No. _____

In the Supreme Court of the United States

ALBERT P. ALTO, *et al.*,
Petitioners,
v.

SALLY JEWELL,
Secretary of Department of Interior, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are (1) whether the doctrine of res judicata and collateral estoppel precluded the Assistant Secretary of the Department of Interior in 2011 from revisiting his predecessor's 1995 final and conclusive decision about petitioners' status as Native Americans; and (2) whether the Assistant Secretary's 2011 decision to declassify petitioners' Native American Indian status violated the Administrative Procedures Act.

PARTIES TO THE PROCEEDING

Petitioners are individuals named as follows: Albert P. Alto, Andre E. Alto, Anthony Alto, Brandon Alto, Chastity Alto, Christopher J. Alto, Daniel J. Alto, Jr. Daniel J. Alto, Sr., Dominique N. Alto, Raymond Alto, Raymond E. Alto, Raymond J. Alto, Robert Alto, Victoria (Alto) Ballew, Angela Ballon, Juan J. Ballon, Rebecca Ballon, Rudy Ballon, Janice (Alto) Banderas, Peter Banderas, Victor Banderas, Monica (Sepeda) Diaz, Anthony Forrester, Dustin Forrester, Johanna (Alto) Forrester, Sarah Forrester, Ernest Gomez, Henrietta (Alto) Gomez, Kathleen Gomez, Humberto R. Green, Lydia (Alto) Green, Paul Anthony Green, Mary Jo (Alto) Hurtado, Justin A. Islas, Cynthia (Sepeda) Ledesma, Destiny C. Ledesma, Isabelle M. (Alto) Sepeda, Lupe Sepeda, Deborah L. (Alto) Vargas, Desiree Vargas, Jeremiah Vargas, Jessiah Vargas, and Terry E. Weight, individuals, and Pamela J. Alto as guardian ad litem for Marcus M. Green, Pedro Banderas as guardian ad litem for Reina A. Banderas, and Dawn Castillo as guardian ad litem for Alexis N. Ledesma.

Petitioners sued respondents, Department of Interior and the Bureau of Indian Affairs under the Administrative Procedures Act.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Albert Alto, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit that affirmed the Assistant Secretary's 2011 decision and order.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is set forth in an unpublished memorandum. (Pet. App. 1) The Regional Director's November 2008 decision in favor of petitioners remaining federally recognized tribal members is unpublished. (Pet. App. 171) The Assistant Secretary's January 28, 2011, decision and order is unpublished. (Pet. App. 111) The district court's opinion granting a preliminary injunction in favor of petitioners is unpublished. (Pet. App. 60) The district court's opinion granting summary judgment in favor of defendants is unpublished. (Pet. App. 6)

JURISDICTION

The Ninth Circuit's judgment was entered on September 20, 2016. (Pet. App. 1) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

25 C.F.R. Part 76. This case also involves due process considerations under 5 U.S.C. § 706 and the Fifth Amendment in that Assistant Secretary Echo Hawk's 2011 decision and order resulted in a loss of citizenship and declassification of petitioners' Native

American Indian status, similar to a denaturalization order.

STATEMENT OF THE CASE[1]

Petitioners' case involves a recurring theme in Indian Country. Disenrollment of federally recognized tribal members despite final Department of Interior decisions finding individuals eligible for tribal membership. See *Aguayo v. Jewell*, Docket No. 16-660 filed Nov. 14, 2016.

Under 25 C.F.R. Part 76, adopted by the San Pasqual Band of Mission Indians as its enrollment ordinance, the Assistant Secretary had "final and conclusive" authority to determine the Band's membership. Petitioners were enrolled as members of the Band pursuant to Assistant Secretary–Indian Affairs, Ada Deer's 1995 final decision that concluded that petitioners' ancestor, Marcus Sr., was 4/4 degree Indian. Assistant Secretary Deer's decision adjudicated the petitioners' rights. Petitioners participated as members of the Band for sixteen years, including holding governmental offices and establishing the Band's successful casino.

In 2008, by a 3-2 vote, the Band's enrollment committee recommended disenrollment of all Marcus Sr. descendants. In support of its disenrollment recommendation, the committee submitted a baptismal record that purportedly recorded Marcus' baptism in 1907. The baptismal certificate cited Jose Alto as the child's father. The disenrollment recommendation was

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[1] The Department of Interior and Bureau (BIA) are interchangeably used in this petition.

submitted to the Bureau's Pacific Regional Office for agency approval to remove petitioners' names from the federally recognized tribal roll. In November 2008, the Regional Director rejected the enrollment committee's action citing insufficient evidence for disenrollment. However, the Band appealed the Regional Director's decision to the Assistant Secretary–Indian Affairs. In January 2011, Assistant Secretary Larry Echo Hawk opined that he had authority to revisit his predecessor's 1995 final decision. He concluded that petitioners' ancestor, Marcus, was not the biological son of Jose and Maria Alto and therefore not Native American. Echo Hawk ordered petitioners' names removed from the federally recognized tribal roll.

In making this decision, Assistant Secretary Echo Hawk overturned three previous BIA agency decisions including one on parity by his predecessor Assistant Secretary Ada Deer. Echo Hawk's decision rewrote the family's lineage, and declassified the petitioners' Native American status despite DNA evidence that established petitioners' Native American ancestry. The evidence was uncontested. The Assistant Secretary, not the Band, disenrolled the petitioners. Petitioners lost their heritage and all tribal and federal benefits which flow from their status as federally recognized tribal members. The petitioners will lose their Indian Health care and other federal benefits that flow from their Native American ancestry due to the Assistant Secretary's finding that their ancestor, Marcus Sr., was "non-Indian."

Petitioners have been federally enrolled tribal members long before the successful Valley View Casino opened. Before being disenrolled, petitioners

represented approximately 20-percent of the Band's tribal members. Tribal disenrollments from casino-rich tribes have dramatically increased in recent years across a broad number of tribes. Disenrollments occur when a small minority of tribal members are put in positions of power on committees to secure a larger share of the revenues for themselves and their supporters. In this case, the initial "disenrollment" action that initiated the Department's review of the final 1995 decision was brought by a 3-2 vote. Most cases brought to challenge mass disenrollments disenfranchising tribal members have been rejected because of jurisdictional or procedural problems. Because petitioners are federally recognized tribal members, this case provides the Court with a unique opportunity to distinguish and limit its decision rendered thirty-eight years ago in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

STATEMENT OF THE FACTS

In 1920, Marcus Alto, Sr.[2] was listed as the "Indian" son of Jose and Maria Alto on the United States Census. (Pet. App. 82) In 1930, Reginald Duro, on behalf of Marcus Sr., certified under oath that Marcus was the son of Jose and Maria, and eligible for inclusion in the California Judgment Roll. Marcus and Maria Alto were listed as Indians on the 1933 California roll prepared by the Bureau.[3] (Pet. App. 115)

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[2] Unless otherwise indicated, all reference to "Marcus" are to Marcus Alto, Sr.

[3] Although also eligible for inclusion in the 1933 roll, Jose Alto died several years before the roll was prepared.

The San Pasqual Indian families were scattered around California and did not live on the reservation land set aside for them in 1910. However, in the 1950's some individuals began to organize the "Band." On July 29, 1959, the Department of Interior published a notice of proposed rulemaking, setting out regulations intended to govern the preparation of the Band's original roll. The rule was codified at 25 C.F.R. Part 48, published March 2, 1960. The implementation of Part 48 regulations resulted in the creation of an approved 1966 tribal roll recognized by the Department of Interior. Marcus and his descendants did not apply for membership in the Band at that time. (Pet. App. 115-116) The Band's Constitution thereafter received Secretary approval in January 1971. Article II of the Band's Constitution provides that:

> Section 1. Membership shall consist of those living persons whose names appear on the approved Roll of October 5, 1966, according to Title 25, Code of Federal Regulations, Part 46.1 through 48.15.
>
> Section 2. All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of Interior.

(Pet. App. 118)

On March 20, 1982, Part 48, which was incorporated by reference as the Band's enrollment regulation in Article II of the Band's Constitution, was re-designated Part 76, as part of a reorganization of C.F.R. Title 25. (See ER 245; AR 1573) The Band had

not updated its original membership roll since it was submitted to the Secretary. Part 76 was enacted to make certain the Department complied with its trust duty to ensure all eligible San Pasqual Indians received their portion of Docket 80A judgment funds. (Pet. App. 160) Besides petitioners, there were several other unrelated individuals whose names were added to the tribal roll when the roll was brought current under Part 76. The Band reviewed a draft of Part 76, and on July 13, 1986, the Band's General Council voted to adopt Part 76. (ER 539, 541; AR 2717, 2719)[4]

Section 76.4 provided a basis to bring the Band's membership current by (1) adding the names of persons living on April 27, 1985, who were not enrolled with some other tribe or band; and (i) who would have qualified for the inclusion of their names on the January 1, 1959, membership roll had they filed applications within the time prescribed. Section 76.14 authorized the Assistant Secretary to review all appeals of rejected applicants and stated: "[t]he decision of the Assistant Secretary on an appeal shall be final and conclusive....The name of any person whose appeal has been sustained will be added to the roll." (Pet. App. 210)

[4] "ER" cites to Excerpts of Record filed in the Ninth Circuit Court of Appeals. "AR" cites to the Agency's Record submitted to the U.S. District Court.

A. Assistant Secretary Deer's 1995 final decision.

On April 10, 1995, Assistant Secretary Ada Deer sent a final decision to the Band's attorney, Eugene Madrigal, which affirmed the Alto descendants' tribal membership eligibility. Assistant Secretary Deer found that "both [Maria] and her husband, Joe Alto, were full-blooded Diegueno Indians. (Pet. App. 209-215) On review of the Band's contention that Marcus was "not a 'blood' lineal descendant of an ancestor from Pasqual," (Pet. App. 211-212) Assistant Secretary Deer stated:

> Although Marcus Sr. was not previously enrolled on the January 1, 1959, membership roll, he possessed 4/4 degree Indian blood of the Band which is more than the 1/8 degree Band blood required. He qualified for enrollment because he was born before January 1, 1959, and he was living on April 27, 1985....[¶] *All available documentation* involving this case has been thoroughly reviewed and based on the preponderance of evidence, I am sustaining the decision made by Acting Sacramento Area Director on January 31, 1994 upholding the enrollment of Marcus Alto, Sr., and his descendants....[¶] *This decision is final for the Department*.

(Pet. App. 212-213, emphasis added)

Thereafter, on June 3, 1996, Part 76 was removed from the Code of Federal Regulations. (Pet. App. 119) Although the federal agency repealed Part 76, the Band

took no official tribal action to *repeal* or *withdraw* Part 76.

B. The Enrollment Committee's 2008 Subsequent 3-2 action.

From 1995 until 2008, the Band abided by Assistant Secretary Deer's final decision until an enrollment challenge was brought against Marcus' descendants and upheld by a 3-2 enrollment committee vote. The disenrollment action was based on the same 1995 litigated claim. The committee forwarded a request to disenroll the petitioners to the Bureau of Indian Affairs, Regional Office, along with an anthropology report claiming to cite to "new evidence" supporting its action to disenroll petitioners. The committee provided no explanation for its failure to present the purportedly new evidence in the 1995 adjudication. Tribal Vice-Chair Robert Phelps, who is a history professor, and was also an enrollment committee member, voted against petitioners' disenrollment. Phelps notified the Department of Interior that the action taken by the 3-2 committee vote to disenroll the petitioners had violated the petitioners' due process rights. Phelps advised the Department that "disenrollment is a serious matter. To rob a family of the rights and benefits of tribal membership, to say nothing of their cultural identity, requires overwhelming proof supporting disenrollment." Based on the anthropology report evidence, Vice Chairman Phelps stated that the proponents of petitioners' disenrollment did not possess such proof. (Pet. App. 189, 190, 198)

C. The Regional Director's 2008 Decision.

On November 26, 2008, the Regional Director acknowledged that Assistant Secretary Ada Deer had issued the 1995 final decision and it was inappropriate for the Committee to seek a remedy as follows:

> ...Mr. Alto's eligibility for membership in the Tribe was already determined by the BIA Southern California Agency Superintendent on May 23, 1991, and was affirmed by the Acting Director on January 31, 1994. On April 10, 1995, the Assistant Secretary-Indian Affairs denied the Band's appeal from the Area Director's January 31, 1994 decision, and the denial decision of the Assistant Secretary was final for the Department. *Therefore, no additional action regarding the enrollment of Mr. Alto and his descendants is required.*

(Pet. App. 172, 173, emphasis added)

The Regional Director also analyzed each item of evidence submitted by the Committee and rejected disenrollment. The Regional Director found that the purportedly new evidence did not demonstrate that Marcus Alto was adopted by Jose and Maria Alto. (Pet. App. 172) As to the baptismal record produced by the Committee, the Regional Director logically concluded:

> Assuming the baptism record is Mr. Alto's, this would prove that he is the son of Jose Alto. On Maria Alto's 1928 application, she listed Jose Alto as 4/4 Digueno Indian from San Pasqual. Jose Alto was listed on several San Pasqual census rolls, in particular the 1910 Census Roll....If this were the case Mr. Alto would still

> be eligible to be included on the San Pasqual membership roll as a descendant of Jose Alto.

(Pet. App. 179)

D. Assistant Secretary Echo Hawk's 2011 Decision.

Petitioners argued that the 1995 Ada Deer decision was final. [ER 476, 479; AR 860, 867] In his January 2011 decision, Assistant Secretary Echo Hawk acknowledged that the petitioners had participated in the Band for sixteen years and were fully engaged in the Band's activities including holding offices in the tribal government. He further noted that "[t]he settled expectation of these Band members, established as they were by good faith decisions by [his] predecessor and by Regional Directors in 1994 and 2008, establish[ed] a strong presumption against reversing course and approving the disenrollments." (Pet. App. 121) Despite the strong legal presumption, Echo Hawk concluded that he retained the authority to revisit his predecessor's decision under 25 C.F.R. section 48.14 (d) and ordered petitioners' names removed from the federally recognized tribal roll.[5]

Although Assistant Secretary Echo Hawk stated in his decision, "the fact that 'Jose Alto' is the name given

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[5] That section provides that "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary." Petitioners argued that this language only applied to individuals who had not had their membership factually adjudicated by the Department of Interior in a "final and conclusive" decision, which was binding on the parties.

as the child's father on the baptismal certificate and is also the name of the man who raised the child establishes a strong presumption the two are the same," he took a 180 degree turn by concluding the Jose Alto named on the baptismal record was not Marcus' biological father. (Pet. App. 145) In making this finding that some other Jose Alto other than the person named in the baptismal record was Marcus' biological father, Echo Hawk rewrote the family's ancestry as "non-Indian." (Pet. App. 148)

E. The District Court found in favor of petitioners' succeeding on the merits and issued a preliminary injunction order.

The district court issued a preliminary injunction barring defendants from disenrolling petitioners, finding petitioners had demonstrated a likelihood of success on the merits in the APA action. Judge Irma Gonzalez opined that the Band's enrollment committee was essentially attempting to reargue the same question that was determined in the earlier challenge - whether Marcus Alto was the biological son of Jose and Maria Alto. The court stated that the doctrine of res judicata was applicable with equal force to administrative decisions. The court noted that even if res judicata did not apply, there were serious questions as to whether collateral estoppel/issue preclusion should bar the re-adjudication of individual issues previously determined by Assistant Secretary Deer. (Pet. App. 75-77)

Judge Gonzalez also found that Echo Hawk's finding that Marcus was the adoptive son of Jose Alto and that the Assistant Secretary's alternative theory that some other Jose Alto was Marcus' father was

inconsistent with the agency record evidence and not reasonable because Marcus was listed as the "Indian" son of Jose and Maria on the 1920 United States census. (Pet. App. 82.) Similar to the Regional Director's reasoning, the court found that the baptismal record established petitioners' ancestor's San Pasqual Indian ancestry as follows:

> ...[T]he evidence submitted by the Tribe suggests that the 'Jose Alto" listed on the [baptismal] certificate was the Jose Alto who raised Marcus Alto Sr.–i.e., a full blooded San Pasqual Indian. Specifically the baptismal certificate lists 'Franco Alto' and 'Litalia Duro' as sponsors. (Citation) In her "Analysis of the Marcus Alto, Sr. Enrollment Challenge," prepared on behalf of the Tribe, Dr. Grabowski states that both of these individuals were San Pasqual Indians and most likely were related to either Jose Alto or Maria Duro. [¶] [Echo] Hawk's alternate conclusion that 'Jose Alto' listed on the certificate might have been the Jose Alto that raised Marcus Sr., but at the same time was *not* his biological father is hardly plausible. It is plainly inconsistent, on the one hand, to accept as true that the 'mother' listed on the baptismal certificate (Benedita Barrios) is the child's biological mother, while, on the other hand, insisting that the 'father' listed on the same baptismal certificate (Jose Alto) is not that child's biological father.

(Pet. App. 89)

F. The District Court reversed course and affirmed the Assistant Secretary's 2011 decision and order.

After Judge Gonzalez retired, petitioners' APA case was reassigned to a new district court judge. That court found that res judicata/issue preclusion principles did not apply because in 1995, Assistant Secretary Ada Deer's authority to review Marcus' eligibility was authorized under Part 76, while in 2011, Assistant Secretary Echo Hawk's asserted authority was exercised under 25 C.F.R. Part 48. (Pet. App. 25-26) In making this finding, the district court failed to address the issue preclusion effect of the Deer 1995 final decision and whether evidence could have been presented in the earlier adjudication. The district court also rejected petitioners' arbitrary and capricious claims and affirmed Echo Hawk's decision that rejected petitioners' DNA evidence of petitioners' Native American ancestry even though no contrary DNA evidence was presented. (Pet. App. 39-41)

G. The Ninth Circuit Court of Appeal's decision.

In a very brief memorandum, the Ninth Circuit Court of Appeal affirmed the Assistant Secretary's decision approving the petitioners' disenrollment. (Pet. App. 145)

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit and District Court's decisions affirming the Assistant Secretary's decision and order ignored important public policy and law–the Department of Interior's duty to apply principles of res judicata and collateral estoppel because the same claim had been previously adjudicated and a final and conclusive decision was issued.

Petitioners and the Band agreed to be bound by Assistant Secretary Ada Deer's final and conclusive decision in 1995 because 25 C.F.R. § 76.14 states:

> The decision of the Assistant Secretary on an appeal shall be final and conclusive...."

(Pet. App. 169)

Several dictionaries, including Black's Law Dictionary online, define the word "conclusive" as "putting an end to inquiry, final, decisive."[6]

Here, the Department of Interior issued a "final and conclusive" decision. Res judicata and claim preclusion principles apply to final Department of Interior decisions. *Dalson v. Pacific Regional Director*, 46 IBIA 209, 212-213 (2008). In *Dalson*, the appellants urged the Interior Board of Indian Appeals (IBIA) to revisit a previous final decision based on new law, an intervening federal court decision involving another tribe. The IBIA rejected reconsideration and

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[6] See, http://thelawdictionary.org/conclusive/
http://www.merriam-webster.com/dictionary/conclusive
http://www.dictionary.com/browse/conclusive.

acknowledged that principles of res judicata apply to final agency decisions as follows:

> Described in general terms, the doctrine of res judicata prevents a party from relitigating the same cause of action against the same party after a final decision has been issued on the merits. See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Allen v. McCurry*, 449 U.S. 90, 94 (1980); see also Black's Law Dictionary 1336-37 (8th ed. 2004) (definition of "res judicata"). The Board applies the doctrine of res judicata to final Departmental decisions, including those rendered by officials whose decisions were subject to appeal to the Board, but for which no timely review was sought. See, e.g., *Racine v. Rocky Mountain Regional Director*, 36 IBIA 274, 277 (2001); *Estate of Ralph James (Elmer) Hail*, 12 IBIA 62, 65 (1983); *Estate of George Swift Bird*, 10 IBIA 63, 66 (1982). [¶] When Appellants failed to file a timely appeal from the Regional Director's February 15, 2006, decision, that decision became final for the Department. See 25 C.F.R. § 2.6 (Finality of Decisions); *American Land Development Corp. v. Acting Phoenix Area Director*, 26 IBIA 197, 199 (1994) (as a consequence of the appellant's failure to file a timely appeal, the Regional Director's earlier decision was final for the Department).

Dalson, *supr*a, 46 IBIA 209, 212-213.

Likewise, the Assistant Secretary was required to apply res judicata and issue preclusion principles based on Assistant Secretary Deer's 1995 final decision in

petitioners' case. That decision was issued after the U.S. Supreme Court decision in *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. 49. The Band was aware of its legal rights, was represented by counsel, and could have readily challenged the Assistant Secretary's decision in federal court under the Administrative Procedures Act. (ER 234; AR 2298)

The district court erred in finding there were sovereignty and self-determination policy considerations that supported the Assistant Secretary's 2011 decision to review the stale claim evidence. (See Pet. App. 27) "Santa Clara Pueblo did not and does not stand for the proposition that tribal membership is 'a matter within the exclusive province of the tribes themselves'–a matter that the federal government absolutely lacks the authority to intervene in....its relatively narrow holding...was purely jurisdictional." See, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 Ariz. L. Rev. 383, 407 (2015).[7] Here, there is no issue of sovereignty and self-determination because the Band gave the Secretary the absolute authority to render a "final and conclusive" adjudicative decision.

Assistant Secretary Echo Hawk explicitly recognized that "[t]he settled expectation[s]" of the parties had long since been adjudicated, but overturned two regional agency decisions and a final Department of Interior decision on parity from his predecessor. Both the Regional Director and Judge Irma Gonzalez recognized that principles of res judicata and issue

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[7] Authors, Gabriel S. Galanda and Ryan D. Dreveskracht.

preclusion applied. The Regional Director's decision reasonably concluded:

> It is inappropriate for the Committee to continue to raise this issue of the validity of the inclusion of Mr. Alto and his descendants on the Band's membership roll or to attempt to disenroll his descendants *and continue to seek remedy from the BIA*.

(Pet. App. 187, emphasis added)

The primary policy underlying application of the collateral estoppel and res judicata doctrines is finality. Once a claim or issue has been finally decided, a litigant cannot demand that it be decided again. In *United States v. Utah Mining Constr. Co.*, 384 U.S. 394 (1966), this Court recognized that "final and conclusive" language was harmonious with res judicata and collateral estoppel principles and barred relitigation. When an administrative agency acts in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, courts apply res judicata. *Id*. at pp. 421-422. Accordingly, as a matter of law, the Assistant Secretary should not have revisited his predecessor's final decision.

II. The Assistant Secretary's 2011 decision to declassify Marcus Sr.'s, status as "non-Indian" to disenroll petitioners was arbitrary. There must be clear and convincing evidence to divest the petitioners of their Indian citizenship and federal recognition as Native American Indians.

Petitioners are federally recognized tribal members, and, as individuals, the Department owes them a duty of trust.[8] As noted on the Department of Interior's website: "The rights, protections, and services provided by the United States to individual American Indians...flow not from a person's identity as such in an ethnological sense, but because he or she is a member of a federally recognized tribe."[9] A "tribal government's ability to determine, define, and limit the criteria for membership, is distinct from its ability to retract a previous determination that an individual has satisfied existing criteria for tribal membership. While the former is properly defined as an aspect of inherent tribal sovereignty–the latter–disenrollment is not." See, *Curing the Tribal Disenrollment Epidemic*, *supra*, 57 Ariz. L. Rev. 383, 389.

In terminating petitioners' tribal citizenship and federal recognition, Assistant Secretary Echo Hawk acknowledged the crucial difference between applicants

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[8] "The Assistant Secretary - Indian Affairs (AS-IA) has responsibility for fulfilling the Interior Department's trust responsibilities to American Indian and Alaska Native tribes and individuals." See https://www.bia.gov/FAQs/ Section V.

[9] See https://www.bia.gov/FAQs/ Section IV.

and those individuals who are federally enrolled tribal members:

> Until a person becomes enrolled in a tribe, the federal government has few obligations to that person; certainly no generalized duty as trustee or guardian. Therefore, as regards the relationship between a tribal government and an applicant for enrollment, all federal duties flow toward the tribal government. Disenrollment of a recognized tribal member invokes an entirely different set of relationships. The federal government has the duty to protect individual trial members even from their own tribal government....Therefore, as a matter of law, *the Federal Government must apply a more stringent standard of review* to enrollment committee recommendations to disenroll tribal members.

(Pet. App. 128, 129; emphasis added)

The necessity to protect Indians from arbitrary tribal disenrollment far outweighs the tribe's interest in restricting membership. However, Assistant Secretary Echo Hawk then proceeded to apply a preponderance of evidence standard in petitioners' case. Echo Hawk reasoned:

> Balancing well-established principles of deference to tribal governments against federal responsibilities to all members of recognized tribes, I find, in agreement with my predecessor in her decision letter of April 10, 1995, that a tribal governing body or enrollment committee

> must show that disenrollment is appropriate by the 'preponderance of the evidence.'

(Pet. App. 129)

In making this decision, Assistant Secretary Echo Hawk failed to apply a more stringent standard of review. It was appropriate for Echo Hawk's predecessor, Assistant Secretary Ada Deer, to apply a preponderance of evidence standard to the original agency adjudication involving petitioners' *application* for tribal membership. However, when Assistant Secretary Echo Hawk revisited his predecessor's final decision, petitioners were no longer "applicants." Rather, petitioners are *federally recognized tribal members* subject to a final Department of Interior decision with vested tribal and federal benefits and rights. Cf., 25 U.S.C. § 13, 25 U.S.C. § 479, 25 C.F.R. § 290.2, § 290.14. As explained above, since the prior decision recognizing the petitioners' tribal status was "final and conclusive," no challenge at all by the Band should have been permitted. That authority was given to Assistant Secretary Deer, who, in 1995, made the final binding determination.

Nonetheless, petitioners alleged that Assistant Secretary Echo Hawk was required to apply a higher evidentiary standard to disenrollment. (ER 97, 208) In this case, tribal citizenship is just as important as U.S. citizenship to the petitioners. Echo Hawk's decision terminating the petitioners' tribal membership and federal recognition is similar to denaturalization

proceedings.[10] Tribal disenrollment does not merely nullify tribal affiliation, it strips the individuals disenrolled entirely of their cultural identity. "Although it is true that they will always be Native by blood and spirit, they are no longer recognized as being Native American by tribal, state and federal governments. Therefore, they are deemed ineligible to receive the benefits and privileges that are granted to enrolled tribal members, such as access to healthcare; housing, tribal schools, various social and educational programs; land allotments; per capita payments as well as tribal and federal educational stipends and grants."[11] Indeed, disenrollment has "severe and unsettling consequences."

The Assistant Secretary's declassification of petitioners' Indian status will cause petitioners severe hardships. See, Amicus Curiae Brief in *Aguayo v. Jewell*, Docket No. 16-660 submitted by the Director of the Tribal Justice Clinic of the Indigenous Peoples Law and Policy Program (IPLP) of the University of Arizona James E. Rogers College of Law. Assistant Secretary Echo Hawk's declassification will cause the petitioners to lose their Indian Health Care Services that they would have qualified for irrespective of whether they

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[10] Petitioners argued that a "clearly erroneous" evidentiary standard applied and alleged in their District Court complaint that the Assistant Secretary abused his discretion in applying the preponderance of evidence standard. (See ER 97, 208)

[11] See, Tribal Disenrollment: The New Wave of Genocide, Johnnie Jae (Feb. 11, 2016) www.http://nativenewsonline.net.

are enrolled tribal members.[12] Echo Hawk's finding that Marcus Sr., was of "non-Indian" descent was made even though no evidence was presented that petitioners' Native American DNA evidence was inaccurate.

As recognized by the San Pasqual Vice Chairman Robert Phelps, who is also a professional historian, the theories concocted by the Band's anthropologist and accepted by the Assistant Secretary were implausible. (Pet. App. 189, 194-198) Likewise, the Bureau's Regional Director, after reviewing the purported "new information" from the Band's anthropologist, concluded the information "does not demonstrate the BIA's [prior] determination is inaccurate, and therefore does not support deletion of Mr. Alto from the Band's membership roll." (Pet. App. 172) Similarly, in determining that a preliminary injunction should issue, Judge Gonzalez found that Assistant Secretary Echo Hawk's explanation that declassified Marcus as "non-Indian" and the adopted child of the San Pasqual couple that raised him was an explanation that ran

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[12] According to the Indian Health Manual, irrespective of tribal enrollment, petitioners would be eligible for Indian Health Care services if they can prove Indian descent. Section 2-1.2 of the manual provides "Persons to Whom Services May Be Provided."

> A person may be regarded as within the scope of the Indian Health program if he is not-otherwise, *excluded therefrom by provision of law*, and:
>
> Is of Indian and/or Alaska Native descent as evidenced by one or more of the following factors such as...(5) *Any other reasonable factor indicative of Indian descent.*

See https://www.ihs.gov/ihm/.

"counter to the evidence before the agency" and was "so implausible that it could not be ascribed to a difference in view of the product of agency expertise." (Pet. App. 88) These are three independent sources that found petitioners' disenrollment was not warranted by the evidence in this case.

At oral argument, petitioners urged the Ninth Circuit to follow Judge Gonzalez's reasoning in issuing the preliminary injunction. Respondents urged the panel to affirm Assistant Secretary Echo Hawk's decision on a scintilla of evidence standard. As emphasized in Echo Hawk's decision, the government was required to apply *a more stringent standard* of review when citizenship and federal recognition is divested. This Court should apply the standard used in denaturalization proceedings. "The evidence justifying revocation of citizenship must be clear, unequivocal, and convincing and not leave the issue in doubt." *Fedorenko v. United States*, 449 U.S. 490, 505 (1981).

Here, the Assistant Secretary's finding that some other Jose Alto was Marcus Alto's biological father did not even meet a preponderance of evidence standard and cannot be upheld to terminate petitioners' tribal citizenship and federal recognition.

CONCLUSION

Disenrollment in Native American tribes is rapidly expanding around the country. *Curing the Tribal Disenrollment Epidemic*, *supra*, 57 Ariz. L. Rev. 383, 385-386. For individuals, like petitioners, who have had their rights adjudicated in a final and conclusive Department of Interior decision, to divest their Indian citizenship and federal recognition on less than a clear

and convincing evidentiary standard violates fundamental principles of due process.

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 20, 2016]

No. 15-56527

D.C. No. 3:11-cv-02276-BAS-BLM

ALBERT P. ALTO; et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
SALLY JEWELL, Secretary of Department of Interior; et al.,	)
	)
Defendants-Appellees,	)
	)
and	)
	)
SAN PASQUAL BAND OF MISSION INDIANS,	)
	)
Intervenor.	)
	)

No. 15-56679

D.C. No 3:11-cv-02276-BAS-BLM

ROLAND ALTO, Sr.; et al.,	)
	)
Plaintiffs-Appellants,	)
	)
and	)
	)
SAN PASQUAL BAND OF MISSION INDIANS,	)
	)
Intervenor,	)
	)
v.	)
	)
SALLY JEWELL, Secretary of Department of Interior; et al.,	)
	)
Defendants-Appellees.	)
	)

MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted September 2, 2016
Pasadena, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: SILVERMAN, IKUTA, and WATFORD, Circuit Judges.

1. The plaintiffs incorrectly contend that Assistant Secretary Larry Echo Hawk's January 28, 2011, decision approving their disenrollment was precluded by the April 10, 1995, enrollment order issued by then-Assistant Secretary Ada E. Deer. In an earlier appeal, we held that under Article III, section 2 of the Band's Constitution, Assistant Secretary Echo Hawk had the authority to resolve this enrollment dispute. *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013). The Band's Constitution expressly incorporates the provisions of 25 C.F.R. Part 48, which govern enrollment decisions for the Band. *See id.* at 1116. Part 48 authorizes the disenrollment of Band members whose initial enrollment decision "was based on information subsequently determined to be inaccurate." 25 C.F.R. § 48.14(d).

The plaintiffs contend that 25 C.F.R. § 48.11 (or its counterpart at 25 C.F.R. § 76.14) rendered Assistant Secretary Deer's decision "final and conclusive" and therefore unreviewable, but that contention lacks merit. Under § 48.11, an enrollment decision by the Assistant Secretary ordinarily will be final and conclusive—unless, under § 48.14(d), new evidence is presented demonstrating that the prior enrollment decision "was based on information subsequently determined to be inaccurate." Here, as explained below, that standard was met. Assistant Secretary Deer predicated her enrollment decision on the assumption that Marcus Alto Sr. was the biological son of Jose and Maria Alto, and the Band's Enrollment Committee submitted new evidence indicating that her assumption

was inaccurate. Thus, Assistant Secretary Echo Hawk had the authority under § 48.14(d) to review the prior decision. (Even if the Part 76 regulations applied, as the plaintiffs contend, those regulations also permit the disenrollment of members whose enrollment was based on information subsequently determined to be inaccurate. *See* 25 C.F.R. § 76.4(b).)

2. Based on a thorough review of the record, we conclude that Assistant Secretary Echo Hawk's decision approving the plaintiffs' disenrollment was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Several documents support the finding that Maria Alto was not Marcus Alto Sr.'s biological mother. The newly submitted 1907 baptismal certificate for Marcus Alto Sr. lists "Benedita Barrios," not Maria Alto, as his mother. Newly submitted affidavits from Band members also support that finding, as does Maria Alto's enrollment application from 1930, which states that she had "no issue."

The evidence presented to Assistant Secretary Echo Hawk likewise supports the finding that Jose Alto was not Marcus Alto Sr.'s biological father. Although the 1907 baptismal certificate lists a "Jose Alto" as Marcus Alto Sr.'s father, Assistant Secretary Echo Hawk reasonably concluded that other evidence was more "telling" as to whether Marcus Alto Sr. was Jose Alto's biological son, in particular, the family's failure to list Marcus Alto Sr. on each of the Band's censuses from 1907 to 1913 while listing Jose Alto's son Frank on each of them. The fact that other families may have omitted some of their biological children from those

early censuses did not preclude Assistant Secretary Echo Hawk from affording weight to Marcus Alto Sr.'s omission from the same censuses. Assistant Secretary Echo Hawk also reasonably concluded that two letters from Frank Alto in 1910—which identified Jose, Maria, and Frank as members of the Alto family, but not Marcus—corroborated his finding that Marcus Alto Sr. was not the biological son of Jose or Maria Alto.

Finally, Assistant Secretary Echo Hawk identified several other documents that support the finding that Marcus Alto Sr. was not a blood member of the Band. They include Dr. Shipek's affidavit in which she stated that each Band elder recalled that Jose and Maria Alto had raised a non-Indian child, and several newly submitted affidavits from Band members stating that Marcus was adopted.

While we acknowledge that there are inconsistencies and inaccuracies in the record, in light of our "highly deferential" standard of review for agency decisions, *see Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007), we cannot say that Assistant Secretary Echo Hawk's decision was arbitrary, capricious, or an abuse of discretion, 5 U.S.C. § 706(2)(A).

AFFIRMED.

The Band's motion for leave to file its amicus brief and the plaintiffs-appellants' motion for judicial notice are GRANTED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 11-cv-2276-BAS(BLM)

[Filed September 30, 2015]

ALBERT P. ALTO, *et al.*,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the United States Department of the Interior, *et al.*,

Defendants.

ORDER:

(1) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND

(2) GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

[ECF Nos. 103, 110]

On September 30, 2011, Plaintiffs commenced this declaratory and injunctive-relief action, seeking judicial review of a decision issued by the Assistant Secretary – Indian Affairs ("Assistant Secretary" or "AS-IA")

under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), against the Secretary of the Department of the Interior and other federal officials.[1] Each defendant is sued in his or her respective official capacity. The complaint was amended once with the First Amended Complaint ("FAC") being the operative complaint. This action arises from the approval of a recommendation from the Enrollment Committee of the San Pasqual Band of Diegueño Mission Indians ("San Pasqual Band" or "Band") to disenroll the named plaintiffs from the Band's membership roll.[2] Now

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[1] The current defendants in this action include Sally Jewell, Secretary of the United States Department of the Interior; Kevin K. Washburn, Assistant Secretary of Indian Affairs; Michael Black, Director of the Bureau of Indian Affairs ("BIA") of the Department of Interior; and Robert Eben, Superintendent of the Department of the Interior Indian Affairs, Southern California Agency. Ken Salazar and Larry Echo Hawk, originally named as defendants, are no longer parties to this action by operation of Federal Rule of Civil Procedure 25(d).

[2] The following are the named plaintiffs in this action (collectively referred to as "Plaintiffs" or "Marcus Alto, Sr.'s descendants"): Albert P. Alto; Andre E. Alto; Anthony Alto; Brandon Alto; Christopher J. Alto; Chasity Alto; Daniel J. Alto, Sr.; Daniel J. Alto, Jr.; Dominique N. Alto; Raymond E. Alto; Raymond E. Alto, Sr.; Raymond J. Alto; Robert Alto; Victoria Ballew; Angela Ballon; Juan J. Ballon; Rebecca Ballon; Rudy Ballon; Janice J. Banderas; Pedro Banderas; Peter Banderas; Victor Banderas; Monica Diaz; Anthony Forrester; Dustin Forrester; Johanna Forrester; Sarah Forrester; Ernest Gomez; Henrietta Gomez; Kathleen M. Gomez; Marcus G. (Minor); Lydia Green; Paul Anthony Green; Humberto R. Green; Mary Jo Hurtado; Justin A. Islas; Alexis L. (Minor); Cynthia Ledesma; Destiny C. Ledesma; Jesse L. (Minor); Isabelle M. Sepeda; Lupe Sepeda; Deborah L. Vargas; Desiree Vargas; Jeremiah Vargas; Jessiah Vargas; Terry Weight; Roland Alto, Sr.; Roland Alto, Jr.; Amanda Minges; David Brokiewicz; Diana

pending before the Court are the parties' cross-motions for summary judgment.

Having reviewed the papers submitted and oral argument from both parties, the Court **DENIES** Plaintiffs' motion for summary judgment, and **GRANTS** Defendants' cross-motion for summary judgment.

I. BACKGROUND[3]

"For nearly two centuries now, [federal law has] recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327 (2008) (citations omitted) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)) (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). The

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Brokiewicz; Patricia Brokiewicz; Jason Alto; Carol Edith Cavazos; Aimee R. Diaz; Jessica Diaz; Toni Diaz; Daniel Gomez; Lisa Huntoon; Christine Martinez; Donelle Martinez; Justine Martinez; Marlene Martinez; Sabrina Martinez; and Cassandra Sepeda.

[3] Some documents included in the administrative record have multiple sets of page numbers. One set appears to be original numbering for the record submitted to the Assistant Secretary. Those numbers appear in the form of ALTO-2012-0001137, for example, which is the first page of the Assistant Secretary's January 28, 2011 Decision ("2011 Decision"). Despite the presence of the other number sets, the parties' briefs appear to use this original numbering. The Court will do the same. Accordingly, references to the administrative record will be designated with the prefix "AR" followed by the appropriate Bates-stamped page number. Applied to the example above, a reference to the first page of the Assistant Secretary's 2011 Decision will read "AR 1137."

"sovereignty that the Indian tribes retain is of a unique and limited character." *Wheeler*, 435 U.S. at 323. "[T]ribes are subject to plenary control by Congress," but they also remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *see United States v. Lara*, 541 U.S. 193, 200 (2004). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, — U.S. —, 134 S. Ct. 2024, 2030 (2014) (citing *Wheeler*, 435 U.S. at 323).

"As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, to determine tribal membership, and to regulate domestic relations among members." *Plains Commerce Bank*, 554 U.S. at 327 (citations omitted). "An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress." *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

A. The San Pasqual Band's Organization[4]

Following a tumultuous history with white settlers dating back to the 1850s, "[i]n 1954 the descendants of

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[4] The background describing the San Pasqual Band's organization is taken almost exclusively from the Assistant Secretary's 2011 Decision. (AR 1137-56.) A timeline of the Band's history is also included in the administrative record. (*See* AR 2092-94; *see also* AR 2060-67.) The Band's organizational history is not in dispute in this action.

the San Pasqual Band realized that they would lose . . . [a] small piece of mislocated reservation land unless they organized to reclaim the reservation" that was initially created by President Ulysses S. Grant's executive order in 1870. (AR 1138-39.) "The Indians were required by the [Bureau of Indian Affairs] to develop proof of their descent from the original San Pasqual members." (AR 1139.)

On July 29, 1959, the Department of the Interior published a notice of Proposed Rulemaking, setting out regulations intended to "govern the preparation of a roll of the San Pasqual Band of Mission Indians in California." (AR 1139.) The final rule was codified at 25 C.F.R. Part 48, published March 2, 1960. (*Id.*) *See also* 25 Fed. Reg. 1829 (Mar. 2, 1960) (codified at 25 C.F.R. pt. 48). These regulations "directed that a person who was alive on January 1, 1959, qualified for membership in the band if that person was named as a member of the Band on the 1910 San Pasqual census, or descended from a person on the 1910 census and possessed at least 1/8 blood of the band, or was able to furnish proof that he or she was 1/8 or more blood of the Band." (AR 1140.)

Under the regulations promulgated in Part 48, an Enrollment Committee ("EC") was formed, "consisting of three primary and two alternate members, all of whom were shown on a 1910 Bureau of Indian Affairs (BIA) census of San Pasqual Indians." (AR 1140.) The regulations provided application and review procedures for any individuals interested in applying for membership in the San Pasqual Band. (*Id.*) Though the BIA's Field Representative accepted the applications, the Enrollment Committee reviewed applications and

made recommendations that ultimately ended up with the Area Director. (*Id.*) "The Director was authorized by the Regulations to determine whether a person is qualified for membership." (*Id.*) Any appeals would then go to the Commissioner and the Secretary of the Interior. (*Id.*) "Thus, under the regulations, the authority to issue a final decision respecting membership in the Band was vested in officials in the Department of the Interior."[5] (*Id.*) The implementation of the regulations resulted in the creation of a membership roll for the San Pasqual Band in 1966. (*Id.*)

In November 1970, the Band voted on its Constitution, which was subsequently approved by the AS-IA in January 1971. (AR 1140; *see also* AR 1599-1600.) Article III of the San Pasqual Band's Constitution provided the following:

> Section 1. Membership shall consist of those living persons whose names appear on the approved Roll of October 5, 1966, according to Title 25, Code of Federal Regulations, Part 48.1 through 48.15.
>
> Sec[tion] 2. All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior.

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[5] Several of the titles in the Department of the Interior have since changed names: the BIA's Field Representative is equivalent to today's Agency Superintendent; the Area Director is now known as the Regional Director; and the Commissioner is now known as the Director of the BIA. (AR 1140.)

(AR 1591; *see also* AR 1140.) "The plain language of the Band's Constitution incorporates the Part 48 regulations as published in 1960 as the controlling law of the Band." (AR 1141; *see also* AR 1591.)

In November 1983, the United States Claims Court issued an award to the San Pasqual Band in a compromise settlement. (AR 1141.) Funds were subsequently appropriated by Congress to satisfy the award. (*Id.*)

In 1987, the regulations were rewritten to assist in the distribution of the judgment funds by bringing the membership roll current. (AR 1141, 1573-77.) The final rule was codified in 25 C.F.R. Part 76, published August 20, 1987. 52 Fed. Reg. 31391 (Aug. 20, 1987) (codified at 25 C.F.R. pt. 76). The revised regulations, Part 76, which became effective September 1987, included the following summary description:

> In accordance with a judgment plan . . . prepared pursuant to the Indian Judgment Funds Distribution Act, as amended, a portion of the judgment funds is to be distributed on a per capita basis to all tribal members living on April 27, 1985. The revision to the regulations will provide procedures, including a deadline for filing applications, to govern the preparation of a membership roll of the San Pasqual Band as of April 27, 1985, which will serve as the basis for the per capita distribution of judgment funds.

(AR 1573.) This revision was later removed in June 1996 because "[t]he purpose for which these rules were promulgated has been fulfilled and the rules are no longer required." 61 Fed. Reg. 27780 (June 3, 1996).

"Members of the San Pasqual Band have been enrolled as required in satisfaction of the judgments of the United States Claims Court docket 80-A." *Id.*

B. Marcus Alto, Sr. and His Descendants' Enrollment

Plaintiffs are descendants of Marcus R. Alto, Sr. Neither Marcus Alto, Sr. nor his descendants were included on the 1966 membership roll. (AR 1140.) But on November 15, 1987, he and several of his descendants did apply for enrollment under the 1987 regulations. (AR 1141.) "His descendants claim[ed] to be eligible for enrollment in the Band based on the alleged biological link that Marcus Sr. provides to Maria Duro Alto and Jose Alto[.]" (*Id.*) Maria Duro Alto[6] and Jose Alto are identified as Marcus Alto, Sr.'s parents, and it is uncontested that both parents were full-blood members of the Band. (AR 1141-42, 1516-18.)

Marcus Alto, Sr. died on June 16, 1988, before his enrollment application had been decided. (AR 1141, 1516-18.) However, the BIA continued processing his descendants' applications, and in May 1991, the BIA Superintendent notified the EC of his determination that Marcus Alto, Sr.'s descendants were eligible for enrollment in the San Pasqual Band. (AR 1141.) The Band challenged that determination in favor of Marcus Alto, Sr.'s descendants, which was ultimately appealed to the Assistant Secretary – Indian Affairs, who at the time was Ada E. Deer. (*Id.*; *see also* AR 752-54.)

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[6] Maria Alto's maiden name is Maria Duro. Throughout the administrative record, she is referred to as Maria Alto, Maria Duro Alto, and Maria Duro. The three names are used interchangeably to refer to Marcus Alto, Sr.'s mother.

On April 10, 1995, in a final decision ("1995 Decision") from the Department of the Interior, the Assistant Secretary affirmed the Regional Director's finding from January 1994 that Marcus Alto, Sr. was full-blooded Diegueño Indian, upheld the enrollment of Marcus Alto, Sr. and his descendants, and found that they are eligible for inclusion on the Band's distribution roll. (AR 1141-42, 1516-18.)

C. The Assistant Secretary's 2011 Decision

A little over a decade later, Marcus Alto, Sr. and his descendants' enrollment status once again came to the forefront. In 2007, Marcus Alto, Sr.'s descendants' qualification for enrollment was challenged, supported with purportedly new evidence. (AR 1142.) The EC reopened the matter of Marcus Alto, Sr.'s ancestry, and Marcus Alto, Sr.'s descendants were provided with an opportunity to rebut the new evidence. (*Id.*) Relying on the 1960 regulations permitting disenrollment when the decision to enroll was based on information "subsequently determined to be inaccurate," the EC proposed a revised membership roll to the BIA based on "new evidence provid[ing] substantial and convincing proof that Marcus R. Alto, Sr. [was] not the biological son of Maria Duro Alto, and that information provided on the 1987 membership application . . . was inaccurate and incomplete." (AR 1142, 2010-11, 2013.)

On November 26, 2008, the Regional Director rejected the EC's recommendation to approve the disenrollment of Marcus Alto, Sr.'s descendants. (AR 1466-74.) In a ten-page written decision, the Regional Director concluded that the information submitted by the EC "does not demonstrate the BIA's prior enrollment determination [in 1995] is inaccurate, and

therefore does not support deletion of Mr. [Marcus] Alto from the Band's membership roll." (AR 1466.) But like the proceedings leading to the 1995 Decision, this challenge was ultimately appealed to the Assistant Secretary – Indian Affairs, who at the time was Larry Echo Hawk. (*See* AR 1137-58.)

On January 28, 2011, the Assistant Secretary issued his twenty-page decision reversing the Regional Director's decision. (AR 1137-56.) To reach his conclusion, the Assistant Secretary identified six "key disputed facts" that first needed to be resolved:

> 1. Whether the 1907 baptismal certificate for "Roberto Marco Alto" is that of Marcus Alto, Sr. A key subpart of this determination is assessing whether Marcus Alto was born in 1905, 1907, or some other year.
>
> 2. Whether Marcus Alto's failure to declare whether or not he was adopted on his application for enrollment in the Band, dated November 15, 1987, is persuasive evidence.
>
> 3. Whether Maria Duro Alto's statement that she had "no issue" (on her application for inclusion on the 1933 Roll of California Indians) is persuasive evidence.
>
> 4. Whether the non-inclusion of Marcus Alto's name on the early San Pasqual censuses is persuasive evidence.
>
> 5. Whether testimonial evidence in the record is persuasive evidence.

> 6. Whether DNA testimony submitted by Alto descendants is persuasive evidence.

(AR 1147.)

Before reaching his conclusion, the Assistant Secretary recognized "[t]here was universal acceptance of the fact that Marcus Alto, Sr., was raised from infancy by Jose Alto and Maria Duro Alto." (AR 1155.) It was also emphasized that "[m]uch of the record evidence [was] conflicting, incomplete, or demonstrably inaccurate[,]" and that "[t]he record itself lack[ed] the most vital documents, including particularly a birth certificate for Marcus Alto." (*Id.*) Despite that, the Assistant Secretary found that "fair interpretation of the most probative, objective, and competent evidence available amply supports the Enrollment Committee's recommendation to disenroll the Alto descendants." (*Id.*) Particular emphasis was given to:

> Marcus Alto's absence from the early San Pasqual Indian censuses that showed Jose and Maria Alto; the competent testimony of tribal elders, family friends, and Dr. Shipek; and the facts set out in the 1907 baptismal certificate as corroborated by testimony in the affidavits. [And] the evidence relied upon by the Alto descendants [was] either self-reported by Marcus Alto, Sr.,—who cannot provide a first-hand account of his birth and parentage—or, in the case of information on Marcus Alto's application for inclusion on the 1933 Roll of California Indians, supplied by people with no obvious or inferable knowledge of Marcus Alto's parentage.

(AR 1155-56.) Based on the evidence available at the time and by a preponderance of the evidence, the Assistant Secretary reversed the Regional Director's decision and determined that Marcus Alto, Sr.'s descendants' "names must be deleted from the Band's roll."[7] (AR 1156.)

D. Procedural History of This Action

On September 9, 2011, Plaintiffs filed this complaint seeking, among other things, judicial review of the Assistant Secretary's 2011 Decision under the APA and the arbitrary-and-capricious standard. Defendants answered.

Shortly after this action began, the Court granted Plaintiffs' motion for a preliminary injunction, restraining and enjoining Defendants from removing Plaintiffs from the San Pasqual Band's membership roll and from taking any further action to implement the Assistant Secretary's 2011 Decision for the duration of this lawsuit. (ECF No. 24.) The Court also enjoined the Assistant Secretary from issuing certain interim orders. (*Id.*)

On March 13, 2012, the complaint was amended upon receiving leave from the Court. (ECF No. 50.) In the FAC, Plaintiffs assert five claims to set aside the

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[7] Interestingly, the Assistant Secretary left open the possibility of revisiting Marcus Alto, Sr.'s enrollment status in the future yet again because "evidence may come to light in the future that could overturn the reasoning set out [in the 2011 Decision]." (AR 1156.) For example, "[u]ncovering Marcus Alto, Sr.'s[] birth certificate, or conducting more thorough and accurate genetic testing, may prove the biological connection claimed by the Alto descendants." (*Id.*)

Assistant Secretary's 2011 Decision: (1) declaratory relief based upon the doctrine of res judicata; (2) declaratory relief on the basis that Defendant Echo Hawk violated the enrolled Plaintiffs' right to procedural due process; (3) declaratory relief and reversal of the 2011 Decision based upon the arbitrary-and-capricious standard; (4) "federal agency action unlawfully withheld and request for preliminary injunctive relief"; and (5) "declaratory and injunctive relief by all Plaintiffs against all Defendants[.]"[8] Defendants answered the FAC.

After the Court granted the San Pasqual Band the limited right to intervene, the Band pursued an interlocutory appeal to the Ninth Circuit. The Ninth Circuit affirmed this Court's determination that it had jurisdiction to review the Assistant Secretary's disenrollment decision and that the San Pasqual Band is not an indispensable party. *Alto v. Black*, 738 F.3d 1111, 1131 (9th Cir. 2013). The Ninth Circuit also remanded to "allow the district court formally to clarify the original injunction to conform with the [Ninth Circuit's] understanding of the injunction," which was eventually resolved by the parties. *Id.*

Now pending before the Court are the parties' cross-motions for summary judgment.[9] (ECF Nos. 103, 110.) The administrative record was lodged with the Clerk of

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[8] Plaintiffs have since abandoned their second claim for procedural-due-process violations. (See Pls.' Reply 1:10–13.)

[9] This action was originally assigned to the Honorable Irma E. Gonzalez. Upon Judge Gonzalez's retirement, the case was transferred to the Honorable Michael M. Anello. In May 2014, this case was then transferred to this Court.

the Court. (ECF No. 51.) Following briefing, the parties appeared for oral argument on September 21, 2015.

II. STANDARD OF REVIEW

Summary judgment is proper if 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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is a particularly appropriate tool for resolving claims challenging agency action. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985). As the administrative record constitutes the entire factual record in this case and there are no facts at issue between the parties, this matter is ripe for summary judgment.

A final agency action is reviewable under 5 U.S.C. § 706 when "there is no other adequate remedy in a court." 5 U.S.C. § 704. "Under the APA, [a court] will reverse an agency's action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or if its factual findings are 'unsupported by substantial evidence.'" *Love Korean Church v. Chertoff*, 549 F.3d 749, 754 (9th Cir. 2008) (internal citations and quotation marks omitted); *see* 5 U.S.C. § 706(2)(A), (E). Review under this standard is "searching and careful," but also "narrow." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989). "Although [the court's] inquiry must be thorough, the standard of review is highly deferential; the agency's decision is 'entitled to a presumption of regularity,' and [the court] may not substitute [its] own judgment for that of the agency." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quoting

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971)).

An agency decision is arbitrary and capricious:

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision 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.

Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also Hovhannisyan v. U.S. Dep't of Homeland Sec.*, 624 F. Supp. 2d 1135, 1149 (C.D. Cal. 2008) ("[A]n agency abuses its discretion when it fails to comply with [its own] regulations."). The agency must "cogently explain why it has exercised its discretion in a given manner," and the reviewing court must determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State Farm*, 463 U.S. at 43.

Where the agency has relied on "relevant evidence [such that] a reasonable mind might accept as adequate to support a conclusion," its decision is supported by "substantial evidence." *Bear Lake Watch, Inc. v. Fed. Energy Regulatory Comm'n*, 324 F.3d 1071, 1076 (9th Cir. 2003). Even "[i]f the evidence is susceptible of more than one rational interpretation, [the court] must uphold [the agency's] findings." *Id.* A court must also "uphold a decision of less than ideal

clarity if the agency's path may reasonably be discerned . . . [but] may not infer an agency's reasoning from mere silence." *Arlington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). The burden is on the plaintiffs to show any decision or action was arbitrary and capricious. *See Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

III. DISCUSSION[10]

Plaintiffs' challenge to the Assistant Secretary's 2011 Decision can be divided into two categories. The first is a purely legal challenge, arguing that the Assistant Secretary's prior determination in the 1995 Decision precludes the conclusion in the 2011 Decision under the doctrines of claim and issue preclusion.[11] The second attacks factual determinations made by the

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[10] Plaintiffs request that the Court take judicial notice of: (1) a page from the 1930 U.S. census for Marcus Alto, Sr.; (2) the San Diego County Death Certificate for Francisco Alto, Jr.; and (3) statements by Connie Alto (Pls.' Reply 5:12–22). In requesting judicial notice, Plaintiffs attempt to add evidence to the record. The Court agrees with Defendants that Plaintiffs attempt to improperly introduce extra-record evidence to challenge the "correctness or wisdom of the agency's decision." *See San Luis & Delta-Mendota*, 747 F.3d at 602. The Court also remains unconvinced that the aforementioned materials are "*necessary* to determine if the agency has considered all factors and explained its decision." *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (emphasis added). Therefore, the Court **DENIES** Plaintiffs' request for judicial notice. However, even if the Court considered these documents, it would ultimately have no effect on the conclusion of this order.

[11] The Court will refer to res judicata as claim preclusion and collateral estoppel as issue preclusion. *See Gonzalez v. Cal. Dep't of Corrections*, 739 F.3d 1226, 1230 n.3 (9th Cir. 2014).

Assistant Secretary in the 2011 Decision. In the latter category, Plaintiffs argue that the Assistant Secretary's findings are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The gist of Defendants' response is that the Assistant Secretary's 2011 Decision was reasonable and, as a result, should be affirmed by this Court.

The Court will address each issue raised by the parties below.

A. Preclusion[12]

Plaintiffs argue that 1995 Decision concluding that Marcus Alto, Sr. was full-blooded Diegueño Indian,

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[12] The Assistant Secretary did not address preclusion in the 2011 Decision. As a result, application of preclusion principles is not reviewed under the APA's arbitrary-and-capricious standard. The parties do, however, both appear to implicitly agree that preclusion is an issue properly before the Court. *Cf. Aguayo v. Jewell*, No. 13-cv-1435, 2014 WL 6473111, at *17 (S.D. Cal. Nov. 18, 2014) (preclusion arguments were first presented to the Department of the Interior before review by the district court in a disenrollment context). The Court's independent research suggests the same. *See Canonsberg Gen. Hosp. v. Sebelius*, 989 F. Supp. 2d 8, 27 n.15 (D.D.C. 2013) (citing *Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("The rule of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise."); *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983) (holding that administrative exhaustion was not required where issue was strictly legal, "[n]o factual development or application of agency expertise [would] aid the court's decision," a decision by the court would not "invade the field of agency expertise or discretion," and controversy "presents issues on which courts and not administrators are more expert" when the only dispute relates to the meaning of a statutory term)).

among other things, precludes re-litigation of his blood quantum. Defendants contend that neither principle bars reevaluation of prior enrollment decisions. The Court agrees with Defendants.

Claim preclusion "forecloses successive litigation on the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Gonzalez*, 739 F.3d at 1230 n.3 (internal quotation marks omitted). In other words, once rendered, judgment is treated "as the full measure of relief to be accorded between the parties on the same 'claim' or 'cause of action.'" *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 887 (9th Cir. 2000). An action is barred under claim preclusion where "(1) the prior litigation involved the same parties or privies, (2) the prior litigation was terminated by a final judgment on the merits, and (3) the prior litigation involved the same 'claim' or 'cause of action' as the later suit." *Id.* at 888.

Issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Gonzalez*, 739 F.3d at 1230 n.3 (internal quotation marks omitted). It applies where "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Hydranautics*, 204 F.3d at 885. "The party asserting preclusion bears the burden of showing with clarity

and certainty what was determined by the prior judgment." *Id.*

In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966), the Supreme Court removed any doubt that preclusion principles may apply to administrative proceedings. Preclusion particularly applies in circumstances "[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Utah Constr.*, 384 U.S. at 422. Since *Utah Construction*, "courts have increasingly given res judicata and collateral estoppel effect to the determinations of administrative agencies acting in a judicial capacity." *United States v. Lasky*, 600 F.2d 765, 768 (9th Cir. 1979).

"Despite this general acceptance, the doctrines are not to be applied to administrative decisions with the same rigidity as their judicial counterpart." *Lasky*, 600 F.2d at 768 (citing *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 10 (5th Cir. 1974); *United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973)); *see also Valencia-Alvarez v. Gonzalez*, 469 F.3d 1319, 1324 n.7 (9th Cir. 2006) ("[I]n the administrative law context, 'the principles of collateral estoppel and res judicata are applied flexibly.'"). "This is particularly true where their application would contravene an overriding public policy." *Lasky*, 600 F.2d at 768 (citing *Tipler v. E.I. du Pont de Nemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971)). Consequently, "the need to proceed cautiously in this area is acute, and due regard must be given in each case as to whether the

application of the doctrine is appropriate in light of the particular prior administrative proceedings." *Id.*

1. Application of Preclusion Principles

When comparing the 1995 Decision and 2011 Decision, it is easy to jump to the conclusion that preclusion principles apply—Marcus Alto, Sr.'s blood degree was a factual issue previously litigated to its conclusion in the 1995 Decision, and it is at issue here once again. *See Hydranautics*, 204 F.3d at 885, 888. But that is an oversimplification of the factual and legal cogs at work. Though the 1995 Decision and 2011 Decision addressed arguably the same factual issue regarding Marcus Alto, Sr.'s blood degree to contradicting conclusions, it is important to consider that the legal foundations to reach those respective conclusions are quite different.

In the 1995 Decision, AS-IA Ada E. Deer found that Marcus Alto, Sr. "possessed 4/4 Indian blood of the Band" in upholding his and his descendants' enrollment and finding that "they are eligible for inclusion on the Band's Docket 80-A distribution roll." (AR 1518.) To reach that conclusion, AS-IA Ada E. Deer relied on the regulatory framework in 25 C.F.R. Part 76 (1987), 52 Fed. Reg. at 31392-93, a regulation implemented in order to distribute certain judgment funds issued as an award in a compromise settlement with the San Pasqual Band. (AR 1141.) Section 76.4 of the 1987 regulations provides the enrollment requirements relied upon in the 1995 Decision. (AR 1516.)

The regulatory framework supporting the 2011 Decision is quite different. AS-IA Larry Echo Hawk

relied on the regulatory framework in 25 C.F.R. Part 48 (1960), 29 Fed. Reg. at 1831, which was also adopted by the San Pasqual Band through its Constitution. (AR 1142.) Section 48.14(d) of the 1960 regulations requires that the membership roll be kept current by deleting "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate . . . subject to the approval of the Secretary." 29 Fed. Reg. at 1831. That is the authority that AS-IA Larry Echo Hawk explicitly invoked in reaching his conclusion in the 2011 Decision that "the enrollment of the Marcus Alto, Sr.[] descendants was based on information subsequently determined to be inaccurate, and as a result, their names must be deleted from the Band's roll." (AR 1142, 1156.)

The two agency decisions relied on fundamentally different regulations permitting their respective actions: Part 76, which was later removed, permitted the Assistant Secretary to review new applications for enrollment; and Part 48 permitted and continues to permit the Assistant Secretary keep the Band's membership rolls accurate and current. *See* 52 Fed. Reg. at 31392-93; 29 Fed. Reg. at 1831. These circumstances call for the "flexible" application of preclusion principles to the administrative agency decision currently before this Court. *See Valencia-Alvarez*, 469 F.3d at 1324 n.7. Proceeding more cautiously, it is apparent that though the 1995 Decision and 2011 Decision address a similar factual issue, the conclusions are very different in nature. The 1995 Decision relied on the now-defunct 1987 regulations permitting enrollment in order to distribute certain settlement funds while the 2011 Decision relied on the still-operative 1960 regulations and the Band's

Constitution permitting reevaluation of membership status under certain circumstances. This critical difference compels this Court to conclude that application of preclusion principles is not appropriate upon reviewing the two administrative proceedings with closer scrutiny. *See Lasky*, 600 F.2d at 768.

2. Policy Considerations

Overriding policy considerations relevant to this case also support the determination that applying preclusion principles would be inappropriate. *See Lasky*, 600 F.2d at 768. There are at least two applicable policies that warrant consideration: (1) "[a] tribe's right to define its own membership for tribal purposes"; and (2) "federal policy favoring tribal self-government[.]" *See Alto*, 738 F.3d at 1115 (citing *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226 (9th Cir. 2013); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005)). Though the San Pasqual Band vested ultimate authority over membership decisions to the Department of the Interior when its Constitution was adopted, that does not minimize a tribe's conscious decision to incorporate language from certain federal regulations. *See id.*

In 1970, presumably contemplating the full impact of § 48.14 of the 1960 regulations as the vehicle for keeping its membership roll current, the San Pasqual Band voted and approved its Constitution incorporating the still-operative provisions of Part 48. (AR 1141, 1591.) From that, it is easy to infer that the Band fully intended to keep its membership roll current and accurate under the provisions of Part 48. In other words, the San Pasqual Band defined its membership as not one that is absolute, but subject to

review under certain circumstances, in part, to promote accuracy. That is further highlighted by the fact that Part 76 is now defunct after serving a specific purpose during a discrete time period.

Strictly applying preclusion principles to the circumstances of this case would negate both policies of a tribe's right to define its own membership and tribal self-government. By precluding the 2011 Decision as a result of the conclusion reached in the 1995 Decision, the Court would effectively nullify portions of Part 48 and the San Pasqual Band's Constitution that allows review of membership decisions based on information subsequently deemed to be inaccurate. It would also override federal policy favoring tribal self-government, which in this case is the San Pasqual Band's incorporation of Part 48 through the approval of its Constitution.

Keeping these policies in mind, this Court is not prepared to make a legal determination based on preclusion principles finding that the San Pasqual Band cannot review membership decisions when it explicitly contemplated that authority through the approval of its Constitution and adoption of Part 48. *See Alto*, 738 F.3d at 1115. To find otherwise would not only offend the San Pasqual Band's right to define its own membership, but also violate federal policy favoring tribal self-government. These policy considerations in conjunction with the fact that the two agency decisions are based on different regulations—one of which is now defunct, and the other which remains operative and incorporated into the Band's Constitution—compel this Court to find that

strictly applying preclusion principles would be inappropriate. *See Lasky*, 600 F.2d at 768.

B. Challenges to the Assistant Secretary's Factual Determinations

"Under the APA, [a court] will reverse an agency's action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or if its factual findings are 'unsupported by substantial evidence.'" *Love Korean Church*, 549 F.3d at 754 (internal citations and quotation marks omitted); *see* 5 U.S.C. § 706(2)(A), (E). The scope of the court's review under the APA is narrow, and a court may not substitute its own judgment for that of the agency. *See San Luis & Delta-Mendota*, 747 F.3d at 601.

Agency decisions are examined to "ensure that it has articulated a rational relationship between its factual findings and its decision[.]" *Fence Creek Cattle*, 602 F.3d at 1132. The agency's factual determinations are entitled to substantial deference and should be upheld if they are supported by the administrative record. *Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992); *see also Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003) (noting that an agency's factual findings must be upheld "if supported by reasonable, substantial, and probative evidence in the record"); *Bonnichsen v. United States*, 367 F.3d 864, 880 n.19 (9th Cir. 2004) ("Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999) ("Substantial evidence is more than a scintilla but less than a preponderance."). If the record supports more than one rational interpretation of the evidence, the court will

defer to the agency's decision. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005).

The administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's positions." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis in original). "Agencies are not required to consider every alternative proposed nor respond to every comment made. Rather, an agency must consider only 'significant and viable' and 'obvious' alternatives." *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1165 (10th Cir. 2014) (quoting *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 724 (5th Cir. 2013)) (internal quotation marks omitted). A court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned[.]" *Arlington*, 516 F.3d at 1112.

Plaintiffs challenge seven factual determinations that the Assistant Secretary relied upon to reach the conclusion to disenroll Marcus Alto, Sr.'s descendants. Each challenge will be discussed below. Though all of Plaintiffs' challenges are asserted under § 706(2)(A)'s arbitrary-and-capricious standard, the Court will also review these challenges under § 706(2)(E) for substantial evidence.

1. Weight Given to the San Pasqual Censuses

Noting that "[t]he record includes BIA censuses of the San Pasqual Indians from 1907 through 1913, all of which include Jose Alto, Maria Duro, and Jose's son, Frank Alto," the Assistant Secretary found that "the

absence of Marcus Alto, under any name, from these Indian censuses to be very weighty evidence that the couple who raised him did not consider him to be a San Pasqual Indian—which would be consistent with his being adopted." (AR 1151.) Plaintiffs argue that the weight given the San Pasqual censuses was arbitrary and an abuse of discretion for three reasons: (1) "the censuses as now acknowledged were inaccurate"; (2) the Assistant Secretary "failed to address the Band's hired anthropology expert's evidence"; and (3) "the 1920 U.S. census identifies Marcus Alto Sr. as Maria and Jose Alto's son, and the Alto family household is identified as 'Indian.'" (Pls.' Mot. 12:1–17.)

To begin, there is no acknowledgment that the censuses are inaccurate. This proposition appears to be rooted in a response in the answer where Defendants admit that the censuses "contain inaccuracies." (*See* Answer ¶ 76.) Censuses "contain[ing] inaccuracies" is very different from stating that the censuses are "inaccurate." The former is an assessment of the censuses' components whereas the latter is an assessment of the censuses as a whole. Plaintiffs fail to identify evidence suggesting that the censuses are inaccurate in their entirety.

In their reply, Plaintiffs elaborate that the "censuses are inherently flawed" because "Jose Alto was reported the same age, age 50, on the 1907, 1908 and 1910 censuses." (Pls.' Reply 4:1–5.) Now it may be fair to conclude that the censuses are inherently flawed for the purposes of determining a member's age, particularly Jose Alto's. However, Plaintiffs fail to persuade the Court that that "flaw" permeates to other

aspects of the censuses, such as the Band's members at the time of the censuses were conducted.

Reviewing the censuses from 1907 through 1912, though there are inconsistencies in some members' ages, there are none identified with respect to the composition of Jose and Maria Alto's nuclear family. The 1907 census indicates that the family consisted of Jose Alto, Maria Alto, and Frank Alto; Marcus Alto, Sr. is not listed even though he was allegedly born in 1905.[13] (AR 2576.) The same family members are listed in each census from 1908 through 1913 indicating Jose Alto as husband, Maria Alto as wife, and Frank Alto as son, but without any mention of Marcus Alto, Sr. (AR 2581, 2541, 2597, 2602, 2605, 2376.) Despite likely inaccuracies regarding members' ages existing throughout these censuses, the censuses are nonetheless incredibly consist with respect to the family consisting of Jose Alto, Maria Alto, and Frank Alto without any mention of Marcus Alto, Sr. Any inaccuracies regarding age do not negate the entirety of each census from 1907 through 1912, including the cornerstone of lineal descendancy for the San Pasqual Band, the 1910 census.

The consistency throughout these censuses is also significant. Repeatedly, throughout a span of seven years, Jose and Maria Alto had the opportunity to identify their progeny, and they did, repeatedly

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[13] Like several other facts in this case, Marcus Alto, Sr.'s birth year remains a point of contention. Plaintiffs take the position that he was born in 1905. (FAC ¶ 82.) Based on that allegation, Plaintiffs must admit that Marcus Alto, Sr. was alive at the time each census was conducted from 1907 through 1912.

identifying Frank Alto as their son. If Marcus Alto, Sr. was indeed the biological child of Jose and Maria Alto, presumably he would have been treated the same as Frank Alto. But he was not. From that, the Assistant Secretary reached a reasonable and sound conclusion that Marcus Alto, Sr. was not Jose and Maria Alto's biological son.

In contrast to the seven censuses from 1907 through 1912, the 1920 U.S. census apparently indicates Marcus Alto, Sr. as "Indian" and the son of Jose and Maria Alto.[14] To reconcile the 1920 census with the censuses from 1907 through 1912, the Assistant Secretary found "the adoption theory to be the most logical explanation for the fact that Marcus Alto is not listed with his parents on the Indian censuses, but does appear on the Federal census of 1920." (AR 1151.) The suggestion appears to be that sometime between the 1907-1912 censuses and the 1920 census, Jose and Maria Alto adopted Marcus Alto, Sr. (*See id.*) Another possibility is that Jose and Maria Alto treated the BIA censuses differently as relating specifically to tribe members compared to the 1920 U.S. census conducted by the federal government. These possibilities are also consistent with the Assistant Secretary's conclusion. Though less than ideal in clarity, the Assistant Secretary's "path may reasonably be discerned." *See Arlington*, 516 F.3d at 1112 (A court must "uphold a

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[14] The Court reviewed the 1920 census documents submitted. (AR 1807, 1983.) It was unable to locate the precise text indicating Jose Alto, Maria Alto, Frank Alto, and Marcus Alto, Sr. due to the low quality of the document scanned, but will presume the names are present given that all parties agree that the names are indeed present in the 1920 census.

decision of less than ideal clarity if the agency's path may reasonably be discerned[.]"). Because this factual determination is supported by the administrative record, the determination and the decision will be given substantial deference. *See Arkansas*, 503 U.S. at 112; *Bayliss*, 427 F.3d at 1214 n.1.

The last point Plaintiffs present is that the Assistant Secretary "failed to address the Band's hired anthropology expert's evidence." (Pls.' Mot. 12:1–8.) Specifically, Plaintiffs argue that the Assistant Secretary failed to consider information in the 121st footnote in an April 2010 report prepared by Christine Grabowski, Ph.D., which purportedly identifies "several children born to other San Pasqual tribal members, between 1897 and 1903, who were NOT identified on the San Pasqual censuses[.]" (*Id.*)

The footnote Plaintiffs identify appears in a portion of the report examining what certain individuals living in Riverside County in 1910 "knew about Marcus Alto's parentage." (AR 1047.) The footnote is associated with the following paragraph:

> Carolina Benson's children by both Jose Castro and Augustin Orosco and their spouses appeared repeatedly in the baptismal records of the St. Francis de Sales Church. Not only did they have several children between all of them, but they served as sponsors for each other's offspring.

(AR 1048.) The footnote itself provides examples of Carolina Benson's family members serving as sponsors for each other's offspring. (*Id.*) There is no mention of who appeared or did not appear in relevant censuses. At best, the portion of the report relevant to the

footnote is an examination of the close ties between certain families reflected in baptismal records. (*See id.*) But more accurately, Plaintiffs grossly mischaracterize the footnote in the expert report, and the Assistant Secretary acted reasonably in not addressing it. *See Ron Peterson Firearms*, 760 F.3d at 1165 (quoting *10 Ring Precision*, 722 F.3d at 724) (Agencies are not required to "consider every alternative proposed nor respond to every comment made. Rather, an agency must consider only 'significant and viable' and 'obvious' alternatives.").

2. Credibility of Certain Affidavits and Testimonial Evidence

In the 2011 Decision, the Assistant Secretary found that "the testimonial evidence contained in affidavits by tribal elders, tribal enrollment committee members, close acquaintances of Maria Duro Alto and Marcus Alto, and especially anthropologist Florence Shipek, Ph.D., to be very credible and probative respecting Marcus's status as biological or adoptive son of Jose and Maria Duro Alto." (AR 1138.) The collection of affidavits considered by the Assistant Secretary included three affidavits from 1994 and six others from 2004. (AR 1150-51.) Focusing primarily on statements by Felix Quisquis, Mellie Duenas, Florence C. Shipek, Ph.D., and Helen Mendez, Plaintiffs appear to argue that the Assistant Secretary's reliance on testimonial evidence is arbitrary and capricious because it "contain[s] hearsay, lacks foundation and [is] contradicted by the Band's other evidence." (Pls.' Mot. 13:1–10.)

It is a "well-settled rule that agencies are not bound by strict rules of evidence in cases brought under the

Administrative Procedure Act." *Villegas-Valenzuela v. Immigration & Naturalization Serv.*, 103 F.3d 805, 812 (9th Cir. 1996). Rather, "the Administrative Procedure Act provides that '[a]ny oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.'" *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) (quoting 5 U.S.C. § 556(d)). "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." *Id.* (quoting 5 U.S.C. § 556(d)) (internal quotation marks omitted).

"[T]he classic exception to strict rules of evidence in the administrative context concerns hearsay evidence." *Calhoun*, 626 F.2d at 148. "Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability." *Id.* The test for admissibility requires "that the hearsay be probative and its use fundamentally fair." *Id.* "[I]t is not the hearsay nature per se of the proffered evidence that is significant, it is its probative value, reliability and the fairness of its use that are determinative." *Id.*

The Assistant Secretary noted that Dr. Shipek is "an anthropologist who worked closely with the Band in establishing its base roll" who "described her careful research into the ancestry of the San Pasqual Band, and her work with tribal elders." (AR 1150.) In her affidavit, Dr. Shipek noted, among other things, that she "met with all the band elders and each provided

[her] with a written list of ancestors and children," "searched the records of San Diego Mission, St. Josephs [sic] Cathedral, and Holy Trinity Church for baptismal, marriage and death records of all persons having those names as written, or by other potential spellings (by pronunciation) and also by translations back into Kumeyaay names, or transliterations of the Kumeyaay names," and "examined San Pasqual Valley school records, the County tax assessor records, county birth, marriage and death records, voter registration records, country court records, and available written reminiscences." (AR 2195.) Dr. Shipek's research led her to the conclusion that Jose Alto and Maria Duro Alto "had no children but had raised one belonging to a non-Indian family." (AR 2195-96.) The thoroughness of Dr. Shipek's research strongly supports the Assistant Secretary's determination that her affidavit was probative, reliable, and fair to use. *See Calhoun*, 626 F.2d at 148.

It is worth reiterating that the Assistant Secretary found the affidavits "very credible and probative" as they related to Marcus Alto, Sr.'s "status as biological or adoptive son of Jose and Maria Duro Alto." (*See* AR 1138.) However, the credibility challenges to the remaining affidavits are mostly critical of affiant assertions that are not relevant to Marcus Alto, Sr.'s lineage. For example, Plaintiffs challenge Felix Quisquis' credibility on the basis that there was a discrepancy regarding his age (Pls.' Mot. 13:1–10), Mellie Duenas on the basis that there was a discrepancy regarding her address (Pls.' Mot. 13:11–18), and Mary Alto Arviso and Laura Guidry on the basis of their ancestry (Pls.' Mot. 13:19–14:13; Pls.' Reply 8:1–15). Though these considerations may weigh

against finding a particular affidavit credible, they do not necessitate that conclusion. Rather, the fact finder—the Assistant Secretary in this case—weighs various considerations to determine credibility. With respect to these remaining affidavits, given that these considerations Plaintiffs identify are not relevant to Marcus Alto, Sr.'s lineage, the Assistant Secretary acted reasonably in determining the affidavits were credible for the purpose of determining whether Marcus Alto, Sr. is the biological or adoptive son of Jose Alto and Maria Alto.

Plaintiffs also challenge statements that it was "common knowledge" Marcus Alto, Sr. was non-Indian in two ways: (1) those making statements asserting this "common knowledge" lacked personal knowledge and other foundational facts; and (2) "common knowledge" is not probative or reliable evidence. With respect to the assertions regarding personal knowledge and foundation, Plaintiffs attempt to strictly apply the rules of evidence by invoking foundation requirements. As discussed above, agencies are not bound by such a strict application of the rules of evidence for cases brought under the APA. *See Villegas-Valenzuela*, 103 F.3d at 812. Rather, the applicable standard is whether the evidence is irrelevant, immaterial, or unduly repetitious. *See Calhoun*, 626 F.2d at 148. Plaintiffs fail to demonstrate that the evidence identified making references to "common knowledge" is irrelevant, immaterial, or unduly repetitious. *See id.*

Plaintiffs' assertion that "common knowledge" is not probative or reliable evidence sounds more in hearsay. They explain that "[c]ommon knowledge can be based on a rumor that if repeated enough times can appear to

be the truth[,]" and "[r]umor is proof of no fact." (Pls.' Reply 7:5–19.) This criticism appears to be directed at the nature of common knowledge being rooted in rumor, which in turn derives from repetition of the statement that Marcus Alto, Sr. was not "Indian" and adopted. (*See id.*) That *is* indeed hearsay. But the test for admissibility in the administrative setting is whether the hearsay evidence is probative and its use is fundamentally fair. *See Calhoun*, 626 F.2d at 148. Plaintiffs fail to demonstrate that the affidavits making reference to common knowledge lack probative value or are not fundamentally fair. *See id.* If Plaintiffs did not mean for this challenge to sound in hearsay, the defective reasoning previously discussed remains—the criticisms directed at these affidavits are simply not relevant to Marcus Alto, Sr.'s lineage. (*See* Pls.' Reply 7:5–19.)

3. Weight of DNA Evidence

Plaintiffs make the following argument directed at the apparent disconnect between the determination that Marcus Alto, Sr. is "non-Indian" and the DNA evidence indicating Native American ancestry:

> The AS-IA acknowledged the affidavits gave credence to the "adoption theory" because they stated that Marcus Alto Sr. was "'Mexican, not Indian." The AS-IA found that many "of the affidavits note that Marcus Alto was <u>non-Indian</u> and the child of a different family <u>not just a different mother</u>." As emphasized, these statements were entitled to no weight and certainly not "substantial weight."

> In finding the adoption theory probable, the AS-IA failed to give any weight to public record documents establishing that Marcus Alto Sr. publicly identified himself as "Indian" and DNA evidence that establishes that Raymond E. Alto has 30-percent Native American ancestry.

(Pls.' Mot. 15:8–18 (citations omitted) (emphasis in original).) In response, Defendants explain that "Plaintiffs[] mistakenly rely on DNA testing that shows a descendant of the Alto family 'has 30-percent Native American ancestry,' possible only if Marcus was a full-blood Indian as Plaintiffs theorize." (Defs.' Mot. 2716–28:5.)

The Assistant Secretary rejected Plaintiffs' argument that DNA markers indicating Native-American ancestry supports a finding that Marcus Alto, Sr. was of San Pasqual ancestry for two reasons. (AR 1155.) The first reason was that the "type of genetic testing relied on . . . does not provide accurate data on the proportion of Indian ancestry." (*Id.*) To support that reason, the Assistant Secretary cited to the Office of Federal Acknowledgment's explanation that "[u]nlike blood degree calculations, the proportion[s] of the DNA markers tracked in such ethnicity testing are not passed to children with predictable mathematical precision[,]" such that "[t]he child of a father with 50 percent 'Native American' markers and a mother with no 'Native American' markers does not have 25 percent 'Native American' markers." (*Id.*) The Assistant Secretary's second reason was that DNA results do not indicate whether the Native-American markers are the result from San Pasqual Indian lineage or another tribe. (*Id.*) These

explanations adequately and reasonably addressed why the Assistant Secretary chose not to rely on DNA evidence.

Plaintiffs' challenge regarding the Assistant Secretary's failure to give any weight to documents establishing that Marcus Alto, Sr. *publicly identified himself* as "Indian" is not supported by the record. To support this proposition, Plaintiffs direct the Court's attention to several documents in the administrative record. (Pls.' Mot. 15:8–18 (citing AR 473, 487, 490, 1985, 2431, 2635).) The first document cited is the 1920 federal census, but this is not necessarily Marcus Alto, Sr. himself publicly identifying himself as "Indian." (AR 2431.) Even if the Assistant Secretary construed the 1920 federal census as Marcus Alto, Sr.'s self-identification that he is "Indian," the Assistant Secretary already reconciled the 1920 federal census with the earlier censuses finding that the consideration of all the censuses is consistent with the adoption theory. (*See* AR 1151.) Several of the other documents identified face similar defects in that they are not statements made directly from Marcus Alto, Sr. himself. (*See* AR 473, 487, 2431.)

There are, however, two documents—a marriage certificate and a social-security document—where Marcus Alto, Sr. indeed identified himself as "Indian." (AR 490, 2635.) In their reply, Plaintiffs characterize the value of these documents as a reliability issue. (Pls.' Reply 8:16–9:13.) They contend that the aforementioned documents, including the 1920 federal census, corroborate the two documents where Marcus Alto, Sr. self-identified himself as "Indian," thereby providing greater reliability. (*See id.*) Though Plaintiffs'

point may have merit, courts "must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'" *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1036 (9th Cir. 2010) (quoting *Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009)). There is ample evidence in the administrative record supporting the Assistant Secretary's credibility determination, such as early census records and affidavits, among many others, and weight given to certain evidence to reach the conclusion that Marcus Alto, Sr. is not a San Pasqual lineal descendant. From that, the Assistant Secretary's reasoning can be easily discerned linking his conclusion to the factual findings, and thus, the conclusion warrants deference. *See Arkansas*, 503 U.S. at 112; *Bayliss*, 427 F.3d at 1214 n.1; *Arlington*, 516 F.3d at 1112 (A court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned[.]").

4. Weight Given to Maria Duro's "No Issue" Statement

Maria Duro Alto's enrollment application showed "no issue" in the space for providing information regarding the applicant's children. (AR 1152.) She also identified her husband as a full-blood Indian. (*Id.*) While considering the impact of Maria Alto's application, the Assistant Secretary noted "disturbing inconsistencies," but ultimately rejected the contention that the "no issue" statement lacked credibility. (AR 1152-53.)

Two reasons informed the Assistant Secretary's conclusion. First, he determined that being able to neither *read nor write* did not establish whether Maria

Alto *spoke and understood* English. (AR 1153.) Based on information contained in the 1920 federal census, the Assistant Secretary found Maria Alto indeed spoke English, suggesting that she understood the meaning of not only the question regarding her children in the application but also her "no issue" response. (*Id.*) And second, under the premise that "the distinction between 'child,' which term applies to both biological and adopted children, and 'issue,' which does not, is a matter of great importance to all parents[,]" the Assistant Secretary determined that "Maria Duro Alto would pay scrupulous attention to that distinction is perfectly consistent with the theory that she adopted Marcus Alto and was careful not to identify a 'child' who did not qualify as an Indian." (*Id.*) Based on these determinations, Maria Alto understood the importance of the application question and her answer. (*See id.*) Accordingly, the Assistant Secretary concluded that "Maria Duro's application contains a statement that precludes Marcus Alto from being Maria Duro's biological son, sworn by two witnesses." (*Id.*)

Plaintiffs challenge this finding on the grounds that the issue was "already addressed, considered and rejected in the April 10, 1995 decision[,]" and the existence of conflicting evidence. (Pls.' Mot. 15:23–16:13; Pls.' Reply 10:9–18.) The former is essentially a preclusion argument, which the Court already rejected above. More importantly, it grossly misstates what was determined in the 1995 Decision. As Defendants accurately point out, the "no issue" statement is not mentioned anywhere in the 1995 Decision, and as a consequence, was not an factor rejected or even considered in the 1995 Decision. (*See* AR 1516-18.)

The latter challenges the Assistant Secretary's ability to weigh evidence and make credibility determinations. However, the existence of conflicting evidence alone does not categorically negate the value of other evidence. It is worth repeating that the administrative record "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's positions." *Thompson*, 885 F.2d at 555 (emphasis in original). And "[a]gencies are not required to consider every alternative proposed nor respond to every comment made." *Ron Peterson Firearms*, 760 F.3d at 1165. Courts "must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'" *Modesto Irrigation*, 619 F.3d at 1036 (quoting *Trout Unlimited*, 559 F.3d at 958).

What is important is not the existence of conflicting evidence, but rather the existence of evidence supporting the agency's reasoning. *See Modesto Irrigation*, 619 F.3d at 1036; *Arlington*, 516 F.3d at 1112. That said, the Assistant Secretary addressed the fact that there is conflicting evidence in the administrative record and thoroughly explained his reasoning to reach the determination that Maria Alto's "no issue" statement in her enrollment application was credible. (*See* AR 1153.) This is not a situation where a determination was less than ideal in clarity. *See Arlington*, 516 F.3d at 1112. There is clear evidence that rationally and reasonably connects the evidence in the administrative record to the Assistant Secretary's finding. *See id.*

5. Marcus Alto, Sr.'s Birth Year

Recognizing that the "record is quite conflicted as to the year of Marcus Alto's birth," the Assistant Secretary identified several documents that may assist in determining Marcus Alto, Sr.'s birth year. (AR 1148-49.) Documents considered included San Pasqual membership-roll records, social-security records, documents filled out by Marcus Alto, Sr., the birth certificate of one of Marcus Alto, Sr.'s children, and Marcus Alto, Sr.'s marriage certificate, among others. (*Id.*) Reiterating that "there seems to be little certainty respecting the year in which Marcus Alto, Sr., was born," the Assistant Secretary found that Marcus Alto, Sr. was born in 1907. (AR 1149.) The Assistant Secretary explained that any claims to have been born in different years was "rationally explained as reflecting his desire to hide the fact he was under-aged at the time of his marriage." (*Id.*)

Plaintiffs argue that the Assistant Secretary's conclusion regarding Marcus Alto, Sr.'s birth year is arbitrary and capricious because he ignored evidence, improperly gave weight to others, and failed to explain why certain evidence "had no relevance." (Pls.' Mot. 16:17–17:24.)

Plaintiffs fail to provide any legal authority requiring the Assistant Secretary to specifically identify *every* issue or *every* fact raised by the parties. More importantly, the Court already rejected this line of reasoning, most recently in discussing the weight given to Maria Duro's "no issue" statement.

In reaching the conclusion that Marcus Alto, Sr. was born in 1907, perhaps the Assistant Secretary did

not explain every nuance in his reasoning to a level satisfying Plaintiffs. But that is not the applicable standard. The evidence that Plaintiffs identify is part of the administrative record, and as such, it is presumed to have been considered—directly or indirectly—by the Assistant Secretary. *See Thompson*, 885 F.2d at 555. At worst, the lack of a *specific* explanation addressing the evidence identified by Plaintiffs is a finding that has "less than ideal clarity." *See Arlington*, 516 F.3d at 1112.

What is important is not the existence of conflicting evidence, but rather the existence of evidence supporting the agency's reasoning. *See Modesto Irrigation*, 619 F.3d at 1036; *Arlington*, 516 F.3d at 1112. The Assistant Secretary provided a more than adequate explanation of his reasoning, referencing documents that corroborate his conclusion while also addressing the other possible birth years. (*See* AR 1148-49.) Like the finding regarding Maria Duro's "no issue" statement, this is not a situation where a determination was less than ideal in clarity. *See Arlington*, 516 F.3d at 1112. There is clear evidence that rationally and reasonably connects the evidence in the administrative record to the Assistant Secretary's finding. *See id.*

6. Frank Alto's "Corroborative" Letter

In the 2011 Decision, the Assistant Secretary determined that "[c]orroborative evidence that Marcus Alto was a non-tribal member being raised by Jose and Maria Alto is found in two letters from Frank Alto, drafted in 1910, identifying Jose, Maria, and himself as tribal members, but not mentioning Marcus Alto." (AR 1154.) Plaintiffs argue that this determination

regarding to the corroborative value of these two letters is arbitrary and capricious based on the speculation of an anthropologist expert and Plaintiffs' opinion that the signatures on the two Frank Alto letters are "substantially different." (Pls.' Mot. 18:4–23; Pls.' Reply 6:10–21.)

To the extent Plaintiffs argue the Assistant Secretary ignored or failed to assign the appropriate weight to the anthropology expert's speculation, the Court has already rejected similar arguments, and based on the same reasoning, rejects this one as well. *See Thompson*, 885 F.2d at 555; *Modesto Irrigation*, 619 F.3d at 1036; *Arlington*, 516 F.3d at 1112. The same reasoning also applies to Plaintiffs' criticism of the weight the Assistant Secretary gave to the two letters written by Frank Alto. *See id.* The Assistant Secretary adequately explained the value of the letters in the greater context of other "documentary evidence from the time of Marcus Alto's childhood support[ing] the conclusion that the reason Marcus Alto was not listed on the early San Pasqual censuses was because an explicit, contemporaneous determination had been made that the child being raised by Jose and Maria was not their biological child." (*See* AR 1154.) This reason alone is sufficient to affirm the Assistant Secretary's determination because there is clear evidence that rationally and reasonably connects this conclusion to evidence in administrative record. *See Arlington*, 516 F.3d at 1112.

Even if the Court entertains the substance of Plaintiffs' challenge to the validity of the two letters based on their opinion that the signatures are "substantially different," the conclusion would remain

the same. Comparing the two letters, it is not clear that the signatures differ substantially. (*See* AR 154, 2707.) More importantly, the contents of the two letters are largely similar, if not identical. (*Cf.* AR 154, 2707.) It is difficult to read one of the letters (AR 154) because of the degraded quality, but from what the Court can glean, the letters appear to be written by the same person. In particular, both letters end with the seemingly unique valediction "With best wishes to you I remain" followed by the signature. (AR 154, 2707.) The comprehensive index to the administrative record, which Plaintiffs submit as an exhibit to their motion, only confirms as much, stating that the letters are different versions of the same letter. (AR 5.) The index does not, as Plaintiffs asserted during oral argument, recognize the signatures as being different, let alone "substantially different." (*See id.*) Consequently, Plaintiffs' attack based on the respective signatures of the two letters lacks merit.

7. Marcus Alto, Sr.'s Biological Father

For the final factual challenge, Plaintiffs argue that the Assistant Secretary's finding that Jose Alto is not Marcus Alto, Sr.'s biological father is arbitrary, capricious, clear error, and an abuse of discretion. (Pls.' Mot. 18:27–20:3.) Plaintiffs' challenge is made in two forms. The first applies preclusion principles, contending that a determination regarding Marcus Alto, Sr.'s parentage in the 1995 Decision precludes the one made in the 2011 Decision. (*Id.* at 18:27–19:14.) And the second is summed up in Plaintiffs' remark that the Assistant Secretary "did not make a rational connection to the agency record evidence in concluding

that some other 'Jose Alto' was Marcus Alto Sr.' biological father." (*Id.* at 19:15–20:3.)

In the 2011 Decision, the Assistant Secretary found that Marcus Alto, Sr.'s adoptive father is not his biological father. (AR 1153.) The starting point of the Assistant Secretary's analysis was Marcus Alto, Sr.'s 1907 baptismal certificate, which lists his parents as Jose Alto and Benedita Barrios.[15] (AR 1153, 1513-14.) Even though Jose Alto is the name of the father who reared Marcus Alto, Sr., the Assistant Secretary concluded that the Jose Alto listed on the 1907 baptismal record is not the same Jose Alto who reared Marcus Alto, Sr. (AR 1153-54.) To reach that conclusion, the Assistant Secretary wrestled with two plausible theories: (1) "the certificate is referring to a different Jose Alto," based on evidence in the record that there were "a number of Jose Altos residing in the area at the time of Marcus's baptism"; and (2) "the 'father' named on the certificate is not really the biological father." (*Id.*) Relying on early census records, the two 1910 Frank Alto letters, and affidavit testimony where Marcus Alto, Sr. "is said to have admitted he was 'adopted' and 'not Indian,'" the Assistant Secretary ultimately concluded that the Jose

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[15] The 1907 baptismal certificate is for Robert Marco Alto. (AR 1513-14.) The Assistant Secretary addressed the obvious disconnect between the name listed in the baptismal certificate and Marcus Alto, Sr.'s name. (AR 1149.) Upon reviewing certain documents in the record, including a 1925 marriage certificate and a 1925 baptismal certificate for one of Marcus Alto, Sr.'s children, the Assistant Secretary concluded that the evidence taken together supported the conclusion that the 1907 baptismal certificate is for Marcus Alto, Sr. (*Id.*) This finding is not in dispute.

Alto who reared Marcus Alto, Sr. is not his biological father. (*Id.*)

Turning now to Plaintiffs' challenge, the Court rejects Plaintiffs' preclusion argument for the same reasons previously discussed in this order. The policy recognizing a tribe's right to define its own membership for tribal purposes and the federal policy favoring tribal self-government in addition to the fact that 1995 Decision and the 2011 Decision are based on different regulations led this Court to conclude that strictly applying preclusion principles to these two agency decisions would be inappropriate. *See Lasky*, 600 F.2d at 768. That same holds true under these circumstances.

Plaintiffs' substantive challenge is understandable and reasonable. The father's name listed on the 1907 baptismal certificate is Jose Alto, and the father who undisputably reared Marcus Alto, Sr. is also named Jose Alto. Plaintiffs diligently identify evidence throughout the administrative record that supports their proposition that the Jose Alto listed on the 1907 baptismal certificate is the same as the Jose Alto who reared Marcus Alto, Sr. (*See* Pls.' Mot. 19:15–20:3.) That evidentiary support includes the 1920 U.S. census listing Marcus Alto, Sr. as the "Indian" son of Jose and Maria Alto (AR 2431); Marcus Alto, Sr.'s marriage certificate stating he is "Indian" and his father is Joseph Alto who is "San Pasqual" (AR 2635); and several other documents demonstrating the same. (Pls.' Mot. 19:15–20:3.) However, what is important is not the existence of conflicting evidence or evidence supporting an alternative conclusion, but rather the existence of evidence supporting the agency's

reasoning. *See Modesto Irrigation*, 619 F.3d at 1036; *Arlington*, 516 F.3d at 1112.

Courts "must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'" *Modesto Irrigation*, 619 F.3d at 1036 (quoting *Trout Unlimited*, 559 F.3d at 958). The Assistant Secretary noted that important evidence was unavailable to determine whether the Jose Alto who reared Marcus Alto, Sr. was his biological father, and even acknowledged "the fact that 'Jose Alto' is the name given as the child's father on the baptismal certificate and is also the name of the man who raised the child establishes a strong presumption that the two are the same." (AR 1153.)

Recognizing the incomplete record and his own initial impressions, the Assistant Secretary thoroughly explained how the evidence in the record rebutted the presumption established by the baptismal certificate, with "[t]he most telling evidence in the record rebutting Jose Alto as Marcus Alto's biological father [being] the early BIA Indian censuses." (AR 1153-54.) He went on to explain:

> From 1907 through 1913, during which time Marcus Alto was undisputedly residing with Jose Alto and Maria Duro Alto, these censuses invariably identify Jose, Maria, and Jose's son, Frank Alto as tribal members and never list Marcus Alto. This fact cannot be written off as oversight; the entire purpose for taking these censuses was to identify and enumerate the people who were members of the San Pasqual Indians. And while there are not many young children included on these censuses, there

> certainly are some, rebutting any argument that Marcus Alto was too young for admission.

(AR 1154.) The Assistant Secretary supported his conclusion further by citing corroborative evidence—the two Frank Alto letters drafted in 1910—that is consistent with census information indicating the nuclear family as including Jose Alto, Maria Duro Alto, and Frank Alto, but not Marcus Alto, Sr. (*Id.*) Whether or not this Court agrees with the ultimate conclusion, the logic of this explanation—particularly, the weight given to the early Indian censuses as playing a foundational role in establishing the tribal membership roll—is transparent, reasonable, and supported by the administrative record. *See Arkansas*, 503 U.S. at 112; *Bayliss*, 427 F.3d at 1214 n.1.

The Assistant Secretary also identified "affidavit testimony refuting a biological connection between Marcus Alto and Jose Alto":

> It may well be true that people would refer to Marcus as "adopted" by Maria and Jose even if his biological parents were Jose and Benedita Barrios. But much of the testimony in the record is more specific. Many of the affidavits note that Marcus Alto was non-Indian and the child of a different family, not just a different mother. In particular, the 1994 affidavit of Dr. Shipek sets out unambiguously that "each elder maintained that Maria Duro Alto and her husband Jose Alto had no children but raised one belonging to a non-Indian family."

(AR 1154.) Dr. Shipek's long history working with and studying the San Pasqual Band is confirmed throughout the administrative record. (*See* AR 2100-34, 2186-89, 2191-92, 2195-96.) Even Dr. Grabowski's June 2008 analysis relied heavily on Dr. Shipek's research. (AR 2058-89.) It comes as no surprise that Dr. Shipek's thorough research would be given considerable weight by the Assistant Secretary.

Even though the administrative record contains evidence supporting Plaintiffs' position against the findings in the 2011 Decision, the Assistant Secretary's conclusion is a reasonable product derived from that evidence in the administrative record. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007). As a result, the Court must defer to the Assistant Secretary's conclusion despite the existence of evidence against that conclusion. *See Modesto Irrigation*, 619 F.3d at 1036.

IV. CONCLUSION & ORDER

Plaintiffs' frustration is understandable. The record strongly suggests that the San Pasqual Band has engaged in a relentless battle to disenroll Marcus Alto, Sr. and his descendants from the very beginning. For the most part, that battle appeared to be one that Plaintiffs were winning all the way up to the Regional Director's November 2008 decision. (AR 1267-75.) Then suddenly, in a complete about face, the Assistant Secretary reversed the Regional Director's decision, found in favor of the Band, and followed the recommendation to disenroll Marcus Alto, Sr.'s descendants. (AR 1137-56.)

However, the Court's role in this situation is "not to substitute its judgment for that of the agency," but rather to examine whether there is a "rational connection between the facts found and the choice made" by the agency. *Bonneville Power*, 477 F.3d at 687 (quoting *State Farm*, 463 U.S. at 43) (internal quotation marks omitted). The Assistant Secretary was tasked with the unenviable responsibility to review thousands of pages in the administrative record, some of which are over a hundred years old, and determining the membership status of the now-deceased Marcus Alto, Sr. Plaintiffs expend considerable effort to identify facts in the record either unmentioned, potentially ignored, or devalued, but as the Court has repeatedly stated, it "must defer to a reasonable agency action 'even if the administrative record contains evidence for and against its decision.'" *Modesto Irrigation*, 619 F.3d at 1036 (quoting *Trout Unlimited*, 559 F.3d at 958). The failure to address the substantial deference afforded to agency decisions—particularly for factual determinations—was a recurring flaw in Plaintiffs' reasoning. *See Arkansas*, 503 U.S. at 112; *Melkonian*, 320 F.3d at 1065.

Under the standard prescribed by 5 U.S.C. § 706(2)(A), which is highly deferential to the agency, Plaintiffs fail to meet their burden to demonstrate that the Assistant Secretary's decision is in any way "arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A); *San Luis & Delta-Mendota*, 747 F.3d at 601. Plaintiffs also fail to demonstrate that the Assistant Secretary's decision is not supported by "substantial evidence." *See Love Korean Church*, 549 F.3d at 754; *Bear Lake Watch*, 324 F.3d at 1076. Upon

this Court's review of the 2011 Decision, the Assistant Secretary articulated a rational relationship between his factual findings and conclusions. *See Fence Creek Cattle*, 602 F.3d at 1132.

In light of the foregoing, the Court **DENIES** Plaintiffs' motion for summary judgment, and **GRANTS** Defendants' cross-motion for summary judgment. Accordingly, this Court affirms the Assistant Secretary's 2011 Decision "revers[ing] the decision made by the Pacific Regional Director on November 26, 2008" and concluding that "the enrollment of the Marcus Alto Sr.[] descendants was based on information subsequently determined to be inaccurate and, as a result, their names must be deleted from the Band's roll." (*See* AR 1156.)

IT IS SO ORDERED.

DATED: September 30, 2015

/s/Cynthia Bashant
Hon. Cynthia Bashant
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil Action No. 11cv2276-BAS(BLM)

[Filed September 30, 2015]

Alberto Alto; Andre E. Alto; Antony Alto; Brandon Alto; Chasity Alto; Christopher J. Alto; Daniel J. Alto, Jr.; See Attachment for Additional Plaintiffs Plaintiff,	)
v.	)
Sally Jewell; Kevin K. Washburn; Michael Black; Robert Eben; Doe Defendants 1 through 10, inclusive Defendant.	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

that the Court DENIES Plaintiffs' motion for summary judgment, and GRANTS Defendants' cross-motion for summary judgment. Court affirms the Assistant

Secretary's 2011 Decision "revers[ing] the decision made by the Pacific Regional Director on November 26, 2008" and concluding that "the enrollment of the Marcus Alto Sr. descendants was based on information subsequently determined to be inaccurate and, as a result, their names must be deleted from the Band's roll". Case is closed.

Date: 9/30/15 **CLERK OF COURT**
JOHN MORRILL, Clerk of Court
By: s/ J. Haslam
J. Haslam, Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(ATTACHMENT)

Civil Action No. 11cv2276-BAS(BLM)

Additional Plaintiffs:

Daniel J. Alto, Sr.; Dominique N. Alto; Raymond Alto, Sr.; Raymond E. Alto; Raymond J. Alto; Robert Alto; Roland J. Alto, Sr.; Victoria (Alto) Ballew; Angela (Martinez-McNeal) Ballon; Juan J. Ballon; Rebecca (Alto) Ballon; Rudy Ballon; Janice L. (Alto) Banderas; Peter Banderas; Victor Banderas; David A. Brokiewicz; Diana Brokiewicz; Patricia D. (Alto) Brokiewicz; Monica (Sepeda) Diaz; Anthony Forrester; Dustin Forrester; Johanna (Alto) Forrester; Sarah Forrester; Ernest Gomez; Henrietta (Alto) Gomez; Kathleen M. Gomez; Humberto R. Green; Lydia (Alto) Green; Paul Anthony Green; Mary Jo (Alto) Hurtado; Justin A. Islas; Cynthia (Sepeda) Ledesma; Destiny C. Ledesma, Amanda M. (Alto) Minges; Isabelle M. (Alto) Sepeda; Lupe D. Sepeda; Deborah L. (Alto) Vargas; Desiree Vargas; Jeremiah Vargas; Jessiah Vargas; Terry E. Weight; Jason Alto; Carol Edith (Alto) Cavazos; Aimee Renae Diaz; Daniel Gomez; Lisa Gomez Huntoon; Christine Martinez; Marlene M. Martinez; Cassandra Sepeda; Raymond J. Alto,as representative for Ben Alto (deceased), Marcus M. Alto (deceased), Marcus R. Alto (deceased), David Alto (deceased), Susan Alto (deceased); Pamela J. Alto as Guardian Ad Litem for Marcus M. Green a minor; Pedro Banderas as Guardian Ad Litem for Reina A. Banderas a minor; Dawn Castillo as Guardian Ad Litem for Alexis N. Ledesma a minor and Jesse Ledesma a minor; Maria A.

Perez-Rolon as Guardian Ad Litem for Roland Rolon a minor; Martin Diaz as Guardian Ad Litem for Jessica Diaz a minor, Toni L. Diaz a minor and Jacob Sepeda a minor; Donald Martinez as Guardian Ad Litem for Danelle Martinez a minor, Justine Martinez a minor, and Sabrina Martinez a minor.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 11cv2276 – IEG (BLM)

[Filed December 19, 2011]

ALBERT P. ALTO, et al.,

Plaintiffs,

vs.

KEN SALAZAR, Secretary of the Department of Interior - United States of America, et al.,

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION [Doc. No. 4].

This is an action challenging Assistant Secretary of the Department of Interior for Indian Affairs Larry Echo Hawk's determination that Plaintiffs' names should be removed from the membership roll of the San Pasqual Band of Dieguno Mission Indians ("Tribe" or "Band"). Plaintiffs, collectively known as the "Marcus Alto Sr. Descendants," seek declaratory and injunctive relief from a January 28, 2011 order issued by Defendant Hawk finding that Plaintiffs' original

enrollment in the Tribe was based on inaccurate information. Plaintiffs allege that the January 28, 2011 order was arbitrary and capricious in violation of their due process rights under the Fifth Amendment and the Administrative Procedure Act ("APA"). Currently before the Court is Plaintiffs' Motion for Preliminary Injunction. [Doc. No. 4.] Having considered the parties' arguments, including those of the Tribe, who was granted leave to file an *amicus curie* brief, and for the reasons set forth below, the Court **GRANTS** the preliminary injunction.

BACKGROUND

I. San Pasqual Indians

The Band is a federally recognized Indian tribe composed of descendants from Indians who occupied the San Pasqual Valley, along the Santa Ysabel Creek east of San Diego, before the arrival of the Europeans. (Compl., Ex. 10, at 2 [Doc. No. 1-11] (hereinafter, "Jan. 28, 2011 order").) Efforts to provide a reservation for the Band began in 1870, but none were successful until 1910. (*Id.*) Even then, the land actually acquired was in the wrong township and not very arable. (*Id.* at 2-3.) Although the United States trust-patented the land as a reservation for the San Pasqual Indians, none of the San Pasqual Indians actually resided there for the next forty years.

In 1928, Congress passed "An Act Authorizing the attorney general of the State of California to bring suit in the Court of Claims on behalf of the Indians of California," which permitted Indians living in California to sue the United States for all claims arising from the uncompensated taking of Indian lands

in California. 45 Stat. 602 (May 18, 1928). The Act also directed the Secretary of the Interior to make a roll of Indians living in California that met the criteria for entitlement to any judgment from litigation provided under the Act. The resulting roll was published in 1933. Marcus Alto Sr., Plaintiffs' ancestor and the individual through whom they claim tribal membership, and Maria Duro Alto, Marcus Alto Sr.'s purported biological mother, were both included on the 1933 roll of California Indians. (Jan. 28, 2011 order, at 3.)

Indians claiming descent from the San Pasqual Indians met in the late 1950s to identify an enrollment committee and formulate criteria for tribal membership. (*Id.*) However, almost from the beginning, disputes developed between the Bureau of Indian Affairs ("BIA") and the tribal members as to how to determine qualifications for Tribe membership. As a result, the Department of the Interior promulgated regulations intended to govern the preparation of the Tribe's membership roll. The final rule was codified at 25 C.F.R. Part 48. *See* Preparation, Approval and Maintenance of Roll, 25 Fed. Reg. 1,829 (Mar. 2, 1960). The Part 48 regulations directed that a person who was alive on January 1, 1959, and who was not an enrolled member of another tribe, qualified for Tribe membership if that person was (a) named as a member of the Tribe on the 1910 San Pasqual census, (b) descended from a person on the 1910 census and possessed at least 1/8 blood of the Tribe, or (c) was able to furnish proof that he or she had 1/8 or more blood of the Tribe. (25 C.F.R. § 48.5 (attached as Exhibit 6 to Strommer Declaration [Doc. No. 10]).) The regulations provided for several levels of review, including appeals

to the Commissioner (now the Director of the BIA) and the Secretary of the Interior. (*Id.* §§ 48.6–48.11.) The authority to issue a final decision respecting membership in the Tribe was vested in the Secretary. (*Id.* § 48.11.)

The implementation of the Part 48 regulations resulted in the creation of a membership roll in 1966. Marcus Alto Sr. and his descendants were not included on that roll.

The Tribe voted on its Constitution in November 1970, and the document was approved by the Assistant Secretary in January 1971. Article III of the Tribe's Constitution provides:

> Section 1. Membership shall consist of those living persons whose names appear on the approved Roll of October 5, 1966, according to Title 25, Code of Federal Regulations, Part 48.1 through 48.15.
>
> Section 2. All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior.

(Compl., Ex. 1 [Doc. No. 1-2] (hereinafter, "Tribe's Constitution").)

Part 48 regulations were later re-codified in 25 C.F.R. Part 76. In 1987, the regulations were re-written to assist the distribution of a judgment fund pursuant to an award by the United States Court of Claims, known as the "Docket 80-A funds." *See* Enrollment of Indians of the San Pasqual Band of

Mission Indians in California, 52 Fed. Reg. 31,391 (Aug. 20, 1987) (to be codified at 25 C.F.R. pt. 76). The goal was to bring current the membership roll of the Tribe to serve as the basis for the per capita distribution of the judgment funds. *Id.* On June 3, 1996, having served its purpose, Part 76 was removed from the Code of Federal Regulations. *See* Enrollment of Indians; Removal of Regulations, 61 Fed. Reg. 27,780 (June 3, 1996). The 1960 regulations, however, are still a part of the Tribe's Constitution. (*See* Tribe's Const., art. III.)

II. 1994/1995 Alto enrollment

As relevant here, Marcus Alto Sr. submitted his application for enrollment in the Tribe on November 15, 1987. He listed Jose Alto and Mario Duro as his parents, both of whom appeared on the 1910 San Pasqual Census Roll. On June 16, 1988, Marcus Alto Sr. passed away. On May 23, 1991, the Superintendent notified the Tribe's Enrollment Committee of his determination that the descendants of Marcus Alto Sr. were eligible for enrollment in the Tribe. The Tribe's Business Committee rejected the Superintendent's determination, contending that Marcus Alto Sr. was not a "blood" lineal descendant of an ancestor from San Pasqual because he was an adopted son of Jose Alto and Maria Duro. Treating the Business Committee's rejection as an appeal, the Acting Area Director denied it on January 31, 1994. The Acting Area Director relied on Marcus Alto Sr.'s earlier 1928 enrollment application and an accompanying letter in determining that Maria Duro was Marcus Alto Sr.'s mother. The Tribe moved for reconsideration. On April 10, 1995, Assistant Secretary Ada Deer affirmed the rejection of

the Tribe's appeal. (*See* Compl., Ex. 5, at 3 [Doc. No. 1-6] (hereinafter, "Apr. 10, 1995 order").) Since Secretary Deer's favorable decision, roughly 100 Marcus Alto Sr. Descendants have been enrolled as members of the Tribe.

III. 2003 and 2005 federal court challenges

In 2003, three members of the Tribe filed a lawsuit against the BIA challenging the decision to enroll descendants of Marcus Alto Sr. *See Caylor v. Bureau of Indian Affairs*, Civ. No. 03cv1859 J (JFS) (S.D. Cal. filed Sept. 8, 2003). Plaintiffs alleged two claims for relief: (1) arbitrary, capricious, and unlawful enrollment under the APA, and (2) breach of trust. The district court dismissed the lawsuit, finding that the APA claim was time-barred and that, in any event, the Tribe was an indispensable party that could not be joined. *Id.*, Doc. No. 29.

In 2005, several members of the Tribe filed another lawsuit against the BIA stemming from the 1995 enrollment of the Marcus Alto Sr. Descendants. *See Atilano v. Bureau of Indian Affairs*, Civ. No. 05cv1134 J (BLM) (S.D. Cal. filed May 31, 2005). Plaintiffs alleged that the BIA's acts and omissions in supervising the enrollment process of the Tribe have deprived them, the Tribe, and the Tribe's prospective members of equal protection of the laws as guaranteed by the Fourteenth Amendment and the Indian Civil Rights Act. The district court dismissed the lawsuit, finding that the plaintiffs lacked standing to sue and that the Tribe was an indispensable party that could not be joined. *Id.*, Doc. No. 13.

IV. 2007 enrollment challenge

In August 2007, a newly enrolled tribal member submitted the present challenge to the qualifications for enrollment of the Marcus Alto Sr. Descendants and provided allegedly new evidence, including a 1907 baptismal record for one Roberto Marco Alto, showing the baby's parents to be Jose Alto and Benedita Barrios. The Enrollment Committee re-opened the matter and, ultimately, recommended that the Marcus Alto Sr. Descendants be removed from the Tribe's rolls because Marcus Alto Sr. was not a biological son of Maria Duro Alto. (Compl., Ex. 6 [Doc. No. 1-7].) The BIA disagreed, finding that the information previously submitted as well as the newly obtained information did not demonstrate that the prior enrollment was based on "inaccurate" information as required by 25 C.F.R. § 48.14(d) for deletion from the Tribe's membership roll.[1] (Compl., Ex. 7 [Doc. No. 1-8].) With regard to the 1907 baptismal record, the BIA concluded that it could not establish whether the person mentioned on it was Marcus Alto Sr. (*Id.* at 5.) Even if it was, the BIA concluded that he was still eligible to be included on the San Pasqual membership roll as a descendant of Jose Alto. (*Id.*) The BIA also found that the absence of Marcus Alto Sr. from the 1907-13 censuses of San Pasqual Indians did not prove that he was not the son of Jose Alto and Maria Dura. (*Id.*) Similarly, the BIA found that Maria Duro's statement

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[1] 25 C.F.R. § 48.14 governs the procedures for keeping the tribal membership roll current and provides, *inter alia*, that "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary." 25 C.F.R. § 48.14(d).

on her 1928 application that she had no "issue" (i.e., children) was not dispositive because Marcus Alto Sr. may have been Jose Alto's son from another relationship. (*Id.*) Finally, the BIA noted that it was "inappropriate for the Committee to continue to raise this issue of the validity of the inclusion of Mr. Alto and his descendants on the Band's membership roll or to attempt to disenroll his descendants and to continue to seek remedy from the BIA." (*Id.* at 8.)

The Enrollment Committee appealed the BIA's decision to Assistant Secretary Hawk, a defendant in this action. After establishing that he had jurisdiction to review the appeal, Defendant Hawk requested additional documentation from the parties. (Compl., Ex. 8 [Doc. No. 1-9].) According to Plaintiffs, in response, the Tribe submitted multiple documents, including a 56-page interpretive report by Dr. Christine Grabowsky and a separate 19-page supplemental memorandum of points and authorities. In a letter to Defendant Hawk, Plaintiffs contended that the Tribe's submittal exceeded the scope of Hawk's request and asked for an opportunity to respond. (Compl., Ex. 9 [Doc. No. 1-10].) According to Plaintiffs, they never received a response to their letter. (Compl. ¶ 43.) On January 28, 2011, Hawk issued his decision, finding that Marcus Alto Sr. Descendants' names must be deleted from the Tribe's membership roll. (Compl., Ex. 10.)

Examining Part 48 regulations, Hawk first determined that the Tribe had the burden of demonstrating by a "preponderance of the evidence" that the enrollment of Marcus Alto Sr. Descendants was based on "inaccurate" information. (Jan. 28, 2011

order, at 8-10.) Hawk then noted that it was undisputed that: (1) the couple who raised Marcus Alto Sr.—Jose Alto and Maria Duro—were full-blooded members of the Tribe, shown on the 1910 census; and (2) the couple raised Marcus Alto Sr. since infancy. (*Id.* at 10.) Therefore, the main question to be determined was whether Marcus Alto Sr. was the biological son of the said couple. (*Id.* at 11.) According to Hawk, to do so required him to resolve several disputed facts.

First, Hawk focused on the year when Marcus Alto Sr. was born. He noted that there were several possible dates: 1903, 1904, 1905, 1906, and 1907. After examining several conflicting pieces of evidence, and relying heavily on the proffered baptismal certificate, Hawk determined Marcus Alto Sr.'s birth year to be 1907. (*Id.* at 12-13.)

Second, Hawk determined that the baptismal certificate proffered by the Tribe was that of Marcus Alto Sr., even though it lists the child's name as "Roberto Alto Marco." (*Id.* at 13.) The baptismal certificate lists "Jose Alto" and "Benedita Barrios" as the child's parents and lists "Franco Alto" and "Litalia Duro" as sponsors. (*See* Compl., Ex. 13, Attach. 14 [Doc. No. 1-14].)

Third, Hawk found unrebutted three affidavits from 1994. The first one was by Dr. Shipek, who stated that she interviewed the San Pasqual elders and that all of them told her that Marcus Alto Sr. was not the biological son of Jose Alto and Maria Duro. The second one was by Ms. Duenas, who asserted that Marcus Alto

Sr.'s biological mother was named "Venidita."[2] The third was by Felix S. Quisquis, who claimed to be a childhood friend of Marcus Alto Sr. Felix related a story, that one day he observed Marcus traveling to Arlington (Riverside County) to visit his mother. Maria Duro, however, did not reside in Arlington. On the other hand, Benedita (Barrios) Rodriguez did reside in Riverside County. (Jan. 28, 2011 order, at 14.)

Fourth, Hawk identified as new evidence six affidavits executed in 2004 as part of the *Caylor* lawsuit, which asserted that Marcus Alto Sr. was not the biological son of Jose Alto and Maria Duro, but rather that he was "Mexican." (*Id.* at 14-15.)

Fifth, Hawk found the absence of Marcus Alto Sr. from BIA censuses of San Pasqual Indians for 1907 through 1913 to be "very weighty evidence" that the couple who raised him did not consider him to be their biological son. (*Id.* at 15.)

Sixth, Hawk gave little weight to Marcus Alto Sr.'s 1928 application for inclusion on the 1933 California Roll of Indians because it was unlikely that Marcus himself reviewed the application, seeing that it contained a number of mistakes and contradictions. (*Id.* at 15-16.)

Seventh, Hawk gave significant weight to Maria Duro's 1928 application for inclusion on the 1933 California Roll of Indians, which stated that she had "no issue." (*Id.* at 16-17.)

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[2] In Spanish, letters "b" and "v" sound alike and therefore are interchangeable.

Eighth, Hawk determined that even though the 1907 baptismal certificate listed "Jose Alto" as the child's father, the preponderance of the evidence established that it was either a different "Jose Alto" or that he was not Marcus Alto Sr.'s biological father. (*Id.* at 17-19.)

Finally, Hawk rejected Plaintiffs' reliance on DNA evidence showing certain degree of Indian blood because of the disputed accuracy of such testing as well as the fact that it only showed general degree of Indian blood, not necessarily San Pasqual Indian blood. (*Id.* at 19.)

In response to Defendant Hawk's decision, Plaintiffs sent a request for reconsideration, which was denied on June 3, 2011. (Compl., Exs. 11, 12 [Doc. Nos. 1-12, 1-13].) Plaintiffs subsequently sent three more requests for reconsideration with supporting evidence. (Compl., Exs. 13, 14, 15 [Doc. Nos. 1-14, 1-15, 1-16].) Plaintiffs allege that, to date, they have not received any response to these requests for reconsideration. (Compl. ¶¶ 53, 56-58.)

Plaintiffs assert that following the January 28, 2011 order, the Tribe (1) cancelled Plaintiffs' health care benefits; (2) removed some of them from elected and appointed offices; (3) barred them from attending and voting at any general council meetings; (4) stopped their per capita gaming income payments, which collectively amounted to approximately $250,000 per month; and (5) converted over $3 million that were vested and required to be held in segregated trust accounts for the minor Plaintiffs. (Compl. ¶¶ 130-133.)

V. Present case

Plaintiffs[3] filed their complaint on September 30, 2011, alleging four causes of action: (1) declaratory relief based on the doctrine of *res judicata*; (2) declaratory relief on the basis that Defendant Hawk violated the enrolled Plaintiffs' right to procedural due process; (3) declaratory relief and reversal of agency's January 28, 2011 order based upon arbitrary and capricious action; and (4) injunctive relief based on the agency's failure to act. [Doc. No. 1.] Plaintiffs also filed an *Ex Parte* Motion for Temporary Restraining Order ("TRO") and a Motion for Preliminary Injunction. [Doc. Nos. 3, 4.] On October 4, 2011, the Court granted Plaintiffs' motion for a TRO and set the preliminary injunction motion for a hearing. [Doc. No. 5.]

Defendants filed a response on October 11, 2011. [Doc. No. 7.] Defendants assert that prior to the TRO order being issued, they worked to implement the January 28, 2011 order. As a result, during August and September of this year, they prepared a revised membership roll and submitted it to the Tribe for

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[3] Plaintiffs separate themselves into five groups of Marcus Alto Sr. Descendants: (A) adult individuals identified on the Tribe's membership roll as duly enrolled members of the Tribe; (B) representatives of the families of deceased individuals identified on the Tribe's membership roll; (C) individuals who have attained the age of majority and otherwise meet the membership requirements, but whose applications have not been processed yet; (D) minor individuals, through their guardians *ad litem*, identified on the Tribe's membership roll; and (E) minor individuals, through their guardians *ad litem*, who otherwise meet the membership requirements, but whose applications have not been processed yet. (Compl. ¶¶ 13-18.)

review on September 19, 2011. To date, the Tribe has not submitted the revised roll to the Secretary for final approval.[4] Accordingly, Defendants assert that there is nothing pending before the BIA for the Court to enjoin. Moreover, Defendants indicate that they "have voluntarily decided to take no further action to implement the Assistant Secretary's decision pending resolution of this lawsuit by this Court." [*Id.*, at 4.]

On October 11, 2011, the Tribe filed a request with the Court to appear specially and an accompanying motion to dismiss this action under Federal Rule of Civil Procedure 19. [Doc. No. 10.] On October 12, 2011, the Court denied the Tribe's request to appear specially, but allowed for the Tribe's motion to be docketed as an *amicus curiae* brief. [Doc. No. 11.] The Court also ordered both parties to respond as to whether this action should be dismissed pursuant to Rule 19. The Court extended the TRO and moved the hearing on the preliminary injunction.

On October 28, 2011, both Plaintiffs and Defendants filed their responses to the Court's order. According to Defendants, with respect to claims one, two, and three of the complaint, the Court can proceed without the Tribe's participation, and therefore dismissal under Rule 19 is not required. (Def. Supp. Briefing, at 1-5 [Doc. No. 14].) However, because claim four of the complaint seeks relief that would directly impact the Tribe's interests, Defendants believe dismissal of that portion of the complaint is required by Rule 19. (*Id.* at

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[4] It appears that because the Tribe disagrees with Defendants as to who has the final approval authority, the Tribe is not likely to re-submit the revised roll to the Secretary.

5-6.) Plaintiffs, on the other hand, assert that dismissal under Rule 19 is not warranted at all. [Doc. No. 15.]

On November 4, 2011, the Tribe sought leave from the Court to file a supplemental brief. [Doc. No. 16.] The Court denied that request on November 7, 2011. [Doc. No. 17.] The Court heard oral argument on Plaintiffs' motion for preliminary injunction on November 15, 2011.

LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" and is "never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22, 24 (2008). Thus, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. As long as all four *Winter* factors are addressed, an injunction may issue where there are "'serious questions going to the merits'" and "a balance of hardships that tips sharply towards the plaintiff." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

DISCUSSION

Plaintiffs' complaint raises four causes of action: (1) *res judicata* of the 1995 decision; (2) violation of procedural due process; (3) arbitrary and capricious agency action; and (4) injunctive relief based on the agency's failure to act. Plaintiffs seek a preliminary injunction that: (a) prohibits Defendant Robert Eden

from removing the enrolled Plaintiffs from the rolls until the case is determined or, in the alternative, requiring the BIA to rescind the newly created supplemental roll; (b) requiring Defendant Hawk to issue an interim order allowing adult Plaintiffs access and voting rights on all general council tribal matters until the case is determined; (c) requiring Hawk to issue an interim order allowing Plaintiffs access to the Indian Health Care services until the case is determined; (d) requiring Hawk to issue an interim order requiring the Tribe to make the per capita payments due to Plaintiffs from December 1, 2010 until January 28, 2011; and (e) requiring Hawk to issue an interim order requiring the Tribe to escrow the minor Plaintiffs' Trust and the per capita payments that would be otherwise due to Plaintiffs. (*See* Compl. ¶¶ 134-138.)

I. Success on the merits

A. *Res judicata*

In their first cause of action, Plaintiffs assert that Secretary Deer's 1995 decision was entitled to *res judicata* effect because it involved the same issue of whether Benedita Barrios was Marcus Alto Sr.'s mother and whether Marcus Alto Sr. was adopted. Plaintiffs further assert that Defendant Hawk's determination that Marcus Alto Sr. was not the biological son of Jose Alto and Maria Duro was contrary to several prior administrative decisions.

The doctrine of *res judicata* is applicable "'whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties.'" *United States v. Liquidators of European Fed. Credit Bank*,

630 F.3d 1139, 1150 (9th Cir. 2011). It applies with equal force to administrative as well as judicial decisions "[w]hen an administrative agency is acting in a judicial capacity . . . resolv[ing] disputed issues of fact properly before it." *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). However, the Ninth Circuit has cautioned that "the principle of res judicata should not be rigidly applied in administrative proceedings." *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995); *accord Vasquez v. Astrue*, 572 F.3d 586, 597 (9th Cir. 2009). Therefore,

> [w]hen applied to administrative decisions, the res judicata doctrine is not as rigid as it is with courts; there is much flexibility which is intended to adapt the doctrine to the unique problems of administrative justice.

Stuckey v. Weinberger, 488 F.2d 904, 911 (9th Cir. 1973) (en banc). For example, where the subsequent proceedings concern issues not previously raised, *res judicata* may not apply. *See, e.g.*, *Lester*, 81 F.3d at 827-28 (concluding that the Commissioner of the Social Security Administration could not apply *res judicata* where the claimant's second application for disability benefits raised the existence of a mental impairment not considered in the previous application); *Gregory v. Bowen*, 844 F.2d 664, 666 (9th Cir. 1988) (declining to apply *res judicata* where the claimant's second application for benefits raised the new issue of psychological impairments).

In this case, serious questions exist as to whether Secretary Deer's 1995 determination was entitled to a *res judicata* effect. On the one hand, arguably, additional evidence has been obtained since Secretary

Deer's 1995 determination that would suggest *res judicata* is inapplicable, including: (1) the 1907 baptismal certificate; (2) additional affidavits from tribal members executed in 2004 as part of the *Caylor* lawsuit; and, to an extent, (3) the affidavits of Dr. Shipek, Ms. Dueans, and Mr. Quisquis executed in 1994, but apparently not considered by Secretary Deer in rendering the 1995 decision. (*See* Jan. 28, 2011 order, at 13-15, 19-20.) Where such new evidence is present, *res judicata* may not be appropriate. *See Lester*, 81 F.3d at 827-28; *Gregory*, 844 F.2d at 666; *see also Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985) (suggesting that *res judicata* may be inappropriate where the claimant has presented new facts to demonstrate that a prior determination of non-disability may have been incorrect).

On the other hand, it is unclear to what extent this "new" evidence sets forth new facts. First, as far as the affidavits of Dr. Shipek, Ms. Duenas, and Mr. Quisquis are concerned, those were executed in 1994 and were presumably considered by Secretary Deer in reaching her decision. (*See* Apr. 10, 1995 order, at 3 (noting that "[a]ll available documentation involving this case has been thoroughly reviewed").) Second, there is a dispute as to whether the 1907 baptismal certificate is for Marcus Alto Sr. at all. Third, there is reason to question the self-serving nature of the additional affidavits executed as part of the *Caylor* lawsuit. Finally, even accepting all of the above "new" evidence, the claimant in the 2007 challenge is essentially attempting to re-argue the same question that was determined in the 1994/1995 challenge: whether Marcus Alto Sr. was the biological son of Jose Alto and Maria Duro. Accordingly, if the above evidence was not

new, *res judicata* might have been appropriate. *See Stuckey*, 488 F.2d at 911 (noting that despite flexibility, "the doctrine [of *res judicata*] retains full force when applied to adjudications of 'past facts, where the second proceeding involves the same claim or the same transaction'" (citation omitted)).

More importantly, even if *res judicata* does not apply, there are serious questions as to whether collateral estoppel applies, which would preclude the re-adjudication of individual *issues* previously determined, as opposed to the *cause of action*. *See Montana v. United States*, 440 U.S. 147, 153 (1979). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.* In this case, the *causes of action* are arguably different because the 1994/1995 proceedings dealt with Marcus Alto Sr. Descendants' attempt to have their names included on the membership roll, for which they had the burden of proof, while the 2007 proceedings deal with the Tribe's attempt to have the Descendants' names removed from the membership roll, for which the Tribe has the burden of proof. Some of the *issues* determined in the two proceedings, however, appear to be identical: (1) the weigh to be given to Marcus Alto Sr.'s and Mario Dura's 1928 applications for inclusion on the 1933 California Roll of Indians; (2) the weight to be given to Marcus Alto Sr.'s absence from the 1907-13 censuses; and, to the extent they were considered in 1995, (3) the weight to be given to the three affidavits from 1994. It does not appear that Defendant Hawk gave any weight to the agency's prior determination of

these issues. Accordingly, Plaintiffs have at the very least demonstrated that there are serious questions going to whether collateral estoppel attached to some of the issues adjudicated in Secretary Deer's April 10, 1995 order.

B. Violation of procedural due process

Plaintiffs assert that Defendant Hawk's failure to issue a briefing order on appeal or to grant Plaintiffs' request to respond to the Tribe's supplemental evidence denied them due process in violation of the Fifth Amendment and the APA.

Due process requires that a party have a full and fair opportunity to litigate its case. *Crocog Co. v. Reeves*, 992 F.2d 267, 270 (10th Cir. 1993). A "full and fair opportunity" means that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer v. Chem Constr. Corp.*, 456 U.S. 461, 481 (1982). In deciding whether agency procedures comport with due process, the Court does not defer to the agency. *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003).

Here, it is not likely that Plaintiffs will be able to demonstrate that they were not provided with a full and fair opportunity to litigate their case. Plaintiffs were represented by an attorney, they submitted evidence at the lower BIA levels, and they were not expressly precluded from submitting additional evidence to the Secretary. Notably, when Defendant Hawk requested certain documents regarding the Tribe's appeal, he directed the request to *both* parties. (*See* Compl., Ex. 8.) The Court does not doubt that, as

Plaintiffs allege, the Tribe submitted excessive documentary evidence in response to Hawk's request. Plaintiffs, however, fail to point to any express or implied agency regulation that precluded them from doing the same. Moreover, nothing prevented Plaintiffs from providing the supplemental documents that they wanted Hawk to consider in their May 3, 2010 letter to him.[5] (*See* Compl., Ex. 9.) "The fact that [Plaintiffs] failed to avail [themselves] of the full procedures provided by [the agency] does not constitute a sign of their inadequacy." *See Kremer*, 456 U.S. at 485.

Plaintiffs' argument that the failure to provide them with an opportunity to respond was a clear violation of the APA similarly misses the mark. 5 U.S.C. § 554(c)(1) provides that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . . [t]he agency shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." As already noted, Plaintiffs had the *opportunity* to submit the facts and arguments for Hawk's consideration when (1) Hawk addressed his request for additional documents to both parties, (*see*

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[5] Indeed, after Defendant Hawk issued his adverse decision, Plaintiffs' new counsel submitted a request for reconsideration, to which he attached the supplemental documents Plaintiffs wanted Hawk to consider. (*See* Compl., Ex. 13.) Plaintiffs have failed to explain why they could not have submitted these same materials to Hawk sooner. Indeed, Plaintiffs had almost eight months from when the Tribe responded to Hawk's request (some time before May 3, 2010) and when Hawk issued his decision (January 28, 2011). (*See* Compl., Exs. 9, 10.)

Compl., Ex. 8), and (2) nothing prevented Plaintiffs from submitting those documents with their April 29, 2010 response to Hawk's request or their May 3, 2010 letter objecting to Tribe's submissions, (*see id.*, Ex. 9). Accordingly, Plaintiffs are not likely to demonstrate that their procedural due process rights were violated.

C. Arbitrary and capricious action

Plaintiffs next assert that Hawk's determination of several facts and issues must be set aside as violating the APA. In deciding whether Plaintiffs are likely to succeed on the merits of this claim, the APA sets forth an additional layer of review. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). Thus, under the APA, "a reviewing court may set aside only agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (citation omitted); *see also* 5 U.S.C. § 706(2)(A). Review under this standard is narrow, and the Court may not substitute its own judgment for that of the agency. *Carlton*, 626 F.3d at 468. "All that is required is that the agency have 'considered the relevant factors and articulated a rational connection between the facts found and the choices made.'" *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005) (citation omitted).

Nonetheless, while the review is deferential, it is not toothless. *Id.* As such, the Court's inquiry "must be 'searching and careful' to ensure that the agency decision does not contain a clear error of judgment." *Id.* (citation omitted). An agency action must be reversed as arbitrary and capricious where the agency has "'relied on factors which Congress has not intended it

to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision 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.'" *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "In performing this inquiry, the court is not allowed to uphold a regulation on grounds other than those relied on by the agency." *Ranchers Cattlemen*, 415 F.3d at 1093.

1. Reliance on the 1907-13 censuses.

Plaintiffs first assert that Hawk's determination that the San Pasqual censuses were "particularly probative" was not supported by the record or any reasoned explanation. Plaintiffs contend that the 1907-13 censuses are wholly untrustworthy because they contain numerous inaccuracies on their face. For example, Plaintiffs point to the following inaccuracies:

- Jose Alto is listed as age "50" on the 1907, 1908, 1909, and 1910 censuses;
- Maria Alto is listed as age "45" on the 1907, 1909, 1910, and 1911 censuses, as age "46" on the 1912 census, and as age "52" on the 1908 census; and
- Frank Alto is listed as age "25" on the 1907 and 1910 censuses, as age "24" on the 1908 census, as age "26" on the 1909 and 1911 censuses, and as age "27" on the 1912 census.

(*See* Compl., Ex. 13, Attach. 8.) On the one hand, despite the above inaccuracies, the failure of these censuses to list Marcus Alto Sr. as living with Jose Alto and Maria Duro at the relevant time significantly undercuts Plaintiffs' argument that he is the couple's biological son. *Cf. Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009) (noting that "an agency need not respond to every single scientific study or comment" for its choice to be upheld as reasonable). Thus, if the censuses were otherwise probative, it could not be said that reliance on them was a "clear error of judgment" so as to make Defendant Hawk's determination arbitrary and capricious. *See, e.g.*, *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 383-85 (1989) (the agency's determination was not "arbitrary and capricious" where the agency conducted a reasoned evaluation of the relevant information and reached a reasonable decision, even though another decisionmaker might have reached a different result). Plaintiffs, however, raise serious questions as to the probative nature of these censuses. As Plaintiffs point out, by consistently listing inaccurate and inconsistent ages for the individuals surveyed, the 1907-13 censuses do not appear to be trustworthy.

Moreover, as the BIA Regional Director indicated in his decision denying the Tribe's challenge, the census data is conflicting on this issue. For example, it appears the 1920 federal census *does* list Marcus Alto Sr. as Maria Alto's son. (*See* Compl., Ex. 7, at 5.) Hawk's rejection of this inconsistency is not reasonable. Hawk acknowledges that Marcus Alto Sr. is listed as living with Jose Alto and Maria Duro on the 1920 federal census, but attributes it to Marcus Alto Sr.'s adoption. (*See* Jan. 28, 2011 order, at 15 ("I find the

adoption theory to be the most logical explanation for the fact that Marcus Alto is not listed with his parents on the Indian censuses, but does appear on the Federal census of 1920.").) Early in his order, however, Hawk expressly determined that it was undisputed that Marcus Alto Sr. was raised by Jose Alto and Maria Duro "since infancy." (*Id.* at 10; *see also id.* at 15 (quoting a handwritten paragraph at the bottom of Marcus Alto Sr.'s 1987 enrollment application, which stated that he was given to Jose Alto and Maria Duro "'on the 3rd day after his birth'").) As such, any adoption would have taken place way before 1920, and there is no reason why Marcus Alto Sr. would appear on that census but not on the earlier Indian ones. Accordingly, Plaintiffs have demonstrated that there are at least serious questions as to the propriety of Hawk's reliance on the 1907-13 censuses.

2. Reliance on the several affidavits.

Plaintiffs next contend that Hawk's decision was arbitrary and capricious because it gave substantial weight to several affidavits stating that Marcus Alto Sr. was a non-Indian and not the biological son of Jose Alto and Maria Duro, while ignoring contrary affidavits and certified DNA test evidence provided by Plaintiffs. The agency has a broad discretion in resolving issues of conflicting evidence. *See Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009) ("When not dictated by statute or regulation, the manner in which an agency resolves conflicting evidence is entitled to deference so long as it is not arbitrary and capricious."). In this case, however, there are at least serious questions as to whether Hawk properly relied on the affidavits submitted by the challengers, while at the same time

discounting the sworn affidavits from 1928. For example, Hawk noted that the 2004 affidavits stated that Marcus Alto Sr. was "Mexican," and not "Indian." (Jan. 28, 2011 order, at 14-15.) However, the probative nature of these statements is called into question by the DNA test evidence submitted by Plaintiffs, which suggests that Marcus Alto Sr. Descendants possess Native American blood. (*See* Compl., Ex. 13, Attach. 11 (showing that Ray E. Alto, grandson of Marcus Alto Sr., possesses between 1/5 and 2/5 of Native American blood).) Similarly, Hawk's reliance on the 1994 affidavits, which indicate that Maria Duro was not Marcus Alto Sr.'s biological mother, appears to completely disregard the BIA Regional Director's conclusion that the evidence suggests that Marcus Alto Sr. might have been the biological son of Jose Alto from a previous relationship. (*See* Compl., Ex. 7, at 5.)

In sum, if Marcus Alto Sr. is indeed the biological son of Jose Alto from a previous relationship, the fact that he is not the biological son of Maria Duro has no effect on his eligibility for Tribe's membership, and therefore the 1994 and the 2004 affidavits were entitled to little, if any, weight. In light of that, Plaintiffs have at the very least raised serious questions as to the propriety of Hawk's reliance on the disputed affidavits.

3. Reliance on the statement that Maria Duro had "no issue."

Plaintiffs next argue that Hawk's finding that Maria Duro had "no issue" was precluded by the 1995 proceedings, wherein Secretary Deer rejected a similar claim. Plaintiffs also contend that this finding is inconsistent with Hawk's statement that "[t]hree of the

affiants claim blood relationship to Maria Duro Alto." (*See* Jan. 28, 2011 order, at 14-15.)

A review of the 1995 decision reveals that it does not discuss the "no issue" language in Maria Duro's 1928 application. (*See* Compl., Ex. 5.) Nonetheless, there are serious questions as to whether Hawk should have given significant weight to this single statement. As Plaintiffs point out, three of the 2004 affiants claimed blood relationship to Maria Duro, which appears to be inconsistent with Mario Duro declaring that she had no children. At the very least, it demonstrates that there are serious questions as to the reasonableness of Hawk's reliance on Mario Duro's statement that she had "no issue." *See Motor Vehicle Mfrs.*, 463 U.S. at 43 (noting that an agency's determination is arbitrary and capricious where the agency "offered an explanation for its decision 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").

4. Determination that Marcus Alto Sr. was born in 1907.

Plaintiffs assert Hawk's determination that Marcus Alto Sr. was born in 1907 is arbitrary in light of the conflicting evidence in the record. The agency, however, has broad discretion in resolving issues of conflicting evidence. *See Lohn*, 559 F.3d at 958. Here, Hawk acknowledged that there was conflicting evidence as to the year when Marcus Alto Sr. was born, with potential choices being 1903, 1904, 1905, 1906, and 1907. (Jan. 28, 2011 order, at 12-13.) After examining the conflicting evidence in the record, Hawk determined that 1907 was the likely year based on the crossed-out

age on Marcus Alto Sr.'s marriage certificate, his baptismal certificate, and his Social Security Death Index. (*Id.*) Hawk rejected 1905 because its use was rationally explained by Marcus Alto Sr.'s desire to hide the fact that he was under-age at the time of marriage. (*Id.*) Because Hawk's determination that Marcus Alto Sr. was born in 1907 was based on a reasoned evaluation of the relevant information, it was not arbitrary and capricious, even though another decisionmaker might have reached a different result. *See Marsh*, 490 U.S. at 383-85.

5. Finding that Quisquis's statement corroborated the 1907 birth year.

Plaintiffs argue that Hawk's finding that Quisquis's statement corroborated the 1907 birth year is inconsistent with Hawk's reliance on the 1907-13 censuses because there is no child identified as Felix Quisquis on those censuses. This potentially might detract from Hawk's reliance on Quisquis's statement. However, Hawk's reliance on the 1907-13 censuses was primarily due to the fact that Jose Alto's son from another relationship, Frank Alto, was listed on those censuses, while Marcus Alto Sr. was not—thereby indicating that Jose Alto and Maria Duro considered Marcus Alto Sr. to be adopted. (*See* Jan. 28, 2011 order, at 15.) The fact that Felix Quisquis might not be listed on those census does not have the same weight.

6. Disregard of Marcus Alto Sr.'s 1928 application.

Plaintiffs assert that Hawk's decision to disregard Marcus Alto Sr.'s 1928 application as an unsubstantiated affidavit was arbitrary and capricious.

However, as Hawk notes, the 1928 application contains several incorrect entries, such as listing Jose Alto as "non Indian" and listing Marcus Alto Sr.'s birth year as 1903, as well as several blank fields that Marcus Alto Sr. would have filled out. (*See id.* at 15-16.) Based on this evidence, Hawk reasonably concluded that the 1928 application was likely filled out without Marcus Alto Sr. ever reviewing it or correcting it. As such, it was reasonable for Hawk to give less weight to this application, even though another decisionmaker might have reached a different conclusion. *See Marsh*, 490 U.S. at 383-85.

7. Reliance on letters signed by Frank Alto.

Plaintiffs argue it was an abuse of discretion to rely on several letters signed by Frank Alto, which make no mention of Marcus Alto Sr. However, it is unclear how much weight Hawk gave to the Frank Alto letters. (*See id.* at 18.) To the extent he considered them as further corroborative evidence, such decision appears to be rational. *See Lohn*, 559 F.3d at 958.

8. Inconsistent findings regarding the 1907 baptismal record.

Plaintiffs assert that Hawk's finding that the 1907 baptismal record was that of Marcus Alto Sr. is inconsistent with his subsequent rejection that the "Jose Alto" listed on that record is the biological father of Marcus Alto Sr. Hawk based this determination on Plaintiffs' apparent concession that "'[t]here were many Jose Altos during [that] time.'" (Jan. 28, 2011 order, at 17 n.17 (citation omitted).) This explanation, however, is conclusory and lacks any "rational connection" to the facts. *See Yerger v. Robertson*, 981 F.2d 460, 463 (9th

Cir. 1992) ("An agency decision is arbitrary and capricious if, in reaching it, the agency failed to consider all relevant facts or to articulate a satisfactory explanation for the decision, including a rational connection between the facts found and the choice made." (citation and internal quotation marks omitted)).

More importantly, even the evidence submitted by the Tribe suggests that the "Jose Alto" listed on the certificate was the Jose Alto who raised Marcus Alto Sr.—i.e., a full blooded San Pasqual Indian. Specifically, the baptismal certificate lists "Franco Alto" and"Litalia Duro" as sponsors. (Compl., Ex. 13, Attach. 14.) In her "Analysis of the Marcus Alto, Sr. Enrollment Challenge," prepared on behalf of the Tribe, Dr. Grabowski states that both of these individuals were San Pasqual Indians and most likely were related to either Jose Alto or Maria Duro. (*See* Strommer Decl., Ex. 19, at 28-29.) As Plaintiffs contend, it would be highly unlikely that two San Pasqual Indians related to the San Pasqual couple that raised Marcus Alto Sr. would act as sponsors to a baptismal of a child of Benedita Barrios (a Mexican) and some other "Jose Alto." Thus, because Hawk "offered an explanation for [his] decision that runs counter to the evidence before the agency," and because that explanation is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," Plaintiffs have raised serious questions as to the reasonableness of Hawk's determination that "Jose Alto" listed on the baptismal certificate is not the "Jose Alto" that later raised Marcus Alto Sr. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

Finally, Hawk's alternate conclusion that "Jose Alto" listed on the certificate might have been the Jose Alto that raised Marcus Alto Sr., but at the same time was *not* his biological father is hardly plausible. It is plainly inconsistent, on the one hand, to accept as true that the "mother" listed on the baptismal certificate (Benedita Barrios) is the child's biological mother, while, on the other hand, insisting that the "father" listed on the same baptismal certificate (Jose Alto) is *not* that child's biological father. Either both parents listed on the baptismal certificate are correct, or both of them are not. Accordingly, Hawk's determination to the contrary is plainly inconsistent, and therefore was likely arbitrary and capricious. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

Overall, Plaintiffs have demonstrated sufficient errors and inconsistencies in Hawk's determinations that serious questions have been raised as to whether those determinations amount to "a clear error of judgment." *See Ranchers Cattlemen*, 415 F.3d at 1093. Moreover, Plaintiffs have sufficiently demonstrated that the agency's decision with respect to some of the issues "entirely failed to consider an important aspect of the problem," "offered an explanation that runs counter to the evidence before the agency," or "[wa]s so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See Carlton*, 626 F.3d at 468-69 (internal quotation marks and citation omitted). Thus, at the very least, Plaintiffs have raised serious questions as to whether Hawk's January 28, 2011 order was arbitrary and capricious.

D. Federal Rule of Civil Procedure 19

The Tribe, appearing as *amicus curiae*, asserts that the whole action should be dismissed under Federal Rule of Civil Procedure 19 because the Tribe is a necessary party that cannot be joined because of sovereign immunity. The absence of a necessary party may be raised at any stage in the proceedings and may be raised *sua sponte* by the Court. *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911-12 (9th Cir. 1991). Rule 19 provides in relevant part:

> (a) Persons Required to Be Joined if Feasible.
>
> > (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> > >
> > > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > > >
> > > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
>
> . . . .

> (b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. . . . .

In making a Rule 19 determination, the Court engages in three successive inquiries. *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010). First, the Court must determine whether a non-party should be joined under Rule 19(a). *Id.* If so, the second inquiry is whether joinder would be feasible. *Id.* Third, if joinder is not feasible, the Court must determine under Rule 19(b) "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* The moving party has the burden of persuasion in arguing for dismissal under Rule 19. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Moreover, because "the burdens at the preliminary injunction stage track the burdens at trial," the non-moving party bears the burden to show a likelihood that its affirmative defense will succeed. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *accord Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007).

1. Should the Tribe be joined under Rule 19(a)?

Relying on Rule 19(a), the Tribe asserts that it is a required party because: (A) in its absence, complete relief cannot be accorded among the existing parties; and (B) the Tribe claims an interest that would be impaired if the action proceeds in its absence or that

would result in the government incurring multiple or inconsistent obligations.

The Ninth Circuit has observed that "[t]here is no precise formula for determining whether a particular non-party is necessary to an action." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Rather, "'[t]he determination is heavily influenced by the facts and circumstances of each case.'" *Id.* (citation omitted).

i. Complete relief

In the present case, complete relief may be accorded among the parties in the Tribe's absence. First, with respect to claims one, two, and three, complete relief can be accorded because those claims focus solely on the propriety of the Secretary's determinations. Those claims seek only declaratory relief regarding the procedures used by the Secretary. Accordingly, the Tribe's absence does not prevent Plaintiffs from receiving their requested relief. *See Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1261-62 (9th Cir. 2000) (concluding that the Barona Group was not an indispensable party to plaintiffs' action to compel the Secretary to issue a ruling regarding their right to share in the portion of Barona Group's gaming revenue); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) ("Because plaintiffs' action focuses solely on the propriety of the Secretary's determinations, the absence of the Wyandotte Tribe does not prevent the plaintiffs from receiving their requested declaratory relief (i.e., a determination that the Secretary acted arbitrarily and capriciously . . .).").

Second, with respect to claim four, complete relief can also be afforded among the parties in the Tribe's absence. In claim four, Plaintiffs seek injunctive relief directing the Secretary to reconsider his January 28, 2011 order in light of the additional evidence submitted and to restore the status quo in the interim. Both of these can be achieved without the Tribe's participation in this suit. Specifically, the Tribe's Constitution delegates to the Secretary the final authority over all enrollment challenges. (*See* Tribe's Const., art. III, § 2 ("All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 . . . ."); *see also* 25 C.F.R. § 48.11 ("The decision of the Secretary on an appeal shall be final and conclusive . . . ."); *id.* § 48.14(d) ("Names of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary.").) Moreover, the Secretary has authority to enter interim orders directing the Tribe to comply with its own Constitution. As Plaintiffs demonstrate, Defendant Hawk did exactly that when the Tribe prematurely suspended Marcus Alto Sr. Descendants' benefits while the administrative appeal was pending. (*See* Compl., Ex. 8, at 3-4 (directing the Tribe to reinstate the tribal benefits to Marcus Alto Sr. Descendants during the pendency of the appeal, or risk enforcement action by the National Indian Gaming Commission).)

The cases relied upon by the Tribe are distinguishable. In those cases, the Ninth Circuit concluded that complete relief could not be accorded among the existing parties where the requested remedy, if granted, would fail to bind the absent Indian

tribe who was in a position to act in direct contravention of that remedy. Thus, in *Confederated Tribes*, various Indian tribes brought an action against federal officials challenging the United States' continued recognition of the Quinault Indian Nation as the sole governing authority of the Quinault Indian Reservation. 928 F.2d at 1497. The Ninth Circuit affirmed the dismissal under Rule 19(a), holding that complete relief was not possible in the absence of the Quinault Indian Nation because "[j]udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation." *Id.* at 1498.

Similarly, in *Pit River Home & Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1092 (9th Cir. 1994), the plaintiff sought judicial review of the Secretary of Interior's designation of the Pit River Tribal Council as the beneficiary of reservation property. The Ninth Circuit affirmed the dismissal under Rule 19(a), concluding that "even if the [plaintiff] obtained its requested relief . . . it would not have complete relief, since judgment against the government would not bind the Council, which could assert its right to [the property]." *Id.* at 1099.

Finally, in *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150, 1153 (9th Cir. 2002), the plaintiff, a member of the Hopi Tribe, sued the Salt River Project Agricultural Improvement and Power District ("SRP") for utilizing a hiring preference policy in violation of Title VII of the Civil Rights Act of 1964. Plaintiff alleged that SRP's lease with the Navajo Nation required it to

preferentially hire Navajos at the Navajo Generating Station. *Id.* The Ninth Circuit upheld the dismissal under Rule 19(a) because the Navajo Nation was an indispensable party. Specifically, the court noted that even if plaintiff was granted the requested relief and hired by the SRP, the Navajo Nation would not be bound by the determination and could even seek termination of its lease with the SRP. *Id.* at 1155-56.

In this case, unlike the above cases, there *are* enforcement mechanisms in place to ensure that the Tribe complies with any determination by the Secretary. First, the Tribe's Constitution provides that the Secretary has the final authority over all enrollment challenges. In the past, the Tribe has demonstrated that it was willing to submit the enrollment challenges to the BIA and the Secretary, and to abide by their decisions—most notably the 1994/1995 enrollment challenge, which was resolved adversely to the Tribe. Thus, if the Secretary were to reject the Tribe's current enrollment challenge, it is presumed the Tribe would comply with that determination. *See Yellowstone County v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996) (concluding that the Tribe was not a necessary party where it could be presumed that the tribal courts would comply with a binding pronouncement of the federal court); *cf. In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982) ("[I]t is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion.").

Moreover, all of Plaintiffs' claims in this case focus on the procedures the Secretary followed in upholding the Tribe's enrollment challenge. Because these

procedures are subject to judicial review under the APA, this Court has the authority to grant complete relief without the Tribe's presence. *See Makah Indian Tribe*, 910 F.2d at 559 (concluding that other tribes were not necessary parties to the Makah Indian Tribe's complaint seeking review of the Secretary's promulgation of regulations and prospective injunctive relief, where the procedures the Secretary followed in promulgating the challenged regulations were subject to judicial review under the Fishery Conservation and Management Act of 1976 and the APA); *see also Hein*, 201 F.3d at 1261-62 (concluding that the Barona Group was not an indispensable party to plaintiffs' action to compel the Secretary to issue a ruling regarding their right to share in the portion of Barona Group's gaming revenue). Accordingly, complete relief can be accorded.

ii. Legally protected interest that would be impaired

The Tribe also does not have a legally protected interest that would be impaired in its absence. The governing inquiry is whether the Tribe will be adequately represented by existing parties. *See Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998). "A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect." *Id.*

In this case, although the Tribe may claim a legally protected interest, the United States can adequately

represent the Tribe. "The United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe." *Id.* at 1154. The Court must look at both the ability of the federal government to represent the tribe and its willingness to do so. *See id.* Here, the federal government and the Tribe share a strong interest in defeating Plaintiffs' suit on the merits and ensuring that the Secretary's January 28, 2011 order is upheld. *See id.* (concluding that the United States could adequately represent the Salt River Pima-Maricopa Indian Community where both shared a strong interest in defeating the plaintiff's suit on the merits); *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (concluding that Indian tribes were not necessary parties to actions filed by the State of Washington against the Secretary of Commerce and the tribes challenging regulation allocating groundfish catches to tribes, inasmuch as the Secretary and the tribes had virtually identical interests and the United States could adequately represent the tribes). The United States has also indicated its willingness to represent the Tribe's interests in this case. (*See* Def. Supp. Briefing, at 4.)

Finally, "an absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 971 (9th Cir. 2008); *see also Makah*, 910 F.2d at 559 ("The absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful."). In this case, Plaintiffs' complaint focuses on whether the Secretary complied with administrative procedures

in upholding the Tribe's enrollment challenge. Accordingly, there is no legally protected interest that will be impaired.

The Tribe's arguments to the contrary are not persuasive. For example, the Tribe argues that the government would not represent the Tribe adequately because the government did not fully support the Tribe's motion to dismiss under Rule 19. This argument is "circular," however, because it essentially bootstraps the government's representation that it *would* adequately represent the Tribe, and therefore the Tribe is not a "required" party, to argue that the government will *not* adequately represent the Tribe. *See Southwest Ctr.*, 150 F.3d at 1154 (rejecting a similar argument). Similarly, the fact that the government will not make all of the Tribe's arguments is irrelevant because the Court's review of an agency decision is necessarily limited to the grounds relied on by the agency. *See Ranchers Cattlemen*, 415 F.3d at 1093. Finally, the Tribe's argument that this is an "intertribal" dispute is erroneous because Plaintiffs are still members of the Tribe,[6] and therefore the dispute

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[6] According to the Title 25 Regulations, which are incorporated into the Tribe's Constitution, *see* Tribe's Const., art. III, § 2, the BIA Director must re-submit the final version of the membership roll to the Secretary for approval before the roll is "approved." *See* 25 C.F.R. § 48.12 ("Upon notice from the Secretary that all appeals have been determined the Director shall prepare in quintuplicate a roll of members of the Band, arranged in alphabetical order. The roll shall contain for each person: Name, address, sex, date of birth, and degree of Indian blood of the Band. *The Director shall submit the roll to the Secretary for approval.* Four (4) copies of the approved roll shall be returned to the Director who shall make one (1) copy available to the Chairman of the Tribal Council and one

is not "between a tribe and non-tribe groups or individuals." *See Rosales v. United States*, 89 Fed. Cl. 565, 586 (Fed. Cl. 2009); *see also Pit River*, 30 F.3d at 1101.

iii. Inconsistent obligations

Finally, the Tribe asserts that proceeding without the Tribe can give rise to inconsistent obligations by the government because any attempt by the Secretary to interfere with the Tribe's rights to govern its internal affairs would likely give rise to tribal litigation against the BIA. However, any such possibility of inconsistent obligations is speculative at the moment, and therefore not sufficient to make the Tribe a required party. *See Southwest Ctr.*, 150 F.3d at 1154 (rejecting possibility of conflict arising from government's "potentially inconsistent responsibilities" where parties failed to demonstrate "how such a conflict might actually arise in the context of [the action at hand]"); *Norton*, 240 F.3d at 1259 ("'The key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria.'" (citation omitted)). Moreover, even if the Court ultimately rules in Plaintiffs' favor, any interference with the Tribe's

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(1) copy available to the Chairman of the Enrollment Committee." (emphasis added)). In this case, there is no indication that the Director has already prepared the final roll in quintuplicate, that he submitted it to the Secretary for final approval, or that the Secretary approved the final roll. Accordingly, although the Secretary has determined that Marcus Alto Sr. Descendants' names should be removed from the Tribe's membership roll and a revised roll was submitted to the Tribe for approval, it appears that Plaintiffs are still members of the Tribe.

rights in this case would be pursuant to the Tribe's own Constitution, which makes the Secretary the final arbiter of enrollment disputes. (*See* Tribe's Const., art. III, § 2.) Finally, as can be seen from the two prior federal lawsuits concerning the enrollment challenges to Plaintiffs' tribal membership, dismissing the action pursuant to Rule 19 seems to have no effect on any future litigation. *See Southwest Ctr.*, 150 F.3d at 1155 (noting that Rule 19's proviso against multiple or inconsistent obligations was not implicated where future litigation could result even if the lawsuit was dismissed).

2. Mandatory injunction

One additional argument merits consideration. Both the Tribe and the government suggest that requiring the Secretary to issue interim orders closely resembles a mandatory injunction—i.e., an injunction that "orders a responsible party to 'take action'"—rather than a prohibitory injunction that simply preserves the status quo. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (citation omitted). "A mandatory injunction goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored." *Id.* at 879 (citation and internal quotation marks omitted). Thus, in general, mandatory injunctions "'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" *Id.* (citation omitted); *see also Stanley v. Univ. of Southern Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) ("When a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly

favor the moving party." (citation and internal quotation marks omitted)).

In this case, the Court does not believe that requiring the Secretary to issue interim orders would constitute an issuance of a mandatory injunction. However, even if it does, the Court believes such relief is appropriate in this case. It is true that the Tribe is entitled to sovereign immunity from suit and that, had Plaintiffs been fully disenrolled as tribal members, the Secretary would have no further duty to them. But, that is not the case. Despite what seems like clear failings on behalf of Plaintiffs or their counsel to protect their own interests, the Court cannot ignore the Secretary's heavy reliance on the Tribe's briefing in adjudicating this case against Plaintiffs. As the preceding pages demonstrate, Plaintiffs have shown that serious questions arise as to the propriety of Defendant Hawk's adjudication. Moreover, as the Court has determined, under the Tribe's Constitution, the Marcus Alto Sr. Descendants are still on the rolls and, therefore, are still members of the Tribe. As such, the Secretary has continuing fiduciary duties and obligations to them. *See Seminole Nation v. United States*, 316 U.S. 286, 295-96 (1942). One such obligation is to protect the individual members' interests until this dispute is fully adjudicated. The Secretary previously acted to protect Plaintiffs' interests while the administrative proceedings were pending. (*See* Compl., Ex. 8, at 3-4 (directing the Tribe to reinstate the tribal benefits to Marcus Alto Sr. Descendants during the pendency of the appeal, or risk enforcement action by the National Indian Gaming Commission).) There is no reason why, if Plaintiffs have shown that they are otherwise entitled to a

preliminary injunction, the Secretary should not be forced to similarly act while this lawsuit is pending. Were this Court to uphold Plaintiffs' appeal and send this matter back to the Secretary, the Secretary would be required to issue the interim orders restoring the status quo, assuming the Tribe's Constitution has not been amended by that time. Therefore, the Court cannot accept the government's argument that the Secretary should not be required to do so in the interim. The Court will not put form over substance.

3. Conclusion

For the foregoing reasons, because complete relief can be accorded in the Tribe's absence, because the Tribe's interest may be adequately represented by the federal government, and because the federal government is unlikely to suffer inconsistent obligations, the Court concludes that the Tribe is not a required party under either Rule 19(a)(i) or Rule 19(a)(ii).

In light of the above determination, the Court need not consider whether the Tribe's joinder is feasible and, if not, whether the action can proceed in the Tribe's absence. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983). Accordingly, at least at this stage, the Court need not determine whether the Tribe has waived its sovereign immunity from suit by either providing in its Constitution for the Secretary's review of the enrollment challenges or by actively participating in the administrative proceedings giving rise to this suit.

II. Irreparable harm

To be entitled to a preliminary injunction, a plaintiff must also show the likelihood—rather than a mere "possibility"—of irreparable harm. *Winter*, 555 U.S. at 20-21. Here, Plaintiffs allege that they have already been stripped of their California Indian Health Care services, elected and appointed offices, per capita checks based on the gambling income, and over $3 million in trust funds for the minor Plaintiffs. (*See* Mem. of P.&A. ISO Motion for Prelim. Inj. Relief, at 18 [Doc. No. 4-1]; Raymond J. Alto Decl. ¶¶ 11-13 [Doc. No. 15-1].) They assert that any further delay will result in further irreparable harm. Moreover, Plaintiffs contend that the Tribe is now in the process of amending its Constitution. (*See* Ray E. Alto Decl. ¶ 11 (attached as Exhibit L to Thor Declaration [Doc. No. 15-4]); Compl., Ex. 19.) According to Plaintiffs, the proposed amendment, if successful, would limit tribal membership to only those who are actually named on the 1966 membership roll, or who are born to someone named on that membership roll. Because they do not satisfy either of the criteria, but were instead added pursuant to Title 25 Part 76 as blood descendants of San Pasqual tribal members who were identified in the 1910 census, Plaintiffs contend they will be "forever precluded from enrollment, irrespective of their lineage and the proof provided." (Mem. of P.&A. ISO Motion for Prelim. Inj. Relief, at 19.)

Plaintiffs have demonstrated that irreparable harm is likely. "It is true that economic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award." *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental,*

Inc., 944 F.2d 597, 603 (9th Cir. 1991). In this case, however, the removal of Plaintiffs from the membership roll has resulted in their removal from elected and appointed positions. It has also resulted in their loss of health insurance benefits. "Like the loss of one's job, the loss of one's job benefits 'does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.'" *Collins v. Brewer*, 727 F. Supp. 2d 797, 812 (D. Ariz. 2010), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); *see also Indep. Living Ctr. of Southern Cal, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 657-58 (9th Cir. 2009) (holding that state Medicaid beneficiaries were likely to be irreparably harmed by a reduction in their benefits), *cert. granted in part*, 131 S. Ct. 992 (2011); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (holding that a denial of needed medical care creates a risk of irreparable injury). Accordingly, the Court concludes that Plaintiffs have demonstrated a likelihood of irreparable harm.[7]

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[7] The Court, however, rejects Plaintiffs' argument that the possibility of the Tribe voting on the constitutional amendment amounts to irreparable harm. First, as the Tribe demonstrates, it is still uncertain when any such vote would take place, (*see* Strommer Decl., Exs. 2, 28), and, therefore, at most, this presents a *possibility* of irreparable harm, which is insufficient. *See Winter*, 555 U.S. at 20-21. Moreover, any harm is speculative because the Secretary would need to approve any final changes to the Tribe's Constitution. (*See* Tribe's Const., art. X.) Finally, the actual text of the proposed constitutional amendment undermines Plaintiffs' claim. Plaintiffs assert that the constitutional amendment, if successful, would limit tribal membership to only those who are actually named on the 1966 membership roll, or who are born to someone named on that membership roll. Because they do not

The government responds that there is no immediate harm because there is nothing currently pending before the BIA to enjoin. Moreover, the government asserts that it has voluntarily decided not to take any further action to implement the January 28, 2011 order while this action is pending. Defendants' voluntary cessation of challenged conduct, however, is not sufficient to moot Plaintiffs' application for a preliminary injunction. *See F.T.C. v. Affordable Media*, 179 F.3d 1228, 1237 (9th Cir. 1999) ("[I]t is actually well-settled 'that an action for an injunction does not become moot merely because the conduct complained of was terminated, *if there is a possibility of recurrence*, since otherwise the defendant[s] would be free to return to their old ways.'" (citation omitted)). In this case, there is a possibility of recurrence because there

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satisfy either of the criteria, but were instead added pursuant to Title 25 Part 76 as blood descendants of San Pasqual tribal members who were identified in the 1910 census, Plaintiffs contend they will be "forever precluded from enrollment, irrespective of their lineage and the proof provided." (*See* Mem. of P.&A. ISO Motion for Prelim. Inj. Relief, at 19.) The proposed constitutional amendment, however, specifically provides that the membership of the Band shall consist of:

> Those living person whose names appear on the approved Membership Roll of October 5, 1966, *according to Title 25, Code of Federal Regulations, Part 48.1 through 48.15 (which incorporates the Census Roll dated June 30, 1910)*.

(Compl., Ex. 19 (emphasis added).) Accordingly, the plain text of the proposed constitutional amendment would *include* Plaintiffs. Plaintiffs, therefore, have failed to demonstrated a likelihood of irreparable harm on the basis of the proposed constitutional amendment.

is no guarantee that the government will not change its mind in the middle of the litigation.[8]

Finally, the Tribe alleges that Plaintiffs create a false state of emergency because nine months had already passed since the Secretary issued his January 28, 2011 order, and that Plaintiffs have been deprived of all of the above-described benefits for this period of time. However, as Plaintiffs' response demonstrates, Plaintiffs spent the past nine months exhausting their administrative remedies by trying to convince Defendant Hawk to reconsider his decision. (*See* Pl. Mem. of P.&A. in opp. to. MTD, at 19 [Doc. No. 15].)

Accordingly, Plaintiffs have demonstrated the likelihood of irreparable harm.

III. Balance of hardships

"To qualify for injunctive relief, the plaintiffs must establish that 'the balance of equities tips in their favor.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138

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[8] Indeed, it appears the government has already changed its mind on at least one aspect of this lawsuit. In its opposition to Plaintiffs' motion for a preliminary injunction, filed on October 11, 2011, the government indicated that there existed a disagreement between it and the Tribe as to "the BIA's interpretation of its approval authority." (Gov't Response to Motion for Prelim. Inj., at 4; *see also id.* at 5 ("And from available information, it appears unlikely that the Band will seek further action by the BIA because it views the BIA's role differently.").) However, at the November 15, 2011 hearing on preliminary injunction, in an apparent change of position, the government asserted that it all along agreed with the Tribe that the January 28, 2011 order was immediately effective. (*See also* Response to Pl. "Reply," at 1-2 [Doc. No. 20].) The government's view now is that the submittal of the revised roll to the BIA for final approval is merely a "ministerial" task. (*Id.* at 2.)

(9th Cir. 2009) (citation omitted). "In assessing whether the plaintiffs have met this burden, the district court has a 'duty ... to balance the interests of all parties and weigh the damage to each.'" *Id.* (citation omitted). In this case, the balance of hardships tips heavily in Plaintiffs' favor. They have already been deprived of their appointed and elected offices, numerous benefits, per capita payments, and the like. On the other hand, since Defendants already indicated that they have voluntarily decided not to take any further action to implement the January 28, 2011 order, it does not appear that Defendants would suffer any hardship if the Court grants Plaintiffs' motion for a preliminary injunction. Moreover, although the issuance of the preliminary injunction might interfere with the Tribe's sovereignty, as previously indicated, this interference is expressly provided for in the Tribe's Constitution and is pursuant to the APA. Accordingly, the balance of hardships tips heavily in Plaintiffs' favor. *See Lopez v. Heckler*, 713 F.3d 1432, 1437 (9th Cir. 1983) ("Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.").

IV. Public interest

The public interest factor requires the Court to consider "'whether there exists some critical public interest that would be injured by the grant of preliminary relief.'" *Maxwell-Jolly*, 572 F.3d at 659 (citation omitted). On the one hand, the public undoubtedly has a strong interest in ensuring that tribal members are not arbitrarily disenrolled due to conflicts among tribal factions, especially when such

disenrollment results in loss of benefits and potentially permanent loss of heritage. Similarly, the Secretary presumably has an interest in having its determination and procedures deemed constitutional. On the other hand, there is an equally strong interest in preserving the Tribe's sovereignty over enrollment issues. Nonetheless, as previously stated, any interference with the Tribe's sovereignty in this case is pursuant to the Tribe's own Constitution. Accordingly, the Court concludes that the public interest in having the Secretary's determination and procedures reviewed on the merits outweighs any possible interference with the Tribe's sovereignty.

V. Bond

Federal Rule of Civil Procedure 65 provides in relevant part: "The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). District courts have discretion to determine the amount of security, if any. *Barahona–Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir.1999). In this case, Plaintiffs assert that they are indigent as a result of the Tribe's withholding of their per capita funds pursuant to the January 28, 2011 order. Waiver of the bond requirement is permissible where the plaintiffs are indigent. *See V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1123 (N.D. Cal. 2009); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 n.42 (C.D. Cal. 1982). Moreover, the Court believes that in this case the cost to the government and the Tribe, in the event they are found to have been wrongfully enjoined, would be minimal.

Accordingly, the Court will exercise its discretion to waive the bond requirement in this case. *See* Fed. R. Civ. P. 65(c).

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs have at the very least shown serious questions going to the merits of their claims, likelihood of irreparable harm, a hardship balance that tips sharply toward them, and that an injunction would be in the public interest. *See Winter*, 555 U.S. at 20; *Alliance for the Wild Rockies*, 632 F.3d at 1135. Accordingly, the Court **GRANTS** their motion for a preliminary injunction and **ORDERS** as follows:

(1) Defendants, their officers, agents, servants, employees, and attorneys are hereby RESTRAINED and ENJOINED for the duration of this lawsuit from removing Plaintiffs from the San Pasqual Tribe's membership roll and from taking any further action to implement the Assistant Secretary's January 28, 2011 order.

(2) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the duration of this lawsuit, the adult Plaintiffs access to, and voting rights at, the general council meetings to the same extent as was enjoyed during the pendency of the administrative proceedings and before the issuance of the January 28, 2011 order.

(3) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the duration of this lawsuit, Plaintiffs access to the Indian Health Care services to the same extent as was

enjoyed during the pendency of the administrative proceedings and before the issuance of the January 28, 2011 order.

(4) Defendant Echo Hawk is hereby ENJOINED to issue an interim order requiring, for the duration of this lawsuit, the Tribe to make the per capita distributions of gaming revenue to Plaintiffs to the same extent as was required during the pendency of the administrative proceedings and before the issuance of the January 28, 2011 order.

(5) Defendant Echo Hawk is hereby ENJOINED to issue an interim order requiring, for the duration of this lawsuit, the Tribe to escrow the minor Plaintiffs' per capita trust funds to the same extent as was required during the pendency of the administrative proceedings and before the issuance of the January 28, 2011 order.

IT IS SO ORDERED.

Date: December 19, 2011

/s/Irma E. Gonzalez
IRMA E. GONZALEZ, Chief Judge
United States District Court

APPENDIX E

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

[Filed January 28, 2011]

SAN PASQUAL ENROLLMENT COMMITTEE	)
AND	)
SAN PASQUAL BAND OF MISSION INDIANS,	)
	)
PLAINTIFFS/APPELLANTS	)
	)
v.	)
	)
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)
	)
DEFENDANT/APPELLEE.	)
	)

ORDER

Introduction

On December 18, 2008, the Enrollment Committee of San Pasqual Band of Diegueño Mission Indians of California (Band) appealed the Bureau of Indian Affairs' Pacific Regional Director's November 26, 2008,

decision rejecting a recommendation of the appellant Enrollment Committee. In August 2008, the Enrollment Committee (Committee) had submitted to the Regional Director (RD) a revised membership roll, from which the descendants of one Marcus Alto, Sr., had been removed. The Committee, having reviewed newly-submitted information, and having commissioned a review of all available genealogical information, determined that the Bureau's 1995 decision to include the Alto descendants on the roll was based on inaccurate information. The Committee determined that Marcus Alto, Sr., was not the biological son of the tribal members who raised him, and therefore did not meet the criteria for membership in the Band. The Committee submitted the proposed changes to the RD, who rejected the proposals. The Committee appealed the RD's decision under the provisions set out in 25 C.F.R. Part 62, "Enrollment Appeals."

My office has reviewed the extensive documentary record in the case. I find that, under tribal law, I have the final authority respecting enrollment and disenrollment decisions, as detailed in 25 C.F.R. Part 48 (1960). I find particularly probative the fact that Marcus Alto, Sr., was not identified on the early San Pasqual censuses; the fact that Maria Duro Alto asserted she had no "issue"; and the fact that the application submitted on Marcus Alto's behalf for inclusion on the 1933 Roll of California Indians is incomplete and demonstrably inaccurate. I find the testimonial evidence contained in affidavits by tribal elders, tribal enrollment committee members, close acquaintances of Maria Duro Alto and Marcus Alto, and especially anthropologist Florence Shipek, to be

very credible and probative respecting Marcus's status as biological or adoptive son of Jose and Maria Duro Alto. I also find that regulations mandating that the Bureau defer to tribal recommendations unless "clearly erroneous" do not apply in this case, and that the appropriate standard of review is "preponderance of the evidence."

The preponderance of the evidence in this case compels me to reverse the RD's decision, and accept the removal from the Board's membership roll of all those whose qualification for membership was based on the belief that Marcus Alto, Sr., was the biological child of Jose/Joseph Alto and Mary/Maria Duro Alto.

Background

Today's federally recognized Indian tribe, the San Pasqual Band of Diegueno Mission Indians of California, descends from Indians who occupied the San Pasqual Valley, along the Santa Ysabel Creek east of San Diego, before the arrival of the Europeans. The United States acquired California through its victory in the war with Mexico. Subsequently, according to the Band's website:

> In 1852 federal authorities sent three commissioners to negotiate treaties with the California Indians. On January 7, 1852, representatives of a number [of] Kumeyaay clans met with Commissioner Oliver M. Wozencraft and negotiated the Treaty of Santa Ysabel. The agreement was part of the famous "18 Treaties" of California, negotiated to protect Indian land rights. After the 18 Treaties were completed, the documents were sent to the United States Senate

> for approval. Under pressure from white settlers and the California Senate delegation, the treaties were all rejected.[1]

Later, "[t]o protect the San Pasqual people, President Ulysses S. Grant created a reservation for them by executive order in 1870, but the order was rescinded in 1871 in response to settler's demands." *Id.* The reservation provided for in Grant's executive order embraced four full townships.[2] Settlers had already occupied the area, and objected to such a large grant. Efforts continued to be made to provide a reservation for these Indians, but none succeeded until 1910; even then, in what the Bureau of American Ethnology called an "inexcusable error,"[3] the land actually acquired for the San Pasqual was in the wrong township – six miles north of the property identified for purchase.

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[1] http://sanpasqualtribe.com/. *See also,* Indians of California v. United States, 98 Ct. Cl. 583, 585 (U.S. Ct. Cl. 1942): "The aforesaid eighteen treaties, on June 1, 1852, were transmitted by the President, Millard Fillmore, to the Senate of the United States for its constitutional action thereon. On June 28, 1852, the Senate, considering each of the treaties as in Committee of the Whole, unanimously refused to advise and consent to the ratification of all and several of the aforesaid eighteen treaties and ordered that the resolutions rejecting the treaties be laid before the President of the United States. The records of the United States Senate do not reveal the reasons for the adverse action on the aforesaid treaties."

[2] "San Pasqual: A Crack in the Hills," Mary Rockwood Peet. The Highland Press, Culver City, Cal. 1949. Administrative Record at 03-006. Page 58.

[3] Quoted at *Id.* p. 62.

None of the Indians who were intended to benefit from the land lived in or near the acquired property, which was arid and incapable of supporting a community.

California Indian Census of 1933

In 1928, Congress passed "An Act Authorizing the attorney general of the State of California to bring suit in the Court of Claims on behalf of the Indians of California," which the 1928 Act permitted Indians living in California on June 1, 1852, and their descendants residing in California, to sue the United States for all claims arising from the uncompensated taking of Indian lands in California (45 Stat. 602; May 18, 1928). The 18 treaties submitted to the Senate by the President on June 1, 1852, were specifically mentioned in the 1928 Act. The 1928 Act directed the Secretary of the Interior, "under such rules and regulations as he may prescribe," to make a roll of Indians living in California that meet the criteria for entitlement to any judgment fund resulting from litigation provided for under the Act, and also a roll of Indians living in California who did not meet those criteria. The Bureau prepared application forms, distributed them to Indians in California, assisted Indians in completing their applications, and published the resulting roll in 1933. As more fully discussed below, Marcus Alto, Sr., and Maria Duro Alto were included on the 1933 roll of California Indians.

Band Organization in 1950s

In 1910, the U.S. trust-patented land as a reservation for the San Pasqual Indians. The land was not located in the San Pasqual traditional lands, and was not capable of supporting many people. The Bureau hired

a non-Indian caretaker (Trask), with an Indian wife belonging to a different tribe. Trask, and later, his two daughters, lived on the land that was acquired to be the San Pasqual Reservation for about 40 years. Then,

> [i]n 1954 the descendants of the San Pasqual Band realized that they would lose even this small piece of mislocated reservation land unless they organized to reclaim the reservation. The Indians were required by the [BIA] to develop proof of their descent from the original San Pasqual members.[4]

Indians claiming descent from the San Pasqual Indians met in the late 1950s to identify an enrollment committee and formulate criteria for membership in the band. According to Dr. Florence Connolly Shipek, there were disputes between the BIA and the tribal members from the very beginning respecting how to determine qualifications for Band membership (*Id.* at 94). On July 29, 1959, the Department of the Interior (Department) published a notice of Proposed Rulemaking, setting out regulations intended to "govern the preparation of a roll of the San Pasqual Band of Mission Indians in California."[5] The final rule was codified at 25 C.F.R. Part 48, published March 2, 1960.[6]

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[4] Pushed into the Rocks: Southern California Indian Land Tenure, 1769-1986. Florence Connolly Shipek. Lincoln: University of Nebraska Press, 1987. Page 93.

[5] 24 Fed. Reg. 6,053 (July 29, 1959).

[6] 25 Fed. Reg. 1,829 (March 1, 1960).

The Part 48 regulations directed that a person who was alive on January 1, 1959, qualified for membership in the band if that person was named as a member of the Band on the 1910 San Pasqual census, or descended from a person on the 1910 census and possessed at least 1/8 blood of the band, or was able to furnish proof that he or she was 1/8 or more blood of the Band. 25 C.F.R. § 48.5.

Under the Part 48 regulations, an Enrollment Committee was formed consisting of three primary and two alternate members, all of whom were shown on a 1910 Bureau of Indian Affairs (BIA) census of San Pasqual Indians. 25 C.F.R. § 48.6. The regulations directed any person interested in applying for membership in the band to obtain an application from the BIA's Field Representative (equivalent to today's Agency Superintendent), fill out the application and return it to the Field Representative, who would forward the applications to the Enrollment Committee for its review and recommendation. The Enrollment Committee would return the applications to the Field Representative, who would forward them to the Area (now Regional) Director. The Director was authorized by the Regulations to determine whether a person is qualified for membership. The Regulations also provided for appeals to the Commissioner (now Director of the BIA) and the Secretary of the Interior. Thus, under the regulations, the authority to issue a final decision respecting membership in the Band was vested in officials in the Department of the Interior.

The implementation of the Part 48 regulations resulted in the creation of a membership roll in 1966. Marcus Alto, Sr., and his descendants were not included on

that roll. Testimonial evidence in the record indicates that, at the time of the formation of a tribal membership roll under the Part 48 regulations, Marcus Alto himself told Enrollment Committee members that he was adopted.[7]

Tribal Law Developments; Judgment Fund Distribution

The Band voted on its Constitution in November 1970, and the document was approved by the Assistant Secretary – Indian Affairs (AS – IA) in January 1971. Article III of the Constitution provides that:

> Section 1. Membership shall consist of those living persons whose names appear on the approved Roll of October 5, 1966, according to Title 25, Code of Federal Regulations, Part 46.1 through 48.15.
>
> Section 2. All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior.

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[7] According to the November 27, 1995, affidavit of Diana Martinez, Marcus Alto, Sr., told her in 1987 that he (Marcus) had "previously" applied for enrollment in the Band, but had been rejected; according to Martinez, Alto related the story of his birth to another woman and his adoption by Maria Duro Alto. According to the February 26, 2004, affidavit of Maria Arviso, daughter (or stepdaughter) of Sosten Alto, member of the first Enrollment Committee, Marcus Alto told the first Enrollment Committee that "since he was not an Indian, but rather had been adopted by Maria and Jose Alto, he of course was not going to make any application for enrollment purposes and would not enroll his children either."

Part 48 was re-designated Part 76 on March 20, 1982, as part of a reorganization of C.F.R. Title 25. (47 Fed. Reg. 13,326). In 1987, the regulations were rewritten to assist the distribution of a judgment fund: "[o]n November 21, 1983, the United States Claims Court granted, in a compromise settlement, an award originally filed with the Indian Claims Commission in Docket 80-A to the San Pasqual Band of Mission Indians. Funds to satisfy the award were appropriated by Congress on January 3, 1984. . . . To distribute the judgment funds, the membership roll of the San Pasqual Band of Mission Indians will have to be brought current to April 27, 1985." 52 Fed. Reg. 31,391 (August 20, 1987). Part 76 was removed from the Code of Federal Regulations on June 3, 1996 (61 Fed. Reg. 27,780) because "[t]he purpose for which these rules were promulgated has been fulfilled and the rules are no longer required. Members of the San Pasqual Band have been enrolled as required in satisfaction of judgments of the United States Claims Court docket 80-A." *Id.*

The plain language of the Band's Constitution incorporates the Part 48 regulations as published in 1960 as the controlling law of the Band.

The 1994 Alto Enrollment

The record includes an application for enrollment in the Band which was signed by Marcus Alto, Sr., on November 15, 1987. Marcus Alto, Sr., passed away on June 16, 1988. His descendants claim to be eligible for enrollment in the Band based on the alleged biological link that Marcus Sr. provides to Maria Duro Alto and Jose Alto, whose names appear on the 1910 San Pasqual Census Roll.

The record shows that, on May 23, 1991, the Superintendent notified the Enrollment Committee of his determination that the descendants of Marcus Alto, Sr., were eligible for enrollment in the Band. On June 13, 1991, the Band wrote to the Superintendent, disputing the Superintendent's findings and recommending that the Altos' application be denied, because the woman who raised Marcus Alto, Sr., was not his biological mother, asserting that she was too old to have a child Marcus's age, and on her application for enrollment on the 1933 Roll of California Indians she said she had "no issue." The June 13 letter from the Band was deemed an appeal of the Superintendent's decision, and reviewed by the RD as such. In early 1994, the RD decided the appeal in favor of the Altos and directed that they be enrolled in the Band.

In accordance with the provision in 25 C.F.R. § 62.10(a), the RD stated in his decision letter that the decision was final for the agency. Nonetheless, by letter dated March 17, 1994, addressed to the Superintendent, the Band sought reconsideration by the BIA, alleging that the Bureau failed to provide the Band with notification and documentation of the appeal as required by regulations. On April 10, 1995, Assistant Secretary – Indian Affairs Ada Deer issued a brief decision letter affirming the RD's decision. The AS – IA, like the RD in his January 1994 decision, cited to five documents in her decision, two of them – the 1910 census and Maria Duro's application for the 1928 roll – for the uncontested proposition that Maria was a full-blood Diegueno Indian. The AS – IA also cited to Marcus Alto's application for inclusion on the 1928 roll, on which Maria Duro and Jose are identified as Marcus's parents. Lastly, the AS – IA decision cited

two letters from Bureau official James Rahily to Marcus Alto, Sr., dated 1930, seeking more information to complete Marcus's application. These letters accepted that Maria Duro was Marcus's mother. Thus, while the AS – IA asserted that "all available documentation involving this case has been thoroughly reviewed," Marcus Alto's application for inclusion on the 1928 roll is the only original source of information supporting the proposition that Marcus is the biological child of Maria Duro Alto.

The descendants of Marcus Alto, Sr., were enrolled in the Band pursuant to the 1994 decision of the Regional Director, affirmed in 1995 by the Assistant Secretary. For 16 years now, the Altos have been part of the Band, fully engaged in its activities and holding offices in the tribal government. The settled expectations of these Band members, established as they were by good-faith decisions by my predecessor and by Regional Directors in 1994 and 2008, establish a strong presumption against reversing course and approving the disenrollments.

The 2008 Enrollment Challenge

The regulations provide for disenrollment when the decision to enroll was based on information "subsequently determined to be inaccurate." 25 C.F.R. § 48.14(d) (1960). In early 2007, a Band member submitted a "challenge" to the qualification for enrollment of the Alto descendants and provided "new" evidence, including a 1907 baptismal record for one Roberto Marco Alto, showing the baby's parents to be Jose Alto and Benedita Barrios. Other new evidence submitted with the challenge included the Social Security Death Index for Marcus R. Alto, showing a

birth date of April 25, 1907, and the Guidry affidavit of December 22,2004. The Enrollment Committee re-opened the matter of Alto's ancestry, and provided the Alto descendants an opportunity to rebut the new evidence. On August 8, 2008, the Committee submitted a proposed revised membership roll to the Bureau, setting off the chain of events leading to this decision.

Jurisdiction

Under settled principles of Federal Indian law, the Federal government usually has little or no jurisdiction over matters of tribal enrollment, except when related to the distribution of trust assets, including judgment funds:

> Indian tribes retain elements of sovereign status, including the power to protect tribal self government and to control internal relations. *See Montana v. United States,* 450 U.S. 544 (1981). One such aspect of this sovereignty is the authority to determine tribal membership. *Id* Such membership determinations are generally committed to the discretion of the tribes themselves. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). As the United States Supreme Court has stated, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* at 72, n.32. Essentially, therefore, a membership dispute is an issue for a tribe and its courts. *See, e.g., Equal Employment Opportunity Comm'n v. Fond du Lac Heavy Equip. and Constr. Co.,* 986 F.2d 246, 249 (8th Cir. 1993); *Martinez v.*

> *Southern Ute Tribe,* 249 F.2d 915, 920 (10th Cir. 1957).

Smith v. Babbitt, 100 F.3d 556, 558 (8th Cir. 1996)(string cites omitted).

Some tribes, however, have incorporated Federal review of tribal membership decisions into tribal law. The San Pasqual Band is one such tribe. The Band's Constitution vests the Secretary with the authority to approve or disapprove the recommendations of the Enrollment Committee. The Constitution directly incorporates the membership provisions of 25 C.F.R. Part 48 (1960). My jurisdiction to approve or disapprove the recommendations of the Committee is set out at 25 C.F.R. § 48.14, "Current Membership Roll":

> The roll shall be kept current by:
> ...
> (d) Names of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary.

Thus, under these regulations – and therefore under the Constitution which incorporates them – the Enrollment Committee's role is only advisory; the regulations vest the Secretary with all decision-making authority respecting enrollment in the Band. In such circumstances, the paradoxical consequence of Federal deference to tribal sovereignty is Federal involvement in tribal membership determinations.

This appeal is brought under the procedural provisions of 25 C.F.R. Part 62, "Enrollment Appeals." Section

62.4 provides that "a tribal committee may file an appeal as provided for in§ 61.11," which in turn says:

> § 61.11 Action by the Director or Superintendent.
>
> (b) The Director or Superintendent, when tribal recommendations or determinations are applicable, shall accept the recommendations or determinations of the Tribal Committee unless clearly erroneous.
>
> (1) If the Director or Superintendent does not accept the tribal recommendation or determination, the Tribal Committee shall be notified in writing, by certified mail, return receipt requested, or by personal delivery, of the action and the reasons therefor.
>
> (2) The Tribal Committee may appeal the decision of the Director or Superintendent not to accept the tribal recommendation or determination. Such appeal must be in writing and must be filed pursuant to part 62 of this chapter.
>
> (3) Unless otherwise specified by law or in a tribal governing document, the determination of the Director or Superintendent shall only affect the individual's eligibility to share in the distribution of judgment funds.

The incorporation by reference of Federal regulations into the San Pasqual Constitution brings this dispute under my jurisdiction.

Burden of Proof

There are four different Parts within Title 25 of the Code of Federal Regulations that help determine the burden of proof and standards of proof applicable to this dispute: 25 C.F.R. Part 48 (March 2, 1960), the original regulations governing membership in the San Pasqual Band; 25 C.F.R. Part 76 (August 20, 1987), the revised regulations governing membership in the San Pasqual Band; 25 C.F.R. Part 61, "Preparation of Indian Rolls" (November 8, 1985); and 25 C.F.R. Part 62, "Enrollment Appeals" (August 13, 1987).

While the Part 48 regulations provide that a person applying for enrollment in the Band bears the burden of proof respecting his or her blood quantum (25 C.F.R. § 48.5(d)), those regulations say nothing about the burden of proof respecting disenrollment, providing only that "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary" (25 C.F.R. § 48.14(d)).

By contrast, the provisions for appealing "adverse enrollment decisions," 25 C.F.R. Part 62, place the burden of proof in all appeals on the appellant (25 C.F.R. § 62.7). The regulations are somewhat circuitous, in that 25 C.F.R. § 62.4 ("Who May Appeal"), provides that "a tribal committee may file an appeal as provided for in § 61.11 of this chapter," (25 C.F.R. § 62.4(b)); while § 61.11(b)(2) directs that a tribal Committee "may appeal the decision of the Director or Superintendent not to accept the tribal recommendation or determination. Such an appeal . . . must be filed pursuant to part 62 of this chapter."

The appellant in this case is the Election Committee, and it bears the burden of proof to show that the enrollment of the Alto descendants was based on inaccurate information.

Standard of Proof

Having established that the Committee bears the burden of proof to show that the Alto descendants should be disenrolled, I must determine what standard of proof the Committee must meet. Appellants vigorously assert that it is the "clearly erroneous" standard, as articulated at § 61.11 (the Bureau "shall accept the recommendations or determination of the Tribal Committee unless clearly erroneous"). Such a deferential standard was also articulated in the revised San Pasqual enrollment ordinance, 25 C.F.R. Part 76:

> 25 C.F.R. § 76.11(d): The Enrollment Committee shall also submit the names of members it recommends be deleted from the membership roll to the Superintendent stating in writing the reasons for such deletions.
>
> 25 C.F.R. § 76.12 Action by the Superintendent.
>
> (a) The Superintendent shall accept the recommendations of the Enrollment Committee unless clearly erroneous.

But neither of the regulatory provisions directing the use of a "clearly erroneous" standard of review respecting the Enrollment Committee's recommendations applies. My review is governed by old 25 C.F.R. Part 48 (which continues in effect through its incorporation by explicit reference in the Band's Constitution) and by 25 C.F.R. Part 62.

Appellants point to the revised San Pasqual membership regulations (25 C.F.R. Part 76) language quoted above to support their assertion that "clearly erroneous" is the appropriate standard of review. But Part 76 has been removed from the C.F.R., and is no longer of any effect. Appellants themselves explicitly reject the overall applicability of Part 76.

Neither is Part 61 controlling. It is true that 25 C.F.R. § 61.11 directs the Bureau to accept the "recommendations and determinations" of a tribal enrollment committee unless "clearly erroneous." Based on the plain language of the preceding section, as well as the title and purpose of the entire Part, "Preparation of Rolls of Indians," I find that it is only a tribe's recommendations respecting applications for enrollment that the Bureau must treat with such deference. By contrast, the matter at hand is a proposed disenrollment of tribal members. The regulations controlling the AS – IA's review of this matter are in Part 62. Despite the fact that Part 62 includes detailed instructions for the actions to be taken by the Superintendent, the Director, and the Assistant Secretary, including with respect to an enrollment committee's recommendations, those regulations do not identify any standard of review.

Principles of statutory construction suggest that the distinction between Parts 61 and 76, which do in fact provide for the application of a "clearly erroneous" standard of review, versus Part 62 which does not, must be accorded significance. Such a construction is reinforced by the fact that all three parts were primarily drafted by the same official, Kathleen L. Slover, of the Branch of Tribal Enrollment Services.

Indeed, Parts 76 and 62 were published in the Federal Register only a week apart (Part 62 at 52 Fed. Reg. 30,159 on August 13, 1987; Part 76 at 52 Fed. Reg. 31,391 on August 20, 1987). Part 61 was published at 50 Fed. Reg. 46,427 on November 8, 1985. Under principles of statutory construction, the fact that the same drafter included specific language in one regulation but not in another, closely-related, regulation, directs that the non-inclusion of a "clearly erroneous" standard in Part 62 must be given effect. Doing so leads to the conclusion that the Department is not bound to apply the "clearly erroneous" standard of review to the Enrollment Committee's determination. Having reached that conclusion, I reject appellants' argument that the presence of the "clearly erroneous" standard in Part 61 and Part 76 support inferring a similar standard for assessing the matter at hand.

Applying a less-deferential standard to an enrollment committee's recommendations respecting disenrollment than to recommendations respecting enrollment is the correct course both as a matter of policy and of law. Until a person becomes enrolled in a tribe, the federal government has few obligations to that person; certainly no generalized duty as trustee or guardian. Therefore, as regards the relationship between a tribal government and an applicant for enrollment, all federal duties flow toward the tribal government. Disenrollment of a recognized tribal member invokes an entirely different set of relationships. The federal government has the duty to protect individual tribal members even from their own tribal government. *Milam v. Dept. of the Interior,* 10 ILR 3013, 3017 (D.D.C. 1982); *Seminole Nation v. Norton,* 223 F. Supp.

2d 122, 137 (D.D.C. 2002). Most obviously, the Indian Civil Rights Act (ICRA) requires that disenrollments must be conducted in a manner that provides the tribal member with due process and ensures that member's equal protection under the laws (25 U.S.C. § 1302(a)(8)) and the Federal Government will not acknowledge or accept an action by a tribal government that violates ICRA. *(Greendeer v. Minn. Area Director,* 22 IBIA 91, 97 (1992)).

Therefore, as a matter of law, the Federal Government must apply a more stringent standard of review to enrollment committee recommendations to disenroll tribal members.

The Department's policy follows Federal Law. It is well-established that membership determinations are one of the most fundamental exercises of tribal sovereignty; but where, tribal law explicitly gives the Federal government approval authority over enrollment decisions by a tribe, as is the case here, such Federal approval should be given only after careful scrutiny of the facts. Deference to an enrollment committee recommendation, where application of the "clearly erroneous" standard certainly would be, is not justified. Balancing well-established principles of deference to tribal governments against federal responsibilities to all members of recognized tribes, I find, in agreement with my predecessor in her decision letter of April 10, 1995, that a tribal governing body or enrollment committee must show that disenrollment is appropriate by the "preponderance of the evidence."

Undisputed Facts

The specific question at issue in this appeal is whether the Regional Director erred in rejecting the Band's Enrollment Committee's proposed revised membership roll. The factual determination that must be made in order to answer that question is whether Marcus Alto, Sr., was the biological son of the couple who raised him. In order to focus the necessary inquiry, those relevant facts that are not in dispute should be identified.

1. The parties do not dispute that the couple who raised Marcus Alto, Sr. – Jose Alto and Maria Duro Alto – were full-blood members of the Band, shown on the 1910 census of San Pasqual Indians. This is true even though Marcus's application for inclusion on the 1933 roll of California Indians lists his father as non-Indian.

2. The parties do not dispute that Marcus Alto., Sr., was raised by Jose and Maria since infancy.

3. The parties do not dispute that the basis for the Alto descendants' claims for qualification for membership in the Band is that Marcus, Sr., is the biological child of Jose and Maria.

4. I also find it an undisputed fact that the only pieces of evidence adduced in support of Marcus Altos' claim to being the son of Jose and Maria are (1) Marcus's own statements; (2) the application submitted on Marcus's behalf for inclusion on the 1933 roll of California Indians, and: (3) two letters from BIA official James Rahily to Marcus Alto,

dated 1930, requesting additional information needed to complete said application.

5. While some arguments made by the Alto descendants respecting Marcus Alto's birth year necessarily imply a birth date other than April 25, no such argument is ever explicitly made, and as elaborated below, I find no dispute respecting Marcus's birth date being April 25.

Disputed Facts

Resolving the question on appeal requires me to analyze the record evidence and make a determination regarding the following key disputed facts:

1. Whether the 1907 baptismal certificate for "Roberto Marco Alto" is that of Marcus Alto, Sr. A key subpart of this determination is assessing whether Marcus Alto was born in 1905, 1907, or some other year.

2. Whether Marcus Alto's failure to declare whether or not he was adopted on his application for enrollment in the Band, dated November 15, 1987, is persuasive evidence.

3. Whether Maria Duro Alto's statement that she had "no issue" (on her application for inclusion on the 1933 Roll of California Indians) is persuasive evidence.

4. Whether the non-inclusion of Marcus Alto's name on the early San Pasqual censuses is persuasive evidence.

5. Whether testimonial evidence in the record is persuasive evidence.

6. Whether DNA testimony submitted by Alto descendants is persuasive evidence.

Analysis of Evidence

A significant volume of evidence has been submitted to my office for review. The Office of Federal Acknowledgement reviewed the administrative record upon which the Regional Director's decision was based and identified fifteen documents or categories of documents that should be included in the record if at all possible. On October 29, 2009, I sent a letter to counsel for the parties, identifying the needed documents and allowing six months for their collection and submission. Both sides submitted briefing and additional documentation, including some of the records identified by OFA. The enhanced documentary record has been thoroughly reviewed and evaluated by my office. My decision to reverse the Regional Director and approve the Band's disenrollments is principally supported by the following evidence in the record.

1. Birth record. There is no birth certificate in the record, and there does not appear to be one in existence. The only evidence in the record that is a contemporary document from the time of Marcus Alto's birth is the 1907 certificate of baptism from Saint Francis de Sales Church. The Alto descendants dispute that this record is of the baptism of their ancestor, relying chiefly on the year of birth (1907) and given name (Roberto Marco). For the reasons elaborated below, I reject the

Alto descendants' challenges to the baptismal certificate.

2. Birth date. Before addressing the question of Marcus Alto's year of birth, it should be set out that the record does not support any dispute regarding the month and date of birth. Marcus Alto himself has indicated birth years of 1903, 1904, 1905, 1906, and possibly 1907 but he never gave any birth date other than April 25. The earliest document in the record showing a birth date for Marcus Alto (other than the disputed baptismal certificate) is his Social Security application from 1937, on which he gave his birth day as April 25, 1905. No document in the record indicates any other birth date. I find the evidence satisfactorily establishes that Marcus Alto was born on April 25.

3. Birth year. The record is quite conflicted as to the year of Marcus Alto's birth. It is given as 1903 (on the 1933 Roll of California Indians and numerous forms filled out by Marcus Alto from 1951 to 1969), 1904 (based on subtracting his age from the birth dates of his children as set out on two birth certificates), 1905 (documents filled out by Marcus Alto after 1980) and 190.6 (based on subtracting his age from the birth date shown on his third child's birth certificate; and based on the "corrected" age shown on his marriage certificate). Marcus Alto is not identified on any of the several early Indian censuses on which his putative parents are

shown, but is listed with them on the 1920 Federal census, at which time he is shown as being 12 years old. Since the 1920 census recorded ages as of January first of that census year, the datum on the 1920 census shows Marcus Alto's birth year to be 1907. In addition, the Social Security Death Index for Marcus Alto shows his year of birth to be 1907.

It appears that, when Marcus Alto filled out his marriage certificate on February 16, 1925, he first indicated his age to be something else, and then changed it to "18." The Band views the document as showing a change from "17" to "18," and explains this change as Marcus Alto misrepresenting his age to avoid the requirement for minors to have their parents' permission to get married. The Alto descendants assert that the age shown is 19, but provide no explanation for the alteration of the date. I find both the physical evidence itself, and the Band's explanatory theory, support the conclusion that Marcus Alto was 17 at the time of his marriage. The superimposed age of 18, coupled with a known birth date of April 25, gives a birth year of 1906. But the number that was overwritten appears to be a "17," which would give a birth year of 1907.

The birth certificate for his first child, Marcus Alto, Jr., born four months after Marcus Alto, Sr.,'s marriage, is not in the record. But the record does include the birth

certificate for Marcus Alto's second child, who was born on November 20, 1926. On that birth certificate, Marcus Alto indicates his age to be "22." The Alto descendants assert that this is "consistent with a birth year of 1905."[8] I cannot agree with their calculations. A person born in 1905 cannot be 22 years old on any date before January 1, 1927. Based on an undisputed birth date of April 25, the information provided by Marcus Alto on the November 1926 birth certificate results in a birth year of 1904.

The birth certificate for Marcus Alto's child born in February 1929 shows Marcus Alto's age as 24. And while, as the Alto descendants point out, such information is "not inconsistent" with a birth year of 1905, it cannot be reconciled with an undisputed birth date of April 25. Thus, this document also indicates a birth year of 1904.

In sum, there seems little certainty respecting the year in which Marcus Alto, Sr., was born. The 1907 date on the proffered baptismal certificate appears to agree with the age first given on his marriage certificate, with the 1920 census, and with the Federal Social Security death index. A birth year of 1907 is also somewhat corroborated by the testimony of his childhood friend (see "Affidavits," below).

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[8] From the "Response" submitted by Glenn Charos, attorney for the Alto descendants, dated April 29, 2010; "Charos Response."

That Marcus Alto, Sr., claimed to have been born in several different years prior to 1907 is rationally explained as reflecting his desire to hide the fact he was under-aged at the time of his marriage.

4. Marcus Alto's name. The disputed baptismal certificate of 1907 shows the child's name to be "Roberto Marco Alto." The marriage certificate of 1925 shows his name – apparently under his own hand – as "Robert Marcus Alto." The baptismal certificate for Marcus Alto's first child, born June 16, 1925, shows the father's name as "Marcos Roberto Alto." It appears that all subsequent documents showing his full name show "Marcus Robert Alto." Because it is not uncommon for people to use names that differ from their birth certificate or baptismal name, I do not find the baptismal certificate's use of "Roberto Marco Alto" to be compelling evidence that the certificate is not for the ancestor of the Alto descendants. It also seems noteworthy that there is no evidence in the record there were two different Alto boys named Roberto and/or Marcus in that place at that time.

   Taken together, the evidence supports the conclusion that the baptismal certificate submitted as new evidence is indeed that of Marcus Alto, Sr.

5. Affidavits from 1994. Three affidavits were executed just after the RD's decision in 1994, one by Florence C. Shipek, PhD., an

anthropologist who worked closely with the Band in establishing its base roll. Dr. Shipek described her careful research into the ancestry of the San Pasqual Band, and her work with tribal elders.[9] According to Dr. Shipek, all the elders agreed that Jose Alto and Maria Duro Alto had no offspring, but adopted and raised Marcus. Dr. Shipek also noted that the Chairman of the Enrollment Committee at that time was Sosten Alto, who was diligent in protecting the rights of Altos and Duros to qualify for Band membership – but who acknowledged that there were several instances where Altos and Duros raised adopted children who would not qualify for membership.

Another of the 1994 affidavits was by a Ms. Duenas, who lived next to Maria Alto in the early 1930s. In what seems an important bit of corroborative evidence, Duenas asserted that Marcus Alto's biological mother was named "Venidita"; the baptismal certificate shows the mother of "Roberto Marco Alto" to be "Benedita Barrios."

The third affidavit from 1994 was executed by Felix S. Quisquis, a tribal member who asserts he was born on April 22, 1907, that he and Marcus Alto were "near the same age," that their two families were good

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[9] "The people with whom I spent most time were those past 80 years of age in 1958-59, and then those past 70 years of age." Shipek affidavit

friends, and that it was "a known fact" that Marcus was not the biological son of the "elderly Indian couple" who raised him. Quisquis relates a story that, in 1932, Marcus Alto said he was in Arlington (in Riverside County, California), to visit his mother. Since Maria Duro Alto resided approximately seventy miles away from Arlington, in Escondido (San Diego County, California), Quisquis reasoned that Marcus Alto was going to visit his biological mother. Mr. Quisquis's supposition is bolstered by the fact that Benedita (Barrios) Rodriguez's application for the 1933 Roll of California Indians gave her 1930 residence as Riverside County.

Nothing in the decisions issued by the Regional Director in 1994 or the AS – IA in 1995 indicates that either of them reviewed the three affidavits, much less rebutted the testimony therein.

6. Affidavits from 2004. Six new affidavits were executed in 2004 as part of a lawsuit filed by tribal members seeking to compel the Bureau to remove the Altos from the Band's roll.[10] Some of the affiants were tribal members

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[10] *Caylor, et al. v. Bureau of Indian Affairs, Southern California Agency, Civil No.* 3:03-cv-01859 (S.D. Cal. 2003). Order granting defendant's motion to dismiss filed April 22, 2004. One of the affidavits, executed by Laura Guidry, does not appear to have been filed in the federal case.

who knew Marcus[11]; others were associated with the Enrollment Committee in the 1950s, when the band first began the process of re-forming. Three of the affiants claim blood relationship to Maria Duro Alto. The affidavits state that Marcus Alto, Sr., was not the natural son of Maria and Jose Alto and that Jose and Maria Alto had adopted Marcus Alto. The affidavits further state that he was "Mexican," not Indian. Having been executed nine years after the AS – IA issued her final decision respecting the enrollment of the Alto descendants, obviously these affidavits constitute new evidence supporting the determination of the Enrollment Committee.

7. Indian censuses. The record includes BIA censuses of the San Pasqual Indians from 1907 through 1913, all of which include Jose Alto, Maria Duro Alto, and Jose's son, Frank Alto. I find the absence of Marcus Alto, under any name, from these Indian censuses to be very weighty evidence that the couple who raised him did not consider him to be a San Pasqual Indian – which would be consistent with his being adopted. The Alto descendants argue that the absence of Marcus Alto from the early tribal censuses was because the

[11] Affiant Gene Morales asserts he was childhood friend of Marcus Alto, and asserts he resides on San Pasqual Reservation; but does not assert tribal membership.

family lived in Arlington at that time.[12] Such an explanation fails to account for the fact that Jose and Maria Alto do appear on those censuses. Furthermore, such a proposition is in direct conflict with Maria Duro's sworn statement that she lived in San Diego County all her life.[13] I find the adoption theory to be the most logical explanation for the fact that Marcus Alto is not listed with his parents on the Indian censuses, but does appear on the Federal census of 1920.

8. The Alto descendants rely on the ample evidence showing that Jose Alto and Maria Duro Alto were the parents of Marcus Alto, Sr. Such evidence does not refute the theory that Marcus Alto was adopted, however, since adoptive parents are parents in fact for many purposes. But under tribal law, only biological descendants of persons shown on the 1910 roll of San Pasqual Indians qualify for membership in the San Pasqual Band.

   All parties agree that the couple who raised Marcus Alto were his "parents" in the sense that they raised him from infancy and performed all the duties of parents. Out of all the documentation in this case, the item that seems to most accurately state the facts and understandings is a handwritten paragraph

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[12] Charos Response, page 9.

[13] Marla Duro's application for inclusion on 1933 Census Roll of California Indians.

at the bottom of Marcus Alto's 1987 application for enrollment in the Band, which states that "Marcus was an only child to the above [Jose and Maria]. He was given to the above on the 3rd day after his birth . . . He was the above named persons' son in every sense of the [word] and never knew any others as parents." It may be that whoever wrote these comments on Marcus Alto's application believed that Marcus Alto did – or should – qualify for enrollment in the Band because of the relationship between Marcus Alto and the tribal members who raised him. The writer's evidence thwarts such a purpose, however, because the relationship described by the writer does not meet the Band's membership criteria.

9. Marcus Alto's application for inclusion on the 1933 Roll of California Indians. The Alto descendants, and Department officials in the past, found support for the determination that Marcus Alto was the biological child of Jose Alto and Maria Duro Alto in Marcus's application for inclusion on the 1933 Roll of California Indians. But, as the Alto descendants acknowledge,[14] Marcus Alto did not fill out that application himself. In fact, the errors identifiable in that document suggest that Marcus Alto never even saw or approved of it. In addition to the statement that his father Jose Alto was "not Indian" –

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[14] Letter, Alto Descendants to Enrollment Committee, September 5, 2007.

which contradicts statements made by Alto on other documents – the application gives a birth year of 1903, which is earlier than any of the birth years claimed by Marcus Alto himself prior to that date. In addition, several data fields were left blank,[15] which Marcus Alto certainly could have filled. It seems clear, then, that the application form was filled out by people who did not know important details about Marcus Alto, and that Marcus himself never corrected or completed that form. Therefore, the application is best construed as an indirect affidavit by the men who signed it: Reginaldo Duro, Roscindo Couro, and John Moretti. All three names appear on the 1933 Roll of California Indians; but none appears on the San Pasqual census of 1910. As an affidavit alleging facts in conflict with the facts attested to in the affidavits of 1994 and 2004, the 1930 application carries little weight as evidence both for alleging facts known to be incorrect and for failure to lay a foundation to the affiants' claim to factual knowledge.

10. Maria Duro's application for inclusion on the 1933 Roll of California Indians. The Alto descendants, the Regional Director in 1994, and the Assistant Secretary in 1995, all cite to correspondence from Bureau official James T. Rahily in 1930, in which Rahily informs

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[15] The month and date of birth; whether married; exact name and birthdate of spouse; whether spouse is of Indian blood; father's date of death.

Marcus Alto that, in order to complete Marcus Alto's incomplete application, "the data regarding your ancestors will be taken from the application of your mother, Maria Duro." I find disturbing inconsistencies in the result, however, since Maria Duro's application showed "no issue" in the space for providing information on the applicant's children. Also, Maria Duro identified her husband as full-blood Indian, which conflicts with the statement on the application submitted for Marcus Alto, that Marcus's father was "not Indian." Thus, the application for Marcus, signed by Mr. Rahily as examiner, contains at least two data points that conflict with Maria Duro's application (apparently filed about five weeks prior to Marcus Alto's application). Maria Duro's application, attested to by her thumbprint, is the only document in the record containing a definitive statement by a person who indisputably knew the facts of the matter respecting a possible biological connection between her and Marcus Alto. That statement was a denial that Maria had any biological children.

The Alto descendants assert that Maria Duro Alto could not read nor write English, and therefore she "could not be expected to comprehend the legal significance of the

question 'Do you have issue?'"[16] But their argument on the credibility of Maria Duro Alto's assertion that she had no issue fails. There is every reason to believe that she understood both the question about "children" and the significance of her answer about "issue." First, the fact that Maria Duro could neither *read nor write* English does not establish whether she *understood and spoke* English. According to the 1920 Federal census, Maria Duro could, in fact, speak English. Furthermore, the distinction between "child," which term applies to both biological and adopted children, and "issue," which does not, is a matter of great importance to all parents. That Maria Duro Alto would pay scrupulous attention to that distinction is perfectly consistent with the theory that she adopted Marcus Alto and was careful not to identify a "child" who did not qualify as an Indian. Thus, Maria Duro's application contains a statement that precludes Marcus Alto from being Maria Duro's biological son, sworn to by two witnesses.

11. Marcus Alto's application for enrollment in the Band, to share in judgment funds. On November 15, 1987, Marcus Alto, Sr., signed an application form for enrollment in the

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[16] Charos Response, page 8. It should be noted that the application form does not use the word "issue," asking only that the applicant list the names and other information for the applicant's "minor children." "No issue" is the response typed on Maria's application.

Band. One question on that form was "[i]s applicant an adopted person?" The fact that Marcus Alto, Sr., elected not to circle either "yes" or "no" in response to that question cannot be overlooked for purposes of assessing the matter on appeal, and provides evidence in support of the Committee's recommendations.

12. Marcus Alto's adoptive father is not Marcus Alto's biological father. Two of the most important lines of evidence developed above to comprehensively rebut the theory that Maria Duro Alto was Marcus Alto's biological mother are unavailable to refute the possibility that Jose Alto was Marcus Alto's biological father. I have found that the 1907 baptismal certificate is that of Marcus Alto, Sr., and demonstrates that Marcus Alto's biological mother was Venidita/Benedita Barrios. But while the certificate refutes a biological connection between Maria Duro Alto and Marcus Alto, the fact that "Jose Alto" is the name given as the child's father on the baptismal certificate and is also the name of the man who raised the child establishes a strong presumption that the two are the same. Furthermore, since the Jose Alto who raised Marcus Alto died prior to the creation of the 1933 Roll of California Indians, we lack an application for him, and therefore, we are deprived of Jose Alto's own testimony respecting his biological progeny.

Nonetheless, the preponderance of the evidence rebuts the presumption established by the baptismal certificate and supports the Committee's recommendation. First, as elaborated by the Alto descendants, there were a number of Jose Altos residing in the area at the time of Marcus's baptism.[17] While I reject the conclusion urged by the Alto descendants, that the baptismal certificate is not that of their ancestor, the fact that there were a number of Jose Altos who could have been listed as the father opens the door to the Committee's evidence. I also accept the possibility, argued by the Committee, that the Jose Alto named on the baptismal certificate is indeed the man who raised Marcus Alto, but was not the biological father. Thus, there are two plausible theories as to how the baptismal certificate does not establish that Marcus Alto's adoptive father is his biological father: that the certificate is referring to a different Jose Alto; and that the "father" named on the certificate is not really the biological father of the child.

The most telling evidence in the record rebutting Jose Alto as Marcus Alto's biological father is the early BIA Indian censuses. From 1907 through 1913, during which time Marcus Alto was undisputedly

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[17] "[T]here were many Jose Altos during this time. We have researched the name and have found at least 9 other Jose Altos." Letter, Alto Descendants to Enrollment Committee, September 5, 2007.

residing with Jose Alto and Maria Duro Alto, these censuses invariably identify Jose, Maria, and Jose's son, Frank Alto as tribal members and never list Marcus Alto. This fact cannot be written off as oversight; the entire purpose for taking these censuses was to identify and enumerate the people who were members of the San Pasqual Indians. And while there are not many young children included on these censuses, there certainly are some, rebutting any argument that Marcus Alto was too young for admission.

Corroborative evidence that Marcus Alto was a non-tribal member being raised by Jose and Maria Alto is found in two letters from Frank Alto, drafted in 1910, identifying Jose, Maria, and himself as tribal members, but not mentioning Marcus Alto.

Taken together, the documentary evidence from the time of Marcus Alto's childhood supports the conclusion that the reason Marcus Alto was not listed on the early San Pasqual censuses was because an explicit, contemporaneous determination had been made that the child being raised by Jose and Maria was not their biological child.

The record also includes affidavit testimony refuting a biological connection between Marcus Alto and Jose Alto. It may well be true that people would refer to Marcus as "adopted" by Maria and Jose even if his biological parents were Jose and Benedita Barrios. But much of the testimony in the

record is more specific. Many of the affidavits note that Marcus Alto was non-Indian and the child of a different family, not just a different mother. In particular, the 1994 affidavit of Dr. Shipek sets out unambiguously that "each elder maintained that Maria Duro Alto and her husband Jose Alto had no children but raised one belonging to a non-Indian family."

It should also be noted that Marcus Alto, Sr., never suggested that the relationship between himself and Jose was of a different nature from the relationship between himself and Maria. He invariably describes them as his "parents." I note in particular his application for enrollment, to share in the judgment fund, dated November 11, 1987. He identifies his parents as Jose and Maria but crucially failed to circle "yes" or "no" in response to the question, "Is applicant an adopted person?" In addition, according to affidavit testimony, Marcus is said to have admitted he was "adopted" and "not Indian."[18]

I find that the preponderance of the evidence supports the conclusion that the Jose Alto who raised Marcus Alto was not Marcus Alto's biological father.

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[18] Martinez affidavit of November 27, 1995; Arviso affidavit of February 26, 2004; Morales affidavit of March 2, 2004.

13. "Mathematical impossibility" of the adoption theory. The Alto descendants develop the argument that DNA testing of members of their family proves they have a degree of Indian ancestry that is possible only if Marcus Alto, Sr., was a full-blood Indian, since he is the only possible source of Indian DNA in the tested descendants. Thus, they reason Jose and Maria Alto must be Marcus Alto, Sr.,'s biological parents. Their argument fails for two reasons.

First, the type of genetic testing relied on by the Alto descendants does not provide accurate data on the proportion of Indian ancestry. As the Office of Federal Acknowledgment has explained:

> Unlike blood degree calculations, the proportion[s] of the DNA markers tracked in such ethnicity testing are not passed to children with predictable mathematical precision (Thomas Shawker, MD, 2010 NGS Conference, Salt Lake City, Utah). The child of a father with 50 percent "Native American" markers and a mother with no "Native American" markers does not have 25 percent "Native American" markers.

Second, even if Marcus Alto, Sr., had been a full-blood Indian, as the Altos argue, it does not necessarily follow that Jose and Maria Alto were his parents or that his parents were San Pasqual Indians. These two

considerations – the limitations of the testing itself, and the limited significance of Marcus Alto's Indian ancestry, if any – rebut the Altos' argument that adoption is a mathematical impossibility.

Conclusion

In the almost two years that have elapsed since the Committee filed its appeal, my office has thoroughly examined the evidence in the record, as supplemented by the parties in response to my letter of October 29, 2009. There is universal acceptance of the fact that Marcus Alto, Sr., was raised from infancy by Jose Alto and Maria Duro Alto. Much of the record evidence is conflicting, incomplete, or demonstrably inaccurate. The record itself lacks the most vital documents, including particularly a birth certificate for Marcus Alto. Nonetheless, fair interpretation of the most probative, objective, and competent evidence available amply supports the Enrollment Committee's recommendation to disenroll the Alto descendants. I place particular reliance on: Marcus Alto's absence from the early San Pasqual Indian censuses that showed Jose and Maria Alto; the competent testimony of tribal elders, family friends, and Dr. Shipek; and the facts set out in the 1907 baptismal certificate as corroborated by testimony in the affidavits. I find the evidence relied upon by the Alto descendants to be either self-reported by Marcus Alto, Sr., – who cannot provide a first-hand account of his birth and parentage – or, in the case of information on Marcus Alto's application for inclusion on the 1933 Roll of California Indians, supplied by people with no obvious or inferable knowledge of Marcus Alto's parentage. Therefore,

based on the preponderance of evidence, I must reverse the decision made by the Pacific Regional Director on November 26, 2008. I am persuaded that the enrollment of the Marcus Alto, Sr., descendants was based on information subsequently determined to be inaccurate and, as a result, their names must be deleted from the Band's roll.

My decision is based upon the thorough examination of all available evidence. I must acknowledge, however, that evidence may come to light in the future that could overturn the reasoning set out here. Uncovering Marcus Alto, Sr.'s, birth certificate, or conducting more thorough and accurate genetic testing, may prove the biological connection claimed by the Alto descendants. But the preponderance of the evidence in the record before me clearly supports the Enrollment Committee's recommendation.

By a copy of this letter, I am instructing the Regional Director to notify each of Marcus Alto, Sr.'s, descendants of this decision. This decision is final for the Department.

Sincerely,

/s/Larry Echo Hawk
Larry Echo Hawk
Assistant Secretary – Indian Affairs

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[*Certificate of Service omitted from the printing of this appendix*]

APPENDIX F

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 76

Enrollment of Indians of the San Pasqual Band of Mission Indians in California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule

SUMMARY: The Bureau of Indian Affairs (BIA) is revising the regulations contained in Part 76 governing the enrollment of Indians in the San Pasqual Band of Mission Indians in California. The Band was granted a judgment award by the United States Claims Court in Docket 80–A. In accordance with a judgment plan, effective April 27, 1985, which was prepared pursuant to the Indian Judgment Funds Distribution Act, as amended, a portion of the judgment funds is to be distributed on a per capita basis to all tribal members living on April 27, 1985. The revision to the regulations will provide procedures, including a deadline for filing applications, to govern the preparation of a membership roll of the San Pasqual Band as of April 27, 1985, which will serve as the basis for the per capita distribution of judgment funds. This part has been previously redesignated from 25 CFR Part 48 at 47 FR 13327, March 30, 1982.

EFFECTIVE DATE: September, 21 1987.

FOR FURTHER INFORMATION CONTACT: Tom W. Dowell, Superintendent, Southern California Agency, Bureau of Indian Affairs, 3600 Lime Street, Suite 722, Riverside, California 92500, telephone number, (714) 351-6624 (FTS 796-6624).

SUPPLEMENTARY INFORMATION: The authority to issue these ruels and regulations is vested in the Secretary of the Interior by 5 U.S.C. 301 and 25 U.S.C. 2 and 9; and 25 U.S.C. 1401 et seq. This final rule is published in exercise of rulemaking authority delegated by the Secretary of the Interior to the Assistant Secretary–Indian Affairs in the Department Manual at 209 DM 8.

A proposed revision to the regulations contained in Part 76 governing the enrollment of Indians of the San Pasqual Band of Mission Indians in California was published for public comment in the Federal Register on Wednesday, June 3, 1987 (52 FR 20727). The period for commenting on the proposed revision to the regulations contained in Part 76 closed on July 6, 1987. No comments on suggestions were received from the public with regard to the proposed revision. Except for the insertion of dates, where appropriate, and the correction of some minor errors, no changes are being made to the final rule revising Part 76 from what was published as the proposed revision.

On November 21, 1983, the United States Claims Court granted, in a compromise settlement, an award originally filed with the Indian Claims Commission in Docket 80–A to the San Pasqual Band of Mission Indians. Funds to satisfy the award were appropriated by Congress on January 3, 1984.

A judgment plan for the use and distribution of the funds was prepared pursuant to the Judgment Funds Distribution Act of October 19, 1973, as amended, 25 U.S.C. 1401 et seq., and became effective on April 27, 1985. The plan provides for eighty (80) percent of the award, less attorney fees and litigation expenses and including all interest and investment income accrued, to be distributed in the form of per capita payments by the Secretary of the Interior in sums as equal as possible to all tribal members born on or prior to and living on the effective date of the plan. To distribute the judgment funds, the membership roll of the San Pasqual Band of Mission Indians will have to be brought current to April 27, 1985.

The regulations contained in Part 76 originally provided procedures for the preparation of a membership roll of the San Pasqual Band as of January 1, 1959, and the authority to maintain a current roll thereafter. No revision or amendment has been made to the regulations since they were promulgated in 1960. Subsequent to the preparation and the approval by the Secretary of the January 1, 1959, membership roll, a constitution and bylaws was adopted by the San Pasqual Band of Mission Indians and approved by the Secretary. The constitution provided that membership in the Band would be in accordance with the regulations contained in this Part 76. Although there were procedures for maintaining a current membership roll, no final enrollment actions have occurred since the completion of a 1959 roll. Consequently, the membership roll of the San Pasqual Band will have to be brought current from January 1, 1959.

Revision to Part 76 is necessary to prepare a membership roll of the San Pasqual Band of Mission Indians as of April 27, 1985, both as a result of the fact that the primary purpose of the regulations as originally promulgated was to prepare a roll as of January 1, 1959, and as a result of the time that has elapsed since the rule was promulgated. The revision is to update and make miscellaneous changes of an administrative nature, including the elimination of sex-based and gender specific terminology. With one exeption the revision is not intended to change the enrollment requirements now in effect, i.e., those requirements contained in § 76.14 Current membership roll. The exception is the inclusion of a provision for the enrollment of individuals who would have qualified for inclusion on the January 1, 1959, roll had they applied by the deadline for filing applications.

The stated purpose of the regulations has been changed. The purpose of revised Part 76 is to provide procedures to bring current the membership roll of the San Pasqual Band to serve as the basis for the distribution of judgment funds awarded the Band by the United States Claims Court in Docket 80–A. The procedures are being characterized as making additions to and deletions from the January 1, 1959, membership roll. Persons whose names appear on the January 1, 1959, membership roll do not need to reapply. However, verification forms will be mailed to them at their last known addresses to ascertain their current names and address, if they are still living and, if deceased, their dates of death.

The qualifications for enrollment are specified in § 76.4 of the revised rule. To establish eligibility for

enrollment individuals will have to file or have filed on their behalf applications on the prescribed form with the Superintendent of the California Agency of the BIA by the deadline specified in § 76.4. Application forms filed after that date will be rejected for failure to file on time regardless of whether the applicant otherwise meets the qualifications for membership. Rejected applicants may still, however, be considered for membership for future purposes.

To provide actual notice to as many potentially eligible beneficiaries as possible, the Superintendent shall mail notices of the preparation of the roll to all persons whose names appear on the January 1, 1959, membership roll at the last available address. Notices shall advise individuals of the preparation of the roll and the relevant procedures to be followed including the qualifications for enrollment and the deadline for filing application forms.

The primary author of this document is Kathleen L. Slover, Branch of Tribal Enrollment Services, Division of Tribal Government Services, Bureau of Indian Affairs.

The Office of Management and Budget has informed the Department of the Interior that the information collection requirements contained in this Part 76 need not be reviewed by them under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

The Department of the Interior has determined that this is not a major rule under E.O. 12291 because only a limited number of individuals will be affected and those individuals who are determined eligible will be

participating in a per capita distribution made by the Secretary of a relatively small amount of funds.

The Department of the Interior has determined that this rule will not have significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., because of the limited applicability as stated above.

The Department of the Interior has determined that this rule does not significantly affect the quality of the human environment and, therefore, does not require the preparation of an Environmental Impact Statement under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4334(2)(C).

List of Subjects in 25 CFR Part 76

Indians—claims, Indians—enrollment.

Accordingly, Part 76 of Subchapter F of Chapter 1 of Title 25 of the Code of Federal Regulation is revised to read as follows:

PART 76–ENROLLMENT OF INDIANS OF THE SAN PASQUAL BAND OF MISSION INDIANS IN CALIFORNIA

Sec.

Authority: 5 U.S.C. 301; 25 U.S.C. 2 and 9; and 25 U.S.C. 1401 et seq., as amended.

§ 76.1 Definitions.

As used in these regulations:

"*Adopted person*" means a person whose biological parents' parental rights have been given to others to exercise by court order.

"*Assistant Secretary*" means the Assistant Secretary of the Interior for Indian Affairs or an authorized representative acting under delegated authority.

"*Band*" means the San Pasqual Band of Mission Indians in California.

"*Census Roll*" means the June 30, 1910, Census Roll of the San Pasqual Band of Mission Indians.

"*Commissioner*" means the Commissioner of Indian Affairs or an authorized representative acting under delegated authority.

"*Descendant(s)*" means those persons who are the issue of the ancestor through whom enrollment rights are claimed; namely, the children, grandchildren, etc. It does not include collateral relatives such as brothers, sisters, nephews, nieces, cousins, etc., or adopted children, grandchildren, etc.

"*Director*" means the Area Director, Sacramento Area Office, Bureau of Indian Affairs or an authorized representative acting under delegated authority.

"*Enrollment Committee*" means a committee of three (3) members whose names appear on the membership roll of the San Pasqual Band of Mission Indians prepared as of January 1, 1959, to assist in enrollment.

"*General Council*" means the governing body of the San Pasqual Band of Mission Indians which consists of all members of the Band 18 years of age or older.

"*Living*" means born on or before and alive on the date specified.

"*Member(s)*" means persons who names appear on the membership roll of the San Pasqual Band of Mission Indians prepared as of January 1, 1959.

"*Membership Roll*" means the membership roll of the San Pasqual Band of Mission Indians prepared as of January 1, 1959, and approved October 5, 1966.

"*Plan*" means the plan for the use and distribution of judgment funds awarded the San Pasqual Band of Mission Indians by the U.S. Court of Claims in Docket 80–A, prepared pursuant to the Act of October 19, 1973, 25 U.S.C. 1401 et seq., as amended, and effective April 27, 1985.

"*Secretary*" means the Secretary of the Interior or an authorized representative acting under delegated authority.

"*Sponsor*" means any person who files an application for enrollment or appeal on behalf of another person.

"*Staff Officer*" means the Enrollment Officer of other personal authorized to prepare the roll.

"*Superintendent*" means the Superintendent, Southern California Agency, Bureau of Indian Affairs, or an authorized representative acting under delegated authority.

§ 76.2 Purpose.

The regulations in this Part 76 are to provide procedures to bring current the membership roll of the San Pasqual Band of Mission Indians to serve as the basis for the distribution of judgment funds awarded the Bands by the U.S. Court of Claims in Docket 80–A.

§ 76.3 Information collection.

The Office of Management and Budget has informed the Department of the Interior that the information collection requirements contained in this Part need not be reviewed by them under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

§ 76.4 Additions to and deletions from the membership roll and the deadline for filing application forms.

(a) The membership roll of the Band shall be brought current to April 27, 1985, by:

(1) Adding the names of persons living on April 27, 1985, who are not enrolled with some other tribe or band; and

(I) Who would have qualified for the inclusion of their names on the January 1, 1959, membership roll of the Band had they filed applications within the time prescribed, or

(II) Who were born after January 1, 1959, and

(A) Are descendants of Indians whose names appear as members of the Band on the Census Roll, provided such descendants possess one-eighth (⅛) or more degree of Indian blood of the Band, or

(B) Are Indians who can furnish sufficient proof to establish that they are ⅛ or more degree of Indian blood of the Band; and

(III) Who file or have filed on their behalf application forms with the Superintendent, Southern California Agency, Bureau of Indian Affairs, 3600 Lime Street, Suite 722, Riverside, California 92501, by November 18, 1987. Application forms filed after that date will be rejected for failure to file them on time regardless of whether the applicant otherwise meets the qualifications for membership. Except that members whose names appear on the membership roll shall not be required to file applications in accordance with this paragraph.

(2) Deleting the names of members who have relinquished in writing their membership in the Band or who have died since January 1, 1959, but prior to April 27, 1985, for whom certified documentation has been submitted.

(b) Members whose names appear on the membership roll whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll subject to the approval of the Assistant Secretary.

§ 76.5 Notices.

(a) The Director shall give notice to all Directors of the Bureau of Indian Affairs and all Superintendents within the jurisdiction of the Director, of the preparation of the roll for public display in Bureau field offices. Reasonable efforts shall be made to place notices for public display in community buildings, tribal buildings, and Indian centers.

(b) The Superintendent shall, on the basis of available residence data, publish and republish when advisable, notices of the preparation of the roll in appropriate locales utilizing media suitable to the circumstances.

(c) The Superintendent shall mail notices of the preparation of the roll to enrollees at the last address available.

(d) Notices shall advise of the preparation of the roll and the relevant procedures to be followed including the qualifications for enrollment and the deadline for filing application forms to be eligible for enrollment. The notices shall also state how and where application forms may be obtained as well as the name, address, and telephone number of a person who may be contained for further information.

§ 76.6 Application forms.

(a) Application forms to be filed by or for applicants for enrollment will be furnished by the Director, Superintendent, or other designated persons, upon written or oral request. Each person furnishing application forms shall keep a record of the names of individuals to whom forms are given, as well as the control numbers of the forms and the date furnished. Instructions for completing and filing applications shall be furnished with each form. The form shall indicate prominently the deadline for filing application forms.

(b) Among other information, each application form shall contain:

(1) Certification as to whether application form is for a biological child or adopted child of the parent through whom eligibility is claimed

(2) If the application form is filed by a sponsor, the name and address of sponsor and relationship to applicant.

(3) A control number for the purpose of keeping a record of forms furnished interested individuals.

(4) Certification that the information given on the application form is true to the best of the knowledge and belief of the person filing the application form. Criminal penalties are provided by statute for knowingly filing false information in such applications (18 U.S.C. 1001).

(c) Application forms may be filed by sponsors on behalf of other persons.

(d) Every applicant or sponsor shall furnish the applicant's mailing address on the application form. Thereafter, the applicant or sponsor shall promptly notify the Superintendent of any change in address, giving appropriate identification of the application, otherwise the mailing address as stated on the form shall be acceptable as the address of record for all purposes under the regulations in this Part 76.

§ 76.7 Filing of application forms.

(a) Application forms filed by mail must be postmarked no later than midnight on the deadline specified. Where there is no postmark date showing on the envelope or the postmark is illegible, application forms mailed from within the United States, including Alaska and Hawaii, received more than 15 days and application forms mailed from outside of the United States received more than 30 days after the deadline specified in the office of the Superintendent, will be denied for failure to file in time.

(b) Application forms filed by personal delivery must be received in the office of the Superintendent no later than close of business on the deadline specified.

(c) If the deadline for filing application forms falls on a Saturday, Sunday, legal holiday, or other nonbusiness day, the deadline will be the next working day thereafter.

§ 76.8 Verification forms.

The Superintendent shall mail a verification form to each member at the last available address to be completed and returned. The verification form will be used to ascertain the member's current name and

address and that the member is still living, or if deceased, the member's date of death. Name and/or address changes will only be made if the verification form is signed by an adult member, if living, or the parent or guardian having legal custody of a minor member, or an authorized sponsor. The verification form may be used by any sponsor to notify the Superintendent of the date of death of a member.

§ 76.9 Burden of proof.

The burden of proof rests upon the applicant to establish eligibility for enrollment. Documentary evidence such as birth certificates, death certificates, baptismal records, copies of probate findings, or affidavits, may be used to support claims of eligibility for enrollment. Records of the Bureau of Indian Affairs may be used to establish eligibility. Except that where the Enrollment Committee recommends the deletion of the name of a member from the membership roll, the burden of proof is on the Enrollment Committee.

§ 76.10 Enrollment Committee election.

(a) At a regular or special meeting at which there is a quorum, the General Council shall elect three (3) persons whose names appear on the membership roll to serve as members of the Enrollment Committee and two (2) persons to act as alternates to the Committee. The three (3) persons receiving the highest number of votes shall constitute the Enrollment Committee of the Band and the persons receiving the fourth and fifth highest number of votes shall serve as alternate members of the Enrollment Committee. The person receiving the highest number of votes shall serve as chairman of the Enrollment Committee.

(b) The Band may elect the Enrollment Committee prior to September 21, 1987. The term of office for the members of the Enrollment Committee shall be two (2) years form September 21, 1987. The Enrollment Committee, so elected, shall replace any Enrollment Committee previously elected under the regulations contained in this Part 76.

§ 76.11 Review of applications by the Enrollment Committee.

(a) The Superintendent shall submit all applications to the Enrollment Committee for review and recommendations; except that, in the cases of adopted persons where the Bureau of Indian Affairs has assured confidentiality to obtain that information necessary to determine the eligibility for enrollment of the individual or has the statutory obligation to maintain the confidentiality of the information, the confidential information may not be released to the Enrollment Committee, but the Superintendent shall certify as to the eligibility for enrollment of the applicant to the Enrollment Committee.

(b) The Enrollment Committee shall review all applications and make its recommendations in writing stating the reasons for acceptance or rejection for enrollment.

(c) The Enrollment Committee shall return the applications to the Superintendent with its recommendations and any additional evidence used in determining eligibility for enrollment within 30 days of receipt of the applications by the Enrollment Committee. The Superintendent may grant the

Enrollment Committee additional time, upon request, for its review.

(d) The Enrollment Committee shall also submit the names of members it recommends be deleted from the membership roll to the Superintendent stating in writing the reasons for such deletions.

§ 76.12 Action by the Superintendent.

(a) The Superintendent shall accept the recommendations of the Enrollment Committee unless clearly erroneous.

(1) If the Superintendent does not accept the tribal recommendation, the Enrollment Committee shall be notified in writing, by certified mail, return receipt requested, or by personal delivery, of the action and the reasons therefor.

(2) The Enrollment Committee may appeal the decision of the Superintendent not to accept the tribal recommendation. Such appeal must be in writing and must be filed pursuant to Part 62 of this chapter.

(b) The Superintendent, upon determining an individual's eligibility, shall notify the individual, parent or guardian having legal custody of a minor, or sponsor, as applicable, in writing of the decision. If an individual files applications on behalf of more than one person, one notice of eligibility or adverse action may be addressed to the person who filed the applications. However, the notice must list the name of each person involved. Where an individual is represented by a sponsor, notification of the sponsor of eligibility or adverse action shall be considered to be notification of the individual.

(1) If the Superintendent determines that the individual is eligible, the name of the individual shall be placed on the roll.

(2) If the Superintendent determines that the individual is not eligible, he/she shall notify the individual, parent or guardian having legal custody of a minor, or sponsor, as applicable, in writing by certified mail, to be received by the addressee only, return receipt requested, and shall explain fully the reasons for the adverse action and the right to appeal to the Secretary. If correspondence is sent out of the United States, registered mail will be used. If a certified or registered notice is returned as "Unclaimed," the Superintendent shall remail the notice by regular mail together with an acknowledgment of receipt form to be completed by the addressee and returned to the Superintendent. If the acknowledgment of receipt is not returned, computation of the appeal period shall begin on the date the notice was remailed. Certified or registered notices returned for any reason other than "Unclaimed" need not be remailed.

(c) Except as provided in paragraph (b)(2) of this section, a notice of adverse action is considered to have been made and computation of the appeal period shall begin on the earliest of the following dates:

(1) Of delivery indicated on the return receipt;

(2) Of acknowledgment of receipt;

(3) Of personal delivery; or

(4) Of the return by post office of an undelivered certified or registered letter.

(d) In all cases where an applicant is represented by an attorney, the attorney shall be recognized as fully controlling the application on behalf of the applicant and service on the attorney of a document relating to the application shall be considered to be service on the applicant. Where an applicant is represented by more than one attorney, service upon one of the attorneys shall be sufficient.

(e) To avoid hardship or gross injustice, the Superintendent may waive technical deficiencies in applications or other submissions. Failure to file by the deadline does not constitute a technical deficiency.

§ 76.13 Appeals.

Appeals from or on behalf of applicants who have been denied enrollment must be in writing and must be filed pursuant to Part 62 of this chapter. When the appeal is on behalf of more than one person, the name of each person must be listed in the appeal. A copy of Part 62 of this chapter shall be furnished with each notice of adverse action.

§ 76.14 Decision of the Assistant Secretary on appeals.

The decision of the Assistant Secretary on an appeal shall be final and conclusive and written notice of the decision shall be given the individual, parent or guardian having legal custody of the minor, or sponsor, as applicable. The name of any person whose appeal has been sustained will be added to the roll.

§ 76.15 Preparation, certification and approval of the roll.

(a) The staff officer shall prepare a minimum of five (5) copies of the roll of those persons determined to be eligible for enrollment. The roll shall contain for each person a roll number, name, address, sex, date of birth, date of death, when applicable, degree of Indian blood and in the remarks column, name and relationship of ancestor on the census roll through whom eligibility was established.

(b) A certificate shall be attached to the roll by the Superintendent certifying that to the best of his/her knowledge and belief the roll contains only the names of those persons who were determined to meet the qualifications for enrollment.

(c) The Director shall approve the roll.

§ 76.16 Special instructions.

To facilitate the work of the Superintendent, the Assistant Secretary may issue special instructions not inconsistent with the regulations in this Part 76.

Hazel E. Elbert,
Acting Assistant Secretary–Indian Affairs.

(FR Doc. 87-19052 Filed 8-19-87; 8:45 am)

APPENDIX G

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

[Stamped November 26, 2008]

CERTIFIED MAIL NO. 7006 3450 0002 4630 7166
RETURN RECEIPT REQUESTED

Allen E. Lawson, Spokesman
San Pasqual Reservation
Attention: San Pasqual Enrollment Committee
P.O. Box 365
Valley Center, CA 92082

Subject: San Pasqual Band of Diegueno Indians Enrollment Committee's Request for Disenrollment

Dear Mr. Lawson:

This responds to the San Pasqual Band of Diegueno Indians Enrollment Committee's (Committee) request dated July 25 and August 8, 2008, that the Bureau of Indian Affairs (BIA) approve the disenrollment of the descendants of Marcus R. Alto Sr. (Mr. Alto). The Committee alleges the Bureau of Indian Affairs (BIA) erroneously approved enrollment of Marcus Alto Sr. with the San Pasqual Band of Mission Indians (Band). Specifically, the Committee requests that BIA render a new decision regarding the enrollment of Mr. Alto

based on the discovery of "new evidence" discussed in "Marcus R. Alto Sr. Enrollment Challenge, August 27, 2007" and in "Analysis of the Marcus Alto, Sr. Enrollment Challenge of Ron Mast, August 27, 2007", which is a report dated June 16, 2008 prepared on behalf of the Band by Christine Grabowski, Ph. D (collectively, the "Information"). The Information submitted by the Committee purports to establish that Mr. Alto was not the biological son of Maria Duro Alto. As a consequence of the Information, the Committee asserts that Mr. Alto and his descendants are not eligible for membership in the Band and must be disenrolled.

After reviewing all documents previously considered by the BIA with respect to this issue, as well as the recently submitted Information, we conclude the Information submitted by the Committee does not demonstrate the BIA's prior enrollment determination is inaccurate, and therefore does not support deletion of Mr. Alto from the Band's membership roll. Specifically, the Information submitted by the Committee does not trigger regulations at 25 C.F.R. Part 48, which provide that members whose names appear on a tribal membership roll whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll subject to the approval of the Secretary.

As set forth in the analysis below, Mr. Alto's eligibility for membership in the Tribe was already determined by the BIA Southern California Agency Superintendent on May 23, 1991, and was affirmed by the Acting Area Director on January 31, 1994. On April 10, 1995, the Assistant Secretary-Indian Affairs denied the Band's

appeal from the Area Director's January 31, 1994 decision, and the denial decision of the Assistant Secretary was final for the Department. Therefore, no additional action regarding the enrollment of Mr. Alto and his descendants is required.

Background:

The Band's initial membership roll was completed and approved by the Commissioner in accordance with 25 C.F.R. Part 48 on October 6, 1966. The 1966 membership roll did not include Mr. Alto.

The Band's current Constitution was approved by the Secretary of the Interior on January 14, 1971. Article III, Section 2 of the Band's Constitution provides that membership in the Band shall be approved according to 25 C.F.R. Part 48 – regulations that were in effect at the time the Constitution was enacted in 1971. Copies of these regulations are attached. The Constitution also provides, at Article III, Section 1(1), and 25 C.F.R. Part 48.14(d), that the BIA is required to approve loss of membership in the Band.

The Band's supplemental membership roll compiled as of September 19, 1995 listed thirty-two (32) individuals who qualified for membership. The 1995 roll was certified and approved by the Area Director on February 12, 1996, in accordance with 25 C.F.R. Part 76.15(c). The supplemental roll included Mr. Alto and his descendants. The specific events that resulted in Mr. Alto's enrollment with the Band, as evidenced by the record, are recited below:

> On November 16, 1987, the Southern California Agency received and processed Mr. Alto's San Pasqual Enrollment Application pursuant to 25

C.F.R. Part 76, which was dated November 15, 1987. Item 11, of Mr. Alto's applications listed Joe Jose Alto, 4/4 Diegueno and Maria A. Duro, 4/4/ Diegueno, as his parents.

On May 23, 1991, the Superintendent, Southern California Agency (Superintendent), pursuant to 25 C.F.R. Part 76.11, submitted a list of individuals that was considered to be eligible for enrollment to the Committee. Among others the list included Mr. Alto, and his descendants.

On June 13, 1991, the Business committee found Mr. Alto and his descendants were ineligible for enrollment, rejecting the Superintendent's May 23, 1991 determination. The June 13th letter, signed by the Band's Business Committee's Chairwoman, further alleged that Mr. Alto, was not a "blood" lineal descendant of an ancestor from San Pasqual because: he was not the "blood" lineal son of Jose and Maria Alto, whom he claimed as his parents; a birth certificate was not submitted; and, according to Maria Alto's 1928 Enrollment Application No. 8685[1], she claimed no children. Based on their findings the Business Committee disapproved Mr. Alto and twenty-four (24) of his descendants because they were not descendants of an ancestor from San Pasqual.

On September 5, 1991, the Superintendent notified the Business Committee pursuant to 25 C.F.R. Part

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[1] Application for enrollment with the Indians of the State California under the Act of May 18, 1928 (45 Stat. L. 602) (1928 Roll).

62.8, that 106 appeals, which included appeals from the descendants of Mr. Alto were received and requested the Business Committee send any supporting documentation to substantiate their appeal of June 13, 1991. The Business Committee was informed that after the expiration of thirty (30) days, the Superintendent would forward all appeals to the Area Director.

On January 31, 1994, the Acting Area Director by letter notified the descendants of Mr. Alto, that the Band's Business Committee's appeal of June 13, 1991 from the Superintendent's decision to approve the enrollment of Mr. Alto and his descendants on the Band's Tribal roll prepared under 25 C.F.R. Part 76.4, was denied. Based on the evidence provided by the Superintendent, the Acting Area Director found that: Mr. Alto's 1928 enrollment application #9077 states he is the son of Maria (Duro) Alto; a letter attached to his 1928 enrollment application dated November 15, 1930 indicates that Mr. Alto's mother was in fact Maria Duro; Maria (Duro) Alto's name appears on the 1910 Census; her mother, Trinidad Duro, is also named on the 1910 Census, the 1928 enrollment application #8685 for Maria (Duro), states her husband, Joe Alto (deceased) was a full Diegueno Indian, and also listed on the 1910 census roll. Further, the Area Director determined that Mr. Alto was not found to have been previously enrolled on the January 1, 1959 Membership Roll; but possesses 4/4 blood of the Band, which is more than the 1/8 degree Indian blood of the Band required; was born before January 1, 1959 and living on April 27, 1985; and he was not an enrolled member of some other tribe

or band. Therefore, meeting all the requirements of 25 C.F.R. Part 76.4, the Acting Area Director upheld the Superintendent's decision of May 23, 1991, finding Mr. Alto and his descendants eligible for inclusion to share in the judgment funds awarded by U.S. Court of Claims in Docket 80-A with the Band and, in accordance with the Band's Constitution, qualified for enrollment with the San Pasqual Band of Mission Indians. The Band did not submit any documentation to substantiate their appeal of June 13, 1991. The Area Director's decision was in accordance with 25 C.F.R. Part 62.10 and final for the Department of the Interior.

On March 17, 1994, Eugene R. Madrigal, Attorney on behalf of the Band, filed with the Superintendent, Southern California Agency, a request for reconsideration of the Area Director's January 31, 1994 decision. The attorney claimed that the BIA's enrollment of Mr. Alto and his descendants was an error, and that now having had the opportunity to examine the appeal documents, the Band requested the opportunity to present such evidence.

On March 25, 1994, the Superintendent by memorandum submitted to the Area Director the Eugene R. Madrigal, Attorney's March 17, 1994 letter request for reconsideration of the Area Director's decision of January 31, 1994. In his memorandum, the Superintendent indicated that the Band did not supply any evidence to be considered.

On April 10, 1995, the Assistant Secretary-Indian Affairs issued a notice to Eugene R. Madrigal,

> Attorney for the Band, informing him that his request of March 17, 1994, for reconsideration of the Acting Area Director's decision of January 31, 1994, was denied. The Secretary, upon review of all available documents involved in Mr. Alto and his descendant's enrollment issues, sustained the decision made by the Acting Area Director on January 31, 1994, and upheld the enrollment of Mr. Alto, and his descendants, on the grounds that they are eligible for inclusion on the Band's Docket 80-A distribution roll. The Secretary further stated that "this decision is final for the Department".

Standard of BIA Review

The Band's Constitution requires that it be interpreted by applying the provisions of 25 C.F.R. Part 48, which were in effect when the Constitution was enacted in 1971, and which continue to be cited in the Band's Constitution as the governing standard of review.

Under the 1971 version of the regulations, the BIA may approve disenrollment actions if tribal members have been placed on a membership roll as a result of inaccurate information. *See 25 C.F.R. Part 48.14(d) as enacted in* 1971. Accordingly, the BIA's review of the Information submitted by the Committee must focus on whether the Information provides evidence that Mr. Alto's name was included on the Band's roll as a result of inaccurate information.

Analysis

Upon submitting the Committee's June 13, 1991 letter of appeal to the Area Director, the Agency informed the Area Director that the Committee did not submit supporting documentation to substantiate their appeal

of June 13, 1991. Furthermore, the Band's attorney's letter of reconsideration dated March 17, 1994 did not include evidence to support their claim that Mr. Alto was erroneously enrolled with the Band. No evidence was submitted by the Band until the Information was included with the letters dated July 25 and August 8, 2008 requesting the Regional Director approve disenrollment of the Alto family. As result of the Business Committee's failure to provide supporting documentation to substantiate their appeal of June 13, 1991, the Information could be considered new evidence, however, we must determine whether or not it demonstrates the prior enrollment determinations were inaccurate.

The new evidence cited in the "Marcus R. Alto, Sr. Report," and in the "Marcus R. Alto Sr. Challenge," that the Committee believes demonstrates Mr. Alto's enrollment was based on inaccurate information includes the following:

1. Baptismal Certificate of Roberto Marco Alto (Spanish form of names), born April 25, 1907, son of Benedita Barrios, matches information for Mr. Alto contained in other documents (such as his marriage certificate, social security record, and death certificate) as to month, day, and year of his birth as well as his place of birth. The order of the first and middle names – Robert Marcus – is also the same as appears on his marriage certificate.

   BIA's Response: In addition to these Certificates, the Church of St. Francis de Sales provided this office with a baptism record dated September 8, 2008, titled "The Holy Sacrament of Baptism"

with a Seal of the Church certifying that "Robert Marco Alto", son of Jose Alto and Benedita Barrios, was born May 25, 1907. None of these Baptismal Certificates provides evidence that the individuals listed on the Certificates are Mr. Alto. The only consistent item on the Certificates is the father, Jose Alto. Furthermore, the church indicated to this office that it did not have a baptism record for a Mr. Alto. Assuming this baptism record is Mr. Alto's, this would prove that he is the son of Jose Alto. On Mario (Duro) Alto's 1928 application, she listed Jose Alto (DOD: 1915) as her husband, who was 4/4 Diegueno from San Pasqual. Jose Alto was listed on several San Pasqual census rolls, in particular the 1910 Census Roll of the San Pasqual Mission Indians, #32, husband of Maria Alto. If this were the case Mr. Alto would still be eligible to be included on the San Pasqual membership roll as a descendent of Jose Alto.

2. BIA censuses of San Pasqual Indians, 1907-1913, listing Jose, Maria and Frank Alto as a family unit. (Frank Alto is Jose's son from a prior relationship.) Mr. Alto is not listed with his claimed parents, Jose and Maria Alto, or anywhere else on these censuses of the San Pasqual Band.

   BIA's Response: The BIA 1907-1913 censuses of San Pasqual Indians, in particular the June 30, 1910 Census of the San Pasqual Mission Indians proves that Jose and Maria Alto were members of San Pasqual. The 1920 census of San Pasqual Mr. Alto is listed as Mary (Maria) Alto's son.

However, we are unable to determine why Mr. Alto was not listed on the other rolls; maybe because he was also Jose Alto's son from a prior relationship. However, the exclusion of Mr Alto at that time on these rolls does not prove he was not Jose and Maria Alto's son.

3. The 1910 letter from Frank Alto to Frank Amos regarding composition of Alto family, with no mention of a brother or of Mr. Alto.

   BIA's Response: Upon reading the letters dated December 24, 1909, January 3, 1910 and February 23, 1910 from Frank Alto (son of Jose Alto) to Frank Amos, Frank Alto asks about the status of the San Pasqual Reservation, identifies relatives at Mesa Grande, talks about legal rights of the Indians at San Pasqual, will contact a relative at San Pasqual, identifies various individuals with family members scattered up his way living in Orange County and Riverside Counties. We are unable to determine its relevance and it does not demonstrate Mr. Alto's enrollment was based on inaccurate information.

4. Mari Duro's 1928 application states she had no surviving "issue" (children). Maria Duro thus did not recognize or acknowledge Mr. Alto as her biological son on her own application. Nor has any other document been found or offered which indicates that Maria Duro acknowledged or recognized Mr. Alto as her biological son.

   BIA's Response: On page 1 of Maria Duro's 1928 application it does state that she had no surviving "issue" (children). There was no

document provided by the Committee that indicates that Maria Duro did not acknowledge or recognize Marcus Alto as her biological son. This may be because Mr. Alto may have been Jose Alto's son from another relationship.

5. The 1928 application of Mr. Alto was not filled out by him but instead by non-relatives whose knowledge about Mr. Alto and his kin were deficient in several material respects. Unlike other applications, that of Mr. Alto contains no explanation why the applicant, who was neither deceased, old, nor infirmed in 1930, did not appear on his own behalf to fill out the form. Follow up letters on November 15, 1930, December 30, 1930, and April 15, 1930 from the Inheritance Examiner James T. Rahily state that Mr. Alto never responded to the official's requests for additional information. The information on Mr. Alto's application regarding his claimed father, Joe Alto, was inconsistent with that contained in Maria Duro's 1928 application.

BIA's Response: The November 15, 1930 and December 8, 1930 letters addressed to Mr. Alto from James T. Rahily, BIA, Examiner of Inheritance, indicate that a Roscindo Couro made application on Mr. Alto's behalf for enrollment with Indians of California under the Act of May 18, 1928, as amended, and requested further information regarding his family members. Mr. Rahily stated: "The data regarding your ancestors will be taken from the application of your mother, Maria Duro, who

applied for enrollment with the Indians of California before me on October 6, 1930, at Soboba." The data on Mr. Alto's 1928 Application Number 9077 was also completed by Mr. Rahily from mother Maria Duro's 1928 application. The information that was on Mr. Alto's application regarding his father, Joe Jose (Spanish form of name) Alto as inconsistent with that contained in Maria Duro's 1928 application was not identified. However, Mr. Alto's application listed Joe Alto as non-Indian; Mr. Cuoro or Mr. Rahily may have incorrectly listed Jose Alto as non-Indian. Maria Duro's application listed her husband Jose Alto as full-blood Diegueno. This may be why Mr. Alto indicated his Degree of Indian Blood to be 1/2.

6. The Affidavit of Dr. Florence Shipek, stating: "Maria Duro Alto and her husband Jose Alto had no children but had raised one belonging to a non-Indian family."

   BIA's Response: The Affidavit dated November 14, 1930 signed by John Morretti and Roscindo Couro, being duly sworn, on oath deposes and says that they were well acquainted with Mr. Alto and further state that Mr. Alto's application and statements of fact are true with reference to his ancestors. The Affidavit was also signed by James T. Rahily, BIA, Examiner.

7. Affidavit of Gene Morales, stating that Mr. Alto repeatedly acknowledged that he was "not an Indian."

BIA's Response: The Affidavit dated November 14, 1930 signed by John Moretti and Roscindo Couro, being duly sworn, on oath deposes and says that they were well acquainted with Mr. Alto and further state that Mr. Alto's application and statements of fact are true with reference to his ancestors. The Affidavit was also signed by James T. Rahily, BIA, Examiner.

8. The November 15, 1987 application of Mr. Alto, in which he did not certify that he was the biological child of Maria Alto. Instead, he indicated that he was the son of Maria A. Duro #290, referred to Maria Antonia Lechusa Alto from La Jolla, not San Pasqual.

   BIA's Response: In reference to the November 15, 1987 San Pasqual Enrollment Application of Mr. Alto, he did list his parents as Joe Jose Alto and Maria Duro Alto and listed #290 as his mother's San Pasqual 1910 Census Number. The census number for Maria Alto is clearly an error, because the 1910 Census Roll is less than 290 individuals. The BIA's copy of the 1910 Census Roll lists 86 members.

9. The 1955 BIA Census of San Pasqual incorrectly indicated that Mr. Alto was the brother of Sosten Alto, even though different fathers were noted for the two men, respectively Joe Alto and Felipe Alto. Mr. Alto's mother was noted as Maria Alto #269 which referred to Maria Antonia Lechusa Alto from La Jolla. The woman designated as #290 on the California Indian Census was removed in 1935 as a duplicate of Maria Antonia Lechusa Alto #269 from La Jolla.

BIA's Response: We agree that the July 1955 BIA Census of San Pasqual incorrectly indicated that Mr. Alto was the brother of Sosten Alto. As noted on the 1955 census roll Mr. Alto was also listed on the 1933 roll. (Roll of California Indians under the Act of May 18, 1928) roll #289, application #9077, and references his mother Maria Duro's application #8685.

10. The 1955 BIA Census of San Pasqual erroneously noted that Marcus Alto, Jr. and Raymond Alto (who are sons of Mr. Alto) were related to Cerlino Alto #268, Francisco Alto #274, Concepcion Alto #275 and Marie [sic] Antonio Alto #290. Instead, Cerlino Alto was the son of Maria Antonia Lechusa Alto (#269 and #290) from La Jolla and is not the woman named Maria Alto who appeared on the 1910 San Pasqual census. Francisco Alto was married to Concepcion but he was not the father of Mr. Alto or Sosten Alto.

    BIA's Response: For the reasons stated at Item 9, we agree that this was erroneously noted in the 1955 BIA Census.

11. The November 15, 1987 application of Mr. Alto was deficient as he did not certify whether he was a biological child or adopted child of the parent through whom eligibility is claimed and provided no proof of parentage-each deficiency sufficient to reject the application under BIA regulations.

    BIA's Response: In reference to the November 15, 1987 San Pasqual Enrollment Application of

Mr. Alto, he did list his parents as Joe Jose Alto and Maria Duro Alto and they are both listed on the 1910 Census Roll of San Pasqual.

12. The four documents that the BIA purportedly relied on the determine Mr. Alto's eligibility is inconclusive, contradictory, contain discrepancies and include information that should have led the BIA to question the probative significance of the documents and the credibility of the information in them.

BIA's Response: 1. In reference to the instructions for completing and submitting his application, Mr. Alto completed and certified that the information given was true and to his best of knowledge. 2. In reference to the Census Roll of California Indians under the Act of May 18, 1928, the BIA Examiner certified that the information given in Mr. Alto's application #9077 was true. 3. The census roll for La Jolla is not relevant because it does not pertain to Mr. Alto. 4. Mary Maria Alto only proves her date of death was on February 12, 1994; cannot determine the relevance.

13. There is no other evidence in the applications or in files maintained by the Enrollment Committee to establish that these individuals otherwise qualify for membership as a descendant of someone on the 1910 roll, or that establishes they posses 1/8 blood of the Tribe.

BIA's Response: The following documents the BIA has in the files support the descendants of Mr. Alto inclusion on the San Pasqual

membership roll: The San Pasqual Constitution; the BIA regulations 25 C.F.R. 48; the 1910 Census rolls for the San Pasqual Mission Indians; the Application for Maria Alto and Mr. Alto for the Roll of California Indians under the Act of May 18 1928.

Conclusion

The January 31, 1994 decision of the Acting Area Director was based upon the preponderance of evidence which resulted in the decision to include Mr. Alto and his descendants on the membership rolls of the San Pasqual Band in accordance with 25 C.F.R. Part 76 and the duly adopted Constitution of the Band.

Because the Information provided by the Committee does not demonstrate Mr. Alto's enrollment was based on inaccurate information, as required by 25 C.F.R. § 48.14(d), the January 31, 1994 decision of the Acting Area Director which identified Mr. Alto and his descendants as enrolled members of the Band remains effective.

This decision may be appealed to the Assistant Secretary-Indian Affairs. Your appeal must be filed with Bureau of Indian Affairs, Pacific Regional Director, 2800 Cottage Way, Sacramento, California, in accordance with regulations at 25 C.F.R. § 62.5. Your Notice of Appeal to this office must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copied of your Notice of Appeal to each interested party known to you. Your Notice of Appeal sent to this office must certify that

you have sent copies to these parties. Upon receipt of your Appeal this office will process your Appeal in accordance with regulations at 25 C.F.R. 62.10. If you file a Notice of Appeal, the Assistant Secretary-Indian Affairs will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

It is inappropriate for the Committee to continue to raise this issue of the validity of the inclusion of Mr. Alto and his descendants on the Band's membership roll or to attempt to disenroll his descendants and to continue to seek remedy from the BIA. Article III - Membership, Section 2[2] of the Band's Constitution, may be revised by the Band to remove the BIA's from its membership process. Please contact the Superintendent, Southern California Agency, for further technical assistance.

Sincerely,

/s/
Regional Director

Enclosures

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[2] Article III-Membership, Section 2 provides "All membership in the band shall be approved according to the Code of Federal Regulations, Title 25 Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior."

cc: Superintendent, Southern California Agency (without enclosures)
Assistant Secretary-Indian Affairs
Pacific Regional Solicitor (without enclosures)
National Indian Gaming Commission (without enclosures)
Chief, Tribal Government Services (without enclosures)

CERTIFIED MAIL NO. 7006 3450 0002 4630 7326
RETURN RECEIPT REQUESTED
Ms. Angela Martinez McNeal
P.O. Box 300261
Escondido, California 92030

CERTIFIED MAIL NO. 7006 3450 0002 4630 7173
RETURN RECEIPT REQUESTED
Glenn W. Charos, Attorney at Law
Law Offices of Glenn W. Charos
for Marcus Alto Sr.'s Descendants
220 West Grand Avenue
Escondido, California 92025

APPENDIX H

SAN PASQUAL BAND OF DIEGUEÑO MISSION INDIANS OF CALIFORNIA

SAN PASQUAL RESERVATION

U.S. Department of the Interior
Bureau of Indian Affairs
Regional Agency
Attn: Dale Morris, Regional Director
2800 Cottage Way
Sacramento, California 95825

August 30, 2008

Dear Mr. Morris:

As the Vice Chairman of the San Pasqual Band of Mission Indians, the San Pasqual Enrollment Committee's Member at Large and a professional historian, I would like to voice my concerns regarding actions taken by the Enrollment Committee of the San Pasqual Band of Mission Indians in the matter of the Alto family disenrollment.

On the morning of Friday, July 25th, the San Pasqual Enrollment Committee voted to recommend the disenrollment of the Alto family, based on a report conducted by the anthropologist hired to assist in an enrollment challenge.

My concern with the Enrollment Committee's actions stems from two sources:

1) The violation of the Alto family's right to due process.
2) The problematic quality of the anthropological report submitted to the Bureau of Indian Affairs.

First, in regards to the matter of due process, it is my opinion that the Alto family's rights have been systematically violated by three members of the tribe's five-member Enrollment Committee. Earlier violations, including the Alto's illegal "suspension," have been chronicled by previous correspondence. The essential point is the fact that pertinent information regarding the activities and planned actions of three members of the Enrollment Committee were purposely withheld from other members of the committee, while the views of all committee members have not been considered throughout the entire process.

As far as the pivotal July 25th meeting is concerned, Enrollment Committee Vice Chairman Joe Navarro and I voiced serious reservations about the quality of the anthropologist's research and the validity of her conclusions. At the meeting, we requested that we have the opportunity to ask the anthropologist, Dr. Christine Grabowski, a number of questions. Committee Chair Victoria Diaz consented, and arranged for a conference call. However, in the middle of the interview, after Mr. Navarro began to press Dr. Grabowski on a specific issue, Ms. Diaz hung the phone up, reusing to allow the examination to continue. I was not given the opportunity to question the anthropologist.

When Ms. Diaz moved to place the disenrollment action to a vote, it was pointed out that Committee Secretary Diana Martinez appears as a critical witness against the Alto family in the anthropologist's report. Because

of proven bias, Mr. Navarro and I requested that Ms. Martinez recuse herself from the vote. When Ms. Martinez refused, the matter of recusal was put to a committee vote. In spite of our protests, Ms. Diaz then allowed Ms. Martinez to vote on the matter of her own recusal, which was decided in her favor by a single vote. The motion to dis-enroll the Alto family was therefore passed by a subsequent vote of 3-2.

Curiously, the same afternoon, roughly four hours after the meting, I received at my home via Federal Express an extensive opinion regarding the Committee's "findings," obviously written by Ms. Diaz and Ms. Martinez's legal counsel. The letter was dated Thursday, July 24th, and purported to represent the Enrollment Committee's conclusions, when in fact the letter was drafted 24 hours prior to our meeting, and before the full committee had considered the matter.

Although I believe that this document was forwarded to the Bureau of Indian Affairs, the serious reservations about the accuracy of the anthropologist's conclusions conveyed by Mr. Navarro and myself, reservations reflected in our no vote on the disenrollment recommendation, were not addressed in the legal opinion.

I have been informed that there has been some question at BIA Regional Headquarters as to why the Alto family did not submit rebuttal documents to the San Pasqual Enrollment Committee within the 30 day allotted time frame, or cooperate with the anthropologist hired by Ms. Diaz and Ms. Martinez to conduct an examination of the Alto family lineage. Alto family representatives informed me that they refused to cooperate because of proven bias against their family

by Ms. Diaz and Ms. Martinez, and that they would simply submit their materials to the Bureau of Indian Affairs for final determination.

Frankly, the behavior of Ms. Diaz and Ms. Martinez, particularly their "suspension" of the Alto family, which follows the logic of "guilty until proven innocent," points to the wisdom of the Altos in dealing with the BIA directly in the matter of their tribal membership.

I therefore urge you to accept all evidence from the Alto family in making the final determination on their enrollment.

My second concern, as you can already guess, stems from the quality and presumed accuracy of the the report conducted by anthropologist Christine Grabowski. As a tenured Professor of History at the California State University, a specialist in the field of California History and the History of the American West, my own reservations reflect my years of experience as a professional researcher.

As I understand it, the Alto family has hired an independent historian to critique the anthropologist's work. However, I do think it appropriate to provide examples of my own concerns. Whish this is not a comprehensive analysis, it does demonstrate that Dr. Grabowski failed to evaluate the evidence with a critical eye and because of that failure, the entire study is fundamentally flawed.

In my professional opinion, the root cause of the problem stems from the fact that Dr. Grabowski refused to keep an appropriate professional distance

from the accusers of the Alto family and fatally compromised the independence of her research. As I indicated in a letter dated February 28, 2008, Dr. Grabowski conducted research pertaining to the Alto family in both San Francisco and Sacramento in the company of Committee Chair Victoria Diaz and Committee Secretary Diana Martinez. Why Ms. Martinez and Ms. Diaz accompanied Dr. Grabowski for a number of days during a supposedly independent investigation has never been satisfactorily explained to me. Beyond the fact that Ms. Martinez has been a long time advocate of the Alto family's disenrollment, Ms. Diaz has been recently indicted on embezzlement charges, and although her case is pending a criminal trial and she has not been convicted of any crime, the fact that a member of the Alto family is currently serving as a witness to the charges against Ms. Diaz should have made Dr. Grabowski particularly cautious in regards to her protocols.

Moreover, both Ms. Martinez and Ms. Diaz were well aware of the fact that I reside and work in northern California. Although my home is less than fifteen minutes from the archives they visited, and I regularly conduct historical research at both places, I was never notified of their research sojourn with Dr Grabowski. I can only conclude that I was purposely kept in the dark about the trip in order to evade my presence and prevent a fair interpretation of the collected evidence.

When I questioned Dr. Grabowski as to the purpose of the rendezvous, she answered my concerns with the argument that facts remain facts regardless of who is present. The defense is disingenuous. Data in the raw may remain unaltered, but the interpretation of

historical evidence as any college undergraduate should know, is vulnerable to personal bias and preconceptions. The imbalances nature of her study regarding the lineage of the Alto clan reflects, I think, the biases and preconceptions generated by Ms. Diaz and Ms. Martinez's inappropriate proximity to this "independent" investigation.

Permit me to provide some examples.

1) On page 18, Dr. Grabowski states that "it is true that Maria Alto and her mother Trinidad Duro appear on the 1910 census of the 'San Pasqual Mission Indians.' Yet it is also true that Marcus Alto, Sr. does not appear on the census even though he was born...in 1903." She goes on to make a similar statement regarding the 1909 census. However, Dr. Grabowski fails to inform the reader that only 1 child appears in the 1909 census out of 51 San Pasqual Indians listed, and that only 5 children appear on the 1910 census, out of a total 86 individuals listed. Demographically, one expects many more children than adults, particularly in 1910. The absence of any children in 1909, and the insignificant number of children listed in 1910, does not provide evidence that Marcus Alto was not the biological child of Jose and Maria, but simply that children were not presented for enumeration by tribal adults.

2) On pages 24-25, Dr. Grabowski makes the bold statement that "There is no evidence that Maria Duro ever recognized Marcus Alto as her natural son," although she admits that "Marcus is found with Jose and Maria Alto on the federal census for Escondido" in 1920.

What is particularly troubling about this statement is that Dr. Grabowski fails to inform the reader that, not only does Marcus Alto appear on the 1920 census; he is in fact listed as the *son* of Jose and Maria on the same census. Adopted children were often listed in the census as "adopted." The census enumerator presumably spoke to either Jose and/or Maria, who would have had to identify Marcus, then 17, as their child. That Dr. Grabowski purposely chose the language "Marcus is found..." rather than admitting that Marcus was listed as the son of Maria and Jose in the document appears to reveal a prejudice against the Alto claim to tribal membership, and is, in my opinion, a grave disservice to the reader in such an important matter.

3) On page 26, Dr. Grabowski asserts that two items, matching birth dates and town of residence, prove beyond a reasonable doubt that the "Marco Roberto Alto" who appears on the baptismal record, the only new evidence submitted in the enrollment challenge, is in fact the Marcus Alto of San Pasqual. She then admits that "the father on the baptism record is noted as Jose Alto," an individual listed on both the 1909 and 1910 censuses of the San Pasqual Indians. She then dismisses the obvious link with the comment "it is unknown which Jose Alto this is since this is not an uncommon name."

This is the lynchpin of the disenrollment action, and here Dr. Grabowski has created an incredible double standard, insisting that Marco Roberto Alto and Marcus Alto are the same individual based on residence and birth month, while arguing that another individual, Jose Alto, with exactly the same first name,

surname, and town of residence as the San Pasqual Jose Alto, cannot be one and the same. By her logic, it is therefore impossible to draw the conclusion with certainty that Roberto Marco and Marcus Alto are one and the same. The fact that she dismissed the probability of Marcus Alto's obvious biological link to the San Pasqual Band in such a cavalier fashion, making no attempt to assess the identity of the Jose Alto on the birth certificate, is the most flawed portion of the study.

4) On page 19, Dr. Grabowski argues that additional evidence that Marcus Alto was a non-Indian stems from the fact that his 1928 application was filed by a non-relative, Roscindo Curo. She then discredits the actions of application witnesses Reginald Duro and John Moretti, who confirmed that Mr. Alto was Indian. "Their motives are unknown," she states, but then fails to explain why any of the three would testify that Mr. Alto was a San Pasqual Indian if in fact he was not.

Roscindo Curo, Reginald Duro and John Moretti are, in a historical sense, the closest eye witness *in time* to the circumstances of Mr. Alto's lineage, and together, their testimony represents the best evidence we have as to Mr. Alto's origins. Such evidence cannot be discounted simply because we cannot, over 80 years later, explain the motives of these three men. There is absolutely no evidence that the testimony of these vital witnesses is false. Therefore, we *must* accept it. Why Dr. Grabowski does not I can only guess.

5) On page 22, Dr. Grabowski uses the fact that Maria Alto stated in her application that she had "no issue," as evidence that Mrs. Alto, the presumed mother of Marcus Alto, was in fact childless at the time.

However, Dr. Grabowski presupposes that Mrs. Alto understood the phrase "no issue," a point confusion for anyone not familiar with genealogical expressions, and fails to even consider this possibility that Mrs. Alto simply misunderstood the terminology.

6) On page 28, Dr. Grabowski discusses the possibility, based on the baptismal record, that San Pasqual's Jose Alto was in fact the biological father of Marcus Alto, while Benedita Barrios, a non-Indian, was Mr. Alto's biological mother, and that Marcus was subsequently raised by Jose and Maria Alto. Although I am not arguing that this arrangement was in fact the case of Marcus Alto's upbringing, Dr. Grabowski's handling of the possibility is yet another example of flawed reasoning. Dr. Grabowski contends that Jose Alto, "was 50 years old when Marcus was born and thus some 22 years older than Benedita, making it unlikely that he would have had a child by the younger woman and then have his wife of over 20 years take of the product of his dalliance."

This conclusion is, frankly, one of the most ridiculous things I have ever read. It argues, firstly, that older men do not have affairs with younger women, and that, if a child was produced by a union of Jose Alto and Benedita Barrios, Maria Alto would act as a modern feminist, throwing her husband out and negating her only means of support. It is easier to believe that, in an early 20th century Hispanic culture, a wife would do absolutely the opposite, tolerate her husband's indiscretion and care for its product to maintain the family union. Again, I am not suggesting that this is what happened. We have no evidence of any such occurrence. But the absolute refusal to accept any

possibility that argues for Alto tribal membership again demonstrates, in my opinion, a pronounced bias on the part of the researcher.

There are just a few of examples of the problematic quality of the anthropological report submitted to the Bureau of Indian Affairs in the effort to dis-enroll the Alto family from the San Pasqual Band of Mission Indians. The totality of the evidence brought against the family in question is, in my professional opinion, inconclusive. As with most family histories, there exists evidentiary gaps and inconsistencies. However, there is also very powerful evidence favoring the Alto enrollment.

Disenrollment is a serous matter. To rob a family of the rights and benefits of tribal membership, to say nothing of their cultural identity, requires overwhelming proof supporting disenrollment. The proponents of the Alto family disenrollment do not possess such proof.

Attached you will find my curriculum vitae (academic resume) as well as my university identification. Please do not hesitate to contact me should you require further assistance.

Sincerely,

/s/Robert Phelps
Robert Phelps, Ph.D.
Associate Professor of History, California State University, East Bay
Vice Chairman, San Pasqual Band of Mission Indians
Member at Large, San Pasqual Enrollment Committee

CC: U.S. Department of the Interior
Bureau of Indian Affairs
Southern California Agency
Attn: Jim Fletcher, Superintendent
1451 Research Park Dr., Suite 100
Riverside, California 92507-2471

CC: U.S. Department of the Interior
Office of the Secretary
Bureau of Indian Affairs
Washington, D.C. 20240

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EDUCATION

Ph.D. History, University of California, Riverside — March, 1996
Fields:
Major: United States History, 1789-1900
Minor: United States History, 1900-present
Specialization:
Nineteenth and Twentieth Century
Urban and Social History
History of the American West
Dissertation:
"Dangerous Class on the Plains of Id: Ideology and Homeownership in Southern California, 1880-1920." Professor Ronald Tobey, Disseration Director, assisted by Professor Charles Wetherell

M.A., History, University of California, Riverside — June, 1990
Field: United States South

B.A., History, San Diego State University — August, 1987

EMPLOYMENT

Associate Professor, Department of History, California Sate University, East Bay	Fall 1998-Present (Tenured 2004)
Lecturer in United States History, Department of History, University of San Francisco	Summer, 1998
Visiting Professor, Department of History, University of the Pacific	1997-1998
Visiting Lecturer, Department of History, University of California, Los Angeles	Spring, 1997
History Instructor, Crafton Hills College	1996-1997
History Instructor, San Bernardino Valley College	Fall, 1996
Visiting Professor, Department of History, University of California, Riverside	Summer, 1996

COURSES TAUGHT

California State University, East Bay

- History of California
- History of the San Francisco Bay Area
- American West
- Historical Research Methods
- The Writing of History
- The Study of the Nature of History
- The United States in the Age of Empire
- The Great Depression and World War Two
- Conference in United States History (*Graduate Seminar*)
- Graduate Research Seminar

- Graduate Thesis Advisor

COURSES TAUGHT
Other Universities and Colleges

- Nineteenth and Twentieth Century United States Political and Social History
- Urban History
- American West
- United States History Survey
- University of the Pacific's Mentor I and II General Education Seminar

PUBLICATIONS

- "Sunshine and Smoke: The Environmental History of Los Angeles," *Reviews in American History* 34 (December 2006).
- "On Comic Opera Revolutions: Maneuver Theory and the Art of War in Mexican California," *California History* 84 (Fall 2006).
- Review of Villa and Sanchez, eds. *Los Angeles and the Future of Urban Culture in Pacific Historical Review* 75 (August 2006).
- Review of *The Elusive Eden: A New History of California*, 3rd edition, by Richard Orsi and Richard Rice in *Nevada Historical Quarterly* 49 (Spring 2006).
- *Images of America; Castro Valley* (Charleston, SC: Arcadia Pres, 2005).
- *Images of America: Early Hayward* (Charleston, SC: Arcadia Press, 2004).
- "All Hands Have Gone Downtown: Urban Places in Gold Rush California," in Richard Orsi and Kevin Starr, eds., *Rooted in Barbarous Soil: California During the Gold Rush* (Berkeley: University of California Press, 2000).

- "Western History and Local Historians," in Carol Kammen and Norma Pendergast, eds., *The Local Historian's Encyclopedia* (New York: Alta Mira Press, 2000).
- "The Frontier Thesis," in Carol Kammen and Norma Pendergast, eds., *The Local Historian's Encyclopedia* (New York: Alta Mira Press, 2000).
- "The Manufacturing Suburb of Los Angeles: Henry Huntington, Alfred Dolge, and the Building of Dolgeville, California, 1903-19100," *Southern California Quarterly* 80 (Winter, 1998/99).
- "The Search for a Modern Industrial City: Urban Planning, the Open Shop, and the Founding of Torrance, California," *Pacific Historical Review* 64 (November, 1995).

ONLINE PUBLICATIONS

- "Crossroads" Writer/Editor for Internet Based Resource for K-12 Teachers on the History of the San Francisco Bay Area (www.historycrossroads.org), 2004-Present.
- "Picture This!" Historical Content Editor for Internet Exhibit on the History of California Presented by the *Oakland Museum* (www.museumca.org/picturethis/), July, 2003.

PUBLIC HISTORY

- Interpretive Advisor, "San Pasqual Battlefield Panel Revision," San Pasqual Battlefield Park, California State Parks.
- Interpretive Advisor, "Gallery Panel Revision," Hayward Area Historical Society (2005).
- Interpretive Advisor, "That 70's Exhibit," Hayward Area Historical Society (2005).

WORKS IN PROGRESS

- *Torrance: Corporate Efficiency and Urban Planning in Turn of the Century Los Angeles*, Book-length manuscript in final stages of research and revision.

PRESENTATIONS

- "The Art of War in Mexican California." Scholar Olli, CSUEB, Concord Campus, 2006.
- "The Urban West." CNTV, California State University, Hayward. Summer, 2002.
- "Saving First Mate Ryan: Living History and the USS Hornet Museum," Presentation, Annual Conference of the *National Council for History Education*. October 27, 2000.
- "The Habit of Self Promotion: The Historiographic Tradition of Los Angeles," Presentation, Annual Convention of the California Council for the Promotion of History, October 30, 1999.
- "Planning in the Borderlands: Frederick Law Olmsted, Jr., Central Los Angeles and City Planning in the Western Metropolis.: Research Presentation. University of the Pacific. February 3, 1998.
- "A Modern Industrial City: Urban Planning, the Open Shop, and the Building of Torrance, California." Research Presentation. University of California, Los Angeles. June 3, 1995.
- "A Modern Industrial City: Urban Planning, the Open Shop, and the Building of Torrance, California." Research presentation. University of California, Riverside. March 2, 1995.
- "A Factory Town in Turn of the Century Los Angeles." Presentation of Teaching Methods to

Los Angeles High School Teachers, History/Social Science Summer Institute. University of California, Los Angeles. July, 1995.

PROFESSIONAL SERVICE

- Reviewer, *World Book Encyclopedia* (2007)
- Reviewer, *California History* (current)
- Presenter, *Teaching American History Grant*, Alameda County School District, 2006-Present.
- Presenter, Hayward Area Historical Society's *K-12 Teaching Workshop*, 2007.
- Manuscript Reviewer for James Rawls, *California: An Interpretive History*, 9th Edition. McGraw-Hill Publishing, 2006.
- Manuscript Reviewer for Richard Stillson, Spreading the *Word: A History of Information in the California Gold Rush*. University of Nebraska Press, 2006.
- Senior Scholar, "Crossroads" K-12 Partnership. *Hayward Area Historical Society* 2002-Present.
- Member, Local Arrangements Committee for the annual conference of the American Historical Association, January 2002.
- Panel Chair, "Individuals in California History,: at the annual conference of the *California Council for the Promotion of History*, September 23, 2000.
- Reviewer, *The Enduring Vision* (Houghton Mifflin College Level Textbook), 1998.

UNIVERSITY SERVICE

- Interim Chair, Department of History.
- History Major Coordinator, CSUEB Concord Campus.

- Member of the Academic Senate.
- Member, CLASS College Election Committee.
- Chair, Contra Costa Advisory Committee.
- Chair, California History/American West Search Committees.
- Member, Academic Standards Sub-Committee, CSU Hayward WASC Committee.
- Member, Faculty Diversity and Equity Committee.
- Undergraduate Coordinator/Advisor, Department of History.
- Coordinator, Committee to Promote the History Major.
- Coordinator, USS Hornet Museum/Cal State Hayward Internship Program.
- Member, Scholarship Committee, Department of History.
- Member, Graduate Admissions Committee.
- Member, Women's History Search Committee.
- Member, Modern Europe/Colonialism History Search Committee.
- Representative, Meeting on the Development of Assessment Programs in the California State University

COMMUNITY SERVICE

- Vice Spokesman, San Pasqual Band of California Mission Indians (January, 2007-Present)
- Enrollment Committee, San Pasqual Band of California Mission Indians (January, 2006-Present)
- Mentor, National Groundhog Shadow Day, 1999-2003.

- "Cities of Gold." Presentation for the San Ramon Rotary Club 2001.
- Assistant Fencing Coach, National Youth Sports Program. Summer, 2002-Summer, 2003.
- "California Society," Presentation at the San Lorenzo History Museum, April, 2004.
- Instructor, K-12 Teacher Training Program, Hayward Area Historical Society, June, 2004.

AWARDS

- *Distinguished Professor of the Year*, CSUEB Concord Campus, 2006-2007 (chosen by students from over 100 CSUEB faculty members teaching at the Concord campus of CSUEB).
- Faculty Activity Grant, California State University, Hayward, 2003.
- Eta Delta Sorority's *Professor of the Year* Award, California State University, Hayward, 2002.
- History Student Association, CSUH *Featured Professor* Award, 2002.
- *Doyce B. Nunis Award*. Award presented for the best article by an emerging scholar in the *Southern California Quarterly*, official journal of the Historical Society of Southern California, 2000.
- *President's Dissertation Year Fellowship*, University of California, 1994-95.
- *Teaching Assistant of the Year*, Department of History, University of California, Riverside, 1993.
- *Dean's Fellowship*, University of California, Riverside, 1990-92.
- *Graduate Opportunity Fellowship*, University of California, Riverside, 1988-90.

- *The Honored Graduate*, Department of History, San Diego State University, 1987.

PROFESSIONAL AFFILIATIONS

- American Historical Association.
- Organization of American Historians.
- Historical Society of Southern California.
- California Council for the Promotion of History.

APPENDIX I

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

[Stamped April 10, 1995]

Mr. Eugene R. Madrigal
Attorney at Law
28581 Front Street, Suite 108
Temecula, California 92590

Dear Mr. Madrigal:

This is in response to your appeal filed on behalf of the San Pasqual Band of Mission Indians. On July 7, 1994, the Acting Sacramento Area Director denied your request for reconsideration from his previous decision that Marcus Alto, Sr. (deceased) and his descendants, named below, met the requirements for enrollment with the San Pasqual Band of Mission Indians and were found eligible to share in the distribution of the judgment funds awarded by the U.S. Court of Claims in Docket 80-A.

Marcus M. Alto, Jr.	Anthony Charles Alto
Benjamin Alto	Brandon Robert Alto
Raymond E. Alto, Jr.	Raymond Alto, Sr.
Robert Marcus Alto	Mary Jo Alto Alvarado
Victoria Alto Ballew	Rebecca Alto Ballon

Johanna Alto Forrester	David Michael Gomez
Ernest Anthony Gomez	Henrietta Alto Gomez
Kathleen Marie Gomez	Richard Eugene Gomez
Susan Yvonne Gomez	Deborah Alto Vargas
Jeremiah Cruz Vargas	Isabelle Alto Sepeda
Cynthia Ann Sepeda	Lupe Isabelle Sepeda
Monica Marie Sepeda	

Title 25 CFR, Part 76, Enrollment of Indians of the San Pasqual Band of Mission Indians in California, § 76.2 and § 76.4 of the Enrollment of the San Pasqual Band directs the Secretary of the Interior to:

> * * * bring current the membership roll of the San Pasqual Band of Mission Indians to serve as the basis for the distribution of Judgment funds awarded the Band by the U.S. Court of Claims in Docket 80-A, and –
>
> (a) The membership roll of the Band shall be brought current to April 27, 1985, by:
>
> (1) Adding the names of the persons living on April 27, 1985, who are not enrolled with some other tribe or band; and
>
> (i) Who would have qualified for the inclusion of their names on the January 1, 1959, membership roll of the Band had they filed applications within the time prescribed, or
>
> (ii) Who were born after January 1, 1959, and

(A) Are descendants of Indians whose names appear as members of the Band on the Census Roll, provided such descendants possess one-eighth (1/8) or more degree of Indian blood of the Band, or

(B) Are Indians who can furnish sufficient proof to establish that they are 1/8 or more degree of Indian blood of the Band; and

(iii) Who file or have filed on their behalf application forms with the Superintendent, Southern California Agency, Bureau of Indian Affairs, 3600 Lime Street, Suite 722, Riverside, California 92501, by November 18, 1987. Application forms filed after that date will be rejected for failure to file on time regardless of whether the applicant otherwise meets the qualifications for membership. Except that members whose names appear on the membership roll shall not be required to file applications in accordance with this paragraph.

(2) Deleting the names of members who have relinquished in writing their membership in the Band or who have died since January 1, 1959, but prior to April 27, 1985, for whom certified documentation has been submitted.

(b) Members whose names appear on the membership roll whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll subject to the approval of the Assistant Secretary. * * * *

The Band alleges that Mr. Marcus Alto, Sr., is not a "blood" lineal descendant of an ancestor from San

Pasqual. According to the 1910 Census Roll, Marcus' mother, Maria Alto's name appears opposite number 33. She is shown as wife, age 45. Her mother, Trinidad Duro, is also listed on the 1910 Census Roll opposite number 66 and is shown as daughter, age 85. The 1928 enrollment application #9077 for Marcus Alto states that he is the son of Maria Duro. The 1928 enrollment application #8685 for Maria Duro states that both she and her husband, Joe Alto, are full-blooded Diegueno Indians.

On November 15, 1930, and December 8, 1930, Mr. James T. Rahily, Examiner of Inheritance from the Mission Indian Agency in Riverside, California wrote to Marcus Alto, Sr. regarding an enrollment application filed on his behalf by Mr. Roscindo Couro. Both letters stated that "the data regarding your ancestors will be taken from the application of your mother Maria Duro who applied for enrollment with the Indians of California before me on October 6, 1930, at Soboba." Although Marcus Sr., was not previously enrolled on the January 1, 1959, membership roll, he possessed 4/4 degree Indian blood of the Band which is more than the 1/8 degree Band blood required. He qualified for enrollment because he was born before January 1, 1959, and he was living on April 27, 1985. In addition, he was not an enrolled member of some other tribe or band.

Based on the foregoing information, the Acting Sacramento Area Director denied the appeal filed by the San Pasqual Business Committee. On March 17, 1994, you appealed that adverse decision and asked for reconsideration. It is the Band's position that they were not afforded the opportunity to examine the appeal

making it impossible for them to respond with evidence they considered pertinent to the action. Apparently, at no time did the Southern California Agency receive a request from the Chairperson to examine any of the appeal cases nor was any pertinent evidence furnished. Also, when you appealed for reconsideration all documentation should have been provided by both you and the Band at that time.

All available documentation involving this case has been thoroughly reviewed and, based on the preponderance of evidence, I am sustaining the decision made by the Acting Sacramento Area Director on January 31, 1994, upholding the enrollment of Marcus Alto, Sr., and his descendants, named above, and find that they are eligible for inclusion on the Band's Docket 80-A distribution roll. By copy of this letter, I am instructing the Sacramento Area Director to notify each of Marcus Alto, Sr.'s descendants, named above, of this decision.

Pursuant to the authority delegated to me by the Secretary of the Interior to act for him on appeals, I regret that your appeal on behalf of the San Pasqual Band of Mission Indians is denied. This decision is final for the Department.

Sincerely,

/S/ Ada E. Deer

Ada E. Deer
Assistant Secretary - Indian Affairs

cc: Sacramento Area Director
Supt., Southern California Agency
Chairperson, San Pasqual Band of Mission Indians

APPENDIX J

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 706

To 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. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.