

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

THE CALIFORNIA VALLEY MIWOK  
TRIBE, et al.,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

Civil Action No. 11-160 (RWR)

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION  
TO SUPPLEMENT ADMINISTRATIVE RECORD**

Defendants' attempt to exclude from the administrative record the birth dates of individual members of the California Valley Miwok Tribe's ("Tribe") membership in 1998 should be rejected. A key issue in this case is whether the Interior Department, in reaching its 2011 Decision, improperly ignored the overwhelming evidence before it that the Tribe's membership in 1998 included scores of adult lineal descendants of the original Tribal members ("Lineal Descendants"). The Department should not turn a blind eye to evidence concerning the identities and ages of the Lineal Descendants that it possessed, reviewed and drew conclusions about prior to the 2011 Decision being issued.

The 2011 Decision purports to establish government-to-government relations with a "Tribe" consisting of just five people (including the four Burleys), based on a 1998 document that was signed by only two persons (the "1998 Resolution"). The 1998 Resolution was adopted without notice to, or opportunity for participation by, Plaintiffs Velma WhiteBear, Michael Mendibles, Antonia Lopez, Antone Azevedo and Evelyn Wilson, as well as Melvin Dixie and scores of other Tribal members who were entitled to vote on any Tribal government. By

recognizing a Tribal government that does not represent the Tribe as a whole, the 2011 Decision violates the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, and the United States' unique trust obligation to Indian tribes.

The issue in this case is not who is entitled to membership in the Tribe or to vote in Tribal elections. Those are issues for the Tribe to decide. The issue is whether the Department has acted lawfully in allowing the Burley family to seize control of the Tribe and in granting recognition to them, even though the 1998 Resolution was not approved by a majority of the Tribe (AR 000179 (1998 Resolution bearing only two signatures)), and even though the Tribe's members were precluded from participating by the Department's wrongful application of criteria that apply only to terminated tribes.

Although the Department had received written genealogies, birth certificates and other material ("Genealogies") documenting the membership of hundreds of Tribal members, including the birth dates of the members, prior to its issuance of the 2011 Decision (AR 002108), the Interior Department improperly seeks to exclude this information from the record. The Genealogies are part of the administrative record because they were before the Interior Department when it made its 2011 Decision, and they should have been considered. It is undisputed that the Genealogies were in Defendants' possession prior to issuance of the 2011 Decision, and that Defendants actively reviewed and considered this information.<sup>1</sup>

The Genealogies are clearly relevant to any conclusion regarding membership in the Tribe. Documents in the record demonstrate that the Tribe's membership includes hundreds of adult Lineal Descendants and their children. (AR 002268-2275) However, the record prepared

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<sup>1</sup>"Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Federal Defendants' Cross-Motion" ("Def. Br.") (Doc 56-1) at 26.

by the Department excludes documents which contain the birth dates of the Lineal Descendants, which is relevant to establish that Plaintiffs and other Lineal Descendants were over eighteen years of age in 1998, and therefore entitled to vote on the adoption of the governing documents that the Department concluded were adopted by the Tribe in 1998.

The Genealogies should have been included in the record because the information in the Genealogies regarding the existence and birth dates of the Tribal members demonstrates that the Department (1) failed to consider all of the relevant factors in making its 2011 Decision, and (2) improperly excluded documents adverse to its 2011 Decision. *See Camp v. F.W. Pitts*, 411 U.S. 138, 142 (1973); *Env'tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981); *Amfac Resorts v. U.S. Dep't of the Interior*, 143 F.Supp.2d 7, 11 (D.D.C. 2001). The Genealogies directly contradict the Department's conclusion that the Tribe currently consists of only five members. (AR 002049) Because the Genealogies contain birth dates, they would show that scores, if not hundreds, of the Lineal Descendants were over 18 years of age in 1998, and thus entitled to vote on any governing documents adopted by the Tribe. The Department should have considered this evidence, and it improperly omitted this evidence from the record.

In *Public Citizen v. Heckler*, 653 F. Supp. 1229 (D.D.C. 1987), the Court held that a Department of Health and Human Services decision not to ban interstate sales of raw milk was arbitrary and capricious. In ruling that the agency improperly refused to include certain agency documents in the administrative record, the Court stated:

The documents HHS wishes to exclude from the administrative record were known to HHS at the time of their decisionmaking, are directly related to the decision made, and are adverse to the agency's position. These documents are indicative of a lack of rationality on the part of HHS in the decisionmaking process.

*Id.* at 1237. The same is true here with regard to the Tribal Genealogies. It is undisputed that these documents were known to the Interior Department at the time of the 2011 Decision, are directly related to the 2011 Decision, and are adverse to the Interior Department's decision. Moreover, the Genealogies are indicative of a lack of rationality on the part of the Department in its decisionmaking process, in that the 2011 Decision fails to offer any explanation for excluding these members from the Tribe.

In order to avoid delay and to protect the privacy of the Tribal members who submitted Genealogies to the Department, Plaintiffs sought to have the record supplemented with a proffered Affidavit of Plaintiff Velma WhiteBear, who is responsible for maintaining the Tribe's membership roster. The WhiteBear Affidavit provides information regarding the number of Lineal Descendants who were over the age of 18 in 1998, without unnecessarily adding to the volume of the agency record before the Court, or revealing private information of Tribal members. Unfortunately, Defendants object to this reasonable procedure. This objection is especially unfounded given that Defendants do not actually dispute the information in the Affidavit regarding the ages of the members who submitted genealogies.

Defendants object to the WhiteBear Affidavit because it "summarize[s] the extensive historical documents submitted to the BIA in 2007." Opposition Br. at 6. However, Defendants do not claim that the information in the Affidavit is false. Nor do they explain why it is a bad thing for the Court and the parties to utilize an accurate summary rather than the extensive documentation that is summarized. Given that Defendants do not deny the accuracy of the information in the Affidavit, it should be accepted as a summary document in lieu of having to burden the record with scores of Genealogies containing personal information of Tribal members.

Defendants contend that the administrative record submitted by the Department "includes all documents that were directly or indirectly considered by the decision-maker." Opposition Br. at 7. That may be the case. But it does not address the fact that the Genealogies were before the Department and were actively reviewed during the administrative process. This assertion is not speculation; Defendants' summary judgment brief admits that the BIA, a defendant in this case, reviewed these documents and reached conclusions about them. *See* Def. Br. at 26 ("by May of 2007, the BIA had only conducted an 'internal review' of the applications and genealogies," and "had concluded which applicants are lineal descendants . . .").

Defendants' fallback is to insist that, although the Genealogies were in the Department's possession when the Department was formulating its 2011 Decision, Plaintiffs have not proven that the Assistant Secretary – Indian Affairs, who authored the Decision, had the Genealogies before him. Opposition Br. at 9. There is zero support for this argument, which would put a premium on federal agencies withholding key documents from decision-makers.

For this argument, Defendants rely on *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1 (D.D.C. 2006). That case is inapposite. In *Pacific Shores*, the plaintiffs failed to show that the documents they sought to add to the record were actually before the decision maker, rather than merely before "before the entire [agency]". *Id.* at 6. The plaintiffs "impl[ied] that the [U.S. Army Corps of Engineers] possessed some of the documents" that the plaintiffs wanted in the record "because [p]laintiffs obtained them through a Freedom of Information Act request." *Id.* at 7. But they provided "no evidence that the Corps' decisionmaker(s) were actually aware of" the documents that plaintiffs sought to include. *Id.* The court held that the plaintiffs should have "describe[d] when the documents were presented to the agency, to whom, and under what context." *Id.*

In this case, however, Plaintiffs are not alleging that the Genealogies merely happened to be somewhere within the Interior Department. Rather, the Genealogies were specifically requested by the Bureau of Indian Affairs ("BIA") in 2007 in connection with its efforts to facilitate a meeting of the Tribe's members so that the Tribe could address governance issues. (AR 001501, 002105) The 2011 Decision at issue in this case decides Ms. Burley's appeal challenging those BIA efforts, and addresses the very same governance issues relating to the Tribe.

In addition, evidence already in the record clearly "describe[s] when the documents were presented to the agency, to whom, and under what context." *Pacific Shores*, 448 F. Supp. 2d at 7. (AR 002105-002108 (Declaration of BIA Superintendent Troy Burdick explaining that the BIA received the Genealogies from Lineal Descendants in response to the 2007 public notice, and that it evaluated them but took no action)) Moreover, Plaintiffs brought the Genealogies to the AS-IA's attention in their briefing on remand, before the Assistant Secretary issued the 2011 Decision. (AR 002139-002140 (stating that the BIA had not released the results of its review of the information received in response to the 2007 public notice)) Plaintiffs also submitted a Tribal Roster with their briefing to the Assistant Secretary that included the names of all adult Lineal Descendants identified through the Tribe's own outreach efforts and "in connection with the 2007 Public Notice." (AR 002140) Finally, individual Plaintiffs in this case submitted affidavits stating that they had submitted Genealogies to the BIA in response to the 2007 public notice. (Affidavits of individual Plaintiffs Yakima Dixie, Velma WhiteBear, Antone Azevedo, Michael Mendibles, Antonia Lopez and Evelyn Wilson, Exhibits 2-7 to Plaintiffs' Motion for Preliminary Injunction, Doc. # 8) Defendants cannot plausibly dispute that the Department's

"decisionmaker(s) were actually aware of" the Genealogies when the 2011 Decision was made. *Pacific Shores*, 448 F.Supp.2d at 7.

Finally, there is no merit to Defendants' assertion that the Genealogies (and the WhiteBear Affidavit) are "neither directly related nor are they adverse to the 2011 Decision." Opposition Br. at 12. Defendants' argument depends on the theory, advanced for the first time in Defendants' summary judgment brief, that the Tribe's membership is limited to distributees named on the 1967 Sheep Ranch distribution plan, and their descendants. Defendants' litigation theory has no bearing on the Assistant Secretary's duty to consider all relevant information in making the 2011 Decision, especially since the theory is found nowhere in his Decision. Defendants cannot limit the administrative record to suit their litigation strategy. The Genealogies are directly relevant to the issue of whether the Department acted arbitrarily and capriciously in allowing a rogue individual, who claims to be a Tribal member, to seize control of the Tribe and its governance with no consideration whatsoever for hundreds of Lineal Descendants who were of majority age at the time and who should have been afforded an opportunity to participate in the proceedings.

### **CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the Motion to Supplement the Administrative Record.

Respectfully submitted,

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