DAYLE ELIESON
United States Attorney

GREG ADDINGTON
Nevada State Bar No. 6875
Assistant United States Attorney
Bruce R. Thompson Federal Building and U.S. Courthouse
400 South Virginia Street, Suite 900
Reno, NV 89501
(775) 784-5438
Greg.Addington@usdoj.gov

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TIMOTHY AARON JOHN, TRAVIS RAY JOHN, TIFFANY LYNNAE JOHN, TYRONE FRED JOHN, SHIRLEY L. PALMER, LESLIE L. PALMER, JALEEN M. FLOWERS, and JESSE WADE PALMER, 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-00247-RCJ-VPC DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT (#38)

Come now the federal defendants (hereinafter "Secretary" or "Secretary of the Interior"), through their undersigned counsel, and submit the following reply memorandum in further support of their cross-motion for summary judgment (#38). This reply memorandum concludes

the briefing of the parties' cross-motions for summary judgment in accordance with the briefing schedule (#34) approved by the court.

The agency decisions being challenged by plaintiffs should be affirmed by this court because they are consistent with the facts described in the Administrative Record (AR-(#32) and are not arbitrary, capricious, or contrary to law.[1] Accordingly, plaintiffs' motion for summary judgment (#35) should be denied and the Secretary's cross-motion (#38) should be granted.

Each of the eight plaintiffs sought inclusion on the Western Shoshone Judgment roll through applications submitted by them (the four "Palmer" plaintiffs) or by applications submitted on their behalf (the four "John" plaintiffs). Congress mandated that, in order to be eligible to share in the Western Shoshone Judgment fund, a person must have "at least 1/4 degree of Western Shoshone blood." 108 Pub.Law 270. As described in the Secretary's cross-motion for summary judgment (#38), the eight plaintiffs each attempted to demonstrate the requisite blood quantum by asserting 100% Shoshone heritage of a common remote ancestor – Hattie Dyer. Plaintiffs acknowledge their eligibility for inclusion on the Western Shoshone Judgment roll turns on whether Hattie Dyer was full blood Western Shoshone (in which case, plaintiffs would each qualify for inclusion) or was not full blood Western Shoshone (in which case, plaintiffs would not qualify for inclusion).

On the determinative issue of Hattie Dyer's Shoshone ancestry, the Secretary examined and considered historical materials from a variety of sources. One significant consideration was the fact that Hattie Dyer previously had been plainly and expressly identified as one-half Paiute

[1] Defendant Secretary also supplied an Appendix (#37-1) containing the materials from the AR that support the Secretary's final appeal determination denying plaintiffs' applications for inclusion on the Western Shoshone Judgment roll. Additionally, plaintiffs themselves supplied additional documentary materials (#35-1) which, though not part of the AR, reinforce the reasonableness of the Secretary's non-eligibility determinations.

on an application submitted to BIA on Hattie's behalf by her daughter. Hattie Dyer's claim of Paiute ancestry was successfully advanced in the late 1970's in connection with her (Hattie Dyer's) application for participation in a Paiute-based benefit distribution. After the Secretary's exhaustive examination in the late 1970's of tribal records, tribal census records, probate records, and individual testimonials from Hattie's contemporaries, the Secretary approved Hattie Dyer's claim of Paiute ancestry and her eligibility to participate in a Paiute-based benefit distribution.

Hattie Dyer's earlier successful effort to establish her Paiute ancestry obviously is incompatible with plaintiffs' current effort to argue Hattie Dyer's full-blood Western Shoshone ancestry. In their zeal to impugn the integrity of the Secretary's earlier determination (in 1977) regarding Hattie Dyer's eligibility for Paiute-based benefits, plaintiffs resort to demonstrably false statements and empty rhetoric. Plaintiffs falsely state: "Hattie Dyer was deceased when the Northern Paiute Judgment Fund application was submitted, appealed, and distributed." *See* Plaintiffs' Reply (#39), p. 2, lines 20-21.[2] Hattie Dyer died on January 20, 1976. *See* Appendix (#37-1), p. 27 (probate record); *see also* Death Certificate (#35-1, p.7. The application filed with BIA for Hattie Dyer to obtain Paiute-based funds was filed in September 1975. *See* Appendix (#37-1), p.40 (Hattie Dyer application).[3] Hattie Dyer plainly was very much alive when her

---

[2] The same false narrative is repeated twice more in plaintiffs' reply (#39). *See* p. 2, lines 8-9 ("The 2010 memo of the BIA referenced in the brief made the assumption that Hattie Dyer had submitted an application for Northern Paiute funds. Hattie Dyer was deceased."); p. 5, lines 4-6 ("The government admits that Hattie Dyer was deceased when the application was Northern Paiute funds was initiated…"). The false statement does not acquire veracity by being repeated.

[3] Plaintiffs are in no position to argue the 1975 application submitted on Hattie Dyer's behalf by her daughter is suspect because it was not submitted directly by Hattie herself. There is nothing peculiar or suspect about such an application. Applications for the John plaintiffs herein were likewise submitted on their behalf by their mother Jennifer John rather than by themselves individually. *See* Appendix, p. 3 (final appeal letter addressed to Jennifer John), p. 6 (appeal letter from Jennifer John on behalf of four John applicants); p. 92 (eligibility determination letter addressed to Jennifer John referencing "application filed on behalf of Tiffany Lynnae John").

application for Paiute-based benefits was "submitted" and "initiated," a fact well-documented through materials plaintiffs themselves have supplied.

Plaintiffs also falsely state: "Hattie Dyer is the last verifiable ancestor of these plaintiffs on the maternal side of the family. There is no verifiable evidence of her parents." *See* Plaintiffs' Reply (#39), p.4, lines 9-10. In fact, Hattie Dyer's 1975 application for Paiute-based benefits and the "family tree" provided with that application identifies Hattie's mother as Judy Longweather and her father as Mike McGuary (and also identifies Judy Longweather's parents by name - identifying them as "Paiute"). Likewise, Hattie Dyer's death certificate (provided by plaintiffs as an attachment to their reply brief (*see* #35-1, p.7)) identifies both of Hattie's parents by name (Judy Longweather and Mike McGuary). Again, documents provided by plaintiffs themselves rebut the rhetoric in plaintiffs' argument.

Plaintiffs erroneously argue the Secretary's non-eligibility determinations at issue here were based on a single unreliable document. *See* Plaintiff's Reply (#39), p. 3, line 13 ("The Agency relied upon a single document, the statement of Wuzzie George (sic)." The referenced letter signed by "Wizzie George" in April 1977 is attached to plaintiffs' cross-motion (#35-1, p. 3). That letter by Wizzie George describes her relationship with Hattie Dyer (they were cousins and Wizzie knew Hattie "since [they] were young girls") and further states Hattie's grandfather was a "full blood Paiute." The "Wizzie George" letter was one part of a larger package of historical materials supporting Hattie Dyer's 1975 application for Paiute-based benefits. Those historical materials are not part of the AR in this case (because they were not considered by the Secretary in connection with the plaintiffs' applications) but are included as an attachment to

plaintiffs' motion for summary judgment (#35-1).[4] Plaintiffs' effort to attack the reliability of the 1977 determination regarding Hattie Dyer's Paiute ancestry fails because the effort is rebutted by the AR and by the additional materials plaintiffs themselves have provided to the Court.

Moreover, the fact of Hattie Dyer's successful 1975 application for Paiute-based benefits (as summarized in the AR) was not the sole determinative factor in the Secretary's decisions regarding plaintiffs' eligibility for Shoshone-based benefits (just as Wizzie George's written statement was not the sole determinative factor regarding Hattie Dyer's application for Paiute-based benefits). Rather, the AR reflects the Secretary's comprehensive evaluation of historical materials relating to Hattie Dyer's Paiute ancestry, including census records, tribal membership rolls, probate records, testimony of contemporaries, and the fact of Hattie Dyer's successful application for Paiute-based benefits.

For example, the AR references the following:

- 1934 census identifying Hattie Dyer (and her brother) as 4/4 Paiute,
- Membership Roll of Fallon-Shoshone Tribe identifying Hattie Dyer as ½ Paiute,

---

[4] One of the factors considered by the Secretary in the non-eligibility determinations at issue here was the *fact* of Hattie Dyer's successful effort to establish her Paiute ancestry in the 1970's. That (undisputed) fact of Hattie Dyer's successful application for Paiute-based benefits is reflected in the AR along with a *summary description* of the historical materials that supported that determination. *See* Appendix (#37-1), p. 46. At the request of plaintiffs' counsel, those historical materials were retrieved and produced – they are attached to plaintiffs' motion (#35-1). In an odd spasm of incoherence, plaintiffs turn this accommodation into an argument that the Secretary was somehow "hiding" these materials "in obvious embarrassment over its lack of veracity and support." *See* Plaintiff's Reply (#39), p.3, lines 9-10. In fact, those historical materials are not part of the AR because they were not considered by the Secretary – though they obviously lend additional support to the conclusion that Hattie Dyer was not full-blood Western Shoshone and supported the Secretary's decision in the 1970's that Hattie Dyer was eligible to share in a Paiute-based distribution of funds.

- Testimony describing Hattie Dyer's Paiute descendancy,
- Hattie Dyer probate record referencing testimony regarding Hattie Dyer being of Paiute Indian descent,
- Hattie Dyer application for distributive share of Northern Paiute Judgment Fund and BIA decision on that application.

See Appendix, pp. 16, 17, 27-28, 40-42, 45-46.

To make the eligibility determinations regarding plaintiffs' applications, the Secretary used information and materials the Secretary was permitted to consider under the applicable regulations. 25 CFR § 61.9 provides as follows:

> The burden of proof rests upon the applicant or tribal member 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 claim of eligibility for enrollment. Records of Bureau of Indian Affairs may be used to establish eligibility.

Section 61.9 is a non-exhaustive description of the types of materials an applicant may use to support an application for eligibility. Once an application is submitted, the Secretary is directed to "consider each application, *all documentation*, and when applicable, tribal recommendations or determinations." *See* 25 CFR § 61.11(a)(italics added).[5] That is precisely what the Secretary did in making the well-supported non-eligibility determinations regarding plaintiffs' applications for inclusion on the Western Shoshone Judgment roll.

Nothing the Secretary has done in connection with plaintiffs' eligibility for a distributive share of the Western Shoshone judgment is detrimental to their tribal identity or heritage. The

[5] Plaintiffs cite to 25 CFR 61.11(b) and suggest the Secretary failed to give due regard to "tribal recommendations or determinations." Section 61.11(b) requires the Secretary to "accept the recommendations or determinations of the Tribal Committee unless clearly erroneous." Here, there was no "recommendation[] or determination[] of [a] Tribal Committee" regarding the plaintiffs' tribal ancestry and section 61.11(b) was therefore inapplicable.

Secretary did nothing more (and nothing less) than make a statutorily required determination regarding their statutory eligibility for participation in a statutory benefit distribution.

The Secretary determined plaintiffs did not demonstrate the requisite 1/4 Western Shoshone blood quantum for inclusion on the Western Shoshone Judgment roll. Plaintiffs' APA challenge to the Secretary's determinations must fail because it was not unreasonable or arbitrary for the Secretary to reach the same conclusion reached in 1977 regarding the Paiute ancestry of Hattie Dyer. Contrary to plaintiffs' argument, the Secretary was not *required* to now reach a conclusion (that Hattie Dyer was full-blood Shoshone) directly in conflict with the Secretary's earlier conclusion (that Hattie Dyer was mixed-blood Paiute). The Secretary was charged with examining *all* pertinent materials and making eligibility determinations consistent with the record as a whole. The Secretary discharged that responsibility with decisions that survive plaintiffs' challenge under the APA because there is a rational basis for the Secretary's decisions and the decisions are supported by facts documented in the Administrative Record.

Based on the foregoing, plaintiffs' motion for summary judgment (#35) should be denied and the Secretary's cross-motion for summary judgment (#38) should be granted.

Respectfully submitted,

DAYLE ELIESON
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' REPLY MEMORANDUM IN FURTHER SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT (#38) 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 July 3, 2018:

Treva Hearne, Esq.
595 Humboldt Street
Reno, NV 89509

_/s/ Greg Addington_____
GREG ADDINGTON