




United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 12 2012

MEMORANDUM ORDER

To: BIA Regional Director, Pacific Region
BIA Superintendent, Southern California Agency

From: Assistant Secretary – Indian Affairs 

Re: San Pasqual Band of Mission Indians – Enrollment Dispute

On January 28, 2011, I issued an order setting out my decision in a tribal enrollment dispute (January 28, 2011, Order). The San Pasqual Band of Mission Indians (the Band) sought to disenroll those members whose claims to be qualified for membership derive from their descent from Marcus Alto, Sr. The Band asserted that Marcus was not the biological child of the Band members who raised him from infancy. My office conducted an extensive study of the voluminous documentary record. Based on that study, I concluded that the preponderance of the evidence supported approving the Band's proposal to remove the descendants of Marcus Alto, Sr., from the Band's roll. My January 28, 2011, Order reversed the decision of the Regional Director, who had affirmed the decision of the Agency Superintendent.

On September 30, 2011, the Alto descendants filed suit in the U.S. District Court for the Southern District of California, *Alto v. Salazar*, Civ. No. 11-cv-2276 (S.D. Cal. filed September 30, 2011). Plaintiffs requested an array of court-ordered relief, including vacatur of the January 28, 2011, Order. Plaintiffs asserted that the decision violated the Administrative Procedure Act (APA) as being arbitrary and capricious and not supported by the evidence. Plaintiffs also requested the court issue a preliminary injunction that would preserve the membership status of the Alto descendants as it existed prior to the issuance of the January 28, 2011, Order, and pending final resolution on the merits. On December 19, 2011, the court issued an order granting the preliminary injunction. The order sets out the following five mandates:

(1) Defendants, their officers, agents, servants, employees, and attorneys are hereby RESTRAINED and ENJOINED for the duration of this lawsuit from removing Plaintiffs from the San Pasqual Tribe's membership roll and from taking any further action to implement the Assistant Secretary's January 28, 2011, Order.

(2) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the duration of this lawsuit, the adult Plaintiffs access to, and voting rights at, the general council meetings to the same extent as was enjoyed during the pendency of the administrative proceedings and before the issuance of the January 28, 2011, Order.

(3) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the duration of this lawsuit, Plaintiffs access to the Indian Health Care services to the same extent as was enjoyed during the pendency of the administrative proceedings and before the issuance of the January 28, 2011, Order.

(4) Defendant Echo Hawk is hereby ENJOINED to issue an interim order requiring, for the duration of this lawsuit, the Tribe to make the per capita distributions of gaming revenue to Plaintiffs to the same extent as was required during the pendency of the administrative proceedings and before the issuance of the January 28, 2011, Order.

(5) Defendant Echo Hawk is hereby ENJOINED to issue an interim order requiring, for the duration of this lawsuit, the Tribe to escrow the minor Plaintiffs' per capita trust funds to the same extent as was required during the pendency of the administrative proceedings and before the issuance of the January 28, 2011, Order.

I am, of course, bound to comply with the court's order. I believe, however, that the limits of my legal authority, together with the government-to-government relationship between the United States and the Band, is such that I do not have the authority to issue the orders, or compel the Band to comply with all aspects of the orders, exactly as phrased by the court. Through counsel, I plan to advise the court of the limitations on my authority.

Nonetheless, the unusual degree of authority I have with respect to disenrollment in this Band – vested in me by the Band's Constitution, not by Federal law – certainly permits me to give effect to the court's injunction in substance. My authority in this regard flows initially from the provisions of former 25 C.F.R. Part 48, which were expressly incorporated into the Band's Constitution. Those regulations direct that “[n]ames 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.” 25 C.F.R. § 48.14(d) (1960). I exercise authority by delegation of the Secretary's authority in this matter. While my January 28, 2011, Order conveyed my approval to remove the Altos from the Band's roll, and while the Southern California Agency of the BIA accepted the *de facto* disenrollment of the Altos, the BIA has not approved a modified roll reflecting that disenrollment. As I advised the Band in my letter to their attorney, Mr. Geoffrey Strommer, dated October 29, 2009, “no member is disenrolled until the Assistant Secretary approves of the disenrollment. Since the Assistant Secretary has not approved the Enrollment Committee's recommended disenrollment, the Alto descendants remain members of the Band.”

The court's order directs me to issue interim orders that allow the Alto descendants to enjoy certain enumerated rights and benefits to the same extent as were enjoyed during the pendency of the review of the Band's disenrollment proposal, which concluded with the issuance of my January 28, 2011, Order.

Accordingly, I issue the following interim orders to be in effect during the pendency of the lawsuit referenced above:

1. I direct all officers and employees of Department of the Interior to take no action in furtherance of my January 28, 2011, Order, and to deem and recognize that the Marcus Alto, Sr., descendants are, and have been since before the issuance of the January 28, 2011, Order, members of the San Pasqual Band, entitled to all rights and benefits enjoyed by such members.
2. In compliance with the court's order, I advise the Band that any action by the Band to deny to the Alto descendants the same right to participate in tribal elections as is enjoyed by all other members shall be recognized as a denial of the Altos' due process rights and will not be recognized by the Department.
3. Because the Alto descendants are deemed to be members of the Band under the terms of this order, they are eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Eligibility for Indian Health Service (IHS) programs and services, whether provided by IHS or the Band, is determined pursuant to regulations found at 42 C.F.R. Part 136. For the purposes of the IHS eligibility regulations, tribal enrollment and membership are indicative of eligibility for health care services. By copy of this order, I hereby notify IHS and the Band that the individuals covered by this order are deemed to be tribal members. I expect IHS and the Band to comply with the IHS regulations for the provision of health care services to individuals covered by this order.
4. Because the Alto descendants are deemed to be members of the Band under the terms of this order, any action by the Band to distribute per capita payments to other members, but deny such distribution to the Alto descendants, would constitute a violation of the Band's Revenue Allocation Plan (RAP) approved by the Secretary under the Indian Gaming Regulatory Act. 25 U.S.C §§ 2701, *et seq.* By copy of this order, I hereby notify the National Indian Gaming Commission (NIGC) and the Band that the individuals covered by this order are deemed to be tribal members. However, it remains to be determined whether the January 28, 2011, Order will survive judicial scrutiny and, if so, when the Altos ceased to be members of the Band. If the final result of this litigation is that (1) the January 28, 2011, Order is affirmed, and (2) the Altos have not been entitled to the rights and privileges of membership since the time the January 28, 2011, Order was issued, then the distribution of per capita funds to the Alto descendants under the court's mandate would not be proper under IGRA. Therefore, the Band is hereby advised that while this order is in effect, the Band may place all per capita distributions to the Alto descendants (including minors) into an escrow account created for this purpose. If the Alto descendants ultimately prevail in this litigation, the Band must distribute the funds in the escrow account to the Alto descendants, including distribution to the minors' trust fund as set forth in the Band's approved RAP.

cc: Director, Indian Health Service
Chairwoman, National Indian Gaming Commission
Spokesman, San Pasqual Band of Mission Indians