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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**,1 in her official capacity as Secretary of the Interior; **BRYAN NEWLAND** in his official capacity as Acting Assistant Secretary – Indian Affairs of the United States Department of the Interior,

Defendants.

Case No.: 2:17-cv-01156 – DAD-CKD

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Date: June 20, 2023
Time: 2:00 pm
Location: Robert T. Matsui United States Courthouse
Room: 4, 15th Floor
Judge: Hon. Dale A. Drozd

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INTRODUCTION

Plaintiff seeks judicial review of Federal Defendants' 2015 and 2020 Decisions under Chapter 7 of the Administrative Procedure Act ("APA"). The APA provides that a "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. This Court must hold Federal Defendants actions "unlawful and set aside agency action, findings, and conclusions" because those actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* In doing so, this Court may award Plaintiff a broad range of relief and remedy sought in Plaintiff's Second Amended Complaint.

Federal Defendants' interpretation of the California Rancheria Act ("the CRA') is at the heart of this cause of action. Plaintiff requested Federal Defendants clarify the status of Plaintiff as a federally recognized tribe. It is necessary to reach the Federal Defendants' bases of their 2015 and the 2022 Decisions that respond to the request for clarification of status, including Federal Defendants' threshold interpretation of the California Rancheria Act forms the bases of those decisions.

Federal Defendants failed to correctly interpret the plain language of California Rancheria Act when determining that the Tsi-Akim Maidu Tribe was congressionally terminated. This finding and conclusion is expressly left in place as a result of the 2020 Decision's narrow and illusory determination the Office of Federal Acknowledgement must first make such a determination before it determines whether Plaintiff can participate in a Part 83 acknowledgement process.

The conclusion that "Congress terminated" Plaintiff's status is a mechanical conclusory pronouncement. In contrast to Supreme Court precedent Federal Defendants offer little or no explanatory reasoning or analysis related to interpretation or the statute, offer no explanation or reasoning for its conclusions in either 2015 or 2020 Decisions, and fail to adequately ventilate records. Moreover, Federal Defendants offer no reasoned explanation for unexplained inconsistency

in its original decision *vis-à-vis* the administrative record or it change of its position in the 2020 Decision from the Plaintiff was terminated and must seek acknowledgment under 25 C.F.R. Part 83 to a new position that the Office of Federal Acknowledgement must determine the status of termination.

Federal Defendants determination that termination was intrinsic and not changeable in both the 2015, and which the conclusion and findings are expressly left in place in their 2020 Decision is contrary to the plain meaning of the California Rancheria Act and violates the APA.

STANDARD OF REVIEW ON MOTION FOR SUMMARY JUDGMENT REGARDING FEDERAL AGENCY ACTION

Plaintiff seeks judicial review in the context of a stipulation with Federal Defendants to bring cross-motions for summary judgment. Doc. 82. Summary judgment is proper when the pleadings, discovery, and affidavits show that there is "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id*.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue for which the opposing party will have the burden of proof at trial, however, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id*. at 325.

Summary judgment, in this instance, serves as a mechanism for deciding, as a matter of law, whether agency action is supported by the administrative record and otherwise consistent with the APA standard of review. *See, e.g., Boston Redevel. Auth. v. National Park Serv.*, 838 F.3d 42, 47 (1st

Cir. 2016) *and Coe v. McHugh* , 968 F.Supp.2d 237, 240 (D.D.C. 2013) (both discussing completeness of administrative record in summary judgment proceedings). The scope of judicial review, however admittedly, "is narrow[,] and a court is not to substitute its judgment for that of the agency" but is not absolute. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This Circuit requires reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 'in excess of statutory jurisdiction,' or 'without observance of procedure required by law.'" *Kalispel Tribe of Indians v. U.S. Dept. of the Interior*, 999 F.3d 683, 688 (9th Cir. 2021) (quoting 5 U.S.C. § 706(2)(A), (C), (D)). "[I]f the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. (internal quotation marks omitted). "Where the allegation is that the agency's decision was arbitrary and capricious, the court reviews the record carefully to ensure that the agency conducted a reasonable evaluation of the relevant factors and reasonably interpreted the governing statute." *Id*. at 692.

A court, "must examine the evidence relied on by the agency and the reasons given for its decision," and determine whether it articulated "a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43. Conversely, courts should reverse and remand where the agency (1) has relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Moreover, "[a]n unexplained inconsistently in agency policy is a reason for holding an interpretation to be an arbitrary and

capricious change from agency practice." *Encino Motor Cars v. Navarro* (June 16, 2016). *See also Dillmon v. Nation Trans. Safety Brd* (DC. 2009) ("agency action is arbitrary and capricious if it departs from agency precedent without explanation.")

Thus, Courts do not review the administrative record to determine whether a material dispute of fact remains, but rather ask whether the agency action was arbitrary and capricious or otherwise in violation of 5 U.S.C. § 706 (2) *et seq*.

ARGUMENT

I. Both the 2015 and the 2020 Decisions violated 5 U.S.C. §706 & §706(2)(A), (C)&(D).

A. Judicial Review of Federal Defendant's Action under *Chevron*.

An agency's interpretation or application of a statute is a question of law reviewed de novo. *See Thomas v. CalPortland Co.*, 993 F.3d 1204, 1208 (9th Cir. 2021). Furthermore, precedent directs this Court when reviewing an agency's interpretation of a statute under 5 U.S.C. §706, apply the standard articulated by the Supreme Court in C*hevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

"Under Chevron step one, [a court] ask[s] whether Congress has directly spoken to the precise question at issue. … At that point, "[i]f the intent of Congress is clear, that is the end of the matter; … [a court] must give effect to the unambiguously expressed intent of Congress." *Safer Chemicals, Healthy Families v. U.S. Envtl. Prot. Agency*, 943 F.3d 397, 422 (9th Cir. 2019) (internal quotation marks and citations omitted).

"[I]f the statute is silent or ambiguous with respect to the specific issue, [a court] must ask at Chevron step two whether the regulations promulgated by the agency are based on a permissible construction of the statute. … If they are, [the court] must defer to the agency. … [The court] need not defer to agency regulations, however, if they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy." *Safer Chemicals, Healthy Families*, 943

F.3d at 422 (internal quotation marks and citations omitted). *See also Chevron,* 467 U.S. at 843 (review is limited to whether an agency's conclusion is based on a permissible construction of the statute).

1. The 1958 California Rancheria Act and its 1964 Amendment.

On August 18, 1958, Congress enacted the California Rancheria Act, P.L. 85-671, 72 Stat. 619 (1958), and that Act was subsequently amended by the California Rancheria Act of Aug. 1, 1964, P.L. 88-419, 78 Stat. 390 (1964) (the "CRA" or "the Act"). AR 000509 – 000511 and AR 000592 – 000597.

Section 1 of the 1958 California Rancheria Act provides that the assets of forty-one (41) named rancherias "shall be distributed in accordance with the provisions of this Act." AR 000509. Section 1 of the California Rancheria Act provides that the assets of 41 (forty-one) named rancherias "shall be distributed in accordance with the provisions of this Act." CRA section 1. *Id*.

Section 2(a) required that either the individual Indians of each Rancheria or the Secretary of the United States Department of the Interior, after consultation with the Indians, prepare a distribution plan for each Rancheria to distribute the proceeds of the sale of the rancheria. Under CRA §2, the Secretary of the Interior gave final approval to distribution plans for each of the subject rancherias. Section 3 required the Secretary to undertake certain other actions with respect to each Rancheria prior to distributing the land pursuant to the distribution. In other words, section 3 and its statutory mandates, are conditions precedent before a rancheria's conveyance became effective or under section 10, the cessation of benefits to individual Indian would be effective. AR 000509.

In 1964, Congress amended the California Rancheria Act. 78 Stat. 390, 391 (1964). AR 000592 – 000597. The effect of the 1964 amendments was to substitute the phrase "sanitation facilities" for the phrase "irrigation or domestic water systems," thereby expanding the services required by the Act to include drainage facilities, sewage and waste-disposal facilities and shifting the

authority for negotiations and implementation to the Secretary of Health, Education and Welfare. AR 000593 – 000594.

The 1964 Amendments also authorized the Secretary to sell California rancherias that were "not occupied" and deposit the money to the interest of California Indians under a new subsection 5(d). AR 000594 – 000595. Congress used the legal term of art, "not occupied," rather than "vacant" or "abandoned" to describe where no individual Indians were found to be using or occupying the rancheria. Section 5(d) allowed the BIA to sell rancherias determined to be "not occupied".

The U.S. House of Representatives Committee Report to the 1964 Amendment makes one comment about new subsection 5(d), stating,

> "The present law does not provide for the disposition of a rancheria or reservation that is presently not occupied. At the present time, there are six unoccupied rancherias in the northern part of the State and six unoccupied reservations in the southern part of the State. The substitute bill adds a new section 5(d) to the law to cover this type of case."

U.S. House of Representatives, Report 1305, "Amending the Act Entitled 'An Act to Provide for the Distribution of the Land and Assets of Certain Indian Rancherias and Reservations in California and for Other Purposes,'" 88th Congress, April 7, 1964 [House Report 88-2305]. The Senate Report uses similar language. *See* Senate Report 88-1263 (July 29, 1964).

The 1964 Amendment to the Act while providing for the disposition of property "not occupied" on June 1, 1964, nothing in congressional hearings or reports indicates that the intent of the new subsection 5(d) was beyond the plain meaning of its language which was to merely dispose of property determined not used for its original purpose, which was for use by individual California Indians. In fact, the 1964 amendment distinguished a significant conditionality that the 1958 Act: lands where no Indians were using or occupying the rancheria. The 1958 Act understood that Congress by purchasing property with real property rights to individual Indians for their use and occupancy required that to divest those Indians of those right it must provide due process and compensation which under the 1958 Act required procedural compliance with the CRA including

sections, 2, 3, and 10. In short, if Indians were found on rancherias the Congress required BIA to find a place for those individuals to live and then the United States trust relationship would be ceased. In the case of the 1964 amendment, because there were no individuals there could be no cessation of relations with those Indians or their polities.

The BIA attempted to promulgate implementing regulations related for the CRA issued as 25 C.F.R. Part 242 (1966).[1] Decl. at Ex H. A federal court in 1972, *Kelly v. U.S. Dept. of the Interior* found the 1965 regulations invalidated. *See Kelly v. U.S. Dept. of the Interior*, 339 F. Supp. 1095, 1100-1102 (E.D. Cal. 1972). In 2005, the United States told the District Court for the Eastern District of California:

> "With the demise of the government's termination policy, Part 242 was replaced 20 years ago by wholly new and unrelated regulations. Therefore, the 1965 regulations, which were the original termination regulations that pre-dated the termination regulations invalidated in *Kelly v. U.S. Dept. of the Interior*, 339 F. Supp. 1095,1100-1102 (E.D.Cal. 1972)."

Corrected Brief for Appellee United States of America, U.S. District Court of the 9th Circuit, WL 2480819 (2005).

2. The Plain Meaning and Congressional Intent of the California Rancheria Act and its Amendment is Unambiguous no Deference is Due.

Defendants' 2015 Decision, incorporated into the 2020 Decision, or the 2020 Decision taken together as one Decision, or alone, violate(s) the Administrative Procedure Act because the plain language of the California Rancheria Act including Federal Defendants' conclusions that the 1964 Amendments or Section 5(d) alone: (1) is a mandatory trigger to cease federal relations with

[1] The relevant section of the invalidated regulation, 25 C.F.R. Part 242.11 (1965) states that "Sale of any rancheria…by the Secretary pursuant to the authority contained in section 5(d) of the Act of August 18, 1958, as amended, shall be conducted in the manner proscribed in that portion of Part 121 of this title which applies to the sale of individually owned trust or restricted land."

otherwise recognized Indian tribe when land is sold under 5(d); and (2) Section 5(d), by its operation of law, did not mandate compliance with other Sections of the California Rancheria Act including Sections 2, 3, and 10. One could not conclude from the plain reading of the CRA section 5(d) alone any provides authority to terminate or cease government-to-government relations with individual Indians or, for that matter a tribe, band, or community of Indians.

In order for the Federal Defendants to terminate their relationship with Plaintiff, Defendants were required to comply fully with the CRA including sections 2, 3, and 10 of the Act. *See, e.g., Duncan v. Andrus,* C-71-1572-WWS (N.D.Cal., March 22, 1977) (finding that in the CRA, 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.). In fact, the 2015 Decision offers no reasoned analysis of the Agency's interpretation of the interplay with Section 5(d) of the Act and Sections 2, 3, and 10. For instance, in neither Decision do Defendants provide an explanation of their interpretation of the Act or reasoned decision for such a conclusion about (1) why section 5(d) provides express congressional authorization to terminated tribal status and cease federal relations; nor does the agency (2) explain why other provisions of the Rancheria Act were not complied with, including providing sanitation facilities or development of irrigation and domestic water systems or information related to the role of the Secretary of Health, Education and Welfare to comply with the entire statutory scheme. Therefore, Defendants' "agency action is arbitrary and capricious if it departs from agency precedent without explanation." *Dillmon v. Nation Trans. Saf. Brd* (D.C. Cir. 2009).

The 2015 Decision finds and concludes without explanation that the Plaintiff's government-to-government relations is terminated and to rekindle such relation Plaintiff must seek federal acknowledgment through the 25 C.F.R. Part 83 process. AR 001080. After this Court's Order of April 2020, Federal Defendants issue Defendants 2020 Decision states, "We conclude that the question of whether your client [Plaintiff] is eligible to pursue Part 83 acknowledgment should have

been assessed by the Office of Federal Acknowledgment in the first instance, and that Assistant Secretary Washburn came to his negative conclusion prematurely." AR 001125.

Intertwined in the 2015 Decision is the 2020 Decision's failure to provided reasoned explanation for its determination (1) that the decision for determining whether Plaintiff is terminated falls upon the OFA, (2) no explanation sufficiently stating an explanation of what from the 2015 Decision survives, and (3) no cogent articulation as to why is exercises its description in the manner it does.. The 2020 Decision withdraws portions of the 2015 Decision without articulating a satisfactory explanation sufficient to justify Federal Defendants' change in policy. *See Dillmon v. Nation Trans. Safety Brd* 588 F.3d 1085 (D.C. Cir. 2009) ("agency action is arbitrary and capricious if it departs from agency precedent without explanation."). An unexplained inconsistently in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice. *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981 (2005).

The greater context within the 2015 and 2020 Decision is that Federal Defendants exercise their authority over Indian affairs, and these Decisions, with 50 plus years of policy that favors self-governance and self-determination. It is critical to remember that "Congress expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition that previously have been terminated." P.L. 103-454, § 103(4)(5).

Moreover, courts in this Circuit have found that revocation of a Band of Indians federally recognized status was not accomplished pursuant to the Rancheria Act since the planned termination of the Indians was never successfully accomplished under the Act, a Band retains its status as a federally recognized governing body eligible to participate in federal programs and services. *See Table Bluff v Andrus*, 532 Fed Supp. 255, 260-261 (N.D.Cal. 1981).

Furthermore, all courts are guided by Indian cannons of construction. In this instance, [w]hen we are faced with two possible constructions, our choice between them must be dictated by a

principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). With the Indian cannon in mind, a plain reading of section 5(d) shows Congress intended to divest itself of property that Indians of California were simply not using.

This Court next need go no further than *Chevron* first step: the statute is unambiguous. The CRA answers the precise question before this Court. The 1964 amendments to the CRA made possible a determination by BIA that the rancheria was "not occupied." AR 000595. There is no record, analysis, including congressional reports showing Congress' intent to terminate its relationship with individual Indians—or for that matter bands, tribes, or communities—upon enactment of Section 5(d) when a rancheria was considered not occupied. Indeed, the statutory scheme of the CRA connections individuals Indians use and occupancy to the sale of a rancheria. Hence, the mere sale of a rancheria, determined to be "not occupied" under CRA § 5(d) is insufficient to terminate the relationship with an Indian tribal government on its face or without complying with other provisions of the CRA.

Federal Defendants failure to explain its interpretation of their unexplained departure of the 2020 Decision from the 2015 Decisions is arbitrary and capricious. *See, e.g., Organized Vill. Of Kake v. Dep't of Agric.*, 795 F.3d 956, 968-969 (9th Cir. 2015) *and, Nat'l Cable & Television Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Plaintiff urges the Court to find and declare that the CRA did not mandate the termination of the Plaintiff and moreover, the mere sale of the "rancheria" pursuant to section 5(d) was insufficient to terminate its government-to-government relationship with Plaintiff.

3. Even if the California Rancheria Act is Silent or Ambiguous, Deference is not Due to the Federal Defendants Decisions of 2015 and 2020 because they failed to provide articulable and reasoned explanation for its decision-making.

a. Federal Defendants Fail to Provide Reasoned Explanation and Ventilate Issues Contained in the Administrative Record that Depart from the Findings, Conclusions, and Actions of the 2015 and 2020 Decisions.

Plaintiff also challenges how Federal Defendants reached it 2015 and 2020 Decisions. In this context it is axiomatic that agency action that is not the product of reasoned decision-making is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 53 (1983). To satisfy the core requirement of reasoned decision-making, an agency must "cogently explain why it has exercised its discretion in a given manner." *Id*. at 48. Federal Defendants ignore relevant record contained in the administrative record regarding the status of the Plaintiff.[2] Without explanation, Federal Defendants failed to review or articulate 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).

The substantial evidence standard requires the appellate court to review the administrative record, weighing both the evidence that supports the agency's determination as well as the evidence that detracts from it. *See Cal. Pacific Bank v. FDIC*, 885 F.3d 560, 570 (9th Cir. 2018), *and De La Fuente v. FDIC* , 332 F.3d 1208, 1220 (9th Cir. 2003) (reviewing the record as a whole). Nowhere in the 2015 Decision or the 2020 Decision do Federal Defendants provide a reasoned explanation for ignoring or failing to explain first, its decisions, first, that the interpretation of the California Rancheria Act may or may not implicate whether the Plaintiff was terminated, and Second, neither the 2015 Decision or 2020 Decision provide reasoned explanation why findings, conclusions, policy,

[2] In making new contradictory findings agencies are required to provide "reasoned explanation" for changing, disregarding its prior findings. *See FCC v. Fox Television Stns*, 556 U.S. 502, 516 (2009). Here, Defendants fail to even acknowledge that they are now reaching opposite or contradictory findings by their own record appearing the in administrative record.

or other records inconsistent within the administrative record. Moreover, while these records appear in the administrative records such records are relevant and are contrary to the findings and conclusions of the 2015 and 2020 Decision. *See 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").

For instance, just a year before Plaintiff first submitted its September 1998 Letter to the Office of Federal Acknowledgement ("OFA"), a congressionally mandated council produced a report on California Indian policy. AR 000782 & AR 000786. (while the report runs 928 pages, Federal Defendants produced only a limited number of pages). Created by federal statute, the Advisory Council on California Indian Policy ("ACCIP") produced a report entitled, Final Reports and Recommendations to the Congress of the United States, Pursuant to Public Law 102-416 (Sept. 1997). This report acknowledges that status of the polity of Taylorsville Rancheria was not affected by as the sale of the Rancheria property in 1966.

The Report states:

> *The El Dorado Rancheria and the Mission Creek Reservation were apparently terminated pursuant to the 1964 Amendments to the Rancheria Act. See 31 Fed. Reg. 9685 (1966)[3] (El Dorado), and 35 Fed. Reg. 11272 (1970) (Mission Creek).*

[3] A federal court invalidated the 1966 implementing regulations to the CRA in 1972. Federal Defendants also overlook evidence that the CFR would be used to terminate the Plaintiff. For example, in an undated latter from the commissioner of Indian Affairs to US. Representative Harold Johnson, the congressman suggests using section 5(d) as a way to dispose of the Taylorsville property. Decl. Ex. A, B, & C. Interestingly, *25 C.F.R. Part 242.11 (1966)* makes section 3 of the Rancheria Act inapplicable providing instead "Sale of any rancheria…by the Secretary pursuant to

> *Several unoccupied Rancherias were sold following the 1964 Amendments: Colfax, Likely, Lookout, Strathmore, and Taylorsville. These sales did not affect the status of any tribe.* AR 000785.

This finding and conclusion makes clear that mere sale of rancheria land does not terminate Plaintiff Tribe's status. "[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary and capricious agency action…" *Butte Cnty v Hogan*, 613 F3d 190, 194 (D.C. Cir 2010). Here, Federal Defendants ignore the finding of a congressionally mandated council on California Indian policy and failed to ventilate and include the report and its analysis and facts in either the 2015 or 2020 Decisions. Such significant contradictory evidence could not be implicitly considered.

Even after the submission of Plaintiff's 1998 Letter, Plaintiff's attorneys consistently and continually framed Plaintiff's efforts to seek a status review. AR 000955, 000957, 000993. On March 18, 2005, Plaintiff wrote directly to the Secretary of Interior, Gale Norton, requesting a "Federal Status Clarification and Services from the Bureau of Indian Affairs" and states that Plaintiff "requires placement on the list of Federally Recognized Tribes and services from the Bureau of Indian Affairs." AR 000593.

In fact, during a span of several years, Plaintiff's attorney sought a "reaffirmation" of the Plaintiff tribal status like the approach that Federal Defendants had taken on several other California tribes' "reaffirmation." AR 000993, 000980 (Congress McClintock seeking to "begin the administrative error correction process."). The 2015 and 2020 Decision fail to ventilate or provide reasoning or cogently explain why it has exercised its discretion related to the administrative record that shows that the agency engaged in discussions about reaffirmation.

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the authority contained in section 5(d) of the Act of August 18, 1958, as amended, shall be conducted in the manner proscribed in that portion of Part 121 of this title which applies to the sale of individually owned trust or restricted land."

In response to Plaintiff's November 15, 2004, FOIA, on January 12, 2005, the Bureau of Indian Affairs, stated that "We can locate no documentation pertaining to the status of the termination of the Taylorsville Rancheria." AR 000955. Unable to produce documents related to status of the Plaintiff *vis-à-vis* its government-to-government relationship indicates at minimum that any request by Plaintiff that sought a status clarification, including the one that led to the 2015 Decision (and subsequently the 2020 Decision), would require Federal Defendants to produce a through and exhausting evaluation of any and all records, and as well as provide a reasoned explanation cogently explaining why it has exercised its discretion available to make its determination of status. Federal Defendants' admission it held no records related to status shows that Federal Defendants failed to provide reasoned explanation related in either its 2015 or 2020 Decisions. More importantly, the BIA's FOIA response is an admission that Plaintiff's government-to-government relationship was never terminated.

Furthermore, there were numerous trust monies held on behalf of the polity known as the "Taylorsville Band of Maidu Indians." AR 001126-001132, AR 0001134 and AR 000615. Again, Federal Defendants fail to cogently explain why it has exercised its discretion despite record showing that Federal Defendants were treating the Plaintiff band of Indians in the same or similar manner as like situated Indian tribes in the holding of trust funds.

Federal Defendants failure to provide a reasoned explanation related to records contained in the Administrative record would have led them to a different conclusion in either the 2015 Decision or the 2020 Decision Therefore, Federal Defendants' findings, conclusions, and actions are arbitrary and capricious and contrary to the law.

II. Documents in possession not contained in Administrative Record Ignored by Federal Defendants Fail to Meet APA Standards.

Defendants rely on prior government documents for their findings and conclusion and presumably when interpreting the Rancheria Act to support the 2015 Decision's conclusion that

"[a]fter sale of the Taylorsville Rancheria, government documents indicate that the Federal Government no longer recognized or carried on a government-to-government relationship with the Taylorsville Rancheria." 2015 Decision at 2-3. However, Federal Defendants either ignore their own records or cherry pick records in their own possession.

Records obtained through a Freedom of Information Act Request and compared to the Administrative Record show that Federal Defendants, in both the 2015 and 2020 Decisions, failed to ventilate facts, analysis, and policy contained in these relevant records that would potentially impact any inquiry related to the status of the Plaintiff. *See e.g., Am. Radio Relay League, Inc., v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). Failure to consider documents relevant to the Decisions of 2015 and 2020 raise substantial questions whether Federal Defendants effort to partially retract the 2015 Decision examined relevant records and articulated a cogent 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).[4]

For instance, in or around On June 25, 1975, Commissioner or Indian Affairs wrote the Sacramento Area Director for the BIA, Decl. Ex. E at 1. In the memorandum the Commission admonished, "The Act establishes certain procedures which must be adhered to by the Indians and Federal Government in carrying out termination, one of which is that before making the conveyances

[4] Of note, Federal Defendants' Administrative Record filing before this Court offers no distinction between which records when used to make findings and conclusions or take actions in either 2015 or 2020 Decisions, and as such Plaintiff assume use of all records for both Decisions.

authorized by the Act (and the amendment)[5] the Secretary of the Interior is directed under section 3" to carryout statutory mandates.

In addition, the same memorandum from the Sacramento Area Director to the Commissioner of Indian Affairs, the Area Director interpreting the Rancheria Act noted that the Act "established certain procedures which must be adhered to by the Indians and Federal Government in carrying out termination." Decl. Ex. at E at 1. The Area Director further stated, "[w]hen section 3 and 10(b) are read in pari materia it becomes clear that only after section 3 services have been completed and the assets there -after distributed can the particular Indian distributees and their dependents who are not members of any other tribe or band of Indians be considered terminated and no longer entitled to Federal services." Decl. Ex. at E at 2 [emphasis in original]. The memorandum continues with this critical passage, "Therefore, upon re-evaluation of these cases, the Bureau of Indian Affairs, with the concurrence of the Associate Solicitor for Indian Affairs, has determined that termination under both the 1958 Act and the 1964 Amendment does not occur until the section 3 improvements have been adequately completed…" Decl. Ex E. at 2.

In a contemporary list of Tribes terminated in California, the Bureau of Indian Affairs listed Taylorsville as "Taylorsville. Land Sold, deed approved 11-4-66." The listing of "Taylorsville" diverges from other Indian tribes listed in the same category. For instance, the first tribe in the list is listed as, "Alexander Valley. Termination effective 8-1-61." Decl. Ex G. Twenty-eight (28) other tribes on that category list and are listed with the descriptor "Termination effective" accompanied by

[5] It is notable that the effect of the 1964 amendments was to substitute the phrase "sanitation facilities" for the phrase "irrigation or domestic water systems," thereby expanding the services required by the Act to include drainage facilities, sewage and waste-disposal facilities and shifting the authority for negotiations and implementation to the Secretary of Health, Education and Welfare. See Rancheria Act Section 3 (1964) (as amended).

a date. "Taylorsville" is not listed with the connotation of "Terminated effective" with a date. *Id*. In fact, one other tribe is listed in a similar manner to the Plaintiff: "Strathmore. Land Sold, deed approved 9-29-67." Of particular interest, as described further below, the congressionally mandated report produced by the Advisory Council on California Indian Policy determined that Strathmore Rancheria was also not terminated as a result of land "not occupied" under Section 5(d) of the Rancheria Act. AR 000785.

On or around January 19, 1979, the Sacramento Area Office, in a survey of California tribes and review of the Office's compliance with the Rancheria Act indicates that, in the case of Taylorsville, the Agency had not complied with Section 3 because "No land left in Indian ownership" and "No residents at time of termination." Decl. Ex at H.

On or after August 1, 1965, Plaintiff is unaware of any communication, direct, indirect, or otherwise, or record sent or created by the Defendants that communicate with individual Plaintiff tribal citizens or the tribe in accordance with any provision of the California Rancheria Act including Sections 2, 3, or 10.

In and February 1978, a Solicitor's Office memorandum noted that "if the section 3 improvements and services set forth in the CRA are not adequately made prior to the distribution of the assets, that the termination of a particular Rancheria and its members was not in accordance with the Rancheria Act and therefore, ineffective." Decl. Ex at F at 1. In a Bureau of Indian Affairs memorandum, January 19, 1979, Federal Defendant admit that Plaintiff is an Indian tribe subject to the IRA and that termination was not in compliance with section 3 of CRA. Decl. Ex at G.

Nowhere do the 2015 and 2020 Decisions provide reasoned explanation or cogently explain why it has exercised its discretion in a given manner. Federal Defendants fail to explain the significant departure in federal analysis and policy of their 2015 and 2020 Decisions *vis-à-vis* records obtained in a FOIA request and in possession of Federal Defendants. These publicly available records held by Federal Defendants, yet not included in the administrative record, were not considered and

therefore Federal Defendants failed to connect relevant facts and analysis to either the 2015 or 2020 Decisions.

A. Application of the CRA makes the Interpretation and Application of Part 83 to Plaintiff Unnecessary.

Title 25 C.F.R. Part 83 is inapplicable because 25 C.F.R. § 83.3 applies "only to indigenous entities that are not federally recognized Indian tribes." 25 C.F.R. § 83.3. Part 83 is *only potentially* applicable if the 1964 amendment mandates the termination of Plaintiff—a tribal government that conducted relations with the United States. Therefore, the interpretation of the California Rancheria Act is critical. If the agency erred interpreting the CRA, 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 federally recognized. *See* 25 C.F.R. § 83.3.

On September 29, 1998, Plaintiff sought a status clarification concerning its government-to-government relationship with the United States. AR 001114. It did so again in 2013. AR 001117. The 1998 Letter was addressed to the Branch of Acknowledgment and Research ("OFA"). On January 31, 1999, the Branch of Federal Acknowledgment replied to Plaintiff's letter "to acknowledge the receipt, on Nov. 16, 1998, of your letter stating that you intend to petition for Federal acknowledgment." AR 001115. Federal Defendants' interpretation of the CRA in the 2020 Decision changes positions from prohibiting Part 83 petitioning, as determined in the 2015 Decision, 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 CRA or of the 2015 Decision's *ipse dixit* interpretation of the Rancheria Act—finding and concluding that "Congress mandated" termination . *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 former position).

Federal Defendants change the conclusion that Plaintiff is now eligible to petition under Part 83. Doc. 70-1 at 4-5. Such a conclusion necessarily requires that the Agency interpreted the California Rancheria Act again; however, Federal Defendants provide no articulable reasons for its new conclusion.

It is critical to reemphasize what precipitated this APA challenge started when Plaintiff sought a clarification of its status as a federally 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. The conclusion that it could not participate, and then later could participate in a Part 83 petition were Federal Defendants findings and conclusions resulting precisely from Federal Defendants' failure to interpret or its interpretation of the California Rancheria Act with a modicum of thoroughness in the 2015 Decision and again in its 2020 Decision.

Federal Defendants' 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. In the 2015 Decision, the tenor and tone are focused on determining the status of the Tribe because this was Plaintiff's request. Doc 13-1 at 1. The 2020 Decision implicitly leaves in place Federal Defendants the interpretation of the California Rancheria Act because Federal Defendants admit that the 2020 Decision "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 is Plaintiff's statutory right to submit a completed petition with or without the 2015 Decision or 2020 Decision—notwithstanding whether the petition would or could be successful.

For instance, for the 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 the Part 83 regulations that 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 CRA, a determination of the 2020 Decision that Plaintiff *may* now petition under Part 83 because the determination was "premature", AR 001125, is indeed, illusory, because it prolongs an inevitable determination under Part 83 which prohibits relations with "terminated" tribes.

The 2020 Decision implicitly leaves in place the interpretation that Congress mandated termination under the 1964 amendments because the decision states "simply retracted the portion of the 2015 Decision that prohibited the Tribe from submitting a Part 83 petition." Doc. 70-1 at 4-5. Put another way the 2020 Decision implicitly stands for the preservation of Federal Defendants' finding and conclusion that under the CRA, "Congress mandated" termination, therefore, Plaintiff is terminated. In practical terms, the 2020 Decision's remand to OFA to determine whether Plaintiff is terminated is illusory and nonsensical when the 2020 Decision leaves in place the finding and conclusion that "Congress mandated" termination under the 1964 Amendment. 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.

III. Plaintiff Urges this Court to Provide Broad Relief Due to Federal Defendants Actions for More than twenty years.

Federal Defendants violated 5 U.S.C. § 706 et seq. Federal Defendants actions are arbitrary and capricious, an abuse of discretions, and contrary of statutory mandated procedures Plaintiff requests this Court find that because Federal Defendants took part in administrative misuse of procedure and doing so have delayed relief to Plaintiff for decades, Plaintiff believes this Court's authority is not limited to mere remand. This Court has "equitable power to order relief tailored to the situation," *id*. and a court reviewing agency action may "adjust its relief to exigencies of the case." *Sierra Pacific Indus v. Lyng*, 1099, 1111 (9th Cir 1989) *quoting Ford Motor Company*, 305 U.S. 364, 373 (1939).

This case presents those unusual circumstances that make remand alone inappropriate. This court should award mandamus relief pursuit and to 28 U.S.C. §1361 as requested in the Second Amended Complaint. Facts and the record show that this Court should have no confidence in the Federal Defendants' ability to decide this matter expeditiously or fairly. Plaintiff believes this Court

has no mandate or deferential obligation to remand when finding Federal Defendants' violations of the APA. A number of exigencies stand out:

- The record indicates that circumstantial political exigencies by county officials pressured the BIA to sell the property to the County for a rodeo grounds.. AR 000601 -- 000604.
- That pressure was so great the local U.S. Congressman was involved. Decl. at Exs. A, B, & C.
- Congressman Johnson observed that 5(d) could be used to sell the property in an exchange with BIA officials. Decl. Ex. B. and AR 000601 at 1 & 3,
- The administrative record indicates that at least on individual Indian associated with Plaintiff inquired about the land. AR 000599. Nonetheless the BIA concluded the rancheria was "not occupied" triggering the sale of the property.
- Nothing in the record of the time of the conveyance of the property shows that termination of the Plaintiff band of Maidu Indians.
- In 2005, response to Plaintiffs FOIA request states it has no information on status of the Plaintiff vis-à-vis its government-to-government relation with the United States. AR 000955.
- Since 1998 Federal Defendants communicated on numerous instances with the Plaintiff about status and reaffirmation resulting in a 2015 Decision corralling Plaintiff into a Part 83 process and then violently shifting gears in their 2020 Decision requiring the OFA reach a determination of whether Plaintiff is terminated, notwithstanding the context that OFA was leading the discussion Plaintiff related to its status since at least 1998.

BIA cannot be trusted that another 20 years will go by before it renders a decision in accordance with this this Court's findings, conclusions of law, and Order on remand. Remand will only cause further delay and expense and further deny congressionally statutory benefits to Plaintiff Maidu

peoples. Plaintiff therefore requests this Court use its equitable power to interpret the CRA finding and declaring that the relationship of the Plaintiff was not and has never been terminated with the United States and instruct Federal Defendants to take appropriate steps to implement this Court's findings, conclusions of law, and Order.

CONCLUSION

Plaintiff claims that Federal Defendants' 2015 Decision and 2020 Decision are actions violate provisions of the APA including 5 U.S.C. § 706 (A) (arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law), § 706 (C) (excess of statutory jurisdiction, authority), and § 706 (D) without observance of procedure required by law). Doc. 65.

Federal Defendants incorrectly and unlawfully interpret the CRA in the 2015 and 2020 Decisions Federal Defendants ignore relevant records, fail to explain departures in its findings, conclusions, and actions, and fail to provide reasoned explanation related to an interpretation of the California Rancheria Act. Federal Defendants fail to cogently explain contradictory or relevant records within or outside the administrative record. Federal Defendants' actions are incongruent with the Supreme Court's demands of federal agency obligations under the APA and therefore are arbitrary and capricious conduct, abuse of discretion, and failure to observe express statutory procedure.

Plaintiff requests that this Court find and declare that the 2015 alone and the 2020 Decision alone, or the 2015 Decision, modified by the 2020 Decision violates 5 U.S.C. §706 (A), (C) & (D).

DATED: March 17, 2023

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