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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' REPLY TO DEFENDANTS RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION OF FACTS RULE 56, Fed. R. Civ. Pro. Judge: Hon. Anthony J. Battaglia Date: 11/18/2021 Time: 2:00 P.M. CtRm: 4A Judge: Hon. Anthony J. Battaglia

COMES NOW PLAINTIFFS, by and through their attorneys of record Alexandra McIntosh and Carolyn Chapman, in reply to the Defendants' Response to Plaintiffs' Motion for Summary Judgment, or in the alternative, Summary Adjudication of Facts.

I – INTRODUCTION

Defendants complain [¶2:13-16] that Plaintiffs "make frequent citations to their 4AC (ECF 105) rather than the . . . FAR (ECF 165, 181). Plaintiffs also frequently cite

exhibits attached to their MSJ (ECF 176-4 to 176-25), sometimes, but not always citing the FAR (cited by Plaintiffs as "AR")". Plaintiffs'' respond: The Defendants' AR and FAR are a mess and totally confusing; lumping together, in some instances, hundreds of pages of documents. Attorney Chapman has responded to Defendants in her attached Declaration [Exhibit 1] which includes "Plaintiffs' Annotated Table of Contents to Government's Final Administrative Record", an Errata notating cross references to the FAR and Plaintiffs' citations in their brief, and a corrected Brief for the convenience of opposing party and the Court.

Defendants complain [¶2:16-19] that "Many of these exhibits appear to be declarations referencing people's memories of events and repeating Plaintiffs' attorneys' legal arguments . . ." In footnote 3 the Defendants accuse Plaintiffs of attempting to violate the Court's rules regarding page limits by making legal arguments in their attorney's declarations . . ." Plaintiffs respond as follows: **First**, Defendants' MSJ contained 37 single spaced footnotes, which in many instances took up ½ of a page (or more), and if double spaced would account for a 44 page brief, way in excess of the 25 page limit.[1] **Second**, it was not Plaintiffs intent to "circumvent" the 25 page limit with declarations, since the declarations only contained the (alleged) legal arguments that Plaintiffs had already made. **Third**, because of the nature of Plaintiffs' legal theory regarding proving that the BIA's actions were "arbitrary, capricious, an abuse of discretion, or not in accordance with the law" Plaintiffs are entitled to file declarations and supporting evidence in a Rule 56 Motion.

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[1] Clearly, Defendants submitted their brief with 37 single spaced footnotes to circumvent the 25 page limit. This Attorney has never seen a 25 page brief with 37 long single spaced footnotes, making it hard to read. Furthermore, Defendants used only ¼ inch difference between each line whereas Plaintiffs' paper had ¾ inch difference between each line. Plaintiffs' margins were 1" on both sides while Defendants' margins were only ½ inch on the right side. Defendants Response to Plaintiffs SJM contains 98 single spaced lines of argument placed in footnotes which, if double spaced, would add an additional 7 pages to their brief, making it difficult for Plaintiff to respond to all of Defendants' footnotes within their 10 page limit.

Defendants complain [¶3:22-23] about the Evidentiary brief that Plaintiffs filed (ECF 183, 185). **First**, on August 30, 2021, the Court ordered the Evidentiary Brief be stricken at ECF 173. **Second**, the purpose of Plaintiffs' Evidentiary Brief was to lay a foundation for their exhibits because not only is the entire record in this case available, but also declarations, exhibits, and other evidence can be used upon which Plaintiffs have based their factual basis to prove that the BIA's actions were "arbitrary, capricious, an abuse of discretion, or without not in accordance with the law." **Third**, because of the nature of Plaintiffs' legal theories to support their contention that Defendants' violated §706 this evidence is admissible. **Fourth**, additional evidence is necessary for Plaintiff to rebut the presumption favoring the Government in APA cases. [See Infra].

Defendants state [¶3:22-23]: "These efforts demonstrate a misunderstanding of how an APA suit is adjudicated." It is the Defendants who misunderstand Plaintiffs' legal theories of this case: It is Plaintiffs' burden to prove that the Defendants' actions were "arbitrary, capricious, an abuse of discretion, or not in accordance with the law." The Defendants have produced only a "bare bones" FAR which Plaintiffs have challenged [ECF 136, 140] and will again challenge in their companion Motion. Plaintiffs clearly understand the limits on APA[2] proceedings. Plaintiffs use of exhibits outside of the FAR is allowed in this case for several reasons: **1)** The Defendants' have cited no case law saying that Plaintiffs cannot use evidence outside of the FAR which consists of declarations of personal knowledge, information, documentation, depositions, and exhibits to show that

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[2] The APA requires reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency actions, findings, and conclusions" that are: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right . . .; (C) in excess of statutory jurisdiction . . . or short of statutory rights; (D) observance of procedure required by law; (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. 5 U.S.C. §706; §553(e). Courts can invalidate actions that are inconsistent with the agency's statutory authority, *Assoc. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Res. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984). See, 5 U.S.C.§551(13).

Defendants' actions were "arbitrary, capricious, an abuse of discretion, or otherwise unlawful." **2)** Plaintiffs use of such evidence is not for the purpose of proving "the truth of the matter" (i.e. Jose Juan, Guadalupe, and Modesta Martinez are 4/4 San Pasqual blood Indians, or that Plaintiffs' applications should be approved), but for the purpose of proving that Defendants' actions were "arbitrary, capricious, an abuse of discretion, or otherwise unlawful." Under Plaintiffs' legal theory all documents are admissible and can be used to satisfy their burden to prove that Defendants' actions were in violation of 5 U.S.C. §706. In light of all of the evidence produced by Plaintiffs, it is clear that the Agency "has not considered all relevant factors." [See, Defendants Response, Page 12, Line 17].

II RESPONSE TO DEFENDANTS' ARGUMENT

A Defendants' Factual statements are incorrect and should be disregarded.

Defendants' cited FAR 85 to support their conclusion that the enrollment of Plaintiffs in 2005 was seriously flawed. [Pg 2:19-23]. They are wrong. FAR 85 discusses the "quorum issue" which was resolved by the BIA's own statements as seen in FAR 67-70 which contains the GC Meeting Minutes and Resolution enrolling Plaintiffs. The Minutes clearly state that a quorum was present. In a letter dated September 1, 2005, the PRO letter admits that there were 62 votes casts which created a quorum. [FAR 78-86; 533-540]. The declaration submitted by Rudy Contreras [Ex 2 ¶¶3,4,5,11] clearly states that a quorum was present. Furthermore, the quorum issue is moot because the BIA issued a decision denying the BC's request to increase Modesta Contreras Martinez's blood degree. [FAR 105-107; 162-164; 165-172; 177-178; See Ex 3-July 24, 2015 letter from Moore]. Defendants' state that the Band's enrollment committee did not even submit the applications to the BIA. This is absolutely incorrect, to wit: FAR 87- Letter dated September 12, 2005, by Lawson (Band) to SCA: "We concur that these applications meet the enrollment criteria . . "; FAR 92-96 – Letter from SCA [Fletcher] to Band [Quisquis] dated September 27, 2005, acknowledging the receipt of 179 enrollment applications "which were hand carried to our office on September 23, 2005" by Rudy Contreras [Ex 2 ¶9] [FAR 92-96; 103-104; 109; 159; 160; 161; 546-550.

On Page 3 the Defendants' state that the Band did not appeal the PRO quorum decision. Again, this is incorrect. Huumaay Quisquis filed an appeal [FAR 351-357] which he dismissed. On Page 3 line 23, Defendants quote FAR 90 implying that it was the "applicant's responsibility to provide what the Bureau believes to be the preponderance of the evidence to support each claim." What the Defendants did not tell the court is that Plaintiffs never received this letter because it was only mailed to the federally enrolled members and that Plaintiffs could not attend any GC meetings because they are not federally recognized. See Declaration Rudy of Contreras ¶¶16, 18. *Assuming arguendo*, the statute provided for the BIA to return unadjudicated applications to the EC, the Plaintiffs were never informed that this happened; they were never given notice by the BIA or the opportunity to provide additional evidence or appeal the action as provided for in 25 CFR §§48.8, 48.9, and/or 25 C.F.R. §62. [See FAR 251-305]. Defendants argue on Page 4 "no right to appeal any action by BIA arose because Plaintiffs applications were never returned by the Band therefore no decision was made by BIA that could be appealed. Plaintiffs' respond: Under the APA failure to perform a statutory duty can be challenged in Federal Court. "An agency must comply with procedural requirements contained in the APA or another statute. [See, *Brown v. Gardner*, 513 U.S. 115, 120 (1994)].

Response to Defendants Point 1, pg 5: Since all decision makers used the 1955 Census Listing Modesta as 4/4, it was an abuse of discretion to rely on the 1928 unvetted, unreliable, and knowingly inaccurate judgment roll applications to deny an increase of Modesta's blood degree. It was an abuse of discretion not to use Modesta's July 18, 1955 membership application to support 4/4 blood degree. [FAR 1-25]

Response to Defendants' Point 2, pg 6: Defendants did not properly notify the appropriate parties. The EC told the BIA they were sending notices to Plaintiffs via certified mail along with information how to appeal the blood decision under 25 CFR §62. As the record shows, none of the plaintiffs' received the alleged mailings which resulted in their inability to appeal and submit additional information. [FAR 251-305].

Response to Defendants' Point 3, pg 7: Defendants' judgment that the

documents provided to the EC did not adequately support the EC's request to increase Modesta Martinez Contreras' blood degree was an abuse of discretion. 25 C.F.R. §48.14 is the statute providing for an increase of blood degree. Plaintiffs challenge this Statute as being unconstitutional because there is no objective standard, only a subjective standard. Furthermore, the BIA used unreliable and unvetted evidence as discussed in Plaintiffs MSJ.

III - PLAINTIFFS HAVE REBUTTED THE PRESUMPTION THAT THE BIA HAS ACTED IN GOOD FAITH.

Defendants argue that "Section IX of Plaintiffs' MSJ Pertains to Dismissed Causes of Action." They are wrong. Defendants do not understand Plaintiffs' legal theory. Section IX rebuts the presumptions that are in favor of the Agency. The APA creates safeguards even narrower than the constitutional ones against arbitrary, official encroachment on private rights. *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950). "Oversight of agency actions is constrained by certain presumptions in favor of the government. *Sanders v. United States Postal Service*, 801 F.2d 1320, 1331 (Fed. Cir. 1986). (See also, *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1091 (D.C. Cir. 1992); *America Cargo Transport v. United States*, 625 F.3d 176, 1180 (9th Cir. 2010). ("Unlike in the case of a private party we presume the government is acting in good faith."). In *Franklin v. Mast*, 505 U.S. 788, 801 (1992) the Court ruled that the President is still subject to Constitutional claims arising outside of the APA (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As detailed in the Defendants' Response on pages 10 through 12, and in Plaintiffs MSJ the Agency has acted: in violation of the Constitution; contrary to 25 CFR §48 which the Agency administers; and in an unlawful manner bringing the APA into play where there is a presumption that the Agency's actions are presumed correct, lawful, and taken in good faith. The Court in *Cobell v. Norton*, 240 F.3d 1081(2000) stated that the DOI's own investigation found employees falsified data, found chaotic record-keeping and failed to follow professional standards. Now that Plaintiffs have rebutted this statutory presumption, the Defendants' have to show that they have acted in good faith. Defendants have not done this. They have not denied any of the actions listed on Defendants' pages

10-12 of their Response or the facts stated in Plaintiffs' MSJ. They have done nothing to rebut the history of discrimination and bad faith actions as stated in Plaintiffs' MSJ which have severely and negatively impacted Plaintiffs, who are the True San Pasqual blood Indians. Defendants' failure to deny the history of their actions that have harmed Plaintiffs and their ancestors can only be interpreted to mean that the facts as stated by Plaintiffs are true. [See, Rule 301, Federal Rules of Evidence: "The party against whom a presumption is directed has the burden of producing evidence to rebut the presumption."] Defendants again bring up "lack of standing," "running of the statute of limitations," and "failure to join an indispensable party" as their defenses. Plaintiffs have already briefed these issues in their Response to DC-MSJ and incorporate said arguments here. [*Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013) (Band is not an indispensable party.)]

IV BECAUSE OF THE EXTREMELY UNUSUAL AND RARE SITUATION IN THIS CASE, THIS COURT SHOULD NOT AFFIRM THE ACTIONS OF THE BIA AND SHOULD ON ITS OWN MOTION BASED ON THE EVIDENCE SUBMITTED BY THE PLAINTIFFS, REVERSE THE AGENCY'S DECISION RGARDING MODESTA'S BLOOD DEGREE AND GRANT PLAINTIFFS' APPLICATIONS FOR MEMBERSHIP.

Defendants argue that, *assuming arguendo,* this Court remands this case to the BIA, it would not be appropriate to order it to adjudicate Plaintiffs' membership applications because the BIA does not have those applications after the EC requested them back for further review. (FAR 174, 189, 494, 709-10). The Defendants also argue [Page 13:9-19] that the BIA cannot interpret 25 C.F.R. 49.5(c) by using the "total degree of Indian Blood. They are wrong. The Declaration of Joe Villalobos [Ex 4] contains a letter dated July 2, 1998, showing that the BIA enrolled the Trask Descendants under the "blood of the band" theory over the objections of the Tribe. The Defendants' have conveniently forgotten several points: 1) Although 25 CFR §48 is tribal law, it is a tribal law based on a federal statute; 2) In 1987 the regulations (25 CFR Part 48) were re-written to assist in the distribution of judgment funds by bringing the membership roll current. The Rule was codified in 25 C.F.R. Part 76 which was removed in June 1996. [See Ex 5- Court opinion

in *Alto v. Jewell* 2015 WL 5734093]; 3) In 1976, 1995, and 1998 the BIA, via Frances Muncy Tribal Specialist, enrolled numerous non-San Pasqual Blood persons, including the Altos and the Trasks; and 4) The BIA has in the past acted on its own without input from the EC, and have enrolled non-San Pasqual blood persons, such as the Trasks and the Altos, over the objection of the EC. [See Plaintiffs MSJ Pages 21-23]. [The Altos were ultimately disenrolled: See, *Alto v. Black*, 215 WL 5734093; *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013)]. [See, Ex 6, Declaration of Alexandra McIntosh. The Declaration of Joe Villolobos [Ex 4] states:

> Frances Muncy (Tribal Operations) admitted in the mid-1990's . . 1995, under 25 CFR 76, applications for enrollment were being obtained and received directly at the BIA Riverside for enrollment in San Pasqual Band." [7-c] Frances Muncy admitted she was under a federal deadline to distribute all of the 80-A docket money before the regulation was withdrawn. That meant that she herself had to take action and when she either did not "hear" from or "disagreed" with the San Pasqual Enrollment Committee at that time, she took over enrollment in the San Pasqual Tribe, as the head of Tribal Operations, BIA Riverside. [7-d] Francis Muncy admitted she was the one that approved for enrollment in the SPBMI and had added to the rolls multiple non-San Pasqual people who did not have SP blood or insufficient SP blood to be added to the Rolls of our SP Tribe. . . . She enrolled non-San Pasqual people who were related to her by marriage. . . . [I]t was at the Riverside BIA office the non-San Pasqual Trask family were . . . enrolled and added to the rolls of the SP Tribe. . . .The Riverside BIA office went so far as to increase their blood degree and then change their blood degree to San Pasqual. (Ex 4 - Villolobos Declaration).

The Defendants are absolutely wrong in their analysis of the applicability of "the blood of the band" analysis to Plaintiffs' enrollment applications as seen by Exhibit 3, dated July 2, 1998, to Joe Villolobos' Declaration [Ex 4]. On March 7, 2017, Javin Moore, Superintendent of the BIA-SCA (Tribal Operations) sent a letter to Lawson, Spokesman for SPBMI, affirming that Alexandra McIntosh, Attorney, submitted applications and pedigree charts for 87 individuals. [FAR 989-991]. The last paragraph on page three states:

> Pursuant to 25 CFR §48.7 Review of Applications by Enrollment Committee.
> The Field Representative shall refer duly filed applications for enrollment to the Enrollment Committee. The Enrollment Committee shall review each such application and may require an applicant to furnish additional information in writing

> or in person to assist the Enrollment Committee to make a recommendation. The Enrollment Committee shall file with the Director, through the Field Representative, those applications which it approves and with those application not approved shall submit a separate[ion] report stating reasons for disapproval. The applications, whether approved or disapproved, shall be filed with the Director within thirty (30) days from receipt of the applications by the Committee. Therefore, these applications are being forwarded to you.

Clearly the EC has not complied with the BIA's directive and the requirements of 25 CFR §48.7 [FAR 26-31] as stated in the Band's Constitution [FAR 40-49]. This situation leads to a solution that can be remedied by the BIA and this Court: This Court should remand both issues to the BIA for **formal adjudication** and have them freshly adjudicate (using evidence produced by Plaintiffs) Modesta Martinez Contreras' blood degree and separately adjudicate Plaintiffs' enrollment application, including applying "the blood of the band" interpretation as was done in 1967, 1995, and 1998. If "the blood of the band" construction was not to be used after 1965, then the BIA should not have enrolled any non-San Pasqual blood persons after that time. On Page 4, Defendants state: "Furthermore, no right to appeal any action by BIA arose because Plaintiffs' applications were never returned by the Band, and therefore no decision was made by the BIA that could be appealed." This statement is incorrect. The July 24, 2015, letter from Moore to McIntosh made it very clear that the April 7, 2004, decision was "final" for the Bureau. [Ex 3]. When Plaintiffs were informed of the "final decision" in 2016, it was too late for them to file an appeal, although they tried to do so in order to satisfy the requirement of "exhaustion of remedies." [FAR 311-408; 660-692; 694-700; 703-706; 709-710]. The facts (both historical and present) make it clear that the BIA has colluded with the Trask Descendants and Lawson, as chairman of the Band, to prevent Plaintiffs from exercising their appeal rights and colluded to deny Plaintiffs due process of law.

IV. CONCLUSION

This Court has the power in an APA suit to compel agency action or hold unlawful and set aside agency action, findings, and conclusions that are found to violate the APA,

Title 5, U.S.C., §706, as in the case at bar. This Court also has the jurisdiction and power to set aside an agency's action on the ground that it is "arbitrary, capricious, an abuse of discretion, or otherwise unlawful, unauthorized by the statute the agency administers, or unconstitutional." 5 U.S.C. §706. "An Agency abuses its discretion when it fails to comply with its own regulations," as in this case. *Hovhannisyan v. United States Dep't of Homeland Sec.*, 624 F.Supp. 2d 1135, 1149 (C.D. Cal. 2008). Summary Judgment is proper if the pleadings, discovery, and affidavits (declarations) show that there is "no genuine dispute as to any material facts and [that] the movant is entitled to judgment as a matter of law." Fed.R.Civ.P., 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary Judgment in Plaintiffs' favor is appropriate because the record before the BIA does not support the agency action and the BIA has not considered all relevant factors on the basis of the record before it as detailed in Plaintiffs' MSJ. The solution is for the Court, except in rare circumstances, to remand to the agency for additional investigation. *See, Fla. Power & Light Co.*, 470 U.S. 729, 744 (1985); *I.N.S. v. Orlando Ventura*, 537 U.S. 13, 16 (2002) ("Generally speaking, a court of appeals should remand case to an agency for decision of a matter that statutes place primarily in agency hands"). "When a federal official owes a plaintiff a 'clear nondiscretionary duty', federal district courts and appellate courts may issue mandamus relief, which is an order compelling an official 'to perform a duty owed to the Plaintiff.'" In this case, the Tribal Constitution and 25 CFR §48 squarely place this matter in the BIA's hands. Because of the extremely unusual and rare situation in this case, this court should not affirm the actions of the BIA and should on its own motion, based on the evidence submitted by the plaintiffs, reverse the agency's decision regarding Modesta's blood degree and approve Plaintiffs' applications for membership, and apply, where necessary, the "blood of the Band" construction. [FAR 34-36].

Dated: October 18, 2021 Respectfully submitted,

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