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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Cindy Alegre, et. al. Plaintiffs, v. SALLY JEWELL, Secretary of The Department of Interior, United States of America, in her official Capacity, et. al., Defendants.	Case No. 16cv2442-AJB (MSB) PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT RULE 56, Fed. R. Civ. Pro. Judge: Hon. Anthony J. Battaglia Ct.Rm: 4A Date: 11/18/2021 Time: 2:00 P.M.

Plaintiffs, by and through their attorneys of record, Alexandra R. McIntosh and Carolyn Chapman, hereby respond to Defendants' Cross-Motion for Summary Judgment.

I

INTRODUCTION

A. PLAINTIFFS' STATEMENT OF RELEVANT FACTS.

At the April 10, 2005, meeting of the San Pasqual Band of Mission Indians [SPBMI] General Council [GC], the GC approved Motion #5 and ratified Resolution #SP041005-01 [Ex 1] (FAR 67-73; 520-526) which approved the addition of 211 new members to the Band's Roll. (Defendants' Cross-Motion for Summary Judgment [DC-MSJ] 2:4-9; 5:6-15). As required by 25 C.F.R. §48.7, on or about April 18, 2005, the Band's EC Vice-Chairman Rudy Contreras hand carried the Resolution along with Plaintiffs' approved applications for membership in the SPBMI (Band) to the SCA. On September 12, 2005, the Band's Business Committee [BC] concurred with the GC and EC. In this letter, the GC acknowledged that the Band's Constitution (FAR 40-49) delegated membership determinations to the Bureau of Indian Affairs [BIA] pursuant to Title 25, C.F.R. Part 48. In that letter, the GC indicated it supported the approval of Plaintiffs' applications for enrollment and asked that the applications be forwarded to the Pacific Regional Office [PRO]. (FAR 87). Once Plaintiffs' applications were received by the PRO, the BIA was required to follow 25 C.F.R. §§48.8, .9, .10, and §48.11. (FAR 26-33). [DC-SJM 16:2-16]. Defendants, in a manner that was arbitrary, capricious, and an abuse of discretion, illegally ignored these statutory requirements when, on April 11, 2006, Superintendent Fletcher sent the names of 157 applicants whose ancestor was Modesta Martinez Contreras (FAR 184) [Ex 2] and returned Plaintiffs' enrollment applications to the new illegally formed EC without adjudication. (FAR 179-186). In a letter dated September 22, 2005, the Band's BC requested the SCA to increase the blood degree of Modesta Martinez Contreras [Modesta] from ¾ to 4/4. (FAR 91). [DC-SJM 5:15-18]. This specific request triggered 25 C.F.R. §48.14(c) as stated in DC-SJM at 16:17-20; 17:1-7. Since §48.14 does not contain separate instructions regarding notice of any decisions made by the BIA, under Chevron and its prodigy, (*Chevron, U.S.A., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837; *Smith v. Berryhill*, 139 S. Ct. 1765 (2019) the notice requirement contained in §48.9 is applicable to §48.14(c) as are §§48.9-.11. (Applicant can appeal the decision to the Commissioner and Secretary). (FAR 30) [DC-MSJ 16:17-20]. On July 28, 2006, the EC sent two letters to SCA saying that it had determined 139 individuals were ineligible for

enrollment. [Ex 15] (FAR 204-214). In this July 28, 2006, the EC stated that they sent notices via certified mail with copies of 25 C.F.R. Part 62 concerning enrollment appeals to Plaintiffs. (FAR 204). Once the BIA received these two letters sent by the EC pursuant to §48.7, the BIA was required to send Plaintiffs notice pursuant to §48.8 and §48.9. The truth is that the BIA failed to give Plaintiffs the required statutory notice of their decision to deny the BC's request to increase Modesta's blood degree from ¾ to 4/4, and that the EC had determined that they were not qualified for federal recognition.

On March 16, 2006, SCA sent a letter to Ms. Hall informing her that the BIA could not give her any information regarding her application for enrollment. [EX 16] (FAR 174). On March 22, 2006, the California Indian Legal Services requested a copy of all of Plaintiffs' applications. [EX 17] (FAR 173). Pursuant to 25 C.F.R. Part 48, the BIA was required to do two separate acts: **1]** Adjudicate Plaintiffs' applications pursuant to §§48.5, .7, .8, .9, .10, and .11and/or 25 C.F.R. §62; and **2]** Determine Modesta's blood degree pursuant to §48.14 and §48.9-11. The BIA's failure to follow the statutory requirements of 25 C.F.R. Part 48, a statute that they themselves wrote was arbitrary, capricious, an abuse of discretion, and otherwise in violation of the law. [See Plaintiffs' SJM ECF 176-1. Pgs 1-4, incorporated herein].

B. <u>SUMMARY OF DEFENDANTS' ARGUMENT</u>

The Defendants argue that this Court should grant their cross-summary judgment motion [ECF 183] because: **1]** "Plaintiffs' APA claims violate the Statute of Limitations" [DC-MSJ:17]; **2]** Plaintiffs lack standing to challenge the BIA's denial of the EC's request to increase Ms. Contreras' blood degree [DC-MSJ 20]; **3]** BIA's actions were not arbitrary, capricious, or an abuse of discretion [DC-MSJ 20-22]; **4]** The BIA did not act in a manner that was arbitrary, capricious, or an abuse of discretion when the Agency returned Plaintiffs' membership applications to the EC without adjudicating them [DC-MSJ 23-25]; **5]** The BIA was not required to give Plaintiffs notice under the Band's Constitution (FAR 30) (25 C.F.R. §48.9) [DC-MSJ 25]; and **6]** There was not a quorum present at the

GC meeting on April 4, 2005. [DC-MSJ2:18-21;3:1-28; 4:1-28; 5:1-4). The Government basis its arguments on a Statement of Facts [DC-MSJ 2-11] that is inaccurate and misleading as discussed below. (The Declaration of Alexandra McIntosh addresses the questions raised in DC-SJM, footnotes 2 and 3 on Page 1 [Ex 3]).

II

PLAINTIFFS' RESPONSE TO THE BIA'S STATEMENT OF FACTS

The Defendants incorrectly stated the facts related to the April 10, 2005, GC's Meeting. [DC-MSJ 2:4-13]. Motion #5, that was unanimously passed on April 10, 2010, states: "To approve the names listed below and on Attachment A 'Membership Roll' for enrollment with the San Pasqual Band of Mission Indians as presented and read to the General Council and to adopt Resolution #SP041005-01.'" [Ex 1] (FAR70). The EC report by James Quisquis indicated that the tribe approved a budget for the EC to hire legal counsel to assist in the preparation of an enrollment ordinance, [Ex 4] (FAR 69), which is allowed pursuant to the Tribe's Constitution which incorporates 25 C.F.R. §48. (FAR 40-49; 26-33). The minutes clearly state that "the ambiguities in the enrollment ordinance compounded with the BIA's inconsistent enrollment practices . . . have led the enrollment committee to draw on one conclusion that '**a** tribe possess[es] the inherent and absolute undisputable right to determine its own membership. . . Martinez v. Santa Clara Pueblo.'" [*Id*.] Resolution NO. SP-041005-01 (FAR 502-521) [Ex 1] recognizes the BIA's present role in the enrollment process under 25 C.F.R. §48, and puts the BIA on notice that the Band intends to finally enact an enrollment ordinance. (Which still has not happened). The Resolution also approved the enrollment of 211 descendants of Modesta Contreras Martinez, who are the Plaintiffs in this case. Clearly, the defendants' use of the word "purportedly" at 2:13 is incorrect and should be stricken. [DC-MSJ 2:13]. [See Declaration of Alexandra McIntosh in response to Defendants' footnotes on pages 2, 3, and 9.].

In footnote 5 on page 2, the Defendants refer to FAR 509 – a telefax transmittal dated April 8, 2005, from Francis Muncy that lacks any indicia of foundation and should be stricken from the record. (Ex 5: FAR 509; 65-66). The attached Declaration of Rudy

Contreras [Ex 6], a percipient witness to the meeting held on April 8, 2005, denies that there was a discussion at the meeting concerning the EC's "view that they no longer need Bureau review or approval of its enrollment," and confirms that a quorum was present on April 10, 2005. The April 8, 2005, letter attached to the Fax cover page from the BIA-SCA (Muncy) stated: "in the absence of such a membership ordinance however, the Tribe's constitution delegates membership determinations to the Bureau, . . ." [Ex 5] (FAR 65-66).

A PLAINTIFFS' RESPONSE TO PAGE 3- 4, BIA'S STATEMENT OF FACTS.

Plaintiffs hereby respond to DC-MSJ at 3:1-8 as follows: **First**, the GC minutes dated April 4, 2005 clearly states at page 1 (FAR 67) "A quorum of the General Council members being present and the meeting having been duly called . . .with the transaction of business." The minutes were certified by Tilda Green (FAR 73). **Second**, in a letter to Rudy Contreras, from BIA-PRO dated September 1, 2005, the Regional Director stated: "The Bureau records indicate there were 180 registered voters at the last tribal election. A quorum for General Council requires at least 30% of registered voters, or a least 60. **It appears that there were 62 votes cast.**" (FAR 85) [Ex 7]. (The FAR does not contain the "sign in sheets" that would prove Plaintiffs' assertion that there was a quorum of registered voters present at the GC meeting on April 4, 2005. [See, Declaration of Rudy Contreras Ex 6]. The quorum issue is a non-issue and is only being used by the Defendants to "muddy the waters".

The SCA's letter to Rudy Contreras dated May 6, 2005 (FAR 76) [Ex 8)] erroneously quotes Section 5 of the Tribe's Constitution: "Quorum requires a quorum of thirty (3) percent of the registered voters for general council meetings **and** three (3) members of the business committee. This is an absolutely incorrect statement. The SP Constitution clearly states on Page 3: "**Sec. 3. Quorum."** "A quorum for **general council** meetings shall consist of thirty (30) percent of the registered voters, . . ." The next paragraph states: "Three (3) members of the business committee shall constitute a quorum." There is no ";" after the word quorum and there is no "and" between the last word "quorum" and the first word "Three". The Band's Constitution does **not** require 3 members of the BC to be present in

order to have a quorum for GC meetings. [Ex 9]. As recognized by the BIA in their September 1, 2005, letter, a quorum was present at the April 10, 2005 GC meeting. (FAR 40-49) [Ex 7].

Footnote 8 [DC-SJM 3:25-28] and Page 16 make it very clear that the BIA understands their responsibilities under the Band's constitution (FAR 40-49) which incorporates Title 25 C.F.R. Part 48, Sections §§48.1-48.15 (FAR 26-33) regarding Band membership. The BIA's acts ignored the statutory requirements outlined in §§48.7, .8, .9, .10, and §48.14. (FAR 26-33). Defendants correctly laid out these statutory procedures in their SJM at 16:2-20 and 17:1-7.

B PLAINTIFFS' RESPONSE TO BIA'S PAGE 4:11-28 AND PAGE 5:1-4.

Defendants seem to confuse a statement of facts with argument. Lines 11-28 on page 4 and lines 1-4 on page 5 are nothing but argument. As stated in the attached declaration of Rudy Contreras, [Ex 6], there was no present intention on the part of the EC or BC to exercise its sovereign right to membership and not require the BIA assistance. These lines should be stricken from the Defendants' statement of facts because they are argument and not facts: They are opinion, not facts. The EC and BC expected the BIA to adjudicate Plaintiffs' applications and Modesta's blood degree or they would not have submitted their applications and letters to the Director through the local Field Representative pursuant to §48.7. The EC and BC expected that Plaintiffs' applications and Modesta's blood increase would be reviewed by the Director pursuant to §48.8 and §48.14 who was required to send the applications for review by the Commissioner and then for final determination by the Secretary. Clearly, this process was not followed in this case. As shown in this response, the April 10, 2005, GC meeting was valid and the Band did not attempt to remove the BIA role in membership determinations. The Band was only taking the steps necessary to create their own enrollment ordinance as authorized by their Constitution. In response to the issue of an appeal to the IBIA of the PRO's decision, see declarations of Rudy Contreras [Ex 6] and Alexandra McIntosh. [Ex 10].

C PLAINTIFFS' RESPONSE TO BIA'S STATEMENT OF FACTS B.

Plaintiffs agree with the facts as stated by the Defendants on Page 5, Lines 6-25. Plaintiffs' response to footnotes 1, 2, and 9 is contained in the declaration of Alexandra McIntosh. [Ex 3]. Plaintiffs move to strike lines 12 through 14 on several basis: **First**, there is no foundation for the "anonymous letter"; **Second**, it was Plaintiffs' understanding that this "anonymous letter" was not used by SCA to make its decision; **Third**, if it was used, it was not attached to the final decision dated February 3, 2006 [Ex 11] (FAR 161, 162-164); **Fourth**, see Declaration of Rudy Contreras in rebuttal to this "anonymous letter". [Ex 12:7-10] (FAR 106, 131-156). See, Plaintiffs' SJM ECF 176-1 at VII, Pgs 9-14. If the PRO relied on the same documents that the SCA relied on, (FAR 162,-163, 177-178), then both the SCA's and the PRO's decision are fatally flawed because of the reliance on unsubstantiated "anonymous" and false information stating that Jose Juan Martinez was not Indian. [DC-SJM 7:10] [See, Plaintiffs' MSJ ECF 176 at VIII: 14-18 - fully addresses the genealogy of Jose Juan Martinez and Modesta Martinez Contreras, his daughter].

On March 6, 2006, for some unexplainable reason California Legal Services requested the BIA, through Fletcher, return Plaintiffs' applications to them. [Ex 13] (FAR 568). On April 24, 2006, BIA-SCA sent a letter to Lawson reminding Lawson that the BIA has "a trust responsibility to advise the tribe when its actions are not in compliance with its own governing documents". [Ex 14] (ECF 74-75).This letter reminded Lawson that he and his (illegal EC) council had been previously admonished on December 2, 2005, that any tribal actions approved by mail ballot vote requiring Bureau approval would not be accepted because the mail in ballot process is not in the tribe's Constitution. "The General Council meeting on January 22, 2006, held off reservation, was the Band's attempt to validate those actions previously adopted by mail ballot vote." The AR is devoid of any more information regarding the illegal election of the EC between January and March of 2006, which is the time frame when the validly elected EC had enrolled Plaintiffs who are descendants of Modesta Martinez Contreras. On April 11, 2006, Plaintiffs' applications were illegally returned to the illegally formed EC who kept them. [Ex 2] (FAR 179-186)

[DC-SJM 7:19-21]. Regarding the "new EC members" that had been illegally elected, see Plaintiffs' SJM ECF 176: #2EXx 41, 45 (ECF 176-7); #3EX 76, 78 (ECF 176-16).

D PLAINTIFFS' RESPONSE TO BIA'S PAGE 8-10, DC-SJM.

In response to DC-SJM 8:3-26, the new EC members relied on a paper written by Phelps, who is not a genealogist. (See Ex 18, Declaration of Alexandra McIntosh in response to Phelps' opinion including subsequent emails wherein Phelps questions his own paper and conclusions). Plaintiffs were never given an opportunity to rebut Phelps opinion. On Page 8 Line 9, the Defendants stated that the EC said that once it had completed its review of the enrollment applications affected by the BIA's denial of the BC request to increase Modesta Martinez Contreras' blood degree it would mail a letter to each applicant informing them of the BIA's decision. Plaintiffs never received this letter. [Ex 18] (FAR 251-305) Furthermore, §48.9 clearly states that it is the BIA's duty and statutory responsibility to inform the applicants of its decisions. (See, DC-SJM 9:4-5). The fact is that once the BIA returned Plaintiffs' unadjudicated applications to the Band, the Band never responded to the BIA as required by §48.7 and the BIA failed to follow §48.9.

III

PLAINTIFFS RESPONSE TO DEFENDANTS' LEGAL ARGUMENTS

A THE APA ALLOWS PLAINTIFFS TO CHALLENGE THE BIA'S ACTIONS.

The Preamble to the Band's tribal Constitution [Ex 9] (FAR 40) states that the Constitution was established under the provisions of Section 16 of the Indian Reorganization Act [IRA] of June 18, 1934 (48 Stat. 984) as amended by the Act of June 15, 1935 (49 Stat. 378). (codified as amended at 25 U.S.C. §§461-479). See, *Aguayo v. Jewell*, 827 F.3d 1213, 1218 (9th Cir. 2016). (Disenrollment case). IRA gives procedural protections for the adoption of governing documents. (*Id*., at 1225). Authority for the Band to create its own Constitution came from IRA, 25 U.S.C. §2. ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior . . . have the management of all Indian affairs and of all matters arising out of Indian relations."). "In *Alto* the BIA

proceeded, as it did here (i.e. in *Aguayo*), under its 'official capacity as a manager of Indian affairs under 25 U.S.C. §2.'" (*Id.*, citing *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013). Enrollment as a member of the SPBMI is controlled by Article III §1 and §2 of the Band's Constitution: "**Section 1**. "Membership shall consist 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." **Section 2.** "All membership in the band shall be approved according to the Code of Federal Regulations Title 25, Part 48.1 through 48.15 (FAR 26-33) and an enrollment ordinance which shall be approved by the Secretary of Interior." (*Id.*) To this date, the Band has not written an enrollment ordinance. Therefore, the membership process must conform with administrative proceedings pursuant to Title 25 C.F.R. §§48.1-48.15. The decision making process in this case by the BIA was **mandatory** under 25 CFR §48. Under the APA the court will reverse an agency's action if it is, as in this case, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. §706(2)(A), or if its factual findings are 'unsupported by substantial evidence,'" *Mester Mfg. Co. v. INS*, 879 F.2d 561, 565 (9th Cir. 1989).

When a suit, as in this case, is not a direct challenge to a tribe's enrollment decision, but is instead a challenge to agency action under the APA, 5 U.S.C. §§500-596, federal jurisdiction is proper to the extent that the plaintiff seeks review of the agency's decisions "under the APA's arbitrary and capricious standard." *Aguayo v. Jewell,* 827 F.3d 1213, 1222, 122 (99th Cir. 2016) citing *Alto v. Black*, 738 F.3d 1111, 1123 (9th Cir. 2013); *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9th Cir. 2013) (propriety of agency action is a federal question over which we have jurisdiction, even when the agency applied tribal law in the context of a membership dispute). *Alto*, 738 F.3d at 1123-25. "Under the APA we have jurisdiction to review more than just affirmative agency action. 'Agency action' in the statute 'includes the whole or part of an agency rule, order license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" 5 U.S.C. §551(13); 5 U.S.C. §701(b)(2) (referring to section 551 for the definition of 'agency action'). The BIA's . . . and its 'failure to act' on their behalf, is a 'final agency action' subject to judicial

review.'" *Aguayo v. Jewell* at 1223. (See, *Love Korean Church v. Chertoff*, 549 F.3d 749, 754 (9th Cir. 2009); 5 U.S.C. §§706(2)(A), (E). DC-SJM 13:9-13. This Court has jurisdiction to review Defendants' "failure to act" (i.e. failure to adjudicate Plaintiffs' enrollment applications) and denial of EC's request to increase Modesta's blood degree.

1. **The Administrative Record.**

Defendants argue [Pg 13:4-9] that the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing. Plaintiffs have already challenged the Administrative Record in this case. See, ECF 136-Motion to Complete the AR; Denied ECF 161; ECF 140-Motion to Supplement AR; Granted and denied in part ECF 161. Plaintiffs renew these challenges to the FAR. As stated in Plaintiffs' SJM it is Plaintiffs' legal opinion that since they have the burden of proof to show that the BIA's actions were arbitrary, capricious, an abuse of discretion, and/or not within the law, Plaintiffs are not confined to the Government's FAR to meet this burden. It is also Plaintiffs' legal conclusion that the FAR is fatally flawed because Exhibits 1-11 are missing from their February 3, 2006, "decision" concerning Modesta's blood degree increase. [Ex 11] (FAR 171. 162-164). Not only are these exhibits missing from the Agency's February 3, 2006, decision, but the FAR is also missing: 1) The letter dated July 28, 2005 to Fletcher SCA from the Martinez/Contreras Families with historical documents; 2) The June 30, 1920, Census of the SPBMI Mesa Grande School Agency. Plaintiffs can not adequately respond to a final decision that noes not contain the supporting documents upon which this decision was made. For this reason, this Court should DENY DC-SJM for failure to support their decision with relevant information, reverse the Agency's decisions, and remand to the BIA so that they can correct their mistakes.

2. **Standard of Review in District Court.**

The standard of review stated in *Sackett v. U.S. Env't Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021) 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." The *Sackett* standard is appropriate here and when applied to the facts in this

case, it is clear that the BIA failed to consider relevant factors as detailed in Plaintiffs' Summary Judgment Motion [ECF 176] , included herein as if fully set forward. The BIA's failure to consider relevant factors and information was "a clear error of judgment." The Agency has no excuse for ignoring the favorable information related to the increase in Modesta's blood degree and for returning Plaintiffs' unadjudicated applications to the new illegally formed EC. The BIA has offered no reason why it ignored the plethora of favorable evidence that has been presented by Plaintiffs in their SJM [ECF 176]. It is obvious that the BIA "hand picked" the evidence that was not favorable to Modesta and ignored the favorable evidence. Clearly, the BIA did not consider all of the relevant factors.

Defendants cite *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 790 (9th Cir. 2012) for the proposition that a court must "uphold a decision of less than ideal clarity if the agency's path may be reasonably disconcerted". The Agency's February 3, 2006, [Ex 11] (FAR 161, 162-164) written explanation for its decision fails to disclose all of the eleven missing documents that they apparently used to form their decision to deny the EC's request to increase Modesta's blood degree. Therefore, the Agency's written decision fails to satisfy legal standards and this Court must follow Defendant's footnote number 19 on page 14. "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" as stated in DV-SJM. *Palisades Gen. Hosp. Inc.*, 426 F.3d 400, 403 (D.C.Cir. 2005). In the case at bar, the Agency made a clear error law when it violated the mandates of the SP Constitution and 25 C.F.R. §§48.8, .9, .10; when they failed to adjudicate Plaintiffs' enrollment applications; when they failed to give notice to Plaintiffs of their decision dated February 3, 2006; and the return of Plaintiffs' unadjudicated applications to the new illegally formed EC. Defendants argue that because they are a governmental agency they are entitled to "a presumption of honesty and integrity". *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). As shown in Plaintiffs' SJM [ECF 176] at IX: 19-25 and #3Ex, the BIA has a one hundred year history of dishonesty and lack of integrity when dealing with the true San Pasqual blood Indians.

B PLAINTIFFS' RESPONSE TO BIA'S ARGUMENT "B" ON PAGE 15.

In Paragraph 1, page 15, lines 3-11, the Defendants make a clearly misleading statement of facts and 25 C.F.R.§48. The paragraph beginning with "On February 25, 1960, and ending with January 1, 1959," is accurately stated. But, the words "or descendants of such Indians possessing at least 1/8 **Indian** Blood of the Band . . ." are inaccurate and misleading. The word "Band" is defined in 48.1(e) as meaning "the San Pasqual Band of Mission Indians" not just any Indian blood. This issue has been fully argued and briefed in Plaintiffs SJM [ECF 176] at IX(B)(4):23-24 and cited #2Exhibits and #3 Exhibits, incorporated herein as if fully set forth.

It is clear from the DC-SJM that they are aware of the requirements of 25 C.F.R. Part 48. It is also clear from the facts as stated by the Defendants themselves and from their Final AR that they failed to follow the following sections of 25 C.F.R.: **(1)** §§48.5 and 48.8: "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 and §48.8." Clearly, the "Director' i.e., PRO failed to review Plaintiffs applications before returning them to the 2006 new illegally formed EC; **(2)** §48.9: ". . . if PRO determines an applicant is not eligible for membership, PRO notifies the applicant of such. Plaintiffs did not receive notification from the PRO of her decision regarding their applications and the issue of Modesta's blood degree; **(3)** §§48.9-.11:"The applicant can appeal the decision to the Commissioner and Secretary". Because Plaintiffs did not receive the required statutory notice from the PRO, they were unable to pursue an appeal and complete their record with additional evidence. (See, FAR 28, 29, 30).

Defendants recognize that corrections to the degree of Indian blood of Band members is to be made pursuant to 48.14 (c) which states: "Corrections to the roll of incorrect dates of birth, degrees of Indian blood, ... may be made by the Director if such **corrections are supported by evidence satisfactory to him.**" (DC-SJM 16:17-20; 17:1-7)[Emphasis added]. Requests for blood change should go through SCA, PRO, and the

Commissioner. Plaintiffs challenge this portion of the statute as being unconstitutionally vague without any standards and subject to the whim of any present Director.

IV

PLAINTIFFS RESPONSE TO BIA'S STATUTE OF LIMITATIONS ARGUMENT.

Although the APA itself contains no specific statute of limitations, a general six-year civil action statute of limitation applies to challenges under the APA. [28 U.S.C. §2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the **right of action first accrues**.")] [Emphasis added]; *Turtle Island Restoration Network v. United State Department of Commerce,* 438 F.3d 937 (2006) citing *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (holding that §2401(a) applies to the APA. The APA creates a presumption favoring judicial review of administrative action." *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). Chapter 7 of the APA, provides for judicial review of "**final agency action** for which there is no other adequate remedy in a court." 5 U.S.C. §704. *Sackett Et Vire v. Environmental Protection Agency, et al.*, 566 U.S. 120 (2012). The APA defines agency action as including even a "failure to act." §551(13), §701(b)(2). Defendants' actions and inactions as described in this Response and in Plaintiffs SJM [ECF 176] have deprived Plaintiffs of "life, liberty, or property, without due process of law in violation of the Fifth Amendment, 25 C.F.R. §48, the Band's Constitution, and the APA. The questions this Court needs to answer are: **1]** When did Plaintiffs receive notice of the Agency's action denying Modesta's blood degree increase? and **2]** When did Plaintiffs have notice that the BIA returned their unadjudicated applications to the new illegally formed EC? Through the BIA's February 3, 2006 Decision, [Ex 11] (FAR 161, 162-164) the BIA "determined' "rights or obligations" regarding Plaintiffs applications and Modesta's blood degree. (*Id.*). The APA's judicial review provision also requires that the person seeking APA review of final agency action have "no other adequate remedy in a court," 5 U.S.C. §704. (*Sackett,*

supra). Plaintiffs have no other adequate remedy in a court of law. The APA provides for judicial review of all final agency actions. *(Id.*)

On July 28, 2006, the EC wrote two letters to SCA saying that they have sent notices to "a list of individuals" via certified mail with copies of 25 C.F.R. Part 62. There are no records of certified mailed letters being sent to Plaintiffs in the AR. There, the Defendants have not carried their burden to show that this mailing actually occurred. *Assuming arguendo*, the Defendants can prove that the EC did send the certified letters, and the letters were received by Plaintiffs, the notice required pursuant to §48.8, §48.9 was supposed to be sent by the BIA, not the EC. In the case at bar, the SOL could not commence before Plaintiffs received actual notice and before Plaintiffs exhausted their administrative remedies. *Assuming arguendo*, this Court finds that Plaintiffs filed their complaint beyond the six year statute of limitations, this Court should apply the doctrine of equitable tolling. The FAR shows that the Plaintiffs did not get any notice from BIA (or even the EC) until Attorney McIntosh received responses from the BIA to her FIOA requests on October 1, 2014, and May 27, 2015, in order to ascertain the status of Plaintiffs' applications. It was only through their FOIA requests that Plaintiffs discovered Dutschke's negative determination and the April 7, 2006, letter. [Pl 4AC Par. 44 at 14:1-4].

In January and April of 2015, Plaintiffs filed their IBIA appeal pursuant to 25 C.F.R. 2.8 with Dutschke. (FAR 311). On August 27, 2015, McIntosh withdrew the appeal because the BIA had not issued a final decision. (FAR 763-768) [See, DC-SJM 10, ftnts 13, 14, 15]. On July 25, 2015, Moore sent a letter to Attorney McIntosh stating that the April 7, 2006, letter was "final" for the Department. [Pl 4AC Par 45; at 14:10-14]. In an attempt to settle this matter Plaintiffs and their attorney met with BIA members and were told to resubmit their §2.8 appeal and documents to Riverside. Plaintiffs supplied the documents as requested on May 23, 2016. (FAR 780 – 960)After waiting four months for a response from the BIA and having received no response, Plaintiffs filed their complaint in this matter on September 28, 2016 [ECF 1].

In *Irwin v. Veterans Administration*, 498 U.S. 89 (1990) the Supreme Court, via Justice Rehnquist, held "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." The Court stated: "Once Congress has made such a waiver (of sovereign immunity), we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver (of sovereign immunity). [Citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969))]. "We have allowed equitable tolling in situations where the claimant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. (*See Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) (adversary's misrepresentation caused plaintiff to let filing period lapse); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). (Same). As stated in the Declaration of Rudy Contreras [Ex 6] the non-San Pasqual Trask descendants mandated all Tribal Government meetings be closed to all people, except Federally Recognized Tribal members who appear on tribal rolls. This mandate locked Plaintiffs out of the ability to inquire about their applications. To make matters worse, the BIA would not meet with the San Pasqual descendants who are not Federally Recognized Tribal members. [Ex6: Contreras 5-6]. The Court tolled the statute of limitations while Plaintiffs were exhausting administrative remedies in *Brown v. Morgan*, 209 F.3d 595 (6th Cir. 2000) and *Harris v. Heggmann*, 198 F.3d 153 (5th Cir. 1999).

Under §48.7 the EC had 30 days to send Plaintiffs' applications to the BIA. When that didn't happen the BIA, as the final arbiter of enrollment actions, had a duty pursuant to the Tribe's Constitution to inquire what was happening. And, if no answer was received from the EC, then the BIA was required to give Plaintiffs notice that their applications were deemed denied by the EC. Furthermore, the BIA was required to give notice under §48.8, §48.9 regarding the denial of Plaintiffs' applications, and/or 25 CFR §62 regarding the denial of Modesta's blood degree increase. This did not happen. In the case at bar there are two issues regarding the failure of the BIA to give notice to Plaintiffs. The first issue

concerns Plaintiffs' applications that were hand carried by EC Chairman Rudy Contreras to the SCA on April 18, 2005 (FAR 76) [DC-SJM 2:18-21] to be approved for federal recognition. That was the last Plaintiffs heard about their applications. Instead of adjudicating Plaintiffs' applications the BIA returned their applications to the new illegally formed EC. The Second issue concerns the denial of the BC's request to increase Modesta's blood degree from ¾ to 4/4. On May 3, 2006, the EC told SCA it received the April 7, 2006, decision denying the request to increase the blood degree of Modesta and that it would do its own independent review of Plaintiffs' applications (FAR194) and that it would prepare and mail each applicant a letter informing them of the BIA's decision. (FAR 195). On July 28, 2006, the EC wrote SCA saying that it had determined that 139 listed individuals were ineligible for enrollment. 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) [DC-SJM 9:4-6].

The issue of the SOL turns on the issue of Notice. 25 C.F.R. §48 is the enrollment statute wherein §48.8 and §48.9 provide for mandatory notice and 25 C.F.R. §62 provides "procedures for the filing and processing of appeals from adverse enrollment actions by Bureau officials". Nowhere in Defendants' SJM did they assert that the BIA provided Plaintiffs with notice under either 25 C.F.R. §48 or 25 C.F.R. §62. It appears that the newly elected illegal enrollment committee said that they were going to give notice and provide Plaintiffs with copies of 25 CFR Part 62. But, as evidenced by the lack of the return notices for the (alleged) certified mailing to approximately 139 individuals in the FAR, the Defendants cannot prove that Plaintiffs received any notice about Modesta's blood degree or their applications. 25 CFR §62.6 requires the appellant to provide the date of delivery of notification of an adverse enrollment action by showing "[t]he date of delivery indicated on the return receipt when notice . . . has been sent by certified mail, return receipt requested". [Ex 19]. There are no certified mail return receipts in the Agency's FAR. In addition, Plaintiffs signed a declaration under penalty of perjury that they never received notice regarding either issue. [Ex 22, Declaration of Plaintiffs ECF 81-1].

Because the BIA has a continuing trust relationship with SPBMI this Court must examine the applicable statute of limitations guidelines for trust actions. The "clear repudiation" standard of trust law is properly applied in the case at bar in determining when a claim arises (i.e. when the BIA expressed a clear repudiation of Plaintiffs applications and the request to increase Modesta's blood degree). At this point, the statute of limitations begins to run. *Pettaway v. Teachers Insurance & Annuity Ass'n of America*, 644 F.3d 427 (D.C. Cir. 2011). The District Court held: "Although applied sparingly, the doctrine of equitable tolling is available to a court to soften the harsh result that would obtain from the strict application of a statute of limitations." *United States v. BCCI Holdings (Luxembourg), S.A.*, 916 F. Supp. 1276, 1284 (D.C.Cir. 1996) citing *Irwin v. Dep't Veterans Affairs*, 498 U.S. 89, 96 (1990). This is one of those rare cases when application of the doctrine is warranted.

Although Defendants argue that that Plaintiffs are barred by the Statute of Limitations, they failed to state when Plaintiffs filed their Complaint in this case and when Plaintiffs received actual notice. The following time line is relevant to the issue of when "final notice" was given to Plaintiffs:

1] 4/10/2005 – EC unanimously voted Plaintiffs qualified for enrollment (FAR 67-73);

2] 4/10/2005 - CG passed Resolution SP041005-01 enrolling Plaintiffs (FAR 67-73);

3] 4/18/2005 – Contreras hand carried Resolution and applications to SCA; (FAR 74);

4] 9/12/2005 - BC Concurred with GC and EC and sent findings to SCA; (FAR 87);

5] 9/22/2005 – BC sent separate letter asking BIA increase Modesta's blood degree pursuant to 25 CFR §48.14 (FAR 91);

6] 9/27/2005 – Superintendent acknowledged receiving Plaintiffs' enrollment Applications (FAR 92-96);

7] 9/29/2005 – EC wrote SCA listing 170 individuals whose applications were part of the request for Modesta's blood degree correction (FAR 97-101);

8] 12/8/2005 – SCA sends letter to PRO (Dutschke) stating he had forwarded BC's

request to increase Modesta's blood degree and stated "preponderance of evidence does not sufficiently demonstrate Modesta is full blood." (FAR 105-156);

9] 12/8/2005 – SCA sent letter to Chairman Quisquis stating BC recommendation to correct Modesta's blood degree was forwarded to Dutschke PRO (FAR 157);

10] 2/3/2006 - Memo signed by F. Muncy and initialed by Dutschke denying BC's request to increase Modesta's blood degree (FAR 161-164);

11] 3/2006 – Band's chair told SCA not to send any correspondence to EC since new members of the EC had been elected (FAR 165-172);

12] 4/7/2006 – Dutschke concurred with Fletcher's SCA 12/8/2005 letter. [This letter was eventually identified on 7/25/2015 as BIA's final decision] (FAR 177-178);

13] 4/11/2006 – Superintendent sent Plaintiffs applications back to Band's new illegal EC (FAR 179-186);

14] 4/21/2006 – SCA letter to Band informing them of his intent to deny their request to increase Modesta's blood degree (FAR 189-191);

15] 5/3/2006 – EC received 4/7/2006 decision. Said it was reviewing applications affected by blood degree decision (FAR 194-203);

16] 7/28/2006 – EC wrote SCA indicating it determined that 139 applicants did not qualify for membership. EC stated they had sent notices via certified mail with copies of 25 CFR Part 62 concerning enrollment appeals (FAR 204-214); [FAR does not have the returned receipts]

17] 2009 – Band imposed an enrollment moratorium that is still in effect as of 10/1/2021; [See, Declaration of Huumaay Quisquis dated 1/13/2015; #3Ex 90:609-610; 6/23/2011 Letter from Band explaining moratorium #3Ex 90:611].

18] 6/24/2014 – Plaintiffs sent letters to PRO informing her that they had not received any notice of the BIA's actions from anyone; (FAR 251-305)

19] 1/5/2015 – McIntosh sent PRO notice of appeal under 25 CFR §2; (FAR 311-376)

20] 7/24/2015 – Moore sent a letter to Plaintiffs attorney McIntosh stating that the April 7,2006, decision was final for the BIA. This letter exhausted Plaintiffs' administrative remedies; (FAR 709-710).

21] 5/23/2016 – Attorney McIntosh sent SCA 87 enrollment applications 3/7/2017 – SCA forwarded the applications to EC. Band has never responded. [See DC-SJM (FAR 780-960).

22] Plaintiffs' filed their Complaint [ECF 1] on September 28, 2016 fourteen months after being notified on July 24, 2015, that the BIA's decision was "final".

As the above list shows, there is no indication that the BIA directly contacted Plaintiffs.

On page 18, lines 7-15 the Defendants argue "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 . . ." [FAR 194-195]. In two letters dated July 28, 2006, [Ex 15] (FAR 212-214) the EC informed the BIA that they had denied Plaintiffs' membership applications and they stated that they had sent "notices via certified mail with copies of 25 C.F.R. Part 62 concerning enrollment appeals." (DC-SJM 9:3-5). This argument totally ignores the fact that the EC failed to follow 25 C.F.R. §48.7 which states "The applications whether approved or disapproved shall be filed with the Director within thirty (30) days from receipt of the applications by the Committee"; §48.8 which addresses the determination of eligibility and enrollment by Director; And §48.9 which states "If the Director determines that 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 therefore. Such applicant shall then have thirty (30) days from the date of the mailing of the notice to him to file with the Director an appeal . . . with any supporting evidence not previously furnished." The bottom line is that the BIA totally ignored the mandatory requirements of 25 C.F.R. §48.8, and §48.9. Therefore, the SOL was tolled during the period of time when the Defendants failed to, or refused to, comport with the requirements of 25 C.F.R. §48. Furthermore, the BIA is the Agency that is required to give Plaintiffs notice of the decisions that were made, not the EC.

Title 25, CFR Part 62 is very specific about the appeal requirements under this section. 62.6(a) Except . . . a notification of an adverse enrollment action will be mailed to the address of record . . . and will be considered to have been made and computation of the appeal period shall begin on: (1) The date of delivery indicated on the return receipt when notice of the adverse enrollment action has been sent by certified mail return receipt requested; . . . (c) computation of 30 or 60 day appeal period. Two points need to be made here: 1] *Assuming arguendo*, the EC really did send certified mail return receipt requested to almost 200 Plaintiffs, certainly the AR would contain at least one of the return receipts; 2] It is very unlikely that if all of the approximately 178 Plaintiffs had received notification

vi certified mail, with appeal instructions, that not one Plaintiff filed an appeal. The bottom line is that the EC did not send notification that on or about July 28, 2006, they had determined Plaintiffs were ineligible for enrollment.

The rest of the Defendants' argument regarding the SOL on pages 18 and 19 consists of simply conjecture and opinion. In *In re Bucknum*, 951 F.2d 204, 207 (9th Cir. 1991), the case cited in Defendants' footnote 29, "A certificate of mailing was present in the Bucknum bankruptcy file. (In re Bucknum, 105 B.R. 25, 27 (Bankr. 9th Cir. 1989). The BAP held that this created a presumption of receipt of notice. . ." There is no evidence in the Agency's FAR of a certificate of mailing; Nor has the Agency [BIA] ever produced the receipts that should have accompanied any certified mailings. Clearly, Plaintiffs did not have actual notice of the BIA's decisions until their discovery of the Director's February 3, 2006 Memorandum that was produced as a result of Attorney McIntosh's FOIA request on October 14, 2014. (See, FAR 251-305, Plaintiffs letters to PRO stating they never received notice from EC or BIA). Also, Plaintiffs' Administrative Remedies were not exhausted until July 25, 2015. Therefore, the Statute of Limitations did not begin to run until July 25, 2015. *Assuming arguendo,* this Court finds that the SOL had run by the time Plaintiffs filed their Complaint on September 28, 2016, the Doctrine of Equitable Tolling is appropriate in this case. "Agency interpretations of statutes of limitations . . . are . . . poor candidates for deference. In general statutes of limitations are not the sort of technical provisions requiring or even benefiting from an agency's special expertise. Rather, much like many jurisdictional provisions, these are texts with which courts are intimately familiar, as we interpret and apply them every day. *AKM LLC v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012).

V

PLAINTIFFS HAVE STANDING TO BRING THIS INSTANT SUIT

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) Justice Scalia stated: "As the parties invoking federal jurisdiction, respondents bear the burden of showing standing by establishing, inter alia, that they have suffered an injury in fact, i.e. a concrete and

particularized, actual or imminent invasion of a legally protected interest. To survive a summary judgment motion, they must set forth by affidavit or other evidence specific facts to support their claim." The *Lujan* Court created a three part test to determine whether a party has standing to sue: 1) The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; 2) There must be a causal connection between the injury an the conduct brought before the court; 3) It must be likely, rather than speculative, that a favorable decision by the court will redress the injury. (*Id.*) *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993); *Flask v. Cohen*, 392 U.S. 83, 99 (1968). Liberalization of standing in the administrative law field has been notable. *Ass'n of Data Processing Service Org. v. Camp,* 397 U.S. 150, 151-152 (1970) citing *Flask v. Cohen*, 392 U.S. 83, 101 (1968). A "Legal Right" could be created by the Constitution or Statute. *Tennessee Electric Power Co. v. McGrath*, 341 U.S. 123 (1951). The statutory right most relied on is the judicial review section of the APA, which provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *cert. dismissed as moot* 320 U.S. 707 (1943); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1991).

The injury needs to be "one of property, one arising out of contract, one protected against tortuous invasion, or one founded in a statute which confers a privilege." Courts have found standing in cases which were grounded in injuries far removed from property rights. Parties have standing when they suffered "injury in fact" to some interest, economic or otherwise. Deprivation of a procedural right with some concrete interest that is affected by the deprivation – a procedural right – is sufficient to create Article III standing. Courts now insist that the plaintiff show "but for" the action, she would not have been injured. Plaintiff's interest, to which she asserts an injury must come within the "zone of interest"

arguably protected by the constitutional provision or statute in question. Many cases allow standing to third parties who demonstrate a requisite degree of injury to themselves and if under the circumstances the injured parties whom they seek to represent would likely not be able to assert their rights. *Valley Forge Coll. V. Americans United*, 454 U.S. 464, 471-476 (1982).

The FAR in this case clearly shows the relationship between Plaintiffs and their deceased ancestor Modesta Martinez Contreras. On September 29, 2005, (FAR 97-101) the EC wrote SCA asking for a list of the 170 applications whose applications were a part of the request for Modesta's blood correction. The two are inseparable: Plaintiffs and the blood they inherited from their ancestors. As such they clearly have standing to bring their case in this Court. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flask v. Cohen*, 392 U.S. 83, 99 (1968). "The gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.; Alabama Power Co v. Ickes,* 302 U.S. 464. 479 (1938); *Ass'n of Data Processing Service Org. v. Camp*, 397 U.S. 150 (1970). Plaintiffs' legal rights are created by the Fourth Amendment to the United States Constitution, the Due Process clause, 25 C.F.R. §48, 25 C.F.R. §62, and the APA. Attached as Exhibit 25 is the declaration of Huumaay Quisquis detailing the benefits he receives as a Federally recognized member of the SPBMI. Huumaay Quisquis states:

A. "I have a lifetime 5 acre land assignment for my lifetime. . . If I pass away, my spouse will have my land assignment for life. Upon the death of a Federally Recognized SP Tribal member, their children or grand children cannot inherit the land assignment unless they are Federally Recognized San Pasqual Tribal member."

B. "I do not pay property taxes to the County of San Diego relating to my 5 acres on the Reservation."

C. "I receive a monthly per capita payment from gaming revenue, currently . . . at $160,000.00 a month."

D. "Because I live on our San Pasqual Reservation, I do not pay state taxes . . I only pay Federal Taxes on my per capital income."

E. "As a Federally Recognized Tribal member, if I purchase an automobile, I not only do not have to pay State tax, the Tribe has a program where my registration is paid for, so I have no registration costs."

F. "All of the Federally recognized Tribal members can purchase significantly discounted HUD homes after the fire on the Reservation."

G. "All of our Federally Recognized Tribal members were given the ability to purchase significantly discounted HUD homes . . ."

H. "If I purchase a manufactured home to place on my land, and I do not have to pay state sales tax, . . . local building codes do not apply. . . without the necessity of purchasing building permits. . . . I can obtain a loan from the Tribe, significantly lower in interest rate than any banking institution would give to him."

I. "As a Federally Recognized Tribal member, I am able to eat meals for myself and my family at any of the restaurants at our casino multiple times per week without cost, . . ."

J. The Tribal general welfare fund will pay for schooling for his children, including tuition, books and housing for any type of degree pursued.

K. "As a Federally Recognized Tribal member I can meet with any person at the BIA if I have any concerns. The San Pasqual Descendants cannot, unless they have a Federally Recognized Tribal member present with them."

L. "Through Indian Health, I have all of my health care provided at no cost. . . . I do not have to pay for outside health insurance, including dental and visual care."

M. "As a Federally Recognized Tribal member, I have the ability to attend Tribal government meetings and vote."

These benefits are an example of Plaintiffs' personal stake in the outcome of this litigation pursuant to *Flask v. Cohen*, 392 U.S. 83, 99 (1968). Denied benefits are the harms

Plaintiffs' have suffered as a result of Defendants' actions which are arbitrary, capricious, an abuse of discretion and in violation of statutory mandates pursuant to Title 25, C.F.R. Part 48. [See also, Ex 26, Declaration of Josephine Villalobos; Ex 27].

VI

DEFENDANTS' ACTIONS WERE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND OTHERWISE ILLEGAL

Plaintiffs take exception to the Defendants' statement on page 23, Line 23-24: "once it was determined that the basis of their recommendations concerning the applications was false . . ." The 1956 San Pasqual Census Roll showing Modesta to be 4/4 SP blood was not a false document; Modesta's 1956 application for membership to the band showing her to be 4/4 SP blood was not a false document. These documents were simply ignored by the BIA. It was illegal for the BIA to return Plaintiffs unadjudicated applications to the new illegally elected EC because there is no statutory provision for returning unadjudicated applications to the EC. Plaintiffs' SJM [ECF 176] goes into lengthy detail as to why the actions of the BIA were arbitrary, capricious, an abuse of discretion, and otherwise illegal. [See, Declaration of Alexandra McIntosh in response to Defendant's ftnt 37, Pg 24.].

In conclusion, the Defendants' argument can be summarized as follows: Since the BIA was not required to follow the Title 25, C.F.R. §48, the they were not required to: **1)** Give notice of the Agency's denial of the EC's request to increase Modesta's blood degree; **2)** Adjudicate Plaintiffs' applications; **3)** Give Plaintiffs notice that they returned their applications to the EC; **4)** Give Plaintiffs the opportunity to appeal pursuant to §48.9 and/or §62. The BIA acted in an arbitrary, capricious manner, abused their discretion, and violated statutory mandates when they failed to follow the procedures set out in §48 and/or §62.

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VII

CONCLUSION

For the reasons stated above, and for the reasons stated in Plaintiffs' Motion for Summary Judgment [ECF 176] , this Court should deny the Federal Defendants' Motion for Summary Judgment and remand this matter back to the BIA with instructions for the BIA to allow Plaintiffs to appeal the decision concerning Modesta Martinez Contreras' blood degree increase and to allow Plaintiffs to submit additional relevant evidence as presented in this Response to DC-SJM and plaintiff's' Summary Judgment Motion.

DATED: October 4, 2021

Respectfully submitted,

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