

submitted overwhelming factual and expert opinion evidence that unidentified remains designated Manila #2 X-816 are those of Pvt Arthur H. Kelder. (Compl. Exh. 1 thru 16)

In addition to the evidence of the identity of unidentified remains X-816 submitted by Plaintiff, family reference samples (DNA) are available for all ten of the Grave 717 unknowns and would permit use of this modern identification technology if any party wishes to dispute the factual basis of the identification of X-816. Defendants have routinely employed DNA matching technology since at least 1998 when The Vietnam Unknown was disinterred from the Tomb of the Unknown in Arlington National Cemetery and identified as Lt. Michael J. Blassie.

Pvt Arthur H. Kelder perished while a prisoner in the infamous Cabanatuan POW camp. He and thirteen other fallen American heroes who died the same day were interred in the camp cemetery in communal grave number 717. These deaths were certified and burial documented by the camp graves registration officer. These records were retrieved after liberation of the camp and have been admitted in multiple judicial and administrative proceedings and found credible. The identities of those in the grave are undisputed.

After the war, the communal grave was opened and the remains of one man were immediately identified on the basis of information from the burial record and individually identified by an identification tag. The other recovered remains were all temporarily interred in Manila Cemetery #2 where the remains of three more men were identified on the basis of the burial record and military dental records.

Facing a congressionally mandated deadline to complete the Fort McKinley Military Cemetery, the ten still unidentified remains were interred there as unknowns before exhausting all possible avenues for identification. Records of the burials were then classified and restricted from public access. Family members were informed that the remains were “non-recoverable.”

III - Administrative Process History

By 2009, the records of Pvt Arthur H. Kelder had been automatically declassified due to time and were obtained by Plaintiff. Immediately recognizing that Kelder's remains were obviously one of no more than ten possibles, he contacted other family members who provided information of distinctive gold dental inlays which conclusively identified the unidentified remains designated as Manila cemetery #2 X-816 which were buried in grave A-12-195 in the Manila cemetery now operated by Defendant ABMC.

While there are established procedures to request exhumation of remains from a domestic cemetery operated or controlled by the Federal Government,¹ there is no equivalent statutory or regulatory process for a family to recover the not officially identified remains of a deceased American servicemember interred in an overseas cemetery operated by Defendant American Battle Monuments Commission (ABMC). Consequently, recovery of unidentified remains buried in an ABMC cemetery is handled under the same regulations as recovery of persons missing in action (MIA) whose whereabouts are unknown, an awkward and ill-suited process for the instant facts.

Therefore, Plaintiff first petitioned the U.S. Army Human Resources Command under Army Regulation 638-2 to recognize Manila Cemetery #2 unknown X-816 as the remains of Arthur H. Kelder. In response, the U.S. Army determined that they no longer had jurisdiction in such a case and forwarded Plaintiff's petition to Defendant Defense POW/MIA Office (DPMO) to be processed under Public Law 111-84 (codified as 10 U.S.C. § 1501 *et seq*) (Compl. Exh.

¹ 32 U.S.C. 553.19 and Army Regulation 290-5 addresses disinterments from Arlington National Cemetery; Army Regulation 210-190 addresses disinterments from Army post cemeteries; 38 CFR 38.621 addresses disinterments from National Cemeteries of the Department of Veterans Affairs

10). On November 23, 2011, Plaintiff also forwarded this same petition to Defendant DPMO and cited 10 U.S.C. § 1501 *et seq.* (Compl. Exh. 12).

No response has been received from DPMO and the administrative record filed on February 1, 2013 does not include this petition or reflect other action in response.

10 U.S.C. § 1501 *et seq.* directs that certain actions are to be taken when *new* evidence concerning an MIA is received from a government agency or designated person. Among these required actions are the convening of a status review board; inclusion of the new information in the missing persons' personnel file; and, the appointment of a missing person's counsel to represent the interests of the missing person.

Plaintiff next requested a meeting with representatives of the three military agencies involved. On February 25, 2012, Plaintiff met with Mr. Greg Gardner, Chief, Past Conflicts Repatriation Branch, U.S. Army Human Resources Command; Mr. Charles Henley, Manager of External Affairs, DPMO; and, Mr. Johnie E. Webb, Deputy to the Commander for External Relations and Legislative Affairs, Joint POW/MIA Accounting Command (JPAC). Each of these persons represented to Plaintiff that they were the "decision maker" for their agency with regard to the case of Pvt Arthur H. Kelder and Mr. Webb further asserted that he and his agency had the authority to further investigate and/or pursue the case, but that it was his decision not to do so. Mr. Gardner recommended that all ten unknowns should be disinterred for identification if any were disinterred and stated that family reference samples were available for all ten. The DPMO decision maker, Mr. Henley, was silent during the entire meeting.

IV - Administrative Record Review

In its review of an agency decision, the court must determine whether the agency "failed to consider an important aspect of the problem," or failed to "explain the evidence which is

available,” which would render the decision arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (“APA”). *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Such review is generally limited to the administrative record, and the Court must consider “the whole record or those parts of it cited by a party.” *Id.* at § 706. Judicial review under the arbitrary and capricious standard focuses on “the administrative record already in existence” when the agency made its decision, rather than “some new record made initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The court must consider “all evidence that was before the decision making body.” *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982).

To ensure adequate review based upon the administrative record, that record must be complete. To be whole, the administrative record must include everything that was before the agency at the time the challenged decision was made, and must include “all documents and materials *directly or indirectly* considered by agency decision-makers and include() evidence contrary to the agency’s position.” *Thompson v. Department of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)(emphasis added).

V - Discrepancies Indicating that the Administrative Record is Incomplete.

The record presented does not reflect any decision, nor would it support a decision. Many of the documents presented by Defendants as a complete administrative record are simply eyewash generated by a low level analyst and not relevant to a decision.

These irrelevant documents are a smokescreen to disguise the missing records and are not even complete themselves – for instance document number 6 is a transcript which explains details of the Cabanatuan burial process, but the burial record it explains is not included. Few of

the modern documents contain substantive recommendations and none of the DPMO or JPAC documents indicate any staff comments or recommendations as would be expected if the record was complete.

Examples of document discrepancies:

- Recommendations from the original identification boards are contained in the X-files (Admin. Record doc 27 through 36) and IDPF's (Admin. Record doc 37 through 49), but no indication of what evidence was considered by these boards. For instance, at one point the field identification board recommended the individual identification of remains Manila Mausoleum X4857 (a/k/a Manila #2 X815) as those of Overby and the other nine unidentified remains from Grave 717 were recommended for group burial. (Admin. Record doc 37 at 13) The reasoning behind these recommendations is undocumented and makes it impossible for a subsequent board to determine what is new evidence and what was previously considered.
- The IDPFs of Hirschi, Kelder, Collins and Kovach (Admin. Record doc 45, 46, 42, & 47, respectively) contain references to case numbers 7809, 6535, 7358 and 7363, but these case files, or any others, are not included in the administrative record.
- While Plaintiff has complained that the DPMO Policy Memo, Subj: Prioritization of Remains Recovery and Identifications, (Compl. Exh. 7) was improperly adopted, the administrative record completely ignores the source or reasoning behind this memo or addresses it in any way. Plaintiff believes it is absolutely incredible that such a major policy memo would be adopted without soliciting staff comments and concurrence.
- Plaintiff's petition for consideration of new evidence was forwarded to DPMO by U.S. Army Human Relations Command (Compl. Exh. 10), as well as by Plaintiff (Compl. Exh. 12) however the administrative record filed contains no DPMO staff comments or recommendations in response to this petition nor any evidence that a status review board was convened as required by 10 U.S.C. § 1509.
- The sole investigative document generated by JPAC (Admin. Record doc number 14) is incomplete and was superseded by later reports which have not been included in the administrative record filed on February 1, 2013. This single JPAC document is not accompanied by evidence of staff comments or recommendations by the intelligence section (J2) or the Central Identification Laboratory.

The documents contained in the administrative record filed by Defendants are rife with such missing references and authenticating documents as well as original documents which are not included. While Defendant Webb asserted that his agency had the authority to decide and had made a decision not to pursue further investigation, there is absolutely no documentation of staff comments, recommendations or memorialization of a decision. In fact, other than

Defendant's assertion, there is no evidence that Defendant Webb had the authority to make a decision concerning further investigation or to convene a status review board.

V - Factual Evidence that the Administrative Record is Incomplete.

Besides the difficulty inherent in determining the contents of Defendant's files, Plaintiff has been further handicapped by the government's proclivity to classify relevant documents as defense secrets or otherwise restrict them from public access.²

Persons with precise information concerning the documents which actually constitute the administrative record are understandably reticent to share information outside of formal discovery proceedings for fear of prosecution or retribution. However, Plaintiff has been able to gather and correlate information from a variety of sources to provide to the Court a sample of the documents which were not included in the administrative record filed by Defendants.

Examples of omitted documents:

- Investigative Report, JPAC Incident 425, X-812 dated 6 March 2012
- Investigative Report, JPAC Incident 425, X-814 dated 7 March 2012
- Investigative Report, JPAC Incident 425, X-815 dated 7 March 2012
- Investigative Report, JPAC Incident 425, X-816 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-818 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-820 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-821 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-822 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-823 dated 9 March 2012
- Investigative Report, JPAC Incident 425, X-812 dated 9 March 2012
- Memorandum for Record, JPAC Incident 425, dated 25 April 2012
- Request for Family Reference Samples, JPAC Incident 425, dated 9 March 2012
- Email Chain regarding JPAC Incident 425 between JPAC External Relations Section (Johnie Webb, Rae Phillips, etc), J2 Historians, and Lab Management in April 2011
- Email Chain regarding JPAC Incident 425 between JPAC External Relations Section (Johnie Webb, Rae Phillips, etc), J2 Historians, J2 Management, and Lab Management in February 2012

² Each of the X-files and IDPFs included in the administrative record include declassification notices and prior classification stamps. These files also contain coversheets and dividers restricting dissemination of the information. Administrative record document number 14 contains a "For Official Use Only" classification notice.

(Plf. Decl. ¶ 4)

The above documents are/were in the custody of Mr. Robert Richeson, JPAC Director of Intelligence (J2) and Commander Lawrence Gonzales JPAC Deputy Director of Intelligence (J2).

The April 25, 2012 Memorandum for the Record described above is known to summarize much of the information which was before Defendant Webb when he verbally denied Plaintiff's request for consideration of the identity of remains X816 as those of Pvt Arthur H. Kelder. Further, this memorandum identifies additional relevant documents in the possession of JPAC Central Identification Laboratory (CIL).

Plaintiff believes the deliberate withholding of these and other relevant documents from the administrative record indicate that a substantial number of additional relevant documents remain to be discovered in the offices of Defendants DPMO, JPAC, JPAC Intelligence Directorate, and JPAC Central Identification Laboratory as well as other areas.

VI - Agency action has been withheld and there is no final action to demarcate the limits of the record.

An action to compel an agency to fulfill a statutory obligation is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed." *Oregon Natural Res. Council Action v. United States Forest Service*, 59 F.Supp.2d 1085, 1095 (W.D. Wash. 1999). In such cases, review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record. *See Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997). *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

When “the government is being sued for inaction ... [t]here is less reason to presume that the record assembled by the agency is presumptively complete.” *CCL, Inc. v. United States*, 39 Fed. Cl. 780, 791 (1997); *see also Lands Council v. Forester of Region One of the U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2005). Moreover, “given that a ‘rule of reason’ ultimately governs the issue of unreasonable delay, some inquiry into ... whether the reasons offered by the agency are the actual reasons for the delay must ... be permitted.” *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006).

VII - Summary

For judicial review to be an effective and worthwhile exercise, courts must be able to put themselves in the position of the agency decision maker to determine if he or she acted arbitrarily or capriciously. Absence of a full and complete record makes judicial review impossible.

Defendants have knowingly and deliberately withheld vital documents and certified an administrative record they knew to be incomplete. This incomplete administrative record is evidence that the agency has acted in bad faith and action has been unlawfully and unreasonably withheld. Any remaining presumption of agency regularity has been forfeited by Defendant’s deliberate actions.

Courts ‘have recognized bad faith where ‘a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights.’” *Maritime Mgmt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001)(quoting *Am. Hosp. Ass’n v. Sullivan*, 938 F.2d 216, 220 (D.C. Cir. 1991)).

This is a simple case seeking merely to honor a fallen American hero by placing his name on his headstone. Yet, Defendants have again and again demonstrated their bad faith over the

more than sixty years since his death and forced Plaintiff to undertake litigation to enforce a most basic right. Defendants' dishonesty dishonors the sacrifice of all American veterans.

Plaintiff respectfully requests the Court grant its motion to complete the administrative record; allow Plaintiff to conduct discovery to enable full and complete judicial review; and, impose appropriate sanctions to discourage future abuse by Defendants.

Respectfully submitted,

/s/ John Eakin

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