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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, and, CALIFORNIA VALLEY MIWOK TRIBE, Defendant-Intervenor	Case No. 1:11-cv-00160-RWR Hon. Richard W. Roberts

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO ADMINISTRATIVE RECORD AND MOTION TO STRIKE EXTRA-RECORD EVIDENCE AND MEMORANDUM IN SUPPORT

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I. Introduction

Defendants, *et al*. ("Assistant Secretary" or "Defendants") hereby oppose Plaintiffs' Motion for Leave to File Supplement to Administrative Record (ECF No. 15) ("Motion to Supplement") and move, pursuant to Fed. R. Civ. P. 12(f), to strike the documents subject to that motion. In the Motion to Supplement, Plaintiffs contend that the Assistant Secretary deliberately excluded historical documents, which Plaintiffs collectively refer to as "Genealogies," from the administrative record. But Plaintiffs do not request this Court to review the genealogies. Instead, Plaintiffs request that this Court review a post-decisional affidavit, drafted by Plaintiffs for the express purpose for litigation.

Plaintiffs' motion and the material submitted should be rejected because: 1) Plaintiffs cannot overcome the presumption of administrative regularity; 2) they fail to show that the administrative record in this case is so bare that it prevents effective judicial review in the absence of these materials; 3) their unsupported allegations of impropriety are insufficient to demonstrate that the agency acted in bad faith; and 4) the post-decisional affidavit – and the genealogies which it purportedly summarizes – is irrelevant to this Court's review of whether or not the Assistant Secretary appropriately discontinued efforts to compel a tribe to organize and expand its membership.

Finally, Plaintiffs' request should be rejected because Plaintiff had every opportunity to bring the Affidavit to the attention of the Assistant Secretary during the administrative process and failed to do so. Plaintiffs' submission of materials in litigation, which it never allowed the Assistant Secretary the opportunity to review when he was preparing his decision, subverts the administrative process and should not be permitted. Accordingly, the Court should deny

Plaintiffs' motion and strike the materials from the judicial record, including any portions that Plaintiffs' Motion for Summary Judgment relies upon.

II. Factual Background

On November 6, 2006, the Superintendent of the Central California office of the Bureau of Indian Affairs issued a decision ("November Decision"), the goal of which was to initiate the California Valley Miwok Tribe's ("Tribe") organization but in the absence of tribal consent. In furtherance of this goal, the Superintendent informed both Mr. Dixie and Ms. Burley that he would publish a notice in the local newspapers, inviting "the members of the Tribe and potential members" to participate a General Council meeting. *See* November 2006 Decision, AR002160.[1] The "main purpose" of the November Decision was to identify a putative group of individuals who would be eligible to participate in the Tribe's organization. *Id*.

The notice described the group of potential members as lineal descendants of: 1) individuals listed on the 1915 census of the Sheepranch Indians; 2) Jeff Davis (the sole individual on the IRA voter list in 1935; 3) Mabel Hodge Dixie (the sole distributee under the 1964 Distribution Plan). Individuals who believed they were lineal descendants were encouraged to submit, among other items, a birth certificate, death certificate, or other official documentation to establishing consanguinity.

The BIA received 503 applications, which included the requested documentation. AR002105. Although the BIA conducted an "internal review" of the documents, the BIA did not complete the process of initiating organization because a member of the Tribe, Ms. Burley,

[1] The documents in the administrative record are cited as CVMT-2011-[Bates Number]. For example, the November 2006 Decision is CVMT-2011-002160. For purposes of brevity, Defendants citation in this brief refers only to the Bates Number. Thus, that same November 2006 Decision is cited as AR002160.

appealed the November Decision to the Regional Director, which effectively stayed any further action. Decl. of Troy Burdick, Superintendent of the Central California Agency, AR002104-06. Ms. Burley contended that the BIA's proffered assistance was not requested by the Tribe, and that the BIA's actions constitute an impermissible intrusion into tribal government and membership matters that are reserved exclusively to Indian tribes. AR001263. Ms. Burley subsequently appealed to the Interior Board of Indian Appeals following her unsuccessful appeal to the Regional Director.

The Board did not reach the merits of Ms. Burley's challenge, and instead dismissed the matter because: 1) any argument regarding organization or the participation of putative members was either "explicitly or implicitly" addressed in the 2005 final decision of the Assistant Secretary and, therefore, outside the jurisdiction of the board, AR001702; 2) and the BIA's decision to "create a base roll of individuals who satisfy criteria that BIA has determined . . . [and] who will be entitled to participate – effectively as members . . . – is properly characterized as an enrollment dispute," over which the Board also lacks jurisdiction. AR001703. The Board, therefore, referred the claim to the Assistant Secretary.

On December 22, 2010, the Assistant Secretary issued a decision letter intended to resolve the citizenship question that the Board had referred. "[R]ecognizing the complex and fundamental nature of the underlying issues," the Assistant Secretary withdrew the December decision and requested additional briefing from the parties. AR002053. Both Mr. Dixie and Ms. Burley submitted voluminous briefs addressing the issues identified by the Assistant Secretary. AR002004.[2]

[2] Among which, were: 1) whether the Secretary has an obligation to ensure that potential tribal members participate in an election to organize the Tribe; 2) the parties' respective positions

On August 31, 2011, the Assistant Secretary issued his reconsidered decision. Plaintiffs subsequently file an amended complaint on October 17, 2011. ECF No. 32. Defendants both filed an Answer and lodged the administrative record on December 1. *See* ECF No. 34, 35. Plaintiffs reviewed the administrative record and identified additional documents that had been excluded from the record. *See* ECF No. 41. On December 14 and December 28 of 2011, Plaintiffs' counsel requested that the administrative record include the 503 genealogies and related information that the BIA received as a result of the 2007 notice. *See* Uram Declaration, ECF No. 51-1 at 1. Counsel for Defendants informed Plaintiffs on both occasions "that the Assistant Secretary – Indian Affairs had not considered the genealogies in arriving at his August 31, 2011[,] decision . . . and that Defendants therefore did not consider the genealogies to be a part of the administrative record." *Id.* at 1-2. On January 10, 2012, however, Defendants supplemented the record with additional documents that Plaintiffs had identified as not included in, but properly a part of, the record.[3] ECF No. 44.

III. Plaintiffs are neither entitled to supplementation nor is extra-record review warranted.

A. The Scope of judicial review is limited to the Administrative Record.

Plaintiffs' claims in this case are governed by the "arbitrary and capricious" standard of judicial review set out in the Administrative Procedure Act ("APA"). Under that standard, judicial review is limited to "the full administrative record before the [decision-maker] at the

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regarding the status of the Tribe's organization and the Federal Government's duty to assist the Tribe in organizing; and 3) the respective parties' views on what the Secretary's role is in "determining whether a tribe has properly organized itself." AR 2172-73.

[3] Those documents were: The Rancheria census; United States' brief filed in Miwok II; Troy Burdick's declaration; United States brief during the IBIA litigation; Mr. Dixie's reconsideration brief and the exhibits; and Ms. Burley's reconsideration brief.

time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *see also* 5 U.S.C. § 706 (stating that a reviewing court "shall review the whole record or those parts of it cited by a party . . . ."). Under the APA, therefore, the court does not take evidence or make findings of fact. *Cronin v. U.S. Dept. of Agriculture*, 919 F.2d 439, 443 (7th Cir. 1990). Rather, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706(2), to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also Fund for Animals v. Babbitt*, 903 F.Supp 96, 105 (D.D.C. 1995); *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981).

The Court should deny Plaintiffs' motion and strike the extra-record materials submitted by Plaintiff because those materials were not before the agency at the time it made its determination challenged in this case. Plaintiff is not entitled to subvert the administrative process by submitting affidavits for the first time in litigation, rather than presenting them during the briefing period on reconsideration. Moreover, Plaintiff has not demonstrated that the narrow exceptions to record review, which are applicable only in limited circumstances, apply in this case. Therefore, Plaintiffs' motion to supplement the record should be denied.

B. Supplementation of the Administrative Record versus the review of extra-record evidence.

As a preliminary matter, Plaintiffs have captioned their motion as one to supplement the record, yet their arguments only address extra-record review exceptions. Supplementation is a claim that the agency did not include information that was before the decisionmaker but was not properly included in the administrative record. *See, e.g.*, *Pacific Shores Subdivision California Water Dist. v. United States Army Corps of Eng'rs*, 448 F.Supp.2d 1, 4 (D.D.C. 2006)

(discussing the different standards and concluding that plaintiffs failed to overcome the presumption of administrative regularity and denying the motion to supplement). On the other hand, review of extra-record evidence is a request that the Court view evidence not included in the record and that was not necessarily considered by the agency. *See, e.g., Cape Hatteras Access Preservation Alliance v. Dep't. of the Interior*, 667 F. Supp. 2d 111 (D.D.C. 2009) (also discussing the varying standards and concluding that plaintiffs failed to demonstrate the biological opinion should be considered as extra-record evidence where the opinion would neither add to the court's further understanding of the case nor would it aid the court's consideration of relevant factors). Each inquiry requires a separate analysis. *See Franks v. Salazar*, 751 F.Supp.2d 62, 67-68 (D.D.C. 2010) (evaluating documents under both standards); *Sara Lee Corp. v. American Bakers Ass'n.*, 252 F.R.D. 31, 34 (D.D.C. 2008) (same); *Earthworks v. DOI*, 2012 WL 373320, *3-5 (D.D.C 2012) (same).

C. Plaintiffs fail to demonstrate that either supplementation of the record or the review of extra record evidence is appropriate.

Against these standards, Plaintiffs sole contention is that the administrative record does not contain the documentary evidence submitted to the BIA in response to the 2007 Notice. Pls.' Mem. at 1. But Plaintiffs do not request that the record be supplemented with the documentary evidence itself. Instead, Plaintiffs request "that the record be supplemented with the attached affidavit of Plaintiffs Velma Whitebear." Pls.' Mem. at 3 (hereinafter "Affidavit"). The essential purpose of the Affidavit is to summarize the extensive historical documents submitted to the BIA in 2007. Pls.' Mem. at 3, 4. Plaintiffs argue that the administrative record should be "supplemented" because: 1) the Defendants "deliberately excluded from the record information

that is adverse to the 2011 Decision;" and 2) "the information contained in the Genealogies is necessary to determine whether the agency considered all the relevant factors." Pls.' Mem. 4-5.

Plaintiffs are wrong. In terms of supplementation, the record that the BIA submitted is the "whole" administrative record, in that it includes all documents that were directly or indirectly considered by the decision-maker. Plaintiffs seek to supplement the record with post-decisional documents that should have been submitted to the agency before this dispute reached this Court. Moreover, while the D.C. Circuit has recognized certain exceptions to the general prohibitions against extra-record review, none of those exceptions apply in this case. The Affidavit contains neither adverse information nor would it aid this Court's consideration of the relevant factors. Therefore, Plaintiffs' motion to supplement the record should be denied.

i. Supplementation is inappropriate where Plaintiffs fail to overcome the presumption of administrative regularity.

Federal Defendants do not dispute that the administrative record must contain all documents directly and indirectly considered by the decision-maker. *See Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp.2d 7, 12 (D.D.C. 2001); *see also Overton Park*, 401 U.S. at 420 (the court "should have before it neither more nor less information than did the agency when it made its decision."). But in applying this standard, it falls to the agency, and not the plaintiff, to determine what documents were in fact considered, and the agency's determination in this regard is entitled to a presumption of regularity. *See Fund for Animals v. Williams*, 245 F.Supp. 2d 49 (D.D.C. 2003) *rev'd on other grounds sub nom. Fund for Animals, Inc. v. Hogan*, 428 F.3d 1059 (D.C. Cir. 2005).

As with all established administrative procedures, an agency's certification that it has lodged a record is entitled to a "strong presumption of regularity." *Sara Lee Corp. v. American*

Bakers Ass'n, 252 F.R.D. 31, 34 (D.D.C. 2008); *accord Midcoast Fisherman's Ass'n v. Gutierrez*, 592 F. Supp.2d 40, 43 (D.D.C. 2008); *Salazar*, 751 F.Supp.2d at 78, 80-81; *Pacific Shores*, 448 F. Supp.2d at 4-7; *Amfac Resorts, L.L.C. v. U. S. Dep't of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001). This presumption was aptly described in *Fund for Animals*:

> The question left for the court is straightforward: who determines what constitutes the "full" administrative record that was "before" the agency?
>
> Common sense and precedent dictate that at the outset, the answer must be the agency. It is the agency that did the "considering," and that therefore is in a position to indicate initially which of the materials were "before" it—namely, were "directly or indirectly considered." If it were otherwise, non-agency parties would be free to define the administrative record based on the materials they believe the agency must (or should) have considered, leaving to the court the unenviable task of sorting through a tangle of competing "records" in an attempt to divine which materials were considered.

245 F. Supp. 2d at 56-57 (internal citations and quotations omitted). As a result, Plaintiffs bear the burden of introducing "clear evidence" to overcome "the strong presumption of regularity [that agencies] properly designated the record." *Pacific Shores*, 448 F.Supp.2d at 4-7; *County of San Miguel, Colorado v. Kempthorne*, 587 F.Supp.2d 64, 72-73, 77 (D.D.C. 2008) (requiring "substantial showing" and "clear evidence" that agency's "record is not accurate and complete").

To overcome this presumption, a plaintiff cannot merely assert "that materials were relevant or were before an agency when it made its decision." *Franks*, 751 F.Supp.2d at 67. Rather, Plaintiffs must introduce concrete evidence that the documents were "actually before the decisionmakers." *Cape Hatteras*, 667 F.Supp.2d at 114; *accord Sara Lee*, 252 F.RD. at 34.

Plaintiffs have failed to make that showing, particularly since the lone affidavit they seek to introduce is post-decisional. While the Affidavit purports to summarize the documentary evidence, Plaintiffs concede that the affidavit itself was never provided to the Assistant Secretary but was instead prepared expressly for purposes of litigation. *See* Affidavit ("This affidavit is

submitted in support of Plaintiffs' Motion to Supplement the Administrative Record."). For that reason alone, Plaintiffs' motion to supplement should be denied. *See Alvarez*, 129 F.3d at 624 (finding "no legal support" for plaintiffs' assertions that a "district court should have considered the affidavits as part of the administrative record because they merely elaborated on details already included in the record.").

Plaintiffs may counter that the Defendants are in "sole possession" of the genealogies and that those documents were brought to the attention of the Assistant Secretary in their briefs on reconsideration. *See* Pls.' Mem. at 2. But it is not enough to state that the documents "were before the entire [agency], rather it must instead prove that documents were before the [agency's] decisionmakers." *Pacific Shores*, 448 F.Supp.2d at 7. While the Superintendent of the Central California Agency of the BIA is in possession of the documentary evidence, it is the Assistant Secretary who is the ultimate decisionmaker in this case. The mere fact that briefing mentioned the genealogies does not mean the genealogies themselves were considered. *See Cape* Hatteras, 667 F.Supp.2d at 114 ("the fact that some comments received during the [designation process] mentioned the BiOp, does not mean that the BiOp itself was considered by the FWS."). As Plaintiffs' own declaration attests, counsel for Federal Defendants maintained on two separate occasions that the Assistant Secretary did not consider the genealogical evidence. And that was after supplementing the record with documents Plaintiffs had identified as mistakenly being excluded. *See* ECF No. 44.

As filed, the administrative record consists of 2,353 pages, which includes historical documents reaching as far back as 1915, reports, BIA records as they pertain to this Tribe, as well as Plaintiffs' voluminous briefs submitted during reconsideration. As a result, the record identifies all documents considered by agency decision-makers in connection with the 2011

Decision. Indeed, the "sheer volume and complexity of the administrative record suggests that it is complete." *Pacific Shores*, 448 F.Supp.2d at 7.

ii. Extra-record review is inappropriate where Plaintiffs attempt to submit materials to the Court that were not submitted to the agency during the Administrative process.

While the D.C. Circuit has recognized certain narrow exceptions to the general prohibition against extra-record review, they are just that – exceptions. As such, they are to be narrowly construed. *Commercial Drapery Contractors v. United States*, 133 F.3d 1, 7 (D.C. Cir. 1998); *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1105 n.18 (D.C. Cir. 1979) (recognizing that in APA cases, practice of supplementing the record for judicial review "decidedly is the exception, not the rule") (internal citation omitted). Thus, it is only in "exceptional cases" that a court will go beyond the administrative record presented by the deciding agency. *Cape Hatteras*, 667 F.Supp.2d at 114 (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Plaintiffs, however, fail to address a threshold requirement: "Before invoking an exception . . . the plaintiff must demonstrate bad faith or improper behavior on the part of the agency, or that 'the record is so bare that it prevents effective judicial review.'" *Fund for Animals v. Williams*, 391 F. Supp.2d 191, 198 (D.D.C. 2005) (citing *Commercial Drapery Contractors*, 133 F.3d at 7); *see also Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010); *Franks v. Salazar*, 751 F.Supp.2d 62 (D.D.C 2010).

Plaintiffs allude to agency impropriety when they contend that the "Defendants deliberately excluded from the record information that is adverse to the 2011 Decision." Pls.' Mem. at 4. Plaintiffs' reliance on bare allegations is insufficient for two reasons. First, any allegation of intentional obfuscation is belied by Plaintiffs' own concessions. Plaintiffs concede

"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." Pls.' Mem. at 1-2.[4] In determining whether extra-record materials should be admitted, however, the Court should assess whether Plaintiffs properly presented to the Assistant Secretary during the administrative process the post-decisional affidavit that it now seeks to raise before this Court. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (parties have a duty to "'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration" in its decision making process) (quoting *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 553 (1978)). Plaintiffs cannot now request this Court to review an affidavit that Plaintiffs had every chance to submit to the Assistant Secretary.

Plaintiffs have provided no explanation why concerns associated with privacy and economy now warrant the review of extra-record evidence, *see* Mot. at 2; Pls.' Mem. at 2, 6, when those same concerns were ostensibly just as relevant during the administrative proceedings. While Plaintiffs may counter that they would have provided an affidavit had they known the genealogies would not have been included in the record, it is entirely anomalous that they would provide a seemingly helpful affidavit that summarizes scores of "detailed information contained in the Genealogies, such as birthdates and family trees, for each of the lineal descendants" but then only provide it in preparation for litigation. *See Alvarez*, 129 F.3d at 624

[4] Plaintiffs also contend that they "specifically brought the Genealogies to the AS-IA's attention in their briefing before the 2011 was made." Pls.' Mem. at 2. Plaintiffs provide no citation, and it is unclear where in their briefing that they addressed this issue.

("To allow the affidavits to be considered now would be to permit *ex post* supplementation of the record, which is not consistent with the prevailing standards of agency review.") (emphasis in original). Plaintiffs' request that this Court review a post-decisional affidavit defies the principle that a court "should have before it neither more nor less information than did the agency when it made its decision." *Id.* at 623.

Finally, even if the Court determines that the threshold requirement has been met, Plaintiffs have failed to make a "strong showing" that either of the two exceptions applies. Plaintiffs first contend that the extra record materials are adverse to the 2011 Decision. A plaintiff can make a prima facie showing that an agency excluded adverse information from the record by proving that the documents at issue (1) were known to the agency at the time it made its decision, (2) "are directly related to the decision," and (3) "are adverse to the agency's decision." *Fund for Animals*, 391 F.Supp.2d 191, 198 (D.D.C. 2005). The documents are neither directly related nor are they adverse to the 2011 Decision. The question before the Court is not, as Plaintiffs would have it, whether each and every "Lineal Descendant" is in fact a member of the tribe; rather, the question before the Assistant Secretary was whether the department should continue efforts to compel a tribe to organize and expand its membership in the absence of the tribe's consent. *If* the Assistant Secretary had concluded that the agency should continue efforts to assist the Tribe's organization the and identify other potential members, and *if* the Assistant Secretary had in fact followed through with the process of organization, then the consanguinity of the purported descendants would be of relevance. But even in those circumstances, it would be the BIA's job to consider the genealogical determinations in the first instance, not the Court's. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

For the same reason, Plaintiffs have failed to show that consideration of such documents is necessary for the Court to determine whether the Assistant Secretary's analysis considered the relevant factors regarding the 2011 Decision. For all intents and purposes, Plaintiffs are attempting to submit additional challenges to the Assistant Secretary's findings without ever having submitted these analyses during the administrative process. That is flatly prohibited by the law of the D.C. Circuit. *See Costle*, 657 F.2d at 285-86; *Alvarez*, 129 F. 3d at 623-24.

Conclusion

Plaintiff should not be permitted to make vague references to 503 separate applications and the attendant historical documents without explanation during the administrative process and then submit, for the first time during litigation, affidavits which purportedly summarize those documents. *Vermont Yankee*, 435 U.S. at 553-54 ("Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic or obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"). Plaintiffs had ample opportunity to submit the Affidavit to the Assistant Secretary, but they did not. Plaintiffs had ample opportunity to introduce the Affidavit to the IBIA, but they did not. Plaintiffs cannot now "introduce evidence in court that they had never sought to introduce to the agency." *Theodore Roosevelt*, 616 F.3d at 515.

Respectfully submitted this 29th day of March, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2012, Federal Defendants' Opposition to Plaintiffs' Motion for Leave to File Supplement to Administrative Record and Motion to Strike Extra-Record Evidence and Memorandum in Support were filed with the United States District Court for the District of Columbia's electronic filing system, to which the following attorneys are registered to be noticed:

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