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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALBERT P. ALTO, et al.,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the Department of the Interior, et al.,

Defendants.

CASE NO. 11-cv-2276 – IEG (BLM)

SAN PASQUAL BAND OF MISSION INDIANS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

JUDGE: Honorable Irma E. Gonzalez
COURTROOM: 1
DATE: June 7, 2012
TIME: 2:00 p.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION

The San Pasqual Band of Mission Indians ("Tribe") has moved for an order dismissing this action under Federal Rule of Civil Procedure (FED. R. CIV. P.) 12(b)(7), for failure to join the Tribe as a required and indispensable party pursuant to FED. R. CIV. P. 19. Alternatively, this action should be dismissed pursuant to FED. R. CIV. P. 12(b)(1) on the grounds that Plaintiffs have not met their burden of demonstrating federal question jurisdiction or standing to bring the action. Separately, the Tribe has also moved for an order dissolving the preliminary injunction pursuant to Fed. R. Civ. P. 54(c) and 65. The Tribe has been granted intervention as of right, without waiver of the Tribe's sovereign immunity, to bring these jurisdictional motions before the Court. This Memorandum of Points and Authorities supports the Tribe's Motion to Dismiss.

The landscape has shifted dramatically since the Court first considered whether this case should be dismissed for failure to join the Tribe. Most significantly, the Court, in its December 19 Order[1] ("Order"), granted preliminary injunctive relief and Assistant Secretary Larry Echo Hawk issued the January 12, 2012 Memorandum Order ("Memorandum Order"). These developments cast into sharp relief the substantial interests of the Tribe directly affected by this case and the federal Defendants inability to defend the Tribe's interests in this case. These developments also underscore that the Court is not able to accord complete relief in the absence of the Tribe, and that the Court's Order subjects the federal Defendants to inconsistent obligations. Furthermore,

[1] Order Granting Preliminary Injunction, *Alto et al. v. Salazar et al.*, No. 11cv2276–IEG (BLM) (S.D. Cal. Dec. 19, 2011).

by underscoring that this case is rooted in Tribal law, these developments expose the Plaintiffs' failure to establish federal question jurisdiction and Article III standing.

This case must be dismissed on the following grounds:

(1) Because the Tribe is not a party, the Court cannot accord the Plaintiffs complete relief. The inability of the federal Defendants to fully implement the Court's Order establishes that Plaintiffs cannot obtain complete relief in the absence of the Tribe, and because the Tribe asserts its sovereign immunity and objects to the Court's determination of this action, the case must be dismissed for failure to join a necessary party.

(2) The Tribe claims substantial self-governance and property interests in the subject action, and the Tribe's ability to protect those interests is impaired and impeded because the Tribe has not been joined as a party. The federal Defendants admit that the United States cannot represent the Tribe's interests. Further, the Court's Order granting preliminary injunctive relief and the Memorandum Order have unquestionably created a conflict of interest between the federal Defendants and the Tribe. Because the Tribe asserts its sovereign immunity and cannot be joined as a party the action must be dismissed.

(3) The Court's Order granting preliminary injunctive relief subjects the federal Defendants to inconsistent obligations, which are borne out in the Memorandum Order. Because the Tribe asserts its sovereign immunity and cannot be joined as a party the action must be dismissed.

(4) The Plaintiffs do not meet their burden of establishing federal question

jurisdiction. Each of their Causes of Action arises under the Tribe's law rather than federal law and they depend upon the Court's interpretation and application of the Tribe's law governing tribal enrollment, a matter over which this Court has no jurisdiction. To the extent Plaintiffs raise federal claims they are inextricably intertwined with Tribal law claims and are rooted in Plaintiffs' claim of a right under Tribal law.

(5) The Plaintiffs lack Article III standing because they fail to state a constitutionally recognizable claim that flows from the actions of the federal Defendants that can be redressed through a favorable decision against the federal Defendants.

FACTS

Plaintiffs, descendents of Marcus R. Alto, Sr. (Marcus Alto descendents), were disenrolled by the Tribe on January 28, 2011. The Plaintiffs filed this action seeking to reverse the Tribe's disenrollment action and numerous actions the Tribe has since taken. The facts giving rise to and forming the basis for the Tribe's Motion to Dismiss are set forth in detail in the Fact section of the Tribe's Memorandum of Points and Authorities in Support of Motion to Dissolve, incorporated herein by reference. [2]

In summary, the Tribe disenrolled the Plaintiffs pursuant to Tribal law authorizing the Tribe's Enrollment Committee to maintain the membership roll and to make corrections to the roll and the delete of names of individuals previously enrolled based on

[2] The facts summarized here are also described in the Tribe's Memorandum of Points and Authorities in Support of Motion to Intervene, *Alto et al. v. Salazar et al.*, No. 11cv2276-IEG (BLM) Docket No. 60-1, and Memorandum of Points and Authorities in Support of Motion to Dismiss, *Alto et al. v. Salazar et al*., No. 11cv2276-IEG (BLM) Docket No. 10.

inaccurate information.[3] In accordance with Tribal law, the BIA reviewed initial decision and the Assistant Secretary issued his January 28, 2011 Decision affirming the Tribe's disenrollment action. The Tribe's disenrollment action was effective and implemented on January 28, 2011, and, since that date, the Plaintiffs have not, as a matter of Tribal law, been members of the Tribe, and they have not enjoyed any of the rights and privileges of membership. Plaintiffs filed this action to reverse the Tribe's disenrollment action and to restore all membership rights arising under Tribal law, and they filed a Motion for a Preliminary Injunction to require the federal Defendants to deem and recognize them as members of the Tribe and to direct the Tribe to require the Tribe to take specific actions.

The Court's December 19, 2011 Order granted preliminary injunctive relief, and in response to that order, the Assistant Secretary issued the Memorandum Order, which sets forth "interim orders" to be in effect during the pendency of the lawsuit. At this juncture in the case, the Tribe's self-governance and property interests are unquestionably directly affected by this litigation.

ARGUMENT

I. FED. R. CIV. P. 19 REQUIRES DISMISSAL OF THIS ACTION BECAUSE THE TRIBE IS A NECESSARY AND INDISPENSABLE PARTY

Federal Rule of Civil Procedure 19 governs the joinder of persons necessary for a suit's just adjudication. *See* FED. R. CIV. P. 19. Under FED. R. CIV. P. 19, a court must dismiss an action if: (1) an absent party is required; (2) it is not feasible to join the absent party; and (3) it is determined "in equity and good conscience" that the action should not

[3] See 25 C.F.R. § 48.14 of the repealed regulations (25 C.F.R. Part 48 (1960) incorporated by reference in Article III of the Tribe's Constitution.

proceed among the existing parties.[4] *See* FED. R. CIV. P. 19; *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008). The Court's Order granting the preliminary injunctive relief and the Memorandum Order issued in response to the Court's Order demonstrate that the Tribe is a necessary party pursuant to each of the three criteria set out in Fed. R. Civ. P. 19(a), and because the Tribe asserts its sovereign immunity, the Tribe cannot be joined and this case must be dismissed for failure to join an indispensible party.

As this Court has observed, attempts to preclude certain actions by a tribe necessarily implicates the Tribe's sovereign immunity and plaintiffs may not make an "end run" around tribal sovereign immunity by suing the United States. *Rosales v. U.S.*, No. 07CV0624, 2007 WL 4233060, at *5 (S.D. Cal. Nov. 28, 2007) (attached as Exhibit 30) (*citing Lewis v. Norton*, 424 F.3d 959, 963 (9th Cir. 2005)).

A. The Tribe is A Necessary Party

Pursuant to FED. R. CIV. P. 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

[4] When FED. R. CIV. P. 19 was amended in 2007, the word "necessary" was replaced by "required" and the word "indispensable" was removed. The changes were intended to be "stylistic only" and "the substance and operation of the Rule both pre- and post-2007 are unchanged." *Republic of Philippines, 553 U.S. at 556–57* (quoting the Advisory Committee).

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 FED. R. CIV. P. 19(a) support the determination that the Tribe is a necessary party.

When the Court initially considered the application of FED. R. CIV. P. 19, the Court declined to find that the Tribe is a necessary party based largely on the Court's determination that the federal Defendants are able to adequately represent the Tribe's interests in this action. Order at 24–28. The Court's Order granting the Plaintiffs injunctive relief and the Assistant Secretary's Memorandum Order issued in response to the Court's Order clearly demonstrate, however, that the Tribe is, in fact, a necessary party: (i) the Court cannot accord the Plaintiffs complete relief among the existing parties; (ii) this action substantially impacts the self-governance and property rights of the Tribe, and the federal Defendants admit that they cannot represent these interests of the Tribe and that the Court's Order subjects them to a clear conflict of interest; and (iii) the Court's Order subjects the federal Defendants to inconsistent obligations. While it is clear that the federal Defendants cannot represent the Tribe's self-governance or property interests, even if they were able to adequately represent the Tribe, which they are not, that would not affect the fact that the Tribe is a necessary party under paragraphs 19(a)(1)(A) and 19(a)(1)(B)(ii) of Fed. R. Civ. P. 19.

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. Memorandum and Order Re: Motion to Dismiss at 6, *Friends of Amador County v. Salazar*, No. 2:10CV-348 WBS-CKD (E.D. Cal. Oct. 4, 2011), Docket No. 10.4, 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.

In this case, the Plaintiffs seek to reverse a tribal disenrollment action carried out by the Tribe and to require the Tribe to reverse its interpretation of Tribal law and restore the membership rights and privileges to the Plaintiffs. Specifically, the Plaintiffs seek injunctive relief requiring the Tribe to permit the Plaintiffs to vote as members of the Tribe's governing body and participate in tribal elections, and to make per capita distributions to adult Plaintiffs and to escrow payments to minor Plaintiffs dating back to January 28, 2011. *See* Complaint for Declaratory and Injunctive Relief at 29–30, ¶¶ 135-138, *Alto et al. v. Salazar et al.*, No. 11cv2276–IEG (BLM) (S.D. Cal. Sept. 30, 2011) ("Complaint").

The Tribe implemented the disenrollment of the Plaintiffs, immediately following the issuance of the Assistant Secretary's Decision on January 28, 2011. As a matter Tribal law, the Plaintiffs are no longer members of the Tribe and have not enjoyed the rights and privileges of tribal membership for over eight months.[5] Although the Court has granted preliminary injunctive relief, it does not bind the Tribe, which is not subject to the Court's jurisdiction and remains free to exercise its inherent rights of self-governance over the internal tribal matters at issue in this case.

In an attempt to circumvent the Tribe's sovereign immunity, the Plaintiffs requested that the Court issue an order that requires the BIA to direct the Tribe perform, or refrain from performing, certain acts associated with the Tribe's membership and governance issues. In the Memorandum Order, the Assistant Secretary admitted his

[5] Plaintiffs acknowledge that they are not treated as tribal members. *See* Complaint at 29, ¶¶ 131–33.

inability to comply with the Court's Order and he identified the conflict of interest in which the Order places him:

> "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 orders, or compel the Band to comply with all aspects of the orders, exactly as phrased by the court."

Memorandum Order at 2.

The federal Defendants filed a Report of Compliance, to which the Plaintiffs filed a vigorous objection and sought supplemental relief, which was denied. *See* Plaintiffs' Objection to the Report of Compliance and Echo Hawk's Order Filed on January 19, 2012 at 3, lines 6–7, *Alto et al. v. Salazar et al.*, No. 11cv2276–IEG (BLM) (S.D. Cal. Jan 23, 2012) ("To date, the Preliminary Injunction Order has not been fully complied with as represented to the Court."). In response the federal Defendants pointed out that the Assistant Secretary lacked authority to carry out certain actions and stated that the Memorandum Order complies with the Court's injunction "to the fullest extent possible under the law." *See* Reply to Plaintiffs' Objection to the United States' Report of Compliance with Preliminary Injunction at 2, lines 14–15, and 3, lines 15–16, *Alto et al. v. Salazar et al*., No. 11cv2276–IEG (BLM) (S.D. Cal. Jan 26, 2012). The Tribe agrees that the BIA lacks the authority to implement the Court's Orders, and a direct comparison of the Court's Order with the Memorandum Order demonstrates that in large measure the Assistant Secretary did not and could not implement the terms of the Court's Order that

are directed at the Tribe, consistent with the rights and interests of the Tribe as a non-party that is not subject to the Court's jurisdiction:

- The Court broadly ordered the Defendants to "allow" the Plaintiffs "access to, and voting rights at, the general council meetings." Order at 32. The Memorandum Order "advises" the Tribe, much more specifically and narrowly, that any action to deny the Plaintiffs a right "to participate in tribal elections . . . will not be recognized by the Department." Memorandum Order at 3.
- The Court ordered the Defendants to allow the Plaintiffs access to health care services. Order at 3. The Defendants do not provide such services, and the Memorandum Order merely "notifies" the IHS and the Tribe that since the Plaintiffs are "deemed" members of the Tribe for purposes of the Order, the BIA "expects" the IHS and Tribe to provide such services accordingly. Memorandum Order at 3.
- The Court's Order directs the Defendants to "require" the Tribe "to make the per capita distributions of gaming revenue to Plaintiffs" and "to escrow the minor Plaintiffs' per capita trust funds." Order at 32–33. In this case the Memorandum Order provides conflicting advice, on the one hand "notifying" the NIGC and the Tribe that since the Plaintiffs are "deemed" tribal members for purposes of the Order, it would violate the Tribe's Revenue Allocation Plan (RAP) to deny Plaintiffs distribution of funds, while at the same time "advising" the Tribe that it can escrow such

funds on the basis that distribution of such funds to them, if in fact they are not members, would also violate the RAP. Memorandum Order at 3.

Furthermore, the Court cannot accord complete relief because the Court's determination regarding the membership status of the Plaintiffs does not provide a basis for the Assistant Secretary to direct the Tribe to take actions prescribed in the Court's Order. The Court has directed the federal Defendants to issue interim orders that exceed the authority of the Defendants and conflict with the BIA's federal trust obligations to the Tribe. The United States is obligated to defer to a tribe's reasonable interpretation of its law. *See, e.g. Cahto Tribe of Laytonville Rancheria v. Dutschke*, No. 2:10-cv-01306-GEB-GGH, 2011 WL 4404149 at *6 (E.D. Cal. Sept. 22, 2011); *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150 (D.D.C. 1999). The deference to a tribe's interpretation of its law is heightened when the tribe's law governs matters of tribal membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). The Supreme Court has recognized that this is a crucial and consequential value affecting the substantial sovereign interests of Indian tribes.

At present the Tribe is not a party to this case and it is not bound by the Court's Order. In fact, the Tribe is in a position to act in contravention of the Court's Order and to initiate separate litigation to challenge the Memorandum Order. *See, e.g., St. Pierre v. Norton*, 498 F. Supp. 2d 214, 221 (D.D.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).

The Court's injunction is grounded in a preliminary conclusion based on the Court's interpretation of the Tribal law governing the Tribe's membership process, which conflicts with the Tribe's interpretation of its law. Specifically the Court interpreted 25 C.F.R. § 48.12, which is purely a matter of Tribal law, to mean that the disenrollment was not "final" with the January 28, 2011 decision, and that the Plaintiffs "are still members of the Tribe" because a final supplemental roll based on the January 28 decision has not been approved.

It is the Tribe's position that this section governed approval of the judgment roll prepared by the BIA based upon applications submitted in 1987. The Tribe's disenrollment action was initiated pursuant to 25 C.F.R. § 48.14, which governs how the Tribe's roll is kept "current." The Marcus Alto descendents were disenrolled pursuant to § 48.14(d), which provides that persons 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(s) (subsections a, b and c apply to changes for deaths, births and factual corrections, which can be made without BIA approval). Plaintiffs' claim that the corrected roll must be approved pursuant to § 48.12 before it is used to distribute "tribal assets" is not accurate and conflicts with the Tribe's implementation of its law. It is the Tribe's interpretation of its Constitution that the Tribe's disenrollment action was immediately effective and implemented on the date of the Assistant Secretary's decision—January 28, 2011, and the BIA's failure to process revisions to the membership roll maintained by the BIA does not affect the Tribe's disenrollment action. The Tribe's interpretation of its Constitution is based on the

authority to disenroll based on inaccurate information in the application for membership. 25 C.F.R. § 48.14(d).

Prior to the Court's Order granting the preliminary injunction, the BIA interpreted this Tribal law in a manner consistent with the Tribe's interpretation, and there was no finding that the Tribe's interpretation of its law is unreasonable. *See* Response to Plaintiffs' "Reply" Filed as Document No. 19, *Alto et al. v. Salazar et al.*, No. 11cv2276–IEG (BLM) (S.D. Cal. Nov. 17, 2011). Thus the United States and this Court are obligated to defer to the Tribe's reasonable interpretation of its membership law. Because the foundation for the Court's Order is based on a misinterpretation of Tribal law made without the Tribe as a party, the Tribe is not bound by that interpretation, and because the Tribe's interpretation of its law is reasonable, the BIA and the Court must defer to the Tribe's interpretation.

Here, the Plaintiffs seek specific relief against a non-party, the Tribe. The Plaintiffs' attempt to circumvent the Tribe's sovereign immunity by seeking relief against the Tribe through the federal Defendants has failed. The BIA admits that it lacks the authority to carry out the Court's Order to implement orders against the Tribe, and the BIA is obligated to defer to Tribe's reasonable interpretation of its membership law. Without the Tribe as a party, the Court cannot accord complete relief to the Plaintiffs, and the Tribe is a required party under FED. R. CIV. P. 19(a)(1)(A), regardless of whether the federal Defendants could adequately represent the interests of the Tribe, which they cannot.

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 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 its 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 adjudication of a claimed interest . . ." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 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*, 982 F.2d at 1317, *citing Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986). Moreover, where sovereign immunity is asserted, the Supreme Court has determined that, if the sovereign's claims are not frivolous, the case must be dismissed because sovereign immunity is "much diminished" if an important and consequential value affecting the sovereign's substantial interests is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection.[6] *See Republic of Philippines v. Pimentel*, 553 U.S. at 853.

[6] Although the *Pimentel* case involved the application of equity factors in FED. R. CIV. P. 19 (b), the courts have long held that the first factor in the FED. R. CIV. P. 19(b) analysis is essentially the same as the inquiry under FED. R. CIV. P. 19(a)(1)(B)(i) regarding whether continuing the action will impair the absent party's ability to protect its interest.

As demonstrated below, the Tribe claims substantial protectable interests in the Tribe's core right of self-governance and self-determination, which are directly affected by this litigation, and the Tribe asserts its sovereign immunity. The Court's Order granting preliminary injunctive relief and the Memorandum Order have directly affected the Tribe's interests, and these developments confirm that the federal Defendants cannot adequately represent the Tribe's interests, and to date have not done so. Under such circumstances, the *Pimentel* Court has made the determination that the Tribe's sovereign immunity would be much diminished if the Tribe's interests are decided by a federal court in the Tribe's absence and over its objection.

a. Tribe Claims Substantial Protectable Interests in the Subject Matter Being Litigated in this Action.

This case implicates a number of the Tribe's fundamental sovereign interests. At its core this is an internal tribal membership dispute that turns exclusively on the interpretation of the Tribe's law—the membership criteria and the enrollment process set forth in the Tribe's Constitution and the terms of a former regulation incorporated therein by reference. The Tribe's enrollment process includes the Tribe's authority to review prior enrollment decisions based on inaccurate information in the application. 25 C.F.R. § 48.14(d). The Tribe clearly has significant self-governance interests in interpreting its own laws, especially in their application to tribal membership issues, and the Tribe objects to the determination of the Tribe's sovereign interests in the absence of the Tribe.

Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas v. Babbitt, 43 F.3d 1491, 1497 n.9 (D.C. Cir. 1995); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994).

In particular the Tribe's Constitution reserves the Tribe's authority to review prior enrollment decisions and to disenroll members if the Tribe determines that the application for membership was based on inaccurate or incomplete information.

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*, 18 F.3d at1458; *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); *Taylor v. BIA*, 325 F. Supp. 2d 1117, 1121 (S.D. Cal. 2004) ("A disposition of issues based on a claim of membership would, as a practical matter, impair the Band's ability to protect its interest in determining its membership."); *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. Cooperative. Ass'n*, 30 F.3d at 1099.

Plaintiffs' suit substantially affects several of the Tribe's most fundamental rights. Significantly, Plaintiffs seek to adjudicate a Tribal membership action absent the Tribe. Tribal membership determinations are the most essential expression of tribal self-governance requiring resolution in tribal forums.[7] Notwithstanding these significant

[7] 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

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 in Tribal elections, 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. Cooperative. Ass'n*, 30 F.3d at 1099; *Shermoen*, 982 F.2d at 1317.

In addition to its interests in self-governance, the Tribe has a protectable property interest in the distribution of revenues generated by tribal enterprises. The preliminary injunction orders the federal Defendants to require the Tribe to make per capita distributions of the Tribe's gaming revenues to the Plaintiffs to the same extent it was required prior to the January 28, 2011 decision. Order at 32–33. The BIA "advised" the Tribe to perform certain actions, on the basis that the Defendants are required by the Court's Order to "deem" the Plaintiffs as tribal members for certain purposes, with the implicit threat that if the Tribe declines the Defendants may refuse to recognize tribal governmental action, or may initiate a separate enforcement action in conjunction with other agencies such as NIGC or IHS. Memorandum Order at 3.

Both the Tribe's sovereign authority over internal tribal affairs and its property interests have already been directly affected by the recent developments in this action. The Tribe thus claims substantial interests in the subject matter being litigated in this

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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.

case, and disposing of these fundamental rights without the Tribe would further impair the Tribe's ability to protect these interests.

b. Federal Defendants Cannot Adequately Represent the Protectable Interests of the Tribe

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. 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. 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 Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Pit River Home and Agr. Cooperative Ass'n.*, 30 F.3d at 1101.

The Interior Department's interests do not necessarily coincide with a tribe's interests under FED. R. CIV. P. 19(a). *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 1000–01 (10th Cir. 2001) *modified on other grounds*, 257 F.3d 1158 (10th Cir. 2001). Furthermore, 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. Cooperative 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).

Developments in this litigation make it clear that the federal Defendants cannot adequately represent the substantial interests of the Tribe that are affected by this action: (i) they admit they cannot represent the Tribe's self-governance interests or the Tribe's interpretation of Tribal law; (ii) the federal Defendants have a conflict of interest with the Tribe; and (iii) under the law of the Ninth Circuit, this is a intertribal dispute.

At the November 15, 2011 hearing on the Plaintiffs' Motion for a Preliminary Injunction, the federal Defendants stated that they would not be able to represent the Tribe's self-governance interests or the Tribe's interpretation of Tribal law. *See* Transcript of Motion Hearing, *Alto et al. v. Salazar et al*., No. 11cv2276–IEG (BLM) (S.D. Cal. Nov. 15, 2011) ("Hearing Transcript"). The federal Defendants stated their position that the Plaintiffs' request for the interim orders in their Fourth Claim "goes beyond the permissible scope of the remedy that the court is entitled to give under the APA" and the Assistant U.S. Attorney stated that the Assistant Secretary did not believe that the United States' ability to protect the Tribe's interests is strictly and narrowly limited to the APA-review question.[8] Hearing Transcript at 23, lines 11–17. Legal counsel for the United States further clarified that if the Court is "going to get into

[8] The Assistant U.S. Attorney stated the following: "I really can't speak for the Tribe, but I can speak for the . . . Assistant Secretary, who feels that we can protect the Tribe's interests strictly and narrowly on that APA-Review question. Hearing Transcript at 24, lines 11–14.

matters directly affecting the Tribe's self-governance, then the Tribe would be a necessary party. . . ." *Id.* "[U]nder Rule 19 analysis as to those claims and those requests for remedies [under the Fourth Claim], I would have to argue the Tribe is going to be directly impacted and would have to have a seat at the table under Rule 19." *Id*. at 27, lines 1–4. Furthermore, with respect to the interpretation of Tribal law, legal counsel for the United States stated that "I can't speak for the Tribe or its interpretation of the law." *Id*. at 18, lines 23–24. This is compounded by the Fifth Cause of Action asserted by Plaintiffs in the First Amended Complaint, which seeks more direct relief aimed at forcing the Defendants and the NIGC to take enforcement action against the Tribe under the provisions of the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. § 2701 *et. seq*.). *See* First Amended Complaint for Declaratory and Injunctive Relief, Fifth Cause of Action, at 31–32, *Alto et al. v. Salazar et al*., No. 11cv2276–IEG (BLM) (S.D. Cal. March. 13, 2012).

By ordering the federal Defendants to issue interim orders against the Tribe, the Court's Order directly affects the Tribe's self-governance interests and by their admission the federal Defendants cannot represent the Tribe's interests. Recent developments confirm that the federal Defendants have not adequately represented the Tribe's interests in this action, and they will not adequately represent the Tribe's interests if this litigation is permitted to continue. Although the United States acknowledges that the Court's Order granting injunctive relief directly affects the self-governance interests of the Tribe, the Defendants did not oppose the Motion for a Preliminary Injunction and they failed to appeal the Order granting the injunctive relief, and they have elected not to file a motion

to dismiss. *See* Declaration of Geoffrey Strommer, dated March 26, 2012, filed in Support of the Tribe's Amended Motion to Intervene, *Alto et al. v. Salazar et al*., No. 11cv2276–IEG (BLM) Docket nos. 60-2 through 60-4. Furthermore, this case will turn on Tribal law, which governs the Tribe's membership action and the BIA's role under those procedures, yet the United States has admitted that it cannot speak on behalf of the Tribe's interpretation of its law.[9] Under such circumstances, the Tribe's interests in this case cannot be adequately represented by the United States.

The federal Defendants are also unable to adequately represent the Tribe's interests because the Court's Order and the Memorandum Order have created a clear conflict of interest between the United States and the Tribe. The Court's Order granting the preliminary injunction requires the federal Defendants to recognize and deem the Plaintiffs members of the Tribe, and it is the legal position of the Defendants that, if the Plaintiffs are members of the Tribe the United States owes them a fiduciary duty. Hearing Transcript at 25, lines 3–10. Prior to the Court's Order and the Memorandum Order, the federal Defendants did not deem the Plaintiffs to be members of the Tribe and thus did not owe the Plaintiffs a fiduciary duty. *See* Response to Plaintiffs' "Reply" Filed as Document No. 19, *Alto et al. v. Salazar et al.*, No. 11cv2276–IEG (BLM) (S.D. Cal. Nov. 17, 2011). By ordering the federal Defendants to recognize and deem the Plaintiffs to be tribal members, the Court has forced the federal Defendants to exercise fiduciary duties towards both the Plaintiffs and the Tribe. The Plaintiffs are seeking the rights and

[9] Plaintiffs acknowledge that the repealed regulations are now a matter of tribal law. *See* Plaintiffs' Objection to the Report of Compliance and Echo Hawk's Order Filed on January 19, 2012 at 2, lines 23–24, *Alto et al. v. Salazar et al*., No. 11cv2276–IEG (BLM) (S.D. Cal. Jan. 23, 2012).

benefits of membership, in direct conflict with the Tribe's position that, under Tribal law, they are no longer members. Thus, the federal Defendants cannot represent the Tribe's interests in this case because they conflict with the Plaintiffs' interests.

Finally, the federal Defendants, by their conduct in this action, have demonstrated that they will not fully defend the Tribe's interests or legal theories. As stated above, this case turns on Tribal law and the federal Defendants have stated that they cannot present this interpretation and are now conflicted from doing so. The Court cannot properly consider this action unless it is informed of the Tribe's interpretation of the BIA's proper role in the Tribe's enrollment proceedings.

In short, even though both the federal Defendants and the Tribe may be interested in defending the January 28, 2011 decision, the federal Defendants admit that they cannot represent the Tribe's fundamental self-governance or property interests that are the subject of this suit. And the federal Defendants cannot represent the Tribe's interpretation of Tribal law, which controls the enrollment actions at issue in this litigation. Furthermore, the Court's Order and the Memorandum Order have created a conflict between the federal Defendants and the Tribe, which precludes their representation of the Tribe's interests.

3. The Tribe's Absence Subjects the Federal Defendants to a Substantial Risk of Incurring Inconsistent Obligations

Under FED. R. CIV. P. 19(a) the Tribe must also be deemed a necessary party because the Court's Order granting the Plaintiffs' request for a preliminary injunction subjects the federal Defendants to a 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 U.S. at 72. 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; *Ransom*, 69 F. Supp. 2d at 150 *citing United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA 75, 80 (June 4, 1992) (It is the IBIA policy that "under the doctrines of tribal sovereignty and self-determination, a tribe has the right initially to interpret its own governing documents in resolving internal disputes, and the Department must give deference to a tribe's reasonable interpretation of its own laws.").

Any attempt by the federal Defendants to interfere with the Tribe's rights to govern its internal affairs would also likely give rise to tribal litigation against the federal Defendants. In considering such potential conflicts, the courts have found compelling the possibility that the United States would incur substantial risk of inconsistent legal obligations if they were sued by a tribe for actions taken in violation of tribal law as a result of a plaintiff's success in an 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 this case the Court's Order granting the preliminary injunction subjects the federal Defendants to inconsistent obligations and potential litigation initiated by the Tribe because, contrary to the Tribe's reasonable interpretation of its law, the Court requires the federal Defendants to recognize and deem the Plaintiffs to be members of the Tribe.

As set forth above, the Tribe's interpretation of its own law is reasonable, and prior to the Court's Order, the United States interpreted the Tribe's Constitution in the same manner and deemed the Plaintiffs to be disenrolled as of January 28, 2011. *See* Response to Plaintiffs' "Reply" Filed as Document No. 19, *Alto et al. v. Salazar et al.*, No. 11cv2276–IEG (BLM) (S.D. Cal. Nov. 17, 2011). The United States and this Court are therefore obligated to defer to the Tribe's reasonable interpretation of its Constitution. The Court's Order, requiring the BIA to adopt a different interpretation of the Tribe's Constitution and requiring the BIA to impose a contrary interpretation of the Tribe's Constitution on the Tribe, conflicts with the BIA's trust obligation to the Tribe and subjects the BIA to inconsistent obligations.[10]

[10] As discussed above, in section I(A)(1) of this brief, the Assistant Secretary's Memorandum Order acknowledges the conflict created by the Court's order.

Based on the Court's misinterpretation of the Tribe's law, the Court's Order also requires the federal Defendants to require the Tribe to permit the Plaintiffs to participate and vote in the meetings of the Tribe's governing body—the General Council, and to vote in elections. The BIA is obligated, however, to avoid unnecessary interference with the Tribe's right to self-government. The Memorandum Order recognizes the conflict yet interferes with the Tribe's right of self-governance by advising that the Tribe's actions will not be recognized unless the Tribe permits the Plaintiffs to participate in Tribal elections based upon a court order that does not apply to the Tribe.

As discussed above, the Memorandum Order describes in some detail the inconsistent obligations created by the portion of the Court's Order directing the BIA to require the Tribe to pay per capita distributions of gaming revenue to Plaintiffs. In an attempt to ride the fence between these conflicting obligations the BIA advises the Tribe to escrow the per capita distributions to the Plaintiffs. *Id.* This conflicting advice impairs the Tribe's ability to comply with its RAP and IGRA and may result in litigation involving the Assistant Secretary. Because the Court's Order is not binding on the Tribe, under Tribal law the Plaintiffs are not members and the payment of per capita distributions would violate the RAP and IGRA. However, if the NIGC deems the Plaintiffs to be members, as advised by the BIA, the NIGC might find that the BIA's advice violates the RAP because the RAP does not permit the Tribe to escrow per capita distributions to adult members, unless they are incompetent.

In sum, the Court's Order granting the Plaintiffs' request for a preliminary injunction has already subjected the federal Defendants to inconsistent obligations

between those arising under the Court's Order and the federal trust obligations to the Tribe. The Assistant Secretary has recognized these conflicting obligations, but the BIA has nonetheless taken actions that violate its federal trust obligations to the Tribe. If this case is permitted to continue, the BIA will be subject to further inconsistent obligations, which may result in litigation over the Memorandum Order.

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* 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 at 1460.

The Tribe has not expressly or unequivocally waived its sovereign immunity regarding the matters in dispute in this case and the Tribe's Constitution does not provide any express waiver of the Tribe's sovereign immunity, nor do Plaintiffs allege any such waiver. As a result, the Tribe is immune from suit and the joinder of the Tribe is not feasible under FED. R. CIV. P. 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, FED. R. CIV. P. 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. *See* FED. R. CIV. P. 19(b)(1)-(4).

In considering the application of FED. R. CIV. P. 19(b), the Supreme Court found that "where sovereign immunity is asserted, and the sovereign's claims are not frivolous, dismissal must be ordered where there is a potential for injury to the sovereign's interests." *Republic of Philippines v. Pimentel*, 553 U.S. at 853 (emphasis added). The Court reasoned that the privilege of sovereign immunity is much diminished if an important and consequential value affecting the sovereign's interest is defined by a federal court in its absence or over its objection. *Id.*

This action would directly affect several tribal interests, including the Tribe's inherent right to determine its own membership. The Supreme Court has 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." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996) ("A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations."). In this action, the Plaintiffs seek to have this Court determine tribal membership law, reverse tribal membership decisions and require the Tribe to provide the rights and privileges of tribal membership in the absence of the Tribe and over the objections of the Tribe. The Tribe has not waived its sovereign immunity to be joined in this case and,

under the Supreme Court's rule in *Pimentel*, the pending action must be dismissed. Thus, the Court need not weigh the factors set forth in FED. R. CIV. P. 19(b).

II. This Suit Must Be Dismissed Because Plaintiffs Have Not Demonstrated Subject Matter Jurisdiction

As discussed above, this case, at its heart, is an enrollment dispute. Plaintiffs seek to litigate the merits of a Tribal enrollment decision that is governed exclusively under Tribal law, and Plaintiffs seek relief for alleged violations of Tribal law. Because Plaintiffs' claims arise solely under Tribal law and are inextricably intertwined with the interpretation and application of Tribal law, the Plaintiffs cannot meet the federal question or standing requirements and this case should be dismissed under FED. R. CIV. P. 12(b)(1).

It is well settled that "federal courts are courts of limited jurisdiction . . . presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). The party invoking federal question jurisdiction bears the burden of proof. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The issue of subject matter jurisdiction can be raised at any point in the proceedings. FED. R. CIV. P. 12(h)(3). Furthermore, subject matter jurisdiction cannot be waived, nor can it be conferred by consent of the parties. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 948 (9th Cir. 2001), *cert. denied, Daimler Chrysler Corp. v. Gibson*, 534 U.S. 1104 (2002).

A. Plaintiffs Fail to Demonstrate Federal Question Jurisdiction

Federal question jurisdiction arises only when the federal question is apparent on the face of a well-pleaded complaint. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987).

The well-pleaded complaint must establish "either that federal law creates the cause of action or that the plaintiff's right to relief . . . depends on resolution of a substantial question of federal law." *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000), *quoting Franchise Tax Bd. Of Calif, v. Construction Laborers Vacation Trust for So. Calif.*, 463 U.S. 1, 27–28 (1983). Moreover, "the complaint must identify the statutory or constitutional provision under which the claim arises, and allege sufficient facts to show that the case is one arising under federal law." *Sac & Fox Nation of Oklahoma*, 193 F.3d at 1165–66, *quoting Martinez v. U.S.O.C*, 802 F.2d 1275, 1280 (10th Cir. 1986).

Plaintiffs allege federal question jurisdiction under 28 U.S.C. §§ 1331, 1361, and the jurisdiction under the APA, 5 U.S.C. §§ 702, 704, and 706. Yet, Plaintiffs fail to demonstrate how these federal laws establish subject matter jurisdiction for their claims. The APA is not an independent grant of subject matter jurisdiction to review agency actions. *Califano v. Sanders*, 430 U.S. 99, 103–07 (1977); *City of L.A. v. U.S. F.A.A.*, 239 F.3d 1033, 1035 (9th Cir. 2001). For jurisdiction to lie under 28 U.S.C. §§ 1331 or 1361 the action must arise under the Constitution, laws or treaties of the United States. *See, e.g., Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1077 (9th Cir. 1990). In order to demonstrate that the case arises under federal law, the federal claim must be a "direct element" of the controversy. C. Wright & A. Miller, 13D Fed. Prac. & Proc. Civ. § 3562 (3d ed.) at 32. "In cases involving tribal affairs, we exercise section 1331 jurisdiction only when federal law is determinative of the issues involved. Jurisdiction to resolve internal tribal disputes [and] interpret tribal constitutions and laws

. . . lies with Indian tribes and not in the district courts." *Timbisha Shoshone Tribe v. United States Department of the Interior*, No. 2:11-cv-00995-MCE-DAD, 2011 WL 1883862 (E.D. Cal. May 16, 2011) (internal citations and quotations omitted), *citing Sac & Fox Tribe of the Mississippi in Iowa v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006).

Plaintiffs seek to litigate a tribal enrollment matter, which is governed exclusively under Tribal law. The United States Supreme Court has said "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." *Santa Clara Pueblo*, 436 U.S. at 72 n.32. The crux of *Santa Clara Pueblo* is that federal courts lack jurisdiction to decide an "intratribal controversy affecting matters of tribal self government and sovereignty." *Kiowa Tribe*, 523 U.S. at 763, *quoting Santa Clara Pueblo*, 436 U.S. at 53. Federal courts have consistently held that they lack jurisdiction over such matters. For example, in *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915, 920–21 (10th Cir. 1957) *cert. denied*, 356 U.S. 960 (1958), the Tenth Circuit held that a dispute involving membership in an Indian Tribe does not present a federal question. The Ninth Circuit followed *Martinez* in *Fondahn v. Native Village of Tyonek*, 450 F.2d 520, 522 (9th Cir. 1971). *See also Montana v. United States*, 450 U.S. 544, 564 (1981); *Smith v. Babbitt*, 875 F. Supp. 1353, 1360–61 (D. Minn. 1995), *aff'd, Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996) ("The great weight of authority holds that tribes have exclusive authority to determine membership issues. A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no

greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations.") (internal citations omitted).

Furthermore, "[a]n ordinance enacted by a federally recognized Indian tribe is not itself a federal law; the mere fact that a claim is based upon a tribal ordinance consequently does not give rise to federal question jurisdiction." *Morongo Band of Mission Indians*, 893 F.2d at 1077, *citing Boe v. Fort Belknap Indian Community of Fort Belknap Reservation*, 642 F.2d 276, 279 (9th Cir. 1981). If the plaintiffs' claims do not involve a dispute or controversy respecting the validity, construction, or effect of federal law, they do not arise under federal law. *See Boe*, 642 F.2d at 279 (No federal question was raised by Indian plaintiffs who sought to contest the results of a tribal election on the ground that the tribal election laws had been violated). Similarly, there was no federal question jurisdiction to consider the plaintiffs' claims that their rights in tribal property were diluted as a result of an allegedly invalid secretarial election to amend a tribal constitution, because their claim of right to tribal property did not arise under federal law but under the rights of tribal membership. *See Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967).

Although Plaintiffs have named federal Defendants and purport to allege federal question jurisdiction, Plaintiffs seek to relitigate the underlying tribal enrollment action and the BIA's review of the Tribe's enrollment action, which are governed exclusively by Tribal law, not federal law. *Atilano v. BIA*, Case 3:05-cv-01134-J (S.D. Cal. Dec. 1, 1995), Order Re: Granting Defendants' Motion to Dismiss, at 6. Plaintiffs have the burden of establishing subject matter jurisdiction, and they have not demonstrated that

their claims, which are rooted in Tribal law and are exclusively governed by Tribal law, are federal claims arising under federal law. Thus, Plaintiffs have failed to meet their burden of establishing subject matter jurisdiction.

Although 28 U.S.C. § 1331 may confer subject matter jurisdiction on federal courts to review APA claims pertaining to federal agency actions, federal question jurisdiction will not lie to resolve purported claims rooted in tribal law and which would require the court to resolve nonjusticiable tribal matters. *Goodface v. Grassrope*, 708 F.2d 335, 338–39 (8th Cir. 1983) (citing *Califano,* 430 U.S. at 106 (the court concluded that "the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute"). In a case involving a dispute arising from two tribal council resolutions barring certain persons from holding appointed or elected tribal office, the court acknowledged that federal district courts have subject matter jurisdiction under 28 U.S.C. § 1331 to review the BIA's action pursuant to the APA, but the court also found that "to the extent that the appellants' complaint can be characterized as one seeking federal judicial review of the two Tribal Council resolutions at issue . . . the district court correctly dismissed the complaint for lack of jurisdiction."[11] *Runs After v. United States*, 766 F.2d 347, 351–52 (8th Cir. 1985) (The Court of Appeals found that the district court correctly held that resolution of such disputes involving questions of interpretation of tribal constitution and tribal law is not within the jurisdiction of the district court.).

[11] The *Runs After* court also found that the plaintiffs in that case had failed to exhaust administrative remedies. *Id.*

The court for the Eastern District for California applied similar reasoning in dismissing purported APA claims challenging an order of the Assistant Secretary – Indian Affairs pertaining to an election dispute between two competing tribal councils. *Timbisha Shoshone Tribe*, 2011 WL 1883862. The action was dismissed in part because the court found that the action would require it to resolve nonjusticiable intertribal matters. *Id.* at 5.[12]

Plaintiffs' causes of action in this case are rooted in Tribal law and there is no federal question jurisdiction for the claims. This Court, in the *Atilano* case, concluded that once the BIA repealed 25 C.F.R. Part 48 and 25 C.F.R. Part 76, it repealed any statutory authority it had, and that "any consultative role the BIA plays in the Tribe's membership enrollment process is that authorized by the Tribe's Constitution . . . which is the sole source of power over the Tribal enrollment process." Order Re: Granting Defendants' Motion to Dismiss at 6, lines 13–19, *Atilano v. BIA*, No. 05CV1134-J (BLM) (S.D. Cal. Dec. 1, 1995). Although the Plaintiffs couch some of their claims as arising under federal law, each of the causes of action in the Plaintiffs' Complaint is rooted in the Plaintiffs' alleged status as tribal members and would require the Court to interpret and apply the Tribe's law governing enrollment and the rights of membership. To the extent that the Plaintiffs raise any claims under the APA, an examination of the causes of action in the Complaint demonstrate they are inseparable from questions of Tribal law and nonjusticiable tribal matters.

[12] In addition to finding a lack of federal question jurisdiction, the court also found that the case should be dismissed under FED. R. CIV. P. 12(b)(7) for failure to join both competing councils, who the court concluded were necessary and indispensable parties. *Id*. at 6–7.

The First Cause of Action claims that the doctrine of res judicata applies to earlier BIA decisions pertaining to the status of Marcus Alto Sr. This claim ignores the Tribal law governing the enrollment process. The Tribe's law directs the Tribe's Enrollment Committee to correct the tribal roll or to disenroll individuals based on information or documentation which demonstrates that information supplied at the time of application for enrollment was inaccurate or incomplete. 25 C.F.R. § 48.14(c) and (d). The Tribe's law also provides a role for the BIA to review tribal membership decisions, but as a matter of Tribal law, not federal law. 25 C.F.R. § 48.14. Thus Tribal law necessarily precludes the application of res judicata. If new documentation or information is presented to the Enrollment Committee demonstrating that information provided at the time of application for enrollment was inaccurate or incomplete, the Committee is directed to disenroll individuals. In order to consider this cause of action, the Court would be required to interpret and apply the Tribe's enrollment law to the decision of the Tribe's Enrollment Committee to reconsider the membership of Alto Sr.. Thus this cause of action arises under Tribal law, not federal law, and would require the Court to consider questions of Tribal law beyond the Court's jurisdiction.

The Second Cause of Action is rooted in the Plaintiffs' allegation that they continue to be entitled to the rights and benefits of tribal membership by virtue of their claim that they are descendents of Jose Alto and Maria Duro. *See* Complaint at 15, ¶¶ 64–65. This Cause of Action further requests that the Court evaluate the merits of the Tribe's underlying enrollment action in light of new evidence not considered by the Tribal Enrollment Committee or the Assistant Secretary. *See* Complaint at 15–16, ¶ 71.

Thus this cause of action is rooted in rights claimed under Tribal law and is dependent upon the Court's consideration of the merits of the underlying Tribal action based on evidence not considered by the federal agency.

The Third Cause of Action seeks to re-litigate the underlying enrollment action before the Court and is dependent upon the Court's interpretation of numerous aspects of Tribal law and the evaluation of the merits of Plaintiffs factual and legal theories under the applicable Tribal law—all in the absence of the Tribe. For example, this cause of action would require the court to interpret Tribal law to determine the relative weight that should be assigned to certain evidence, which evidence can be considered, and the applicable standard of review. Tribal law governs all the issues presented in this cause of action. Thus it does not arise under federal law and does not establish federal question jurisdiction.

The Fourth Cause of Action, as well as the Fifth Cause of Action, set out in the First Amended Complaint, request injunctive relief that runs against the Tribe—not the federal Defendants. Furthermore, as clarified by the Court's Order granting the preliminary injunction, Plaintiffs' requested relief is dependent upon the Plaintiffs' allegation that they continue to be entitled to the rights and benefits of Tribal membership. The Court's Order granting the preliminary injunction is dependent on the Court's interpretation of the Tribe's law governing both the Tribe's disenrollment action and the BIA's authority to approve a supplemental roll.[13] Under the Tribe's

[13] As described above, the Court's conclusion that the disenrollment was not effective on January 28, 2011 was based on application of 25 C.F.R. § 48.12, which does not govern disenrollment. The Tribe's disenrollment action was initiated pursuant to 25 C.F.R. §

interpretation of its law, the BIA's failure to process changes to the roll maintained by the BIA pursuant to § 48.12 does not affect the Tribe's disenrollment action under § 48.14. Consistent with the Tribe's understanding, the BIA has taken the position that the processing of the revisions to the membership roll maintained by the BIA is a ministerial task. Response to Plaintiffs' "Reply" Filed as Document No. 19 at 2, lines 7–10, *Alto et al. v. Salazar et al.*, No. 11cv2276–IEG (BLM) (S.D. Cal. Nov. 17, 2011). The Court, however, lacks jurisdiction to interpret the Tribe's law, thus the Court lacks jurisdiction to consider or grant Plaintiffs' claims under the Fourth and Fifth Causes of Action.

Because the present case arises exclusively under Tribal law and each of the Plaintiffs' claims would require the Court to interpret and apply Tribal law, this case is distinguishable from other federal cases, in which district courts have found APA jurisdiction. In the *Cahto Tribe of Laytonville Rancheria* case, for example, the BIA and the Court found that the underlying membership dispute turned on an interpretation of a federal law, the Hoopa Yurok Settlement Act, which is incorporated in the Tribe's governing documents. 2011 WL 4404149, *6–7. This is distinguishable from the former BIA regulations incorporated in the San Pasqual Band's Constitution, which is solely a matter of Tribal law. Order Re: Granting Defendants' Motion to Dismiss at 6, lines 17–19, *Atilano v. BIA*, No. 05CV1134-J (BLM) (S.D. Cal. Dec. 1, 1995). Similarly, in *Hein v. Capitan Grande Band of Diegueno Mission Indians*, the court interpreted federal law, not tribal law, in the consideration of the Plaintiff's motion to compel the Assistant Secretary to Act and to make a determination under federal law as to whether the

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48.14, which governs how the Tribe's roll is kept "current." The Marcus Alto descendents were disenrolled pursuant to § 48.14(d).

Plaintiffs should be recognized as a separate federally recognized tribe or whether, under the IGRA, the Plaintiffs were entitled to the distribution of gaming revenues. *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256,1261 (9th Cir. 2000); *see also Coyote Valley Band of Pomo Indians v. United States*, 639 F. Supp. 165, 169 (E.D. Cal. 1986) (the court considered claims to compel the BIA to hold secretarial elections on draft constitutions under 25 U.S.C. § 476). Because the Plaintiffs' claims are all rooted in Tribal law and are all dependent upon the Court's interpretation and application of the Tribe's law, they do not arise in federal law and do not establish federal question jurisdiction.

B. Plaintiffs Lack Article III Standing to Assert the Claims in the Amended Complaint

Plaintiffs lack Article III standing to assert the Causes of Action set forth in the Amended Complaint. Standing is a threshold requirement for the district court's jurisdiction. *See Warth* v. *Seldin*, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."); *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233 (9th Cir. 1980) (standing is a necessary element of federal court jurisdiction). To satisfy "the irreducible constitutional minimum of standing," Plaintiffs must satisfy three elements. *Lujan*, 504 U.S. at 560. First, Plaintiffs must show an injury-in-fact—"an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation and citations omitted). Second, Plaintiffs must show that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent

action of some third party not before the court. *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" on the merits. *Id.* at 561 (internal quotations and citations omitted). Here, Plaintiffs cannot establish standing under the *Lujan* test.

Plaintiffs allege no injury arising under federal law or originating in federal action taken pursuant to federal law. Plaintiffs cannot meet the requirements for standing because their claims are based on alleged eligibility for membership under Tribal law. Defendants acknowledge that the controlling law is Tribal, not federal. As set forth above, the Court has no jurisdiction to interpret Tribal law or direct enforcement against the Tribe, which has not waived immunity.

With regard to the causation prong, Plaintiffs must demonstrate that the alleged injury is not the result of the "independent action" of some third party not before the court. *Lujan*, 504 U.S. at 561. Plaintiffs cannot meet this standard because their alleged injury is the result of "independent action" by the Tribe acting pursuant to Tribal law. Plaintiffs cannot meet the second prong of the standing test because their claims ultimately run against the Tribe, not the Defendants. As discussed above, the Plaintiffs' five causes of action are inseparable from questions of Tribal law and nonjusticiable tribal matters. And it is clear that Plaintiffs seek relief that would have to be enforced directly against the Tribe. Relief that does not "remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Although causation and redressability are normally "overlapping inquiries" with "no real analytic difference," *Emergency Coal. to Defend Educ. Travel v.*

U.S. Dep't of Treasury, 545 F.3d 4, 11 (D.C. Cir. 2008), "causation does not inevitably imply redressability," because there may be circumstances where "governmental action is a substantial contributing factor in bringing about a specific harm, but the undoing of the governmental action will not undo the harm." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1278 (D.C. Cir. 2007).

Similarly, Plaintiffs cannot satisfy the third standing prong, because their alleged injury is not judicially redressable. Any relief granted Plaintiffs, to be effective, requires enforcement directly against the Tribe. Even assuming that Plaintiffs' alleged injuries are sufficiently linked to the complained of actions by Defendants, Plaintiffs must still establish that a decision in their favor would likely redress their injuries. *See Lujan*, 504 U.S. at 561. On this ground alone the Plaintiffs' claims fail. Plaintiffs must demonstrate that their alleged injuries are traceable to a violation of federal law; here the governing law is Tribal, not federal. *See Lujan*, 504 U.S. at 561 (noting that plaintiff invoking federal jurisdiction bears burden of establishing standing). The alleged injury is not redressable if enforcement is not binding on a party that is not subject to the court's jurisdiction, particularly where the result hinges on an interpretation of law not binding on the absent party. *Id.* at 568–69 (no reason that non-parties "should be obliged to honor an incidental legal determination the suit produced"). A plaintiff's standing fails where it is speculative whether the requested relief will alter the "independent choices" of third parties that are the direct cause of the plaintiff's injuries. *See Bennett v. Donovan*, 797 F. Supp. 2d 69, 75 (D.D.C. 2011), *citing Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004). *See also Steel Co.*, 523 U.S. at 107; *Renal*

Physicians Ass'n, 489 F.3d at 1278 (There may be circumstances where "governmental action is a substantial contributing factor in bringing about a specific harm, but the undoing of the governmental action will not undo the harm."). In this case, the Defendants' inability to implement the terms of the Court's Order demonstrates that it is highly implausible that the Court can order effective relief that runs solely against the federal Defendants.

The determining factor in Plaintiffs' claim is that any relief fashioned by the district court—either an order directing the BIA to reconsider the disenrollment decision or the more invasive forms of relief aimed at directing the Tribe to recognize the Plaintiffs as members for purposes of exercising political rights or eligibility for Tribal benefits—directly implicates the Tribe's sovereign right to determine its own membership and enrollment procedures. *See Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994) (concluding that tribes "have the right to control their membership roster, and any federal litigation on that subject would disrupt the conduct of intratribal affairs, an area that the federal government has left to the tribe itself").

The district court has no authority to direct any relief favorable to Plaintiffs without impermissibly impairing the Tribe's sovereign right to govern its own membership and enrollment process. Simply, the district court has no authority to interpret the Tribe's Constitution or determine the Tribe's membership criteria or enrollment procedures. A dispute involving membership in an Indian Tribe does not present a federal question and federal courts lack jurisdiction over such matters. *See Martinez*, 249 F.2d at 920, and other cases discussed above. Any role the Defendants

play in the Tribe's membership process is that authorized and defined by Tribal law. Thus, any decision of the district court would impermissibly alter the Tribe's limited grant of authority to the BIA over membership disputes. "[C]ourts have consistently recognized that in absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine *all* questions of its own membership, as a political entity." *Id.* (emphasis added). In this case the BIA does not exercise review pursuant to congressional authority, but merely by virtue of the Tribe's own law delegating review authority to the BIA. Thus, there is no basis for the Court to exercise federal question jurisdiction, and no basis for the Court to order relief that redresses the Plaintiffs' alleged injuries. *Id.*

Any role the Defendants play in the Tribe's membership process is that authorized and defined by Tribal law. Thus, any decision of the Court would impermissibly alter the Tribe's grant of authority to the BIA over membership disputes. Since it is not sufficiently likely that the district court can redress the Plaintiffs' alleged injuries, Plaintiffs do not have standing to sue. *See Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (noting that plaintiff must demonstrate that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

Plaintiffs' Amended Complaint must be dismissed because they lack standing.

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' attempt to make an "end run" around the Tribe's sovereign immunity by suing the officials of the Interior Department under the APA cannot succeed under the joinder rule set forth in FED. R. CIV. P. 19. The Tribe is a necessary party and cannot be joined, and because it has not waived its sovereign immunity, this action must be dismissed pursuant to FED. R. CIV. P. 12(b)(7), In the alternative, this action should be dismissed pursuant to FED. R. CIV. P. 12(b)(1) on the grounds that Plaintiffs have not established federal question jurisdiction and lack standing to bring the action. The Tribe thus requests that this case be dismissed.

Respectfully submitted,

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