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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY L. (HAYES) AGUAYO, et al.,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

CASE NO. 12-cv-00551-WQH (KSC)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: August 20, 2012
Time:
Courtroom: Dept. 4
Judge: Hon. William Q. Hayes

[ORAL ARGUMENT REQUESTED]

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INTRODUCTION

Plaintiffs filed a First Amended Complaint ("FAC") alleging a cause of action for declaratory relief and equitable estoppel. (ECF 37.)[1] In amending their complaint, plaintiffs withdrew their injunctive relief cause of action, and completely revised their allegations for declaratory relief identifying the discrete actions taken by the Bureau of Indian Affairs ("BIA"). Absent further prosecution of plaintiffs' Motion for a Preliminary Injunction, the court dismissed plaintiffs' motion. (ECF 42.)

The defendants filed a Motion to Dismiss the FAC pursuant to Fed. R. Civ. Proc. Rules 12 (b)(1), 12 (b)(6), and 12 (b)(7). (ECF 41, p. 2.) The defendants' argument fails to address plaintiffs' affirmative allegations and evidence that demonstrates that further agency exhaustion in this case would be futile. (ECF 37, p. 6, FAC ¶¶¶ 29, 30, 31.)

As argued herein, plaintiffs have established subject matter jurisdiction and have affirmatively stated a cause of action for declaratory relief and equitable estoppel. The BIA cannot arbitrarily remove plaintiffs from the "official" roll without determining whether the Band's Executive Committee's 2009 Revised Membership Ordinance is void.

REVIEW STANDARDS

There are distinct review standards in ruling on the defendants' Motion to Dismiss.

Fed. R. Civ. P. Rule 12(b)(1). Plaintiffs have the burden of persuasion of establishing subject matter jurisdiction under Rule 12 (b)(1), *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court is not restricted to the face of the pleadings and "may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction."[2] *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989). See, e.g., *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947) (when the issue of jurisdiction is raised,

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[1] "ECF" refers to the Electronic Court Filing Docket number. In citing to the record, plaintiffs further refer to the page number at the top of the ECF filing, for reference.

[2] See *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir.1983) (consideration of material outside the pleadings does not convert a Rule 12 (b)(1) motion into one for summary judgment).

"the court may inquire by affidavits or otherwise, into the facts as they exist.")

Fed. R. Civ. P. Rule 12(b)(6). The Federal Rules of Civil Procedure place the burden on the defendants as the moving party to demonstrate that plaintiffs have failed to state a claim for relief. To overcome a motion to dismiss on Rule 12 (b)(6) grounds, plaintiffs need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). The Court must accept the allegations in the FAC as true and draw all reasonable inferences in favor of plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (overruled on other grounds by *Davis v. Scherer*, 468 U.S. 183 (1984)); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). A court may consider extrinsic evidence in deciding the motion, including documents on which the complaint "necessarily relies." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.2001); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994).

Fed. R. Civ. P. Rule 12(b)(7). In ruling on a Fed. R. Civ. P. Rule 12 (b)(7) motion to dismiss for failure to join a required party under Fed. R. Civ. P. Rule 19 grounds, the defendants have "the burden of persuasion in arguing for dismissal." *Makah Indian Tribe v. Verity*, 910 F. 2d 555, 558 (9th Cir. 1990). The Court can consider extrinsic evidence including affidavit evidence. *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960).

I. PLAINTIFFS HAVE EXHAUSTED THEIR AGENCY APPEAL ON THE ISSUE OF WHETHER THE 2009 REVISED MEMBERSHIP ORDINANCE IS VOID. ANY FURTHER ADMINISTRATIVE AGENCY EXHAUSTION IS NOT REQUIRED OR WOULD BE FUTILE.

In their Motion to Dismiss, the defendants submit the acting Regional Director's decision dated June 7, 2012, regarding plaintiffs' administrative appeal. (ECF 41-2, p. 84.) The June 7, 012 decision was received after plaintiffs filed the FAC. (Emblem Declaration, ¶ 2.) The defendants contend the decision is not "appealable." (EXH 1.)[3]

Plaintiffs' counsel filed a Notice of Appeal and Notice to Take Action because plaintiffs were forced into the Hobson choice of exhausting agency action and inaction to prevent defendants from

[3] "EXH" refer to Exhibits 1-5 accompanying the Declaration of Thor O. Emblem in Support of plaintiffs' Opposition to Defendants' Motion to Dismiss.

asserting plaintiffs' failure to exhaust. Nonetheless, the June 7, 2012 decision is FINAL because it does not contain a statement that it may be appealed, and it does not identify the person or agency to whom it may be appealed as required by 25 C.F.R. 2.7 (c). The APA provides for judicial review of "final" agency action for which there is no other adequate remedy." 5 U.S.C. § 704. Since the defendants' position is that the decision is "not appealable" (EXH 1), the Court should construe the June 7, 2012 decision as "final" for purposes of Administrative Procedures Act ("APA") review. 25 C.F.R. 2.6. An agency action subject to further agency exhaustion must state that it may be appealed.

i. Plaintiffs have exhausted their administrative appeal on the challenged ordinance to the BIA's Regional Office, the highest agency level authorized under the disputed July 2009 Revised Membership Ordinance.

In plaintiffs' case, any further agency exhaustion is futile. Plaintiffs allege that on February 24, 2012, the Regional Director (in a related case) ruled that the challenged 1997 Constitution is valid because it was adopted by Resolution 97-36. (ECF 37, p. 5, FAC ¶ 25; ECF 37-3, p. 56.) Plaintiffs allege the agency took "action" reviewing a void ordinance. The 2009 revised ordinance derives its authority from the 1997 Constitution approved by Regional. (ECF 41-2, p. 47.) The Band's 1997 Constitution was required to be ratified by the Band as a whole; it was not. (EXH 2, Lucero Declaration, ¶¶¶¶¶¶¶¶¶¶ 5, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19.)

On March 21, 2012, the defendants took the position that they will not review plaintiffs' challenge to the putative constitution or determine whether the 2009 Revised Membership Ordinance is void. (ECF 37, p. 6, FAC ¶ 30, Mar. 21, 2012 court hearing pp. 28, 30.)

As argued *infra*, the defendants have a duty to act and have determined the 1997 Constitution was validly adopted by the Band in a related case. The defendants' acts in plaintiffs' case also demonstrate futility. On June 7, 2012, the acting Regional Director issued a decision that did not address plaintiffs' challenge to the contested ordinance or address the evidence that plaintiffs submitted, including evidence that the Band's own public website on February 16, 2012 admitted that the "Tribe is organized under the Articles of Association." (ECF 37-3, pp. 61-62.)

The plaintiffs allege that the Articles of Association and the original membership ordinance

are the Band's binding governing documents. (ECF 37, p. 3, FAC ¶¶ 11-12.) Plaintiffs have exhausted agency review under the challenged ordinance. Further agency exhaustion is futile. Plaintiffs have alleged that the IBIA does not have jurisdiction and cannot review Regional's actions.[4] (ECF 37, p. 6, FAC ¶ 31.) The IBIA ruled that it does not have jurisdiction. (EXH 4.)

Plaintiffs have also requested that Regional take action within 10-days, but the agency has not taken action. (Emblem Declaration, ¶ 3.) There is no further avenue of appeal. Further exhaustion to the Assistant Secretary is futile because the Assistant Secretary is a party, and has taken the position that the June 7, 2012 decision is not appealable. (EXH 1.) "There are occasions when a court is obliged to exercise its jurisdiction and is guilty of an abuse of discretion if it does not, the most familiar examples perhaps being when resort to the administrative route is futile or the remedy inadequate." *Winterberger v. Gen. Teamsters Auto Truck, etc*., 558 F.2d 923, 925 (9th Cir. 1977).

ii. The APA creates a presumption favoring judicial review of administrative action.

Paragraph 27 (ECF 37, p. 6) of the FAC alleges:

> ...the BIA has a duty to make a reasonable interpretation of the Band's governing documents and cannot enforce a void 2009 ordinance against Plaintiffs who are federally approved and enrolled tribal members within the meaning of *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989) ("in some cases enforcement of a tribe's ordinance against its own members may raise federal issues of tribal power").

"Although the APA does not confer jurisdiction...its judicial review provisions, 5 U.S.C. §§ 701-706...provide...a limited cause of action for parties adversely affected by agency action." See *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 185 (D.C. Cir. 2006). Preclusion of judicial review is not lightly inferred. *Barlow v. Collins*, 397 U.S. 159, 166-167 (1970). There is no statute precluding APA judicial review of BIA actions. See *Goodface v. Grassrope*, 708 F. 2d 335, 338 (8th Cir. 1983) "We know of no statute precluding judicial review of BIA actions...we determine that the district court could review the agency action under the arbitrary or capricious standard."

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[4] See, *Marquez v. Bureau of Indian Affairs*, 37 IBIA 99 (2002); see also, 43 C.F.R. 4.330 (b)(1)(b). The federal defendants agree that the Interior Board of Indian Appeals (IBIA) lacks jurisdiction. (See ECF 22, p. 2.)

The Supreme Court has long recognized that the APA creates a "presumption favoring judicial review of administrative actions." *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984). 5 U.S.C. § 702 provides that "a person suffering legal wrong because of agency action" may seek district court review. As argued *infra*, interpreting and enforcing a void membership ordinance, ignoring a valid membership ordinance which gives the Secretary final and conclusive authority over tribal membership, and ignoring a final agency decision which is binding between governments, affects plaintiffs' rights, and is a legal wrong.[5]

iii. The June 7, 2012 Regional decision is "final action" within the meaning of 25 C.F.R. 2.7 (c).

The defendants' sovereign immunity defense should be rejected. There is no further "appeal" process. The FAC alleges that Regional is interpreting and applying a void ordinance. (ECF 37, pp. 4-8, FAC ¶¶¶¶¶¶¶¶ 22, 27, 28, 29, 30, 33, 34, 43.) The BIA has taken the position that the June 7, 2012 decision cannot be appealed. (EXH 1.) The June 7, 2012 decision is FINAL because it did not contain a statement that it may be appealed. 25 C.F.R. 2.7 (c).

The BIA concedes that once the plaintiffs' "appeal reaches the very top and becomes the final agency decision (i.e., no more appeals), then...this Court would have jurisdiction under the APA." (EXH 3, Mar. 21, 2012 court hearing, p. 22.) Plaintiffs allege that they have no other adequate remedy. (ECF 37, p. 6, FAC ¶ 31.) See, 5 U.S.C. § 704.

The case is ripe for APA review. Plaintiffs seek declaratory relief. Section 702 of the APA waives the government's sovereign immunity defense in all actions seeking equitable relief. *The Presbyterian Church v. United States*, 870 F.2d 518, 523-525, n. 9 (9th Cir. 1989). "An action [in district court]...seeking relief other than money damages...shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702.

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[5] The 1989 Assistant Secretary decision must be honored as "final" between the government and the Band. (EXH 2, Lucero Declaration, ¶ 21.)

II. THIS COURT HAS JURISDICTION GRANTED BY THE ADMINISTRATIVE PROCEDURES ACT TO REVIEW AGENCY ACTION THAT IS ARBITRARY AND CAPRICIOUS AND THAT IS UNREASONABLY WITHHELD.

In *Cahto v. Amy Dutschke*, 2:10-cv-01306-GEB-GGH (E. Dist. Cal.), the district court was faced with determining whether the BIA's membership decision could be reversed at all under the APA. The district court concluded that it had jurisdiction, as did the BIA, because Section 6 of the Cahto Band's Membership Ordinance Number 1 provided: A person disapproved for enrollment may appeal to the BIA; section 7 states the membership roll is to be prepared with a certification as to its correctness by the BIA; and section 8 stated the membership roll is to be kept current by making corrections as necessary, including deleting of names of persons on the roll who were placed there erroneously, fraudulently, or otherwise incorrectly. The district court reasoned these sections read in their context provided the BIA authority to review the subject dis-enrollment decision. (EXH 5, see Opinion pp. 3, 10-11.)

In plaintiffs' case, the Pala Band's original membership ordinance that plaintiffs allege is the valid ordinance and controls, requires the BIA's "review" of enrollment decisions. The challenged 2009 Revised Membership Ordinance enacted by the 6-member Executive Committee also requires the BIA's "review" which invokes government-to-government relations. Both membership ordinances require the Band's membership roll to be submitted to the BIA for "official" purposes. In the original membership ordinance, the Band's official roll is required to be submitted by the Executive Committee, through the Field Representative, to the Area Director. (ECF 41-2, p. 40; see also EXH 2, Lucero Declaration, ¶ 4.) In the challenged 2009 Revised Membership Ordinance, in order for the membership roll to be used for "official purposes," it shall be certified and submitted by the Executive Committee, through the Southern California Agency Superintendent, to the Pacific Regional Director. (ECF 41-2, p. 55.) As in *Cahto*, these provisions including certifying the official membership roll, when read together provide the BIA with full authority to "review" and make a determination of which membership ordinance governs.

Notwithstanding, the defendants waived any claim of sovereign immunity when the Regional agency undertook action to "review" the plaintiffs' appeal and therefore had to consider all issues

and evidence raised by plaintiffs' in their appeal.[6] (See Argument VIII, *infra*.) Having undertook such authority, the BIA cannot simply ignore evidence and argument. The Ninth Circuit has consistently held that the BIA's actions on "review" cannot be arbitrary and capricious. See, *Baciarelli v. Morton*, 481 F.2d 610, 612 (9th Cir. 1973). "The agency must articulate a 'rational connection between the facts found and the choice made.'" *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am v. U.S. Dep't of Agric.,* 415 F. 3d 1078, 1093 (9th Cir. 2005) (citation omitted).

The BIA has in fact taken "action" when it interpreted a void ordinance. 5 U.S.C. § 706 (2). Under these circumstances, the BIA's argument that it has not waived its sovereign immunity under the APA should be rejected. (ECF 41-1. pp. 6, 15) Indeed, the defendants admit a potential waiver. See ECF 41-1, pp. 15-16: "...the only potential waiver of sovereign immunity...is from the Administrative Procedures Act of 1946, 5 U.S.C. § 500 et seq."

Here, federal court review under the APA is a continuation of the internal BIA review procedures begun by Regional. Where the record belies the agency's conclusion, the district court has the responsibility to undo agency action. See, *Petroleum Communications, Inc. v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir.1994) (citation omitted).

III. PLAINTIFFS' FAC ALLEGES "AGENCY ACTION" WITHIN THE MEANING OF 5 U.S.C. SECTION 551 (13) AND *SUWA*.

Plaintiffs allege that the defendants have taken a discrete action by making an arbitrary determination that the challenged 2009 Revised Membership Ordinance governs. Plaintiffs allege their procedural due process rights within the meaning of the Fifth Amendment have been violated by the BIA's action of interpreting a void membership ordinance. (ECF 37, p. 6, FAC ¶¶¶¶ 31-34.) "Agency action' is defined as 'including the whole or a part of an agency rule, order license, sanction, relief, or the equivalent or denial thereof, or failure to act...5 U.S.C. § 551 (13) 2000." *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 141 (D.D.C. 2002). See also, 5 U.S.C. § 706 (1).

[6] A tribe can surrender its right to determine membership to the Bureau of Indian Affairs. *Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp. 2d 1171, 1185 (E.D. Cal. 2009).

i. Plaintiffs' claims fall within the defintion of categories listed in *SUWA*.

In *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55 (2004) the Supreme Court discussed judicial review of claims for agency inaction under the APA as follows:

> Sections 702, 704, and 706 (1) all insist upon an "agency action," either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706 (1)). The definition of that term begins with a list of five categories of decisions made or outcomes implemented by an agency — "agency rule, order, license, sanction [or] relief." § 551 (13). All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: "an agency statement of . . . future effect designed to implement, , or prescribe law or policy" (rule); "a final disposition . . . in a matter other than rule making" (order); a "permit . . . or other form of permission" (license); a "prohibition . . . or . . . taking [of] other compulsory or restrictive action" (sanction); or a "grant of money, assistance, license, authority," etc., or "recognition of a claim, right, immunity," etc., or "taking of other action on the application or petition of, and beneficial to, a person" (relief). §§ 551 (4), (6), (8), (10), (11). [¶] The terms following those five categories of agency action are not defined in the APA: "or the equivalent or denial thereof, or failure to act." § 551 (13). But an "equivalent . . . thereof" must also be discrete (or it would not be equivalent), and a "denial thereof" must be the denial of a discrete listed action (and perhaps denial of a discrete equivalent). *SUWA*, *supra*, 542 U.S. 55, at p. 62.

Plaintiffs affirmatively allege that the agency's inaction is an "injury in fact" and is arbitrary and capricious, and violates the Fifth Amendment. (ECF 37, p. 6 ¶¶¶¶¶ 29, 30, 33, 34, 35.) Although the plaintiffs appealed the validity of the 2009 Revised Membership Ordinance to Regional, the BIA, in fact, has taken "action" by reviewing a void ordinance. "Relief" is defined as recognition of a claim or right, and can include "taking of other action on the application or petition" for purposes of APA action. See 5 U.S.C. § 551 (11) (B) and (11) (C).

Plaintiffs have asked Regional to rescind its approval of the void 1997 Constitution.[7] (ECF 41-2, p. 80.) Regional's action/inaction falls within the definition of "agency action" for purposes of *SUWA*. Although Regional adjudicated the issue in a related appeal, Regional's decision denies the plaintiffs an adjudication of their argument and evidence. 5 U.S.C. § 551 (7). If necessary, plaintiffs can amend their complaint (see Emblem Declaration, ¶ 4) to assert that Regional failed to act on whether it should rescind its "retroactive" approval of the void 1997 Constitution. See, 5 U.S.C. §§ 551 (5) and 551 (10) (B).

[7] Plaintiffs allege that Regional has a potential conflict of interest. The Band is represented by a former employee who is niece of the Regional Director. Regional has not disclosed whether there is a conflict of interest. (ECF 37, p. 2 ¶ 7.)

ii. Regional's action is final and creates legal consequences.

The plaintiffs have met the defendants' cited standard that Regional's action is final and creates adverse legal consequences.

> An agency action will be considered final when two conditions are met: If the decision both (1) represents the consummation of the agency's decision making process; and (2) determines rights or obligations or creates legal consequences. See Bennett v. Spear, 520 U.S. 154, 177-78 (1997); Oregon Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006). (See ECF 41-1, p. 23.)

The BIA's action of enforcing a void ordinance is final, nonappealable agency action, 5 U.S.C. § 704 because it creates immediate concrete injuries that denies the plaintiffs' "relief." The BIA admits: "[I]f you remove the [1997] Constitution, then you go to the Articles of Association." (EXH 3, Mar. 21, 2012 court hearing, p. 20.) The Articles of Association vests final decisions for making degree of blood changes of tribal members to the BIA. (ECF 41-2, p. 39) The Assistant Secretary's 1989 decision as to plaintiffs' ancestor's blood degree quantum is final and conclusive. Plaintiffs are federally approved tribal members on the "official" certified roll and are subject to a final agency decision which must be enforced by the BIA as "final." (ECF 37, pp. 3, 7, FAC ¶¶¶ 11, 12, 38; EXH 2, Lucero Declaration, ¶ 21.) Therefore, Regional's action in recognizing a void ordinance adopted in July 2009 by the Band's 6-member committee as controlling creates immediate legal consequences to plaintiffs — consequences which would not occur under the original Articles of Association and the original membership ordinance. *Bennet v. Spear*, *supra*, 520 U.S. 154, 177-178.

IV. THE DEFENDANTS' STATUTE OF LIMITATIONS DEFENSE SHOULD BE REJECTED.

The defendants' statute of limitations defense, 28 U.S.C. § 2401(a), should be rejected for three reasons.

i. The Defendants' statute of limitations defense does not apply because the 1997 Constitution is void ab initio.

Plaintiffs affirmatively allege that the 1997 Constitution was not ratified in a duly called election as required under Article IX of the Constitution and therefore is void ab initio. (See ECF 37, pp 4-5, FAC ¶¶¶¶¶¶ 17, 20, 21, 22, 23, 24.) There is no evidence whatsoever that the Band's

1997 Constitution was properly ratified. (EXH 2, Lucero Declaration, ¶¶¶¶ 14, 15, 16, 17.) Therefore, the agency's "retroactive" approval was void. The fact that the 1997 Constitution was subsequently amended does not resuscitate a void action. (Id. at ¶ 18.) See *Cabazon Band of Mission Indians v. City of Indio*, 694 F.2d 634, 637 (9th Cir. 1982) concluding the Cabazon Band was not required to take action within any prescribed statutory time to establish annexation invalidity because Indio's attempted annexation was void ab initio. See also, *Nichols v. Rysavy*, 809 F. 2d 1317, 1325 (8th Cir. 1987) "No cause of action could accrue on a void transaction, and we remanded the case to the district court to determine whether the sale was in fact void, thus barring the United States' statute of limitations defense."

ii. The Plaintiffs' challenge to the 2009 Revised Membership Ordinance did not accrue until after July 2011.

The Executive Committee's Revised Membership Ordinance was enacted on July 22, 2009. The revised ordinance was not applied to plaintiffs until February 3, 2012. The revised ordinance has a preamble which states:

> BE IT FURTHER RESOLVED, that the Executive Committee of the Pala Band, by adoption of this revised Ordinance, does not intend to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the member roll of the Pala Band of Mission Indians.... (ECF 41-2, p. 48, emphasis added.)

Plaintiffs allege that plaintiff Anna H. Yanez (Trujillo) was subject to a "secrecy agreement" and could not disclose or discuss the existence of the Executive Committee's Revised Membership Ordinance, even if she understood it. Plaintiffs allege they did not learn of the 2009 Ordinance until July 2011, when it was first applied to family-related tribal members who are descendants of Margarita Britten. (ECF 37, p. 8, FAC ¶ 41.)

In *Wind River Min. Corp. v. U.S.*, 946 F. 2d 710, 715 (9th Cir. 1991), the Ninth Circuit acknowledged:

> ....no one was likely to have discovered that the BLM's 1979 designation of this particular WSA was beyond the agency's authority until someone actually took an interest in that particular piece of property, which only happened when Wind River staked its mining claims. The government should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before anyone discovered the true state of affairs.

The 6-member Executive Committee's authority to enact the 2009 Revised Membership Ordinance comes solely from the void 1997 Constitution which was approved retroactively by Regional. (See ECF 41-2, p. 47.) Approval of a void tribal constitution exceeds the BIA's authority.[8] If a challenge contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years. *Wind River Min. Corp. v. U.S.*, *supra*, 946 F. 2d 710, 715.[9] "[T]he challenge to the initial action accrues when an agency issues a decision applying the initial action to the challenged party." *Conner v. U.S. Dept. of the Interior*, 73 F.Supp.2d 1215, 1219 (D. Nev. 1999).

In plaintiffs' case, on February 16, 2012, the Band claimed that it is governed by Articles of Association. Plaintiffs' action accrued on March 23, 2012, when Regional informed plaintiffs that it would only review plaintiffs' appeal under the void ordinance. Plaintiffs' claim is not time barred. Even assuming plaintiffs should have known about the BIA's approval of the void Constitution much earlier, plaintiffs would have lacked standing. An "injury in fact" is a prerequisite to establish standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (the plaintiff must have suffered an "injury in fact"— an invasion of a legally protected interest which is concrete and particularized.) Plaintiffs would have been unable to assert standing against the BIA any earlier because plaintiffs' "injury in fact" had not accrued until the void ordinance was applied.

iii. Plaintiffs asked Regional to rescind its approval of the void 1997 Constitution.

Additionally, a statute of limitations defense does not apply because plaintiffs have asked the agency to rescind approval of a void action. The BIA can refuse to recognize the void ordinance and rescind its approval of the unratified Constitution as a matter of public policy. Cf., *Moapa Band of*

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[8] "Error is not to be perpetuated simply because it has been once made, and wisdom is not to be rejected merely because it comes late." *Western Coal Traffic League v. United States*, 694 F.2d 378, 391 (9th Cir. 1983).

[9] "Other circuits have concluded that an agency regulation or other action of continuing application may be challenged after a limitations period has expired if the ground for challenge is that the issuing agency acted in excess of its statutory authority." *Wind River Min. Corp. v. U.S.*, *supra*, 946 F. 2d 710, citing *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C.Cir. 1990) and other cases.

Paiute Indians v. United States Dept. of Interior, 747 F.2d 563, 564-566 (9th Cir. 1984); *Wheeler v. U.S. Dept. Of Int., Indian Affairs Bur.*, 811 F.2d 549, 551 (10th Cir. 1987). A party may "obtain[] judicial review of agency regulations once the limitations period has run...[by] petition[ing] the agency for amendment or rescission of the regulations and then...appeal[ing] the agency's decision." *NLRB Union v. FLRA*, 834 F.2d 191,196. (D.C. Cir. 1987).

Plaintiffs asked Regional (through counsel) to rescind its retroactive approval of the Band's void 1997 Constitution. (ECF 41-2, p. 80.) See also, *Pit River Home & Agr. Cooperative Ass'n v. United States*, 30 F.3d 1088, 1093 (9th Cir. 1994) (discussing that the Secretary REVOKED approval of the Council's constitution citing *Pit River Home and Agric. Coop. Ass'n v. United States*, No. S-75-505 (E.D.Cal. filed Dec. 20, 1985).)

As a matter of public policy, Regional can rescind its retroactive approval of a constitution which has not become "effective." In *Moapa Band of Paiute Indians v. United States Dept. of Interior*, *supra*, 747 F.2d 563, 565-566, the Moapa Band's Business Council enacted an ordinance permitting the licensing and operation of prostitution on the reservation. The Department's Superintendent initially approved the ordinance. Later, the Phoenix Area Director of the Bureau of Indian Affairs reversed the approval and rescinded the ordinance. The Moapa Band appealed to the Secretary of the Interior who affirmed the revocation. The Ninth Circuit reviewed the Moapa Band's Constitution and reasoned:

> Consistent with the narrow sweep of section 701, we interpret the tribal constitution to require the Secretary to approve tribal ordinances unless he finds "cause" to rescind them. Under this interpretation, we review the Secretary's public policy findings of "cause" under the same "arbitrary and capricious" standard that applies to the Secretary's other actions. See 5 U.S.C. § 706 (2)(a) (1976). (Emphasis added.)

In *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 151 (D.D.C. 1999), the district court held that the BIA and IBIA "acted arbitrarily and capriciously" in determining that the Saint Regis Mohawk Tribe had validly adopted its Constitution. The district court observed "Constitutions are never amended or repealed by implication of any kind." Id. at p. 152. Similarly, it does not matter that the Pala Band later voted on amendments to the void Constitution. Regional has provided NO documentation that the 1997 Constitution was legitimately ratified. (EXH 2, Lucero Declaration, ¶¶ 16, 18.)

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"Tribal sovereignty is dependent on, and subordinate to...the Federal Government." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). Enforcement of a void ordinance enacted pursuant to a Constitution which was not adopted by the Band as a whole, is against public policy. It does not promote tribal sovereignty, it undermines it. It violates the government's general trust obligation, not only to Plaintiffs, but to the Band, to review and enforce a void membership ordinance. A fundamental principle is that enforcement of tribal ordinances requires consent of the governed.

Consequently, this is a case where enforcement of a tribe's void ordinance against its own members raises federal issues of tribal power which must be resolved. *Chilkat Indian Village v. Johnson*, *supra*, 870 F.2d 1469, 1475; 25 U.S.C. Section 2.

V. THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS HAVE FAILED TO ESTABLISH SUBJECT MATTER JURISDICTION OR STATE A CLAIM BASED UPON THE BIA'S ALLEGED VIOLATION OF ITS FIDUCIARY DUTY SHOULD BE REJECTED.

Defendants argue that the FAC should be dismissed under both Rule 12 (b)(1) and Rule 12 (b)(6). (ECF 41-1, p. 24.) As previously emphasized, in ruling on a 12 (b)(1) motion, the court can consider declarations and other extrinsic evidence. Furthermore, a Rule 12 (b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Here the government is wrong on both points.

i. The BIA has a duty to interpret tribal law to carry-out its government-to-government responsibility with the Band and with the Band's tribal members.

The BIA's position that it has no duty to make a decision in plaintiffs' appeal as to whether the 1997 Constitution and the Revised Membership Ordinance is void or valid is BELIED by the fact that the agency determined the 1997 Constitution was valid three-days after Plaintiffs' filed their appeal, and applied the void ordinance. (ECF 37-3, p. 56.)

The defendants nonetheless argue that plaintiffs cannot state a claim based upon the BIA's alleged violation of fiduciary duty. (ECF 41-1, pp. 24-25.) Plaintiffs disagree. The cases cited by defendants are inapt. *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011) involved the

issue of whether the fiduciary exception to the attorney-client privilege applies to the general trust relationship between the United States and Indian tribes, and is not on point. In *United States v. Navajo Nation*, 556 U.S. 287, (2009) (Navajo II), the case involved invoking jurisdiction under the Indian Tucker Act in federal claims court wherein the Tribe sought monetary damages from the government and is inapt. In *Marceau v. Blackfeet Hous Auth.*, 540 F.3d 916 (9th Cir. 2008), the plaintiffs alleged that the Blackfeet Housing Authority breached the covenants of habitability, merchantability, and good faith and fair dealing by selling defective homes to plaintiffs; not on point.

Notwithstanding, the defendants' cases do NOT stand for the proposition that the general trust relationship between the BIA and the Band is no longer recognized. The cases cited by defendants do NOT expressly overrule previous Supreme Court cases which have upheld the general trust responsibility doctrine. A principle that "has long dominated the government's dealings with Indians...[is] the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). Based upon the individual case circumstances, the Supreme Court has imposed "moral obligations of the highest responsibility and trust" in the federal government. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

The defendants' argument that plaintiffs must allege a specific federal statute should be rejected. Plaintiffs have not invented the BIA's fiduciary obligation out of thin air. Other district courts have found that the BIA has a fiduciary duty under the general trust doctrine. "The obligation of the BIA to review a tribal constitution is justified under its trust responsibility to administer the government-to-government relations between the United States and the Indian tribes." *Seminole Nation v. Norton*, *supra*, 223 F. Supp. 2d 122, 138 citing *Milam v. Dept. of the Interior*, 10 ILR 3013, 3017 (D.D.C. 1982).

To sufficiently state a claim for relief and survive a Rule 12 (b)(6) motion, the pleading does not need detailed factual allegations, but the factual allegations must be enough to raise a right to relief above a speculative level. *Bell Atl. Corp. v. Twombly*, *supra*, 550 U.S. 544, 555. The BIA's website states:

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> The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to...carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes. (See http:/www.bia.gov/FAQs/index.htm)

Plaintiffs are federally enrolled tribal members, not applicants. (ECF 37, p. 2, FAC ¶ 3.) It is agency protocol to recognize the final decision. Plaintiffs have sufficiently alleged subject matter jurisdiction based on the defendants' breach of fiduciary duty. In reviewing whether there is subject matter jurisdiction, this Court can consider the Declaration of Elsie Lucero who was employed by the Southern California Agency for 21-years. She advised the enrollment committees of some 30 Southern California tribes, including the Pala Band. Ms. Lucero states that having given membership review to the BIA, "the BIA has a fiduciary obligation to determine if the 1997 Constitution was validly ratified by the general membership, and which membership ordinance controls. (EXH 2, Lucero Declaration, ¶¶ 3, 5.) Accordingly, this Court can conduct limited review of the tribal documents submitted to the agency and determine which documents control and grant declaratory relief. See, *Seminole Nation v. Norton*, *supra*, 223 F. Supp. 2d 122, 145, the district court was required to interpret Article III of the Seminole Constitution.

ii. Plaintiffs allege *Pit River* is controlling on the issue of breach of fiduciary duty.

In *Pit River Home & Agr. Cooperative Ass'n v. United States*, *supra,* 30 F.3d 1088, 1097-1098, in a suit over which group of Indians were the beneficial owners of a piece of property, the Ninth Circuit found that the district court's dismissal based on lack of subject matter jurisdiction was in error because the Association's claim of beneficial ownership was based on the government's breach of fiduciary duty. The same reasoning is applicable here. Plaintiffs have affirmatively alleged that the BIA has a fiduciary duty to Plaintiffs who are enrolled tribal members. (See ECF 37, p. 7 FAC ¶ 40.) Former Assistant Secretary Echo Hawk acknowledges such an obligation as well: "The federal government has the duty protect individual tribal members even from their own tribal government." (ECF 41-2, p. 89.) The Court should not dismiss the FAC based on lack of subject matter jurisdiction because it would be reversible error.

Furthermore, dismissal without leave to amend is appropriate only when the court is satisfied that the deficiencies in the complaint could not be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003) citing *Change v. Chen*, 80 F. 3d 1293, 1296 (9th Cir. 1996). Plaintiffs can amend their complaint, if it is deficient, to allege that the BIA's fiduciary duty is premised on the BIA's authority found in 25 U.S.C. Section 2, wherein "Congress has expressly vested in the Bureau of Indian Affairs the authority for the "management of all Indian affairs and of all matters arising out of Indian relations." *Seminole Nation of Okla. v. Norton*, *supra*, 223 F. Supp. 2d 122, 138. In *Seminole*, *supra*, the Commissioner of Indian Affairs, under the general supervision of the Secretary of the Interior, actively supervised the payments. Here, the BIA actively approved the Band's void Constitution under its management of Indian affairs authority. Plaintiffs suspect that if they are allowed to conduct "discovery," that the agency's own internal manuals may cite to similar authority.

Because plaintiffs bear the burden of proving subject matter jurisdiction, if a specific statute must be alleged, plaintiffs request opportunity to discover facts (such as agency manuals) which would affirmatively support their jurisdictional allegations of duty. It is an abuse of discretion to dismiss for lack of subject matter jurisdiction without giving plaintiffs reasonable opportunity, if requested, to conduct discovery for this purpose. See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992).

iii. Plaintiffs have properly pleaded a cause of action for violating federal law, the Indian Civil Rights Act, ICRA.

Plaintiffs allege that the Indian Civil Rights Act ("ICRA") 25 U.S.C. § 1302 requires the DOI/BIA to interpret which of the Tribe's membership ordinances are valid in order to discharge the agency's government-to-government responsibility. (ECF 37, p. 5, FAC ¶ 28.)

Former Assistant Secretary Echo Hawk states that disenrollments must be reviewed for ICRA violations. (ECF 41-2, p. 89.) Applying a void membership ordinance is a violation of ICRA which the defendants' cannot acknowledge. The Interior Board of Indian Appeals agrees and has held that ICRA, 25 U.S.C. § 1302, binds the Interior Department in its federal supervisory actions over

tribes.[10] See *United Keetowah Band v. Muskogee Area Director*, *supra*, 22 IBIA 75, 83. See also (1992); *Ransom v. Babbitt*, *supra*, 69 F. Supp. 2d 141, 153.

Cohen's Handbook on Indian Law (2005) § 4.01[2][b] at p. 213, acknowledges that a cause of action against the Bureau of Indian Affairs for their "review" of tribal membership is legally sound. "In cases in which the Secretary of the Interior has the power to review tribal membership provisions, there may be a cause of action against the Secretary for approval of provisions that violate federal law, including the due process and equal protection provisions of the Indian Civil Rights Act." Accordingly, this Court has subject matter jurisdiction and plaintiffs have stated a claim upon which the Court can grant relief.

VI. THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS HAVE FAILED TO ESTABLISH SUBJECT MATTER JURISDICTION OR STATE A CLAIM BASED UPON THE BIA'S VIOLATION OF PLAINTIFFS' DUE PROCESS RIGHTS SHOULD BE REJECTED.

Defendants argue that the FAC should be dismissed under both rules 12 (b)(1) and 12 (b)(6). (ECF 41-1, p. 25.) The federal defendants argue that it is the Band, not the defendants, who have deprived plaintiffs of their property interest. (See ECF 41-1, pp. 25-26.) Plaintiffs disagree. Plaintiffs allege they are duly enrolled tribal members who are subject to a final 1989 decision by the agency and remain on the "official" certified tribal roll[11] while agency review is pending. (ECF 37-2, p. 19.) Regional has produced NO EVIDENCE to support the 1997 Constitution was ratified or that the Executive Committee's 2009 ordinance is valid. Resolution 97-36 was a vote of approval to send the Revised Constitution to the Southern California agency director for review. (EXH 2, Lucero Declaration, ¶¶ 16, 17.)

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[10] The IBIA has recognized even without specific statutory authority, that under some circumstances, the BIA must make determinations concerning intra-tribal disputes. The BIA's authority derives from its general trust responsibility to carry out government-to-government relations with Indians. See, *Wells v. Acting Aberdeen Area Dir.*, 24 IBIA 142, 145 (1993); *Cahto Tribe v. Laytonville Rancheria v. Pac. Regional Dir.*, 38 IBIA 244, 248 (2002).

[11] Indian status, for purposes of Native American benefits is dependent upon being recognized as a member of an Indian tribe on a federally approved roll. (See 25 U.S.C. § 479, "the term 'Indian'... shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.")

Plaintiffs allege the 1989 Assistant Secretary decision has the same legal effect of a final judgment, i.e., is entitled to finality and collateral estoppel. (ECF 37, pp. 3, 7, FAC ¶¶¶ 11, 12, 38.) According to agency policy: "[T]hat final decision by the Assistant Secretary in 1989 must be honored as 'final' between the government and the Band." (EXH 2, Lucero Declaration, ¶ 21.)

Procedural due process imposes constraints on governmental decisions which deprive individuals of "property" interests within the meaning of the Due Process Clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 318, 332 (1976). The requirements of due process frequently vary with the type of proceeding involved. *Hannah v. Larche*, 363 U.S. 420, 440 (1960). The former Assistant Secretary has acknowledged the defendants' duty to enrolled tribal members: "Until a person becomes enrolled in a tribe, the federal government has few obligations to that person; certainly no generalized duty as trustee or guardian." However, "[d]isenrollment of a recognized tribal member invokes an entirely different set of relationships." (ECF 41-2, pp. 88, 89, emphasis added.) The agency has taken action by interpreting plaintiffs' tribal membership under a void ordinance. The defendants cannot avoid APA review or APA subject matter jurisdiction by simply not acting at all – because agency inaction that violates an individual's fundamental right to due process, includes inaction that is arbitrary and capricious, and is reviewable under the APA. 5 U.S.C. §§ 551 (13), 706 (1).

The defendants' argument fails because it is Regional's action in interpreting a void ordinance and void Constitution, and Regional's inaction, that is at issue. The fundamental requisite of due process is that agency review must be in a meaningful manner. *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). In the present context, these principles have not been complied with. According to 28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution..." Consequently, plaintiffs have sufficiently alleged subject matter jurisdiction for APA review and subject matter jurisdiction under 28 U.S.C. § 1331 based on the BIA's alleged constitutional violation. See, *The Presbyterian Church v. United States*, *supra*, 870 F.2d 518, 524 ("The churches properly invoke federal jurisdiction under 28 U.S.C. § 1331 because their claims arise out of the Constitution.")

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VII. THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDES THE DEFENDANTS FROM ASSERTING PLAINTIFFS HAD A DUTY TO CHALLENGE THE VOID 2009 REVISED MEMBERSHIP ORDINANCE ENACTED PURSUANT TO AUTHORITY OF AN UNRATIFIED CONSTITUTION.

As argued *supra*, the defendants' statute of limitations defense does not apply under the circumstances of this case. Plaintiffs have affirmatively alleged that the 1997 Constitution is void as is the 2009 Revised Membership Ordinance enacted pursuant to the void constitution. (See ECF 37, pp 4-5, FAC ¶¶¶¶¶¶ 17, 20, 21, 22, 23, 24; EXH 2, Lucero Declaration, ¶¶¶¶¶ 14, 15, 17, 18, 19.) Plaintiffs assert that Plaintiff, Anna Trujillo, was under a secrecy agreement. Plaintiffs allege these facts preclude the defendants from asserting that plaintiffs had a duty to challenge the void constitution. (ECF 37, p. 9, FAC ¶¶ 51, 52.)

These facts are sufficient to allege a delayed accrual of action. *Wind River Min. Corp. v. U.S.*, *supra*, 946 F. 2d 710, 715.

VIII. THE BAND IS NOT A REQUIRED PARTY UNDER FED. R. CIV. P. RULE 19.

Fed. R. Civ. P. Rule 19 (a)(1) does not grant absent non-parties a substantive legal right to joinder; it is an equitable rule of discretion, purely pragmatic, its purpose is to effect justice. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116-117 n. 12 (1968). "The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe v. Verity*, *supra*, 910 F. 2d 555, 558 (citations omitted).

In determining whether an absent party is required, Fed. R. Civ. P. Rule 19 requires the Court to balance several factors: (1) The extent to which a judgment rendered in the person's absence might prejudice that person or existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment or shaping the relief or other measures; (3) whether a judgment and relief rendered in the Band's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. The Court must first consider whether the Band is a required party. If the Band is a required party, then the Court must also factor in an equitable determination: whether, in equity and good conscience, the action should proceed among the existing parties or whether the case should be

dismissed. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008); *Cachil Dehe Band of Wintun Indians v. California*, 536 F.3d 1034 (9th Cir. 2008) citations omitted.

i. In the Band's absence, complete relief between the parties can be afforded.

The Band is not a required party because the FAC alleges Regional's action in interpreting void governing documents– it does not implicate the Band. *Hein v. Capitan Grande Band of Diegueno Mission*, 201 F. 3d 1256, 1258 (9th Cir. 2000). The plaintiffs became enrolled pursuant to the final decision of the Assistant Secretary, and the agency's approval of void constitution and review under a void 2009 ordinance is at issue. It is uncontested that the Band did not decide to contest plaintiffs' ancestor's blood quantum at least until July 2011 and February 3, 2012. Thus, neither the United States nor the Band face a substantial risk of conflicting obligations from an adverse judgment because the issue of plaintiffs' ancestor's blood degree quantum was finally decided in 1989, and not appealed by the Band and the plaintiffs are enrolled members.

Furthermore, Rule 19(a)(1)(A) is not implicated. Relief can be afforded among the current parties to the lawsuit, and the defendants are not asserting a claim for indemnity, contribution, or the like against an absent party. See *Thomas v. United States*, 189 F.3d 662, 668 (7th Cir. 1999) (rejecting argument that a tribe is necessary within the meaning of Subsection 19(a)(1)(A) because it might refuse to abide by the legal consequences of a judgment against the United States).

ii. The Band does not have a legally protected interest.

The Band does not have a legally protected interest that would be prejudiced because on February 16, 2012, and at the time plaintiffs appealed to Regional and challenged the void ordinance adopted pursuant to the void constitution, the Band publicly admitted that it was governed by Articles of Association. (ECF 37, p. 10, FAC¶ 51; ECF 37-3, pp. 60-62.)

iii. The Band has an equal interest in ensuring the agency's action is not arbitrary.

The Band, as a whole, has an equal interest in an administrative process regarding its enrolled tribal members that is lawful under the public rights exception. *Makah Indian Tribe v. Verity*, *supra*, 910 F. 2d 555, 559.

iv. The Band's interests are well-protected by the federal defendants who have made nearly identical arguments as the Band made during the Regional appeal.

When the United States is defending a federal agency's actions, it is generally capable of adequately protecting the interests of all nonparties that share an interest in seeing the action upheld. "The United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe." *Southwest Center for Biological Diversity v. Babbitt*, 150 F. 3d 1152, 1154 (9th Cir. 1998); *Washington v. Daley*, 173 F. 3d 1158, 1167-1168 (9th Cir. 1999).

In its response to plaintiffs' appeal to Regional, the Band's Executive Committee relies on the Regional's Feb. 24, 2012 ("Howard Decision") (ECF 41-2, p. 59, fn. 2), and states that the Howard appeal was adversely decided (ECF 41-2, p. 60, and fn. 3), that the decision applies in plaintiffs' case; that the 1997 Constitution, not the Articles of Association govern (ECF 41-2, p. 65); that the 1997 Constitution was validly adopted because it was accepted by a vote of 27 persons in favor, and 0 against at a duly called general council meeting where Resolution 97-36 was passed (ECF 41-2, p. 69); that applying the void ordinance does not violate ICRA (ECF 41-2, p. 71); that plaintiffs cannot challenge the BIA's approval of the 1997 Constitution based on a statute of limitations defense (ECF 41-2, pp. 66-67); that the BIA does not otherwise possess independent authority to overrule tribal action (ECF 41-2, p. 71); that the collateral estoppel doctrine does not apply to the 1989 final decision as to Margarita Britten's blood quantum. (ECF 41-2, pp. 72-75.)

Any legally protected interest asserted by the Band's Executive Committee is adequately protected by the defendants who have asserted nearly identical arguments in the instant motion. There is no conflict of interest where the present party to the suit will undoubtedly make all of the absent party's arguments. *Southwest Center for Biological Diversity v. Babbitt*, *supra*, 150 F. 3d 1152, 1154. It is the agency's action in approving a void constitution and accepting the void ordinance as the Band's controlling governing documents that are at issue. The Band is not a required party. See, *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001) (challenge to a decision accepting lands in trust for tribe did not require joinder of the tribe where the BIA was defending its own decision to accept the land and the tribe's position was virtually identical to the BIA's position.)

Notwithstanding, the federal government defendants have a trust responsibility to protect the Band's interests in this matter. *Washington v. Daley*, *supra*, 173 F. 3d 1158, 1168; 25 U.S.C. § 2.

v. The cases cited by the defendants for Fed. R. Civ. P. Rule 19 dismissal are inapplicable.

The defendants cite cases requiring Fed. R. Civ. P. Rule 19 dismissal without any analytical application of the facts in those cases to the case at bar. The determination of whether a party is required or is subject to dismissal is heavily influenced by the facts and unique circumstances of each case. *Pit River Home & Agr. Cooperative Ass'n v. United States*, *supra*, 30 F.3d 1088, 1098, citing *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir.1982).

In *Confederated Tribes of Chehalis v. Lujan*, 928 F.2d 1496, 1497-1498 (9th Cir 1991), the Quinault and the Quillehute Indians signed the Treaty of Olympia creating a reservation. President Grant issued an executive order enlarging the reservation and required that it be for the use of the Quinault, Quillehute, Hoh, Quit, and other tribes on the Pacific coast. Several of the affiliated tribes and individual tribal members filed an action seeking to enjoin and prevent federal officials from dealing solely with the Quinault Indian Nation as the governing body.

The *Confederated Tribes* case did not involve an express grant of review by the Band to the BIA through ordinances. Where the Tribe expressly grants review, "[a] tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989). Plaintiffs need not affirmatively allege that the Band has waived its sovereignty. In any event, plaintiffs could amend their complaint.

In *Shermoen v. United States*, 982 F.2d 1312, 1315 (9th Cir. 1992) several actions were challenged including the BIA's action to treat property as "two separate reservations and the Yourk or Klamath Indians and the Hoopa Indians as two separate tribes." Individuals and Coast Indian Community of Yurok Indians brought suit against the United States challenging the Hoopa-Yurok Settlement Act of 1988 where Congress sought to resolve the legal conflicts of the reservations. Id. at p. 1314. The problem was that the United States, as the only named defendant, could not adequately represent the "competing interests" between the tribes. Id. at p. 1318. In contrast, here there is no conflict of interest because the defendants have raised nearly identical arguments.

Pit River Home & Agr. Cooperative Ass'n v. United States, *supra*, 30 F.3d 1088, involved an Association seeking federal agency approval that it was a federally recognized tribe. After the district court held a two-day hearing, the court concluded that the Association was not a federally recognized tribe. Id. at p. 1095. In contrast, plaintiffs are federally recognized tribal members. More importantly, the Band delegated membership review to the BIA, the Band must submit its official roll to the agency for certification, the BIA maintains the certified roll for "official" purposes, which means the plaintiffs cannot be removed from the "official" certified roll maintained by the agency without the BIA's certification of a new roll.

vi. Any prejudice to the Band could be reduced by inviting it to submit its position in an amicus brief so the Court could shape relief with all arguments considered.

The defendants cannot demonstrate prejudice to the Band because on February 16, 2012, the Band publicly acknowledged that it operates under Articles of Association. However, if there is any prejudice to the Band, it could be reduced by inviting the Band to submit its position in an amicus brief so that the Court could shape relief if necessary. (Assuming the Band's positions are not duplicative of the defendants' position as they appear to be). This Court has "broad discretion to appoint amici curiae." *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995). "The Supreme Court has encouraged shaping relief to avoid dismissal." *Makah Indian Tribe v. Verity*, 910 F. 2d 555, 560 citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, *supra*, 390 U.S. 102, 111-112.

vii. Plaintiffs do not have an adequate remedy if this case is dismissed.

As acknowledged by the Interior Board of Indian Appeals, ICRA, 25 U.S.C. § 1302, binds the Interior Department in its federal supervisory actions over tribes. Plaintiffs have no adequate remedy available. There is no further right to appeal (EXH 1) and the IBIA does not have jurisdiction. (EXH 4.) Plaintiffs allege they have no tribal court remedy to review the issue of whether the Revised Membership Ordinance is void. (ECF 37, p. 6, FAC ¶ 31.) "[I]f no alternative forum is available, the court should be 'extra cautious' before dismissing the suit" on joinder grounds. *Makah Indian Tribe v. Verity*, *supra*, 910 F. 2d 555, 560.

viii. Rule 19 requires balancing equitable considerations.

Even if the Band has sovereign immunity, a finding of sovereign immunity does not eliminate the need to weigh all of the four Rule 19 (b) factors. *Davis v. United States*, 192 F. 3d 951, 960 (10th Cir. 1999). The equity and good conscience language leaves a court with substantial discretion. *Davis v. United States*, 199 F. Supp. 2d 1164, 1175 (W.D. Okla 2002).

There are public policy and constitutional implications at issue where the agency has a general trust duty, but retroactively approves a void constitution, and then later enforces a void ordinance enacted pursuant to the void constitution against federally enrolled tribal members. *Chilkat Indian Village v. Johnson*, *supra*, 870 F.2d 1469, 1475; 25 U.S.C. Section 2.

CONCLUSION

Plaintiffs have established a duty and subject matter jurisdiction. (See EXH 2, Lucero Declaration.) The FAC alleges, and plaintiffs have demonstrated, that they have no other adequate remedy; that they have exhausted all agency review, and further attempts to exhaust agency review would be futile based on the position of the defendants.

This case can then be resolved expeditiously by summary judgment since Regional has ruled that the 1997 Constitution is valid based on Resolution 97-36 which was passed at a general council "meeting" rather than a tribal "election." (ECF 41-2, p. 19.) The Court can take judicial notice of the "Howard" decision. The documents attached to the FAC, the 1997 Constitution and the Articles of Association define the Band's requirements for an "election." Identical to the BIA's position, the Band relies on Resolution 97-36 (ECF 41-2, p. 69) which was passed by a vote of 27 members, and the agency's approval (ECF 41-2, p. 66) as evidence that the 1997 Constitution is valid. Therefore the Band is not a required party.

The issue of Regional's action is ripe. Plaintiffs have given the federal defendants every opportunity to act. The June 7, 2012 decision does not address the evidence and argument submitted in the agency appeal. The agency must articulate a rational connection between the facts found and the conclusions made. See *Latino Issues Forum*, 558 F. 3d 936, 941 (9th Cir. 2009); *Environmental Def. Ctr., Inc. v. EPA*, 344 F. 3d 832, 858 n.36 (9th Cir. 2003), cert. denied, 541 U. S. 1085 (2004).

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Declaratory relief to determine the rights and obligations of the parties is the appropriate remedy in this case. The interests of justice are simply not served by dismissing this case.

DATED: August 6, 2012.

Respectfully submitted:
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