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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ALBERT P. ALTO, et al.,

12 Plaintiffs,

13 vs.

14 KEN SALAZAR, Secretary of the  
15 Department of the Interior - United States of  
16 America; LARRY ECHO HAWK, Assistant  
17 Secretary of the Department of Interior-  
18 Indian Affairs - United States of America;  
19 MICHAEL BLACK, Director of the Bureau  
of Indian Affairs of Department of Interior -  
United States of America; ROBERT EBEN,  
Superintendent of the Department of Interior  
Indian Affairs, Southern California Agency,  
in their official capacity,

20 Defendants.  
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CASE NO. 11cv2276-IEG(BLM)

Order Denying in Part and Reserving  
Ruling in Part on Tribe's Motion to  
Dismiss [Doc. 70]; Denying Motion to  
Dissolve Preliminary Injunction [Doc.  
68]; Granting Motions to File Briefs in  
Excess of Page Limits [Docs. 68, 70,  
78]

22 Plaintiffs, collectively known as the "Marcus Alto Sr. Descendants," seek declaratory and  
23 injunctive relief from a January 28, 2011 order issued by Defendant Assistant Secretary Echo  
24 Hawk finding that the Marcus Alto Sr. Descendants should be excluded from the San Pasqual  
25 Band of Mission Indians ("Tribe" or "Band") membership roll. Presently before the Court is  
26 (1) the Tribe's motion to dismiss under Fed. R. Civ. P. 12(b)(7) for failure to join the Tribe as a  
27 required and indispensable party within the meaning of Fed. R. Civ. P. 19 or alternatively to  
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1 dismiss for lack of subject matter jurisdiction<sup>1</sup> pursuant to Fed. R. Civ. P. 12(b)(1), and (2) the  
2 Tribe's motion to dissolve the preliminary injunction.

3 Following full briefing and oral argument, for the reasons discussed herein, the Court  
4 DENIES IN PART and RESERVES RULING IN PART on the Tribe's motion to dismiss and  
5 DENIES without prejudice the Tribe's motion to dissolve the Preliminary Injunction.

### 6 Procedural History

7 The parties are well-familiar with the factual background of this case, and the Court will  
8 not repeat it herein. Plaintiff's original complaint was filed on September 30, 2011, alleging four  
9 causes of action: (1) declaratory relief based on the doctrine of *res judicata*; (2) declaratory relief  
10 on the basis that Defendant Echo Hawk violated the enrolled Plaintiffs' right to procedural due  
11 process; (3) declaratory relief and reversal of the agency's January 28, 2011 order based upon  
12 arbitrary and capricious action; and (4) injunctive relief based on the agency's alleged failure to  
13 act. [Doc. No. 1.] Plaintiffs also filed an *Ex Parte* Motion for Temporary Restraining Order  
14 ("TRO") and a Motion for Preliminary Injunction. [Doc. Nos. 2, 3.] The Court granted the TRO  
15 and set a schedule for briefing the preliminary injunction. [Doc. No. 5.]

16 On October 11, 2011, while the motion for preliminary injunction was pending, the Tribe  
17 filed a request with the Court to appear specially and an accompanying motion to dismiss this  
18 action under Federal Rule of Civil Procedure 19. [Doc. No. 10.] On October 12, 2011, the Court  
19 denied the Tribe's request to appear specially, but allowed the Tribe's motion to be docketed as an  
20 *amicus curiae* brief. [Doc. No. 11.] The Court also ordered both parties to respond as to whether  
21 this action should be dismissed pursuant to Rule 19. The Court extended the TRO and moved the  
22 hearing on the preliminary injunction.

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24 <sup>1</sup>The Tribe argues Plaintiffs lack Article III standing because they allege no injury arising  
25 under federal law and instead allege only nonjusticiable matters of Tribal law. These arguments  
26 are intertwined with Plaintiffs' arguments regarding subject matter jurisdiction, and are not  
27 addressed separately herein. Plaintiffs have demonstrated the Assistant Secretary's decision has  
28 caused them actual "injury in fact" that is concrete and particularized and that is fairly traceable to  
the Assistant Secretary's decision. *See Friends of the Earth, Inc. v. Laidlaw Environmental  
Services*, 528 U.S. 167, 180-81 (2000) (setting out Article III standing). Plaintiffs' injury is  
redressable by the Court under the Administrative Procedures Act in that the Assistant Secretary  
has the final decision making authority as delegated by the Tribe. *Lujan v. Defenders of Wildlife*,  
504 U.S. 555, 572 (1992) (holding that a plaintiff who raises matters which are not redressable  
lacks Article III standing).

1 By order filed December 19, 2011, the Court declined to dismiss the action under Fed. R.  
2 Civ. P. 19, finding that complete relief could be accorded in the Tribe's absence, that the Tribe's  
3 interest may be adequately represented by the federal government, and the federal government is  
4 unlikely to suffer inconsistent obligations in the Tribe's absence. [Doc. No. 24, pp. 21-28.] The  
5 Court granted Plaintiffs' motion for preliminary injunction, and enjoined the Defendants from  
6 removing Plaintiffs from the Tribe's membership roll or taking any further action to implement the  
7 Assistant Secretary's January 28, 2011 order.

8 On January 12, 2012, Assistant Secretary Echo Hawk issued a memorandum order to the  
9 BIA Regional Director and BIA Superintendent. That memo confirmed that the Bureau of Indian  
10 Affairs ("BIA") had not approved a modified roll reflecting the disenrollment of the Altos, and  
11 concluded (as found by the Court in its preliminary injunction order) that the Plaintiffs remain  
12 members of the Band. [Doc. No. 26-1, p. 2.] The Assistant Secretary directed that because the  
13 Alto descendants are deemed to be members of the Band, they remain entitled to all rights and  
14 benefits enjoyed by such members, including participation on tribal elections, provision of health  
15 care services, and per capita distribution of income under the Band's Revenue Allocation Plan. [*Id.*  
16 p. 3.]

17 Plaintiffs filed an objection to the Assistant Secretary's memorandum order on January 23,  
18 2012, seeking further relief from the Court. [Doc. No. 28.] The Court, however, denied the  
19 objection, concluding no further equitable relief was appropriate at the time. [Doc. No. 43.]

20 By order filed March 12, 2012, the Court granted Plaintiffs leave to file a first amended  
21 complaint ("FAC"). [Doc. No. 49.] The FAC, filed on March 13, 2012, again seeks declaratory  
22 relief based upon *res judicata* and violation of due process, and seeks reversal of the Agency's  
23 January 28, 2011 order under the Administrative Procedures Act. [Doc. No. 50, ¶¶ 60-125 (First,  
24 Second, and Third Causes of Action).] The FAC also, again, seeks injunctive relief requiring  
25 Assistant Secretary to issue an order to the Tribe to enforce Plaintiffs' rights and benefits. [Doc.  
26 No. 50, ¶¶ 126-138 (Fourth Cause of Action).] Finally, Plaintiffs add a Fifth Cause of Action for  
27 declaratory and injunctive relief, seeking pay-out of Indian Gaming Regulatory Act and Revenue  
28 Allocation Plan funds withheld between January 29, 2011 and January 12, 2012. [Doc. No. 50,

¶¶ 139-148 (Fifth Cause of Action).]

The Administrative Record was filed with the Court on March 19, 2012. [Doc. No. 19.] The Tribe thereafter filed a motion to intervene pursuant to Fed. R. Civ. P. 24(a). Because the Court's preliminary injunction order, the Assistant Secretary's January 23, 2012 Memorandum Order, and Plaintiff's newly added Fifth Cause of Action raised additional issues regarding the scope of the Court's jurisdiction to adjudicate the issues in the case, the Court granted the Tribe leave to intervene for purposes of filing the current motions.

### **Motions to Extend Page Limits**

Both the Tribe and the Plaintiffs filed overlength briefs without obtaining prior leave of Court. The Court GRANTS the requests contained in those briefs for leave to file excess pages. In the future, however, the Court cautions counsel they should stay within the page limitations set forth in the Local Rules unless they obtain prior leave of Court to exceed those limits.

### **Motion to Dismiss**

Although the Tribe moves to dismiss the entire action for lack of subject matter jurisdiction and for inability to join a required party, the Court agrees with the parties – the First, Second, and Third Causes of Action are wholly distinguishable from Plaintiffs' Fourth and Fifth Causes of Action. Therefore, the Court will address the Tribe's arguments regarding the first three causes of action, before addressing the Tribe's arguments on the Fourth and Fifth Causes of Action.

#### **A. Jurisdiction and Joinder with Regard to the First, Second, and Third Causes of Action**

The Court may not exercise jurisdiction over an Indian tribe because of tribal sovereign immunity. *Lewis v. Norton*, 424 F.3d 959, 961 (9<sup>th</sup> Cir. 2005). However, even if the Plaintiffs demonstrate the Tribe's sovereign immunity does not bar the action, Plaintiffs must still establish the presence of subject matter jurisdiction in order to proceed against the Federal Defendants. *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9<sup>th</sup> Cir. 2007).

Federal subject matter jurisdiction is a matter of statutory authority. *Id.* (citing *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 553 (2005) ("federal courts have no jurisdiction without statutory authorization"). Here, Plaintiffs allege the Court has jurisdiction under 28 U.S.C. § 1331 "in that the Administrative Order complained of herein has effectively stripped the

1 Plaintiffs’ vested property rights and done so without full and fair consideration and full briefing  
2 on the issues, all in violation of their right to due process.” [FAC, ¶ 3.] Plaintiffs further allege  
3 the Assistant Secretary’s action “was arbitrary and capricious within the meaning of the due  
4 process clause of the Fifth Amendment” invoking the Court’s jurisdiction under the  
5 Administrative Procedures Act, 5 U.S.C. §§ 702, 704, and 706. [FAC, ¶ 4.] Finally, Plaintiffs  
6 allege “[t]his Court has jurisdiction pursuant to 28 U.S.C. § 1361 to compel an officer or employee  
7 of the United States or any agency thereof to perform a duty owed to the Plaintiffs.” [FAC, ¶ 5.]

8       The Court concludes it has jurisdiction over Plaintiffs’ First, Second and Third Causes of  
9 Action under the APA. The APA is not an independent grant of subject matter jurisdiction to  
10 review agency actions. In order to proceed with a claim under the APA, Plaintiffs must establish  
11 that “[a] person suffer[ed] legal wrong because of agency action, ... within the meaning of a  
12 relevant statute.” 5 U.S.C. § 702. “When ... review is sought not pursuant to specific  
13 authorization in the substantive statute, but only under the general review provisions of the APA,  
14 the ‘agency action’ in question must be ‘final agency action’.” *Lujan v. National Wildlife*  
15 *Federation*, 497 U.S. 871, 882 (1990) (quoting 5 U.S.C. § 704). Here, there was no “agency  
16 action ... within the meaning of a relevant statute” when the Enrollment Committee initially, on  
17 July 25, 2008, notified the Plaintiffs they were disqualified from enrollment. Because 25 C.F.R.  
18 Part 48 is no longer part of the federal regulations, but is merely part of the Tribal Constitution,  
19 any act or omission in violation of that regulation does not become reviewable under the APA  
20 absent some further statutory basis. The current federal regulations regarding preparation of Rolls  
21 of Indians “are not to apply in the compilation of tribal membership rolls where the responsibility  
22 for the preparation and maintenance of such rolls rests with the tribes.” 25 C.F.R. § 61.2.

23       For that reason, in both of the prior actions surrounding the Alto Plaintiffs’ enrollment,  
24 Judge Jones concluded the Court lacked subject matter jurisdiction because enrollment matters are  
25 purely a matter of interpretation of tribal law. [*Atilano v. Bureau of Indian Affairs*, Case No.  
26 05cv1134-J, Doc. No. 13, p. 6 (“The BIA once had statutory authority over the Tribe’s enrollment  
27 pursuant to 25 C.F.R. Part 48 and 25 C.F.R. Part 76. However, in 1996, the BIA repealed any  
28 such authority. ... As a result, any consultative role the BIA plays in the Tribe’s membership

1 enrollment process is that authorized by the Tribe's Constitution. Thus, if the Court granted any of  
2 Plaintiffs' requested relief, it would interfere with the Tribe's Constitution, which is the sole  
3 source of power over the Tribal enrollment process."); *Caylor v. Bureau of Indian Affairs*, Case  
4 No. 03cv1859-J, Doc. No. 29, p.9 (rejecting plaintiffs' claims under the APA because the  
5 enrollment regulations pursuant to which plaintiffs brought suit, 25 C.F.R. §§ 76.2 and 76.4 had  
6 been repealed and the plaintiffs did not initiate an administrative action to challenge the  
7 administration of the election.")]

8 This case is different, however, because the Plaintiffs are now seeking judicial review of a  
9 final agency decision issued pursuant to the appeals process set forth in 25 C.F.R. §§ 62.1 *et seq.*<sup>2</sup>  
10 Assistant Secretary Echo Hawk exercised his authority to make a final decision regarding  
11 Plaintiffs' enrollment because the Enrollment Committee of the Tribe appealed pursuant to the  
12 "Enrollment Appeals" provision of the federal regulations. [FAC, Exhibit 10, p. 1 (finding  
13 jurisdiction under 25 C.F.R., Part 62, "Enrollment Appeals").] "[F]inal agency action for which  
14 there is no other adequate remedy in a court [is] subject to judicial review" under the arbitrary and  
15 capricious standard. 5 U.S.C. §§ 704 and 706. Judicial review of the Assistant Secretary's  
16 January 28, 2011 decision arises not only because the Tribe vested authority, pursuant to Article  
17 III of its constitution, with the Secretary of the Interior to issue final decisions respecting  
18 membership in the Tribe and approval of disenrollment decisions, but also because the Tribe  
19 utilized the federal Enrollment Appeals process set forth in the federal regulations. Assistant  
20 Secretary Echo Hawk's January 28, 2011 order was a final agency decision, subject to judicial  
21 review under the APA. Thus, the Court has jurisdiction over Plaintiffs' First, Second, and Third  
22 Causes of Action.

23 The Court previously addressed the Rule 19 joinder issues in its Preliminary Injunction  
24 Order. Having fully reviewed the Tribe's arguments, the Court finds no basis to reconsider its  
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26 <sup>2</sup>Part 62 of Title 25 of the C.F.R. is entitled "Enrollment Appeals." The purpose of the  
27 regulations is "to provide procedures for the filing and processing of appeals from adverse  
28 enrollment actions by Bureau officials." 25 C.F.R. § 62.2. Notably, the procedures apply where  
"[a]n appeal to the Secretary is provided for in the tribal governing document." *Id.* The  
regulations provide for several levels of review, culminating in a decision by the Assistant  
Secretary "which shall be final for the Department." 25 C.F.R. § 62.11.

1 prior decision that the Tribe is not a party required to be joined under Fed. R. Civ. P. 19 with  
2 regard to the first three Causes of Action. The Court can afford complete relief on those claims for  
3 review of the agency's decision, even in the absence of the Tribe, because those claims focus  
4 solely on the propriety of the Secretary's decision. For all of the reasons explained by the Court in  
5 its Preliminary Injunction Order, the Tribe does not have a legally protected interest that would be  
6 impaired in its absence. The United States can and will adequately represent the Tribe's interest in  
7 upholding the Assistant Secretary's decision. Thus, with regard to the First, Second, and Third  
8 Causes of Action, the Court hereby adopts and incorporates its prior decision denying the Tribe's  
9 Rule 19 motion. [See *Preliminary Injunction Order*, Doc. No. 24, pp. 21-26.] The Tribe's motion  
10 to dismiss for lack of subject matter jurisdiction and for failure to join a required party is DENIED  
11 as to Plaintiffs' first three Causes of Action.

12 B. Jurisdiction and Joinder with regard to Plaintiffs' Fourth and Fifth Causes of Action

13 The Court is far less certain, however, of Plaintiffs' ability to demonstrate jurisdiction over  
14 their Fourth and Fifth Causes of Action. Plaintiffs' Fourth Cause of Action alleges Assistant  
15 Secretary Echo Hawk's "failure to act" on their request for reconsideration provides a basis for the  
16 Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).  
17 Plaintiffs' Fifth Cause of Action alleges that the Bureau of Indian Affairs/Department of the  
18 Interior is required to enforce their rights to per capita payments under the under the Indian  
19 Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710, and/or Indian Civil Rights Act ("ICRA"), 25  
20 U.S.C. § 1303.

21 Under the APA, "[t]he only agency action that can be compelled ... is action that is legally  
22 required." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). Although the  
23 Plaintiffs broadly assert the Federal Defendants owe them a fiduciary duty to act, they do not  
24 define the nature, extent, or source of the alleged duty. Similarly, although Plaintiffs assert the  
25 Court has jurisdiction over their claims generally under 28 U.S.C. § 1331 and 1361<sup>3</sup>, Plaintiffs do

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27 <sup>3</sup>Section 1331 provides that "The district courts shall have original jurisdiction of all civil  
28 actions arising under the Constitution, laws, or treaties of the United States." Section 1361  
provides "The district courts shall have original jurisdiction of any action in the nature of  
mandamus to compel an officer or employee of the United States or any agency thereof to perform

1 not persuasively show the Court can compel the Defendants to act under the IGRA or the ICRA.

2       The Court also has reservations about its ability to proceed on the merits of Plaintiffs'  
3 Fourth and Fifth Causes of Action in the absence of the Tribe. Plaintiffs' Fourth Cause of Action  
4 purports to compel agency action unlawfully withheld [FAC, ¶ 128], but as a practical matter  
5 Plaintiffs challenge the Tribe's failure to make monthly per capita distributions of gaming income  
6 to them, as well as their inability to participate in Tribal elections and lack of access to Indian  
7 Health Care services. Plaintiffs seek an order from the Court requiring the Assistant Secretary to  
8 compel the Tribe to issue the required payments and to permit them access to tribal governance  
9 and Indian Health Care services. Similarly, Plaintiffs' Fifth Cause of Action is phrased as a  
10 controversy between Plaintiffs and the Assistant Secretary as to whether they continue to be  
11 federally enrolled members of the Tribe after he issued the January 28, 2011 order. [FAC, ¶ 140.]  
12 However, at its core, Plaintiffs' Fifth Cause of action seeks a declaration that at no time were they  
13 removed from the federally approved roll such that they are entitled to their per capita gaming  
14 revenues. [FAC, ¶ 147.] If the Court were to find in favor of Plaintiffs on their Fourth and Fifth  
15 Causes of Action, the Tribe is not bound by the Court's order and could decline to grant Plaintiffs  
16 relief even if ordered to do so by the Assistant Secretary. This not only impairs the interest of the  
17 Tribe, but also leaves the government open to inconsistent obligations.

18       Nonetheless, the Court believes it is most appropriate to delay resolution of the question of  
19 the Court's jurisdiction over Plaintiffs' Fourth and Fifth Causes of Action, and the ability to  
20 proceed in the absence of the Tribe, until the Court has conducted the administrative review  
21 Plaintiffs request in their First, Second, and Third Causes of Action. As Plaintiffs conceded at oral  
22 argument, the Fourth and Fifth Causes of Action would be rendered moot if the Court found in  
23 favor of the Federal Defendants and upheld the Assistant Secretary's decision. Under such  
24 circumstances, and given the difficult and highly disputed nature of the jurisdictional and Rule 19  
25 inquiries underlying the Fourth and Fifth Causes of Action, the Court defers ruling on the Tribe's  
26 motion to dismiss the Fourth and Fifth Causes of Action at this time.

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a duty owed to the plaintiff."



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Although the Assistant Secretary's January 12, 2012 Memorandum Order impacted the relationship between the agency and the Tribe, the Federal Defendants neither requested it be vacated nor advised the Court it could not make efforts to preserve the *status quo* pending resolution of the merits of Plaintiffs' claims under the APA. For all of the reasons explained in the Court's Preliminary Injunction Order, the Court continues to believe that at this time the Plaintiffs have established a likelihood of success on the merits, irreparable harm, and that the balance of equities weigh in favor of a preliminary injunction. Therefore, the Tribe's motion to dissolve the Preliminary Injunction is DENIED.

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**DATED: June 13, 2012**

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