CM/ECF system. Service with this electronic NEF constitutes service pursuant to the Federal Rules of Appellate Procedure, and the NEF itself will constitute proof of service for individuals so served.

I declare under penalty of perjury under the laws of the State of California and that the foregoing is true and correct.

Executed on April 9, 2018 at Los Angeles, California.

*/s/ Andrew W. Twietmeyer*____
Andrew W. Twietmeyer