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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERT P. ALTO, et al.,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the Department of Interior - United States of America, LARRY ECHO HAWK, Assistant Secretary of the Department of Interior-Indian Affairs - United States of America, MICHAEL BLACK, Director of the Bureau of Indian Affairs of Department of Interior - United States of America, and ROBERT EBEN, Superintendent of the Department of Interior Indian Affairs, Southern California Agency, in their official capacity; and DOE Defendants, 1 through 10, inclusive,

Defendants.

CASE NO. 11-cv-2276-IEG (BLM)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS FILED BY THE SAN PASQUAL BAND OF MISSION INDIANS

[Filed with Declaration of Raymond J. Alto in Support of Plaintiffs' Opposition to Motion to Dismiss Filed by San Pasqual Band of Mission Indians and Declaration of Thor O. Emblem in Support of Plaintiffs' Opposition to Motion to Dismiss Filed by San Pasqual Band of Mission Indians]

JUDGE: Hon. Irma E. Gonzalez
COURTROOM: 1
DATE: November 15, 2011
TIME: 1:30 p.m.

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INTRODUCTION

The San Pasqual Band of Mission Indians (Tribe) filed a Motion to Dismiss under Federal Rule of Civil Procedure 19 claiming it is a required party and cannot be joined as a defendant because of its sovereign immunity. However, no evidence accompanied the Tribe's Motion to establish that the Tribe's General Council has authorized a special appearance on behalf of the Tribe as a whole to invoke sovereign immunity. Upon reviewing the Motion, the Court ordered the parties to brief the Tribe's Motion to Dismiss, treating the Tribe's Motion as an *amici curiae*.

Plaintiffs contend that (1) the Tribe waived its sovereign immunity by voluntarily interjecting itself into the agency review process, and by fully participating in the proceedings below, and therefore the District Court's review under the Administrative Procedures Act (APA) is proper as an extension of the agency review; (2) the Tribe is not a required party since Plaintiffs' Complaint seeks District Court review of an agency decision under the APA and injunctive relief based on agency inaction; and (3) alternatively, if the Tribe is a required party, Plaintiffs' Complaint can be amended to join the Tribe as a defendant.

Plaintiffs further contend that the injunctive relief sought is appropriate to preserve and enforce the status quo since Plaintiffs are still members of the Tribe on the federally approved and recognized Tribal Roll. However, the current managing faction of the Tribe is denying Plaintiffs' Tribal membership rights, requiring the BIA to exercise its fiduciary duty to take action to preserve and enforce the status quo.

Plaintiffs further dispute that they "have made up a false state of emergency," as argued in the Motion to Dismiss. On August 30, 2011, the Tribe's "Business Committee" gave notice that it would be discussing amendments to the Tribe's Constitution, including enrollment ordinances. The Tribe held two town hall meetings on September 12, 2011 and September 19, 2011 without Plaintiffs' participation. Since Plaintiffs have not been officially removed from the federally recognized Roll, Plaintiffs were entitled as federally recognized Tribal members to vote at the General Council meeting held on Sunday October 9, 2011. Plaintiffs advised tribal Chair, Allen Lawson, that the Court had issued the Temporary Restraining Order and asked to attend the October 9 General Council meeting, but Mr. Lawson notified Plaintiffs that they could not attend.

The ink had not yet dried on the Temporary Restraining Order issued on October 4, 2011, when five days later, on October 9, 2011, the Tribe's Business Committee and/or Enrollment Committee members (without providing fair notice to Tribal members so they could attend and vote on this issue) presented a motion to adopt an "enrollment moratorium" before the Tribe's General Council. Without Plaintiffs' participation and their nearly 50 votes, General Council members were asked to pass an enrollment moratorium which affected Plaintiffs' rights.

As is further documented in the accompanying exhibits, there is a small faction within the Tribe that controls the Business and Enrollment Committees. These individuals continue to commit acts in excess of the Tribal governing power granted to them including falsely certifying official actions and events to United States governmental agencies which acts did in fact not occur.

Plaintiffs' Complaint seeks administrative review under the APA, and asks for an order that requires the Bureau of Indian Affairs (BIA) to perform its fiduciary duty to preserve the status quo. The Secretary of the Interior is charged not only with the duty to protect the rights of the Tribe, but also the rights of individual members. The BIA has not protected Plaintiffs' status quo after Defendant Echo Hawk's January 28, 2011 Order was rendered despite repeated requests to do so.

STATEMENT OF THE FACTS

Although Plaintiffs have set forth the factual basis for declaratory and injunctive relief in their Complaint, there are additional facts this Court needs to be aware of in response to the Tribe's Motion to Dismiss and the Tribe's accompanying exhibits.[1]

Plaintiffs have been subject to a previous enrollment challenge in which certain Tribal members alleged that Plaintiffs' ancestor, Marcus Alto Sr., was the son of Benedita Barrios and the adopted son of Jose and Maria Duro Alto. The BIA ruled in favor of Plaintiffs finding Jose and Maria were Marcus Alto Sr.'s parents and their enrollment was approved in April 1995 by BIA Assistant Secretary Ada Deer. Plaintiffs contend the final order is entitled to *res judicata* effect. In 2004, a few Tribal members brought a delayed challenge to the 1995 approval in District Court, in *Caylor v. Bureau of Indian Affairs.* (Plaintiff's Exhibit BB [DE-7]) That case was dismissed.

[1] Plaintiffs have submitted several new exhibits in response to the Tribe's Motion to Dismiss.

In 2007, an Alto descendent, Plaintiff Angela (Martinez-McNeal) Ballon, who was serving on the Tribe's Business Committee, informed the San Diego County District Attorney that Tribal member Victoria Diaz[2] was using her Tribalissued American Express card for personal use in direct violation of the Tribe's policies and procedures. Thereafter, the District Attorney charged Victoria Diaz with felony criminal charges.[3] (Plaintiffs' Exhibit A)

In 2008, three members of the Tribe's five-member Enrollment Committee, Victoria Diaz, Diana Martinez and Claudina Masura voted to "suspend" the enrolled Alto family Plaintiffs.[4]

On July 6, 2008, Enrollment Committee member and Tribal Vice-Chair Robert Phelps immediately sought to inform the Tribe that three members of the Enrollment Committee had assumed for themselves the power to suspend the rights and privileges of the enrolled Plaintiffs, even though the BIA had informed the Tribe that neither the Tribe's Constitution nor the Code of Federal Regulations provided for Plaintiffs' suspension. Phelps also informed Tribal members that the Business Committee decided to lift the Enrollment Committee's suspension. However, the Tribal Chair, Allen Lawson, unilaterally declared that he would simply ignore the Committee's judgment and continue the suspension. (Plaintiffs' Exhibits B and I)

On July 7, 2008, the Enrollment Committee's three members that voted to oust Plaintiffs sent a letter to Tribal members to justify their actions. (Plaintiffs' Exhibit C)

By letter dated July 25, 2008, the Enrollment Committee "recommended" to the BIA that Plaintiffs, as descendants of Marcus Alto Sr., be removed from the federally recognized Tribal Roll. (Complaint Exhibit 6)

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[2] Victoria Diaz is currently the Enrollment Committee Chair, and she is also the tribal Vice-Chair and serves with Allen Lawson on the Business Committee.

[3] The criminal charges where later dismissed because it was argued that the use of the credit card was an internal Tribal issue, but no further action was taken.

[4] Diana Martinez is presently on the Enrollment Committee. She was on the Enrollment Committee when the Alto Plaintiffs initially applied for Tribal membership and submitted a declaration in support of that challenge. She was also on the Enrollment Committee in 2008 when she, Diaz, and Masura took action to "suspend" the Alto family descendants and terminate their tribal rights. Claudina Masura claims to be Diana Martinez's cousin. (Decl of Raymond J. Alto, ¶ 4)

On August 30, 2008, Enrollment Committee member and tribal Vice-Chair Robert Phelps wrote to BIA Regional Director Dale Morris regarding the Tribe's enrollment challenge. (Plaintiffs' Exhibit D)

On November 26, 2008, the BIA's Regional Director Dale Morris ruled in favor of the enrolled Alto Plaintiffs and against the Tribe making certain findings of fact. (Complaint Exhibit 7)

The Tribe's Constitution. Article III states:

> All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior. (Plaintiffs' Exhibit F)

The San Pasqual Tribe does not have an enrollment ordinance. (Tribe's Memorandum, p. 6, fn. 6) According to a BIA letter dated April 8, 2005, "[i]n the absence of such a membership ordinance, however, the Tribe's Constitution delegates membership determinations to the Bureau, pursuant to the procedures set forth in the regulations." The BIA's official legal position as of April 4, 2005, is that "[t]he Tribe's Enrollment Committee has only the authority to make recommendations, pursuant to the same regulations." (Plaintiffs' Exhibit G)

After the Tribe's enrollment challenge against Plaintiffs was rejected by the Regional Director on December 18, 2008, the Tribe and its Enrollment Committee filed a Notice of Appeal to Assistant Secretary Echo Hawk invoking the agency administrative review process. The appeal sought relief and a ruling that "the BIA be directed to prepare a supplemental membership roll deleting the names of the individuals" from the Tribe's federally approved and recognized roll. (Plaintiffs' Exhibit H)

The Suspension of Plaintiffs' Tribal Benefits During the Agency Review Process.

As noted, during the agency review, Tribal Chair Allen Lawson stated that Plaintiffs' Tribal membership rights would be suspended, despite the Business Committee's majority vote to lift the suspension[5] and despite being advised by the BIA that there were no provisions in the Tribe's Constitution to provide for suspension of Tribal membership privileges. (Plaintiffs' Exhibit B and I)

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[5] See Plaintiffs' Exhibit I, Motion #2 and subsequent note, "Spokesman Allen Lawson stated that [he] would ignore the Business Committee's decision and would continue to enforce the suspension of the Alto family."

On June 26, 2009, Plaintiffs wrote Echo Hawk advising him that their Tribal rights had been suspended for several months and requested that Echo Hawk order Plaintiffs' status quo restored. (Plaintiffs' Exhibit E)

Echo Hawk subsequently ruled in favor of enforcing the status quo while the case was pending agency review. In a letter dated October 29, 2009, Echo Hawk advised the Tribe that it was unlawfully withholding benefits from Plaintiffs who are federally recognized Tribal members. (Plaintiffs' Exhibit K, pp. 3-4)

After Echo Hawk issued the October 29, 2009 letter, and in or about November 2009, Plaintiffs' Tribal rights were fully restored, they received their accrued unpaid per capita distribution of gaming profits, and the enrolled adult Plaintiffs participated in voting in tribal meetings. Plaintiff Raymond J. Alto was elected to the Tribe's Business Committee in January 2011.[6] (Plaintiffs' Exhibit G; see also Declaration of Raymond J. Alto)

The Suspension of Plaintiffs' Benefits and Per Capita After Echo Hawk's January 28, 2011 Decision.

When the Tribe appealed to Echo Hawk, it filed a response to the Regional Agency's November 26, 2008 decision and a memorandum in support of its appeal. (Tribe's Exhibits 20, 22)

However, Echo Hawk did not issue a briefing schedule and he did not request Plaintiffs' response to the additional documents and briefing filed by the Tribe in support of its appeal. (Complaint, ¶ 67) Instead, Echo Hawk issued the October 29, 2009 letter asking the parties to try to locate certain items. In response to that letter, Plaintiffs submitted certain items. The Tribe submitted a Supplemental Memorandum, 89 Exhibits, and a 54-page Supplemental Report authored by Christine Grabowski, PhD, an anthropologist with further interpretation of evidence. (Complaint, ¶ 41) Plaintiffs objected to the Tribe's additional evidence and requested an opportunity to respond to the Tribe's expanded legal position and argument. (Complaint, ¶ 42; Complaint Exhibit 9)

Plaintiffs were not allowed full briefing prior to Echo Hawk adjudicating the case and his order/decision dated January 28, 2011. (Complaint, ¶ 43)

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[6] Plaintiffs California Indian Health services were not terminated during the first "suspension" which occurred while agency proceedings were pending.

Immediately after Echo Hawk issued his January 28, 2011 order/findings, the Tribe's management banned Plaintiffs from the reservation and voting, diverted the enrolled Plaintiffs' vested and due per capita revenue, and distributed accumulated minor trust funds that the Tribe, as fiduciary, had a duty to hold in trust for the minor Plaintiffs under law and the Tribe's Revenue Allocation Plan.

Plaintiffs were told by Allen Lawson that they would have to submit their per capita and minors' trust claims to the General Council at a July 10, 2011 meeting. The Enrollment Committee's lawyer was present at the General Council meeting but Plaintiffs' lawyer was not allowed to attend the meeting.

The False "Certified" Business Committee Resolutions.

Thereafter, by letter dated July 12, 2011, Plaintiffs were notified by Allen Lawson that their request for per capita fund payments and for funds held in a Tribal account for the minor Plaintiffs had been rejected on "appeal" and was a "final" decision by the Tribe's General Council. Attached to that letter were two "certified" Business Committee Resolutions - SP071011-01 and SP071011-02 - signed by all individual Business Committee members. The Tribe sent copies of the July 12, 2011 letter with the two certified Resolutions to the BIA and National Indian Gaming Commission (NIGC) which oversee the Revenue Allocation Plan. (Plaintiffs' Exhibit M)

Plaintiffs later learned from a confidential informant Tribal member[7] that the Resolutions were NOT presented to the General Council, and were not in the agenda "package" provided to General Council members. As soon as Plaintiffs learned this information, on July 23, 2011, Plaintiffs immediately notified the NIGC and the BIA about the fraudulently submitted "certified" Resolutions and the *ultra vires* acts of the Business Committee pertaining to the alleged "final" action, a fraud on the agencies and a fraud on the Tribe's General Council. (Plaintiffs' Exhibit N)

In fact, the Tribe has here submitted the same two fraudulent "certified" Business Committee Resolutions attached to the Tribe's Exhibit 18, but has failed to candidly advise this Court that the

[7] The BIA knows that tribal members have been previously threatened and are afraid to speak up because Mr. Lawson controls the committees, tribal members' jobs at the Tribe's casino, and the appointed paid positions within the Tribe. (See Plaintiffs' Exhibit G, Southern California Agency letter dated April 8, 2005 to Mr. Lawson: "Many of the individuals have asked to remain anonymous for fear of retaliation."

two Resolutions were "withdrawn" so no "final" action occurred regarding Plaintiffs' per capita at the July 10, 2011 meeting.[8] (See Tribe's Memorandum, p. 17; see also, Plaintiffs' Exhibit R, "*Mr. Emblem is correct that the Business Committee resolutions attached to the Tribe's July 12, decision letter do not accurately reflect the General Council's decision made at the July 10 meeting.*")

According to the NIGC's official position, all enrolled members are entitled to receive an equal share of the per capita gaming revenues. (Plaintiffs' Exhibit O) Because Plaintiffs are still enrolled members, on August 2, 2011, Plaintiffs again notified the NIGC and BIA that the Revenue Allocation {lan and the Indian Gaming Regulatory Act (IGRA) had been violated and provided documentary evidence that the Tribe's management unlawfully cancelled payment on Plaintiffs' accrued/vested per capita. (Plaintiffs' Exhibit P)

On August 10, 2011, Plaintiffs again notified the NIGC and BIA that the Revenue Allocation Plan had been violated and provided documentary evidence that the Tribe's management paid out "bonus checks" to other Tribal members which were the minor Plaintiffs' accumulated per capita income which was required by law to be maintained in segregated trust accounts. (Plaintiffs' Exhibit Q)

On August 11, 2011, Plaintiffs received copies of letters from Allen Lawson dated July 29, 2011 and August 8, 2011 which were sent to the NIGC. (Plaintiffs' Exhibit R and S) On August 12, 2011, Plaintiffs once again notified the NIGC and BIA about the Tribe's fraudulent Resolutions. Plaintiffs also advised the NIGC and BIA that Assistant Secretary Echo Hawk's Order was not self-executing and did not automatically delete Plaintiffs from the federally approved Roll. Plaintiffs requested assistance to obtain their Tribal benefits. In this letter, Plaintiffs further notified the NIGC and BIA that "the Tribe's current Business Committee members are committing ultra vires acts and placing the tribal members at risk for recovery of improperly distributed gaming proceeds creating a conflict of interest between the business management team and the individual tribal members." (Plaintiffs' Exhibit T)

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[8] Immediately after Plaintiffs complained, the Business Committee, on July 28, 2011, adopted Resolution, SP071011-01A, and then submitted it to the NIGC to cover up the fraudulent acts of the individual Business Committee members.

On August 30, 2011, Plaintiffs again wrote to Echo Hawk asking him to review several letters which were sent to his attention and advised him that more than 50 individuals lost their health care, monthly income, and that Plaintiffs had over $3 million in past due and/or vested per capita funds converted by the Tribe. (Plaintiffs' Exhibit U)

Plaintiffs' New Enrollment Applications.

On July 8, 2011, Plaintiffs sent 14 applications to the Tribe's business office but they were refused because of a claimed "enrollment moratorium" which moratorium had not been approved by the Tribe's General Council or the BIA. (Plaintiffs' Exhibits X and Z) At that time, Plaintiffs also notified Defendant Southern California Agency Superintendent, Robert Eben, advising him that the applications were rejected and that the Enrollment Committee was attempting to enforce an unauthorized "enrollment moratorium." (Plaintiffs' Exhibits Y and Z)

On September 2 and 12, 2011, Plaintiffs (Group C and E) once again sent their applications for Tribal membership to the Enrollment Committee to be processed with new evidence of their right to enrollment. (Plaintiffs' Exhibits V and W) To date the Tribe has taken no action on these enrollment applications.

The Proposed Constitutional Amendment and Enrollment Ordinances.

The Tribe currently has no enrollment ordinances that have been approved by the BIA as required by the Tribe's Constitution. During September 2011, when Plaintiffs learned that the Business Committee was attempting to amend the Tribe's Constitution and adopt enrollment ordinances which affected Plaintiffs' rights, and because the BIA remained silent despite numerous letters and calls requesting action and assistance, and since Plaintiffs' case had not been assigned for review, Plaintiffs filed their Complaint in this Court seeking APA review of the Agency's decision, declaratory and injunctive relief.

On October 4, 2011 this Court granted a Temporary Restraining Order that Plaintiffs not be removed from the federally approved Roll. Plaintiffs notified Tribal Chair Allen Lawson and his counsel, Geoff Strommer, that the TRO was pending, and asked that Plaintiffs be allowed to attend the Tribe's General Council meeting set for October 9, 2011, and further asked that NO enrollment ordinances be ruled upon. (Tribe's Exhibit 1) However, the Chair stated that based on Echo Hawk's

January 28, 2011 decision, neither counsel nor the Marcus Alto, Sr. descendants would be allowed to attend the October 9, meeting. (Tribe's Exhibit 2)

On October 6, 2011, two members of the Tribe's Enrollment Committee, Victoria Diaz and Diana Martinez, sent a letter dated October 9, 1011 to Tribal members which purported to give "notice" of action which would be taken at the meeting. (Plaintiffs' Exhibit Z) The enrollment moratorium action (affects 14 Plaintiffs) and was actually "broadened" and voted on at the October 9, 2011 General Council meeting even though no such action was described or identified on the agenda previously distributed to Tribal members. (Plaintiffs' Exhibit Z, ¶¶16, 17)

The Tribe's Membership Roll is maintained by the Southern California Agency. The BIA "is vested with authority to approve additions to or deletions from the Band's membership roll."[9] (Plaintiffs' Exhibit AA [DE-7-1]) Superintendent Robert Eben states, the "Band has not submitted the revised roll to the BIA for approval." (Plaintiffs' Exhibit BB [DE-7]) Therefore, Plaintiffs have not been removed from the federally approved and federally recognized Roll to date. Plaintiffs contend that the BIA has a fiduciary duty to preserve and enforce their status quo as federally recognized Tribal members and they are entitled to have their status quo as Tribal members with all rights thereto restored while the case is pending review.

ARGUMENT

I. THE TRIBE WAIVED ITS SOVEREIGN IMMUNITY IN ITS GOVERNING DOCUMENT DELEGATING ENROLLMENT DECISIONS TO THE BIA, BY VOLUNTARILY INTERJECTING ITSELF INTO THE BIA REVIEW PROCESS, AND BY FULLY PARTICIPATING IN THE PROCEEDINGS. THEREFORE, THE DISTRICT COURT'S REVIEW UNDER THE ADMINISTRATIVE PROCEDURES ACT IS MERELY AN EXTENSION OF THE AGENCY REVIEW.

This is a case of first impression. Plaintiffs' Complaint seeks review of federal agency action under Title 5 U.S.C. sections 706 (1) and 706 (2)(A). (Complaint, p. 28, ¶¶ 125 and 128) Every case turns on its unique facts, and the facts here should lead the Court to conclude that the Tribe has waived its claim of sovereign immunity by voluntarily interjecting itself into the agency review process.

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[9] The Tribe does not make "routine" changes to the federally approved roll. To Plaintiffs' knowledge there have only been 6 or 7 supplemental rolls approved by the Southern California Agency after the Tribe's 1966 organizing roll was initially approved by the BIA.

The Tribe's statement that it is the Enrollment Committee, not the BIA, which takes action to maintain the Tribal Roll and can disenroll individuals as warranted[10] is not the official position that either the Tribe or the BIA has taken in the past. The record demonstrates:

- "The Tribe's Enrollment Committee has only the authority to make recommendations" pursuant to the Part 48 regulations." (Plaintiffs' Exhibit G)
- Section 48.14 (d) incorporated through the Tribe's constitutional provision on enrollment states:

  Names of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary. (See Plaintiffs' Exhibit CC)
- The BIA "is vested with authority to approve additions to or deletions from the Band's membership roll." (Plaintiffs' Exhibit AA, ¶ 3 [DE-7-1])
- The Tribe itself acknowledged the BIA's right to make the determinations on July 28, 2008 and sought Regional Agency review and approval of the Enrollment Committee's recommendation to remove the Plaintiffs from the federally approved roll. (Complaint Exhibit 6)
- The Tribe's Notice of Appeal dated December 18, 2008 acknowledges and requested "that the BIA be directed to prepare a supplemental membership roll deleting the names of the individuals from the Tribe's official roll." (Plaintiffs' Exhibit H)

Without providing any evidence that the Tribe's Motion to Dismiss filed on October 11, 2011 was authorized by the Tribe's General Council, its governing body, attorneys Hobbs & Strauss now assert "sovereign immunity" and argue it has not been waived."[11] (Tribe's Memorandum, pp. 25-26) Plaintiffs disagree. In essence, sovereign immunity is immunity from lawsuits generated in judicial systems that have no jurisdiction over the Tribe because of its sovereign right to govern itself. The Tribe voluntarily relinquished its sovereign right to govern itself on Tribal enrollment issues because it adopted Article III, section 2 in its Constitution which requires "all membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15," and this provision delegates the Tribe's sovereign right to determine its own membership to the BIA.

In *United States v. Oregon*, 657 F.2d 1009 (9th Cir.1981), the Yakima Tribe entered into a conservation agreement which arose from a longstanding dispute between the United States

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[10] Tribe's Memorandum, p. 8, l. 10-14.

[11] At the October 9, 2011 meeting, the Tribe's general council was not advised nor did it authorize a "special appearance" in District Court on behalf of the Tribe. Sovereign immunity must be asserted on behalf of the entire tribe. (See Plaintiffs' Exhibit Z, ¶¶ 16, 17)

government, and several states in the Pacific Northwest, over fishing rights in the Columbia River Basin. The Yakima Tribe intervened as a party. One year later, the District Court entered judgment in favor of the United States enjoining Oregon from enforcing certain fishing regulations, establishing a procedure for promulgation of future state regulations, and expressly retaining the Court's jurisdiction to enforce the decree. Several years later, the original parties to the suit and intervenors entered into the conservation agreement. When suit was later brought against the Yakima Indian Tribe seeking to enjoin some of its own fishing practices, the tribe invoked its sovereign immunity. The Ninth Circuit held that the Yakima Tribe had waived its immunity from federal jurisdiction by intervening as a party plaintiff and entering into an agreement that the parties would submit all future disputes to the Oregon District Court for resolution. *Id.* at p. 1010-1011.

"*United States v. Oregon* must be viewed as establishing that Indian tribes may, in certain circumstances, consent to suit by participation in litigation." *McClendon v. United States*, 885 F.2d 627, fn. 2 (9th Cir. 1989). In Plaintiffs' case, the San Pasqual Tribe's action of delegating the enrollment approval to the BIA and submitting the enrollment challenge for review to the federal agency is similar to the Oregon case where the Yakima Tribe voluntarily relinquished their claim of sovereign immunity by becoming an intervenor. Similarly in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the United States Supreme Court held that the tribe's act of entering into a contract with an arbitration clause provided a limited waiver of sovereign immunity to be sued in state court to resolve issues of the agreement.

In *United States v. Oregon*, *supra*, the Ninth Circuit reasoned:

> Intervenors under Fed.R.Civ.P. 24(a)(2), such as the Yakima Tribe, enter the suit with the status of original parties and are fully bound by all future court orders. (Citations omitted.) By successfully intervening, a party makes himself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervener and the adverse party.

Here similarly, by voluntarily relinquishing the right in its Constitution, and by submitting to the overriding sovereignty of the United States and the BIA to review and approve the Tribe's enrollments, the Tribe waived its right to assert tribal sovereignty over the Court's review of the BIA's decision.

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Plaintiffs anticipate that the Government may move the Court for dismissal relying upon the Southern District Court cases of *Caylor v. Bureau of Indian Affairs*, 03cv1859-J(JFS) wherein individual members of the San Pasqual Tribe sued the Department of the Interior, BIA claiming the agency had wrongfully enrolled the descendants of Marcus Alto Sr., and *Atilano v. Bureau of Indian Affairs*, 05cv1134-J (BLM) wherein individual members of the San Pasqual Tribe sued the BIA and the two cases were dismissed based on Rule 19 grounds. (Plaintiffs' Exhibit BB [DE-7]) Neither unpublished case dismissals provide grounds to dismiss here because in *Caylor v. Bureau of Indian Affairs*, it would have been the Tribe's cause of action to challenge the Plaintiffs' enrollment back in 1995, and the Tribe failed to timely challenge the Ada Deer decision. In *Atilano v. Bureau of Indian Affairs*, individual tribal members brought the case against the agency. However, the *Atilano* plaintiffs relied on less convincing authority than that cited herein in opposition to the BIA's Motion to Dismiss.[12]

The facts in Plaintiffs' case are also distinguishable from *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) which is relied upon by the Tribe in its sovereign immunity claim. (Tribe's Memorandum, p. 25.) In *Quechan*, the California Department of Fish and Game brought an action against the Quechan tribe seeking relief declaring its right to enforce California Fish and Game laws against non-Indians on the tribe's Fort Yuma Indian Reservation, and authorizing California Fish and Game personnel to enter upon the reservation to enforce those laws. The Court found sovereign immunity required dismissal because it also noted "that the tribe's sovereign immunity [would] not bar California from ever obtaining a judicial resolution of the questions presented by this case." *Id.* at p. 1156. In contrast, Plaintiffs have no other remedy at law if their case is dismissed on sovereign immunity grounds or on the basis that the Tribe is a required party.

Likewise, the facts in *Quileute Indian Tribe v. Babbitt*, 18 F. 3d 1456 (9th Cir. 1994) relied upon by the Tribe in support of its sovereign immunity claim are distinguishable. (Tribe's Memorandum, p. 26) In *Quileute*, a member of the Makah Indian Tribe died intestate. His property

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[12] Cases should not be authority or have relevance for propositions not fully presented or considered.

included fractional interests in trust lands on the Makah, Quinault, and Quileute reservations. A Department of Interior administrative law judge ruled that the property interests on the Quinault reservation should escheat to the Quileute Indian Tribe on the theory that the property was probably allotted originally to Quileute Indians. The Quileute Indian Tribe filed suit against the United States and the Quinault Indian Nation, seeking to overturn the Department of Interior's decision that certain fractional property interests within the Quinault Reservation escheat to the Quinault Indian Nation rather than to the Quileute Indian Tribe. The Quileute Indian Tribe sought a declaration that it was one of the "recognized tribal governments" of the Quinault reservation. The *Quileute* Court concluded "that a tribes's participation in an administrative proceeding does not waive tribal immunity in an action filed by a third party seeking review of the agency's decision. *Id.* at pp. 1457-1460.

In contrast, Plaintiffs' case here involves review of the administrative proceedings where both Plaintiffs and the Tribe appeared, and it has not being brought by a third party. The distinction is important. *Quileute* involved a probate proceeding where the tribe had not relinquished its sovereignty. Here, the Tribe voluntarily delegated its sovereign right to determine its own membership to the BIA in its governing document which makes the BIA's decision reviewable under the APA. "[A] tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe." *McClendon v. United States*, *supra*, 885 F.2d 627, 630.

In *McClendon*, *supra*, 885 F.2d 627, the Ninth Circuit distinguished circumstances which would constitute a waiver of sovereign immunity. The Court found the case of *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir.1987) instructive. The Jicarilla tribe brought suit to cancel certain oil and gas leases on reservation lands awarded by the Department of the Interior. While that suit was pending, Dome Petroleum Corporation brought an independent action seeking to pay adjusted bonuses to preserve its interest in certain leases. The *McClendon* Court noted that the District Court in *Jicarilla* dismissed Dome's suit for lack of jurisdiction over the Jicarilla tribe, and the Court of Appeals affirmed, noting:

> Although the Tribe's filing of the Jicarilla litigation may have waived its immunity with regard to Dome's intervention in that suit, we cannot construe the act of filing that suit as a sufficiently unequivocal expression of waiver in subsequent actions relating to the same leases .... Waiver of immunity in the present action was not one

> of the terms of the Tribe's initial suit; it therefore cannot be made a party to this subsequent litigation. (Citing *Jicarilla Tribe*, 821 F.2d at 539-40 (emphasis added).
>
> The *McClendon* court reasoned likewise:
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> Thus, Jicarilla Tribe indicates that tribal initiation of litigation alone does not establish waiver with respect to related matters. The dispute over the lease agreement in this case is no more closely linked with the Tribe's underlying suit than was Dome's action to the Jicarilla Tribe's lease cancellation suit. *McClendon v. United States*, 885 F.2d 627, 630, emphasis added.

In contrast to *McClendon* and *Jicarilla*, the underlying case here is limited to the issues and evidence already presented by the parties during the agency proceedings and is linked with the Tribe's underlying appeal. Consequently, this Court can find that the Tribe waived its sovereign immunity claim under the facts of this case and that review is appropriate under the APA because it is merely an extension of the agency review.

II. FEDERAL RULE OF CIVIL PROCEDURE, RULE 19 DOES NOT REQUIRE DISMISSAL OF PLAINTIFFS'CASE BECAUSE THE TRIBE IS NOT A REQUIRED PARTY.

Federal Rule of Civil Procedure, rule 19 requires the court to balance several factors: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment or shaping the relief or other measures; (3) whether a judgment and relief rendered in the Tribe's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. If a required party is absent, the court must also factor in an equitable determination: whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008).

In addressing the Tribe's Motion to Dismiss, the proper approach is first to decide whether the Tribe is a required party which should be joined under rule 19(a). If the Court concludes the Tribe is a required party, "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Cachil Dehe Band of Wintun Indians v. California*, 536 F.3d 1034 (9th Cir. 2008) citations omitted.

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"The moving party has the burden of persuasion in arguing for dismissal." *Makah Indian Tribe v. Verity*, 910 F. 2d 555, 558 (9th Cir. 1990).

A. <u>The BIA's Decision is the Basis of Plaintiffs' Complaint for Declaratory Relief. The Tribe Will not be Prejudiced by its Absence Since Court Review Consists of Reviewing the Agency Record</u>.

The Tribe argues, that although Plaintiffs have fashioned the Complaint as a procedural challenge against the BIA, the Complaint and Plaintiffs' actions make clear that the Tribe is the true target of this action. (Tribe's Memorandum, p. 12.) Plaintiffs disagree. The Tribe only made a recommendation for disenrollment; it was the Agency decision and factfinding process that approved it and is the crux of the case. Plaintiffs's Complaint for Declaratory Relief alleges:

- The agency (Echo Hawk's) decision should be overturned because of the doctrine of res judicata in that the issue of whether Benedita Barrios was Marcus Alto Sr.'s mother was previously adjudicated by Assistant Secretary Ada Deer. (Complaint ¶¶ 60-62)
- The agency (Echo Hawk's) decision should be overturned because it violated Plaintiffs' procedural due process rights by issuing no briefing schedule on appeal and allowing the Tribe to submit a Supplemental Memorandum by the Tribe's attorney, 89 additional exhibits, and a 54-page Supplement Report authored by Christine Grabowski, PhD, an anthropologist with interpretation of evidence without providing Plaintiffs with an opportunity to submit rebuttal evidence and by inaction in failing to address rebuttal evidence submitted pursuant to the Order which left open the door for consideration of evidence. (Complaint ¶¶ 41, 63, 67, 69)
- The agency (Echo Hawk's) decision should be overturned because the agency finding that Jose Alto and Maria Duro Alto were not the biological parents of Marcus Alto Sr. is not supported by substantial evidence. (Complaint ¶¶ 73)
- The agency (Echo Hawk's) decision was based upon arbitrary and capricious interpretation of evidence, the 1907-1913 Censuses were not accurate. (Complaint ¶¶ 74-82)
- The agency (Echo Hawk's) decision was based on the Tribe's affidavits and unsworn statements which were inconsistent with DNA and other evidence submitted, and the statements of ancestry lacked foundation. (Complaint ¶¶ 83-93)
- The agency (Echo Hawk's) finding of Marcus Alto Sr.'s birth year as 1907 was arbitrary and inconsistent with other evidence submitted (Complaint ¶¶ 94-99) and additional rebuttal evidence which should have been considered. (Complaint ¶¶ 99-101)
- The agency (Echo Hawk's) finding that the 1909-1910 Frank Alto Letters are corroborative evidence is an unreasonable finding. (Complaint ¶¶ 102-105)
- That the agency (Echo Hawk) should have given substantial weight (as all other agency review had previously accorded) to Marcus Alto Sr.'s 1928 California Indian Application. (Complaint ¶¶ 106-113)

- That it was an abuse of discretion for the agency (Echo Hawk) to adopt a heightened DNA test standard, never applied to tribal members in enrollment challenges reviewed by the BIA (Complaint ¶¶ 114-117)
- The agency (Echo Hawk's) findings about the Baptismal Record were inconsistent and arbitrary, and were contrary to the Regional Agency's findings which were entitled to a presumption of correctness. (Complaint ¶¶ 118-119)
- The agency (Echo Hawk) abused his discretion by applying a preponderance of evidence standard to overturn the Plaintiffs long-standing vested tribal rights as Native American Indians. (Complaint ¶¶ 120-125)

The Tribe argues that it is a required party because it is not clear that the United States will make all of the Tribe's arguments. (Tribe's Memorandum, p. 21.) This argument should be rejected. The government is not required to make the Tribe's arguments because an Agency's decision is upheld or reversed on the basis of the Agency's reasoning in that decision. See, *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008).

A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect. *Southwest Center for Biological Diversity v. Babbitt*, 150 F. 3d 1152, 1154 (9th Cir. 1998).

To make a factual determination that the absent party is required, the court must first decide if complete relief is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party. *Makah Indian Tribe v. Verity*, *supra*, 910 F. 2d 555, 558.

"The United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe."[13] *Southwest Center for Biological Diversity v. Babbitt*, *supra*, 150 F. 3d 1152, 1154. In this case, the Tribe will not be prejudiced because the case involves administrative record review, which requires the court to review the administrative record as a whole, weighing both the evidence that supports the Agency's determination as well as the

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[13] The Tribe will not be prejudiced because it has an equal interest in an administrative process that is lawful. *Makah Indian Tribe v. Verity*, *supra*, 910 F. 2d 555, 559.

evidence that detracts from it. See *De la Fuente v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003) (reviewing the record as a whole); *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001).

B. The BIA Can be Ordered to Perform its Fiduciary Duty to Plaintiffs to Preserve and Enforce the Status Quo While APA Review is Pending.

"There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a)....The determination is heavily influenced by the facts and circumstances of each case." See *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir.1982) (*per curiam*)

Plaintiffs have demonstrated that their rights are being infringed. As federally enrolled Tribal members, the BIA has a fiduciary duty to preserve and enforce the status quo. Relief is possible among those already parties to the suit. Plaintiffs seek a preliminary order that the BIA preserve and enforce the status quo while the case is pending APA review as follows:

- Restore the status quo so that the (previously) enrolled Plaintiffs (which have not been removed from the federally recognized roll) can participate in and vote on general council matters. (Complaint, p. 30 ¶ D)
- Restore the status quo so that the Plaintiffs can have their California Indian Health Care services restored. (Complaint, p. 30 ¶ E)
- Enter an Order requiring Defendant Assistant Secretary Echo Hawk to issue an interim Order requiring the Tribe to pay the per capita due from December 1, 2010 to the date of Echo Hawk's January 28, 2011 order (Complaint, p. 31 ¶ G)
- Enter an Order requiring Defendant Assistant Secretary Echo Hawk to issue an interim Order requiring the Tribe to escrow the minors' trust funds and the adult per capita that would be due Plaintiffs (Complaint, p. 31 ¶ H)

The Tribe argues that "these are all actions that can [only] be afforded by the Tribe, not the BIA..." (Tribe's Memorandum, p. 3) Plaintiffs disagree. The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the case can be held. See, *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) [injunction "prohibitory" where it "preserves the status quo.']

It is only the BIA that can preserve and enforce the status quo through its government-to-government relations. The BIA is the primary federal agency charged with carrying out the United States' trust responsibility to the American Indian people, and maintaining the federal government-to-government relationship with the federally recognized Indian tribes, and as such has

the ability to enforce the status quo through its trust responsibility. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).[14] The BIA implements federal laws and policies and administers programs established for American Indians under the trust responsibility and the government-to-government relationship.

Plaintiffs are still federally recognized Tribal members. The BIA has a fiduciary duty to act and to protect federally recognized Tribal members, and in the past, the BIA has protected Plaintiffs' rights. (Plaintiffs' Exhibit K)

As the record demonstrates, the BIA has exercised similar authority in Plaintiffs' case. In 2008, the Tribe initially "suspended" Plaintiffs' Tribal membership and rights during the enrollment challenge while on review with the BIA. However, the BIA advised the Tribe that the suspension action was unlawful, and that the Tribe could not suspend membership privileges under the Tribe's Constitution and its Revenue Allocation Plan. (Plaintiffs' Exhibit J) The NIGC also notified Allen Lawson that suspension of duly enrolled members was improper under the Revenue Allocation Plan. (Plaintiffs' Exhibit O) Thereafter, on October 29, 2009, Echo Hawk, asserting legally enforceable BIA fiduciary authority, advised the Tribe that it could not withhold Plaintiffs' membership benefits or it would be in violation of laws subject to enforcement by the BIA and NIGC which is an agency within the Department of Interior. (Plaintiffs' Exhibit K, pp. 3-4)

The Assistant Secretary's October 29, 2009 letter enforcing Plaintiffs' rights states in part:

> The Band's constitution and Revenue Allocation Plan (RAP) (indirectly, at Section VIII (B)) mandate that membership in the Band shall be determined in accordance with 25 D.F.R. part 48, which directs that disenrollment of members 'whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll subject to the approval of the Secretary. By the plain language of that binding regulation – binding on the Band because it was made part of the Band's constitution; binding on the Secretary because of its status as a formally-enacted regulation – no member is disenrolled until the Assistant Secretary approves of the disenrollment....**I will transmit a copy of this letter to the Chairman of the National Indian Gaming Commission, whose responsibilities include taking enforcement actions against tribes that violate their RAPs**. (Emphasis added.)

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[14] See also Title 25 U.S.C. § 117(b)noting that the United States has a responsibility to the Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreements between the United States and any Indian tribe.

After receiving Echo Hawk's letter, in November 2009, the Tribe reinstated all of the enrolled Plaintiffs' membership rights including several months of their accrued per capita payments which had been suspended improperly. Plaintiffs were allowed to vote at General Council meetings. (See Declaration of Raymond J. Alto, ¶¶ 7, 8, 9, 10)

However, immediately after Echo Hawk's January 28, 2011 decision, Allen Lawson again unlawfully suspended Plaintiffs membership rights and benefits even though Plaintiffs had not been removed from the federally approved and federally recognized Tribal Roll.

Contrary to the Tribe's argument, this is not a case where Plaintiffs have sat on their rights for eight long months before filing this action seeking injunctive relief and asking this Court to order the BIA to act to restore Plaintiffs' status quo. (Tribe's Memorandum, p. 1) Rather, Plaintiffs immediately advised Echo Hawk that they had not been given an opportunity to file rebuttal evidence and asked that the order be vacated. (Complaint Exhibit 11, p. 113)

The delay in filing this action was because Echo Hawk did not respond to Plaintiffs' request to vacate the Order until June 3, 2011, when he issued a letter denying the request. (Complaint Exhibit 12) Again on June 26, 2011 and July 2, 2011, based upon the January 28, 2011 Order wherein Echo Hawk left the door open for reconsideration of additional evidence "that could overturn the reasoning set out here..." Plaintiffs submitted additional rebuttal evidence in order to exhaust agency review. (Complaint Exhibits 13, 14) On July 11, 2011, Plaintiffs again requested Echo Hawk vacate the Order, restore the status quo, and order briefing. (Tribe's Exhibit 14.) And again on August 30, 2011, Plaintiffs wrote to Echo Hawk asking that the agency take action and advising Echo Hawk that timely response was crucial because more than 50 individuals had lost their health care and their per capita funds had been converted. (Plaintiffs' Exhibit U)

The Tribe itself asked Echo Hawk to deny Plaintiffs' request for reconsideration.[15] Echo Hawk continued to ignore all communication. The BIA has been aware that the new roll was being prepared by the Southern California Agency, and it knew about the Business Committee's action of trying to enforce an enrollment moratorium at least as early as July 2011. The BIA is also aware that the Tribe is in the process of amending its Constitution. (Plaintiffs' Exhibit AA, ¶ 6 [DE-7-1])

[15] See Tribe Exhibit 13, letter dated July 6, 2011 to Echo Hawk.

These are actions that affect Plaintiffs's rights, yet the BIA has not lifted a pen to protect and preserve the status quo despite the numerous requests.

During the same period, the BIA was notified that the individuals from the Business Committee submitted two false certifications. The BIA has sat silently by while more than 50 individuals lost their income, their California Indian Health Care services, and have had over $3 million in past due and/or vested per capita gaming funds converted, all of this in spite of the fact Plaintiffs are still federally recognized Tribal members.[16](Plaintiffs' Exhibits N, P, Q, T, U, AA [DE-7-1], BB [DE-7])

Under the broad authority in 25 U.S.C. Section 2, Congress has expressly vested in the BIA the authority for the "management of all Indian affairs and of all matters arising out of Indian relations." *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 138 (D.D.C. 2002) (discussing *Milam v. United States Dep't of Interior*, 10 I.L.R. 3013, 3015 (D.D.C. Dec. 23, 1982)). "The Secretary of the Interior is charged not only with the duty to protect the rights of the tribe, but also the rights of individual members." (Plaintiffs' Exhibit U, *Milam v. United States Dep't of Interior*, *supra*, 10 I.L.R. 3013, 3017, emphasis added.)

Plaintiffs have not been removed from the federally recognized and approved Tribal Roll under the applicable statutory provision, section 48.12 which requires:

> Section 48.12 - Upon notice from the Secretary that all appeals have been determined the Director shall prepare in quintuplicate a roll of members of the Band, arranged in alphabetical order....The Director shall submit the roll to the Secretary for approval. Four copies of the approved roll shall be returned to the Director who shall make one copy available to the Chairman of the Tribal Council and one copy available to the Chairman of the Enrollment Committee. (Plaintiffs' Exhibit CC)

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[16] A copy of Plaintiffs' letters to Echo Hawk and NIGC were also sent to the BIA Southern California Agency and Sacramento Regional Office. The only response was BIA Attorney Advisor James Porter who took a telephone call. Porter was previously assigned the case and told Plaintiffs the case had not been assigned for review and Porter could take no action unless authorized by a higher chain of command.

Because no new Roll has been approved/certified by the BIA, Plaintiffs cannot be unilaterally excluded from voting in Tribal affairs, their health care, and the per capita benefits should be restored.[17]

Gaming revenues are Tribal assets which must be distributed equally to all federally enrolled Tribal members. "[T]he BIA has a strict and heavy burden to administer funds to be distributed to Indians consistent with the highest fiduciary standard and therefore its withholding of tribal assets is consistent with its role as trustee, and with its responsibility under the Indian Self-Determination Act." *Seminole Nation of Okla. v. Norton*, *supra*, 223 F. Supp. 2d 122, 137-138. Moreover, Plaintiffs themselves cannot protect their rights because they do not have a private independent right to enforce IGRA. Only the NIGC an agency within the Department of Interior has the right to enforce the IGRA violations.[18] See *Hein v. Capitan Grande Band of Diegueno Mission*, 201 F. 3d 1256, 1260 (9th Cir. 2000).

Notwithstanding, Plaintiffs have been notified that "[i]n matters related to tribal membership, the NIGC defers to the official position of the BIA...." (Plaintiffs' Exhibit O, emphasis added) However, the BIA has taken no action. The NIGC will only take action if it is notified by the BIA to take action, as Echo Hawk did in the past in forwarding his letter to the NIGC. (Plaintiffs' Exhibit K, pp. 3-4) An order that the BIA restore and enforce the status quo which pertains to the conversion of Plaintiffs' per capita income is much different from the facts in *Davis v. United States*, 199 F. Supp. 2d 1164, 1175 (W.D. Okla 2002). (Tribe's Memorandum, p. 24)

In *Davis v. United States*, *supra*, 199 F. Supp. 2d 1164, the Court found:

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[17] The Tribe receives millions in tax payer funding for programs. To this extent, the court can tailor relief and the BIA can be ordered to require that the Tribe pay the Plaintiffs their per capita that accrued up until the January 28, 2011 decision; and that the Tribe escrow the per capita funds until this case is resolved, or use its government-to-government authority if the Tribe refuses.

[18] IGRA established the National Indian Gaming Commission, a three-member body within the Department of the Interior consisting of a Chairman appointed by the President and two associate members appointed by the Secretary of the Interior. See 25 U.S.C. § 2704(a), (b)(1). The statute confers extensive powers upon the Chairman and the Commission. The Chairman's powers, outlined in section 2705 of the statute, include the power to close a gaming facility temporarily and to fine a tribe. See, *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F. 3d 1030, 1033 (11th Cir. 1995).

> Plaintiffs request the Court issue an injunction compelling defendants to require that the Seminole Nation provide benefits deriving from the Judgment Fund Award to the Black Seminoles. A favorable judgment for plaintiffs on their judgment fund award claim would, in effect, reverse the decisions of the Tribe's governing body, and significantly interfere with the Tribe's ability to govern its programs. Essentially, the Court would be defining who is eligible for participating in tribal programs.

In contrast here, there is no "tribal law" which governs the payment of gaming revenues in this case. The Tribe does not define who can be paid from gaming revenues. Rather, according to the NIGC, IGRA and the Tribe's federally approved Revenue Allocation Plan requires distribution of funds pursuant to the Plan.

> The Band's RAP (Revenue Allocation Plan) was approved by the Department of the Interior on April 14, 2003. Under Section VII (A)(2) of the RAP, all duly enrolled members of the Band are entitled to receive a per capita distribution. Failure to issue a per capita payment to some members is in violation of the RAP. (See, Plaintiffs' Exhibit O, Tribe's Exhibit 23)

Additionally, California Indian Health Care Services requires a letter from the BIA for each claimant in order to restore {laintiffs' health care. (Declaration of Thor O. Emblem, ¶ 3) Consequently, this Court can order the BIA to provide a letter to California Indian Health Care Services to restore Plaintiffs' health care services.

Contrary to the Tribe's claim, the relief sought does not involve an intra-tribal dispute,[19] it involves preserving and enforcing the status quo (which was done during the Agency proceeding). The Agency's ruling is before this Court, and it is the Agency's ruling which caused the instant harm to Plaintiffs. Injunctive relief to restore the status quo is sought because of the BIA's inaction. Where the legality of the acts of federal officials in approving a tribal action (or their inaction) is challenged, the matter is not an "intratribal dispute" insulated from federal court review and relief. See *Milam v. United States Dep't of Interior*, *supra*, 10 I.L.R. 3013, 3015. (Plaintiffs' Exhibit DD)

The Tribe relies on *Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director*, 38 IBIA 244, 249 (2002) to argue that the BIA's authority must be narrowly construed and undertaken in such a way as to avoid unnecessary interference with the tribes' right to self-government. (Tribe's

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[19] The Tribe argues that the per capita issue is an intratribal conflict. (See Tribe's Memorandum, p. 21.) There is nothing intratribal about submitting false certified resolutions to the two governmental agencies. This is a case where the Department of Interior has a duty to act on the illegality of the conversion of over $3 million in per capita gaming revenues pursuant to the fiduciary duties and IGRA. The NIGC will not act unless the BIA says to act. (Plaintiffs' Exhibit O)

Memorandum, p. 24) But that case was superceded in *Cahto Tribe v. Dutsche, Regional Director for the Pacific Region, Bureau of Indian Affairs, et al*, United States District Court, Eastern District of California, Case No. 2:10-cv-01306-GEB-GGH, filed on September 22, 2011. In *Cahto*, the District Court found that the Tribe had delegated its authority to the BIA to review enrollment decisions pursuant to the Cahto Tribe's enrollment ordinance provisions.[20] Even though the BIA does not like to be involved in enrollment actions, it nonetheless exercised its fiduciary duty to the enrolled Sloan/Hecker tribal members by withholding government benefits until the Cahto Tribe recognizes the federally approved members. (Plaintiffs' Exhibits EE and FF)

Plaintiffs' Complaint seeks review of federal Agency action under Title 5 U.S.C. sections 706 (1) and 706 (2)(A). (Complaint, p. 28, ¶¶ 125 and 128.) Agency action is defined as including the whole or a part of an agency rule, order, licence sanction relief, or the equivalent or denial thereof, or failure to act. 5 U.S.C. § 551 (13); *Seminole Nation of Okla. v. Norton*, *supra*, 223 F. Supp. 2d 122, 141.

Significantly *Hein v. Capitan Grande Band of Diegueno Mission*, *supra*, 201 F. 3d 1256, 1258 is dispositive of the Rule 19 issue as it pertains to Plaintiffs' action for injunctive relief:

> We reverse the district court's decision dismissing plaintiffs' remaining claims on appeal; those claims are brought only against the United States and the Secretary of the Interior, and the Barona Group is not, pursuant to Rule 19, an indispensable party with respect to these causes of action. In particular, plaintiffs have asked the district court to compel the Secretary of Interior to issue a ruling with respect to their tribal status and, relatedly, their rights to a share of the proceeds of the Barona Group's gaming operations. That cause of action, as well as the cause of action against the Secretary and the United States for breach of trust, remains properly before the district court.[21] (Emphasis added.)

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[20] The Cahto Tribe disenrolled the Sloan/Hecker family on grounds that they had been enrolled with a previous tribe. BIA review was requested, but the agency never took action. In 2009, the BIA finally rendered a decision that Sloan/Hecker family member's names should be included on the Tribe's membership roll immediately since it had never taken action. (See Plaintiffs' Exhibit EE)

[21] Although the Ninth Circuit reversed on Rule 19 grounds, it did not consider the lower court's ruling on the issue of sovereign immunity. *Hein v. Capitan Grande Band of Diegueno Mission*, 201 F. 3d 1256, 1258.

Similarly, in Plaintiffs' case, the injunctive relief sought is against the Secretary/BIA to preserve and enforce the status quo. The *Hein* court concluded, "[g]iven that plaintiffs' complaint named Bruce Babbitt, the Secretary, in his official capacity, we direct the district court to treat plaintiffs' APA claim as an action to compel the Secretary to decide their appeal. See 5 U.S.C. § 706(1) (citation omitted) We express no opinion on the merits of the claim at this time, except to note that jurisdiction would exist even if the Barona Group were entitled to sovereign immunity." 201 F. 3d 1256, 1261.

C. Plaintiffs do not Have an Adequate Remedy if the Case is Dismissed.

The Interior Board of Indian Appeals (IBIA) lacks jurisdiction to review tribal enrollment issues. See *Marquez v. Bureau of Indian Affairs*, 37 IBIA 99 (2002). The only remedy Plaintiffs have available for review of the Agency decision which terminated their heritage and Tribal membership stating that Plaintiffs must be removed from the federally recognized Roll is in the District Court under the APA. (Title 5 U.S.C. sections 706 (1) and 706 (2)(A).) "[I]f no alternative forum is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Makah Indian Tribe v. Verity*, *supra*, 910 F. 2d 555, 560.

D. If the Court Finds the Tribe a Required Party, the Case Should Only be Dismissed if it is Determined "in Equity and Good Conscience" That the Action Should not Proceed Among the Existing Parties.

A finding of sovereign immunity by itself does not eliminate the need to weigh all of the four Rule 19(b) factors. *Davis v. United States*, 192 F. 3d 951, 960 (10th Cir. 1999). The equity and good conscience language in Rule 19 "leaves the district judge with substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward." *Davis v. United States*, *supra*, 199 F. Supp. 2d 1164, 1175.

The Tribe voluntarily relinquished its sovereign right to govern itself regarding Tribal membership issues when it adopted Article III, section 2 of its Constitution which delegated approval of "all membership in the band" to the BIA. Since the Assistant Secretary issued the Order affecting Plaintiffs' rights, the BIA, not the Tribe is the appropriate defendant. Complete relief can be granted without the Tribe's presence because the Agency's decision is upheld or reversed on the basis of the Agency's reasoning in that decision.

The Court can also grant Plaintiffs complete injunctive relief because the Secretary/BIA has a duty to enforce Tribal members's rights when they are unlawfully denied. Plaintiffs have not been removed from the federally approved and recognized Tribal Roll to date, so they have a right to have their status quo preserved and enforced while the case is pending review. Finally, the fact that Plaintiffs would have no other forum in which to bring their claim if their suit were dismissed weighs heavily in favor of allowing the suit to proceed.

III. ALTERNATIVELY, IF THE COURT FINDS THAT THE TRIBE IS A REQUIRED PARTY, PLAINTIFFS' COMPLAINT CAN BE AMENDED TO JOIN THE TRIBE AS A DEFENDANT AND THEREFORE THE CASE SHOULD NOT BE DISMISSED.

As argued *supra*, Plaintiffs can also amend their Complaint to join the Tribe as a defendant since the Tribe's governing document delegated the enrollment decision to the Agency, and the Tribe waived its sovereign immunity.

CONCLUSION

The Court has several options. The Court can find that the Tribe is not a required party, that the case involves record review of the agency decision. The Court can find that in equity and good conscience the case should and can proceed without the presence of the Tribe as a party. The Court might also tailor relief so as not to invoke sovereign immunity. The Court can find the Tribe has waived its sovereign immunity in its governing document, and alternatively, if this Court concludes that the Tribe is a required party, the Court can grant Plaintiffs leave to amend the Complaint to join the Tribe as a defendant in this case.

The Court should not dismiss Plaintiffs' case unless the Tribe and/or government has met its burden of establishing sovereign immunity, that the Tribe is a required party, and the Court is satisfied that equity and good conscience dictate the case must be dismissed.

DATED: October 28, 2011

Respectfully submitted,

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