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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Cindy Alegre, et. al.,)	Case No. 16cv2442-AJB (MSB)
	)	PLAINTIFFS' POINTS AND
Plaintiffs,	)	AUTHORITIES IN SUPPORT OF
	)	THEIR MOTION FOR
v.	)	SUMMARY JUDGMENT AND/OR
	)	SUMMARY ADJUDICATION OF
SALLY JEWELL, Secretary of	)	FACTS
The Department of Interior, United	)	Rule 56, Fed. R. Civ. Pro.
States of America, in her official	)	Judge: Hon. Anthony J. Battaglia
Capacity, et. al.,	)	Ct.Rm: 4A
	)	Date: 11/4/2021
Defendants.	)	Time: 2:00 P.M.
)	

**PLAINTIFFS' POINTS AND AUTHORITIES IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE,
MOTION FOR SUMMARY ADJUDICATION OF THE FACTS**

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1 PLAINTIFFS submit the following Memorandum of Points and Authorities
 2 with Exhibits Set #1, Exhibits Set #2, Exhibits Set #3¹ and Memorandum in
 3 support of their Summary Judgment Motion [SMJ], seeking to reverse the
 4 February 3, 2006, agency decision/order of the Assistant Secretary [AS], and
 5 seeking to have Plaintiffs applications adjudicated by the Bureau.
 6
 7

8 **I BACKGROUND OF CASE**

9 Plaintiffs are the descendants of Jose Juan, Guadalupe, and Modesta
 10 Martinez. [4AC 12-19:ECF 105]. The Martinez Ancestors are full blooded San
 11 Pasqual Indians (See, *Id.*: 28; #1EX 1:1-24 PSSUMF #2). On April 10, 2005,
 12 Plaintiffs submitted their applications to the San Pasqual [SP] Enrollment
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18 ¹ Plaintiffs' EXHIBITS are presented in three parts: 1) EXHIBIT SET #1
 19 contains the documents that make up the procedural history of the case and directly
 20 addresses the events leading up to and after the BIA's February 3, 2006, decision;
 21 2) EXHIBIT SET #2 contains documentation that supports a finding that the BIA's
 22 use of unverified and unreliable sources to determine Modesta Martinez Contreras'
 23 blood degree was arbitrary, capricious, an abuse of discretion, or otherwise not in
 24 accordance with law, as was the BIA's refusal to investigate the genealogy of Jose
 25 Juan, Guadalupe, and Modesta Martinez; and 3) EXHIBIT SET #3 contains
 26 documentation showing the hundred plus years of the BIA's interference with the
 27 Sovereign Immunity of the Tribe which has resulted in the formation of two
 28 diametrically opposed Bands within the Tribe: The "Old Band" and the "New
 Band" which was done in violation of 5 U.S.C. §760. All facts as stated in
 Plaintiffs' Memorandum of Points and Authorities in support of their Motion for
 Summary Judgment focus on demonstrating that the agency action in this case is
 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
 law" or is "unsupported by substantial evidence." Title 5 U.S.C. §706(2)(A), (E).

1 Committee [EC] for enrollment with the Band. [*Id.* 29; #1EX 5:63-70; #2EX
2 28:427-429]. After considering historical documents and newly discovered
3 evidence such as the July 1955 SP Census showing that Modesta and her brother
4 George both had 4/4 SP blood, [#1EX 4:47-62; #1EX 1:137-140; #1EX 1 13:144-
5 145; #1EX 5:63-70; #1EX 8; #1EX 13:144-145; #1EX 17:156; PL4AC 29:10], the
6 EC unanimously voted that Plaintiffs had established they were qualified for
7 enrollment. [*Id.* 30; #1EX 8:91-116]. At the Band's General Council [GC] meeting
8 on April 10, 2005, the GC unanimously agreed with the EC that Plaintiffs qualified
9 for membership in the SPBMI (Resolution SP041005-01). [*Id.* 30; #1EX 5; #2 EX
10 28:427-429; AR 67-73]. On April 18, 2005, Rudy Contreras, hand carried
11 Resolution SP041005-01 along with a total of 179 Plaintiffs' applications to
12 Fletcher, ["Fletcher"] former Superintendent, Southern California (SCA)
13 requesting approval of the Resolution. [#1EX 5].

14
15 On September 12, 2005, the Band's Business Committee [BC] concurred
16 with both the GC and the EC, and sent its findings to the SCA. Under federal law,
17 25 C.F.R. §48, [#1EX 7:81-90; AR 26-33] and the Tribal Constitution [#1EX 6:71-
18 80; AR 40-49], Plaintiffs were eligible to be enrolled and federally recognized as
19 members of the SPBMI. [#1EX 5]. On September 22, 2005, the BC, in a totally
20 separate letter, requested the BIA increase Modesta's SP blood degree from $\frac{3}{4}$ to
21 4/4. [*Id.* 32; #1EX 5]. On September 27, 2005, the Superintendent acknowledged

1 receiving Plaintiffs' enrollment applications. [#1EX 5; AR 58]. On December 8,
2 2005, Fletcher sent Defendant Dutschke ("Dutschke"), PRO, a Memo/letter stating
3 that he had forwarded the BC's blood degree request to her, pursuant to 48.14(c)
4 and that "the preponderance of the evidence does not sufficiently demonstrate that
5 Modesta [] is full blood[.]" (*Id.* 33; #1EXS 5, 10: AR 105-156). On December 8,
6 2005, the BIA-SCA sent a letter to Chairman James Quisquis, stating that the BC's
7 recommendation to correct the blood degree for "Modesta" was forwarded to
8 Dutschke, RD-SCA. [*Id.*]. [#1EX 11:137-110; #2EX 34:451-452]. Neither notice
9 of this Memo nor the Memo itself was sent to Plaintiffs. [#1EXs 10,11:137-140;
10 #2EX 30:440-441; #2EX 34:451-452; AR 72-123; 321-324].

15 On February 3, 2006, in a Memo/letter initialed by Dutschke on January 31,
16 2006, Dutschke, without independently adjudicating Plaintiffs' applications,
17 denied the BC's request to increase Modesta's blood degree. [#1EXS 5, 12]. On
18 March 6, 2006, CLS, on behalf of the Band, requested copies of the 179
19 enrollment applications. #1EXS 5,14]. On April 7, 2006, Dutschke concurred with
20 Fletcher's December 8, 2005, letter. [#1EXS 11, 13]. On April 11, 2006, without
21 adjudicating Plaintiffs' applications as required by 25 C.F.R. §48.8, the
22 Superintendent sent copies of 157 of the 179 applications back to the Band's EC
23 with a list of Modesta's descendants (Plaintiffs). [#1EXS 5,15, 23; AR 179-183].
24 On April 21, 2006, SCA sent a letter to the Band informing them of his intent to

1 deny their request to increase Modesta's blood quantum.² [#1EXS 5, 17; AR 189-
 2 191]. On June 24, 2014, Plaintiffs sent individual letters to PRO Dutschke
 3 informing her that they had not received notice regarding their request for
 4 Modesta's blood increase and their applications [#1EX 10:125-136] even though
 5 the EC stated it would prepare and mail each applicant a letter informing them of
 6 the BIA's decisions. [#1EXS 5, 10, 19, 23, 24 (Plaintiffs' Declaration ECF 81-1)].
 7
 8 Around July 25, 2015, Defendant Moore issued a letter stating that the BIA no
 9 longer had the original applications to adjudicate the enrollment, and the April 7,
 10 2006, letter was final for the Department, exhausting Plaintiffs' administrative
 11 remedies. (*Id.* 45) [#1EXS 5, 13, 18, 19]. On May 6, 2016, Plaintiffs resubmitted
 12 their appeal [#1EX 25], but did not receive a response from Defendants. (P4AC
 13 46-47) [#1EXS 5, 21, 22, 23].

18 II. THE ADMINISTRATIVE PROCEDURES ACT [APA]

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 22 ²When Plaintiffs' names were added to the SPBMI membership roll on April 10,
 23 2005, the enrollment committee was made up of a majority of descendants of the
 24 true San Pasqual Indians. [#2EX 27:426; #3EX 76:438]. On January 22, 2006, an
 25 "illegal meeting" was held off of the San Pasqual reservation wherein Allen
 26 Lawson and his friends approved ratification of all "illegal mail-in ballots" wherein
 27 a new EC was elected consisting of a majority of non-San Pasqual blood
 28 members. Plaintiffs' applications were returned to this new EC, not the EC that
 approved their membership. This new EC then placed a moratorium on enrollment
 in 2009, which is still in effect today, twelve years later. [#2EX 32:446-450; #3EX
 78:447].

1 The APA sets forth standards governing judicial review of decisions made
2 by federal administrative agencies. See, *Dickinson v. Zurko*, 527 U.S. 150, 152
3 (1999); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004);
4 *Public Util. Dist. No. 1 v. Federal Emergency Mgmt. Agency*, 371 F.3d 701, 706
5 (9th Cir. 2004). Pursuant to the APA, agency decisions may be set aside if
6
7 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
8 law.” 5 U.S.C. 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002); *Gardner*
9 *v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011). [See e.g., *U.S.*
10 *Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001)]. The agency must articulate a
11 rational connection between the facts found and the conclusions made. See, *Latino*
12 *Issues Forum v. EPA*, 558 F.3d 936, 941(9th Cir. 2009). In an arbitrary and
13 capricious review, the focus is on the agency’s explanation or justification of its
14 decision and whether the decision can be reasoned from the body of evidence.
15 See, Martha S. Davis, A Basic Guide to Standards of Judicial Review, 33
16 S.D.L.Rev. 469 (1988). In the case at bar, the Agency purposefully limited its AR
17 to only the 1910 Census [#1EX 2:25-31] and the October 5, 1966 Judgment Roll
18 [#1EX 3:32-46]. As discussed below, these documents were only intended as a
19 “starting point” for Plaintiffs’ applications and Modesta’s blood degree inquiry.
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21 An agency’s decision can be upheld only on the basis of the reasoning in that
22 decision. See, *California Energy Comm’n v. Dep’t of Energy*, 585 F.3d 1143, 1150
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(9th Cir. 2009). An agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law when it: (1) denies a litigant due process and prejudices the litigant's substantial rights; (2) fails to make findings of facts; (3) improperly basis its decision on non-statutory criteria; (4) weights only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result. "An agency acts arbitrarily and capriciously when it denies a litigant due process and prejudices its substantial rights." "Whether an agency's procedures comport with due process requirements presents a question of law reviewed de novo." See, *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010) (as amended). *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003)(en banc) (noting no deference is owed to agency).

III THE ADMINISTRATIVE RECORD

Plaintiffs have challenged the adequacy of the Administrative Record [AR]. This Court denied, without prejudice, Plaintiffs' Motion to Complete the AR and granted in part and denied in part Plaintiffs' Motion to Supplement the AR. In doing so this Court stated: "While Plaintiffs . . . as to how the **unreliability of evidence** necessarily means that the administrative record was incomplete." [ECF 161:8; Order 7/29/21]. Plaintiffs are renewing their Motion to complete and/or supplement the AR. In the meantime, since this Court has put a stay on discovery [ECF 134] Plaintiffs have found no statute, rule, regulation, or case law that

1 prohibits Plaintiffs from using the documents and evidence presented in their
2 instant SJM to satisfy their burden to prove that Defendants' actions are "arbitrary,
3 capricious, an abuse of discretion, or otherwise not in accordance with law" or is
4 "unsupported by substantial evidence." 5 U.S.C. §706(2)(A), (E). *Assuming*
5 *arguendo*, the AR is complete, it becomes clear that the BIA's decision of
6 February 3, 2006, was based on unvetted and unreliable documentation.
7

9 IV ISSUES

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11 This case involves the actions taken, and not taken, by the AS-IA pursuant to
12 authority expressly delegated to him under the SPBMI Constitution [#1EX 6:71-
13 80: AR 6] and 25 C.F.R. §48 [#1EX 7:91-116; AR 7] to approve membership and
14 federally recognize Plaintiffs. [#2EX 28:427-429]. On February 3, 2006, the
15 Agency denied the BC's request to increase Modesta's SP blood degree from $\frac{3}{4}$ to
16 $\frac{4}{4}$. [#1EX 12:141-143]. It failed to give Plaintiffs notice of their actions and
17 decisions as required under §48.9 and §48.10. On April 11, 2006, the Agency
18 returned Plaintiffs' unadjudicated applications to the illegally elected new EC.
19 The questions presented to this Court are whether the following actions by the
20 Defendants are arbitrary, capricious, an abuse of discretion, in violation of the law,
21 or unsupported by substantial evidence [5 U.S.C. §§706(2)(A), (E)] by: (1) Failing
22 to adjudicate Plaintiffs applications as required by 25 C.F.R. §48.8; (2) Denying
23 Plaintiffs the right to appeal pursuant to 25 C.F.R. §§48.9, 48.10, and the Due
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1 Process clause; (3) Failing to give notice, pursuant to 25 C.F.R. §§48.8 and 48.9, to
2 Plaintiffs that the Agency did not adjudicate their applications but summarily
3 returned them to the new EC on or about April 11, 2006. [#1EX 15;17; AR 146-
4 153. (4) Denying the EC's request to increase Modesta's blood degree from $\frac{3}{4}$ to
5 $\frac{4}{4}$ based on unverified and unreliable documents as stated by Larry Echo Hawk
6 and Artman in the Juaneno cases and by Echo Hawk in the Alto case [#2EX 36,
7 37, 38]; (5) Failing to do additional research regarding the genealogy of Jose Juan,
8 Guadalupe, and Modesta Martinez; (6) Failing to protect Tribal assets of the true
9 San Pasqual blood Indians as required by law; (7) Failing to go beyond the 1910
10 Census and the 1966 San Pasqual Membership Roll; and (8) Failing to protect
11 Tribal sovereignty over enrollment decisions.

12 **V THE ENROLLMENT PROCESS**

13 Enrollment in the SPBMI is based on the following documents: San Pasqual
14 Constitution, Article III which incorporated Title 25, C.F.R. §48, which uses the
15 1910 Census as a base roll. The Tribal Constitution defines membership as
16 consisting "of those living persons whose names appear on the approved Roll of
17 October 5, 1966, according to Title 26, C.F.R. Part 48.1 through 48.15." Title 25
18 C.F.R. §48 contains the following definitions: 48.2(e): "Band" means the San
19 Pasqual Band of Mission Indians; (g): "Census Roll" means the June 30, 1910
20 Census Roll of the San Pasqual Band of Mission Indians. The "approved roll of
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1 October 5, 1966”, [#2EX 5:204-217] was compiled from the 1933 Census roll
2 which, in turn, was compiled from the 1928 Judgment Roll Applications. [#2EX
3 43:498-505-Deposition of Francis Muncy – Lodged with this Court].
4

5 **VI THE DEFENDANT AGENCY’S ACTIONS VIOLATED 5 U.S.C. §706**
6 **BECAUSE IT DENYIED PLAINTIFFS DUE PROCESS OF LAW.**

7 Once the EC tendered Plaintiffs applications to the Agency, the Agency was
8 required pursuant to the SP Constitution and 25 C.F.R. §48 to adjudicate
9 their applications within 30 days. [§48.7]. This was not done. The Agency was also
10 required to give Plaintiffs notice of their actions pursuant to §48.8. This was not
11 done. Furthermore, there is no provision in the statute for the Defendants to have
12 returned Plaintiffs ‘applications to the EC without adjudicating their applications.
13 Defendants’ actions denied Plaintiffs their right to appeal the Agency’s February 3,
14 2006 decision in violation of due process of law. Without being able to exercise
15 their right to appeal, Plaintiffs were not able to submit additional documents and
16 arguments in support of their applications. They were not able to make a full AR.
17 As a result, the AR in this case is a “bare bones” AR and this Court has denied
18 Plaintiffs’ requests to supplement and/or complete the AR, all in violation of due
19 process of law. The Agency’s actions violate 5 U.S.C. §706.
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26 **VII THE AGENCY’S ACTIONS VIOLATED 5 U.S.C. §706 BECAUSE IT**
27 **RELIED ON UNVETTED AND UNRELIABLE EVIDENCE**

28 **A. The February 3, 2006. Letter of Denial.**

1
2 This Court is required to evaluate the reasons why the Agency denied the
3 Business Committee's request to increase Modesta's blood degree from $\frac{3}{4}$ to $\frac{4}{4}$.
4

5 The February 3, 2006, letter states, in pertinent part:

6 In accordance with the Bureau of Indian Affairs Policy, dated July 26,
7 1965, Determining Degree of Indian Blood, . . . In accordance with the
8 Band's Constitution, . . . provides that membership shall be approved
9 ". . . Title 25, Part 48.1 through 48.15 and an enrollment ordinance . . .
10 The band has never developed an enrollment ordinance . . . There are
11 no specific criteria in the Band's Constitution and Bylaws or in the 25
12 CFR regulations that pertain to the enrollment of Indians . . . that
13 provides a process for degree of Indian blood change. . . Upon review
14 of all the documents presented by the parties, we have concluded that
15 the preponderance of the evidence does not justify the degree of Indian
16 blood change for Modesta . . . We base our analysis of the situation as
17 follows: The request for Modesta . . . to increase her blood degree . . .
18 is based on the Certified Copy of the San Pasqual Indian Census Roll
19 dated July 1955 and the June 30, 1910 San Pasqual Census Roll.
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21 The June 30, 1910, Census for the SPBMI was used to determine the
22 band's membership by the Secretary of the Interior on March 2, 1950
23 (25 CFR Part 48). The degree of San Pasqual Indian blood shown on
24 the membership roll was determined in accordance with the Secretarial
25 Decision interpreting "blood of the Band" to be the total degree of
26 Indian Blood of a person named on the basic membership census roll.
27 [Basic roll is the 1910 Roll §48.2(g)].
28

29 The 1955 Census Roll listed the parents of Modesta as: Guadalupe
30 (Alto) Martinez and Jose Juan Martinez. The June 1910 Census Roll
31 lists Jose Juan Martinez, #15, without blood degree. In Modesta's . . .
32 1928 enrollment [actually judgment roll application] number 4507 her
33 blood degree is $\frac{3}{4}$. . . [#1EX 12:141-143].

34 This decision failed to state that Modesta's SP blood degree reflected in the July
35 1955 SPC Roll was $\frac{4}{4}$, as was her brother George's blood degree. Defendants'

1 actions violated 25 C.F.R. §§48.7, 48.8, 48.9 as discussed supra and infra and their
2 decision was arbitrary, capricious, an abuse of discretion violating 5 U.S.C. §706.
3

4 **B. The agency's written decision does not satisfy legal standards and the**
5 **lack of notice to plaintiffs of its decision violates 25 U.S.C. §706**

6 The BIA's written decision dated February 3, 2006, is not legally sufficient,
7 and the lack of notice to Plaintiffs of its February 3, 2006 decision, and the lack of
8 notice that the Bureau returned Plaintiffs' unadjudicated applications to the EC, is
9 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
10 law" or is "unsupported by substantial evidence." 5 U.S.C. 706(2)(A), (E) in the
11 following ways: 1) The BIA failed to give Plaintiffs timely notice of their April 11,
12 2006, decision to return their unadjudicated applications to the new EC; 2) Without
13 receiving notice, Plaintiffs were barred from filing an appeal as authorized by
14 §48.9, preventing them from creating a full AR in violation of Due Process; 3) The
15 BIA failed to attach to its letter of February 3, 2006, a list of the documents and a
16 copy of the documents the Agency reviewed [#1EX 12:141-147]; 4) The BIA only
17 used the 1910 Census and the October 5, 1966 membership roll to deny the BC's
18 request to increase Modesta's blood degree. [#1EX 3:32-46; #2EX 5:204-217]; 5)
19 The Agency knew that the 1928 applications were unvetted and unreliable and
20 were applications for a Judgment Roll being prepared pursuant to law, not
21 applications for tribal membership. [#2EXS 12 (45Stat.L. 602); 13:294-336; #2EX
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1 14:327-369 (See Declaration of Carolyn Chapman, Esq.); 6) The Agency
2 purposefully left off the fact that Modesta Contreras Martinez and her brother
3 George Martinez are both listed on the July 1955 San Pasqual Census as having
4 4/4 San Pasqual Blood Degree. [#1EX 4:47-62; #2EX 5:199-203]; 7) The BIA
5 knew that the 1909 Census shows the Martinez family on the SP Reservation and
6 that the White Trask family was not on the San Pasqual Reservation or on the 1909
7 SP Census. [#2EX 5:139-151]. [See Declaration of Alexandra McIntosh]; 8) The
8 1928 Applications were altered without following Finale's 6/20/1978
9 Memorandum (quoted infra at VIII-B). [See Declaration of Carolyn Chapman
10 #1EX 35; #2EX 26:424-25]. [See also, #2EX 13: 306-336]; 9) The BIA ignored
11 the 1955 Senate Hearing testimony wherein [#3EX 46:344-348] Mary Matson and
12 Leonard Hill testified: a)there are two bands of San Pasqual Indians: "the old
13 band" (consisting of indigenous historical SP Indians) and "the new band" (made
14 up of descendants of Frank Trask [White] family and other non-SP blood persons);
15 10) Francis Muncy's deposition makes it clear that: a) the Bureau relies only on the
16 1928 California Judgment Applications; b) Federally recognized tribes have used
17 allotment rolls and, for example, 1940 Census roll; c) Census records from 1852
18 through 1928 would not have been taken into consideration by the Agency because
19 the 1928 applications were considered by the BIA to be a census record ; d) The
20 1933 census roll is made from the information extrapolated from the 1928
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1 judgment applications; e) the bureau did not rely on the federal records as opposed
2 to the bureau census records; f) Regional office has the authority to correct the
3 1928 applications; g) the bureau does not use information that is on early birth
4 records with blood degree and a tribe; h) the Agency only uses information that
5 could be traced back to a bureau approved record; and i) there were errors on the
6 1928 roll. [#2EX 43:498-505; Deposition Lodged with this Court]; 11) The BIA
7 ignored the January 23, 2001, Echo Hawk Opinion [#2EX 37:461-479] which
8 states: "The petitioner would be much better served by using data extracted from
9 the 1928 application as a starting point to make a full analysis based on a variety of
10 documents. . . the 1933 census roll was not a proxy for a group or tribal
11 membership. . . the 1933 census roll was not fully vetted." [#2EX 37:461-479]
12 [Note the 10/5/1966 San Pasqual Membership Roll was compiled by using the
13 1928/1933 judgment roll]; 12) The BIA ignored the Junaneno Opinion: Proposed
14 findings against the Juaneno Band [#2EX 36:455-460 by Artman: "[T]he JBB
15 petitioner's analysis of the application data is not reliable. The petitioner would be
16 much better served by using data extracted from the 1928 Applications as a starting
17 point to making a full analysis, based on a variety of documents . . ."; Final findings
18 against the Juaneno Band by Echo Hawk: "The 1933 Census Roll was not a proxy
19 roll for group or tribal membership. . . the 1933 Census Roll was not fully vetted."
20 [#2EX 38:480-487]; 13) The BIA ignored the July 1955 Ray Davis Field Report:

1 Indian Census Roll: Modesta Martinez Contreras . . . is listed as 4/4 San Pasqual
2 Blood; she is on the 1933 SP Judgment Roll; her father Jose Juan Martinez and
3 mother Guadalupe are full blood SP Indian, as is her brother George [#2EX 5]; 14)
4 The BIA ignored Modesta's 6/4/1955 application for Tribal Enrollment [#2EX
5 19:374-391] that indicates Jose Juan Martinez and his family are 100% San
6 Pasqual blood (filed stamped on July 18, 1955 and located in the Archives. [See
7 Declaration of Alexandra McIntosh]); 15) The BIA ignored Finale's June 20, 1978,
8 Memo which stated: "*All available records must be used and the determination as
9 to degree of Indian blood must be made on the merits of the evidence in each
10 case.*" [See VIII-A] [#2EX 26: 424-425]; 16) The Bureau failed to apply the
11 Solicitor's June 7, 1965, "Blood of the Band" interpretation to Plaintiffs' [#3
12 EX61] [See declaration of Alexandra McIntosh]; 17) The BIA ignored available
13 birth certificates, church records, [#2EX 1:1-21] and Census records between 1852
14 and 1928 to substantiate San Pasqual blood degree. (See discussion, *infra*); 18) The
15 BIA knew that by statute the term "band" referred to the San Pasqual Band of
16 Mission Indians, and not any other band. [48.1(g) "band" refers to the San Pasqual
17 Band of Mission Indians]. [#3EX 61]; 19) The BIA, as a matter of practice, which
18 is a violation of their own rules, practices, and procedures, uses only the 1910
19 census and the October 5, 1966 membership list. [See Muncy Deposition, #2EX
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1 43:498-505]; 20) The standard for blood correction under 48.14 is arbitrary and
2 capricious or otherwise not within the law because it is vague and subjective.
3

4 The Agency's actions, as outlined above in paragraphs 1 through 20 are
5 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
6 the law, and are unsupported by substantial evidence in violation of 5 U.S.C. §706.
7 According to the rulings in the Echo Hawk and Artman cases, the 1928 Judgment
8 Roll Applications and the 1910 SP Census were only a starting point to making a
9 full analysis based on a variety of documents.
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12 **VIII THE DEFENDANTS' DECISION TO IGNORE ALL OTHER**
13 **RELEVANT INFORMATION ABOUT THE MARTINEZ FAMILY**
14 **VIOLATES 5 U.S.C. §706**

15 **A Historical Background** – Although there were 18 Treaties guaranteeing
16 the Indians of California that they could keep their land, it was not until 1910 that
17 this became a reality. [See, #2EX 2:32; #2EX 3:33-35; #2EX 4:36-50] Pursuant to
18 the Homestead Act of 1862, [#2EX 6:218-220] Jose Juan Martinez obtained
19 homestead grants [#2EX 6, 44:506-510] and land grants from Presidents Cleveland
20 and Grant [#3EX 4:74]. In 1878 the Superior Court of San Diego issued a Writ of
21 Ejectment [#2EX 241-248] against Jose Juan in favor of Bevington a White man.
22 Ultimately, the indigenous San Pasqual Indians were evicted from their ancestral
23 land and scattered around the area. It was not until June of 1910 that land was
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1 finally set aside for the San Pasqual Indians. [See, Map #2EX 46: 528-529; #2EX
2 8:249-255; 25 Stat. 712-714; #2EX 9:261-266; #3EX 4:74].

3
4 **B The BIA violated 5 U.S.C. §706 when they failed to consider**
5 **historical Church and Census records.**

6 On June 20, 1978, Finale sent a Memo to the Area Directors with
7 instructions how to make corrections to the 1928 Judgment Roll Applications.
8
9 [#2EX 26:424-25]. He stated, in pertinent part:

10 “Where there is a conflict in the information reflected in the records as to the
11 degree of Indian blood possessed by an individual it becomes a question of
12 which records can be accepted as being the most reliable. There is no definite
13 criteria for determining the most reliable records. **All available records must**
14 **be used** and the determination as to degree of Indian blood must be made on
the merits of the evidence in the case.”

15 The Agency has not followed this protocol. Muncy testified that the Bureau only
16 uses the 1910 Census Roll and the October 5, 1966, SP Membership Roll (which is
17 compiled from the 1928 Judgment Roll) in adjudicating applications and blood
18 degrees. She also stated that the Bureau only uses records that they compile. This
19 is contrary to Finale’s directions.
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22 **1. Church Records:** In this case, the available Church records between
23 1852 and 1867 clearly show that Santiago Parapax [Martinez] was a San Pasqual
24 Indian, as was his wife Ysabel and their son Jose Juan Martinez. [#1EX 1; #2EX
25 1:1-32]. It was arbitrary, capricious, and an abuse of discretion for the BIA to
26 disregard these reliable records.
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28

1 **2. Census Records from 1850 through 1928:** Pursuant to Finale's Memo,
2 the Bureau was required to consider all of the relevant Census Records from 1852
3 through 1928. These records have been thoroughly analyzed and attached as the
4 following exhibits to this Motion: #2EX 5:51-182; #3EX 1:2-69; Declaration of
5 Carolyn Chapman, Esq. #2EX 564-65. For example, the May 20, 1910 Thirteenth
6 Census of the United States [Escondido Township, Indian Population Schedule,
7 Dwelling 7, Family 9, Lines 27-34] clearly shows the following [#2EX 5:152-
8 158]: "Jose Juan Martinez, Head, M. Ind., . . . Tribe San Pasqual: Degree Indian
9 Blood: 100%; Martinez, Adeline (aka Guadalupe), Wife, F., Ind., . . . Tribe San
10 Pasqual: Degree Indian Blood: 100%." Their children Antonio, Tifilio, Maud,
11 George, and Tilda, were all listed as SP Tribe: Degree of Indian Blood: 100%. It
12 was arbitrary, capricious, and an abuse of discretion to ignore these records.
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18 **C The BIA ignored their own internal memorandums, rules, and**
19 **regulations when they failed to give weight to other identifying**
20 **documents.**

21 If Plaintiffs had been given their due process right to appeal the Agency's
22 decision, in addition to the Church and Census documents, Plaintiffs would have
23 presented the following evidence to show Jose Juan, Guadalupe, and Modesta's
24 blood degree to be 100% San Pasqual blood:
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26 **1 Additional census records:** [See, #1, #2, #3EX Census]. Jose Juan
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1 and his family are listed in the following SP Census reports: 1852 San Pasqual
2 Census [SPC]; 7/31/1860 SPC; 7/18/1870 SPC; 1880 SP Census; 1880 Federal
3 Census; June 30, 1809 SPC; September 27, 1898-1900 SPC; June 1, 1890 –
4 Twelfth Census of U.S. lists all of Jose Juan Martinez's family as does the San
5 Pasqual census of 1901, 1907, and 1909 which were taken by Amos Frank who
6 certainly knew who was a San Pasqual Indian.
7

8
9 **2 Comparison of the answers in the 1928 Judgment Rolls** for Jose
10 Juan Martinez, Guadalupe Martinez, Thomas Martinez, Jose Dolores Martinez,
11 Maria Antonia Martinez, Modesta Contreras Martinez. In these 1928 Judgment
12 Roll Applications each family member responded differently to the questions
13 regarding race, blood quantum, heritage. See #2EX 14 and Declaration of Carolyn
14 Chapman detailing these discrepancies. Because of these basic discrepancies, the
15 Agency never should rely on the 1928 judgment rolls which were turned into the
16 1959 San Pasqual Membership Roll.
17

18
19 **3 Undated Jose Juan Martinez handwritten notes and Jose Juan**
20 **Martinez Homestead documents** prove that he was present on the San Pasqual
21 Land during the 1800s as evidenced by the following Homestead documents
22 presented in #2EX 6; 44:506-510.
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25 **4 Declaration of Amelia Contreras Villalobos** re: Santiago and
26 Jose Juan Martinez were her great grandfather and grandfather. [#2EX 44]
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IX THE DEFENDANTS' HISTORICAL VIOLATION OF 25 U.S.C. §706 HAVE DENIED PLAINTIFFS THEIR RIGHT TO DUE PROCESS OF LAW AND RESULTED IN THE CREATION OF TWO IRRECONCILABLE BANDS WITHIN THE TRIBE: "THE OLD BAND" AND "THE NEW BAND".

A Historical background. In 1873 the San Pasqual village was A regularly organized Indian pueblo, formed in accordance with the provisions of the secularization act in 1834. [2/31/1870, #3Ex 4]. It was set off by President Grant's Executive Order, which was speedily revoked and the process of dispossessing the Indians began. In the early 1870's Calvin Washburn, Frank and Henry Trask's stepfather, "burnt the Indians out there to the San Pasqual ranch. . . Washburn claimed the place and filed on it and he sold the place then to Perry Bevington who sold the ranch to Stewart." [#2EX 7:241-248; #3EX 2:70-72; 48:359-462]. BIA agents did try to find land for the evicted indigenous SP Indians. [#3EX 8].

On July 1, 1910, Congress issued a Land Patent in trust to SPBMI [#3 EX 17] and had earlier authorized monies to pay persons whose activities related to Indian activities. [#3EX 9:106-110]. On or about February 1, 1910, Amos Frank, the Indian agent in the area, employed Frank Trask, a White European as a judge, sheriff, and caretaker for the new San Pasqual Patented reservation land. [#3EX 12, 13, 14, 15, 16]. Shortly after hiring Trask, Amos Frank settled Frank Trask and his $\frac{3}{4}$ blood Mesa Grande Indian Wife Lenora LaChappa onto the newly patented SP Land. [See, #3EX 38: 317-322; #3EX 29, 30, 31, 32]. [See, Mesa Grande Census:

1 #3EX 7:82-103]. Between 1910 and 1916 numerous letters were written by SP
2 Indians to the Bureau asking about the newly patented SP Reservation and
3 complaining that a White man, Frank Trask³ was living on the SP reservation, and
4 he would not allow any San Pasqual Indians to move onto the reservation. [#3EX
5 10, 18, 19, 20, 21, 22, 23, 24, 25, 26]. On February 1, 1958, the Trask Descendants
6 in a letter to Senator Kuchel admitted living on the SP patented land from the year
7 1909 to 1958. [#3EX 49:363]. [#3EX 50:364]. Allowing Frank Trask and his
8 descendants to live on the patented San Pasqual Reservation for 50 years was a
9 violation of the original Land Patent to the San Pasqual Indians and 25 USC §706.
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14 **B The Agency's Acts have deprived Plaintiffs of due process of law.**

15 For almost 125 years the BIA has greatly interfered with the sovereign right
16 of the Tribe to assure that only those who possess San Pasqual Blood are members
17 of the Tribe. As of present day, the membership of the SPBMI is made up of
18 almost 50% of persons who possess absolutely no San Pasqual Blood. (Note that
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22
23 ³ The bureau was well aware of the fact that Frank Trask was a White man and that
24 neither he nor his wife Lenora LaChappa had any San Pasqual Blood. [See,
25 12/14/1920 letter to Mrs. Trask from Mission Indian Agency: "Your husband
26 Frank Trask is not a San Pasqual Indian."; See, 1928 Judgment Roll Applications
27 (signed in November-December of 1931) of **Florence May Trask Fisher Stewart**
28 (**Wolf**) #3EX 38:317-322; **Leonora LaChappaTrask Scholder Ames** #3EX
39:323-328; **Helen Trask Lawson** #3EX 40:329-334. (Lawson changed his name
from McKinnon #3EX 43:338) wherein they described Frank Trask as "White".

1 all of the Trask women married White men, giving them an advantage of “White
2 privilege” in that decade). In a bold act to obtain more power in the Tribe, in 1935
3 and 1939, the Trasks attempted to adopt several people into the Tribe who did not
4 have San Pasqual Blood. Requests were denied. [See, #3EX 41, 42], Yet, the
5 Agency has denied Plaintiffs, who are the true descendants of the indigenous San
6 Pasqual Indians federal recognition in the SPBMI Tribe. The following Agency
7 acts are arbitrary, capricious, an abuse of discretion, and/or a violation of the law:
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11 **1. Using the 1910 census instead of the 1909 census.** The facts
12 clearly show that Jose Juan Martinez and his family were on the 1910 San Pasqual
13 Census and listed as 100% San Pasqual blood. The 1910 Census also clearly
14 indicates that the Frank Trask and his family were not on that Census. In fact, they
15 were on the Mesa Grande Census with Lenora LaChappa identified as $\frac{3}{4}$ Mesa
16 Grande Indian. It was the BIA who wrote the San Pasqual Constitution and who
17 advised that the 1910 Census and not the 1909 Census be used as a starting point
18 for membership identification. [See Declaration of Alexandra McIntosh].
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22 Trasks were not on the 1909 San Pasqual census roll, so they used the 1910
23 SP Census Roll that now included Frank and Lenora Trask living on the San
24 Pasqual Reservation, thanks to Amos Frank. This was simply another tactic by the
25 Bureau to make sure that Frank Trask’s descendants had a foothold into the Tribe.
26
27 As the census records show, after 1917 there is no evidence of Jose Juan Martinez
28

1 and his family, or any San Pasqual Indians, living on the patented SP Reservation:
2 only Trask Descendants. [See, SPC records between 1917 and 1955: #3EX 11:160
3 (6/30/1917), 161 (6/30/19918), 162-3 (6/30/1922), 164 (6/30/1923), 165-169
4 (6/30/1924), 170 (6/30/1925), 171 (6/30/1926), 172-175 (1928), 191 (6/30/1930),
5 192 (4/1/1930), 195 (1933), 196 (1934), 198-199 (1934-1938), 211-224 (1955).].
6
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8 **2. Approving assignments of San Pasqual Patented Land for Trask**
9 **family members.**

10 As an example of the Bureau dissipating the assets they held in trust for only
11 the true San Pasqual Indians, an undated (circa 1950's) Bureau Field Officer
12 reported that assignments [i.e. of land] have been approved at San Pasqual by Mrs.
13 Wolfe [i.e. Florence Trask (White) Fisher (White) Stewart (White) Wolfe
14 (White): . . . for her children . . . and relatives . . . "[#3EX 86:575-577].
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16

17 **3. 1959-1960: Violating the APA requirements of informal rulemaking.**
18

19 The minimal procedural requirement requires agencies to take the following
20 steps when issuing a rule: 1) Publish a notice . . . ; 2) Provide a comment period . . . ;
21 3) Publish a revised final rule in the Federal Register . . . Prior to publishing the
22 1959 proposed 25 CFR 48, the BIA held meetings so the members could vote on
23 the proposed enrollment statute. There was much confusion. [#3EX 51:365-366;
24 52:367]. On October 6, 1959, a letter from USDOJ-BIA to L.Hill, AD, [#3EX
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53:368] discussed new revisions. . On November 20, 1955, a letter from Williamson to Garcia, Field Rep., Riverside stated, in pertinent part:

“We suggest that the attached correspondence [i.e. revised section 49.5(f)] not be made available to the San Pasqual enrollment committee in view of the fact that they may not understand why additional corrections [i.e., 48.5(f)] to the regulations would be recommended subsequent to their acceptance of the regulations as published in the Federal Register on July 29, 1959.” [#3EX 54:369].

[#3EX 55:370-372- compared to the 1960 Published version with Section 48.5(f)].
[#3EX 56:373-378]. [#3EX 54:369]. The proposed statute only had Sections 48.5 (a-e) [#3EX 55:370-372]. The Bureau illegally published 25 C.F.R. Part 48 with 48.5(f) in violation of the APA rulemaking requirements.

4. Solicitor’s “blood of the band” “Construction of the Language”

It was the Solicitor’s opinion in 1965 wherein he illegally interpreted the phrase “Indian blood of the Band” in 25 C.F.R. §48.5(b) to mean any Indian blood of any band that has resulted in the creation of two Bands within the SP Tribe.
[#3EX 61:398-400; #2EX 25:416-423; #3EX 62:401-409; #3EX 61:398-400].

Every time the EC denied membership to a Trask descendant, and/or a non-San Pasqual blood person, the Bureau overruled the objections and enrolled them anyway. Many challenges to the enrollment of Trask Descendants and other non-San Pasqual Blood Persons by Bureau were made by Tribal members as shown in the exhibits to ~~PSSMUT~~ ^{PL MSJ} #3. [#3EX 57:377-378 (8/11/1960); #3EX 58:379-393]

(8/19/1960); #3EX 59:394-396 (11/21/1962); #3EX 61:398-400 (6/7/1965)
[Solicitor's "blood of the band" construction of the language in 25 C.F.R. 48.1(e)];
#3EX 62:401-409 (4/18/1969); #3EX 69:417-420 (3/3/1994); #3EX 70:421-424
(3/23/1994); #3EX 71:425 (3/28/1994); #3EX 72:426 (7/18/1995); #3EX 73:427
(9/19/95); #3EX 74:431 (7/2/1998) (blood degrees have been increased to 3/8
Indian blood for Frank and Lenora (LaChappa) Trask' descendants); and the
November 2014 Challenge to the enrollment of the Trask Descendants presented
by Huumaay Quisquis which was returned because the new enrollment committee
had placed a moratorium on all enrollment issues in 2009. [#3EX 88, 89, 90, 91].
The failure of the Bureau to support the Tribe's objections to the enrollment of
non-San Pasqual blood Trask Descendants, and other non-San Pasqual blood
persons, has undermined the Tribe's sovereignty when it comes to enrollment of
San Pasqual Blood Indians in violation of 5 U.S.C. §706.

X CONCLUSION

Pursuant to Rule 56, Fed.R.Civ.Pro, if there is no genuine dispute as to any
material facts, Plaintiff as movant is entitled to judgment as a matter of law and
this Court should rule in Plaintiffs' favor based on the undisputed facts stated
herein. It is clear that the actions on the part of the Defendants by: 1) summarily
rejecting the EC's recommendation to enroll the Plaintiffs; 2) summarily rejecting
the BC's separate request to increase their ancestor Modesta Contreras Martinez's

1 blood degree from $\frac{3}{4}$ to $\frac{4}{4}$; 3) summarily failing to give Plaintiffs' notice of their
2 February 3, 2006 decision; 4) summarily denying Plaintiffs the right to appeal and
3 make their record; and 5) summarily basing their February 3, 2006, decision to
4 deny the EC's request to increase Modesta's blood degree from $\frac{3}{4}$ to $\frac{4}{4}$ on
5 knowingly unvetted and "unreliable documentation" are "arbitrary, capricious, an
6 abuse of discretion, or otherwise not in accordance with law" or are "unsupported
7 by substantial evidence." 5 U.S.C. §706(2)(A), (E). The Defendants' acts have
8 directly impinged on the Tribe's sovereignty to enroll only San Pasqual blood
9 Indians, violated the mandates of 25 CFR §48, violated the APA, and violated
10 Plaintiffs' due process rights. For these reasons, Plaintiffs request this Court: 1)
11 rescind the Bureau's February 3, 2006, decision; 2) order the Bureau to re-evaluate
12 Modesta's SP blood degree, using the evidence submitted herein; 3) order the
13 Bureau to adjudicate Plaintiffs' applications using the evidence submitted herein;
14 4) order the Bureau to apply the "blood of the band" language construction to the
15 Plaintiffs who qualify for membership under that definition; and 5) order the
16 Bureau to give notice and to comply with 25 C.F.R. §48.

23 Dated: August 31, 2021

Respectfully submitted,

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