UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TIFFANY L. (HAYES) AGUAYO, (691) et al.,

Plaintiffs,

vs.

KEN SALAZAR, Secretary of the Department of Interior - United States of America; LARRY ECHO HAWK, Assistant Secretary of the Department of Interior-Indian Affairs - United States of America; AMY DUTESCHKE, Regional Director Dept. of Interior Indian Affairs, Pacific Regional Office; and ROBERT EBEN, Superintendent of the Department of Interior Indian Affairs, Southern California Agency, in their official capacity; and DOE Defendants, 1 through 10, inclusive,

Defendants.

CASE NO. 12cv0551-WQH-KSC

ORDER

HAYES, Judge:

The matters before the Court are the Motions for Appointment of Guardian Ad Litem (ECF Nos. 3, 4, 5, 6) filed by Plaintiffs and the Motion to Dismiss the First Amended Complaint (ECF No. 41) filed by Defendants Ken Salazar, Secretary of the Department of the Interior; Lary Echo Hawk, Assistant Secretary of the Department of the Interior, Indian Affairs; Amy Dutschke, Regional Director, Department of the Interior, Pacific Regional Office of Indian Affairs; Robert Eben, Superintendent of the Department of Interior, Southern California Agency of Indian Affairs; and Does 1-10.

PROCEDURAL BACKGROUND

On March 5, 2012, Plaintiffs initiated this action by filing a complaint. (ECF No. 1).

On March 5, 2012, Plaintiffs filed an Ex Parte Application for Temporary Restraining Order (ECF No. 2) and a Motion for Preliminary Injunction. (ECF No.7). On March 29, 2012, the Court denied the Ex Parte Application for Temporary Restraining Order on the grounds that Plaintiffs had failed to show a likelihood of success on the merits. (ECF No. 23).

On June 11, 2012, Plaintiffs filed the First Amended Complaint ("Complaint") against Defendants, asserting two claims for "declaratory relief in Plaintiffs' favor that the DOI/BIA action in finding the Band's Constitution and revised membership ordinance valid is arbitrary and capricious within the meaning of the Administrative Procedures Act and Fifth Amendment to the United States Constitution." (ECF No. 37). In the first claim for relief, Plaintiffs assert that "the agency's action [on February 24, 2012] is arbitrary and capricious in interpreting the void revised membership ordinance and finding the unratified Constitution valid and must be set aside under the Administrative Procedure Act." *Id.* at 9. In the second claim for relief, Plaintiffs assert that "the 'Acting' Regional 'approval' of the unratified Revised Constitution in or about July 2000, and the approval retroactive to 1997[,] was an improper agency act because a tribal election had not been held to adopt the Revised Constitution." *Id.* Plaintiffs affirmatively assert equitable estoppel principles to "preclude [the Defendants] from asserting that Plaintiffs had a duty to challenge the void constitution ...." *Id.* at 9-10.

On July 9, 2012, Defendants filed the Motion to Dismiss. (ECF No. 41). On August 6, 2012, Plaintiffs filed an Opposition. (ECF No. 45). On August 20, 2012, Defendants filed a Reply. (ECF No. 49). On November 9, 2012, the Court held oral argument.

BACKGROUND FACTS

Plaintiffs are descendants of Margarita Britten, who was identified on the Pala Band of Mission Indians ("Pala Band") allotment roll in 1913 as 4/4 degree Pala Indian. (ECF No. 37-2 at 22).

On November 6, 1960, the Pala Band officially adopted the Pala Band Articles of Association (ECF No. 37-1 at 24-31), previously approved by the Commissioner of Indian

Affairs on March 7, 1960. *Id.* at 32. The Articles of Association provided that the General Council of the Pala Band had the authority to enact tribal ordinances "governing future membership, loss of membership and adoption of members into the Band." *Id.* at 28.

On March 19, 1961, the General Council enacted Ordinance No. 1, which delegated to the United States the authority to approve or deny tribal membership determinations made by the Executive Committee of the Pala Band. *Id.* at 47. Ordinance No. 1 became effective on November 26, 1961. *Id.*

On December 19, 1994, the Pala Band sent a letter to the Superintendent of the Bureau of Indian Affairs ("BIA") which stated: "This is to certify that on November 22, 1994, at the Tribal elections for the Pala Band of Mission Indians, it was voted to accept the new Constitution for the Pala Band. The vote was Yes 131, No 65." *Id.* at 49. The letter was signed by the "Chairperson" and three members of an "Election Committee." *Id*. at 49.

On June 16, 1995, the Superintendent of the BIA Southern California Agency sent a letter to the Area Director of the BIA Sacramento Area Office which stated:

> Forwarded for your review and subject to Area Director's approval is the original Constitution of the Pala Band. The revised document was adopted through ballot vote on November 22, 1994. The Agency received the document on March 21, 1995.
>
> Please be further advised that a proposed draft of the revised Articles of Association was submitted to the Agency on November 16, 1993. Review of that document was completed on December 30, 1993 and returned to the Band with recommendations for consideration.
>
> Attached are Agency comments and/or recommendations. Agency withholds its recommendation for approval.

Id. at 51.

On December 8, 1997, the BIA Southern California Agency received a certified copy of Tribal Resolution No. 97-36. *Id.* at 65. Tribal Resolution No. 97-36 stated, in part:

> NOW THEREFORE BE IT RESOLVED, that effective the twelfth day of November, 1997 the Pala Band of Mission Indians, exercising our inherent rights as a sovereign, federally-recognized Tribe, do hereby adopt the Pala Tribal Constitution to supersede the Articles of Association which were approved by the Commissioner, Bureau of Indian Affairs, on March 7, 1969.
>
> This is to certify that the above resolution was passed at a duly call [sic] meeting of the Pala Band of Mission Indians General Council held on the 19 day of November 1997, by a vote of 27 "For", 0 "Against", with a quorum present said

resolution not having been rescinded or amended in any way.

Id.

On December 23, 1999, the Superintendent of the BIA Southern California Agency forwarded a copy of Tribal Resolution 97-36 and the revised Constitution to the Area Director of the BIA Sacramento Area Office. *Id.* at 67. On July 26, 2000, the Regional Director of the BIA ("Regional Director"), with authority "redelegated" to him by the Assistant Secretary of Indian Affairs, issued a Certificate of Approval for the revised Constitution, which applied retroactively to the adoption of the Constitution on November 12, 1997. (ECF No. 37-2 at 1). On October 4, 2000, the BIA sent an official notification of the certification of the revised Constitution to the Pala Band. *Id.* at 2. The revised Constitution delegates to the Executive Committee of the Pala Band ("Executive Committee") the authority to "amend and/or replace its existing Enrollment Ordinance with an Ordinance governing adoption, loss of membership, disenrollment, and future membership...." (ECF No. 37-1 at 55).

On July 22, 2009, the Executive Committee adopted a revised version of Ordinance No. 1. (ECF No. 37-2 at 11). The revised Ordinance provides that the Executive Committee is the final authority regarding enrollment determinations, effectively retracting BIA approval from the process. *Id*. Revised Ordinance No. 1 provides:

> A person whose application has been rejected shall have 30 days from the date of the mailing of the notice to him to file with the [Bureau's] Pacific Regional Director an appeal from the rejection of his application for enrollment along with a written statement specifying why he/she believes that the decision was incorrect. The Pacific Regional Director shall review the decision of the Executive Committee and the written appeals statement submitted by the applicant and make a recommendation to the Executive Committee as to whether it should uphold or change its decision and stating the reasons for the recommendation…Within thirty days of receipt of the recommendation of the Director, the Executive Committee shall meet and consider that recommendation and make a final decision on the appeal of decision. The decision of the Executive Committee shall be final.

Id. at 17-18.

On February 3, 2012, the Chairman of the Pala Band of Mission Indians sent Plaintiffs a letter informing them that they had been disenrolled from the tribe and that tribal benefits were terminated effective immediately. (ECF No. 37-1 at 2). The letter stated:

This action was voted upon at a duly called Special Meeting of the Executive

> Committee of the Pala Band of Mission Indians, with a quorum present....
>
> After review of your enrollment information, you are being served notice that you are no longer a member of the Pala Band of Mission Indians.
>
> A process to appeal this decision pursuant to Section 8, Paragraph A, of the Pala Band's Enrollment Ordinance, Ordinance #1, is set forth in the tribal constitution...
>
> You have thirty (30) days from date of mailing to appeal with the Pacific Regional Director of the Bureau of Indian Affairs to address your eligibility for enrollment as a member of the Pala Band of Mission Indians....

Id.

On February 21, 2012, Plaintiffs filed a "Notice of Appeal from the Pala Band of Mission Indian's Executive Committee's February 3, 2012 Decision to Terminate Appellants' Tribal Membership" with the Regional Director. *Id.* at 4-15. In the appeal, Plaintiffs assert that the Pala Band is organized under Articles of Association, which state that membership shall consist of all living decedents of a person on the allotment rolls with at least 1/16 degree of Indian blood, and that the Bureau of Indian Affairs has the final decision on enrollment matters. *Id.* Plaintiffs assert that the 1997 Constitution, which purports to give the Pala Band General Council the authority over termination of membership, was never properly approved by a majority of voters in a duly called election. *Id.* Plaintiffs assert that the blood quantum of Margarita Britten was decided in 1989 by the Bureau of Indian Affairs and the Pala Band is collaterally estopped from challenging the agency's final decision. *Id.*

On February 24, 2012, the Regional Director sent a letter to eight members of the Pala Band and descendants of Margarita Britten, none of whom are plaintiffs in this case, in response to their appeal of the Pala Band's decision to terminate their tribal memberships. (ECF No. 37-3 at 54-56). These individuals were disenrolled for the same underlying reason as the Plaintiffs in this case, i.e., they allegedly do not possess the required 1/16 degree of Indian blood of the Pala Band. *See id.* The Regional Director's letter stated that the Pala Band's enrollment ordinance "does not provide [the BIA] with the authority to decide enrollment appeals," but does "provide authority to [the BIA] to review and make recommendations on enrollment appeals to the Executive Committee [of the Pala Band]." *Id.* The Regional Director recommended that the disenrolled members remain enrolled with the

Pala Band. *Id.* The letter stated:

> You also inquired in your appeal notice if the current Constitution was valid and if it was passed and voted on in accordance with the Band's governing documents. Our records indicate the Constitution of the Pala Band of Mission Indians was adopted to replace the Articles of Association by Resolution of 97-36. This resolution was passed at a duly called meeting of the Pala Band of Mission Indians General Council held on November 19, 1997, by a vote of "27 For" "0 Against" with a quorum present.

Id.

On March 23, 2012, the Acting Regional Director of the BIA responded to the February 21, 2012 appeal filed by Plaintiffs. The letter stated:

> This letter is to inform you of the timely receipt of sixty-three (63) appeals at the Pacific Regional Office on February 28, 2012, and the status of the process concerning our review and recommendations to the Executive Committee of the Pala Band of Mission Indians (and) regarding the appeals filed by you on behalf of your clients....
>
> These appeals are being reviewed pursuant to provisions of the Tribe's Ordinance No. 1, which governs enrollment and maintenance of the Tribe's roll. ... The appeal of eligibility decisions is addressed in Section 7 of the Ordinance and provides: "The Pacific Regional Director shall review the decision of the Executive Committee and the written appeals statement submitted by the applicant and makes a recommendation to the Executive Committee as to whether it should uphold or change its decision and stating the reasons for the recommendation." ...
>
> Our recommendations to the Executive Committee will be premised on the appellant meeting the provisions of Section 1 of the Ordinance, and we anticipate our recommendations will be provided within the next 30 days....

(ECF No. 37-3 at 58-59).

On June 7, 2012, the Regional Director sent a letter to Plaintiffs which stated that he would not consider the merits of their disenrollment dispute, citing Ordinance 1 of the revised Constitution. The letter stated:

> Requests for Regional Director review of the Band's disenrollment decisions are based on Section 8, Appeals of Eligibility Decision, of the Band's Enrollment Ordinance dated July 22, 2009. Because the Band's Enrollment Ordinance does not invoke any provision of federal law that would provide the Bureau of Indian Affairs with the authority to decide enrollment appeals, there is no required federal action to take with regard to these requests, and we cannot render any decision regarding the Executive Committee's actions.

(ECF No. 41-2 at 84-85). The Regional Director recommended that Plaintiffs remain enrolled in the Pala Band.

On July 2, 2012, Plaintiffs appealed from the June 7, 2012 letter by filing a Notice to

Take Action, pursuant to 28 C.F.R. section 2.8, and a Notice of Appeal, pursuant to 25 C.F.R. section 2.9 with the Interior Board of Indian Appeals ("IBIA") and the Acting Assistant Secretary of Indian Affairs ("ASIA"). (ECF No. 41-2 at 2- 14). In the Statement of Reasons attached to the Notice of Appeal, Plaintiffs contend that the Regional Director's June 7, 2012 decision to "interpret[] the unratified Constitution and revised enrollment ordinance," as opposed to the Articles of Association, is arbitrary and capricious on the grounds that the revised Constitution was not properly ratified and a final decision on the blood quantum of Plaintiffs' ancestor has been issued. (ECF No. 41-2 at 7-9).

In response to the July 2, 2012 appeal, the IBIA Office of Hearings and Appeals sent a letter to Plaintiffs on July 18, 2012, stating that the IBIA does not have jurisdiction to review tribal enrollment disputes. (ECF No. 49-1 at 2-5). The IBIA letter states: "Certain tribal enrollment disputes are appealable to the ASIA pursuant to the regulations in 25 C.F.R. Part 62." The IBIA dismissed the appeal that Plaintiffs sent to the IBIA but noted that the same appeal remains pending before the ASIA. *Id.* at 4.

ALLEGATIONS OF THE COMPLAINT

> Plaintiffs are collectively 62 of "Margarita Britten's Descendants" and many have been enrolled in the Pala Band of Mission Indians (the "Band") for the past 20 years. Plaintiffs are federally recognized tribal members. Plaintiffs' ancestor, Margarita Britten, was identified as #25, on the Pala Band of Mission Indians Allotment Roll approved by the Secretary of Interior November 3, 1913, as 4/4 degree Pala Indian....
>
> Plaintiffs at all times mentioned herein were individuals who by virtue of their lineal descent and Pala Indian ancestry are federally enrolled adult tribal members of the Pala Band of Mission Indians or duly enrolled minor members who were sent letters by the Band's Executive Committee dated February 3, 2012, that they were disenrolled effective immediately. (EXH 1). Plaintiffs were disenrolled due to their alleged insufficient blood quantum.
>
> As directed in the Band's Executive Committee's February 3, 2012 letter, Plaintiffs filed a timely "Appeal" to the Regional Director of the Bureau of Indian Affairs, Pacific Regional Office. (EXH 2)....
>
> [I]n 1989, the Band delegated through its governing membership Ordinance No. 1, the authority to the BIA to make a final and conclusive determination as to the issue of Margarita Britten's blood quantum, and ... the BIA entered final decisions that the Plaintiffs' ancestor, Margarita Britten, was 4/4 Pala Indian....
>
> [The] Band is still governed by the Band's Articles of Association and Ordinance No. 1 which delegates final and conclusive membership decisions to the BIA. (EXH 6 and EXH 7)....

> [T]he Band's 6-member Executive Committee on or about November 12, 1997, decided for themselves that the "Revised" Constitution should be submitted to the BIA, and therefore requested General Council's approval on November 19, 1997, to submit a "Revised" Constitution to the BIA.
>
> [O]n December 19, 1997, at a specially-called General Council meeting, only 27 members of the Band (not the Band as a whole) voted "27 in favor" and "0 against" voted to submit the "Revised" Constitution to the BIA for approval. (EXH 10)....
>
> [T]he "Revised" Constitution that was allegedly "approved" by the "Acting" BIA/Regional Director retroactive to November 12, 1997, is void ab initio, and the "revised" membership ordinances subsequently passed pursuant to the Executive Committee's powers it gave itself in the unratified Constitution is also void. (EXH 12)....
>
> On February 24, 2012, the Pacific Regional Office's acting director took an official agency position that the Band's Revised Constitution submitted is valid because it was voted on in a specially called general council meeting. (EXH 13).
>
> [T]he agency's February 24, 2012, decision that the Constitution is valid constitutes "agency action" and is patently unreasonable and arbitrary within the meaning of the Administrative Procedures Act ....
>
> On March 23, 2012, Dutschke asserted the BIA Regional Office would only review Plaintiffs' Appeal under the provisions of the void revised membership ordinance. Plaintiffs contend Ms. Dutschke's action is "agency action" and that any further final agency review by Dutschke would be futile as to Plaintiffs' Appeal because the Regional Director has found the void revised membership ordinance governs.
>
> On March 21, 2012, the agency Defendants announced their position that they will only interpret the void ordinance under their government-to-government responsibility and obligation, and therefore, further agency exhaustion by way of administrative "appeal" is futile.
>
> [The] causes of action for declaratory relief and common law equitable estoppel involve the federal defendants' action; the federal defendants have taken a discrete action by making a determination that the void revised membership ordinance governs; Plaintiffs have exhausted agency review and further attempts at exhaustion would be futile; and Plaintiffs have no adequate remedy to review the agency's arbitrary and capricious decision by appealing to the Interior Board of Indian Appeals (IBIA) because the Board lacks jurisdiction over tribal issues involving membership and membership ordinances. *Marquez v. Bureau of Indian Affairs*, 37 IBIA 99 (2002).
>
> [U]nder the void revised membership ordinance and pursuant to the language of that void ordinance, the only review and remedy available of the actions taken by the BIA in interpreting and applying a void ordinance under the void Constitution, is district court review under the Administrative Procedures Act. ...
>
> [T]he federal defendants' action in interpreting a void membership ordinance is "agency action" within the meaning of Administrative Procedures Act.

> [The] Pacific Regional Agency's action in reviewing the Plaintiffs' membership under a void revised ordinance is an injury in fact, and violates the Plaintiffs' procedural due process rights within the meaning of the Fifth Amendment....
>
> [T]he federal defendants have a non-discretionary duty to uphold the final and conclusive 1989 decisions regarding Margarita Britten's blood quantum, under its government-to-government relations with the Band, and to not recognize any action by the Band's Executive Committee to remove Plaintiff members due to the blood quantum which was a final adjudication of the issue between governments which the Band did not appeal.
>
> [T]he district court has jurisdiction over this action pursuant 28 U.S.C. § 1331 and 28 U.S. C. § 1361 because the agency action in interpreting a void ordinance violates Plaintiffs' constitutional rights under the Due Process Clause of the Fifth Amendment and presents federal question jurisdiction....

(ECF No. 37 at 1-7).

APPLICABLE STANDARD

"A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Rule 12(h)(3) of the Federal Rules of Civil Procedure provides: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). In determining the presence or absence of federal jurisdiction, the court applies the "'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). When assessing subject matter jurisdiction, the court assumes the truth of all allegations in the complaint. *See Castaneda v. United States*, 546 F.3d 682, 684 n.1 (9th Cir. 2008). Subject matter jurisdiction must exist at the time the action is commenced and must be disclosed in the complaint. *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). "If jurisdiction is lacking at the outset, the district court has 'no power to do anything with the case except dismiss.'" *Id.* (quoting 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3844, at 332 (1986)).

DISCUSSION

I. Claim One

Defendants contend that this action should be dismissed on the grounds that "the United States has not waived sovereign immunity ... for Plaintiffs' claims, and the Court is without [subject matter] jurisdiction to consider them." (ECF No. 41-1 at 24). Defendants assert that "the only potential waiver of sovereign immunity alleged by Plaintiffs is from the Administrative Procedures Act of 1946. " *Id.* at 6-7. Defendants contend that the letters sent by the BIA, dated February 24, 2012, March 23, 2012, and June 7, 2012, cannot be reviewed under the Administrative Procedures Act ("APA") on the grounds that Plaintiffs have failed to exhaust their judicial remedies within the BIA and the letters do not constitute "final agency actions." *Id.* at 13.

Plaintiffs contend that "[t]he defendants' sovereign immunity defense should be rejected" on the grounds that "[t]he June 7, 2012 Regional decision is 'final action' within the meaning of 25 C.F.R. 2.7 (c)." (ECF No. 45 at 15). Plaintiffs assert that "the [IBIA] does not have jurisdiction to review tribal enrollment disputes. 43 C.F.R. § 4.330(b)(1). The IBIA cannot consider this case." (ECF No. 50 at 2). Plaintiffs contend that they "have exhausted their agency appeal on the issue of whether the 2009 revised membership ordinance is void." (ECF No. 45 at 12).

Generally, the United States and its agencies may not be sued in federal court unless Congress has waived sovereign immunity. Sovereign immunity is waived under the APA to permit a suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action...." 5 U.S.C. § 702 ("The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States."). "'[A]gency action' is defined in [5 U.S.C.] § 551(13) to include 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.'" *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

Pursuant to the APA, only "final agency action for which there is no other adequate remedy in a court" may be judicially reviewed. 5 U.S.C. § 704 ("[T]he requirement of a final

agency action is considered jurisdictional. If the agency action is not final, the court ... cannot reach the merits of the dispute."). In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), the Court of Appeals explained: "As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision making process - it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id*. at 591 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Similarly, "when a statute or agency rule dictates that exhaustion of administrative remedies is required, the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988).

A. February 24, 2012 letter

On February 3, 2012, the Pala Band's Executive Committee sent a letter to Plaintiffs, informing Plaintiffs that they had been disenrolled from the tribe. (ECF No. 37-1 at 17). On February 21, 2012, Plaintiffs appealed the decision of the Executive Committee to the Regional Director. *Id.* at 3-15. On February 24, 2012, the Regional Director sent a letter to other former-Pala Band members who had been disenrolled, which stated: "Our records indicate the Constitution of the Pala Band of Mission Indians was adopted to replace the Articles of Association by Resolution of 97-36. This resolution was passed at a duly called meeting of the Pala Band of Mission Indians General Council held on November 19, 1997, by a vote of '27 For' '0 Against' with a quorum present." (ECF No. 37-3 at 53-56).

The BIA letter dated February 24, 2012 was not sent to Plaintiffs in this case, nor was it sent in response to any appeal filed by Plaintiffs in this case. The February 24, 2012 letter does not constitute an action "by which rights or obligations have been determined, or from which legal consequences will flow" with respect to the Plaintiffs in this case. *Fairbanks North Star Borough*, 543 F.3d at 586. The Court concludes that the February 24, 2012 BIA letter (ECF No. 37-3 at 56) does not constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

B. March 23, 2012 letter

On March 23, 2012, the Regional Director sent a letter to Plaintiffs informing them that the BIA had received the February 21, 2012 appeal and that a review and recommendation of the Pala Band's decision to disenroll Plaintiffs was forthcoming. (ECF No. 37-3 at 58-59). The letter stated that the review and recommendation would be conducted "pursuant to provisions of the Tribe's Ordinance No. 1, which governs enrollment and maintenance of the Tribe's roll." *Id.*

The purpose of the March 23, 2012 letter was to inform Plaintiffs that their appeal had been received and that a decision from the Regional Director was forthcoming. The March 23, 2012 letter was "of a merely tentative or interlocutory nature" and did not "mark the consummation of the agency's decision making process." *Fairbanks North Star Borough*, 543 F.3d at 586; *see also* (ECF No. 37-3 at 59) ("This letter is to inform you of the timely receipt of sixty-three (63) appeals at the Pacific Regional Office on February 28, 2012, and the status of the process concerning our review and recommendations to the Executive Committee of the Pala Band of Mission Indians (and) regarding the appeals filed by you on behalf of your clients."). The Court concludes that the March 23, 2012 letter (ECF No. 37-3 at 58-59) does not constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

C. June 7, 2012 letter[1]

On June 7, 2012, the Acting Regional Director of the BIA sent Plaintiffs a letter in response to their February 21, 2012 appeal, which stated in part: "Because the Band's Enrollment Ordinance does not invoke any provision of federal law that would provide the Bureau of Indian Affairs with the authority to decide enrollment appeals, there is no required federal action to take with regard to these requests." (ECF No. 41-2 at 84-85). The letter stated: "[I]t is our recommendation that these individuals remain enrolled with the Band as there was no evidence provided to support the disenrollment of these individuals." *Id.* at 84.

[1] The Complaint contains no allegations relating to the June 7, 2012 letter, nor was the letter attached to the Complaint as an exhibit.

On July 2, 2012, Plaintiffs appealed from the June 7, 2012 letter to the IBIA and the ASIA; that appeal remains pending before the ASIA.[2] The June 7, 2012 letter does not constitute final agency action until Plaintiffs exhaust their administrative remedies or can demonstrate that the July 2, 2012 appeal is futile. *See* 25 C.F.R § 2.6(a) ("No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. [§] 704..."); *see also* 25 C.F.R. § 2.6(c) ("Decisions made by the Assistant Secretary--Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary--Indian Affairs provides otherwise in the decision.").

II. Claim Two

Plaintiffs allege that the Pala Band's revised Constitution, certified by the BIA on July 26, 2000, was never properly adopted and that the 1960 Articles of Association remain in effect, providing the Bureau of Indian Affairs with final decision making authority over tribe membership. Plaintiffs contend that claim two is not time barred because the claim "accrued on March 23, 2012, when Regional informed plaintiffs that it would only review plaintiffs' appeal under the void ordinance." (ECF No. 45 at 21). Defendants contend that Plaintiffs are barred from challenging the BIA's July 26, 2000 certification of the revised Constitution on the grounds that the approval "took place outside the APA's statute of limitations period" and that "equitable estoppel principles ... do not apply to this situation." (ECF No. 41-1 at 19). Plaintiffs assert 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." *Id* at 19. Plaintiffs assert that "[i]f a challenge contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years." *Id.* at 21.

Pursuant to 28 U.S.C. section 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of

[2]On July 18, 2012, the IBIA sent Plaintiffs a letter stating that the Board does not have the jurisdiction to review tribal enrollment disputes but that the appeal would be referred to and heard by the Assistant Secretary of Indian Affairs pursuant to 25 C.F.R. 62. (ECF No. 49-1 at 2-5).

action first accrues." 28 U.S.C. § 2401(a); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 n. 12 (9th Cir. 2006) (applying the six-year statute of limitation to an APA claim). The right to bring a civil suit challenging an agency action accrues "upon the completion of the administrative proceedings." *Wind River Min. Corp. v. United States*, 946 F.2d 710, 714 (9th Cir. 1991) (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967)). In *Wind River Mining Corp. v. United States*, a mining corporation challenged the establishment of a "wilderness study area" by the Bureau of Land Management; the plaintiff asserted that this agency action, which fell outside of the six-year statute of limitations, was void "*ab initio*" on the grounds that it constituted "*ultra vires* [action] as exceeding the agency's statutory authority." *Wind River Min. Corp.*, 946 F.2d at 714. The Court of Appeals for the Ninth Circuit stated:

> If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of that decision. Similarly, if the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision....

Id. at 715. However, the Ninth Circuit held that "a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger." *Id.* at 716.

Plaintiffs filed claim two in this Court on June 11, 2012, approximately 12 years after the agency's certification of the revised Constitution on July 26, 2000, but just four days after the agency's application of the revised Constitution to Plaintiffs in the June 7, 2012 letter. Plaintiffs allege that they were adversely affected by the agency's application of the revised Constitution and that the revised Constitution was certified in excess of statutory authority. On July 2, 2012, Plaintiffs appealed from the June 7, 2012 decision of the BIA to apply the revised Constitution. Based upon these allegations, the Court concludes that it lacks subject matter jurisdiction to review claim two until Plaintiffs exhaust their administrative remedies or can demonstrate that the July 2, 2012 appeal is futile. *See Wind River Min. Corp.*, 946 F.2d at 714; *see also N.V. Philips' Gloeilampenfabrieken v. Atomic Energy Comm'n*, 316 F.2d 401, 406 (D.C. Cir. 1963) ("under § 2401(a), ... when, as here, the claimant must first present his

claim to an executive tribunal, the right of action does not accrue until the executive tribunal has acted on the claim").

III. Futility of the July 2, 2012 appeal

Plaintiffs contend that the July 2, 2012 appeal pending before the ASIA is futile on the grounds that counsel for Defendants stated, at an oral argument on March 21, 2012 and in an e-mail on June 28, 2012, that the certification of the revised Constitution is not appealable. (ECF No. 45 at 13-14). Defendants contend: "Because recourse within the agency is still available, Plaintiffs have not exhausted the administrative process and cannot carry their burden of showing that further administrative exhaustion would be futile." (ECF No. 49 at 7).

"There are exceptional circumstances where exhaustion may not be required. For example, administrative review may be futile by virtue of a preannounced decision by the final administrative decision-maker." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675 (9th Cir. 1988) (citing *Ringer v. Schweiker*, 684 F.2d 643, 647 (9th Cir. 1982)).

On March 21, 2012, at an oral argument held by the Court regarding the Ex Parte Application for Temporary Restraining Order (ECF No. 2) filed by Plaintiffs, counsel for Defendants stated: "The BIA's position is that we don't have – the only obligation that we have, the only authority we have, is that granted by the Tribe, and that is under the enrollment ordinance, and the only thing we can do is make a recommendation. We cannot decide anything." (ECF No. 45-2 at 14). On June 28, 2012, counsel for Defendants sent an e-mail to Plaintiffs' counsel which stated: "The June 7, 2012 Decision is not subject to appeal. It is a recommendation consistent with the authority in the Tribe's governing documents regarding disenrollments." (ECF No. 45-2 at 2).

The statements made by counsel for Defendants do not represent a "preannounced decision" from the "final administrative decision-maker" with respect to disenrollment disputes. *White Mountain Apache Tribe*, 840 F.2d at 675; *see also* 25 C.F.R. § 62. Plaintiffs have not alleged the existence of any "exceptional circumstances" rendering their July 2, 2012 appeal futile. *Id.* at 675.

CONCLUSION

The Court concludes that Plaintiffs have failed to allege the existence of a final agency action that is subject to judicial review under the APA at this time. *See Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 2:10-CV-01306-GEB-GG, 2011 WL 4404149 (E.D. Cal. Sept. 22, 2011) ("[U]nder 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 [BIA] must give deference to a tribe's reasonable interpretation of *its own laws*. However, the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions[.]" (quotations and citations omitted)). The Court concludes that this action must be dismissed because the United States has not waived its sovereign immunity pursuant to the APA and the Court lacks subject matter jurisdiction. *See United States v. Dalm*, 494 U.S. 596, 608 (1990).

IT IS HEREBY ORDERED that the Motion to Dismiss the First Amended Complaint (ECF No. 41) filed by Defendants is GRANTED. The Motions for Appointment of Guardian Ad Litem (ECF Nos. 3, 4, 5, 6) filed by Plaintiffs are DENIED as moot.

DATED: November 19, 2012

WILLIAM Q. HAYES
United States District Judge