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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TIMOTHY AARON JOHN, TRAVIS AARON JOHN, TIFFANY LYNNAE JOHN, TYRONE FRED JOHN, SHIRLEY L. PALMER, LESLIE M. PALMER, JALEEN M. FLOWERS, and JESSIE WADE FLOWERS, Plaintiffs, v. THE SECRETARY OF THE INTERIOR, through its Acting Assistant Secretary, BUREAU OF INDIAN AFFAIRS, its officers, servants, agents, employees, representatives, and attorneys, Defendants.	Case No. 3:14-cv-247-LRH-VPC DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT and DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (#35)

Come now the federal defendants (hereinafter "Secretary" or "Secretary of the Interior") identified in the caption of the complaint, through their undersigned counsel, and file their cross-motion for summary judgment. In accordance with the briefing schedule (#34) approved by the Court, this cross-motion for summary judgment will also serve (through a duplicate filing) as the Secretary's response to

plaintiffs' motion for summary judgment (#35). The Secretary submitted the Administrative Record (AR) (#32) regarding the decisions being challenged jointly by the eight plaintiffs. By stipulation (#33), the parties agreed that "[i[f any of the plaintiffs intend to further challenge the Secretary's non-eligibility determinations, such plaintiff shall file his/her motion for summary judgment and corresponding memorandum of law" by the established deadline. The issues and claims remaining in this action may now be adjudicated by the Court through the cross-motions for summary judgment and the Secretary's AR regarding the agency action being challenged by plaintiffs.

As discussed below, the agency decisions being challenged by plaintiffs should be affirmed by this Court because they are consistent with the facts supplied by materials in the AR and are not arbitrary, capricious, or contrary to law. Accordingly, plaintiffs' motion for summary judgment (#35) should be denied and the Secretary's cross-motion should be granted.

This cross-motion is based on the papers on file herein and the memorandum of law below. As required by the Order (#34) establishing the briefing schedule, an Appendix is filed herewith containing the AR materials referenced in the Secretary's memorandum of law below.[1]

Respectfully submitted,

DAYLE ELIESON
United States Attorney

/s/ Greg Addington
GREG ADDINGTON
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[1] The AR consists of 1119 pages of materials supplied to the Court in electronic format. The Certification of Completeness and an Index for the AR are attached to the Notice of Submission of Administrative Record (#32). Because the AR necessarily reflects the agency's decisions on eligibility applications for each of the eight plaintiffs, the AR has many duplicate entries.

The Appendix filed herewith includes the documents necessary for the Court's disposition of this case.

MEMORANDUM OF LAW IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action under the Administrative Procedure Act (APA) seeks judicial review of related non-eligibility determinations made by the Secretary's designee regarding the eligibility of eight individuals for inclusion on the Western Shoshone Judgment roll. The eight plaintiffs are related to one another and share a common family heritage. As to each of the eight plaintiffs, the Secretary's designee determined that each individual did not demonstrate eligibility for inclusion on the Western Shoshone Judgment roll because he or she did not demonstrate the requisite 25% (1/4) Western Shoshone blood quantum.

Plaintiffs Timothy John, Travis John, Tiffany John, and Tyrone John (the "John plaintiffs") are four siblings with a common parentage, the children of Jennifer John and Hansen John. The John plaintiffs claim Western Shoshone ancestry through their mother – Jennifer John.

Plaintiffs Shirley Palmer, Leslie Palmer, Jaleen Flowers, and Jessie Palmer (the "Palmer plaintiffs") are four siblings with a common parentage, the children of Dorothy Palmer and Steve Palmer. The Palmer plaintiffs claim Western Shoshone ancestry through their mother – Dorothy Palmer.[2]

The four John plaintiffs and the four Palmer plaintiffs all claim Western Shoshone ancestry through a lineage with a common great-great grandmother – Hattie Dyer. Whatever Western Shoshone ancestry was possessed by Hattie Dyer (who died in 1976) was passed through succeeding generations to the John plaintiffs and the Palmer plaintiffs through their common grand-parents (Fred and Leona Hicks) and plaintiffs' respective mothers (Jennifer John and Dorothy Palmer). The eligibility of the John

[2] Jennifer John and Dorothy Palmer are sisters, children of Fred Hicks and Leona Hicks. The John plaintiffs are cousins to the Palmer plaintiffs.

plaintiffs and the Palmer plaintiffs for inclusion on the Western Shoshone Judgment roll turns on the tribal ancestry of their great-great grandmother Hattie Dyer. If Hattie Dyer was full-blood Shoshone (as claimed by each of the eight plaintiffs), then the plaintiffs would each possess the requisite 25% Western Shoshone blood quantum for inclusion on the Western Shoshone Judgment roll. On the other hand, if Hattie Dyer was not full-blood Shoshone but rather was ½ Paiute (as determined by the Secretary) – or, indeed, if she was anything other than full-blood Western Shoshone - then the plaintiffs would not meet the 25% Western Shoshone blood quantum eligibility threshold.

Notably, and as discussed below, an application was submitted in 1975 on behalf of Hattie Dyer for Hattie Dyer to share in the distribution of monies through the Northern Paiute Judgment fund – monies reserved for those with Paiute tribal ancestry. Hattie Dyer's application, submitted on Hattie's behalf by her daughter, initially was denied by Bureau of Indian Affairs (BIA) but then reversed on administrative appeal. Hattie Dyer demonstrated her Paiute tribal ancestry during the administrative appeal process (pursued by Hattie's daughter following Hattie's death) through probate records, personal testimonials, and tribal census records. The current claim by the John plaintiffs and the Palmer plaintiffs requires them to impugn the integrity of the earlier (successful) effort by Hattie Dyer and her immediate descendants to establish Hattie Dyer's Paiute ancestry and to thereby obtain funds reserved for those with Paiute tribal ancestry. The Secretary's 1977 eligibility determination regarding Hattie Dyer's application for Paiute-based benefits – a determination supported by substantial evidence supplied in the earlier administrative appeal – would be incompatible with a determination now that Hattie Dyer was full-blood Shoshone. Hattie Dyer's direct descendants already have established Hattie Dyer's Paiute ancestry in order to obtain Paiute-based benefits and the current effort by *other*

descendants of Hattie Dyer to now claim Shoshone-based benefits was properly rejected by the Secretary.[3]

The Secretary's challenged determination regarding plaintiffs' eligibility for inclusion on the Western Shoshone Judgment roll is supported by the AR and is not arbitrary or capricious. Accordingly, plaintiffs' motion for summary judgment should be denied and the Secretary's cross-motion should be granted.

II. THE WESTERN SHOSHONE JUDGMENT FUND

In 1951, various tribes and groups of Indians, later denominated as the "Western Shoshone Identifiable Group," filed a claim in the Indian Claims Commission[4] seeking compensation from the United States for the loss of aboriginal title to certain lands in Nevada and California. *See United States v. Dann*, 470 U.S. 39, 41 (1985) (discussing the litigation). In 1962, eleven years after the Western Shoshone claim was filed, the Commission entered an order finding that the Identifiable Group had been "deprived of their lands" in the nineteenth century by "gradual encroachment by whites, settlers and others," *Shoshone Tribe v. United States*, 11 Ind. C1. Comm. 387, 416 (1962), and later awarded the Identifiable Group approximately $26 million in compensation. *W. Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318, 453 (1977).

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[3] Curiously, plaintiffs assert "[t]here is no dispute of facts." *See* Plaintiffs' Motion (#35), p.11, line 14. While there is no dispute regarding the content of the AR and the Secretary's eligibility determinations for each of the eight plaintiffs, there is one and only one dispute between the parties in this case; namely: was Hattie Dyer full-blood (4/4) Western Shoshone or not? As discussed below, the Secretary properly answered that question in the context of plaintiffs' applications for Shoshone-based benefits.

[4] Prior to its dissolution in 1978, the Commission had jurisdiction over claims brought on behalf of "an Indian tribe, band, or other identifiable group" of Indians, arising from the taking of aboriginal lands by the United States without payment of agreed upon compensation. 25 USC § 70a (1976), 60 Stat. 1049; 79 Pub.L. 726 (August 13, 1946).

The Court of Claims affirmed the award and certified it to the General Accounting Office in 1979, which automatically set aside the amount of the award and deposited it into an interest-bearing trust account in the United States Treasury. *Dann*, 470 U.S. at 42. The process of adopting a plan for distributing a judgment fund obligates the Secretary of the Interior to consult with affected groups and, if there is consensus, prepare and submit a proposed plan to Congress. 25 USC § 1402(a). Where, as here, there is no consensus, the responsibility remained with Congress to enact a distribution plan. *See* 25 USC § 1402(c), (d).

In 2004, Congress enacted the Western Shoshone Claims Distribution Act, Pub. L. 108-270, 118 Stat. 805, ("2004 Act") which required the Secretary of the Interior to establish a roll consisting of all individuals living on the date of enactment who have at least one-quarter (1/4) degree of Western Shoshone blood, are United States citizens, and who were not certified as eligible to receive a *per capita* payment from another previously appropriated judgment fund based on aboriginal land claims. *Id.*, § 3(b).[5] The 2004 Act provides that, after establishing the roll, the Secretary shall distribute 100 percent of the funds in shares "as equal as practicable" to those on the roll. *Id.*, § 3(c)(1). As of June 2003, the judgment fund held approximately $142 million resulting from the original Indian Claims Commission judgment. S. Rep. No. 108-151, at 2 (2003).

On September 28, 2012, the Western Shoshone Judgment roll for the distribution of the Western Shoshone Judgment funds was completed and approved in accordance with the 2004 Act and the regulations promulgated thereunder (25 CFR Parts 61 and 62 – *see*, specifically, 25 CFR § 61.4(k)). Final distributions were made to eligible recipients via direct deposit to bank accounts on September 29, 2012, and via check on October 2, 2012. The total number of eligible recipients was 5,361.

[5] The statutory eligibility criteria can now be found at 25 CFR § 61.4(k), the regulations which also govern the process by which BIA reviewed applications for inclusion and compiled the rolls of persons eligible to share in the distribution of funds.

Eligibility for a distributive share of the fund is not tied to membership in any tribe shown on the list of federally recognized tribes but instead was directed by Congress to be determined by a minimum (1/4) blood quantum level. There is no recognized tribe encompassing the entire population of Western Shoshone people. Rather, there is a series of tribes and bands throughout the Great Basin, principally in Nevada, whose members are of Western Shoshone heritage. *See* "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." 80 Fed.Reg. 1942 (January 14, 2015). Most of the persons who met the statutory eligibility criteria are members of one of several currently recognized tribes.

In determining the blood quantum of applicants, the Secretary considered information from a variety of sources, including historical census rolls prepared by BIA officials and data on tribal members provided by tribes. In so doing, the Secretary followed the directive in 25 CFR § 61.4(k)(2) to use Indian census rolls prepared by BIA officials between 1885 and 1940 as well as "other documents acceptable to the Secretary." The burden of proof to demonstrate eligibility rested with the applicant. *See* 25 CFR § 61.9.

III. PLAINTIFFS' APPLICATIONS FOR INCLUSION

There are eight plaintiffs in this case, each claiming the Secretary acted improperly in denying their applications for inclusion on the Western Shoshone Judgment roll. The four "John plaintiffs" presented their applications through their mother – Jennifer John. *See* Appendix, p.138-141 (application of Travis John). The four "Palmer plaintiffs" presented individual applications. *See* Appendix, pp. 741-742, 1101-1102. The applications all were denied by the BIA Regional Director through letters that described the administrative appeal rights for those applicants who were dis-satisfied with the Regional Director's decision. *See* Appendix, pp. 92-93, 672-673. The eight plaintiffs filed their

administrative appeals, with supporting documentation regarding the plaintiffs' claimed Western Shoshone tribal ancestry. *See* Appendix, pp. 6-7, 653-654. [6]

Plaintiffs' administrative appeals were presented for final decision to the Acting Assistant Secretary-Indian Affairs. The administrative appeal process included review of birth records, death records, probate records, tribal census rolls, "family tree" records, and other materials from tribal and BIA resources. *See* Appendix, pp. 14, 16-18, 42, 47, 140-141. The administrative appeals were denied through final decision letters describing the Western Shoshone Judgment roll eligibility criteria and the factual analysis leading to the non-eligibility final decisions. *See* Appendix, pp. 3-5, 770-772. The final decision letters also address the determinative issue regarding the tribal ancestry of Hattie Dyer and the conflicting historical records pertaining to Hattie Dyer. *Id.* Specifically, the final decision letters state:

> After reviewing various census rolls, probate records for Hattie Dyer, applications to participate in the Northern Paiute payment submitted by Hattie Dyer, Agnes Dyer Young, and Virginia K. Paulson, the fact that all three received Northern Paiute payment from Docket 87, and other records on file at the Western Regional Office, blood degree determinations were made for your family.

Appendix, p. 771.

Plaintiffs acknowledge the tribal ancestry of their great-great grandmother Hattie Dyer is the determinative factual issue for their eligibility for inclusion on the Western Shoshone Judgment roll.

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[6] References to the Appendix, filed herewith, use the Appendix page number references corresponding to where the document is located in the AR. The AR contains many duplicate entries with the same document appearing many times because the AR reflects the Secretary's individualized eligibility determinations for each of the eight related plaintiffs. For example, the AR contains multiple eligibility applications and multiple eligibility determination letters – many of them identical except for the name of the applicant. The AR also contains multiple copies of documents pertaining to Hattie Dyer's application for Paiute-based benefits in the mid-1970's and historical documents demonstrating her Paiute ancestry.

The Appendix provides materials from the AR pertaining to Hattie Dyer's application for Paiute-based benefits and also provides representative letters and applications to show the administrative processing of plaintiffs' related applications.

Quite plainly, if Hattie Dyer was full-blood Western Shoshone then the plaintiffs would each possess the requisite 25% Western Shoshone blood quantum for inclusion on the Western Shoshone Judgment roll. On the other hand, if Hattie Dyer was anything other than full-blood Western Shoshone (as determined by the Secretary) then the plaintiffs would not meet the 25% Western Shoshone blood quantum eligibility threshold.

The Secretary was faced with conflicting information regarding the Western Shoshone heritage of Hattie Dyer. To resolve the issue of Hattie Dyer's Western Shoshone - Paiute heritage, the Secretary compiled and examined available relevant information – including the information provided through historical census records, probate records, and tribal enrollment records. Significantly, Hattie Dyer (through an application submitted on her behalf by her daughter (Appendix, pp. 40-42)) previously had expressly and affirmatively sought a distributive share of funds statutorily reserved to persons with Paiute ancestry. In her application for those Paiute-based benefits, Hattie Dyer was affirmatively represented to be ½ Paiute.

Initially, BIA rejected the claim of Hattie Dyer for inclusion on the Paiute eligibility roll (Appendix, p. 35) but that determination was reversed following administrative appeal of BIA's initial non-eligibility determination (Appendix, p. 45). The record of BIA's action on the Hattie Dyer appeal regarding her eligibility for Paiute-based funds reflects the factual basis for BIA's action. *See* Appendix, p. 46. The BIA memorandum (Appendix, p. 46) documenting BIA's action on the Hattie Dyer appeal and BIA's review of pertinent materials states as follows describing the materials reviewed by BIA in the Hattie Dyer appeal:

> ADDITIONAL EVIDENCE: 1) Ltr dated 5-6-77, 2) notarized affidavit dtd 4-23-77, 3) Case Record Card, 4) ltr from Levi Longweather dtd 12/22/42, 5) Certificate of Death, 6) Census Roll Fallon Res. verifying relatives are Paiute Indians.

Appendix, p. 46.[7]

Hattie Dyer's successful administrative appeal in 1977 demonstrated her Paiute tribal ancestry through probate records, personal testimonials, and tribal census records. Based on her successful appeal, she and her descendants were found eligible to receive funds reserved for those with Paiute tribal ancestry. Hattie Dyer's successful application for Paiute-based benefits can not be squared with plaintiffs' current effort to obtain Shoshone-based benefits because plaintiffs' efforts require Hattie Dyer to be full-blood Shoshone – a tribal ancestry Hattie Dyer expressly rejected with appropriate historical documentation establishing her own Paiute ancestry.

In addition to the materials provided through the Hearne declaration (#35-1, *see* fn. 7, *supra*), the AR also supplies materials adequately supporting the Secretary's non-eligibility decisions in this case. Focusing on the Paiute-Shoshone ancestry of Hattie Dyer (the determining factor for the plaintiffs' eligibility), the AR contains the following references to Hattie Dyer's Paiute ancestry:

1) September 27, 2010 memorandum (Appendix, p. 16) stating "On the 1934 census both Fred Dyer, DOB: 1/1/1892 and Hattie Dyer, DOB: 4/14/1893 appear as 4/4 Paiute…"; further stating "The family tree submitted with Hattie Dyer's application to share in the Northern Paiute Indian Judgment Award, Docket 87 indicated that she is ½ Paiute"; further stating "…documents submitted by Hattie Dyer and the 'Basic Membership Roll of the

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[7] This BIA memorandum (p. 46) also is attached as page 2 to the Declaration of Treva Hearne (#35-1). The Hearne declaration (#35-1) also includes copies of the 6 documents referenced in the BIA memorandum. Those 6 documents are not included in the AR but were retrieved and provided to plaintiffs' counsel at her request. The Hearne declaration suggests these documents are "missing" from the AR and the declaration includes a small fragment of a larger e-mail exchange between counsel to erroneously suggest these materials were somehow concealed from plaintiffs or their counsel. In fact, the documents attached to the Hearne declaration properly were not included in the AR for this case because they were not part of the Secretary's record on review. Rather, the documents are part of the AR pertaining to the Hattie Dyer appeal in the mid-1970's.

The AR for this case contains the BIA memorandum (Appendix, p. 46) describing the documents relied on and the materials documenting BIA's action on the Hattie Dyer appeal in 1977, materials which fully support the Secretary's determinations being challenged herein by the plaintiffs. The Secretary does not object to the materials attached to the Hearne declaration being reviewed by the Court – those documents fully support the integrity of BIA's action on the Hattie Dyer appeal 40 years ago and also support the Secretary's eligibility determinations under review herein.

Fallon-Shoshone Tribe of the Fallon Reservation and Colony, page 14' indicated that she is ½ Paiute."

2) September 17, 2010 memorandum (Appendix, p. 17) describing ancestry analysis, including reference to "testimony establishes that she [Hattie Dyer] is of Paiute descendancy."
3) Probate Record March 1978 (Appendix, pp. 27-28) regarding death of Hattie Dyer stating "…testimony adduced at the hearing establishes that she was of Paiute Indian descent and such testimony further establishes the probable reason why the records are apparently in error."
4) Hattie Dyer's application for distributive share of Northern Paiute Judgment Fund (Appendix. pp. 40-42).
5) BIA decision on Hattie Dyer appeal regarding her eligibility for share of Paiute Judgment Fund (Appendix, p. 45-46).

Based on the well-supported determination in 1977 that Hattie Dyer had properly claimed to be 1/2 Paiute, Hattie Dyer and her descendants were found eligible to participate in the distribution of Paiute-based funds. Given that earlier well-supported determination regarding the Paiute ancestry of Hattie Dyer, the Secretary determined that the eight plaintiffs herein did not (could not) establish that they possessed the requisite 1/4 Western Shoshone blood quantum for inclusion on the Western Shoshone Judgment roll. Plaintiffs contend that the Secretary's determination should be overturned as arbitrary and capricious.

IV. APA STANDARD OF REVIEW

Agency action may be set aside under the APA, 5 U.S.C. § 706(2)(A), only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency's action receives a presumption of validity, and it will not be vacated unless it

> "has relied on factors which Congress had 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."

National Ass'n of Homebuilders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007), *quoting Motor Vehicle Mrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Review under the arbitrary and capricious standard is narrow, and the court does not substitute its judgment for that of the agency. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). The courts apply deference to an agency's determination in an area involving a "high level of technical expertise." *Id.* at 993, *quoting Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003), *and Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). Courts are not free to impose procedural requirements on an agency not explicitly enumerated in the pertinent statutes. *Id.* at 993.

Disagreements among the contributors of recommendations to the final decision-maker do not render the final decision arbitrary or capricious. The Supreme Court held in *National Ass'n of Homebuilders, supra*, 551 U.S. at 658-59:

> [T]he only "inconsistency" respondents can point to is the fact that the agencies changed their minds - something that, as long as the proper procedures were followed, they were fully entitled to do. The federal courts ordinarily are empowered to review only an agency's final action, see 5 U.S.C. § 704, and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decisionmaking process arbitrary and capricious.

V. DISCUSSION

The Secretary's non-eligibility determinations regarding the John plaintiffs and the Palmer plaintiffs were not arbitrary, capricious, an abuse of discretion, or contrary to law. BIA utilized its considerable expertise and experience to seek out and collect probative evidence regarding the Western Shoshone heritage of the eight plaintiffs just as it previously had done in connection with the Paiute heritage claimed by Hattie Dyer – the great-great-grandmother of plaintiffs. Quite plainly, the Secretary utilized useful and appropriate resources when determining issues involving tribal heritage and tribal ancestry.

Given the prior application of Hattie Dyer to receive Paiute-based funds and given the earlier well-supported determination that Hattie Dyer was 1/2 Paiute, it was not unreasonable or arbitrary for the Secretary to again reach the same conclusion and reject plaintiffs' claim that Hattie Dyer actually

was full-blood Shoshone. In making a determination regarding plaintiffs' own claims of 1/4 Western Shoshone blood quantum, the Secretary considered the conflicting historical information and made a determination which is fully consistent with prior tribal ancestry determinations, reliable tribal resources, census records of related persons, and historical statements of tribal ancestry by the specific individual (Hattie Dyer) whose tribal ancestry was then being assessed. While plaintiffs certainly can identify historical materials which suggest a contrary result, the Secretary was charged with examining *all* pertinent materials and making an eligibility determination consistent with the record as a whole. The Secretary discharged that responsibility with a decision which overcomes plaintiffs' challenge under the APA because there is a rational basis for the Secretary's decision and the decision is supported by facts documented in the AR.[8]

Plaintiffs elaborate on their assertion that there is more or better record evidence to support a finding that Hattie Dyer was full-blood Western Shoshone rather than a finding to the contrary. Yet in 1977, plaintiffs' ancestors persuaded BIA that the historical evidence was sufficient to support a finding that Hattie Dyer was ½ Paiute. At the urging of plaintiffs' relative (Hattie Dyer's daughter), BIA determined that Hattie Dyer was ½ Paiute and thereby allowed plaintiffs' predecessors to share in the distribution of the Paiute Judgment funds. This Court should not permit plaintiffs to now claim eligibility

[8] This action is analytically identical to an earlier action adjudicated by this Court. In *Tabibian/Adkins v. Secretary of Interior*, 3:15-cv-253-LRH-WGC, this Court rejected a similar challenge to the Secretary's determination regarding another individual's eligibility for inclusion on the Western Shoshone Judgment roll. Just as in the present case, the eligibility determination in *Tabibian/Adkins* turned on the tribal heritage of the plaintiff's ancestor. Just as in the present case, there was conflicting historical evidence regarding the tribal heritage of the remote ancestor. Just as in the present case, there was a prior successful application for Paiute-based funds that established the Paiute heritage of the remote ancestor – a determination incompatible with the subsequent effort by the plaintiff to obtain Shoshone-based benefits. Just as in the present case, the plaintiff was seeking Shoshone-based funds by asserting Secretary error in the prior determination of Paiute heritage. Summary judgment was entered in favor of the Secretary in the *Tabibian/Adkins* action (*see* Order entered March 14, 2016). The same analysis yields the same result in this case.

to share in the Western Shoshone Judgment fund by assailing the very evidence earlier put forward by their relatives.

Plaintiffs acknowledge their eligibility for inclusion on the Western Shoshone Judgment roll turns on whether Hattie Dyer was full-blood Western Shoshone. If Hattie Dyer was not full-blood Western Shoshone, plaintiffs are not eligible. As discussed above, the Secretary had a rational basis to conclude that Hattie Dyer was not full-blood Western Shoshone and the Secretary was not *required* to reach a contrary result on account of conflicting historical records. Accordingly, plaintiffs' APA-based judicial challenge to the Secretary's decision fails.

VI. CONCLUSION

Based on the foregoing, plaintiffs' motion for summary judgment should be denied and the Secretary's cross-motion for summary judgment should be granted.

Respectfully submitted,

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United States Attorney

/s/ Greg Addington
GREG ADDINGTON
Assistant United States Attorney

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT and DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (#35) was made through the Court's CM/ECF system, which will automatically e-serve the same on the attorneys of record set forth below, on March 30, 2018:

Treva Hearne, Esq.
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/s/ Greg Addington
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