Thor O. Emblem CSBN 141880
Tracy L. Emblem CSBN 145484
LAW OFFICES OF THOR O. EMBLEM
800 W. Grand Ave., Ste B
Escondido, CA 92025
Telephone: (760) 738-9301
Facsimile: (760) 738-9409

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY L. (HAYES) AGUAYO, (691), 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, AMY DUTESCHKE, Regional Director Dept. of Interior Indian Affairs, Pacific Regional Office, 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. '12CV0551 WQHKSC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER GRANTING PRELIMINARY INJUNCTION

DATE:
TIME:
JUDGE:
DEPT:

///

///

///

///

///

///

///

///

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

Federal Court Rules

Federal Cases

TABLE OF AUTHORITIES (Cont'd)

Federal Cases, cont.

TABLE OF AUTHORITIES (Cont'd)

INTRODUCTION

Plaintiffs (descendants of Margarita Britten) are approximately 62 individuals who are members and applicants for membership, of the Pala Band of Mission Indian Tribe ("the Band") in San Diego County. Many Plaintiffs reside on the Pala Indian reservation and have been active members 20 years or more. Many plaintiffs are women who are the sole support of their minor children. 23 Plaintiffs are minor children.

On February 3, 2012, the Band's Executive Committee ("EC") wrote Plaintiffs a letter terminating Plaintiffs' tribal membership and benefits immediately, except for Plaintiffs' health care coverage, which was terminated effective March 1, 2012. As demonstrated by Plaintiffs' Declarations attached as Exhibit 4(B) to the Complaint, Plaintiffs are suffering extreme hardship from the EC's actions. Plaintiffs contend that the EC's actions excede the scope of the Committee's governing authority under the Band's governing documents, and the EC's decision to terminate Plaintiffs' benefits while Plaintiffs' appeal of the termination of their tribal membership and benefits (the "Appeal") is pending violates Plaintiffs' civil rights.

As will be demonstrated, and publicly admitted by the Band on its website, the Band is governed by its Articles of Association and its original enrollment ordinance which delegates "final" enrollment decisions to the Bureau of Indian Affairs ("BIA"). These documents are controlling in the enrollment decision because the Band's 1997 proposed constitution which granted the EC authority to unilaterally revise the Band's enrollment ordinance, was never ratified in a duly called election.

Plaintiffs contend they have a high likelihood of succeeding on the merits of their challenge of the EC's actions before the administrative agency, based upon the accompanying exhibits and law, and seek a Temporary Restraining Order and Preliminary Injunction to require the Assistant Secretary and the BIA to take all necessary action to preserve Plaintiffs' status quo pending final resolution of the Appeal. Plaintiffs are suffering extreme hardships. Without immediate Court intervention, Plaintiffs will continue to be irreparably harmed. Moreover, no harm will befall Defendants by virtue of injunctive relief.

///

BACKGROUND HISTORY

The Band's EC consists of six members elected by the Band's General Council. Since 1987, tribal member Robert Smith has been in control of the EC and is "Chairman" of the Band.

The EC, without the General Council's input, unilaterally revised Enrollment Ordinance No. 1 in December 2005 (Complaint Exhibit 5 [Exhibit 10 attached thereto]) and again in revised ordinance July 22, 2009 (Complaint Exhibit 5 [Exhibit 11 attached thereto]) pursuant to an illegitimate 1997 Constitution. The "revised" enrollment ordinances removed the BIA's final approval over enrollment decisions which was contained in the originally enacted enrollment ordinance No. 1, and gave the final approval authority to the EC. However, the Band drafted a Constitution and revised it and the 1997 Revised Constitution was never adopted in a referendum election by a majority of the Band's voting members, which Plaintiffs allege that there were approximately 500-600 members.

The Band's membership consists of many members who do not reside locally and therefore cannot attend regular General Council meetings. For the past several years, the EC has been operating with a lack of transparency. The EC members are required to sign confidentiality agreements, and cannot disclose events and information known to them, even to other tribal members or the Band's General Council. The EC does not allow tribal members to have access to the EC's meeting minutes, and access to tribal members' addresses, so that tribal members can communicate with each other about the affairs of the Band.

The Margarita Britten Descendants are the largest voting block within the General Council. At previous General Council meetings, some Margarita Britten Descendants began questioning some of the EC's financial dealings, and questioned beneficiaries of contracts entered on behalf of the Band.

Some Margarita Britten Descendants also signed a circulated petition to discuss recall of the tribal vice-chair, Leroy Miranda, who pleaded guilty to a criminal charge of lewd conduct in 2010. On information and belief, some members from the EC Committee persuaded signors of the petition to withdraw their signatures.

///

Soon after, the Margarita Britten Descendants began to receive disenrollment letters, stating they were no longer tribal members and terminating their tribal membership – effective immediately.

Plaintiff, Annalee (Yanez) Trujillo, who was officially elected by the Band's General Council to the EC in 2011 for a two-year term, was illegally removed from her position by the EC on February 3, 2012.

By immediately terminating the Margarita Britten Descendants from the tribal rolls on February 3, 2012, effective immediately, presumably by reducing Plaintiffs' "blood-quantum," the EC effectively removed 117 adult voting tribal members – many who live locally or on the reservation.

ARGUMENT

I.

AUTHORITY TO GRANT A PRELIMINARY INJUNCTION.

An injunction is an equitable remedy, therefore its issuance is one which falls within the sound discretion of the district court. See *Hecht Co. v. Bowles*, 321 U. S. 321, 329 (1944). A district court may grant a preliminary injunction "to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. Of Tex. v. Camenisch*, 451 U. S. 390, 395 (1981). "A plaintiff seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1361 to compel an officer or employee of the United States or any agency thereof to perform a duty owed to Plaintiffs. The DOI-BIA has a fiduciary duty owed to Plaintiffs to take action to preserve and enforce the status quo.

Under the broad authority in 25 U.S.C. Section 2, Congress has expressly vested in the Bureau of Indian Affairs 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 (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." See *Milam v. United States Dep't of Interior*, 10 I.L.R. 3013, 3017, emphasis added.

Plaintiffs served an urgent request on the Assistant Secretary to take immediate action to protect and preserve the status quo. Defendants have failed to act within ten days of the notice. An agency's "failure to act" constitutes agency action. (Title 5 U.S.C. § 551 (13).) The Administrative Procedures Act allows a court to "compel agency action unlawfully withheld or unreasonably delayed." (Title 5 U.S.C. § 706 (1).) Additionally, Plaintiffs allege that irreparable harm is occurring and without a speedy and equitable remedy Plaintiffs will continue to suffer substantial hardships; and that "irreparable harm" is an exception to exhaustion of administrative review action. See *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004).[1]

Plaintiffs have no plain, speedy and equitable remedy and continue to suffer severe hardships. Their monthly per capita income has been stopped causing them severe economic hardships. Their health care has been terminated. The voting rights as tribal members have been rescinded and one Plaintiff has been removed from office, even though Plaintiffs' appeal is pending agency review.

The purpose of a preliminary injunction is to preserve the relative positions of the parties until the cause can be heard on the merits. See, *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994) [injunction "prohibitory" not mandatory, where it "preserves the status quo."]

II.

PLAINTIFFS ARE LIKELY TO SUCCEED IN THEIR CHALLENGE THAT THE 1997 PALA BAND CONSTITUTION WAS NEVER EFFECTIVELY RATIFIED IN A DULY CALLED ELECTION.

The Pala Band publicly admits it is governed by the Articles of Association. (Exhibit 6) However, in another case involving Margarita Britten descendants, the BIA (Pacific Regional Office) has recently concluded that the Band's 1997 Constitution is valid. (Exhibit 8) Plaintiffs have

[1] In some circumstances, a court is obliged to exercise its jurisdiction in spite of a failure to exhaust, and "is guilty of an abuse of discretion if it does not." *Winterberger v. Gen. Teamsters Auto Truck, Etc.*, 558 F.2d 923, 925 (9th Cir. 1977).

provided additional evidence and argument in its appeal of the Band's decision[2], because as argued, the Band's revised 1997 Constitution cites Article IX as follows:

> This Constitution shall become effective **immediately after its approval by a majority vote of the voters voting in a duly called election** at which this Constitution is approved by the Bureau of Indian Affairs. (Emphasis added)

The Pacific Regional Office has taken the erroneous position that the current Constitution is valid because Resolution 97-36 was passed at a meeting of the [Band] held on November 19, 1997, by a vote "27" for" and "0" Against" with a quorum present. (Complaint Exhibit 8, p. 3) However, the ratification process required than a "meeting." The Band never ratified the Constitution wherein a majority of tribal members were allowed to vote "in a duly called election." The difference between a "meeting" and an "election" is not merely one of semantics. For instance, one requirement of an "election" in the Band's governing documents is establishing poling places, and absentee ballots, and other requirements as needed. (See Constitution, IV - ELECTIONS, section 1. (Complaint Exhibit 5 [Exhibit 7 attached thereto - Constitution, p. 6]); see also the Band's Articles of Association, Section 4 - Elections ("poling places, election committees and absentee balloting." (Complaint Exhibit 5 [Exhibit 3 attached thereto - revised Articles of Association approved 1980])

The Constitution could not become effective retroactively based upon a "meeting." The Band did not duly notify its membership that it was having a constitutional election; as demonstrated by the 27 votes, (while there were between 500 - 600 tribal members) and there were no absentee ballots. In its February 24, 2012, decision, the Regional BIA has made no rational connection between the facts and the choice made because a meeting is not an election. See *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am v. U.S. Dep't of Agric.*, 415 F. 3d 1078, 1093 (9th Cir. 2005) (citation omitted). Plaintiffs' rights must be protected until full APA review of the case.

The BIA is required to follow the reasoning in *Ranson v. Babbitt*, 69 F. Supp. 2d 141 (DDC 1999). In that case, the Saint Regis Mohawk Tribe (a non-IRA tribe) held a referendum election to

---

[2] According to Pacific Regional Office (Regional Tribal Operations Specialist) Shirley Lincoln, Plaintiffs' appeal documents were forwarded to Central (Echo Hawk's Office) for review. (See Declaration of Thor O. Emblem.)

determine whether the tribe would adopt a tribal constitution creating three branches of tribal government. The ballots that supported the ratification were less that 51 percent of eligible voters. Although not the required amount of votes, the tribal clerk certified that a "majority of those present and casting valid ballots voted in favor of adopting the tribal constitution. The BIA rejected a challenge to the constitution, and emphasized that the principles of tribal self-government required it to recognize the tribe's constitution. *Id.* at p. 143-146. The district court set aside the agency's action as arbitrary. Based upon the simple application of mathematics, the district court found that the tribe had never ratified the Constitution. *Ranson v. Babbitt*, 69 F. Supp. 2d 141, 151. The court noted, "Constitutions are never amended or repealed by implication of any kind." *Id.* at p. 152.

Tribal membership is comparable to United States citizenship. As the Solicitor of the Department stated in an opinion published as M-36793, 76 I.D. 353, 355, II Op. Sol. Indian Affairs 2004, 2005 (1969):

> Tribal membership is as fundamental to Indians as American citizenship is to Americans generally. To an Indian, membership in an Indian tribe corresponds to that citizenship rather than to membership in an organization, fraternity, class or group. In early dealings with Indian tribes, members were, indeed, referred to as citizens of those tribes. Such designation is more closely correlated with the designation of tribes as "domestic dependent nations."

Neither tribal sovereignty nor tribal historical values are at issue here. Review and interpretation of the Band's governing documents by the BIA is required to discharge the government-to-government's fiduciary responsibility and relationship. *United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA 75, 76, 83 (1992). (Exhibit 10) In discharging its duty, the BIA is required to fulfill its responsibility to interpret tribal laws and procedures in a reasonable manner in order to carry out its duty to recognize a tribal government. *Ranson v. Babbitt*, *supra*, 69 F. Supp. 2d 141, 153.

It is patently unreasonable for the BIA to assert that a "meeting" is sufficient to adopt the Band's Constitution when Article IX expressly and unequivocally calls for ratification of the Constitution by a majority of voters at a "duly called election."

///

///

III.

PLAINTIFFS ARE LIKELY TO SUCCEED IN THEIR CHALLENGE THAT THE BIA'S PREVIOUS 1989 DETERMINATION OF MARGARITA BRITTEN'S BLOOD QUANTUM WAS A FINAL DECISION ENTITLED TO COLLATERAL ESTOPPEL EFFECT.

The Band's original enrollment ordinance applies rather that the revised 2005 and 2009 enrollment ordinances unilaterally enacted by the EC through the unratified Constitution. The original enrollment ordinance requires the BIA to make a final decision on the Band's enrollment matters. (See Exhibit 5, attached Exhibit 4, p. 3 "Appeals") The original enrollment ordinance #1 states, "the decision of the Secretary on appeal shall be final and conclusive..." Consequently, the BIA's final 1989 determinations as to Margarita Britten's 4/4 blood quantum requires the BIA to stand on its 1989 "final" decision. Collateral estoppel protects litigants from the burden of relitigating an identical issue with the same party or his privy and prevents repeated and needless litigation. *Parklane Hosiery Co. v. Shore*, 439 US 322, 326 (1979).

The BIA previously reviewed the question of Margarita Britten's blood quantum in 1985. That challenge was rejected in two decisions in 1989. The Department of Interior issued decisions on May 17, 1989, by Acting Assistant Secretary Ashbra, and on September 11, 1989, by Acting Assistant Mills; both found Margarita Britten to be 4/4 degree Pala Indian. These decisions were final and not appealed to the District Court under the Administrative Procedures Act. Consequently, collateral estoppel prevents relitigating this issue. Plaintiffs have been and are at all times remain federally approved tribal members.

IV.

PLAINTIFFS HAVE DEMONSTRATED THAT THEY ARE SUFFERING AND ARE LIKELY TO CONTINUE TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF.

To be entitled to a preliminary injunction, a plaintiff must also show the likelihood–rather than a mere"possibility"– of irreparable harm. *Winter v. Natural Res. Def. Council, Inc.*, *supra*, 555 U.S. 7, 20-21. A colorable claim of irreparable harm is one that is not wholly insubstantial, immaterial, or frivolous. Economic hardship constitutes irreparable harm: back payments cannot erase either the experience or the entire effect of several months without food, shelter or other

necessities. Economic hardship, such as subsistence on General Assistance and food stamps, lack of medical insurance, and homelessness supports a finding of irreparable harm. *Kildare v. Saenz*, 325 F. 3d 1078, 1083 (9th Cir. 2003).

Likewise, the loss of one's job and job benefits does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages. *Collins v. Brewer*, 727 F. Supp. 2d 797 812 (D. Ariz. 2010), aff'd sub nom. *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); see also *Indep. Living Ctr. of Southern Cal, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 657-658 (9th Cir. 2009) (holding that state Medicaid beneficiaries were likely to be irreparably harmed by a reduction in their benefits), cert. granted in part, 131 S. Ct. 992 (2011); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (holding that a denial of needed medical care creates a risk of irreparable injury).

Plaintiffs have presented substantial evidence of irreparable harm. A sampling of the Declarations submitted to Defendants are as follows:

> My health care is critical to my family. I have [a] blood clot disorder and I need to have mediation. I am on blood thinners that have to be monitored on a weekly basis. Due to this disorder, I have had two mini-strokes and a cardiac repair. (Jacqueline McWhorter Declaration, ¶ 4)
>
> I am nine-months pregnant...I bought my home with a HUD 184 loan...I have been living in my home for the past 3 ½ years. During this time I have made a lot of improvements...Losing my per capita income will cause me to lose my home. (Stephanie Walsh Declaration, ¶¶ 3, 5)
>
> I am a single mother and support my household consisting of three children and a young grandchild. I also depend on the per capita income to help support his household....the Executive Committee arbitrarily removed me from my elected position...I was also on the Business Board of the Pala Casino and I was removed from that position as well. (Annalee Trujillo Declaration, ¶¶ 4, 5)
>
> My child's father passed away prior to her birth, leaving me a single mother. My daughter was born with congenital heart problems. I pay for her doctor visits with my per capita. I struggle as an adult with learning disabilities which interfere with seeking employment. I will not be able to support my daughter if I lose my monthly per capita income and will be forced to apply for government services. (Dawn Mojado Declaration, ¶¶ 3, 4)
>
> I am a single mother [with] two children to support...Their father is a Pala tribal member, but he is in prison for domestic violence. I am afraid that if I lose my per capita I will not be able to financially support my children with clothing, food and shelter...I do pay a rent payment [for a tribal home] which the Band takes directly out of my per capita income. (Patricia Walsh Declaration, ¶¶ 4, 5)

///

> My tribal health care is very important. I have petit mal seizures and stomach and kidney problems...I need my tribal health care benefits to maintain my health. (Elizabeth Martinez Declaration, ¶ 4)
>
> I am a single mother of five children...three of my children are minors...Since around 1994, I have been employed with the Pala Band. I have been their Senior Director for about six years...I could lose my job. I need transportation to get my children to school and doctor visits. I have a car payment. [Losing my per capita income means] I may likely lose my car if I am unable to make the payments for it. (Annette Walsh Declaration, ¶¶¶ 3, 4, 7)
>
> I am a single mother of two children, ages 3 and 6. I am the sole provider for my children...[Because of the per capita benefits being terminated] I will not be able to support my children. (Tina Poulin Declaration, ¶3)
>
> I live in Temecula, California in a rented home. I have joint physical custody of my three children, ages 12, 11, and 10...I will be homeless and have no where to live with my family. (John Trujillo Declaration, ¶ 3)
>
> I had to move into my grandmother's home. It is very difficult because my three children and I share one bedroom...I have had to apply for TANF (welfare). (Leslie Trujillo Declaration, ¶¶ 3, 4)
>
> Due to my health issues, I am unable to work...Without the income, I will have to file bankruptcy. (Laura Jean Trujillo Declaration, ¶ 5)
>
> Losing my per capita means I cannot support my son, age 1-years old...I will also likely lose my truck and I will be unable to have transportation. (Christian Griffith Declaration, ¶ 4)
>
> I am the sole support for my family. I have three children, ages 5, 3 and a 6-week old baby. Without my monthly per capita payments, I have no way of supporting my family. (Justin Griffith Declaration, ¶ 3)
>
> I grew up on the reservation and my identity is tied to my Cupa Indian culture. The Pala Executive Committee [has] stripped my of my heritage and I have lost all rights as a Pala tribal member including voting rights, tribal loans, per capita income, and my insurance for medical, dental and vision. (Joshua Trujillo Declaration, ¶ 5)

Plaintiffs' Appeal and Request for Immediate Action to Preserve the Status Quo were personally delivered to Echo Hawk's and Deutchke's offices on February 22, 2012, and on the outside of the Fed Ex packages, the recipients were advised in large bold black permanent marker letters that URGENT action was required. On February 20, 2012, Plaintiffs faxed their request to take immediate action to various agencies and thereafter followed up with telephone calls to various individuals within these agencies. To date, Plaintiffs have not received anything in writing as to whether the agency will take any steps to preserve the status quo. (See Declaration of Thor O. Emblem) As alleged in the Complaint, the BIA has taken no action to preserve other similarly situated Margarita Defendants who had appealed the earlier E.C.'s decision to disenroll them in

2011. Plaintiffs are suffering severe financial hardships caused by the immediate termination of their benefits. The EC has cut-off per capita funds that were actually accrued to Plaintiffs in Janaury 2011 even before the termination letters. (See Complaint, ¶ 57; Declaration of Peter Trujillo, Jr., ¶¶¶ 3, 4, 5)

As emphasized, Plaintiffs contend that further agency exhaustion is not required before granting injunctive relief because Plaintiffs are suffering immediate and irreparable harm. Plaintiffs cannot afford to wait days or weeks while their families and minor children suffer. Some Plaintiffs have already received notices that their mortgages and/or rent due on their homes on tribal land but because of their per capita income has been terminated, they are in imminent danger of being evicted from their homes. Plaintiffs have already been notified that their health care insurance benefits are terminated. (See Declaration of Peter Trujillo, Jr.)

Defendants have taken no action despite their fiduciary duty to prevent the continuing irreparable harms caused from the EC's ultra vires action which terminated Plaintiffs' benefits before a final decision has been rendered. The EC has taken this action despite no authority to do so in the Band's governing documents (at least before a final decision is rendered).

Plaintiffs have demonstrated the balance of equities tips in their favor. *Stormans, Inc. v. Selecky*, 586 F. 3d 1109, 1138 (9th Cir. 2009). They have been deprived of their appointed and elected offices, numerous benefits, per capita payments and health care. No further administrative agency exhaustion is required. A court can waive the need to exhaust administrative remedies under appropriate circumstances. *Heckler v. Ringer*, 466 U.S. 602, 617-619 (1984). Waiver may be invoked when enforcement of the exhaustion requirement would cause the claimants irreparable injury. Continued immediate and irreparable harm is such a circumstance. *Rhodes v. United States*, 574 F.2d 1179, 1181 (5th Cir. 1978).

V.

THIS COURT SHOULD WAIVE THE SECURITY REQUIRED UNDER FEDERAL RULE OF CIVIL PROCEDURE 65 (C) OR ORDER A NOMINAL AMOUNT.

District courts have discretion to determine the amount of security, if any. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1337 (9th Cir. 1999); *Kaepa, Inc. v. Iachilles Corp.*, 76 F. 3d 624, 628 (5th

Cir. 1996). On February 28, 2012, the Band ceased paying Plaintiffs their share of per capita income from their casino. Accordingly, where an action is brought by an impecunious plaintiff, a court can grant preliminary injunctive relief without requiring any security. See, *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385, fn. 42 (CD CA 1982). Waiver of the bond requirement is permissible where the plaintiffs are indigent. See *V.L. v. Wagner*, 669 F.Supp. 2d 1106, 1123 (N.D. Cal. 2009).

There is no likelihood of harm in requiring the BIA to perform its fiduciary duty and enforce the status quo while Plaintiffs' appeal is pending agency review and until such review is exhausted. The EC has terminated Plaintiffs' tribal membership and benefits without affording Plaintiffs' their procedural due process of agency review.

Consequently, a nominal or no bond is appropriate where the court determines that there is no realistic harm from granting preliminary injunctive relief. See, *Doctor's Assocs., Inc. v. Stuart*, 85 F. 3d 975, 985 (2nd Cir. 1996); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421, fn.3 (4th Cir. 1999).

CONCLUSION

A temporary restraining order/preliminary injunction will protect the rights of Plaintiffs who are entitled to full agency review by the BIA and APA review of the agency's decision as to whether the EC's action to arbitrarily terminate their tribal membership and benefits violated Plaintiffs' procedural due process rights.

Plaintiffs also respectfully request that their attorney's fees and costs incurred in obtaining the temporary restraining order and preliminary injunction be paid by the government under the Equal Access to Justice Act, 28 U.S.C. § 2412, as defendants have taken a position which was not substantially justified and contrary to several previous agency actions and decisions. See*, Pierce, Secretary of Housing and Urban Development v. Underwood*, *et al*. 47 U. S. 552 (1988).

Plaintiffs gave the Department and BIA an opportunity to act prior to being forced to file the instant Complaint for injunctive relief in this Court in order to stave off irreparable harm.

///

///

///

Consequently, Plaintiffs ask this Court to grant Plaintiffs' request for a temporary/preliminary restraining order and require the BIA to take all action necessary to preserve the status quo.

DATED: March 5, 2011

Respectfully submitted,

LAW OFFICES OF THOR O. EMBLEM

s/ Thor O. Emblem
Attorney for Plaintiffs
E-mail: Thor@emblemlaw.com