

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
Civil Division**

THE CALIFORNIA VALLEY MIWOK  
TRIBE, *et al.*,

Plaintiffs,

v.

KEN SALAZAR, in his official capacity as  
Secretary of the United States Department of  
the Interior, *et al.*,

Defendants.

Case No. 1:11-cv-00160-RWR

Hon. Richard W. Roberts

**PLAINTIFFS' MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

Plaintiffs hereby move for an order to supplement the administrative record in this case with information pertaining to the birth dates of individuals who are already identified in the record as members of the California Valley Miwok Tribe ("Tribe"). As explained in Plaintiffs' attached memorandum of points and authorities, supplementation of the record is appropriate because the Defendants improperly excluded from the record detailed information about hundreds of individuals who are lineal descendants of known historical members of the Tribe (the "Lineal Descendants"). That information includes personal genealogies, birth dates and other information establishing the basis for Lineal Descendants' membership in the Tribe (collectively, the "Genealogies"). Defendants have admitted that they received the Genealogies and that they prepared, but never sent, letters to each of the Lineal Descendants who submitted a Genealogy [*see* Administrative Record ("AR") at 002105].

Plaintiffs believed that the Genealogies and letters would be included in the administrative record prepared for this case, since they were already in the Defendants' possession and possessed obvious relevance to any conclusion regarding Tribal membership. In addition, Plaintiffs raised the issue of the Genealogies in their May 2011 briefing to the Assistant Secretary – Indian Affairs ("AS-IA") before he issued the August 31, 2011 decision that

Plaintiffs challenge in this case (the "2011 Decision") [AR 002139-002140]. For that reason, and due to privacy concerns, Plaintiffs did not re-submit detailed personal information of the type contained in the Genealogies to the AS-IA during the briefing process. But when Defendants prepared the administrative record, they refused to include the Genealogies, as set out in the attached Affidavit of Robert Uram, attached hereto as Exhibit "1".

Despite Defendants' exclusion of the Genealogies from the record, the record currently contains undisputed evidence that the Tribe's membership at present includes 242 adult Lineal Descendants and their children [AR 002268-002275]. However, the record prepared by Defendants does not reveal the birth dates of the Lineal Descendants, which is relevant to establish that Plaintiffs and other Lineal Descendants were over the age of 18 in 1998 and entitled to vote on the adoption of the governing documents that Defendants allege were adopted by the Tribe in 1998.

In order to avoid delay and to protect the privacy of all those who submitted Genealogies to the BIA, Plaintiffs seek a limited remedy for the Defendants' improper exclusion of the Genealogies from the administrative record. Plaintiffs do not seek to add the Genealogies themselves. Plaintiffs simply request that the record be supplemented with the attached affidavit of Plaintiff Velma WhiteBear, who is responsible for maintaining the Tribe's membership roster. The WhiteBear affidavit provides information about the number of Lineal Descendants who were over the age of 18 in 1998. The affidavit is based on a review of Tribal records containing the same information found in the Genealogies: the birth certificates and family histories of the Lineal Descendants.

### **CONCLUSION**

For the reasons set forth above, the parties respectfully request that the Court order that the administrative record be supplemented with the attached Affidavit of Velma WhiteBear. A proposed order is enclosed.

**CERTIFICATION REGARDING MEET AND CONFER**

On March 1, 2012, counsel for Plaintiffs discussed the relief sought herein with counsel for Defendants. Counsel for Defendants stated that Defendants would not consent to the relief requested by Plaintiffs. Specifically, Defendants would not agree to the supplementation of the record requested herein, or to stipulate regarding the birth dates of the Plaintiffs or other members of the Tribe.

Respectfully submitted,

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DATED: March 2, 2012

**CERTIFICATE OF SERVICE**

I certify that on March 2, 2012, I caused the foregoing "Motion to Supplement the Administrative Record" to be filed with the Court pursuant to the electronic filing rules. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/ Roy Goldberg  
Roy Goldberg

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**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF THEIR MOTION TO SUPPLEMENT THE**  
**ADMINISTRATIVE RECORD**

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I. INTRODUCTION

In 2007, the Bureau of Indian Affairs ("BIA") sought to help the California Valley Miwok Tribe ("Tribe") identify its members and bring them together for the purpose of organizing a formal government for the Tribe. The BIA published a notice identifying known historical members of the Tribe and asking that lineal descendants of those historical members—*i.e.*, those who would be generally recognized as members of the Tribe based on traditional membership practices—submit genealogies and other information documenting their lineage [Administrative Record ("AR") 001501]. The BIA received genealogies and supporting information (the "Genealogies") from 503 individuals (the "Lineal Descendants") [AR 002105].

The BIA reviewed all of the Genealogies and prepared a letter to each of the Lineal Descendants [AR 002105]. But the BIA never sent those letters or released the Genealogies, because Silvia Burley appealed the BIA's efforts to assist the Tribe in organizing. Ms. Burley took the position that she, her two daughters and her granddaughter (collectively, the "Burley Faction") were the only members of the Tribe and were the only ones entitled to participate in its organization [AR 001539-001541].

The Interior Board of Indian Appeals ("Board") eventually referred Ms. Burley's appeal to the Assistant Secretary – Indian Affairs ("AS-IA"). In April 2011, the AS-IA requested briefing from Plaintiffs and from the Burley Faction to assist in deciding Ms. Burley's appeal [AR 002004]. In their briefing, Plaintiffs argued that the Burley Faction were not the only members of the Tribe and pointed to the Genealogies as evidence of a much larger group of Lineal Descendants who were members of the Tribe [AR 002139-002140]. Plaintiffs also submitted a roster of the adult Lineal Descendants known to them (several hundred children were omitted for privacy reasons) [AR 002268-00275]. Because the Genealogies were already in the AS-IA's possession, Plaintiffs did not think it necessary to re-submit the detailed information



contained in the Genealogies, such as birthdates and family trees, for each of the Lineal Descendants.

The AS-IA issued his decision on August 31, 2011 (the "2011 Decision"). The 2011 Decision found that there were only five members of the Tribe: the Burley Faction and Plaintiff Yakima Dixie. The Decision found, without explanation, that none of the other Lineal Descendants were members of the Tribe. The Decision also found that Ms. Burley and Mr. Dixie, without involving the rest of the Tribe's members, had adopted a valid governing document for the Tribe in 1998 [AR 002049-002057]. Plaintiffs challenged the 2011 Decision in their First Amended Complaint.

In preparing the administrative record for this case, Defendants excluded the Genealogies and the letters that the BIA had written to the Lineal Descendants. Plaintiffs requested that Defendants supplement the record with the Genealogies, but Defendants refused. *See* Affidavit of Robert J. Uram, attached as Exhibit "1". Defendants maintained that the AS-IA had not considered the Genealogies in arriving at the 2011 Decision and that Defendants therefore did not consider the Genealogies to be part of the administrative record. *Id.*

Defendants' exclusion of the Genealogies from the administrative record in this case was improper. The Genealogies have been in Defendants' sole possession since 2007, and Plaintiffs specifically brought the Genealogies to the AS-IA's attention in their briefing before the 2011 Decision was made. It would be appropriate for the Court to order that the Genealogies be added to the record. However, Plaintiffs do not ask the Court for this relief, in light of privacy concerns and the desire to avoid delay.

Despite Defendants' exclusion of the Genealogies from the record, the record already contains proof of their existence [AR 002105], as well as undisputed evidence that the Tribe's

membership currently includes 242 adult Lineal Descendants and their children [AR 002268-002275]. However, the record prepared by Defendants does not reveal the birth dates of the Lineal Descendants, which is relevant to establish that Plaintiffs and other Lineal Descendants were over the age of 18 in 1998 and entitled to vote on the adoption of the governing documents that the Defendants allege were adopted by the Tribe in 1998. Plaintiffs therefore seek a limited remedy for the Defendants' improper exclusion of the Genealogies from the administrative record.

Plaintiffs request that the record be supplemented with the attached affidavit of Plaintiff Velma WhiteBear, who is responsible for maintaining the Tribe's membership roster. *See* Affidavit of Velma WhiteBear, attached as Exhibit "2" ("WhiteBear Affidavit"). The WhiteBear Affidavit provides information about the number of Lineal Descendants who were over the age of 18 in 1998. The Affidavit is based on a review of Tribal records that contain the same information found in the Genealogies: the birth certificates and family histories of the Lineal Descendants. Including the WhiteBear Affidavit in the record will allow the Court to evaluate the 2011 Decision in light of the evidence that was before the AS-IA when he made the 2011 Decision, without causing delay or placing additional administrative burdens on the parties.

## II. ANALYSIS

A challenge to agency action under the Administrative Procedure Act is normally based on the administrative record. *See* 5 U.S.C. § 706; *James Madison Ltd., Inc. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). The record includes all materials "compiled by the agency that were before the agency when the decision was made." *Id.* (quotation marks and citations omitted). However, the D.C. Circuit recognizes four "well established" exceptions that allow supplementation of the administrative record compiled by an agency. *Amfac Resorts v. Department of Interior*, 143 F.Supp.2d 7, 11 (D.D.C. 2001). Supplementation is appropriate

when (1) there was such a failure by the agency to explain administrative action so as to frustrate effective judicial review; (2) supplementation is necessary to determine whether the agency considered all the relevant factors; (3) the agency may have deliberately or negligently excluded documents adverse to its decision; or (4) there is a strong showing of bad faith or improper behavior on the part of the agency. *Id.* (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973), *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981), *Kent County v. U.S. Environmental Protection Agency*, 963 F.2d 391, 395-96 (D.C. Cir. 1992), *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990), and *James Madison Ltd., supra*, 82 F.3d at 1095).

In this case, at least two of the exceptions apply. First, the Defendants deliberately excluded from the record information that is adverse to the 2011 Decision. *See Kent County, supra*, 963 F.2d at 395-396 (EPA acted "at least negligently" by excluding reports prepared by its own experts that were contrary to its decision). The Genealogies would show that there are several hundred Lineal Descendants who are descended from known historical Tribe members. Lineal descent from historical members has always been the foundation for membership in this Tribe (and many other tribes), as discussed in Plaintiffs' Memorandum of Points and Authority in Support of their Motion for Summary Judgment. Thus, the Genealogies would directly contradict the AS-IA's conclusion that the Tribe currently consists of only five members [AR 002049].

Because the Genealogies contain birth dates, they also would show that scores, if not hundreds, of the Lineal Descendants were over the age of 18 in 1998, and thus entitled to vote on any governing documents adopted by the Tribe. The 2011 Decision finds that the Tribe created a valid government in 1998 by adopting Resolution #GC-98-01 (the "1998 Resolution"), a

document that bears just two signatures [AR 002049-002050]. Because any governing documents must be adopted by a majority of the Tribe, the Genealogies would contradict the AS-IA's conclusion that the Tribe established a valid government under the 1998 Resolution. *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267-1268 (D.C. Cir. 2008) [CVMT II].

As noted above, the record already contains undisputed evidence that the Tribe's current membership includes 242 adult Lineal Descendants and their children [AR 002268-002275]. However, the current record does not specifically reveal the exact number of Lineal Descendants who were adults in 1998. Either the Genealogies or the WhiteBear Affidavit would provide that information.

Second, the information contained in the Genealogies is necessary to determine whether the agency considered all the relevant factors. *See Environmental Defense Fund*, 657 F.2d at 285. The Genealogies would reveal overwhelming evidence, collected by the agency's own experts, that the Tribe's membership currently includes hundreds of Lineal Descendants *and* that many of those members were adults in 1998. The existence of those members in 1998 is a "relevant factor" in any decision recognizing a tribal government based on the 1998 Resolution, because the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, requires that tribal organization reflect majoritarian values. *CVMT II, supra*, 515 F.3d at 1267. Thus, either the Genealogies or the WhiteBear Affidavit would reveal that the 2011 Decision failed to consider relevant factors in recognizing a Tribal government based on the 1998 Resolution.

### III. CONCLUSION

Defendants' exclusion of the Genealogies from the administrative record was improper, and supplementation of the record to correct Defendants' omission is warranted under at least

two exceptions that are well established in this Circuit. However, Plaintiffs recognize that requiring the inclusion of the full Genealogies could cause unnecessary delay and implicate privacy concerns. Therefore, Plaintiffs offer the WhiteBear affidavit to establish key facts that the Genealogies would reveal, including the fact that at least 83 of the Lineal Descendants were over the age of 18 in 1998, including each of the individual Plaintiffs.

Respectfully submitted,

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