Timothy C. Seward
California State Bar Number 179904
Hobbs, Straus, Dean & Walker, LLP
1903 21st Street, 3rd Floor
Sacramento, CA 95811
Telephone: (916) 442-9444
Facsimile: (916) 442-8344
Email: tseward@hobbsstraus.com

Geoffrey D. Strommer (pro hac vice)
Hobbs, Straus, Dean & Walker, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
Telephone: (503) 242-1745
Facsimile: (503) 242-1072
Email: gstrommer@hobbsstraus.com

Attorneys for the San Pasqual Band of Mission Indians

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' REPLY IN SUPPORT OF MOTION TO DISMISS** JUDGE: Honorable Irma E. Gonzalez, Chief Judge COURTROOM: 1 DATE: June 7, 2012 TIME: 2:00 p.m.

INTRODUCTION

The San Pasqual Band of Mission Indians ("Tribe") moved for an order dismissing Plaintiffs' Complaint under Federal Rule of Civil Procedure (FED. R. CIV. P.) 12(b)(7), for failure

to join the Tribe as an indispensable party pursuant to FED. R. CIV. P. 19; and under FED. R. CIV. P. 12(b)(1), because Plaintiffs cannot demonstrate federal question jurisdiction or standing.[1]

The federal Defendants oppose the Tribe's motion, in part, by trying to distinguish Plaintiffs' first three causes of action from their fourth and fifth causes of action. Defendants argue that the Court has jurisdiction over Plaintiffs' first three causes of action for the narrow purpose to review the Assistant Secretary's final January 28, 2011 decision under the Administrative Procedures Act (APA), because, they argue, the Court can accord complete relief as to these causes of action and Defendants can adequately represent the Tribe's interests on those claims.[2] Defendants Opposition in Part (ECF 75) at 5–9. Defendants do not support dismissal of the fourth and fifth causes of action, but they acknowledge that these claims directly affect the Tribe's right of self-government and that the United States cannot represent the Tribe's interests on those claims. Plaintiffs do not address the elements of the Tribe's motion in an organized way, but broadly argue in scattered sections of their brief that the Tribe is not an indispensable party because the Court may "override" the Tribe's immunity and the Tribe surrendered its governmental interest by delegating enrollment approval authority to the Secretary. *See, e.g.*, Plaintiffs' Opposition (ECF 76) at 4.

The arguments put forth by Defendants and Plaintiffs fail because (i) Plaintiffs' claims arise under the Tribe's law and (ii) Plaintiffs seek to reverse the Tribe's enrollment action, as well as the Assistant Secretary's January 28, 2011 decision, both of which arise from and are governed by the Tribe's law, and thus the Tribe is a required party under all three grounds set

---

[1] The Tribe has been granted intervention as a matter of right, without waiver of the Tribe's sovereign immunity, to bring these jurisdictional motions. (ECF Nos. 60, 67.)

[2] Defendants do not oppose the dismissal of Plaintiffs' fourth and fifth causes of action under Rule 12(b)(7) and do not oppose dismissal of the Complaint under Rule 12(b)(1).

forth in FED. R. CIV. P. 19(a) and is immune from suit and cannot be joined so that this action must be dismissed. Further, Plaintiffs cannot show federal jurisdiction or standing.

ARGUMENT

I. UNDER RULE 19 THE TRIBE IS A REQUIRED AND INDISPENSABLE PARTY

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 proceed among the existing parties. *See* FED. R. CIV. P. 19; *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008).

A. The Tribe is A Required Party

The Tribe is a required party.[3] Plaintiffs' argument relies principally on *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256 (9th Cir. 2000). *See* Plaintiffs' Opposition (ECF 76) at 21–24. However, *Hein* is distinguishable because the court addressed a claim arising in federal law, not tribal law. The court considered the plaintiff's claim as a motion to compel the Assistant Secretary to make a determination under federal law as to whether the plaintiffs should be recognized as a separate federally recognized tribe or whether, under the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et. seq.*), the plaintiffs were entitled to the distribution of gaming revenues. *Id.* at 1258. In the present case, Plaintiffs' claims arise solely in Tribal law, and turn on the interpretation and application of Tribal law. The Plaintiffs' detailed analysis of the enrollment provisions, see Plaintiffs' Opposition (ECF 76) at 11–14,

[3] Under 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 the interest. *See* FED. R. CIV. P. 19(a).

illustrate how clearly their claims and alleged rights are rooted in the interpretation and application of the Tribal law.

1. Complete Relief Cannot be Accorded Without the Tribe

The Secretary approved the Tribe's disenrollment action on January 28, 2011, and from that date the Plaintiffs, as a matter of Tribal law, ceased to be members of the Tribe. Plaintiffs seek to restore their membership in the Tribe, which will require a remedy reversing the Tribe's disenrollment action, not just invalidating the Assistant Secretary's decision.

The Tribe is not a party and is not bound by the Court's Order. The Defendants attempt to distinguish the claims in the first through third causes of action from the fourth and fifth causes of action by arguing that the Plaintiffs do not in the first three causes seek direct relief against the Tribe. *See* Defendants Opposition in Part (ECF 75) at 5–6. On the contrary, the Court's current Order and the Memorandum Order, which impose direct interim relief against the Tribe, foreshadow the problems that would arise with a favorable order on Plaintiffs' first three causes of action.

The situation facing the Plaintiffs in this case is similar to that in *Taylor v. Bureau of Indian Affairs*, 325 F. Supp. 2d 1117, 1120–1121 (S.D. Cal. 2004), where the court found that complete relief could not be granted because the complaint was based on a disputed assertion of tribal membership and even if the court enjoined the BIA, the tribe could still assert its right to deny membership and grazing rights. *See also Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 998 (9th Cir. 2011).

Even if the Assistant Secretary's decision is invalidated and remanded, Defendants' argument skips a crucial step, because the Court's order would not be binding on the Tribe and would not require the Tribe to reverse its disenrollment action or grant the Plaintiffs membership

rights in the Tribe. Thus the Court cannot accord complete relief among the parties, and the Tribe is a required party.

2. Defendants Cannot Adequately Represent the Tribe and Adjudication Without the Tribe Would Impair The Tribe's Ability to Protect Its Interests

Application of this provision of FED. R. CIV. P. 19(a) involves a determination whether the absent party asserts protectable interests, and, if so, whether an existing party adequately represents those interests. This rule is to be applied so as to preserve the right of parties "to make known their interests and legal theories." *Shermoen v. U. S.*, 982 F.2d 1312, 1317 (9th Cir. 1992), *citing Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986). Further, the Supreme Court has found a government's sovereign immunity is "much diminished" if an important and consequential value affecting the sovereign's substantial interests is determined by a court in the sovereign's absence and over its objection. *See Pimentel*, 553 U.S. at 853.

Defendants concede that the Tribe has substantial rights of "self-governance and self-determination" directly affected by the litigation,[4] but contend that, as to the first through third causes of action, they can adequately protect the Tribe's interests. *See* Defendants Opposition in Part (ECF 75) at 5–6, 8. This position misconstrues the nature of the claims asserted and remedies sought in the first three causes of action and minimize the effect a ruling in favor of Plaintiffs would have on the rights and interests of the Tribe. Plaintiffs raise substantial protected governmental and financial interests in all five claims. *See* Points and Authorities in Support of Motion to Dismiss (ECF 70-1) at 34–38. Resolution of the claims will require

[4] It is notable that the Defendants have conceded, *repeatedly*, that this action substantially impacts the self-governance rights of the Tribe, that the federal Defendants cannot represent these interests of the Tribe. *See* Points and Authorities in Support of Motion to Dismiss (ECF 70-1) at 19–22.

interpretation of the Tribe's laws, *see Id.* at 12–13, 15–17, and the Defendants cannot represent the Tribe's interest in litigating those issues.[5] Further, the Plaintiffs are ultimately seeking to reverse the Tribe's enrollment decision—not just the Defendants' decision, and the Defendants do not share the Tribe's interest in protecting the Tribe's role in making enrollment decisions and limiting federal interference. Moreover, the Defendants will not present the Tribe's legal arguments regarding the Tribe's Constitutional membership criteria and enrollment process and or the extensive record developed by the Tribe's Enrollment Committee in support of its decision. The target of Plaintiffs' claims is the Tribe's enrollment action and Defendants have not, will not, respond to the false allegations Plaintiffs make against the Tribe's process, the absurd theories regarding the Tribe's interests, or the tortured interpretations of Tribal law. Absent its presence as a party, the Tribe would be deprived of its right to make known its interests and present arguments to defend those interests.[6]

Defendants cannot adequately represent the Tribe's substantial interests 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, in which the BIA cannot

---

[5] With respect to the interpretation of Tribal law, legal counsel for the United States has stated that "I can't speak for the Tribe or its interpretation of the 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") at 18, lines 23–24. Tribal law is at issue in all five causes of action.

[6] For example, Defendants did not raise the Tribe's interests in opposition to Plaintiffs' motion for preliminary injunction, and have not responded to Plaintiffs absurd theory that the Tribe surrendered its interests in tribal membership, or the false allegations that the Business Committee "falsified" resolutions. Note that the Tribe's letter dated July 29, 2011, attached as Exhibit R to the Plaintiffs' response, ECF 15-5, demonstrates that the resolutions were not "false" but accurately reflected the decision made by the General Council.

adequately represent the Tribe's interests.[7] *See* Points and Authorities in Support of Motion to Dismiss (ECF 70-1) at 18–22. The present case is distinct from the cases relied upon by Plaintiffs and Defendants, such as *Hein,* 201 F.3d 1256; *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998), and *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001), which involved claims challenging, or seeking to compel, a federal action under federal law. Unlike those cases, Plaintiffs' claims arise in Tribal law and the Tribe's interests in self-government, which Defendants cannot represent, are at the heart of each of Plaintiffs' claims.

3. Defendants Have Substantial Risk of Incurring Inconsistent Obligations

Contrary to Defendants' assertion, a decision by this Court vacating the Assistant Secretary's January 28, 2011 decision would not "simply put the Tribe back into the position" the Tribe was in after the Regional Director's decision. Defendants Opposition in Part (ECF 75) at 9. Unless the Tribe is a party to this action, the invalidation of the Assistant Secretary's decision would not, on its own, require the Tribe to reverse its final disenrollment decision or the subsequent actions of the Tribe to implement the disenrollment decision. If the BIA were required to impose a ruling in favor of the Plaintiffs on their first three counts against the Tribe, Defendants would be in the same conflicted position they found themselves in trying to impose the preliminary injunction, because the Tribe would not be bound by the order. Any such effort would create the potential for tribal litigation against the federal Defendants. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002), *aff'd sub nom*, *Davis ex rel. Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003).

[7] Contrary to Defendants assertion, the impartial, quasi-judicial role played by the BIA under the Tribe's Constitution is wholly different from the advocacy that would be required to adequately represent the Tribe's interests in this case.

B. The Tribe Has Not Waived Its Sovereign Immunity

"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." *Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.,* 523 U.S. 751, 754 (1998). The Tribe did not waive its immunity by intervening for the limited purpose to seek dismissal. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 999–1000 (W.D. Wis. 2004), *aff'd*, 422 F.3d 490 (7th Cir. 2005). The Tribe's voluntary participation in administrative proceedings also did not waive immunity in federal court. *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994). Plaintiffs argue that the Tribe waived immunity by delegating review authority over enrollment decisions to the BIA, but cites no authority for that proposition.[8] Significantly, the Tribe's Constitution does not include a waiver of the Tribe's immunity and no congressional waiver of sovereign immunity has been asserted. In fact, the Plaintiffs invite the Court to simply "override" the Tribe's immunity, *see* Plaintiffs' Opposition (ECF 76) at 4, despite the lack of authority.[9] "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 immune from suit and joinder is not feasible. FED. R. CIV. P. 19(b).

---

[8] The Plaintiffs quote a statement by the U.S. Attorney in a different proceeding, in a misleading effort to show that the Defendants believe the Tribe has waived its sovereign immunity, but it is clear in the context of the full hearing transcript that the U.S. Attorney was referring to the immunity of the federal defendant in that case, not the Tribe. *See* Declaration of Timothy C. Seward in Support of Tribe's Reply, Exhibit A, Transcript of Motion Hearing, *Aguayo et al. v. Salazar et al*., No. 12cv0551–WQH (S.D. Cal. Mar. 21, 2012) ("*Aguayo* Hearing Transcript") at 15-32. In fact, the U.S. Attorney in this case has stated that the Tribe *is* immune from suit. *See* Hearing Transcript at 27, lines 16–23.

[9] Cases the Plaintiffs strain to "distinguish," *see* Plaintiffs' Opposition (ECF 76) at 4-10, would require the Court to rule contrary to the immunity upheld in those cases. For example, in *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989), the court ruled that participation in one proceeding was not the "unequivocal expression of waiver" necessary to waive immunity in subsequent actions.

C. The Tribe is Indispensable and the Suit May Not Proceed Without the Tribe

"[W]here 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." *Pimentel*, 553 U.S. at 853. The Court need not weigh the factors set forth in FED. R. CIV. P. 19(b). Plaintiffs seek to have this Court interpret tribal membership law, reverse tribal membership decisions and require the Tribe to provide rights and privileges of tribal membership in the absence of the Tribe. The Tribe cannot be joined and the action must be dismissed.

II. Dismissal is Proper Because Plaintiffs Cannot Establish Subject Matter Jurisdiction

Plaintiffs fail to demonstrate federal question jurisdiction. For federal question jurisdiction to exist, a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. *Gully v. First Natl. Bank*, 299 U.S. 109, 112 (1936). There is no federal question jurisdiction 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 v. Sanders,* 430 U.S. 99, 105 (1977); *see also Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529, 532 (8th Cir. 1967) (finding no federal question jurisdiction because claim did not arise under federal law but under the rights of tribal membership).

In the present case, 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. The tribal membership rights Plaintiff seeks to restore are created and governed pursuant to Tribal law, not federal law. Although the Tribe has created a limited role for the BIA under the Tribe's Constitution, the BIA's role is also a creature

of Tribal law, not federal law. The Defendants admit their role arises in Tribal law[10] and cite only *Moapa Band of Paiute Indians v. U.S. Dept. of Interior*, 747 F.2d 563 (9th Cir. 1984), a case which did not address federal question jurisdiction.[11] (ECF No. 75 at 3) The Plaintiffs rely on APA cases which arise under federal law and do not involve nonjusticiable tribal issues. *See* Plaintiffs' Opposition (ECF 76) at 29–30. Plaintiffs do not meet their burden of establishing federal jurisdiction and the action must be dismissed.

Plaintiffs lack standing to assert tribal claims. Plaintiffs do not address standing, and have not satisfied their burden to demonstrate that their alleged injuries result from a violation of federal law. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As argued in our Points and Authorities in Support of Motion to Dismiss (ECF 70-1) at 38–42, the alleged injuries are not redressable because any interpretation of tribal law and relief ordered by the Court would not bind the Tribe. *See Lujan,* 504 U.S. at 568–69.

CONCLUSION

The Tribe requests this case be dismissed pursuant to FED R. CIV. P. 12(b)(7) and (b)(1).

Respectfully submitted,

s/ Timothy C. Seward

Timothy C. Seward
California Bar Number #179904
Attorney for the San Pasqual Band of Mission Indians

DATED this 31st day of May, 2012.

[10] *See* Declaration of Timothy C. Seward in Support of Tribe's Reply, Exhibit A at 25.

[11] Defendants' reliance on 5 U.S.C. § 701(a)(2), which narrowly exempts from judicial review agency actions committed to agency discretion, is misplaced because Plaintiffs' claims arise under Tribal law.