As we discuss more fully below, based on significant precedent in the Ninth Circuit and other courts regarding the application of Rule 19, the Tribe is a necessary and indispensable party under Rule 19 and this case cannot be heard, in equity and good conscience, in the absence of the Tribe and should be dismissed.

A. The Tribe is A Necessary Party

Pursuant to Rule 19(a), the Tribe is a required party if any one of the following criteria is met: (A) the court cannot, in the absence of the Tribe, accord complete relief among the existing parties; *or* (B) the Tribe claims an interest relating to the subject of the action and disposing of the action in the Tribe's absence *may* either (i) impair or impede the Tribe's ability to protect its interest, or (ii) leave an existing party subject to a substantial risk of incurring multiple or inconsistent obligations because of the interest. *See* FED. R. CIV. P. 19(a). The Tribe is a necessary party if just one of these tests is satisfied, but as demonstrated below, all of the factors set out in Rule 19(a) support the determination that the Tribe is a necessary party.

1. In the Absence of the Tribe, Complete Relief Cannot be Accorded Among the Existing Parties to Plaintiffs' Suit

The Tribe is a required party, because in the Tribe's absence the court cannot accord complete relief among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). A court cannot provide litigation parties complete relief where the requested remedy, if granted, would fail to bind all absent parties who are in a position to act in direct contravention of that remedy. *Friends of Amador County v. Salazar*, No. 2:10CV00348 WBS-CKD, Memorandum and Order Re: Motion to Dismiss, at 6, Sept. 29, 2011 (Exhibit 29). Where an Indian tribe is an absent party and the relief requested in the case would

directly order the tribe to perform, or refrain from performing, certain acts, the judgment would not bind the tribe unless the tribe is joined as a party to the action and bound by res judicata. *See E.E.O.C. v. Peabody W. Coal. Co.*, 400 F.3d 774, 780 (9th Cir. 2005).

For example, in *Pit River Home and Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1092 (9th Cir. 1994), a group of Indian families sued the United States and claimed beneficial ownership of real property held in trust by the United States for the benefit of the Tribe. The court found that the Tribe was a necessary party because "even if the (plaintiff) obtained its requested relief in this action, it would not have complete relief, since judgment against the government would not bind the Council, which could assert its right to possess" the Tribal land. *Id.* at 1099. Similarly, in *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991), various groups of Indians brought an action against federal officials challenging the United States' continuing recognition of the Quinault Indian Nation as the sole governing authority to the Quinault Indian Reservation. The court found that the Quinault Nation was a necessary party because "(j)udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation." *Id.* at 1498.

Existing case law supports the right of tribal self-governance, including particular deference to the jurisdiction and authority of tribes to resolve internal tribal matters. The Supreme Court, in considering a tribal membership dispute under the Indian Civil Rights Act (ICRA) (25 U.S.C. §§ 1301 - 1341), recognized Congress' intent to preserve tribal sovereignty and self-determination and accordingly limited federal court jurisdiction over

such claims to avoid substantial interference with the Tribe's ability to maintain itself as a culturally and politically distinct entity.[16]

In this case, the Plaintiffs seek to adjudicate an internal membership dispute that turns on the interpretation of the membership criteria and the enrollment process set forth in the Tribe's Constitution. The Plaintiffs were disenrolled by the Tribe on January 28, 2011, immediately following the issuance of the Assistant Secretary's Order, and they are no longer members of the Tribe and have not enjoyed the rights and privileges of tribal membership for over eight months.[17] *See* Exhibit 3. Yet, the Plaintiffs seek an order that would require the Tribe to change its membership rolls and afford Plaintiffs the rights and privileges of tribal members, including voting rights on the Tribe's governing body and per capita payments of tribal government revenues. *See* Complaint p. 29-30. Thus the Plaintiffs are seeking relief that would require the Tribe to perform, or refrain from performing, certain acts. Unless the Tribe is joined as a party to the action and bound by res judicata, the requested relief would not be binding on the Tribe, and the Tribe could continue to assert its inherent rights of self-governance over the internal tribal matters at issue in this case in direct contravention of such relief, if granted.

The Plaintiffs' seek to avoid the need for the Tribe to be a subject of the Court's jurisdiction by requesting instead that the Court issue an order that requires the BIA to ensure that the Tribe to perform, or refrain from performing, certain acts associated with

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[16] *See* cases cited above in footnote 15.

[17] Plaintiffs' acknowledge that they are not treated as tribal members. *See* Complaint at p. 29 ¶ 131 – 133.

the tribe's membership and governance issues. The BIA does not have the authority to interfere in this way with the tribe's internal membership and governance decisions, however, so this approach must fail. If the remedy granted by the Plaintiffs were to be granted, the Tribe would be in a position to act in direct contravention of the remedy and could file its own litigation to enforce its right to determine tribal membership and governance issues. *See. e.g., St. Pierre v. Norton*, 498 F. Supp. 2d 214, 221 (D.C.C. 2007) (court found that complete relief could not be provided in a suit involving a tribal membership issue absent the tribe because the tribe would likely file its own suit to enforce its right to determine membership issues).

Further, the BIA does not have the authority to order the Tribe to make, or escrow, payments of tribal gaming revenues to certain persons. Such distributions, and the resolution of disputes regarding such distributions, are governed by the Tribe's Revenue Allocation Plan (RAP) established and approved pursuant to the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. § 2710(b)). *See* 25 C.F.R. § 290.12, page 848 (2010). Plaintiffs sought such payments under the RAP, and the General Council issued the Tribe's final decision denying the appeal under the RAP dispute resolution process. *See* Letter dated July 12, 2011 from the Business Committee to Emblem (Exhibit 18). Tribal payments made outside of a tribe's approved RAP may violate IGRA which is subject to enforcement by either the Department of Justice or the National Indian Gaming Commission. 25 C.F.R. § 290.10, page 848 (2010).

Rule 19(a) requires that the court be able to accord complete relief requested. Here, without the Tribe as a party, the Court could not do so. Moreover, because the

relief requested by the Plaintiffs may conflict with the implementation of the Tribe's RAP, the Tribe may be statutorily prohibited from carrying out the ordered remedy.

2. This Action Implicates Fundamental Interests of the Tribe and Adjudicating the Action in the Tribe's Absence Would Substantially Impair or Impede the Tribe's Ability to Protect Those Interests

The Tribe is also deemed a required party because the Tribe claims a legally protected interest relating to the subject of this action and disposing of this action in the absence of the Tribe would, as a practical matter, impair or impede the Tribe's ability to protect the interest. Fed. R. Civ. P. 19(a)(1)(B)(i). An absent party need merely "claim" a legally protected interest in the suit because "(j)ust adjudication of claims requires that courts protect a party's right to be heard and to participate in a claimed interest. . ." *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1155, n. 5 (9th Cir. 2002), quoting *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The joinder rule is to be applied so as to preserve the right of parties "to make known their interests and legal theories." *Shermoen v. United States*, 982 F.2d at 1317, *citing Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986). Although a court would not be required to find a party necessary based on patently frivolous claims. *Id.* at 1318.

This case implicates a number of the Tribe's fundamental interests. At its core this is an internal tribal membership dispute that turns on the interpretation of the membership criteria and the enrollment process set forth in the Tribe's Constitution and the terms of a regulation incorporated therein by reference. The Tribe clearly has

significant self-governance interests in interpreting its own laws, especially in their application to tribal membership issues.

The courts have found that an absent Indian tribe undoubtedly has a legally protected interest in any adjudication of its governing authority over its reservation. *See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994); *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1498 (Quinault Indian Nation is a necessary party to action challenging the Quinault's governing authority); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990) (absent tribes are necessary parties to Makah's challenge to Department of Interior's intertribal fish allocation decision); *St. Pierre*, 498 F. Supp. 2d at 220 (an absent tribe necessary in a dispute regarding interpretation of the tribe's constitution and reversal of tribal law regarding membership). It is also well established that "absent tribes have an interest in preserving their own sovereign immunity, with its concomitant 'right not to have (their) legal duties judicially determined without consent.'" *Shermoen*, 982 F.2d at 1317; *Pit River Home & Agr. Co-op. Ass'n*, 30 F.3d at 1099.

Plaintiffs' suit thus implicates several of the Tribe's most fundamental rights. Significantly, Plaintiffs seek to adjudicate the Tribe's membership rolls absent the Tribe. Tribal membership determinations are the most essential expression of tribal self-governance requiring resolution in tribal forums.[18] Notwithstanding these significant

[18] In *Santa Clara Pueblo v. Martinez*, the Court found that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community" and held that federal courts have no jurisdiction over a tribal membership dispute. 436 U.S. at 72, n.32.

interests, Plaintiffs seek to litigate, without the participation of the Tribe, questions over who will have voting rights on the Tribe's General Council and who are entitled to other rights and privileges of tribal membership including per capita payments of tribal gaming revenues. For these reasons, there can be no doubt that the Tribe claims substantial and fundamental legally protected interests in the subject matter of this case. Moreover, the Tribe also has an interest in preserving its sovereign immunity not to have its legal duties determined without consent. *Pit River Home & Agr. Co-op. Ass'n*, 30 F.3d at 1099; *Shermoen*, 982 F.2d at 1317.

Disposing of these fundamental rights without the Tribe would impair the Tribe's ability to protect these interests. In certain circumstances impairment may be minimized if the absent party is adequately represented in the suit. *Wichita and Affiliated Tribes of Oklahoma,* 788 F.2d at 774. While the United States may adequately represent an Indian tribe where there is no conflict of interest, the courts have held that the United States cannot adequately represent an absent tribe, when it may face competing interests, or there exists a conflict of interest between the United States and the tribe. *See, e.g., Makah*, 910 F.2d at 558; *Pit River Home and Agr. Coop Ass'n.*, 30 F.3d at 1101. An existing party may adequately represent the interest of an absent part if (1) the present party will undoubtedly make all the absent party's arguments, (2) the present party is capable and willing to make the absent party's arguments, and (3) the absent party would not offer any necessary elements that the present parties would neglect. *Shermoen*, 982 F.2d at 1318. The Interior Department's interests do not necessarily coincide with a

tribe's interests under Rule 19(a). *Citizen Potawatomi Nation v. Norton*, 248 F. 3d 993, 100-01 (10th Cir. 2001) *modified on other grounds*, 257 F.3d 1158 (2001).

In cases that involve intertribal conflicts, the Ninth Circuit has held that the United States is not an adequate representative of an absent tribe. *See, e.g., Pit River Home & Agr. Coop. Ass'n*, 30 F.3d at 1001 (finding that the United States could not adequately represent the interests of the Council in an action brought by a group of Indian families who claimed beneficial ownership in the Tribe's trust property). For the purposes of this rule, an "intertribal" dispute includes disputes between a tribe and non-tribe groups or individuals. *Rosales v. United States*, 89 Fed. Cl. 565, 586 (2009).

The federal defendants in this action cannot fully and adequately represent the Tribe's interests, because this action involves a dispute between the Tribe and individuals claiming membership in the Tribe, and the Tribe's interests and the Interior Department's interests diverge and conflict on several important aspects involving this dispute. It is not clear that the United States will make, or be willing to make, all the Tribe's arguments or that the Tribe would not offer necessary elements that the United States may neglect.

A few examples of differences between the tribe and the federal defendants illustrate the point. The Assistant Secretary declined to adopt the Tribe's interpretation of fundamental aspects of Article III of the Tribe's Constitution, which establishes the BIA's role in reviewing the Enrollment Committee's membership determinations (Exhibit 5). Notably, during the BIA's administrative review of the Enrollment Committee's decision, the Tribe argued that the BIA should have applied a clear and convincing standard rather than a preponderance of the evidence standard and that the

burden of proof should be on the individual to prove their membership and not on the Tribe to disprove it. *See* Tribe's Memorandum in Support of Notice of Appeal at 9-17 (Exhibit 22). In another example, in the Tribe's appeal to the Assistant Secretary, the Tribe identified a number of significant flaws in the Regional Director's decision, including, among other things, evidence that the decision relied extensively on a forged baptismal certificate.[19] The Assistant Secretary expressly declined to apply the Tribe's interpretation of its Constitution and did not express an opinion on the false baptismal certificate. *See* January 28 decision at 8-10 (Exhibit 21). If the Court allows this action to proceed, the case may well turn on the interpretation of the Tribe's Constitution and it is unlikely that the United States would raise these (and potentially other) arguments that it does not agree with in the absence of the Tribe. Thus, the United States cannot adequately represent the Tribe's interests in the interpretation of its own Constitution and the proper consideration of relevant evidentiary facts.[20]

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[19] The Tribe argued in its brief to the Assistant Secretary that a baptismal certificate for Alto Sr. was evidence that he was not the birth child of a tribal member and that the Region's objection to this evidence was based entirely on a new and false baptismal certificate that the BIA created during the course of its review of the Committee's disenrollment action, and which contains many blatant errors. *See* Memorandum in Support of Notice of Appeal at 28-31 (Exhibit 22); Report III at 26-29 (Exhibit 20).

[20] We note that the Seventh Circuit found that the United States may adequately represent a tribe in a challenge to a federal Secretarial election to amend a tribal constitution held pursuant to the Indian Reorganization Act (25 U.S.C. § 476) in *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999). In *Thomas* the court found that Congress had explicitly reserved to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions. *Id.* at 677. Although Plaintiffs have alleged that interim relief was necessary to prevent the Tribe from conducting a constitutional election, no such election is contemplated or scheduled at this time and therefore the BIA's authority under § 476 is not implicated. Moreover, the reasoning of the *Thomas* court does not apply to this case because there is no federal law expressly authorizing the BIA to

The presence of the United States in this case does not adequately protect the Tribe's multiple interests in this case. The United States has an interest in defending the decision of the Assistant Secretary and defending federal officials from an action to enjoin their conduct. While the government has a general duty to support the right of the Tribe to exercise its inherent right of self-governance over the fundamental, internal matters at issue in this case, the United States also faces the competing interests of the Plaintiffs. Furthermore, the United States and the Tribe have conflicting interpretations of the Tribe's Constitution and it is uncertain that the United States would make all the Tribe's evidentiary arguments, especially those related to the Region's reliance on a false document. Finally, as a practical matter, the issues at stake in this action will ultimately have very little consequences for the federal government, but could have a grave impact on the Tribe's authority to govern its internal affairs.

3. The Tribe's Absence Would Subject the Government Defendants to a Substantial Risk of Incurring Inconsistent Obligations

Under Rule 19(a) the Tribe must also be deemed a necessary party because, if the Plaintiffs were to be granted their requested relief in the absence of the Tribe, the government would be subject to substantial risk of incurring inconsistent obligations regarding the requested relief.

The federal government plays no role in a tribe's membership decisions, except where membership is governed by specific treaty or law, or where a tribal constitution authorizes the Secretary of the Interior to review enrollment. *Santa Clara Pueblo*, 436

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intervene in a tribal membership decision and the BIA's role in the dispute before this Court arises solely as a matter of tribal law.

U.S. at 461. Accordingly, the Department acknowledges that tribal membership is "considered a matter within the exclusive province of the tribes themselves," except where specifically provided in federal statutes or tribal law. *Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director*, 38 IBIA 244, 249 (2002). Where a tribe authorizes the BIA to exercise formal authority to review tribal actions through its constitution or ordinances, "that authority must be narrowly construed, and BIA review must be undertaken in such a way as to avoid unnecessary interference with the tribes' right to self-government." *Id.* at 246-47.

Any attempt by the BIA to interfere with the Tribe's rights to govern its internal affairs would likely give rise to tribal litigation against the BIA. In considering such potential conflicts, the courts have found compelling the very real possibility that defendants would incur substantial risk of inconsistent legal obligations if BIA officials were sued by a tribe for actions taken in violation of tribal law as a result of plaintiff's success in the action. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002), *aff'd*, 343 F.3d 1282 (10th Cir. 2003) (finding that the United States would incur a substantial risk of inconsistent legal obligations if BIA officials were sued by the Seminole Nation for actions taken in violation of tribal law as a result of the court's granting an injunction against the BIA to require the BIA to take some action against the Seminole Nation's administration of its Judgment Fund Programs).

In sum, the Plaintiffs seek to have the court order the BIA to take actions that would violate its federal trust obligations to the Tribe and quite possibly its obligations under federal statute or regulations.

B. The Tribe Cannot Be Joined to this Action Because the Tribe Has Not Waived Its Sovereign Immunity over the Matters in Dispute in this Case

After determining that the Tribe is a necessary party, the Court would have to consider whether the Tribe could be joined to the suit. FED. R. CIV. P. 19(b). Indian tribes possess sovereign immunity from unconsented suit, and such immunity poses an absolute bar to subject matter jurisdiction. *Alvarado v. Table Mountain Rancheria,* 509 F.3d 1008, 1015-16 (9th Cir. 2007) ("tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe"), *citing Lewis v. Norton,* 424 F.3d 959, 961 (9th Cir. 2005). "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize." *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979).

The Tribe is a federally-recognized Indian tribe. *See* 25 U.S.C. § 715a; 75 Fed. Reg. 60,810-60,814 (October 1, 2010). It is well-settled that, absent an express unequivocal waiver or Congressional abrogation, the Tribe is immune from suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo,* 436 U.S. at 58; *accord Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.,* 523 U.S. 751, 754, (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity").

Any waiver of sovereign immunity must be unequivocally expressed. *See Quechan Tribe of Indians*, 595 F.2d at 1155. The Tribe's voluntary participation in administrative proceedings "is not the express and unequivocal waiver" of sovereign

immunity that is required in the Ninth Circuit. *See Quileute Indian Tribe*, 18 F.3d at1460.

The Tribe has not expressly or unequivocally waived its sovereign immunity regarding the matters in dispute in this case. As a result, the Tribe is immune from suit and the joinder of the Tribe is not feasible under Rule 19(b).

C. The Tribe is Indispensable to this Case and the Suit May Not Proceed in Equity and Good Conscience in the Tribe's Absence

Because the Tribe cannot be joined to the action, Rule 19(b) requires the Court to consider whether, "in equity or good conscience," the action should proceed in the absence of the Tribe or be dismissed. Fed. R. Civ. P. 19(b). The Federal Rules set out the following four factors courts are to consider in making this determination: (1) the extent to which a judgment rendered in the party's absence might prejudice the absent party or the existing parties; (2) the extent to which any prejudice could be lessened by or avoided by (A) protective provisions in the judgment, (B) shaping the relief, or (C) other measures; (3) whether a judgment rendered in the party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. Fed. R. Civ. P. 19(b)(1)-(4).

Because the Tribe has sovereign immunity, little balancing of these factors is required. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) ("if the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor'") (*quoting Confederated Tribes of the Chehalis Indian Reservation*, 928 F.2d at 1499).

Nevertheless, if the four factors are considered, they tip sharply in favor of dismissing the suit. Thus, the Tribe is an indispensable party.

1. The Tribe Will Be Substantially Prejudiced if a Judgment Is Rendered in the Absence of the Tribe

The first factor in the Rule 19(b) analysis is essentially the same as the inquiry under Rule 19(a)(2)(i) regarding whether continuing the action will impair the absent party's ability to protect its interest. *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1498 n.9 (D.C. Cir. 1995); *Quileute Indian Tribe*, 18 F.3d at 1460. Where a favorable judgment would, in effect, reverse the decisions of a tribe's governing body, and significantly interfere with a tribe's ability to govern its programs, such judgments have been to be highly prejudicial to the absent tribe.

Although the Tribe would not be bound if relief were to be granted in this action, the Tribe would undoubtedly be prejudiced because of the nature and breadth of the requested relief. Plaintiffs seek to order the Tribe to perform, or refrain from performing, certain actions inextricably tied to the Tribe's most fundamental rights of self-government. As noted above, the Plaintiffs attempt to make an "end run" around the Tribe's sovereign immunity by filing this action against the United States, but the remedies are clearly aimed directly at the Tribe. The Plaintiffs' legal counsel underscored the true objective of this suit in his letter to the Tribe's Spokesman, dated October 4, 2011, which seeks to enforce, against the Tribe, the Temporary Restraining Order granted by this Court on October 4, 2011 (Exhibit 1). In that letter, Plaintiffs' counsel asked if the Alto family would be permitted to attend and vote at the General

Council meeting scheduled for October 9, 2011, and requested that he also be permitted to attend and speak. *Id.* In the alternative, Plaintiffs' Counsel requests "that NO Alto matters be discussed or ruled upon, NO amendments to the constitution are discussed or ruled upon, and NO Ordinances are discussed or ruled upon." *Id.* The import of this letter is clear. Plaintiffs will seek to shut down the Tribal government unless the Tribe grants voting rights and other rights and privileges of membership to persons who were disenrolled by the Tribe on January 28.

The Plaintiffs cannot enforce these demands directly against the Tribe because it is not bound by the Order, but the Plaintiffs' Complaint makes clear that they will seek to enforce this Order through the BIA and possibly other federal and state agencies. The Plaintiffs pursued a similar strategy during the period this matter was under administrative review. In late 2008, in *Alto v. Lawson*, No. 37-2009-00050002-CU-FR-NC, an action filed in California state court, the Marcus Alto descendants sought to challenge the disenrollment action and require the Tribe to pay the disenrollees withheld per capita payments. On February 20, 2009, the state court dismissed *Alto v. Lawson* for lack of jurisdiction, citing *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1061 (2005), a decision that recognizes the basic principle that intra-tribal disputes should be resolved in tribal political and judicial forums in accordance with tribal law, as interpreted by the tribe.[21] At the same time, while review of the disenrollment action was pending before the BIA, the Tribe had to respond to inquiries from the National

[21] *See* Judgment in *Alto v. Lawson*, No. 37-2009-00050002-CU-FR-NC (Calif. Sp. Ct., County of San Diego) (Exhibit 27).

Indian Gaming Commission regarding the disenrollment action.[22] Again, subsequent to the January 28 decision, the Marcus Alto descendants requested that NIGC initiate an investigation of the Tribe's action, to which the Tribe was forced to respond. *See* February 21, 2011 Letter from Charos to NIGC (Exhibit 25); August 2, 2011 Letter from Emblem to NIGC (Exhibit 26). *See also* the Tribe's response, Letter dated August 8, 2011 from Lawson to Stevens (Exhibit 7).

As a result of Plaintiffs' actions during the administrative appeal process, the Tribe's ability to govern itself, engage in economic activities, and to deliver governmental services were severely hampered. Based on this history, and unless the Tribe complies with the Plaintiffs' demands, the Plaintiffs will most likely use any relief granted in this matter to disrupt and interfere with the Tribe's relationship with the BIA, the National Indian Gaming Commission, the State of California, and with private parties regarding economic relationships. It is also quite likely that such actions would give rise to litigation with government agencies and possibly private entities.

There is no doubt that if this case proceeds in the absence of the Tribe and relief is granted that the Tribe would be subject to substantial prejudice. It would be severely hampered its ability to govern internal matters and to provide government services, and its relationship with government agencies and private entities would likely be compromised.

[22] *See* July 18, 2008 Letter from NIGC to Lawson (Exhibit 23); August 20, 2008 Letter from Lawson to NIGC (Exhibit 24).

2. The Prejudice to the Tribe Cannot be Lessened or Avoided by Protective Provisions or the Shaping of Relief

When the requested relief would require action of an absent party, the courts have found that it would not be possible to shape relief so as not to prejudice the absent party. *St. Pierre,* 498 F. Supp. 2d at 221 ("the ruling Plaintiffs request goes straight to the heart of the Tribe's internal governance"); *Davis v. U.S.*, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002) ("No matter how the remedy is shaped, essentially the Court will be modifying the Tribe's policies and ordinances. Further, the Court finds there are no protective provisions which could be included in the judgment which would prevent trampling on the (tribe's) sovereign right to make its own laws and be ruled by them.").

Similarly the relief requested in this case goes straight to the heart of the Tribe's internal governance and seeks to require the Tribe to perform, or refrain from performing, certain actions fundamental to its inherent right to govern its internal affairs. There is no way such relief could be fashioned or shaped in a manner that would lessen or avoid the prejudice the Tribe.

3. Adequate Relief Could Not Be Rendered in the Absence of the Tribe

For the purposes of this analysis, no partial relief is adequate. *See Dawavendewa,* 276 F.3d at 1162 ("No partial relief is adequate. Any type of injunctive relief necessarily results in the above-described prejudice to (Defendant) and the Nation."). As discussed above, the relief requested would substantially affect the rights of the absent Tribe, even though the Tribe, because of its absence from the action, would not be bound by the Court's order should the Plaintiffs' requested remedy be granted. Thus, it is clear that

adequate relief cannot be rendered in the absence of the Tribe. Moreover, the adequacy factor "cannot be given dispositive weight when the efficacy of the judgment would be at the cost of the absent parties' rights to participate in litigation that critically affects their interests." *Wichita and Affiliated Tribes of Oklahoma,* 788 F.2d at 777.

4. Plaintiffs Have No Right to Adjudicate the Membership Issues in Federal Court and the Tribe's Sovereign Immunity Favors Dismissal

Plaintiffs do not have a general right to litigate the membership issues raised in this case because federal courts have long refrained from interfering in matters of Tribal membership, which are treated as non-justiciable internal matters. A Tribe's authority to define its membership and regulate its form of government is central to the Tribe's existence. *See Santa Clara Pueblo,* at 72 n.32 (a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community"); *Fletcher v. Babbitt*, 116 F.3d 1315, 1326-27 (10th Cir. 1997) ("Indian tribes are separate sovereigns with the power to regulate their internal and social relation, including their form of government and tribal membership."). The Plaintiffs in this matter have been provided several forums in which to argue their case, and their claims have been thoroughly and exhaustively considered. They do not have a right to further review of these membership claims in federal court.

Finally, when considering the equity of dismissing a case under Rule 19(b), the courts have long held that the Tribe's interest in maintaining its sovereign immunity outweighs a plaintiff's interest in litigating its claim. *See Pit River Home & Agr. Co-op. Ass'n*, 30 F.3d at 1102 ("Council's interest in maintaining its sovereign immunity

outweighs the Association's interests in litigating its claim."); *Quileute Indian Tribe*, 18 F.3d at 1460 (plaintiff's interest in litigating their claim did not outweigh tribe's interests in maintaining its sovereign immunity, despite lack of alternative forum); *Confederated Tribes of Chehalis Indian Reservation*, 928 F.2d at 1500 ("Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interests in maintaining its sovereign immunity"); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (although the Ninth Circuit pursues a four-factor analysis even when immune tribes are at issue, it has "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or form for the plaintiffs.")

In this case the Plaintiffs have already been provided an adequate opportunity for review within tribal and federal administrative processes, and the Tribe's sovereign immunity outweighs the Plaintiffs' claims to further review by this Court.

IV. CONCLUSION

Plaintiffs' motives in this case are clear: they seek, an order from this court that will somehow result in the Tribe being required to perform, or refrain from performing, actions that go to the heart of the Tribe's authority to govern its internal affairs and to interpret tribal law, including over membership matters. Plaintiffs' transparent attempt to make an "end run" around the Tribe's sovereign immunity by suing the officials of the Interior Department under the APA violates the joinder rule set forth in Rule 19. The Tribe is a necessary party and cannot be joined, and, in equity and good conscience, this

matter cannot continue in the absence of the Tribe. The Tribe thus requests that this case be dismissed.

Tim Seward, California Bar Number 179904
Attorneys for the San Pasqual Band of
Mission Indians

DATED this 11th day of October, 2011.