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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TSI AKIM MAIDU OF TAYLORSVILLE RANCHERIA,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Acting Secretary of the Interior; BRYAN NEWLAND, in his official capacity as Assistant Secretary-Indian Affairs of the United States Department of the Interior; and DOES 1-100,

Defendants.

Case No.: 2:17-cv-01156 – TLN-CKD

PLAINTIFF'S OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT.

Date: February 10, 2022
Time: 2:00 pm
Ctrm: 2, 15th Floor
Judge: Hon. Troy L. Nunley

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I. INTRODUCTION AND BACKGROUND.

Federal Defendants' Motion to Dismiss offers no sufficient grounds to dismiss Plaintiff's Second Amended Complaint and is grounded on a misplaced depiction of the matter before this Court. Federal Defendants' characterization of the matter is likely driven by the Agency's desire to avoid subjecting its interpretation of the California Rancheria Act to judicial review. Federal Defendants gymnastically argue, as bases for their requested dismissal, that this matter procedurally mirrors other matters when a tribal group initiates a cause of action seeking to compel federal acknowledgment as an Indian tribe or a tribe challenges a final decision on an already completed a 25 C.F.R. Part 83 petition under the Administrative Procedure Act ("APA"). Alternatively, for several reasons, Federal Defendants argue this Court lacks some form of jurisdiction to review this matter. Their arguments are wide of the mark.

Here, Federal Defendants fixate on the Part 83 process and the Plaintiff's eligibility to either to avail itself of this process or are mandated to follow it to dismiss the Second Amended Complaint. These arguments provide no grounds for this Court's dismissal. Doc. 70-1 at 2-3. Plaintiff is not seeking the Agency's approval to avail itself of the 25 C.F.R. Part 83 process in the Second Amended Complaint. This matter, challenges decision(s) by Federal Defendants in response to Plaintiff's request "seeking clarification regarding its status as a federally recognized tribe." Doc 13-1 at 4. As a result of that request, Federal Defendants made a determination on June 9, 2015, ("2015 Decision") based on the interpretation of a statute and the review of an administrative record. Doc 13-1. That interpretation of a statute, the California Rancheria Act, and the manner of reaching the 2015 Decision, is subject to judicial review under the APA, including 5 U.S.C. § 706.

While Plaintiff seeks relief among which *might* include an Order from this Court placing Plaintiff on the List of Federally Recognized Tribes, Doc. 65 at 31, that remedy, if appropriate, is one of fifteen (15) remedies requested by Plaintiff. Doc. 65 at 29-32. And any remedy this Court might fashion would logically flow from this Court's judicial review. Plaintiff seeks a number of remedies for which *one* may trigger doctrinal precedent, as discussed, *infra.*, that potentially allows this Court to fashion an Order placing Plaintiff on the list of federal recognized tribes. *See* Pub. L. 103–454; 108 Stat. 4791, 4792. Plaintiff's request for that and other remedies require judicial review of actions that are properly reviewable by this Court.

Federal Defendants may fail to apprehend that it is the Agency's interpretation of the California Rancheria Act that is at the heart of this cause of action. *See, e.g.*, Doc. 65 at ⁋⁋ 1, 5, 25, 27, 29. As this matter proceeds, Plaintiff will show that when Federal Defendants were requested by Plaintiff to clarify the status of Plaintiff as a federally recognized tribe, Federal Defendants should have *correctly* interpreted plain, unambiguous language of the California Rancheria Act, supported by records produced and held by the Agency, and determined that the United States' relations with the Indians of Tsi-Akim Maidu that the Tsi-Akim Maidu Tribe was not terminated.

Plaintiff believes Federal Defendants erred when determining that the Tsi-Akim Maidu Tribe is terminated, under the California Rancheria Act. Federal Defendants (1) failed to correctly interpret the California Rancheria Act the plain language of the Rancheria Act, (2) offer little or no reasoning or analysis related to the plain language of the statute, (3) offer no explanation or reasoning for its conclusion that the United States terminated its relations with individual Indians or the Tribe, (4) appears to rely on documents cherry-picked from the historical and administrative record that provide the basis for its decision, and (5) finally, offer no reasoned explanation as to the change of its position in the 2020 Letter—in so far as it impacts the interpretation of the California Rancheria Act. *See, e.g., Butte Cnty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), *and Motor Vehicle Mafrs. Ass'n of the United States v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 45 (1983); *see also Genuine Parts, Co. v. EPA*, 890 F3d 304, 313 (D.C. Cir. 2018).

Federal Defendants want this Court to believe that the Agency's *inter dixit* pronouncement that "Congress terminated" the Plaintiff's tribal status is the thoroughgoing pathway to the weakness of the Plaintiff's Second Amended Complaint, and therefore it should be dismissed. [1] This however, is mere

[1] After admitting that Plaintiff does not include a "rule-making" claim in the Second Amended Complaint, Federal Defendants make a big deal out of whether their action(s) is a "rule" or an "adjudication." Doc 70-1 at 5-6. Here, the government encourages this Court to dismiss this non-existent claim. Doc 70-1 at 5. However, Defendants must be including this discussion for a reason. The agency raises an interesting procedural point, is action something more than informal agency action because their calling it an adjudication? Perhaps, Defendants, as trustee to Indian tribes, acknowledge that their procedure necessarily be compatible with constitutional due process in certain circumstances *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). Is this especially true if the Agency has interpreted the California Rancheria Act incorrectly? Doubtless, Federal statutory rights denied constitutes concrete injury. Judicial review of the California Rancheria Act that concludes that the Federal Defendants'

distraction to avoid judicial review. Furthermore, Federal Defendants' characterization of the May 2020 Letter, issued during *pending* litigation, as a "retraction" is a further attempt to avoid judicial review of its incorrect and unlawful interpretation of the California Rancheria Act.

In short, Federal Defendants offer no grounds to dismiss this matter, and this Court should proceed with judicial review under the APA.

II. ARGUMENT.

1. Federal Defendants' Arguments Related to this Court's Jurisdiction[2] over *one* of several Remedies Sought by the Plaintiff are insufficient Grounds for Dismissal.

Federal Defendants' arguments are insufficient to dismiss this matter.

Fundamentally, Federal Defendants misapprehend the procedural posture of this matter and Plaintiff's claims in its *Second Amended Complaint*. In doing so, the government misses the mark, offering no grounds for dismissal at all. For instance, Federal Defendants state, that "the only claim properly raised … is whether the Department erred in concluding that the tribe may not pursue federal recognition under Part 83 because Congress terminated the tribe when the Department sold the Taylorsville Rancheria." Doc. 70-1 at 6. However, Federal Defendants mischaracterize the claims made in the Second Amended Complaint. As made clear in the Second Amended Complaint, at the heart of Plaintiff's claim "is whether the California Rancheria Act mandates termination of Plaintiff in accordance with Defendants' interpretation of the statute." Doc. 65 at 3.

Moreover, Federal Defendants repeat the 2015 Decision's finding that the "Department's sale of the Rancheria pursuant to congressional mandate qualifies as a Congressional termination of the Federal

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interpretation is unlawful raises questions of that termination, in fact, never occurred. *Accord Greene v. Lujan*, 1992 WL 533059 W.D. Wash 1992).

Moreover, the identification of the 2015 Decision as an adjudication is merely distraction. It remains true that this is agency action subject to judicial review. Courts ordinarily defer to the substance of action, *see Vermont Yankee Nuclear Power Plant Co. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), agency action is reviewable under 706 an may find violation if the action is arbitrary and capricious, *See also*, *Citizens to Preserve Overton Park, Inc. Volpe*, 401 U.S. 402 (1972). Any argument informal adjudication is not "final agency action" is "unworthy of the government." *Menkes v. Dep't of Homeland Security*, 486 F.3d 1307, 1313 (D.C. Cir. 2007).

[2] Any argument that the California Rancheria Act might be construed to prohibit judicial review making any decision by the Secretary, including the 2015 Decision or 2020 Letter, unreviewable by this Court was rejected almost 50 years ago by the U.S. District Court for the Eastern District of California. *See Kelly v. United States*, 339 F. Supp. 1095, 1099 & FN 9 (E.D. CA 1972).

relationship." Doc. 13-1 at 1; Doc 70-1 at 3 (quoting the 2015 Decision) & 7 (stating "…Congress terminated the tribe when the Department sold the Taylorsville Rancheria in 1966."). Even, here, Federal Defendants continue their incorrect and unlawful interpretation of the California Rancheria Act. *Accord Smith v. United States,* 515 F. Supp. 56 (N.D. Cal. 1978) ("under the Act actual termination of the rancheria is *permissive,* not mandatory, being dependent upon approval by a majority of the Indians who would participate in the distribution," under California Rancheria Act Section 2(b), *citing Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977) [emphasis in original]).

Federal Defendants also argue that Plaintiff's claims amount to "federal recognition claims," Doc. 70-1 at 2, and therefore this Court lacks jurisdiction. Doc. 70-1 at 3-4. Such argument is wrong and distracting. Federal Defendants' arguments mischaracterize the primary claim in the Second Amended Complaint by fixating on one of several remedies requested. Doc. 65 at 29-32. Such a remedy seeking on Order, for example, placement on the list of federal recognized tribes is *only* fashioned, pursuant to doctrinal precedent, *after* the court reviews the agency's decision-making process and interpretation of the California Rancheria Act under the APA. Notwithstanding any remedy, the focus of this cause of action is, and subject to, judicial review of the decision-making process that determined the Plaintiff was terminated. An unlawful interpretation of the California Rancheria Act constitutes concrete injury. *See* FN1, *supra.* Federal Defendants generally agree that Plaintiffs claim that the interpretation of the California Rancheria Act is squarely before this Court noting in Footnote 2: "plaintiff's claim challenging the 2015 Decision that the sale of the unoccupied Rancheria constitutes Congressional legislation terminating or forbidding the government-to-government relationship so that the tribe cannot be acknowledged under 25 C.F.R. §83.4."

In short, Plaintiff seeks APA judicial review of the 2015 Decision to determine if Federal Defendants correctly interpreted the California Rancheria Act, and in doing so, met the standards of the APA. In 2015, Plaintiff sought clarification of its status as a federally recognized tribe. Doc. 13-1 at 1. The 2015 Decision resulted in final agency action that purported to determine that the California Rancheria Act terminated Plaintiff. A lawful and correct interpretation of the California Rancheria Act resolves the status of Plaintiff. Judicial review of Federal Defendants' statutory interpretation and the decision viewed under the lens of the APA is of no small consequence because that interpretation

implicates statutory government benefits available to individual Indian citizens of the tribe as well as Plaintiff as a federally recognized tribe. *Accord Greene v. Lujan*, 1992 WL 533059 W.D. Wash 1992).

Federal Defendants point to precedent as grounds for its request for dismissal. However, Federal Defendants' proffered precedent are all distinguishable from the present case.

In *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 196 (D.C.C. 2011, aff'd 708 F.3d D.C. Cir. 2013), and, *Miami Nation of Indian of Ind., Inc. v. Interior*, 255 F.3d 342, 346-48 (7th Cir. 2001), both courts' APA review examined negative determinations denying, separately, Plaintiffs' acknowledgment petitions under 25 C.F.R. Part 83. Federal Defendants reliance on *Muwekma* or *Miami Nation,* as grounds for dismissal is misplaced. These cases simply do not guide whether this Court has proper jurisdiction over the *relief* sought (including Orders to either compel the government to conduct government-to-government relations or placement on the list of federally recognized tribes). Moreover, the 2015 Decision is made based upon an interpretation of the California Rancheria Act to reach its conclusions. *Muwekma* or *Miami Nation* provide no grounds for dismissal of this action. Both focus on APA review once a Part 83 petition concluded. The posture before this Court is distinguishable.

Federal Defendants rely heavily on a more recent matter as a basis for dismissal. In *Agua Caliente Tribe of Cupeno Indians of Pala Reservation v. Sweeney,* 932 F.3d 1207, 1219 (9th Cir. 2019), Plaintiff, in that matter, singularly sought relief to compel the United States to place Plaintiff on the list of federally recognized tribes following a 2016 decision denying the Plaintiff's request. Doc. 13-1 at 4.

Here, Federal Defendants take great pains to divert this Court's attention from the specific challenged action of the Second Amended Complaint, arguing that *Agua Caliente of Cupeno Indians* articulates a rule mandating that any tribal group must petition under Part 83 *before* judicial review over any decision can be undertaken, and in turn, Federal Defendants urge, this Court is obligated to follow that rule. Doc. 70-1 at 4-5. This argument ignores the procedural posture of this matter and the distinguishing factors of *Agua Caliente of Cupeno Indians* and other similar matters.

In *Agua Caliente of Cupeno Indians*, Federal Defendants zero-in on the *one* remedy sought by the Plaintiff in that matter: placement on the list of recognized tribes. *See Agua Caliente of Cupeno Indians,* 932 F.3d at 1209-1210, 1216. However, *Agua Caliente of Cupeno Indians* is distinguishable because the agency action challenged in that matter was made following a request to the Agency, by the

Plaintiff, to place it on the list of federally recognized tribes. Here, Plaintiff did not make a request for placement on the list of federally recognized tribes by the Agency in 2015; Plaintiff merely requested clarification of status—it was the agency that determined Plaintiff was "terminated.". Doc 13-1 at 1.

In addition, *Agua Caliente of Cupeno Indians* is further distinguishable because the agency action challenged in that matter was made *after* the Agency issued 2015 Policy Guidance "directing any unrecognized group … to petition under 25 C.F.R. Section 83", *see Agua Caliente* at 1212. Moreover, *Agua Caliente of Cupeno Indians* is additionally distinguishable because the 2015 Decision—in this matter—interpreted the California Rancheria Act and relied on agency records[3] to determine the status of the tribe. Most significantly *Agua Caliente of Cupeno Indians* did not apply or interpret the California Rancheria Act. Federal Defendants thus, overstate the jurisdictional concern related to one of several remedies sought by Plaintiff.

Furthermore, Federal Defendants, lean-on the ruling in *Agua Caliente of Cupeno Indians* to do considerable heavy-lifting to ground its bases for dismissal including that Plaintiff "must exhaust administrative remedies [under Part 83], and until they do so, they are not entitled to the relief sought in this lawsuit" Doc. 70-1 at 5. Federal Defendants then attempt to bootstrap *Agua Caliente of Cupeno Indians'* ruling on exhaustion to then assert that Plaintiff must petition under Part 83 *before* Plaintiff can obtain judicial review of the California Rancheria Act. Doc. 70-1 at 5 (FN 5) (arguing that the Office of Federal Acknowledgment should make the determination of termination because somehow the agency conclude that doing so was now premature"). But these arguments ignore the procedural posture of this matter that is distinguishable from *Agua Caliente of Cupeno Indians*.

The posture of this matter is fundamentally distinguishable from *Agua Caliente* as discussed above. The initial request to the Agency in this matter fundamentally differs and the California Rancheria Act's interpretation in that request makes the application of *Agua Caliente of Cupeno Indians* exhaustion analysis inapposite. Moreover, the remedy sought by Plaintiff is not the same as *Agua Caliente of Cupeno Indians*. Among other remedies Plaintiff seeks, in this matter, are Orders and declaratory relief that the agency's interpretation of the California Rancheria Act is incorrect or

[3] *See, e.g., Mashpee Wampanoag Tribe v Barnhardt*, No. 18-2242, 2020 WL 3037245, at *15 (D.D.C. June 5 2020) (rejecting the argument that the Secretary implicitly considered contrary evidence finding that "[t]he Secretary's failure to specifically address [contrary evidence] was arbitrary and capricious").

unlawful, the agency violated the APA because its decision was arbitrary and capricious and unlawful and contrary to the law. Doc. 65 at 3 & 29. Therefore, Federal Defendants' focus on one request for relief is not grounds to dismiss the Second Amended Complaint.

Federal Defendants' argument might give pause as to one remedy this Court is able to provide, and may reflect the *general rule*, that this Court might conclude it cannot provide relief fashioned to compel placement of the Plaintiff on the list. Although, this Court, during the course of these proceedings, may find violations of the APA and provide other remedies.[4] However, it is worth noting that the ruling in *Agua Caliente of Cupeno Indians* is instructive concerning the possibility that after a finding of an incorrect or unlawful interpretation of the California Rancheria Act—or other a violation of the APA—this Court might fashion an Order directing Federal Defendants to *resume federal relations* with the Plaintiff based on a doctrinal exception. As the *Agua Caliente of Cupeno Indians* Court acknowledges, one exception to administrative exhaustion is futility because of an adverse decision. *See Agua Caliente of Cupeno Indians* at 1219 citing *James v HHS*, 824 F.2d 1132, 1139 (D.C. Cir. 1987).

Federal Defendants offer no jurisdiction or other grounds for dismissal of the Second Amended Complaint. Federal Defendants motion must be denied.

2. The 2015 Decision and it's so called "retraction" are Subject to Judicial Review Under the APA.

Federal Defendants may choose to refer to the 2020 Letter as a "retraction," but two things are true for purposes of this matter the APA: (1) whether the 2015 Decision was modified or not modified by the May 2020 Letter, the 2015 Decision remains subject to judicial review, and (2) the May 2020 Letter is agency action subject to review, and likely unlawfully issued, in light of this pending litigation.

The APA allows the review of final agency action. Plaintiff's Second Amended Complaint makes clear that Plaintiff seeks judicial review of the agency action(s), in so far as one, or both,

[4] This Court might determine that relief is required that remands the matter back to the agency for action consistent with this Court's findings and conclusions of law. In fact, this Court might agree with Plaintiff and find that that Federal Defendants erred in their interpretation of the California Rancheria Act and the agency violated the APA in reaching its 2015 Decision and determine that Federal Defendants could not have concluded the tribe was terminated. In this context, this Court's finding related to statutory interpretation and judicial review of agency action under 706 impact the remedies or Orders this Court crafts or affects further proceeding before the agency on remand.

interprets the California Rancheria Act and determines that the status of the Plaintiff as a federally recognized tribe is terminated.

Whether the May 2020 Letter is final, or otherwise, is inconsequential to one of the primary actions Federal Defendants took in this matter, namely: whether the Agency's 2015 decisional interpretation of the California Rancheria Act was in err when it determined that Plaintiff was terminated. APA, § 706 provides this Court authority "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. In so far as the 2015 Decision's interpretation of the California Rancheria Act stands, it is reviewable under the APA.

Federal Defendants' interpretation of the statute in the 2020 Letter is silent although the Agency now purports to change position from prohibiting Part 83 petitioning to now allowing it. Doc 70-1 at 5 (stating Letter retracts portion of 2015 Decision). Federal Defendants offer no new reasoning or interpretation of the 2015 Decision's interpretation of the Rancheria Act; therefore, the APA allows review of the agency's decision-making for its compliance with the APA. *See, e.g., FCC v. Fox*, 556 U.S. 501 (2009) ("reasoned explanation is needed" when there is a departure from facts and circumstances creating the form position). In addition, whether the May 2020 Letter is final or otherwise is only consequential in so far as the Federal Defendants rely on it to reach its conclusion that the Tribe is terminated. [5] In other words, in so far as the 2020 Letter interprets the California Rancheria Act it is subject to judicial review.

Federal Defendants argue that the 2020 Letter "simply retracts the portions of the 2015 Decision that prohibited the Tribe from submitting a Part 83 petition." Doc. 70-1 at 4-5. However, at issue is the Agency's unsupported change in agency position from the 2015 Decision. The Agency changes the conclusion that Plaintiff is now eligible to petition under Part 83. Such a conclusion necessarily requires that the Agency interpreted the California Rancheria Act again because eligibility for the Part 83 process

[5] The interpretation of the California Rancheria Act is critical. If the agency erred interpreting the California Rancheria Act, Federal Defendants insistence that the Plaintiff submit to administrative acknowledgment process is moot because 25 C.F.R Part 83 is inapplicable because 25 C.F.R §83.3 applies only to indigenous entities that are not federal recognized."

ridings on the determination that the status of the tribe was terminated.[6] However, no articulable reasons for its new conclusions are found in the 2015 Letter. *See FCC v. Fox*, 556 at 516. In short, even if the 2020 Letter withdraws the conclusion that Plaintiff may not petition for Part 83, but may now do so, the 2020 Letter leaves in place the 2015 Decision's interpretation of the California Rancheria Act.

It is important to note, Federal Defendants seem to be convinced that the remedy Plaintiff seeks is to be able to petition under Part 83. However, the Second Amended Complaint stands for the claims and remedies that the Plaintiff currently seeks meet the standard that the allegations are plausible on their face because Plaintiff alleges specific factual allegations in the Second Amended Complaint to nudge the claims across the line from conceivable to plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).[7] As described elsewhere, the interpretation of the plain, unambiguous language of the California Rancheria Act, *vis-à-vis* the specific details of this Plaintiff's history and land associated with it, is at the heart of the Second Amended Complaint. Plaintiff seeks declaratory relief and judicial review under the APA that the agency's interpretation was in err and the Plaintiff was not terminated. The consequences or remedy for which may or may not be within the confines of this litigation. Federal Defendants erred in their interpretation of the California Rancheria Act, resulting in concrete injury.[8]

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[6] Thus, one of the key questions before this Court is whether, like the 2015 Decision, the May 2020 Letter is agency action reviewable, see Part II (3), *infra.*, under the deferential "arbitrary and capricious" standard. 5 U.S.C. 706(2)(a) asking whether the agency in its effort to partially retract the 2015 Decision examined relevant records and articulated a satisfactory explanation for the decision including rationally connecting facts before it and choice made. *See Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2576-2581 (2019).

[7] Federal Defendants raise *Bell Atlantic Corp. v. Twombly* concerns about Plaintiff's pleading in only two paragraphs. Doc. 70-1 at 5. However, Plaintiff, on the face of its complaint, plausibly argues that the California Rancheria Act, based on the detailed factual allegation plead, cannot be plausibly construed to terminate Plaintiff as a federal recognized tribe. Concerns about the sufficiency of Plaintiff's pleadings are a mere distraction and additional burden for this court to work through all in an effort to avoid judicial review of this Agency's interpretation of the California Rancheria Act to this Plaintiff.

[8] The California Rancheria Act provides a procedure for the termination of these rancherias and distribution of assets, including property, to eligible Indians. If the Agency is correct then it followed Section 1 and 2 of the Act. The preparation of a plan for termination is mandatory and such a termination plan does not become effective until approved by a majority of adult Indians who would participate in the distribution. Judicial review as allowed by this Court of the 2015 Decision, Doc.41, will review the agency's interpretation of the Act as well as the documents the 2015 Decision relied on to reach its conclusion and determination that Plaintiff is terminated.

Furthermore, it is critical to reemphasize what precipitated this APA challenge started when Plaintiff sought a clarification of its status as a federal recognized tribe from the agency, nothing more. Doc. 13-1 at 1. Plaintiff did not request whether it should or could participate in the Part 83 petition process at the time of that request; nor is Plaintiff seeking this remedy in this matter. The conclusion that it could not participate, and then later could participate in a Part 83 petition[9] were conclusions resulting precisely from the agency's interpretation of the California Rancheria Act in the 2015 Decision. The 2020 Letter implicitly leaves in place, according to arguments by the Federal Defendants, the interpretation of the California Rancheria Act because they admit that the 2020 Letter "simply retracted the portion of the 2015 Decision that prohibited the Tribe from submitting a Part 83 petition." Doc. 70-1 at 4-5. The request of eligibility for Part 83 status was unnecessary because it was, and remains, Plaintiff's statutory right to submit a completed petition notwithstanding the 2015 Decision—even if it knew it would be unsuccessful.

For Plaintiff, the consequences of requesting its status from the agency necessarily guided whether it was prudent to complete and submit a petition under Part 83, given that the Part 83 regulations prohibited "terminated" tribes from being acknowledged under the process at the time. *See* Part 83(g) (2011), and *see* Doc. 13-1 at 4 FN 2 citing this regulation. Moreover, if indeed Plaintiff is terminated under the California Rancheria Act, a determination of the May 2020 Letter that Plaintiff *may* now petition under Part 83 because the determination was "premature", Doc. 70-1 at 3.; is, illusory, because it prolongs an inevitable determination under Part 83 which prohibits relations with "terminated" tribes. *See, e.g.*, 25 C.F.R. § 83.4 (2015).

As discussed further in Part II (3) of this memorandum, the 2020 Letter is subject to judicial review in so far as it interprets the California Rancheria Act. Federal Defendants aver that the 2020 Letter "simply retracted the portion of the 2015 Decision that prohibited the Tribe from submitting a Part 83 petition." Doc. 70-1 at 4-5. It is likely, but unknown, from the 2020 Letter implicitly stands for the conclusion that Federal Defendants do not change its interpretation of the California Rancheria Act nor its determination that Plaintiff is terminated. The issuance of the 2020 Letter begs the questions,

[9] The only mention of the Part 83 process in the 2015 Decision appears in FNs 1 & 2 and the last page, Doc. 13-1 at 9. The 2015 Decision, focuses on determining the status of the Tribe because this was to requested relief from the Plaintiff sought.

why, upon remand under Part 83, would the Office of Federal Acknowledgment change the policy position of the 2015 Decision that concluded the Petitioner was terminated, when the May 2020 Letter offers no articulated reasons for its change in position or analysis or interpretation of the California Rancheria Act?

It is this underlying administrative process in the 2015 Decision and the 2020 Letter that Plaintiff also challenges how the agency reached it decision(s) and which administrative records were relied upon. In this context it is axiomatic that agency action that is not the product of reasoned decision-making is arbitrary and capricious. *State Farm*, 463 U.S. at 43. And to satisfy this core requirement of reasoned decision-making, an agency must "cogently explain why it has exercised its discretion in a given manner." *Id*. at 48. Therefore, the 2020 Letter is consequential for judicial review in so far as it retracts, modifies, interprets the California Rancheria Act that Plaintiff is terminated.

To allow Federal Defendants to unilaterally change the 2015 Decision related to its interpretation of whether Plaintiff is terminated without judicial review and allow this case to be dismissed, runs afoul of the APA's limits on administrative review, encourages this Court to "slip into juridical inertia" and urges this Court defer to the agency's limitless expertise, all-in-all undermining this Court's jurisdiction under the APA. *Volkswagenwerk Aktiengesellschaft v. FMC,* 390 U.S. 261, 272 (1968), *and see generally Burlington Trucklines v. United States,* 371 U.S. 156, 167 (1962). Doubtless, under the APA, a district court may not review an agency's decision until it is final. It is precisely for this reason that once a district court assumes jurisdiction over an appeal of final agency action, the agency's authority over the decision is divested. *See Doctors Nursing & Rehabilitation Center v. Sebelius,* 613 F.3d 677-78 (7th Cir. 2010) (stating an agency may not divest a district court of jurisdiction simply by reopening or reconsidering a final agency decision). Here, Federal Defendants attempt to divest this Court of jurisdiction by issuing a "retraction" that allegedly makes judicial review irrelevant is shrewd at best.

This Court issued an Order, Apr. 24, 2020, holding it had jurisdiction to review the 2015 Decision under the APA, § 706. Doc. 41. While the agency might have authority to inherently correct

administrative decisions,[10] *see, e.g., Belville Min. Co. v. United States*, 999 F.2d, 989, 997 (9th Cir 1993), that authority does not extend to the "proposition that an agency may unilaterally correct its final decision *after* a case has been filed in district court." *Confederated Tribe of Grand Ronde Community of Oregon v. Salazar*, Civ. No. 1:13-cv-00849-BJR Dkt. At Doc 23 *citing* Doc. No. 83. at 10 (D.D.C. 2013) (finding federal defendants did not have authority to supplement an agency decision that was currently being reviewed under Sec. 706 by the same court *citing Doctors Nursing & Rehabilitation Center v. Sebelius, 613 F.3d 672, 677078 (7th Cir. 2010*) (stating an agency may not divest a district court of jurisdiction simply by reopening or reconsidering a final agency decision.)). *See also, American Petroleum Institute v. EPA. 638 F.3d 382, 286 (D.C. Cir. 2012)* and *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2576-2581 (2019) (when determining post litigation partial modification of a previous Order reviewable under 706 and finding remand when the explanation for the "informal agency action" is "incongruent with what the record reveals" especially "when there is a disconnect between the decision made and explanation given'.). In *Grand Ronde*, the agency issued a corrective letter that purported to partially withdraw the Bureau of Indian Affairs' actions that were challenged under the APA during the middle of that processing. *See id*. Federal Defendants' attempt at a legal end-around of judicial review is inconsistent with legal precedent and the high standards this nation expects of government; therefore the 2020 Letter was unlawful issued.

Alternatively, Federal Defendants rightly cite *Bennett v. Spear*, 520 U.S. 154, 178 (1997), as the pathway for determining agency finality. The May 2020 Letter has all the *indicia* of APA finality: whether "the agency's decisionmaking process" has "consummat[ed]," and the reality of whether "rights or obligations have been determined" by or "legal consequences will flow" from the challenged agency action. *See Id.* at 178.

Federal Defendants admit that the May 2020 Letter to partially withdraw portions of the 2015 Decision which impact "direct and appreciable legal consequences" on judicial review in this matter. *Army Corp of Eng'rs v. Hawkes Co*, 136 S.Ct. 1807, 1814 (2016). Withdrawing a portion of a previous 2015 Decision which reached conclusions flowing from the agency's prior decision impact rights and

[10] Plaintiff agrees that Federal Defendants have inherent authority to correct administrative mistakes. This would be true in the context that Federal Defendants determine that Plaintiff is not lawfully terminated under the California Rancheria Act, as amended in 1964.

obligation of the Plaintiff including to potentially seek judicial review in this matter. According to the Federal Defendants, the 2015 Decision can only be read, applying the 2020 Letter, as a mandate that Plaintiff petition for acknowledgment under Part 83, and this is why it is final agency action. Federal Defendants even suggest that this Court could fashion an Order "that could vacate that portion of the 2020 Letter stating that the sale of the Rancheria equates to Congressional legislation terminating the federal relationship to ensure that the issue will receive *de novo* review by the Department within the context of the tribe's documented Part 83 petition." Doc. 70-1 (FN 5). Federal Defendants suggestion is based on the premise that the 2020 Letter has consummated a final Decision.

Federal Defendants' arguments that the 2020 Letter of otherwise divests this Court of jurisdiction is at worst unlawfully issued, or, at best, final agency action which misses the mark. If final agency action, the 2020 Letter's authorization merely restates the statutory right to petition under Part 83, and either leaves, undisturbed, the interpretation of the California Rancheria Act from the 2020 Letter[11] or reinterprets the Act to reach its partial withdrawal in the 2020 Letter. In either case, 2015 Decision and likely the 2020 Letter Decision are subject to judicial review.[12]

Federal Defendants provide no grounds for dismissal of the Second Amended Complaint.

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[11] If this is the case, dismissing this matter now shows that the 2020 Letter truly is illusory because, for purposes of this Plaintiff, the 2015 Decision's determination that the Plaintiff was terminated remains intact.

[12] The 2015 Decision issued in response to Plaintiff's specific request to determine the status of the Tribe,

> " [Plaintiff] has approached the Office of the Assistant Secretary – Indian Affairs seeking clarification regarding its status as a federally recognized tribe…[Plaintiff] has requested a decision on whether it was terminated and therefore ineligible for acknowledgment by [Federal Defendants]…/The Department properly sold the Taylorsville Rancheria pursuant to the 1964 amendment to the California Rancheria Act and fully implemented the provisions of the California Rancheria Act for Taylorsville Rancheria."

Doc. 13-1 at 4. At the time, Plaintiff sought an interpretation of whether the Tribe was terminated and would impact the likelihood of success if Plaintiff decided to submit its petition. Under the regulations found at 25 C.F.R. 83.7(g) (2011), prior to revision in July 1, 2015, 25 C.F.R. 83.4 & 83.12 (2015), as well as after, Congress forbids a federal relationship with a group and may not receive federal acknowledgment. *See* Doc. 13-1 at 4 and FN 2; ECF 70-1 at 2, FNs 1 & 2.

3. Post-Hoc Decision-Making is Prohibited Under the APA and the 2020 Letter is Unlawful.

To be clear, Federal Defendants argue that the May 2020 Letter is a mere "retraction"[13] but it, in fact, epitomizes the type of *post-hoc* rationalization that the APA prohibits and attempts to disguise the Agency's lack of reasoned explanation in both the 2015 Decision as well as the lack of reasonable explanation or what administrative record the Agency reviewed that led the Agency to its retraction or produced the original 2015 Decision. *See SEC v Chenery Corp.*, 318 U.S. 80, 87-88 (1943) (courts must be able to discern connection in the record and the agency decision).

Here, as discussed *supra.*, the May 2020 Letter is an effort to supplement the administrative record by offering a conciliatory, at best, or a sheep-in-wolves-clothing illusory offer to enter the Part 83 petition process because now the agency, without explanation, has determined that Plaintiff is eligible to participate in the Federal Defendant's convoluted Part 83 process without reasoned explanation. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Here Federal Defendants, via the May 2020 Letter, offer an *unexplained departure*; but the 2020 Letter stands for a consummation of the agency's decision-making because it changes portion of the 2015 Decision 180-degrees. Doc 70-1 at 4-5. Plaintiffs agree; the administrative record must be produced in advance of further the litigation and this too is subject to judicial review. Doc. 70-1 at 6-7.

To determine whether the Agency's retraction interpretated the California Rancheria Act and that interpretation offered by the 2015 Decision, the Agency created a new administrative record in 2020 and this, along with the 2015 Decision, is subject to judicial review. Here the agency's action(s) decided rights from which direct and attributable legal consequences flow. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (providing finality guidance in agency setting be those of Plaintiff that has not been terminated or those subject to access to the Part 83 process). The record to be considered by this Court "consists of the administrative record compiled by the agency in *advance of litigation*, not any record thereafter constructed in the reviewing court." *AT&T Info. Sys. Inc. v Gen. Services Admin.*, 8100 F.2d 1233, 1236 (D.C. Cir 1987); A*m. Textile Mfrs. Inst., Inc. v Donovan,* 452 U.S. 490, 439-40 (1981) ("[P]ost hoc rationalization of the agency…to this litigation cannot serve as a sufficient predicate for

[13] Nowhere do Federal Defendants explain or cite the legal significance of the term "retraction." A review of the APA definition section seems to indicate that the 2020 Letter is an Order subject to review under the APA so long as it is final. As discussed above, its finality is determined by its impact.

agency action."). In short, Federal Defendants cannot use a May 2020 Letter to "retract" portions of a 2015 Decision by characterizing it as merely partially withdrawing the unspecified and unexplained portions of the 2015 Decision or its record without reasoned explanation or articulate its reasoning. Therefore, the 2020 Letter was unlawfully issued and, at minimum, the 2015 Decision is subject to APA review.

Therefore, Federal Defendants offer insufficient arguments to justify dismissal of this matter in light of sufficient pleadings that establish review under the Administrative Procedure Act. Therefore, Federal Defendants' Motion to Dismiss must be denied.

III. CONCLUSION.

Federal Defendants' Motion to Dismiss is an effort to corral and pigeonhole Plaintiff to seek federal acknowledgment under 25 C.F.R. Part 83 despite the fact that Plaintiff does not seek Part 83 remedy in this matter. Federal Defendants' arguments are insufficient grounds for dismissal. Federal Defendants want this Court to ignore the procedural posture as straightforward as they are and how the judicial review of the agency's action of 2015 ultimately impacts the status of the Plaintiff vis-à-vis whether the agency's interpretation of the California Rancheria Act is incorrect. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863 (1984) (initial agency interpretation is not carved in stone.").

For the forgoing reasons the Federal Defendants' Motion to Dismiss must be denied.

DATED: January 27, 2022

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