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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al., Plaintiffs, v. UNITED STATES, et al., Defendants.	Case No.: 16-cv-2442-AJB-KSC DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATE: November 4, 2021 TIME: 2:00 p.m. CTRM: 4A JUDGE: Hon. Anthony J. Battaglia

Defendants the United States of America, the Department of the Interior (DOI), DOI's Assistant Secretary-Indian Affairs (AS-IA) Bryan Newland, Director of the Bureau of Indian Affairs (BIA) Darryl LaCounte, Regional Director of BIA's Pacific Regional Office (PRO) Amy Dutschke, and Superintendent of BIA's Southern California Agency (SCA) Javin Moore[1] (collectively Defendants) hereby move for summary judgment on Plaintiffs' first and second claims in their Fourth Amended Complaint (4AC) alleging claims under the Administrative Procedure Act (APA) and for declaratory relief. A Memorandum of Points and Authorities in support of this motion is provided below.

[1] Since the individually named defendants are sued in their official capacities, successors to their positions are automatically substituted as parties. *See* Fed. R. Civ. P. 25(d). Actions against officers of the United States in their official capacities are treated as claims against the United States. *See Solida v. McKelvey*, 820 F.3d 1090, 1095 (9th Cir. 2016).

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I. Introduction

On September 9, 2019, Plaintiffs[2] filed their 4AC alleging: 1) an APA claim, 2) a claim seeking declaratory relief or a writ of mandate; and 3) a claim alleging Defendants violated Plaintiffs' Fifth Amendment Equal Protection rights. (ECF No. 105) On August 12, 2020, the Court granted Defendants' motion to dismiss the third claim. (ECF No. 121)[3] Now, Defendants move for summary judgment on the two remaining claims.

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[2] The 4AC lists 129 "Group A Plaintiffs" and 18 "Group B Plaintiffs." (ECF No. 105, ¶¶ 14, 17) Group B Plaintiffs were only part of the now dismissed third claim. (ECF No. 105-1 at 6, 11, 15)

The 129 Group A Plaintiffs include 119 who Plaintiffs allege were assigned Tribal Enrollment Numbers (TEN)) (ECF 105, 4AC, ¶ 14), which mostly, but not entirely match the "Roll" numbers indicated by the Band at the April 10, 2005 General Council Meeting. (FAR 70-73) (differences include plaintiffs Demitro Contreras, Daniel Morales, Jr., and Desiree Morales). Plaintiffs allege 10 of the Group A Plaintiffs were not given TENs "because they were inadvertently left off the enrollment list." ECF 105, 4AC, ¶ 14 n.1. Many, but not all, of Plaintiffs with listed TENs are among the individuals SCA listed as being among those whose enrollment applications were hand-carried to SCA on September 23, 2005. (FAR 92-96; *see also infra* § II.B) (plaintiffs not so listed appear to include Frank Alegre, Kristy Maria Anaya, Valerie Boyle, Melvin Cannon, Melissa Chaloux, Nathan Chaloux, Rita Contreras, Rochelle Contreras, Libby Flores, Ruben Gonzalez, Jr., Bernadette Johnson, Juan Lucero, Virgil Lucero, Ruben Martinez, Evette Peart, and Tisha Peart). Some, but not all, of those individuals, are listed by SCA as among the 19 individuals who were on a list received by SCA as being descendants of Ms. Contreras, but whose applications were not received by SCA. (FAR 103) The 10 individuals alleged to have been inadvertently not provided a TEN are not on either of SCA's lists (except perhaps Frederick Murillo, III). (FAR 92-96, 103). If Plaintiffs' claims were otherwise viable, these facts would raise complicated issues regarding which Plaintiffs have standing to bring their APA challenges. For the reasons described in this motion, however, regardless of such issues, Defendants are entitled to summary judgment on Plaintiffs' two remaining claims.

[3] The original Complaint (ECF No. 1) contained similar APA challenges to those left in the 4AC. In their First and Second Amended Complaints (FAC & SAC), Plaintiffs added numerous additional claims, including that Defendants: (1) in or about 1960, secretly amended the federal regulation that governed, at the time, the enrollment of persons into the Band in order to benefit "a White man" named Frank Trask, and his descendants; (2) failed to inform Plaintiffs regarding the amendments; and, as a result, (3) allowed Frank Trask's descendants "who have no San Pasqual blood" to secure "full control of the tribe and the enrollment process" to the Plaintiffs' detriment. (ECF Nos. 13, 44.) The Court dismissed both the FAC and the SAC for violation of Fed. R. Civ. P. 8(a)'s requirement for "a short and plain statement of the claim showing that the pleader is entitled to relief," concluding both complaints were "argumentative, prolix, replete with redundancy, and largely irrelevant." (ECF Nos. 43, 59.) In their Third Amended Complaint Plaintiffs continued to add causes of action, including claims involving the historical creation and early proceedings of the Band stretching back over a century. (ECF No. 62.) The Court largely granted Defendants' motions to dismiss those claims. (ECF Nos. 98-99)

II. Facts

A. Band's Initial Attempt to Eliminate the Bureau of Indian Affairs' Role In Membership Decisions and Add 211 New Members, Including Many Of Modesta Contreras' Great-Grandchildren

On April 10, 2005, the San Pasqual Band of Mission Indians (Band or Tribe) held a General Council (GC) meeting, at which they voted to approve Motion # 5, which adopted Resolution # SP041005-01. (FAR 70-73) Resolution # SP041005-01:

1) Approved the effort to develop an enrollment ordinance by the Band's Enrollment Council/Committee (EC);[4]
2) Ratified and approved the addition of 211 new members to the Band's Roll; and
3) Determined that requiring the BIA's concurrence with the changes to the Band's roll would be inconsistent with the principles of tribal self-government and is not required by tribal law.[5]

(FAR 520-521) The individuals whose membership into the Band were purportedly approved were given Roll numbers 430-641 (skipping number 607). (FAR 71-73, 521-526) On April 12, 2005, the EC certified those individuals were considered by them to be enrolled members of the Band, added to the membership roll, and given roll numbers.[6] (FAR 59-64)

On or about May 6, 2005, SCA wrote the Band's Vice-Chairman, Rudy Contreras, indicating that Vice-Chairman Contreras had hand carried Resolution # SP041005-01 to SCA on April 18, 2005, and sent a letter on April 20, 2005, requesting approval of the resolution and the enrollment related actions taken by the GC on April 10, 2005. (FAR 76)

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[4] The EC appears to refer to itself both as the "Enrollment Council" and the "Enrollment Committee." (FAR 59)

[5] The EC Chairman told SCA at a meeting on April 8, 2005, that the EC believed they no longer needed BIA review or approval of its enrollment decisions. (FAR 509)

[6] The EC's certification skipped the individual listed as Roll # 465. (FAR 60-61) Also, it appears that the EC was not aware that Roll number 607 was skipped, as it indicated that 212 members were listed. (FAR 59) For reasons that are unclear, it appears the EC sent its certification to the Band's Chairman, Allen Lawson, on April 6, 2005, four days before the GC's vote. (FAR 58-64)

SCA informed Vice-Chairman Contreras that it was unable to reach those substantive questions because the GC meeting at which the resolution was passed was not procedurally valid pursuant to the Band's Constitution. (*Id.*) Specifically, SCA indicated that pursuant to Art. VI, Sec. 5 of the Band's Constitution, a quorum for GC meetings required thirty percent of registered voters and three members of the business committee (BC),[7] but only one member of the BC attended.[8] (*Id.*) The letter stated that SCA's decision could be appealed to PRO within 30 days of receipt of the decision, and that if no appeal was filed, the decision would become final for DOI. (*Id.*)

On or about September 1, 2005, PRO wrote Vice-Chairman Contreras in response to his May 11, 2005, appeal of SCA's decision, informing him that PRO affirmed the decision declining to validate Resolution # SP041005-01, including the approval of 211 new members to the Band. (FAR 78-86) The PRO decision letter summarized in detail the arguments made by the Band in its April 20, 2005, letter and May 11, 2005, appeal. (FAR 78, 81-84) In the April 20, 2005, letter, Vice-Chairman Contreras asked SCA to approve Resolution # SP041005-01 allowing the Band to assume control over its own membership and achieve self-determination pursuant to Article VIII, Section 1 of the Band's Constitution. (FAR 81; FAR 44-45) Vice-Chairman Contreras' explained that "the [GC] determined that [BIA's] concurrence in the changes to the Band's roll would be inconsistent with the principles of tribal self-government and is not required by tribal law. . . . [T]he [GC] has determined to assert its sovereign immunity over its enrollment procedures and to find that [BIA] approval of the Tribe's enrollment actions is not required under tribal law." (FAR 81-82) In the May 11, 2005, appeal, Vice-Chairman Contreras explained the Band

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[7] Art. VI of the Band's Constitution is available at FAR 42-43.

[8] Furthermore, SCA's letter indicated that its staff had agreed to attend a special GC meeting on April 2, 2005, to address enrollment issues raised by the resolution, but that meeting was cancelled. (FAR 76) Also, on or about April 8, 2005, SCA provided the Band's Chairman, Vice-Chairman, and other Council members, as well as the Chairman of the Band's EC, a summary of BIA's responsibilities regarding Band membership determinations under the Band's Constitution. (*Id.*; FAR 65-66) SCA was told the letter would be shared at the GC meeting, but was later told the April 10, 2005, meeting was cancelled. (FAR 76)

disagreed with SCA's determination that a GC quorum required three members of the BC to be present under the Band's Constitution and Robert's Rules of Order. (FAR 83)

PRO responded to the latter argument by stating that even though "the Constitutional provision in question . . . could be read either as requiring three [BC] members at a [GC] meeting or as merely requiring that number as a quorum for [BC] meetings," "[a] resolution of this issue may be unnecessary . . . for there are at least two other possible bases for declining to recognize the validity of the Resolution." (FAR 84-85) First, PRO indicated the Band had not demonstrated that the constitutional quorum requirement of at least 30% of registered voters being present at the April 10, 2005, GC meeting had been met. (FAR 85)

Second, as demonstrated by the GC meeting minutes, Resolution #SP041005-01, and the attempt to add 211 new members to the Band's roll, was passed based on the Band EC's decision that the Band "posses[ed] the inherent and absolute undisputable right to determine its own membership." (FAR 70) Indeed, the Resolution stated that "[t]he [EC] has not requested [BIA] concurrence in these determinations on the ground that the Band seeks to exercise its sovereign right to determine its membership and no longer requires [BIA] assistance." (FAC 85) Furthermore, the EC failed to submit the 211 applications and supporting documentation to the BIA. (*Id.*) Moreover, the Band was attempting to more than double its size, without requesting the approval of the BIA, by "conven[ing] meetings of the individuals they seek to add to the rolls, and then allow[ing] these individuals to vote on their own enrollment, as if they constituted the [GC]." (*Id.*) PRO determined, however, that the only way for the Band to displace BIA's role in membership determinations was to adopt a membership ordinance pursuant to the Band's Constitution, which the Band had not done. (*Id.*) Therefore, PRO affirmed the SCA's decision that the Resolution and the attempt to add 211 new members to the Band was invalid because of the questions regarding the validity of the April 10, 2005, GC meeting, and because the Band's attempt to remove the BIA role in membership determinations was invalid under the Band's own Constitution without properly adopting a new membership ordinance. (*Id.*) SCA informed the Band that

its decision could be appealed to the Interior Board of Indian Appeal ("IBIA") within 30 days of receipt of its decision, and that if no appeal was filed, the decision would become final for DOI. (FAR 86) No appeal of PRO's decision was received by the IBIA. (ECF No. 68-2, Dutschke Decl., ¶¶ 7-8)

B. Band's Attempt to Increase Modesta Contreras' Blood Degree So That Her Great-Grandchildren Would Have Sufficient Blood of the Band To Become Members

On or about September 12, 2005, the Band's GC wrote SCA affirming that it had not yet adopted an enrollment ordinance, and therefore the Band's Constitution delegated membership determinations to BIA pursuant to the procedures set forth in (former) Part 48 of the Code of Federal Regulations. (FAR 87) The GC indicated it supported approval of applications for enrollment attached to the letter, and asked they be forwarded to the PRO. (*Id.*) On or about September 19, 2005, the GC wrote the Band's membership indicating that several hundred applications had been sent to the BIA, which included some applications based on proven blood degrees, whereas others involved requests for blood degree changes with the applicants' families' histories. (FAR 90)

On or about September 22, 2005, the EC requested SCA: 1) increase the blood degree for Modesta (Martinez) Contreras ("Ms. Contreras") from 3/4 to 4/4 degree blood of the Band (FAR 91); and 2) concur with the GC's and EC's approval of 173 applications for enrollment into the Band and forward the applications on for final approval (FAR 545). On or about September 27, 2005, SCA wrote the EC acknowledging that it received 179 hand-delivered enrollment applications and the request to change Ms. Contreras' blood degree. (FAR 92-96) On or about September 29, 2005, the EC wrote SCA listing 170 individuals whose applications were part of the request for correction of blood degree for Ms. Contreras. (FAR 97-101) On or about November 4, 2005, SCA wrote the Band about 19 applicants who were listed on the September 29, 2005, letter whose applications were not received.[9] (FAR 103)

[9] This appears to include at least 11 plaintiffs in this case. (FAR 103) Furthermore, there appear to be several plaintiffs who were neither named on the September 27, 2005, SCA letter regarding the enrollment applications it received or the September 29,

On December 8, 2005, SCA wrote a memorandum to PRO[10] regarding the Band's request to increase Ms. Contreras' blood degree. (FAR 105-107) The memorandum explained that the EC provided two documents supporting its request to increase Ms. Contreras' blood degree: 1) an excerpt of the July 1955 Band Census Roll which identified her degree of Indian blood as 4/4 (FAR 111); and 2) the Band's 1910 Census Roll which does not list blood degrees (FAR 113-116). (FAR 105) SCA noted, however, that according to information Ms. Contreras supplied on her 1928 application to be named on the Original Roll of California Indians, her degree of Indian blood is 3/4, based on her father Jose Juan Martinez being 1/2 and her mother Guadalupe (Wypoke) Martinez being 4/4. (FAR 105, 125-130) SCA noted this information was substantiated on Ms. Contreras' father's 1928 application (105, 119-124), and on Ms. Contreras' April 21, 1960, application to join the Band (FAR 105, 117-118). SCA attached to its memorandum an anonymous letter it received, with attachments, arguing Jose Juan Martinez was not Indian, and Ms. Contreras was only 1/4 Indian. (FAR 106, 131-156) SCA concluded that considering

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2005, EC letter regarding applicants who were part of the correction of blood degree for Ms. Contreras.

Additionally, SCA listed 27 of the 179 hand-delivered applications as individuals who were not descendants of Ms. Contreras. (FAR 104) Many of them were among the applicants who were eventually determined to meet the criteria for Band membership (with various degrees of blood of the Band). (FAR 159) Therefore, even if some or all the accepted applicants were cousins of some or all of Plaintiffs, SCA's determination they met criteria is not proof of an equal protection violation or any other misdoing in this suit.

At the Band's January 22, 2016, GC meeting, new members of the EC were elected. (*Compare* FAR 28 (EC members who certified admission of 211 new members in April 2005) *with* FAR 165-172 (new EC members elected January 2006, as indicated in GC meeting minutes and Resolution # SP-0122060-06) (There was also an attempt to allow the Band to conduct GC votes by mail due to violent behavior at tribal meetings held on the reservation, but SCA warned such actions might violate the Band's Constitution. (FAR 167, 192)

[10] The Band's Constitution does not set out a procedure to determine requests to correct the blood degree of a member other than saying it shall be made by PRO if supported by satisfactory evidence. BIA internal policies state such requests should receive review from SCA, PRO, and the Commissioner. (FAR 9-11, 31, 40, 158; *see also* 25 C.F.R. §§ 62.4(a)(5); 62.10 (appeal of adverse enrollment action, including request to change blood degree, is determined by AS-IA (or his delegate)). The Band was advised SCA's determination was sent to the Regional Director, who would subsequently forward to the Central Office, on or about February 3, 2006. (FAR 161)

this evidence, "the preponderance of the evidence does not sufficiently demonstrate that Modesta [Contreras] is full blood." (FAR 106)

On or about February 3, 2006, PRO wrote a memorandum to the Deputy Bureau Director Tribal Services concurring with SCA's analysis that "the preponderance of evidence does not justify the degree of Indian blood change for [Ms.] Contreras." (FAR 162) PRO relied on the same documents SCA did and recommended the request to increase Ms. Contreras' blood degree be denied.[11] (FAR 162-163) On or about April 7, 2006, the Acting Principal Deputy Assistant Secretary-Indian Affairs made a final decision denying the EC's request to increase Ms. Contreras' blood degree. (FAR 177-178) That decision also relied on the same documents that SCA relied upon. (*Id.*) On April 21, 2006, SCA mailed the EC a copy of the final decision. (FAR 189-191) In the same letter, SCA explained it was returning the original enrollment applications of Ms. Contreras' descendants for the Band's review, since the determination not to increase Ms. Contreras' blood degree would affect the Band's analysis of the applications. (FAR 189; *see also* FAR 494, 709-710) Since the return of Ms. Contreras' descendants' original applications, the Band has not resubmitted the descendants' applications (including Plaintiffs') for review by BIA for approval or disapproval. (FAR 494, 500, 710; *see also* ECF No. 68-2, Dutschke Decl., ¶¶ 18-19)

Meanwhile, sometime in or around January to March of 2006, the Band's Chairman told SCA to not send any correspondence to the EC since new members had recently been elected to that Committee. (FAR 159, 174)[12] Subsequently, SCA met with the new EC.

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[11] On or about April 14, 2006, the EC told the Band's members that of the 179 enrollment applications provided to SCA in September 2005, 150 would require an increase in the blood degree of a single ancestor to be eligible for membership, 22 met the requirements to become members of the Band, and 7 did not. (FAR 187) The EC informed the Band's membership that SCA and PRO determined that the requested blood degree increase should be disapproved, and the matter was forwarded to the Central Office for a final decision. (*Id.*)

[12] FAR 174 appears to be a letter SCA wrote on or about March 16, 2006, to an individual who was among the 179 applications that were hand-delivered to SC on September 23, 2005. (FAR 92, 94, 174) That individual was one of those who BIA approved for membership. (FAR 159)

(FAR 174) During that meeting, the EC requested the opportunity to re-review the enrollment applications that the prior EC had supported. (FAR 92-96, 159, 174, 545)

On or about May 3, 2006, the EC told SCA it received the April 7, 2006, decision denying the request to increase the blood degree for Ms. Contreras, and that it was beginning to review the enrollment applications affected by the blood degree decision. (FAR 194) The letter also stated that prior to receiving BIA's decision, the EC embarked on its own independent review of the issue and based on that review and the information contained in the April 7, 2006, decision, the EC concurred that Ms. Contreras' blood degree should not be increased. (*Id.*) Furthermore, the EC stated that once it had completed its review of the enrollment applications affected by the BIA's denial of the EC request to increase Ms. Contreras' blood degree, it would prepare and mail to each applicant a letter informing them of the BIA's decision and the concurrence of the EC. (FAR 195) The EC attached a research report prepared by EC member Dr. Robert Phelps which concluded "the traditionally recognized blood quantum of both Ms. Contreras and her father, Jose Juan Martinez, at 3/4 and 1/2 respectively, are correct, and . . . any change in their current blood quantum would be a serious misrepresentation of the lineage of the . . . Band." (FAR 196; *see also* FAR 203 ("Jose Juan Martinez's 1929 application for recognition as a California Indian, his response to the 1900 census, and his own personal recollections support his claim that he was of mixed parentage. . . . Further, Modesta Contreras' multiple applications for identification as a California Indian and enrollment as a member of the San Pasqual Band illustrates her consistent recognition that she was the product of a union between a full blooded San Pasqual Indian mother and a father who claimed a 50% San Pasqual Indian blood degree. [¶] Therefore, based on overwhelming evidence, it is clear that the blood degree provided by Modesta Contreras in 1929 and 1960 was in fact accurate, and that her listing as 1/1 San Pasqual Indian in the 1955 Census Role by federal officials was probably the result of a clerical error.")

On or about July 28, 2006, the EC wrote SCA indicating that it had determined that 139 listed individuals whose applications had been reviewed by the EC were determined

ineligible for enrollment because they did not possess sufficient blood degree, including almost all of Plaintiffs who appear on the September 27, 2005, SCA letter indicating SCA had received an application for them to join the Band. (FAR 92-96, 204-207) The EC stated that they had sent notices via certified mail with copies of 25 C.F.R. Part 62 concerning enrollment appeals. (FAR 204) The Band never provided BIA the enrollment applications of the individuals listed in the attachment to the July 28, 2006, letter, or any of Ms. Contreras' descendants, to the BIA to determine whether or not they should be allowed to become members of the Band. (FAR 494, 500, 710; *see also* ECF No. 68-2, Dutschke Decl., ¶ 21)

C. Recent Actions

On or about September 17, 2013, attorney Alexandra McIntosh wrote PRO that she represented several of Ms. Contreras' descendants who wished to be enrolled in the Band. (FAR 216-217) She indicated the July 1955 Band Census Roll that states Ms. Contreras is 4/4 blood of the Band, supports her clients' claims, and emailed that document to PRO. (FAR 216; 224-227) She also referenced a 1933 Indian Census Roll that she indicated did not name any members of the Band, and emailed that document to PRO. (FAR 216.; FAR 218-223.) Ms. McIntosh and BIA employees communicated by email over the next few weeks. (FAR 228-246)

On or about May 21, 2014, Ms. McIntosh wrote SCA that "for the past two (2) years, I have been searching through internal Bureau records at the National Archives Riverside, San Francisco, Washington D.C. and St. Louis, to piece together a full history of the San Pasqual Indians. Utilizing the thousands of pages of documents that have been gathered, I feel confident that we will be able to achieve a complete resolution to the San Pasqual enrollment issues once and for all." (FAR 248) Such records included San Pasqual census and federal census records. (FAR 249-250)

On or about April 8, 2015, Ms. McIntosh sent PRO a Notice of Appeal From Inaction pursuant to 25 C.F.R. § 2.8, arguing PRO failed to take action on her clients' applications to join the Band in 2005 by not providing notice under (former) 25 C.F.R. § 48.9, regarding

PRO's decision as to those applications.[13] (FAR 379-408) She alleged that among other consequences, the failure to be allowed to join the Band cost her clients per capita payments that between May 2005 and April 2015 amounted to no less than $737,365.68 each. (FAR 383-384) On June 9, 2015, PRO explained the matter would be referred to SCA.[14] (FAR 653-654)

On July 24, 2015, SCA explained that in response to the Band's request to increase Ms. Contreras' blood degree from 3/4 to 4/4, a memorandum was sent by SCA to PRO on December 8, 2005. Thereafter, by letter to the Band's Chairman on April 7, 2006, the Acting Principal Deputy Assistant Secretary-Indian Affairs rendered a final decision determining there was insufficient evidence to increase the blood degree. On or about April 21, 2006, the enrollment applications for Ms. Contreras' descendants were returned to the new EC, at their request, without a decision being rendered by BIA, because the applications were affected by the decision denying the Band's request to increase Ms. Contreras' blood degree. (FAR 709-710)

On or about July 19, 2016, Ms. McIntosh faxed SCA a summary of the documents she collected regarding Jose Juan Martinez. (FAR 977-980) She wrote "[t]he evidence presented herein of Jose Juan is new evidence that has not been previously available, nor presented to the [Band] or [BIA] relating to enrollment of the true San Pasqual descendants,

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[13] On June 29, 2015, Ms. McIntosh further explained to an attorney at the BIA Office of the Solicitor that her appeal challenged the fact that the decisions made in the February 3, 2006, PRO memorandum and the April 7, 2006, final decision denying the request to increase Ms. Contreras' blood degree were not provided to the applicants in violation, she argued, of (former) 25 C.F.R. § 48.9 and 48.10. (FAR 663-665) On or about May 23, 2016, Ms. McIntosh again explained to SCA her belief that PRO violated (former) 25 C.F.R. § 48.9 by not providing Ms. Contreras' descendants who were applying to be members of the Band notice of its February 3, 2006 memorandum; and the Acting Principal Deputy Assistant Secretary-Indian Affairs violated (former) 25 C.F.R. § 48.10 by not providing them notice of his April 7, 2006 decision. (FAR 783-785)

[14] PRO explained an appeal of their decision could be taken to IBIA. (FAR 653-654) On July 14, 2015, Ms. McIntosh filed an appeal with IBIA. (FAR 674-692) On August 12, 2015, PRO filed a motion for dismissal, explaining that PRO referred the matter to SCA, who responded on July 24, 2015, that BIA never made a decision on Ms. Contreras' descendants' enrollment applications. (FAR 715-716) On August 27, 2015, Ms. McIntosh withdrew her appeal. (FAR 763)

until this time. Based on the new evidence, under 25 CFR §48.5 (b) and (c), the San Pasqual descendants qualify for enrollment in their tribe, the [Band], forthwith; and pursuant to the vote of the [GC] in April 2005." [FAR 978]

On or about May 23, 2016, Ms. McIntosh provided SCA 87 enrollment applications to the Band for great-grandchildren of Ms. Contreras.[15] (FAR 781-960) On or about March 7, 2017, SCA forwarded the 87 applications to the EC "pursuant to [former] 25 CFR § 48.7" for review. (FAR 989-991) The Band has not returned the applications or sent BIA any further requests to approve or disapprove enrollment applications for Plaintiffs. (FAR 494, 500, 710; *see also* ECF No. 68-2, Dutschke Decl., ¶ 22)

III. Argument

A. Permissible Challenges to Tribal Membership Disputes Under the APA

Federal courts normally lack jurisdiction regarding the adjudication of tribal disputes, especially controversies pertaining to tribal membership, because Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government, including matters of membership, and are unconstrained by constitutional provisions limiting federal or state authority, including the Fifth Amendment); *Alto v. Black*, 738 F.3d 1111, 1115 (9th Cir. 2013) ("In view of the importance of tribal membership decisions and as part of the federal policy favoring tribal self-government, matters of tribal enrollment are generally beyond federal judicial scrutiny."); *Miranda v. Jewell*, No. EDCV 14-00312-VAP, 2015 WL 226024, at *6 (C.D. Cal. Jan. 15, 2015), aff'd, 671 F. App'x 574 (9th Cir. 2016) ("Federal courts normally play no part in the adjudication of tribal disputes . . . .").

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[15] That same day, Ms. McIntosh provided SCA a copy of a letter from the EC stating the Band had declared a moratorium on processing enrollment applications (or disenrollment actions) on October 9, 2011, for a period of no more than four years. (FAR 967-968) It appears Plaintiffs allege, however, that the moratorium is still in place. (ECF No. 105, 4AC, ¶ 41)

A federal court may sometimes indirectly review tribal enrollment decisions under the APA when a tribe's own governing documents vest the government with authority over membership decisions and BIA takes a final agency action pursuant to such authority. *See Alto*, 738 F.3d at 1115-19;[16] *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1228 (9th Cir. 2013) (since tribal governing document only provided BIA right to review rejected applications for enrollment, no APA review of disenrollment decision); *Miranda*, 2015WL 226024, at *6. In such a case, the APA acts as a waiver of sovereign immunity allowing judicial review to determine if the BIA acted arbitrarily and capriciously. *See Alto*, 738 F.3d at 1123 (allowing review, "under the APA's arbitrary and capricious standard," "the Assistant Secretary's action in issuing the 2011 Disenrollment Order [which was] triggered by the Band's own request, not that of the putative tribal members"); *Cahto Tribe of Laytonville Rancheria*, 715 F.3d at 1227–28 (reviewing district court's conclusion that BIA's decision that Cahto Tribe's determination applicants were ineligible for membership was not arbitrary and capricious pursuant to the APA); *Miranda*, 2015WL 226024, at *7-*9 (reviewing whether BIA's endorsement of Santa Ynez Band of Chumash Indians' decision to deny membership to plaintiffs was arbitrary and capricious).

Plaintiffs' two remaining causes of action of their 4AC allege BIA acted arbitrarily and capriciously under the APA[17] by failing to provide Plaintiffs notice of BIA's decision

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[16] The *Alto* case involved the same tribe as at issue here, the San Pasqual Band of Mission Indians. *See* 738 F.3d at 1115.

[17] Plaintiff's first cause of action is labeled an APA claim, whereas their second cause of action is labeled one for declaratory relief or mandamus, Regardless, the Ninth Circuit has explained that all such challenges to the propriety of BIA's actions on tribal membership are fairly characterized as APA claims. *Alto*, 738 F.3d at 1117 ("The Altos' initial pleadings describe four claims for declaratory and injunctive relief. . . . Although only the third claim is explicitly denominated as an APA claim in the complaint, the first three claims all involve challenges to the propriety of the BIA's decision. All three may therefore be fairly characterized as claims for judicial review of agency action under the APA, 5 U.S.C. §§ 701–706.").

Although Plaintiffs make passing reference to constitutional and statutory provisions other than the APA in their first two causes of action, this Court has already dismissed with prejudice Plaintiffs' attempts to rely on such provisions. *See* ECF 98 at 12-13; ECF No. 99 at 11-12; ECF No. 121 at 12.

denying the request to increase Ms. Contreras' blood degree, or of BIA's actions concerning Plaintiffs' enrollment applications.[18] *See* ECF No. 105 ¶¶ 33-41, 67, 71, 77-80, 84, 92, 94-95.

In such an APA action, the Supreme Court has explained that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (internal citations and quotation marks omitted). "Under the APA, [a court] will reverse an agency's action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or if its factual findings are 'unsupported by substantial evidence.'" *Love Korean Church v. Chertoff,* 549 F.3d 749, 754 (9th Cir. 2008) (internal citations and quotation marks omitted) (citing 5 U.S.C. § 706(2)(A), (E)).

This standard requires a "reviewing court [to] consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Sackett v. U.S. Env't Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021); *see also Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) (court's role is "to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made). The scope of the court's review under the APA is highly deferential—as long as an agency's decision is supported by reasonable evidence it must be upheld even if the evidence is susceptible to alternative conclusions; a court cannot substitute its judgment for that of the agency. *See San Luis & Delta–Mendota v. Jewell,* 747 F.3d 581, 601 (9th Cir. 2014); *see*

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[18] Plaintiffs also allege that BIA's actions were "unlawfully withheld or unreasonably delayed" pursuant to 5 U.S.C. § 706(1). As indicated above, BIA is not withholding or delaying any actions regarding the blood degree increase request or Plaintiffs' applications. Therefore, Plaintiffs' challenges are appropriately considered under the APA's arbitrary and capricious standard. Regardless, the analysis would be the same as described herein.

also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (a court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"). "Deference . . . is especially appropriate, where . . . the agency's decision involves a high level of technical expertise." *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 790 (9th Cir. 2012). Furthermore, "a presumption of regularity attaches to the actions of Government agencies," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001), including "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

A district court adjudicating an APA claim pursuant to a motion for summary judgment does not use the normal standard of requiring there be no genuine issue of material fact. *See Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 770 (9th Cir. 1985); *US Citrus Sci. Council v. United States Dep't of Agric.*, 312 F. Supp. 3d 884, 894 (E.D. Cal. 2018). This is because in an APA claim, "the district court is reviewing a decision of an administrative agency which is itself the finder of fact." *Occidental Eng'g Co.*, 753 F.2d at 770. Therefore, in an APA claim, a district court uses "summary judgment [as] an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Id.*; *see also Palisades Gen. Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) ("Unlike a district court managing a 'garden variety civil suit,' a district court reviewing a final agency action ''does not perform its normal role' but instead 'sits as an appellate tribunal.'").[19]

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[19] "Thus, 'under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the correct legal standards.'" *Palisades Gen. Hosp. Inc.*, 426 F.3d at 403; *see also Fla. Power & Light Co.*, 470 U.S. at 744 (if a district court finds against the government in an APA claim, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation").

B. Band's Constitutional Provisions Regarding Membership Application and Changes to Blood Degree

On February 25, 1960, the Secretary of the Department of the Interior adopted 25 C.F.R. Part 48, Sections 48.1-48.15, to govern procedures for enrollment in the Band and for the preparation, approval, and maintenance of the Band's membership roll. (FAR 26-33; *see also* 25 Fed .Reg. 1829 (Mar. 2, 1960)). Members of the Band were required to be Indians appearing on the Band's June 30, 1910, Census Roll who were still alive as of January 1, 1959, or descendants of such Indians possessing at least 1/8 Indian Blood of the Band, or otherwise able to furnish sufficient proof that he or she is 1/8 or more degree Indian blood of the Band (although affiliation with other tribes could be disqualifying). (FAR 27-28, (former) 25 C.F.R. §§ 48.2(g), 48.5)

On November 29, 1970, the Band adopted its Constitution and Bylaws, which were approved by the AS–IA on January 14, 1971. (FAR 40-49) Article III, Section 1, of the Constitution states that membership in the Band "consist[s] of those living persons whose names appear on the approved Roll of October 5, 1966, according to Title 25, Code of Federal Regulations, Part 48.1 through 48.15." (FAR 40) Article III, Section 2 states "membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior." (*Id.*) Therefore, as the Ninth Circuit has explained:

> Article III, section 2 of the Band's Constitution gives the Secretary of the Interior final authority over tribal enrollment decisions. . . . The Constitution also expressly incorporates federal regulations, adopted in 1960 and formerly codified at 25 C.F.R. §§ 48.1–48.15 . . ., which addressed tribal enrollment criteria, the process for completing an initial membership roll, the procedures for keeping the membership roll current, and the purposes for which the roll was to be used.
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> The 1960 Regulations have since been removed from the Code of Federal Regulations, but the reference to them remains in the Tribe's Constitution. The parties agree that the substance of the otherwise defunct 1960 Regulations survive as tribal law and govern enrollment decisions for the Band.[20]

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[20] The parties so agree here as well.

Alto v. Black, 738 F.3d 1111, 1116 (9th Cir. 2013).

The Band's constitutional process to apply to join the Band begins with the steps outlined by former 25 C.F.R. Part 48:

- Applications are filed with "the Field Representative" i.e., SCA,[21] which determines if they are "duly filed," and then refers the applications to the EC (FAR 28, § 48.7);
- The EC reviews the applications and subsequently files with the "Director" i.e., PRO,[22] through SCA, those applications which it approves, and those applications not approved with a statement of the reasons for the disapproval (*id.*);
- The PRO reviews the reports and recommendations of the EC and determines the applicants who are eligible for enrollment in accordance with the provisions of § 48.5 (FAR 29, § 48.8,);
- If PRO disagrees with the EC's decision, it is sent to the BIA Commissioner for final determination by the "Secretary"[23] (*id.*); furthermore, if PRO determines an applicant is not eligible for membership, PRO notifies the applicant of such. (FAR 30, § 48.9);
- The applicant can appeal the decision to the Commissioner and Secretary (FAR 30, §§ 48.9 - .11).

A different section of former Part 48, § 48.14, governs how the Band's membership roll is kept current. (FAR 30-31) Corrections regarding the degree of Indian blood of Band members may be made by PRO if supported by evidence it finds satisfactory pursuant to § 48.14(c). (FAR 31) Unlike §§ 48.7-.11, § 48.14(c) does not specify any specific

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[21] The "Field Representative" means the Area Field Representative, Riverside, California (FAR 27, (former) 25 C.F.R. § 48.2(d)). The parties agree that position is now the Superintendent of SCA. *See* ECF No. 105, 4AC, ¶ 24. Here, Defendants will refer to both that office and the Superintendent as SCA.

[22] The "Director" means the Area Director, Sacramento Area Office (FAR 27, (former) 25 C.F.R. § 48.2(a)). The parties agree that position is now the Regional Director of PRO. *See* ECF No. 105, 4AC, ¶ 23. Here, Defendants will refer to both that office and the Regional Director as PRO.

[23] The "Secretary" means the Secretary of the Interior (FAR 27, (former) 25 C.F.R. § 48.2(c)). The parties agree that DOI delegated the Secretary's authority to review the Band's membership issues to the AS-IA. *See* ECF No. 105, 4AC, ¶ 21.

procedures that need be followed before PRO determines a request to change a Band member's Indian blood degree. A BIA July 26, 1965, memorandum, however, indicates such requests should go through SCA, PRO, and the Commissioner.[24] (FAR 37) Furthermore, the memorandum states that "[i]n the absence of any specifications in constitutions or Federal statutes to the contrary . . . the agency records should be examined and a determination made . . . on the preponderance of the information[25] reflected in the records." (*Id.*)

C. The Court Should Grant Defendants Summary Judgment Because Plaintiffs' APA Claims Violate the Statute of Limitations

APA claims are covered by the six-year statute of limitations in 28 U.S.C. § 2401(a) for civil cases against the United States.[26] *See Turtle Island Restoration Network v. U.S. Dep't of Com.*, 438 F.3d 937, 942–43 (9th Cir. 2006). The statute of limitations generally accrues at the time the agency action becomes final.[27] *See Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016). Since Plaintiffs' initial Complaint was filed on September 28, 2016 (ECF No. 1), more than ten years after the denial of the EC's request to increase Ms. Contreras' blood degree and the return of Plaintiffs' applications, their claims are

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[24] The parties agree that the Acting Principal Deputy Assistant Secretary was delegated the duty to review the Band's membership issues. *See* ECF No. 105, 4AC, ¶ 21; *see also* 25 C.F.R. §§ 62.4(a)(5); 62.10.

[25] Regulations in Title 25, Part 61, govern the compilation of rolls of Indians by the Secretary of the Interior pursuant to statutory authority. 25 C.F.R. § 61.2. Therefore, such regulations are not relevant to requests to change blood degree. Indeed, the regulations would not even be relevant to applications to join the Band, since the Band's Constitution, not a federal statute, provides the legal authority for compiling the roll for the Band.

[26] Statutes of limitations bar even just claims because "it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944).

[27] Defendants previously argued that BIA never took a final agency action regarding Plaintiffs' enrollment applications, and therefore their APA claims regarding their applications should be barred. (ECF No. 68-1 at 7-17; No. 85 at 1-5) Since the Court disagreed with that argument (ECF No. 99 at 6-9), however, Defendants now argue in the alternative that even if the Court was correct, they are still entitled to summary judgment, including because Plaintiffs' claims were filed beyond the statute of limitations.

untimely under § 2401(a). Therefore, the Court should grant Defendants summary judgment on that basis.

Plaintiffs argue that their claims are timely because they did not receive notice of PRO's February 3, 2006, memorandum, and DOI's April 7, 2006, final decision regarding the denial of the EC's request to increase Ms. Contreras' blood degree until they received a response to their Freedom of Information Act request on October 1, 2014. (ECF no. 105, 4AC, ¶¶ 7, 44).[28] The AR demonstrates however, that in a letter to SCA dated May 3, 2006, the EC confirmed receipt of DOI's final decision denying the EC's request to increase Ms. Contreras' blood degree, and that once it had completed its review of the enrollment applications affected by that denial, the EC would prepare and mail to each enrollment applicant a letter informing them of BIA's decision and EC's concurrence in that decision based on their independent investigation. (FAR 194-195) Then, in a letter dated July 28, 2006, the EC sent SCA a list of individuals they determined did not qualify for enrollment in the Band (including many Plaintiffs) and stated that notices were sent to them via certified mail.[29] (FAR 212-214).

Therefore, the AR demonstrates that most Plaintiffs received notice in 2006 that the request to increase Ms. Contreras' blood degree was denied and that because of that decision, the EC no longer considered them to be eligible for membership. Accordingly, Defendants are entitled to summary judgment on at least those Plaintiffs' claims since their initial Complaint was filed over 10 years later.

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[28] Plaintiffs also conclusively state that "the violations alleged herein are continuing violations." Even if there was a nonfrivolous argument supporting that claim, the "continuing violations" doctrine "is not applicable in the context of an APA claim for judicial review." *Hall v. Reg'l Transp. Comm'n of S. Nev.*, 362 F. App'x 694, 695 (9th Cir. 2010) (unpublished); *Citizens Legal Enf't & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1230 (S.D. Cal. 2011), aff'd, 540 F. App'x 587 (9th Cir. 2013); *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1229 n.3 (D. Mont. 2004), aff'd, 469 F.3d 801 (9th Cir. 2006).

[29] The Ninth Circuit has concluded that a Bankruptcy court's record of a mailing can only be overcome by clear and convincing evidence that the mailing was not, in fact, accomplished, and that such evidence would have to be more than an affidavit saying the mailing was not received. *See In re Bucknum*, 951 F.2d 204, 207 (9th Cir. 1991). Similar reasoning should apply here.

Perhaps more importantly, however, all Plaintiffs that filed applications with the Band in or before September 2005 should have reasonably known that they had not had those applications approved well before September 28, 2010 (six years before the initial Complaint was filed). Under federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action. *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981) (emphasis added). Furthermore, "a plaintiff need not have actual knowledge if the circumstances would lead a reasonable person to investigate further." *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995); *cf. Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001) ("[P]laintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the [civil RICO] fraud."). To excuse Plaintiffs from taking minimal steps to inquire or otherwise investigate the status of their applications until almost a decade after submitting them "would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government."[30] *United States v. Kubrick*, 444 U.S. 111, 123 (1979). Here, all Plaintiffs had reason to know that the applications to join the Band they submitted in or before September 2005 had not been approved well before September 28, 2010. Therefore, the Court should grant Defendants summary judgment regarding all Plaintiffs' APA claims based on BIA's handling of their applications to join the Band.

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[30] For similar reasons, any argument that equitable tolling should be used to excuse Plaintiffs' violation of the statute of limitations would be meritless since equitable tolling requires a plaintiff to pursue his rights diligently (and that an extraordinary circumstance stood in his way), which as described above, Plaintiffs have not. *See Holland v. Florida*, 560 U.S. 631, 649 (2010); *Mishewal Wappo Tribe of Alexander Valley v. Jewell*, 84 F. Supp. 3d 930, 942 (N.D. Cal. 2015), aff'd sub nom. *Mishewal Wappo Tribe of Alexander Valley v. Zinke*, 688 F. App'x 480 (9th Cir. 2017).

D. The Court Should Grant Defendants Summary Judgment Regarding Plaintiffs' Claims Regarding BIA's Denial of the EC's Request to Increase Ms. Contreras' Blood Degree Since Plaintiffs Lack Standing and Because BIA's Actions Were Not Arbitrary, Capricious, or an Abuse of Discretion

Plaintiffs claim that BIA acted arbitrarily and capriciously by failing to provide them notice of their actions denying the Band's request to increase Ms. Contreras' blood degree. These claims are based on their conflating the Band's constitutional procedures for applying for membership with those for a request for a change to blood degree. Indeed, Plaintiffs were not even parties to the blood degree change request, so not only were they not entitled to notice, but they lack standing to challenge BIA's actions. Furthermore, BIA actions denying the EC's request to increase Ms. Contreras' blood degree, and notifying the EC of that decision, were not arbitrary and capricious. For any and all these reasons, Defendants are entitled to summary judgment.

First, Plaintiffs were not the parties that requested Ms. Contreras' blood degree change; the EC made the request. (FAR 91). So not only were Plaintiffs not entitled to notice of BIA's decision, but they lack standing to challenge that decision pursuant to the APA. A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982). Indeed, "even when [a] plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . [a] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499. There is a "limited exception[]" to this rule that allows "litigants to bring actions on behalf of third parties, provided three important criteria are satisfied[, including that] there must exist some hindrance to the third party's ability to protect his or her own interests." Here, however, there was no hinderance to the EC protecting its own interests. Therefore, Plaintiffs lack standing to challenge the BIA's actions regarding the EC's request to increase Ms. Contreras' blood degree, and Defendants are entitled to summary judgment on that basis. *Cf. United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008), aff'd,

564 U.S. 210 (2011), and abrogated on other grounds by *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (concluding son lacked standing to pursue rights belonging to his father since there was no obstacle preventing father from asserting his own rights); *Warth*, 422 U.S. at 499-500 (insufficient for third-party plaintiff to allege injury-in-fact to meet standing requirement); *Kyung Park v. Holder*, 572 F.3d 619, 625 (9th Cir. 2009) ("Claims premised on the government's treatment of a third-party must satisfy the stringent constitutional standing requirements.").

Even if Plaintiffs had standing, Defendants are still entitled to summary judgment because it was not arbitrary, capricious, or an abuse of discretion for BIA to notify the EC of their decision denying the request to increase Ms. Contreras' blood degree since the EC was the party who made the request. Plaintiffs played no role in this entire process. Plaintiffs' argument otherwise is due to their conflation of the Band's constitutional provisions relevant to their applications to join the Band (25 C.F.R. §§ 48.7-.11) with those relevant to the EC's request to increase Ms. Contreras' blood degree (25 C.F.R. § 48.14(c)).[31] *See, e.g.* ECF No. 105, 4AC, ¶¶ 38-39 (wrongly alleging former § 48.9 applies

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[31] In the absence of specific constitutional procedures to analyze requests to correct degrees of Indian blood of Band members, BIA uses the procedures indicated in its July 26, 1965, memorandum entitled Determining Degree of Indian Blood. (FAR 132-134, 162, 499, 563 *see also* 25 C.F.R. §§ 62.4(a)(5); 62.10 (appeal of adverse enrollment action, including request to change blood degree, is determined by AS-IA (or his delegate))) As described above, those procedures were followed here, including that PRO did not merely rely on the two documents provided by the Band to make its decision, but looked at additional records in BIA's files, including Ms. Contreras' 1928 application for the Original Roll of California Indians, her father's 1928 application, and Ms. Contreras' April 21, 1960, application to join the Band (FAR 105). Any argument that it was arbitrary and capricious for BIA not to engage in a two-year search through the National Archives in Riverside, San Francisco, Washington D.C. and St. Louis similarly to Ms. McIntosh, or to consider the "new evidence" she discussed in her July 2016 fax to SCA, before rendering a decision on the request to increase Ms. Contreras' blood degree would be without merit. *See Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005) ("[J]udicial review of an agency decision typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court."). Besides, even if the new evidence would have contradicted information in the AR, "in light of [the] 'highly deferential' standard of review for agency decisions," the existence of inconsistencies and inaccuracies does not render an agency decision arbitrary, capricious, or an abuse of discretion. *See Alto v. Jewell*, 661 F. App'x 502, 504 (9th Cir. 2016); *see also Alto v. Jewell*, No. 11-CV-2276-BAS BLM, 2015 WL 5734093, at *22 (S.D. Cal. Sept. 30, 2015), aff'd, 661 F. App'x 502 (9th Cir. 2016) (Court's role in this situation is . . . to examine whether there is a 'rational connection between the facts

to EC's request to increase Ms. Contreras' blood degree); ¶¶ 80-81 (wrongly alleging former §§ 48.8-.9 applies).[32] Simply stated, the request to increase Ms. Contreras' blood degree did not come from Plaintiffs, it came from the EC. Therefore, it was appropriate for the decision denying the request to be sent back to the EC and not to Plaintiffs.

Indeed, not only does the AR show SCA mailed the EC a copy of DOI's final decision denying their request on April 21, 2006, (FAR 189-191), but it also shows that the EC responded back on May 3, 2006, that it received the decision, and that based on its own recent review of the issue agreed that Ms. Contreras' blood degree should not be increased.[33] (FAR 194)

The AR further demonstrates that BIA repeatedly notified the EC of the steps taken to analyze its request to increase Ms. Contreras' blood degree in addition to notifying them of the final decision denying that request. (FAR 157 (notifying EC that SCA was forwarding request to PRO); FAR 158 (explaining the July 26, 1965, memorandum provides the procedures BIA used to analyze the request); FAR 161 (explaining that SCA's preliminary finding was the preponderance of evidence did not support increasing Ms. Contreras' blood degree, but that decision was at that time with PRO); FAR 184-186 (notifying EC of final

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found and the choice made' by the agency. . . . [A]s the Court has repeatedly stated, it 'must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'').

[32] This is made evident by reading §§ 48.8-.9, Section 48.8 indicates PRO "shall review the reports and recommendations of [EC] and shall determine the applicants who are eligible for enrollment in accordance with the provisions of § 48.5." Section 49.9 indicates, "If [PRO] determines an applicant is not eligible for enrollment in accordance with the provisions of § 48.5, he shall notify the applicant in writing of his determination and the reasons therefor." (FAR 29-30) Ms. Contreras was not an "applicant" for enrollment into the Band. Rather, she was a historical member of the Band, whose name appears on the Band's June 30, 1910, Census Roll that serves as the primary basis for determining Band membership. (FAR 27-28, 32)

[33] Even if Plaintiffs were entitled to notice of BIA's decision regarding the EC's request to increase Ms. Contreras' blood degree (which they were not), the evidence in the AR demonstrates that they (or at least many of them) likely did receive such notice. *See* FAR 195 (EC stated that once it had completed its review of the enrollment applications affected by the BIA's denial of the EC's request to increase Ms. Contreras' blood degree, it would prepare and mail to each applicant a letter informing them of the BIA's decision and the concurrence of the EC); FAR 204 (EC stated they sent notices via certified mail to 139 individuals, apparently including at least many of Plaintiffs).

decision denying request to increase blood degree)). That was the reasonable, appropriate way to handle the EC's request under all relevant rules and regulations. Therefore, the Court should grant Defendants' summary judgment over Plaintiff's unsupported claim that it was arbitrary, capricious, or an abuse of discretion for BIA not to also provide them notice of their denial of the EC's request.

E. The Court Should Grant Defendants Summary Judgment on Plaintiffs' Claims Regarding BIA's Return of Their Membership Applications to EC Since It Was Not Arbitrary, Capricious, or an Abuse of Discretion

The court should also grant Defendants summary judgment over Plaintiffs' claim that it was arbitrary, capricious, or an abuse of discretion to return their membership applications to the EC without adjudicating them. As SCA explained, it returned the applications because they would be affected by BIA's decision not to increase Ms. Contreras' blood degree. Importantly, Plaintiffs claimed to have the minimally sufficient blood of the Band – 1/8 – based solely on being great-grandchildren of Ms. Contreras, assuming Ms. Contreras was 4/4 blood degree.[34] (FAR 790-960, 993-1022; *see also* ECF 105, 4AC, ¶ 30). The same assumption was also the basis for the EC recommending that the applications be approved. (FAR 91 (EC stated that the requested change of Ms. Contreras' blood degree would affect the appropriate calculation of the blood degree of her descendants who recently filed applications for enrollment in the Band); 97-101 (EC indicating individuals "who are part of the correction of blood degree" for Ms. Contreras); *see also* FAR 92-96 (SCA received Ms. Contreras' descendants' enrollment applications and request to correct Ms. Contreras' blood degree at or near the same time)).

Therefore, it was appropriate for SCA to return Ms. Contreras' descendants' applications to the EC once it was determined that the basis of their recommendations concerning the applications was false and that it would be necessary and prudent for the EC

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[34] If Ms. Contreras was 4/4 blood of the Band, then her children would be at least 1/2, her grandchildren at least 1/4 and her great-grandchildren at least 1/8. Since BIA denied the request to increase Ms. Contreras' blood degree from 3/4 to 4/4, however, her children would only receive 3/8 blood of the Band from her, her grandchildren 3/16, and her great-grandchildren 3/32, which is less than 1/8.

to provide new recommendations based on the correct information regarding Ms. Contreras' blood degree. BIA's review of applications to enroll in the Band are supposed to be informed by the reports and recommendations of the EC.[35] (FAR 29 (former 25 C.F.R. §§ 48.7-.8)) Therefore, BIA was entitled to the EC's informed recommendations in light of the information that Ms. Contreras' degree of blood degree remained 3/4.[36] In other words, since the EC's initial support of Plaintiffs' applications was based on its incorrect presumption that Ms. Contreras' blood degree would be increased, BIA was entitled know if the EC would continue to support the applications once they knew that Ms. Contreras' blood degree was 3/4. The EC was certainly in a superior position to determine if any of the applicants had other lines of relative with blood of the Band that would allow them to at least reach the 1/8 threshold, or if their only relevant relative was Ms. Contreras, leaving them short of the minimum required for Band membership. Indeed, the Band requested the new EC have an opportunity to re-review the enrollment applications before a decision was made by BIA on the applications. (FAR 174, 709-710) Given the changed circumstances regarding Ms. Contreras' blood degree, it was not arbitrary or capricious for BIA to honor that request.[37] Furthermore, since BIA reasonably returned Plaintiffs' application to the EC

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[35] Indeed, SCA is required by the Band's Constitution to determine if applications to join the Band are "duly filed" and to refer such applications to the EC. (FAR 29, 25 C.F.R. § 48.7; FAR 40, Art. III, Sec. 2) Plaintiffs' applications were not "duly filed" since they were sent to BIA based on the EC's mistaken understanding regarding Ms. Contreras' blood degree. Therefore, it was appropriate for SCA to refer Plaintiffs' enrollment applications back to the EC to allow all parties a chance to appropriately analyze them with a correct understanding of the relevant facts.

[36] It was certainly conceivable that at least some of the applicants could have had additional relatives with blood of the Band that was not previously vigorously pursued by the EC, perhaps because it was easy to rely solely on descendance from Ms. Contreras if she were full blood. Indeed, Modesta Contreras (FAR 91) née Modesta Martinez (FAR 32) married Paul S. Contreras (FAR 790-960). The Vice-Chairman of the Band in 2005 was Rudy Contreras. (FAR 76, 78, 87, 90, 109) So, it was at least conceivable that Ms. Contreras' great-grandchildren could have received blood of the Band through Paul S. Contreras as well, to say nothing of each applicant's other six great-grandparents.

[37] BIA has repeatedly told Plaintiffs' attorneys that it will adjudicate their applications to join the Band if the EC provides BIA their applications along with a recommendation whether to approve or not as required by former 25 C.F.R. § 48.7. *See, e.g.,* FAR 989-991. Indeed, even if the Court were to order this case remanded to BIA to determine whether Plaintiffs should become Band members, without the EC following the Band's constitutional procedures regarding enrollment applications, it is not clear how BIA

without reaching a decision on the applicants' eligibility, no notice was due Plaintiffs under the Band's Constitution. (FAR 30 (25 C.F.R. § 48.9)

IV. Conclusion

For the reasons stated above, the Court should grant the Federal Defendants summary judgment on Plaintiffs' two remaining claims in their 4AC.

DATED: September 10, 2021

Respectfully submitted,

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would be able to legally do so.