No. 12-56145

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT P. ALTO, *et al*,
Plaintiffs-Appellees,

v.

KEN SALAZAR, Secretary of the Department of the Interior,
KEVIN K. WASHBURN, Assistant Secretary – Indian Affairs,
MICHAEL S. BLACK, Director of the Bureau of Indian Affairs ("BIA"), and
ROBERT EBEN, Superintendent of the Southern California Agency of BIA,
Defendants-Appellees,

- and -

SAN PASQUAL BAND OF MISSION INDIANS,
Intervenor-Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA (No. 3:11-cv-02276-IEG)

ANSWERING BRIEF OF THE FEDERAL APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

MISCELLANEOUS:

STATEMENT OF JURISDICTION

Plaintiffs Albert P. Alto and other descendants of Marcus R. Alto, Sr., ("Plaintiffs") brought this action against the Department of the Interior Assistant Secretary – Indian Affairs and other federal officials ("Federal Defendants"), seeking declaratory and injunctive relief from a January 28, 2011, order by the Assistant Secretary (hereinafter, the "Disenrollment Order"), which approved a recommendation from the Enrollment Committee of the San Pasqual Band of Digueño Mission Indians (the "Band" or "San Pasqual Band") to remove the Plaintiffs from the Band's membership roll. The district court had jurisdiction under 5 U.S.C. §§ 702, 706 (Administrative Procedure Act) and 28 U.S.C. § 1331. *See* pp. 31-34, *infra*.

On December 19, 2011, the district court issued a preliminary injunction effectively setting aside the Disenrollment Order and granting other relief, pending a final decision in the case. ER[1] I:51-52. Citing interference with internal tribal affairs, the San Pasqual Band moved to intervene for the limited purpose of filing motions to dismiss the action and dissolve the injunction on the theory (1) that the Band is a necessary and indispensable party that cannot be joined due to tribal sovereign immunity, and (2) that the court lacks subject-matter jurisdiction because

[1] "ER" citations are to the Appellants' Excerpts of Record; "SER" citations are to the Plaintiffs-Appellees' Supplemental Excerpts of Record.

the enrollment dispute is solely one of tribal law. SER 204-220. The district court granted the Band's motion for limited intervention. ER II:233 (Dkt. 67). By order dated June 13, 2012, the district court determined that it had jurisdiction over at least some of the Plaintiffs' claims and that Rule 19 did not preclude adjudication of those claims. ER I:6-7. The court therefore denied the Band's motion to dissolve the preliminary injunction. ER I:9. The Band timely filed a notice of appeal from the order declining to dissolve the preliminary injunction. *See* ER II:1-3 (dated June 19, 2012); *see also* 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B) (60-day appeal period). The Band invokes this Court's jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The power to determine tribal membership is a fundamental aspect of tribal sovereignty and self-government. Through its Constitution, however, the San Pasqual Band gave the Secretary of the Interior final authority to determine whether individuals meet tribal-law membership criteria. Exercising such authority *via* delegation from the Secretary, the Assistant Secretary – Indian Affairs issued an order approving a recommendation from the Band's Enrollment Committee to disenroll the Plaintiffs. The Plaintiffs now challenge the Assistant Secretary's Disenrollment Order under the Administrative Procedure Act ("APA"). The issues in this interlocutory appeal are:

- Whether the district court correctly determined that it has subject-matter jurisdiction to review the Disenrollment Order, even though the Assistant Secretary applied tribal law; and
- Whether the district court properly determined, under Federal Rule of Civil Procedure 19, that it could preliminarily enjoin the Disenrollment Order pending judicial review, notwithstanding the Band's asserted interest and sovereign immunity from suit.[2]

[2] The Band states five issues for review (*Brief* at 3-4). In framing these issues, the Band mistakenly assumes that the pending preliminary injunction provides relief sought in the Plaintiffs' fourth cause of action. *See* pp. 34-36, *infra*.

STATEMENT OF THE CASE

A. Nature of the Case

The Plaintiffs brought this action for declaratory and injunctive relief against Larry Echo Hawk in his official capacity as Assistant Secretary – Indian Affairs[3] (hereinafter, the "Assistant Secretary") and other federal officials, asking the district court to set aside the Assistant Secretary's January 28, 2011, Disenrollment Order, which approved a recommendation from the Enrollment Committee of the San Pasqual Band to remove the Plaintiffs from the Band's membership roll. Under the Band's Constitution, membership is determined in accordance with former federal regulations – 25 C.F.R., §§ 48.1-48.15 (1960) (hereinafter, the "1960 Regulations") – that limit enrollment, *inter alia*, to biological descendants of Indians who appeared on a 1910 census roll. The 1960 Regulations permit the deletion of names from the Band's membership roll if the information on which an enrollment was based is later determined to be inaccurate. The 1960 Regulations give the Secretary of the Interior final authority to approve the Band's membership roll and any deletion from the membership roll.

The Plaintiffs claim eligibility for enrollment in the Band as descendants of Marcus R. Alto, Sr., whom Plaintiffs allege was the biological son of Jose Alto and

[3] Mr. Echo Hawk resigned from office, effective April 27, 2012 and has been replaced by Kevin K. Washburn. *See* Fed. R. App. P. 43(c)(2).

Maria Duro Alto, whose names appear on the 1910 census roll. The Enrollment Committee of the Band contends that the Plaintiffs are not eligible for enrollment because Marcus R. Alto, Sr., was adopted. In 1995, then Assistant Secretary – Indian Affairs Ada Deer determined that Marcus R. Alto, Sr., was a blood lineal descendant of Maria Duro Alto and that his descendants were eligible for enrollment. SER 190-193. In August 2008, the Enrollment Committee of the San Pasqual Band asked the Bureau of Indian Affairs ("BIA") Pacific Region Director ("Regional Director") to reconsider that decision and disenroll the Plaintiffs based, in part, on new evidence. The Regional Director denied the request and the Enrollment Committee appealed to the Assistant Secretary. Exercising *de novo* review, the Assistant Secretary reversed. In his Disenrollment Order, the Assistant Secretary determined that the Enrollment Committee had established, by a preponderance of the evidence, that Marcus R. Alto, Sr., was not a blood lineal descendant of Maria Duro Alto and/or Jose Alto, that the Plaintiffs' enrollment had been based on inaccurate information, and therefore that Plaintiffs' names must be deleted from the Band's roll. ER II:141-160.

The Plaintiffs now challenge, under the APA and other statutes, the Assistant Secretary's decision to reconsider the 1995 enrollment decision and the Assistant Secretary's factual determinations on the present evidentiary record. Citing "serious questions" on these issues, the district court granted a preliminary

injunction to preclude the Federal Defendants from implementing the Disenrollment Order and to provide other relief. The Assistant Secretary issued an order substantially complying with the preliminary injunction. The Assistant Secretary, however, has not rescinded the Disenrollment Order. The Federal Defendants intend to defend the Disenrollment Order on the merits in further proceedings before the district court.

The issue in the present interlocutory appeal is whether the district court erred or abused its discretion when exercising jurisdiction to preliminarily set aside the Disenrollment Order pending judicial review. The Band contends (1) that the district court lacks subject-matter jurisdiction because the Disenrollment Order was an application of tribal law, and (2) that the district court abused its discretion in declining to dismiss the action under Federal Rule of Civil Procedure 19(b) because the Band is an indispensable party that cannot be joined due to tribal sovereign immunity. As explained *infra*, although tribal membership determinations ordinarily are beyond the purview of federal courts, the district court did not err in exercising jurisdiction to review the Assistant Secretary's action or abuse its discretion in declining to dismiss under Rule 19.

B. Course of Proceedings and Decision Below

1. Plaintiffs' Causes of Action

The Plaintiffs filed the present case on September 30, 2011, stating four causes of action. ER II:222 (Dkt. 1). The Plaintiffs added a fifth cause of action *via* amended complaint filed on March 13, 2012. ERII:42-75. The first three causes of action allege: (1) that the Assistant Secretary (Echo Hawk) erred in declining to treat the 1995 decision by his predecessor (Deer) as *res judicata* on the question of Marcus R. Alto, Sr.,'s parentage and eligibility for membership, ER II:55-56; (2) that the Assistant Secretary violated the Plaintiffs' due process rights by allegedly failing to provide the Plaintiffs sufficient opportunity to participate in the administrative proceedings, ER II:56-57; and (3) that the Assistant Secretary's factual findings are arbitrary and capricious. ERII:58-70. In their prayer for relief, the Plaintiffs ask the district court to declare the Assistant Secretary's action unlawful and to set aside the Disenrollment Order based on the alleged violations. ERII:70, 73.

In their fourth and fifth causes of action, the Plaintiffs seek additional injunctive relief relating to the Band's delivery of membership benefits. In their fourth case of action, the Plaintiffs ask the district court to direct the Assistant Secretary to issue orders to provide voting rights, to provide access to Indian Health Care services, and to require the Band to make *per capita* payments of

gaming revenues[4] to the Plaintiffs to the same extent such benefits are provided to other enrolled members. ER II:70-72. In their fifth cause of action, the Plaintiffs seek additional declaratory and injunctive relief with respect to the distribution of gaming revenues under the Indian Gaming Regulatory Act ("IGRA") and the Band's Revenue Allocation Plan ("RAP").[5] ER II:72-73.

2. Preliminary Injunction

Simultaneously with the filing of their September 30, 2011, complaint, the Plaintiffs moved for a preliminary injunction and moved *ex parte* for a temporary restraining order ("TRO"). ER II:222 (Dkts. 1, 3-4). The district court granted a TRO enjoining the Federal Defendants from implementing the Disenrollment Order, pending a hearing and ruling on the Plaintiffs' motion for preliminary injunction. ER II:223 (Dkt. 5).

The Federal Defendants filed a response to the motion for preliminary injunction on October 11, 2011. ER II:224 (Dkt. 7). While not disputing the finality of the Disenrollment Order for purposes of APA review, the Federal

[4] The Band has operated the Valley View Casino on the San Pasqual Reservation since 2001. *See* http://www.valleyviewcasino.com/AboutUs/sanpasqual.aspx .

[5]Under IGRA, net revenues from certain types of gaming activities may not be used to make *per capita* payments to tribal members unless the Secretary of the Interior has approved a tribal RAP under specified statutory requirements. 25 U.S.C. § 2710(b)(3); *see also* 25 C.F.R. § 290.10 (implementing regulation).

Defendants argued that a preliminary injunction was unnecessary and unwarranted because Band and BIA officials had not yet completed the ministerial process of presenting a revised roll for the Assistant Secretary's approval and certification, and because the Federal Defendants had voluntarily determined not to take such steps or other actions to implement the Disenrollment Order pending resolution of the Plaintiffs' suit. *See* ER I:48-49.

On the same day, the San Pasqual Band sought leave to appear in the action for the limited purpose of filing a motion to dismiss under Federal Rule of Civil Procedure 19, based on the Band's interest and sovereign immunity. ER II:224 (Dkt. 10); SER 37-79. The district court denied the Band's motion to specially appear but accepted the Band's memorandum of law as an *amicus curiae* filing, and directed the parties to submit responses to the Band's Rule 19 argument. ER II:224 (Dkt. 11). In a response filed on October 28, 2011, the Federal Defendants asserted that the Assistant Secretary's Disenrollment Order was subject to judicial review and potential vacatur under the APA, notwithstanding the Band's absence and sovereign immunity. SER 80-86. The Federal Defendants also observed, however, that the additional injunctive relief sought by the Plaintiffs in their fourth cause of action – specifically, orders requiring the Assistant Secretary to compel

the Band to take various actions – were not available under the APA or other federal law.[6] SER 84-85.

The district court held a hearing on the motion for preliminary injunction on November 15, 2011. ER II:225 (Dkt. 18). On December 19, 2011, the district court issued an order granting a preliminary injunction and declining to dismiss under Rule 19. ER I:20-52. As to Rule 19, the district court reasoned that it could grant complete relief to the Plaintiffs on their APA claims notwithstanding the Band's absence and that the Band's interests would not be impaired because they would be adequately represented by the Federal Defendants. ER I:42-47. As for preliminary injunctive relief, the district court determined that, while it lacked jurisdiction over the Band, it had power to direct the Federal Defendants to preserve the *status quo*. ER I:46-47. The court thus enjoined the Federal defendants from "removing [the Plaintiffs] from the San Pasqual Tribe's membership roll and from taking any further action to implement the [Disenrollment Order]." ER I:51. And the court directed the Assistant Secretary to issue specific "interim order[s]" "for the duration of [the] lawsuit," including:

- "to allow . . . the adult Plaintiffs access to, and voting rights at, the general council meetings,"

[6] The Plaintiffs' fifth cause of action (seeking similar relief) had not yet been added. *See* p. 7, *supra*.

- "to allow . . . Plaintiffs access to the Indian Health Care services," and
- "to requir[e] . . . the [Band] to make . . . per capita distributions of gaming revenue to the Plaintiffs"

"to the same extent" such benefits are provided to other enrolled members. ER I:51-52.

On January 19, 2012, the Federal Defendants filed a "Report of Compliance with Preliminary Injunction," ER II:107, with an attached memorandum order issued by the Assistant Secretary on January 12, 2012. ER II:108-110. In the memorandum order, the Assistant Secretary observed that he lacked "legal authority . . . to . . . compel the Band to comply with all aspects of the orders, *exactly as phrased* by the [district] court" (emphasis added), but that he had authority, including as vested under the Band's Constitution, to "give effect to the court's injunction in substance." ER II:109. Accordingly, for the duration of the suit, the Assistant Secretary:

- directed all officers and employees of the Department of the Interior "to take no action in furtherance of" the Disenrollment Order and to "recognize that the [Plaintiffs] are . . . members of the San Pasqual Band,"
- "advise[d] the Band that any action . . . to deny . . . the [Plaintiffs]" the "right to participate in tribal elections" afforded all other members "will not be recognized" by the Department;
- "notif[ied]" the "Indian Health Service ("IHS")" and the Band that the Plaintiffs "are deemed to be tribal members" eligible for IHS services, and that the Department "expect[ed] IHS and the Band to comply with

> . . . IHS regulations for the provision of health care services to [the Plaintiffs],” and
>
> - Notified the Band that “any action . . . to distribute per capita payments to other members” and not to the Plaintiffs “would constitute a violation of the Band’s Revenue Allocation Plan (RAP) approved by the Secretary under [IGRA],” but that the Band could escrow any per capita payments that might be owed to the Plaintiffs during the pendency of the suit, pending a final resolution of the action and the Plaintiffs’ enrollment status.

ER II:110. The Assistant Secretary provided copies of the memorandum order to the Spokesman of the San Pasqual Band, the Director of IHS, and the Chairwoman of the National Indian Gaming Commission. *Id.*

On January 23, 2012, Plaintiffs filed an “objection” to the Federal Defendants’ report of compliance, asserting that the Assistant Secretary’s orders did not go as far as required by the district court’s preliminary injunction. ER II:227 (Dkt. 28). On January 30, 2012, the district court denied Plaintiffs’ objections and request for further relief, concluding that “no further equitable relief is appropriate at this time.” ER I:18-19, II:229 (Dkt. 43).

3. Refusal to Dissolve Preliminary Injunction

On March 26, 2012, the San Pasqual Band filed a motion to intervene for the limited purpose of filing motions to dissolve the injunction and dismiss the action for lack of subject-matter jurisdiction and nonjoinder of the Band under Rule 19. ER II:232 (Dkt. 60). The district court granted limited intervention on May 9,

2012, ER II:233 (Dkt. 67), and the Band filed its jurisdictional and Rule 19 motions on the same date. ER II:233 (Dkts. 68-70). The Federal Defendants responded to the motion to dismiss, opposing the motion in part. ER II:234 (Dkt. 75). The Federal Defendants reiterated that the Band is not an indispensable party under Rule 19 with respect to the Plaintiffs' first three causes of action, but that the court lacks subject-matter jurisdiction to order the injunctive relief the Plaintiffs seek under causes of action 4-5. *Id.* The district court held a hearing on the Band's motions on June 7, 2012. ER II:235 (Dkt. 81). By order dated June 13, 2012, the district court denied the Band's motion to dissolve the injunction, denied the motion to dismiss as to causes of action 1-3, and deferred judgment on dismissal as to causes of action 4 and 5. ER I:1-9.

Although the Assistant Secretary applied tribal law when issuing the Disenrollment Order (*see* pp. 24-25, 31, *infra*), the district court determined that the Assistant Secretary's decision was federal agency action subject to judicial review under the APA, and thus that the court had subject-matter jurisdiction over the Plaintiffs' first three causes of action. ER I:4-6. The district court then repeated its determination that it could accord complete relief to the Plaintiffs on those claims, notwithstanding the Band's absence, and that the Federal Defendants could adequately represent the Band's interests in the proceedings and thus that the Band was not a required party under Rule 19. ER I:6-7.

As to the Plaintiffs' fourth and fifth causes of action, the district court expressed "reservations" as to whether subject-matter jurisdiction existed. ER I:7. The court observed that the APA did not enable the court to compel agency action that was not otherwise "legally required," ER I:7 (quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004)), and that the Plaintiffs had not identified any source of law imposing a duty on the Federal Defendants to order the Band to make *per capita* payments or to order the Band to take the other specified actions. ER I:8. Nonetheless, the court concluded that it was "most appropriate to delay" decision on the court's jurisdiction to grant the relief requested in the Plaintiffs' fourth and fifth causes of action, pending judicial review of the first three causes of action. *Id.*

As to the motion to dissolve the preliminary injunction, the district court acknowledged that the preliminary injunction "impacted the relationship" between the Department of the Interior and the Band. ER I:9. The court determined, however, that the injunction was warranted on the facts of the case and that the court "could . . . make efforts to preserve the *status quo* pending resolution of the merits of Plaintiffs' claims under the APA." *Id.*

4. Proceedings on Merits

The Federal Defendants filed the administrative record with the district court on March 19, 2012. ER II:230-31 (Dkt. 51). On June 18, 2012, the Plaintiffs moved for summary judgment. ER II:236 (Dkt. 84). The San Pasqual Band filed its notice of appeal on the following day. ER II:237 (Dkt. 86). On June 21, 2012, the district court denied the Plaintiffs' summary judgment motion without prejudice. ER II:237 (Dkt. 90). The district court reasoned that the appeal divested the court of jurisdiction over matters being appealed,[7] but that Plaintiffs could refile their motion, as appropriate, upon resolution of the appeal. *Id.*

[7] An appeal from the grant or denial of a preliminary injunction generally does not divest the trial court of jurisdiction to proceed with the action on the merits. *G & M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir. 1973); *Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012); 11A Wright & Miller, Federal Practice and Procedure § 2962, at 438–39 (2d ed.1995).

STATEMENT OF THE FACTS

A. Initial Enrollment

1. San Pasqual Band

The San Pasqual Band traces its heritage to Indians who occupied the San Pasqual Valley (east of present-day San Diego) from before the arrival of European settlers. ER II:142. After the United States acquired dominion over California (following war with Mexico), federal authorities negotiated treaties with numerous bands of California Indians including those in the San Pasqual Valley. *Id.* However, under pressure from settlers, Congress refused to ratify the treaties. *Id.* In 1870, President Ulysses S. Grant issued an executive order establishing a reservation for the San Pasqual people, but the order was rescinded in 1871, again due to objections from settlers. *Id.* In 1910, the United States prepared a census roll of San Pasqual Indians and took land into trust to create a reservation for those Indians. ER I:143-44. Due to an error, however, the subject land was several miles away from the San Pasqual Indians' traditional territory. *Id.* For approximately 40 years, the reservation was occupied by a non-Indian caretaker with an Indian wife who belonged to a different tribe. ER I:144.

In 1934, Congress enacted the Indian Reorganization Act, providing any Indian tribe "the right to organize for its common welfare" and to adopt a constitution and bylaws to become effective when ratified by a majority vote of all

adult members and approved by the Secretary. *See* 25 U.S.C. § 476(a). In the 1950s, Indians claiming descent from the San Pasqual Indians began organizing for purposes of reclaiming the San Pasqual Reservation. ER II:143-44. In 1959, to assist these Indians in resolving membership disputes, the Department of the Interior ("DOI") published proposed regulations to "govern the preparation of a roll of the San Pasqual Band of Mission Indians in California." 24 Fed. Reg. 6,053 (July 29, 1959). After considering comments from interested persons, DOI issued a final enrollment regulation in 1960. 25 Fed. Reg. 1,829 (March 1, 1960). The Secretary of the Interior promulgated the enrollment regulations – published at 25 C.F.R., Part 48 – under statutes that give the Secretary and President broad generic authority over Indian affairs. *Id.* (citing 25 U.S.C. §§ 2 and 9).[8]

2. 1960 Regulations

The 1960 Regulations addressed four issues: (a) enrollment criteria, 25 C.F.R. § 48.5 (1960); (b) the process for completing an initial roll, *id.* §§ 48.3-48.4, 48.6-13; (c) the procedures for keeping the initial roll current, *id.* § 48.14;

[8] These statutes state that "[t]he Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and that "[t] he President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." 25 U.S.C. § 9.

and (d) the purposes for which the roll was to be used. *Id.* § 48.15; *see also* ER II:126-129 (complete regulations).

a. *Enrollment Criteria*

The 1960 Regulations limited enrollment to persons in the following categories who were not already enrolled or affiliated with another tribe or band:

> (a) Indians whose names appear[ed] as members on the [1910] Census Roll,
>
> (b) Descendants of Indians whose names appear[ed] as members of the Band on the [1910] Census Roll, provided such descendants possess[ed] one-eighth (⅛) or more degree of Indian blood of the Band, [and]
>
> (c) Indians [who could otherwise] furnish sufficient proof to establish that they [were] ⅛ or more degree Indian blood of the Band.

25 C.F.R. §§ 48.5(a)-(c) (1960); *see also id.* §§ 48.5(e)-(f) (exclusions for persons enrolled or affiliated with other tribal groups). The Regulations imposed a deadline of 90 days (from the publication of the Regulations) for the filing of enrollment applications, *id.* § 48.4, and placed the burden of proof on applicants to establish that they possessed the required degree of Indian blood of the Band. *Id.* § 48.5(d).

b. Enrollment Procedure

Under the 1960 Regulations, applicants were required to timely submit written applications with specified information to a local BIA official (the Area

Field Representative for Riverside, California), *id.* § 48.4, who was directed to refer the applications to a tribal "Enrollment Committee" established under the Regulations. *Id.* § 48.7. Any person who "believe[d]" that he or she was a member of the Band had the right to participate in an election of the Enrollment Committee, but eligibility to serve on the Committee was limited to persons whose names appeared on the 1910 Census Roll. *Id.* § 48.6. The Enrollment Committee was authorized to review applications for enrollment, to request additional information from applicants, and to file all applications with the Area Director of the Sacramento Area Office of BIA (now Regional Director), with a "separate report stating reasons for disapproval" of any application. *Id.* §§ 48.2(c), 48.7.

The Regulations directed the Regional Director to "prepare and submit for approval by the Secretary a [final] roll of the members of the [San Pasqual] Band." 25 C.F.R. §§ 48.3. Specifically, the Regulations directed the Regional Director to "review the reports and recommendations of the Enrollment Committee and . . . determine the applicants who are eligible for enrollment in accordance with [the criteria set out in the Regulations]." *Id.* § 48.8. If the Regional Director declared any applicant ineligible, the applicant had a right to appeal, first to the Commissioner of Indian Affairs and then to the Secretary. *Id.* §§ 48.9-48.10. The 1960 Regulations specified that "[t]he decision of the Secretary on an appeal shall be final and conclusive." *Id.* §48.11. The Regulations further specified that once

all appeals were completed, the Regional Director was to submit a final roll for the Secretary's approval, *id.* § 48.12, and "affix a certificate" to authenticate the "approved roll." *Id.* § 48.13; *see also id.* § 48.5 (granting Secretary the authority to make a "final determination" on the roll).

c. Maintaining and Use of the Roll

The 1960 Regulations provided that the approved roll "shall be kept current" by "striking . . . names" of persons who die or who relinquish membership in writing and by adding the names of children "who meet . . . membership requirements." 25 C.F.R. §§ 48.14(a)-(b). Under the Regulations, the Regional Director was authorized to make such changes and other "corrections," *e.g.*, to stated birth dates, degrees of Indian blood, or family relationships, without approval of the Secretary. 25 C.F.R. § 48.14(e). However, the Regulations prohibited use of the roll "for the distribution of tribal assets" until approved by the Secretary. The Regulations also provided that the "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary." 25 C.F.R. § 48.14(d). The Regulations further specified that the "approved roll shall be used for all official purposes," unless otherwise directed by Congress. *Id.* § 48.15.

3. 1966 Roll and Constitution

Federal and tribal officials completed an enrollment under the 1960 Regulations in 1966. ER II:144. In 1970, the duly enrolled members of the Band adopted a constitution, which was subsequently approved by the Assistant Secretary. *Id.*; *see also* 25 U.SC. §§ 476(a), (d) (providing for Secretarial approval). Article III, Section 1 of the Band's Constitution states that "[m]embership shall consist of those living persons whose names appear on the approved roll of October 5, 1966 . . ." ER II:131. Article III, Section 2 states that "[a]ll membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 [the 1960 Regulations] and an enrollment ordinance which shall be approved by the Secretary of the Interior." *Id.*

The Band's Constitution vests governing authority in a "General Council" consisting of all members over 19 years of age and a Business Committee elected by members of the General Council. ER II:132-133. The powers of the General Council are enumerated in Article VIII. ER II:135-36. Article VIII, Section 1, provides that certain of these enumerated powers – namely, the power to "make assignments of reservation lands" and the power to "control future membership, loss of membership and the adoption of members" – shall be exercised "pursuant to ordinances or resolutions approved by the Commissioner of Indian Affairs."

ER II:136. The Band has never adopted a membership ordinance under this provision. SER 52 n. 6 (Band's *Motion to Dismiss*).

B. Subsequent Enrollment

In November 1983, the United States Claims Court[9] issued a monetary judgment in favor of the the San Pasqual Band in an action styled "Docket 80-A." *See* 52 Fed. Reg. 31,391 (Aug. 20, 1987) (describing history). Pursuant to the Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. § 1401 *et seq.*, the United States prepared a distribution plan, which called for a portion of the award to be distributed to tribal members as *per capita* payments. 52 Fed. Reg. 31,391. To enable such distribution, DOI promulgated new enrollment regulations for the San Pasqual Band, which were published at 25 C.F.R., Part 76, and became effective on September 1987.[10] *Id.* DOI explained that, although the 1960 Regulations (*supra*) contained procedures for maintaining a current membership roll, no final enrollment actions had taken place since the initial enrollment under

[9] The Claims Court (now Court of Federal Claims) was established in 1982 and inherited substantially all of the trial-court jurisdiction of the former Court of Claims, *see Hercules, Inc. v. United States*, 516 U.S. 417, 423 n. 5 (1996), including matters that originated with the Indian Claims Commission, which was abolished in 1978. *Paiute-Shoshone Indians of Bishop Community of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 998 n. 3 (9th Cir. 2011).

[10] In an earlier restructuring, the 1960 Regulations were re-designated 25 C.F.R., Part 76 without substantive change. *See* 47 Fed. Reg. 13,327 (March 30, 1982).

the 1960 Regulations. *Id.* The 1987 regulations were designed to bring the roll current. *Id.*

The 1987 regulations made one change to enrollment criteria: they added a provision to enable the enrollment of persons "who would have qualified for inclusion on the [initial] roll, had they applied by the deadline for filing applications." *Id. see also id.* at 31,392-93 (adding 25 C.F.R. § 76.4(a)(1)(i)). The 1987 regulations also specified a narrower purpose; *viz.*, to "provide procedures to bring current the membership roll of the San Pasqual Band . . . to serve as the basis for distribution of judgment funds awarded the Band by the U.S. Court of Claims in Docket 80-A." *Id.* at 31,392 (adding 25 C.F.R. § 76.2). In 1996, after the enrollment process was completed and judgment funds were distributed, DOI removed Part 76 from the Code of Federal Regulations, noting that "the purpose for which these rules were promulgated has been fulfilled and the rules are no longer required." 61 Fed. Reg. 27,780 (June 3, 1996).

C. Enrollment Dispute Relating to Marcus R. Alto, Sr.

1. Plaintiffs' Enrollment

Marcus R. Alto, Sr., did not apply for enrollment in the San Pasqual Band under the 1960 Regulations, but he and many of his descendants did apply for enrollment under the 1987 regulations. ER II:145. Marcus R. Alto, Sr., died in June 1988, before his application was decided. *Id.* However, the BIA continued to

process his descendants' applications and in 1991 the Superintendant of BIA's Southern California Agency notified those descendants that they were eligible for membership through Mr. Alto. *Id.* The Band disputed that determination and appealed, first to the Regional Director and then the Assistant Secretary. *Id.* In April 1995, Assistant Secretary Ada Deer issued a decision affirming the Regional Director's determination that Marcus R. Alto, Sr., was a full-blood Digueño Indian. SER 190-193.

2. Disenrollment Recommendation and Order

In August 2008, the Band's Enrollment Committee submitted a request to the Regional Director to approve the disenrollment of the descendants of Marcus R. Alto, Sr.. ER II:77. The Enrollment Committee based its request on 25 C.F.R. § 48.14(d) (1960) – incorporated by reference in the Band's Constitution – which authorizes the deletion of the names of persons found to have been enrolled on inaccurate information. ER II:77-79. The Enrollment Committee cited "new evidence" providing "substantial and convincing proof that Marcus R. Alto, Sr., [was] not the biological son of Maria Duro Alto, and [thus] that the information provided on the 1987 membership application of Marcus R. Alto, Sr., . . . was inaccurate and incomplete." ER II: 83. The Enrollment Committee asked the Regional Director to "process the disenrollment action and approve a supplemental

roll" that deleted the names of 50 individuals whose enrollments were based on Marcus R. Alto, Sr.,'s claim to be the son of Maria Duro Alto. ER II:80-83, 87-88.

The Regional Director denied the request and the Enrollment Committee filed an appeal with the Assistant Secretary. ER II:141. The Assistant Secretary reversed. ER II:142, 160. While observing that the Federal government ordinarily "has little or no jurisdiction over matters of tribal enrollment" (not related to the distribution of trust assets), the Assistant Secretary determined that he had jurisdiction to resolve the enrollment dispute in this case, under the provisions of the Band's Constitution incorporating the 1960 Regulations. ER II:147. Reviewing the extensive documentary evidence[11] *de novo*, the Assistant Secretary determined that the Enrollment Committee had demonstrated, by a preponderance of the evidence, that the information supporting the Plaintiffs' enrollment was inaccurate and that the Plaintiffs did not meet tribal eligibility criteria. ER II:148-160. Accordingly, the Assistant Secretary concluded that the Plaintiffs' names "must be deleted from the Band's roll." ER II:160.

[11] Because the Assistant Secretary's factual findings are not at issue in this appeal, the pertinent evidence is not described herein.

SUMMARY OF ARGUMENT

Under federal law, Indian tribes are sovereign governments with inherent power to determine their own membership, ordinarily without interference or oversight from federal agencies and courts. Here, however, the San Pasqual Band, through its Constitution, made the Secretary of the Interior and subordinate federal officials the final arbiters of tribal enrollment decisions. When carrying out the functions set out in the Band's Constitution, the Assistant Secretary acted pursuant to his federal statutory authority to manage Indian affairs and subject to federal constitutional, statutory, and regulatory limits on the exercise of such authority, including limits imposed under the APA. Thus, although the Assistant Secretary applied tribal law when issuing the Disenrollment Order, the order is final agency action under the APA, and the Plaintiffs' first three causes of action challenging the Disenrollment Order under the APA are grounded in federal law. The district court did not err when exercising subject-matter jurisdiction over those claims.

Nor did the district court abuse its discretion in determining that the Band is not a "required party" to an adjudication of the claims. Under Rule 19(a), an absent party is deemed "required": (1) if the court cannot grant complete relief without the absent party, or (2) if the adjudication will leave the absent person practically unable to protect an interest relating to the subject of the action. Here, because the Band bound itself, *via* its Constitution, to final enrollment decisions

rendered by the Assistant Secretary, a judgment remanding the Disenrollment Order to the Assistant Secretary for a new final decision would grant meaningful relief to the Plaintiffs, even though the Band would not be bound by the district court's judgment *per se*. Further, such a judgment would not impair the Band's sovereignty and self-government interests, again because the Band itself chose to vest federal officials with final authority over enrollment decisions and is free to amend its Constitution to provide for different procedures. As for the Band's interest in affirming the Disenrollment Order, the Federal Defendants share the same interest and can adequately represent the interest in the Band's absence.

Because the district court did not abuse its discretion in declining to deem the Band a "required party" under Rule 19(a), this Court need not address whether the district court would have discretion to proceed under Rule 19(b) even if the Band were a required party. On the other hand, if this Court determines that the district court did abuse its discretion under Rule 19(a), this Court should remand for a Rule 19(b) determination or conduct its own Rule 19(b) determination and affirm. There is no *per se* rule requiring dismissal whenever an absent sovereign is a "required party" under Rule 19(a) and immune from suit. Rather, Rule 19(b) requires a balancing of the factors set out therein. Due to the unique facts of the present case, there is minimal impairment to the Band's interests – even if the threat of impairment is sufficient to render the Band a "required party" – and no

alternative forum for the Plaintiffs. Under such circumstances, the court reasonably can proceed "in equity and good conscience" in the Band's absence.

STANDARD OF REVIEW

The Band moved for dissolution of the district court's preliminary injunction on the grounds that the district court lacked subject-matter jurisdiction and that Rule 19 compelled dismissal due to the absence of an indispensible party.[12] "Determinations regarding subject-matter jurisdiction are reviewed *de novo*." *Nevada v. Bank of America Corp.*, 672 F.3d 661, 666-67 (9th Cir. 2012). A district court's Rule 19 determination is reviewed for abuse of discretion, with any underlying legal determinations reviewed *de novo*. *Salt River Project Agr. Imp. and Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012).

[12]A court may grant a preliminary injunction only if the plaintiff shows: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in the plaintiff's favor; and (4) that injunctive relief is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). A district court's balancing of these factors, including upon a motion to dissolve a preliminary injunction, is reviewed for abuse of discretion. *Leigh v. Salazar*, 677 F.3d 892, 896 (9th Cir. 2012); *Taylor v. Westly*, 525 F.3d 1288, 1289 (9th Cir. 2008). Here, however, such balancing is not at issue. In its appeal, the Band challenges the preliminary injunction solely for an alleged lack of subject-matter jurisdiction and because Rule 19 allegedly compels dismissal. In preliminary-injunction appeals where a jurisdictional defect is asserted, this Court's practice is to review the threshold jurisdictional question separate from its review of the district court's application of the preliminary injunction factors. *See, e.g.*, *Taylor*, 488 F.3d at 1199-1200 (standing); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1072 (9th Cir. 1996) (notice requirement).

ARGUMENT

"For nearly two centuries," federal law has "recognized Indian tribes as 'distinct, independent political communities,'" *Plains Commerce Bank v. Long Family Land and Cattle*, 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)), "qualified to exercise many of the powers and prerogatives of self-government." *Id.* (citing *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978)). Because tribes operate within and subject to the sovereignty of the United States, "tribal sovereignty . . . is of a unique and limited character." *Wheeler*, 435 U.S. at 323. Nevertheless, tribes retain all attributes of sovereignty that have not been "divested . . . by federal law" or by "necessary implication of their dependent status." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980); see also *State of Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998).

These inherent powers include the authority to determine membership and immunity from suit over membership disputes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-72 (1978). As stated by the Supreme Court, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* at 72, n. 32. Because "[an] Indian Tribe has the power to define membership as it chooses, subject to the plenary power of Congress," *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007),

the federal courts are "without jurisdiction to review direct appeals of tribal decisions regarding disenrollment of members." *Jeffredo v. Macarro*, 599 F.3d 913, 920 (9th Cir. 2010). Stated differently, "[t]ribal immunity bars suits to force tribes to comply with their membership provisions, as well as suits to force tribes to change their membership provisions." *Lewis v. Norton*, 424 F.3d 959, 961-63 (9th Cir. 2005).

It does not follow, however, that the district court erred or abused its discretion when preliminarily enjoining the Assistant Secretary's Disenrollment Order, pending judicial review, on the particular facts of this case. Here, the Band's Constitution gives the Secretary of the Interior and subordinate federal officials final authority over tribal enrollment decisions. The Plaintiffs challenge the Assistant Secretary's decision-making procedures and factual findings, not any action by the Band. In arguing that the Assistant Secretary's action is not subject to federal judicial review, the Band makes two distinct arguments: (1) that the district court lacks subject-matter jurisdiction because the enrollment dispute solely concerns the application of tribal law (*see Brief* at 1, 54-46); and (2) that Rule 19 compels dismissal, given the Band's interest and sovereign immunity (*Brief* at 21-28, 31-54). Neither argument withstands scrutiny.

I. THE DISTRICT COURT HAS SUBJECT-MATTER JURISDICTION

A. The District Court Has Subject-Matter Jurisdiction Over Plaintiffs' First Three Causes of Action

As explained *supra* (pp. 16-23), DOI promulgated the 1960 Regulations to assist the San Pasqual Band in organizing under the Indian Reorganization Act (25 U.S.C. § 476). After an initial enrollment, the Band adopted a constitution that incorporated the 1960 Regulations as tribal law. DOI subsequently replaced, then rescinded, the enrollment regulations, leaving the 1960 Regulations extant solely under the Band's Constitution. In his Disenrollment Order, the Assistant Secretary expressly applied this "tribal law." ER II:141, 146-48.

The Band is mistaken, however, in concluding (*Brief* at 55) that the Plaintiffs' cause of action arises under tribal law. By adopting a constitution incorporating the 1960 Regulations (ER II:131), the Band committed itself to a process whereby final enrollment decisions are made by a federal official, the Secretary of the Interior, under authority granted in federal law. When carrying out the enrollment functions set out in the Band's Constitution, the Assistant Secretary did not act as a tribal officer or as a private citizen. Rather, he acted under the authority of his office to "manage[] . . . Indian affairs," 25 U.S.C. § 2, and "supervis[e] . . . public business relating to . . . Indians." 43 U.S.C. § 1457. Further, he acted in accordance with duties that the Assistant Secretary undertook

(*via* his predecessor) when approving the Band's Constitution under the Indian Reorganization Act. *See* 25 U.S.C. §§ 476(a), (d). ER II:138. The rescission of the 1960 Regulations (and successor regulations) did not divest the Secretary and his subordinates of such federal *statutory* authority, nor free the Secretary and his subordinates from restraints imposed under federal law, including judicial review under the APA. This is not to say that 25 U.S.C. § 2 empowers the Secretary to make tribal enrollment decisions. As explained, *supra*, the power over membership is an inherent sovereign power belonging to tribes. But where a tribe, through the exercise of its sovereign power, gives the Secretary final authority over enrollment decisions, the Secretary accepts and exercises such authority pursuant to the powers of his federal office.

Indeed, when issuing the Disenrollment Order, the Assistant Secretary acted in accordance with DOI regulations that govern appeals from "adverse enrollment actions by [BIA] officials," 25 C.F.R. § 62.2(a), both where the "adverse enrollment action is incident to the preparation of a tribal roll subject to Secretarial approval," *id.*, § 62.2(b)(1), and where Secretarial review is "provided for in the tribal governing document." *Id.* § 62.2(b)(2). These regulations reflect the limited federal role in tribal enrollment matters and the status of the Disenrollment Order as final agency action. *See* 25 C.F.R. § 62.11 ("The Assistant Secretary shall make a decision on the appeal which shall be final for the Department . . ."). Under the

APA, any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" is entitled to judicial review of the action, 5 U.S.C. § 702, if the action is "final" and there is "no other adequate remedy in court." *Id.* § 704. Here, the Plaintiffs claim to be "aggrieved by" and to "suffer . . . legal wrong" as a result of the Assistant Secretary's final Disenrollment Order. Thus, their suit falls squarely within the terms of the APA, even though the Secretary acted in accordance with tribal law.

To be sure, the APA is not an independent grant of subject-matter jurisdiction. *Gallo Cattle Co. v. U.S. Dept. of Agriculture*, 159 F.3d 1194, 1198 (9th Cir. 1998) (citing *Califano v. Sanders*, 430 U.S. 99, 97 (1977)). But "federal court[s] [have] jurisdiction pursuant to 28 U.S.C. § 1331 over challenges to federal agency action as claims arising under federal law, unless a statute expressly precludes review." *Id.* (citing *Parola v. Weinberger*, 848 F.2d 956, 958 (9th Cir.1988)); *see also* 5 U.S.C. § 701(a)(1).[13] Stated differently, whether the

[13] The APA also does not apply where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Although 25 U.S.C. § 2 might not itself provide a "meaningful standard against which to judge the [Assistant Secretary's] exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830, (1985), such a standard is provided by the 1960 Regulations, which the Assistant Secretary committed to following, as a matter of federal law, when approving the Band's Constitution. *See Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708 (9th Cir. 2011) (meaningful standard may be provided by "regulations, established agency policies, or judicial decisions") (quoting *Mendez–Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir.2003)).

Assistant Secretary properly exercised his duty to "manage[] . . . Indian affairs" *vis a vis* the San Pasqual Band – and in accordance with the duties the Assistant Secretary agreed to perform when approving the Band's Constitution – is a question that arises under federal law (25 U.S.C. § 2), for purposes of 28 U.S.C. § 1331. *See, e.g.*, *Moapa Band of Paiute Indians v. U.S. Dept. of Interior*, 747 F.2d 563, 565-566 (9th Cir. 1984) (Assistant Secretary's decision to reject tribal ordinance is subject to APA review, where tribal constitution granted Assistant Secretary final approval authority). Thus, the district court had subject-matter jurisdiction over the Plaintiffs' APA claims, including jurisdiction to review and set aside the Disenrollment Order – assuming Rule 19 did not compel dismissal, a separate question addressed *infra* (pp. 36-60).

B. The District Court's Jurisdiction Over Plaintiffs' Fourth and Fifth Causes of Action is Not Before the Court

Whether the district court also has subject-matter jurisdiction to grant the additional injunctive relief sought by the Plaintiffs in their fourth and fifth causes of action is not presently before this Court. The district court expressly deferred making any final jurisdictional decision on these two causes of action, ER I:7-8, and there is no pending order granting the specific relief sought in these causes of action. As the Band observes (*Brief* at 19), in its initial preliminary injunction, the

district court "granted the relief requested in the Fourth Cause of Action."[14] Specifically, the district court ordered the Assistant Secretary to order the Band to make *per capita* payments of gaming revenues to the Plaintiffs and to take other actions. ER I:7-8. However, the Assistant Secretary expressly declined to issue direct orders to the Band as specified in the preliminary injunction, stating that he lacked "legal authority" to do so. ER II:109. Although the Plaintiffs objected, ER II:227 (Dkt. 28), the district court issued a subsequent order on January 30, 2012, refusing to grant further equitable relief. ER I:18-19, II:229 (Dkt. 43). The January 30, 2012, order had the effect of modifying/narrowing the previously-issued preliminary injunction to conform to the more limited steps taken by the Assistant Secretary in his January 12, 2012, memorandum order (ER II:107-110). *See* pp. 11-12, *supra*.

Moreover, in its June 13, 2012, order declining to dissolve the preliminary injunction – the order now on appeal – the district court indicated that the pending injunctive relief is based on the Plaintiffs' showing as to their first three causes of action and serves to "preserve the *status quo* pending the resolution of the merits of [these] APA claims." ER I:5-7, 9. Thus, contrary to the Band's framing of the issues (*Brief* at 3-4, 30-31), the district court did not assert jurisdiction over the

[14] The preliminary injunction was issued before the Plaintiffs added their fifth cause of action *via* amended complaint (on March 13, 2012). *See* pp. 7-10, *supra*.

Plaintiffs' fourth or fifth causes of action when reaffirming its decision to preliminarily set aside the Disenrollment Order. ER I:7-9. Rather, the district court relied on its subject-matter jurisdiction over the first three causes of action. *Id.* For reasons already stated, that jurisdictional determination was not in error.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION UNDER RULE 19

Under Rule 19 of the Federal Rules of Civil Procedure, the parties and/or court must join, as a "required party" to a pending civil action, any person who is "subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the persons absence may:
>
> > (i) as a practical matter impair of impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(A)-(B), 19(a)(2). If the joinder of any such person is not feasible, the court "must determine whether, in equity and good conscience, the

action should proceed among the existing parties or should be dismissed."[15] *Id.* 19(b). When making such determination, the court must consider, among other factors: (1) the extent to which a judgment rendered in the absence of a required person would prejudice that person or the existing parties; (2) the extent to which any such prejudice could be lessened or avoided in the terms of judgment or through other measures; (3) whether a judgment rendered in the absence of a required person would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action is dismissed for nonjoinder. *Id.*

When a civil action involves the interests of a government entity that cannot be joined due to sovereign immunity, Rule 19 may require dismissal. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 872 (2008). Indeed, this Court has in numerous cases affirmed or directed dismissal of an action involving tribal interests, where tribal sovereign immunity precluded joinder of the affected tribe. *See Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150, 1155-63 (9th Cir. 2002) (challenge to employment preference in tribal lease); *Manybeads v. United States*, 209 F.3d 1164, 1165-1167 (9th Cir. 2000) (dispute over use and occupancy of tribal land); *Pit River Home and Agr. Co-op. Ass'n v.*

[15] Before a 2007 amendment, Rule 19 used the terms "necessary party" to describe persons who must be joined if "feasible" and "indispensable party" to describe persons without whom the court cannot proceed in "equity and good conscience." *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008). The substance of the Rule is unchanged. *Id.*

United States, 30 F.3d 1088, 1098-1103 (9th Cir. 1994) (dispute over right to occupy tribal trust land); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994 (intertribal dispute over escheat of property rights) ; *Shermoen v. United States*, 982 F.2d 1312, 1317-1319 (9th Cir. 1992) (challenge to constitutionality of statute settling tribal land dispute); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498-1499 (9th Cir. 1991) (dispute over tribe's right to govern reservation); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-560 (9th Cir. 1990) (dispute involving tribal fishing rights).

On the other hand, this Court's decisions make it clear that tribal sovereign immunity and Rule 19 do not bar every suit where an absent tribe claims an interest. *See, e.g., Salt River Project*, 672 F.3d at 1179-1181; *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 969-977 (9th Cir. 2008); *Hein v. Capitan Grande Band of Digueño Mission Indians*, 201 F.3d 1256, 1261-62 (9th Cir. 2000); *and Washington v. Daley*, 173 F.3d 1158, 1167-1169 (9th Cir. 1999) (all affirming district court decisions to exercise jurisdiction, despite impacts on tribal interests); *see also Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1257-61 (10th Cir. 2001) (same). As this Court has stated, Rule 19 determinations are "heavily influenced by the facts and circumstances of each case." *Cachil Dehe Band*, 547 F.3d at 970 (quoting *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir.1982) (per curiam));

see also Pimentel, 553 U.S. at 862-63 (Rule 19 determinations are "case specific"). On the unique facts of the present case, the district court did not abuse its discretion in determining that the Band is not a "required party."

A. The San Pasqual Band Is Not a "Required Party"

1. The District Court Can Provide Complete Relief on the APA Claims

As noted *supra*, joinder of an interested person is "required" where feasible, if, absent such person, "the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A). In determining whether "complete relief" can be accorded within the meaning of this provision, the relevant question is not whether the court would be able to grant additional relief if an absent third-party could be joined, but whether the court can "fashion meaningful relief" on the existing claims "as between the [present] parties." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983); *accord Henne v. Wright*, 904 F.2d 1208, 1212, n. 4 (8th Cir. 1990); *see also EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005).

Some decisions from this Court indicate that "complete relief" might not be possible, where a district court's judgment will not bind an absent tribe and meaningful relief depends on tribal action. For example, in *Dawavendewa*, this Court considered a private civil-rights (Title VII) suit challenging a hiring-

preference policy imposed by the Navajo Nation as a condition of a lease. *See* 276 F.3d at 1153. Because a judgment against the prospective employer (lessee) declaring the lease condition invalid would not bind the Nation – which would remain free to enforce the lease condition, including in tribal court – this Court concluded that complete (meaningful) relief could not be accorded on the claim. *Id.* at 1155-56; *accord Peabody Western Coal*, 400 F.3d at 780. Similarly, in *Confederated Tribes*, this Court affirmed a district court's conclusion that complete relief could not be accorded in a suit by several Indian tribes seeking a declaration of rights in a federal Indian reservation. 928 F.2d at 1498-99. This Court observed that judgment against the named federal officials would not bind the Quinault Nation, which could "continue to assert sovereign powers and management responsibilities over the reservation." *Id.*; *see also Pit River*, 30 F.3d at 1099 (following *Confederated Tribes*).

In the present case, however, if the district court sets aside the Disenrollment Order for procedural or substantive error[16] and remands the matter to the Assistant Secretary, the Band would be bound by any new outcome on remand, notwithstanding its absence in the judicial proceedings. The Band would be bound

[16] The APA authorizes district courts to "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious . . . or otherwise not in accordance with law . . . [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (E).

because, under the unique provisions of the Band's Constitution, the enrollment decisions of the Secretary (or his delegates) are final for the Band under tribal law. *See* pp. 18-22, *supra*.

The Band asserts (*Brief* at 53) that an order setting aside the Disenrollment Order would not accord complete relief because "the court could not directly order the [Band] to reverse its [*i.e.*, the Band's] final enrollment decision" or to reverse actions that the Band has taken, to date, "to implement the disenrollment decision." But this assertion misconceives the issue. The Band can act as a tribal entity only through its duly tribal officials or entities; *viz.*, the General Council, Business Committee, or Enrollment Committee. The Band's Constitution does not give any one of these entities authority to make a "final enrollment decision." *See* pp. 18-20, *supra*. Nor does the Band explain on what legal authority (tribal, federal, or otherwise) Band officials may disregard enrollment decisions of the Assistant Secretary.

To be sure, given the Band's absence and immunity from suit, the district court cannot directly order the Band to restore membership benefits to the Plaintiffs pending a new decision by the Assistant Secretary on remand. Nor can the district court order the Band to remedy alleged injuries to Plaintiffs from actions taken by tribal officials in reliance on the Disenrollment Order. However, it is reasonable to presume that tribal officials will respect the outcome of any

proceedings on remand (subject to their own legal rights to challenge the Assistant Secretary's final determination). *Cf. Yellowstone County v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996) ("tribal judges . . . are expected to comply with binding pronouncements of the federal courts"). Moreover, as illustrated by the Secretary's January 12, 2012, order (ER II:109-110), the Plaintiffs are entitled to various benefits under federal law, if determined to be duly enrolled members of the San Pasqual Band. Because the Secretary has final authority to make enrollment decisions for the San Pasqual Band and because a reversal of the Disenrollment Order would have significance for the Plaintiffs under federal law, the district court did not abuse its discretion in concluding that it could "fashion meaningful relief as between the parties," notwithstanding the Band's absence. *Northrop Corp. v. McDonnell Douglas Corp*., 705 F.2d at 1043,

2. Judicial Review of the Disenrollment Order Will Not Impair the Band's Ability to Protect Sovereignty Interests

Joinder of an interested person is also "required" where feasible if the person "claims an interest relating to the subject of the action" and a judgment may "as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B). When applying this rule, this Court first asks whether the absent party has a "legally protected interest" and then whether that interest will be "impaired or impeded" by the suit. *Salt River Project*, 672 F.3d at 1180. If the

absent party's interests are adequately represented by an existing party, so as to negate any practical impairment of those interests, the absent party is not "required." *Id.* Here, the Band does not have a distinct "legally protected interest" that will be impaired by the Plaintiffs suit, and the Band's interest in the substance of the Disenrollment Order is adequately represented by the Federal Defendants.

a. The Band's Sovereignty Interests Are Not at Stake

Not every claimed interest in the outcome of litigation can render a person a "required party" under Rule 19(a)(1)(B). *See Cachil Dehe Band*, 547 F.3d at 970. Among other things, the interest "must be more than a financial stake, and more than speculation about a future event." *Id.* (citing *Makah*, 910 F.2d at 558). In addition, "an absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Id.* at 971 (citing *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468-69 (9th Cir.1986)).

To show a legally-protected interest, the Band stakes its Rule 19 arguments on the Band's "sovereign right to define its own membership," *see Brief* at 40 (quoting *Santa Clara Pueblo*, 436 U.S. at 72, n.32) and its related interests in defending the "[Band's] interpretation and application of its membership law" and the Enrollment Committee's "evaluation of membership evidence" and "authority and . . . findings." *See Brief* at 43. Although sovereignty and self-government

rights are interests protected under Rule 19, *see Pimentel*, 553 U.S. at 865-873, the Band's sovereignty and self-government interests, properly considered, are not implicated in the Plaintiffs' first three causes of action.

In general, a tribe's sovereign right to define its own membership consists of: (1) the power to define enrollment criteria and procedures, and (2) the power to make enrollment decisions through duly appointed tribal officials. The Band's power to establish its own enrollment law is not threatened in these proceedings. The Plaintiffs do not challenge the enrollment criteria or procedures that the Band adopted through its Constitution. Rather, the Plaintiffs challenge a specific enrollment decision (principally findings of fact) made by the Assistant Secretary under the criteria and procedures established in the Band's Constitution.

As for the Band's power to make final enrollment decisions through its own officials, that right is not at issue here because the Band did not vest such power in tribal officials, but instead conferred such power upon the Secretary and subordinate federal officials. *See* pp. 18-22, *supra*. To be sure, the Band retains sovereign authority to amend its Constitution and thereby reclaim total authority over enrollment decisions.[17] But under its existing Constitution, the Band has

[17] Article VIII, Sec. 2 of the Band's Constitution states that "[a]ny rights and powers heretofore vested in the [B]and, but not expressly [enumerated] . . . shall not be lost . . . , but may be exercised through the adoption of appropriate amendments to this constitution and bylaws." ER II:136.

conferred upon the Secretary – and not any tribal entity[18] – the authority over membership that otherwise would be solely within the Band's sovereign jurisdiction. The district court's jurisdiction to review the Assistant Secretary's decision is equal in scope to the authority conferred upon the Secretary under tribal law.

The Band's suggestion (*Brief* at 43-44) that the Enrollment Committee possesses authority to render membership decisions is contrary to the plain terms of the tribal enrollment regulations, which established and empowered the Enrollment Committee to "review" enrollment applications (specifically, those submitted by the original deadline), to "require . . . applicant[s] to furnish additional information," and to "make a recommendation" on each application to the Regional Director. 25 C.F.R. §§ 48.2(f), 48.6, 48.7 (1960) (ER II:128); *see also* ER II:131 (Constitution And Bylaws of the San Pasqual Band, Art. III, § 2) (incorporating 1960 Regulations). The power to "determine the applicants who are eligible for enrollment" is vested in the Regional Director, 25 C.F.R. § 48.8 (1960) (ER II:128), subject only to federal administrative appeals and final approval by the Secretary. *Id.* §§ 48.9-48.13 (ER II:128-29). The regulatory provision that

[18] Under Art. VIII, Sec. 1(l), of the Band's Constitution, the authority of the General Council – *i.e.*, the authority of the Band to act *via* plebiscite – "to control membership, loss of membership and the adoption of members" can only be exercised "pursuant to ordinances or resolutions . . . approved by the Commissioner of Indian Affairs." ER II:136.

require the roll to be "kept current" does not mention the Enrollment Committee, [19] but instead assigns maintenance duties to the Regional Director and Secretary and plainly give the Secretary final approval authority. *Id.* § 48.14 (1960) (ER II:129).

Thus, although the Band is correct (*Brief* at 44) that "tribal law does not divest the Tribe of its *interest* in membership decisions or the membership process" (emphasis added), tribal law has divested the Band of *authority* to make final membership decisions. The Band's description of the authority conferred upon the Secretary under tribal law is understated. *See, e.g., Brief* at 11 ("The [Band's] procedures provide a limited role for the BIA to review the Tribe's membership decisions"); *id.* at 43-44 ("The [Band] has elected to provide an additional layer of due process rights by submitting enrollment decisions to the BIA for approval"). Through the incorporation of the 1960 Regulations, the Band's Constitution plainly commits final enrollment decisions, including any interpretation of tribal law necessary to making those decisions, to the Secretary and subordinate federal officials. *See* pp. 18-22, *supra*. Indeed, while the Band downplays the Secretary's role, the Band ultimately does not dispute the Secretary's authority, under tribal law, to render final enrollment decisions, nor

[19] The 1960 Regulations do not contain procedures for maintaining a standing Enrollment Committee, but instead provided for a one-time election from persons whose names appeared on the 1910 census roll. *Id.* §§ 48.2(f), 48.6.

contend that tribal law gives any authorized officer or representative of the Band the power to review or disregard the Secretary's enrollment decisions.

Because the Band did not retain final enrollment authority in tribal officials as a tribal sovereign function, federal judicial review of the Assistant Secretary's action cannot be deemed to impair tribal *sovereignty* interests. Instead, the Band's interests in the present suit are akin to the interests of potentially affected individual Band members. The Band and its enrolled members have an interest in the procedural fairness and integrity of the Assistant Secretary's decision, and individual Band members have a potential financial stake in the outcome of these proceedings. These are not "legally protected interests" that require joinder under Rule 19(a)(1)(B). *See Cachil Dehe Band*, 547 F.3d at 970.

b. The Federal Defendants and Band Have Virtually Identical Interests in Affirming the Disenrollment Order

To the extent the Band's interest in the substance of the Disenrollment Order is a legally protected interest, the district court did not abuse its discretion in determining that the Federal Defendants will adequately represent that interest. This Court considers three factors when determining, under Rule 19(a)(1)(B), whether an existing party will sufficiently represent an absent party so as to negate impairment to the absent party's interest: (1) "whether the interests of [the] present party . . . are such that it will undoubtedly make all of the absent party's

arguments"; (2) "whether the [present] party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Salt River Project*, 672 F.3d at 1180 (quoting *Shermoen*, 982 F.2d at 1318) (citation and internal quotations omitted).

Because the Assistant Secretary's Disenrollment Order granted all of the relief that the Band sought *via* its Enrollment Committee, the Band's present interest is in affirming the Assistant Secretary's decision. There is no reason to believe that the Assistant Secretary will not make all merits arguments that reasonably can be made in defense of his own decision. Nor is there any additional "element" the Band can bring in aid of the Assistant Secretary's cause as against the APA challenges brought by Plaintiffs. Where federal and tribal officials share a common interest in defending a federal agency action favorable to a tribe, the federal agency generally will be deemed an adequate representative of the absent tribe's interests for Rule 19 purposes. *See, e.g.*, *Daley*, 173 F.3d at 1167 (promulgation of regulations allocating fishing rights to tribes); *Southwest Center for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998) (adoption of plan for use of stored water, including to benefit tribe); *accord Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (federal decision to take land into trust for tribe). This is true even where tribes might be

"better prepared" to present certain evidence or arguments in their cause. *See Daley*, 173 F.3d at 1168, n. 11.

The Band argues (*Brief* at 47) that the Federal Defendants cannot adequately represent the Band's interests here because the case involves "intertribal conflict." This Court has stated that, under certain circumstances, "[i]n disputes involving intertribal conflicts, the United States cannot properly represent any of the tribes without compromising its trust obligations owed to all tribes." *Quileute Indian Tribe*, 18 F.3d at 1460 (citing *Confederated Tribes*, 928 F.2d at 1500; *Makah*, 910 F.2d at 560). The present case, however, does not involve a conflict between multiple tribes or tribal factions to whom the Federal Defendants owe a trust duty. In his Disenrollment Order, the Assistant Secretary determined that the Plaintiffs have no rights in the San Pasqual Band and therefore that the federal government owes them no trust duty, individually or as members of the Band. The Assistant Secretary cannot be presumed to be conflicted by his alleged trust duty to the Plaintiffs when defending the very decision by which he determined that the United States owes no such duty.

The cases cited by the Band do not hold otherwise. *See Brief* at 47 (citing *Pit River*, 30 F.3d at 1101 and *Rosales v. United States*, 89 Fed. Cl. 565, 586 (2009)). Both of those cases involved disputes between different factions of Indians to whom the federal government arguably owed a trust obligation (*vis a vis*

their status as Indians) notwithstanding the outcome of the factional dispute. *See Pit River*, 30 F.3d at 1092-93; *Rosales*, 89 Fed. Cl. at 572-73. As just explained, although the Federal Defendants would have trust obligations to the Plaintiffs (*vis a vis* their tribal membership), if the Plaintiffs prevail in this suit and their enrollment in the San Pasqual Band is ultimately affirmed by the Assistant Secretary on remand, there is no present conflict between the Band and Federal Defendants with respect to the defense of the Disenrollment Order. Further, contrary to the band's contention (*Brief* at 51) the district court's preliminary injunction cannot be seen to have created such a conflict. The Federal Defendants' interim obligation to comply with the preliminary injunction does not change their overriding interest in warding off an adverse final judgment.

c. There is No Relevant Dispute over Tribal Law

The Band also argues (*Brief* at 47-50) that the Federal Defendants cannot adequately defend the Band's interests in the relief provided by the Disenrollment Order, because the Plaintiffs' claims turn on an interpretation of tribal membership law and because the Band's reasonable interpretation of such law is owed deference by the courts. Because the Band cannot be compelled to appear and present its interpretation of tribal law, the Band reasons (*id.*) that a "necessary element" for adjudication of the Plaintiffs' claims will be missing in the Band's absence. *See Salt River Project*, 672 F.3d at 1180 (court should consider whether

absent party would "offer any necessary element to the proceedings that the present parties would neglect").

This argument begins with a flawed predicate. Contrary to the Band's contention, the Plaintiffs' complaint does not call for or require any interpretation of tribal law. As already noted, the Plaintiffs do not challenge substantive requirements for enrollment; they only challenge the Assistant Secretary's factual determinations and the allegedly defective manner in which he made those determinations (*i.e.*, allegedly without due process and in violation of the doctrine of administrative *res judicata*). The administrative rules and procedures the Assistant Secretary was required to follow when issuing the Disenrollment Order, and the extent to which the Secretary's factual findings and legal determinations are subject to judicial review, are matters of federal law, not tribal law.

As already noted (*supra*, at pp. 31-32) the Band's Constitution did not create the office of the Secretary of the Interior; it only gave the Secretary, in his official capacity, the authority to make certain final determinations for the Band. When agreeing, *via* approval of the Band's Constitution, to assume such functions, the Assistant Secretary had no ability to enlarge the powers of his office. *See* 25 U.S.C. § 476(d) (tribal constitutions must be consistent with "applicable law"). Thus, the Band's Constitution cannot reasonably be interpreted as freeing the Assistant Secretary from limitations that govern the exercise of his official duties,

including those imposed under the United States Constitution, federal statutes, or agency regulations. It is those federal limitations that the Plaintiffs seek to enforce in their APA claims.

Further, although one minor disagreement over tribal law did emerge in the proceedings below, the Band misconstrues the significance of that disagreement. As explained (pp. 8-9, *supra*), in their response to the Plaintiffs' motion for preliminary injunction, the Federal Defendants argued that an injunction was not necessary to protect the Plaintiffs' alleged membership interests, in part because the Regional Director had yet to submit a revised roll to the Secretary for final approval and certification in accordance with sections 48.12 and 48.13 of the 1960 Regulations. *See* ER I:48-49; *see also* ER II:129 (regulations). Relying on a different provision – section 48.14(d) – the Band took (and takes) the view that the Disenrollment Order was effective immediately and that the Plaintiffs ceased to be Band members the moment the Order was issued. *See Band's Brief* at 19-20. At the preliminary injunction hearing, government counsel stepped back from the government's initial interpretation of the regulations, stating that the question is one of tribal law for the Band to determine. ER II:111, 114; *see also* ER I:49 n. 8. In contrast, in its preliminary injunction order, the court interpreted the 1960 regulations to mean that the Plaintiffs "are still members of the Tribe." ER I:44-45 & n. 6. The Band now cites this history (*Brief* at 48-49) as proof that the

Band's interpretation of tribal law is threatened by the district court's judicial review and that the Federal Defendants cannot speak for the Band on this issue.

The Band fails to show, however, that this legal issue is germane to the Rule 19 inquiry. Rule 19 directs courts to consider whether an absent party's ability to protect its interests will be impaired "as a practical matter." Fed. R. Civ. P. 19(a)(1)(B). Here, the Plaintiffs' claims are predicated on the alleged invalidity of the Disenrollment Order under federal law; not on any alleged failure by tribal or federal officials to complete ministerial tasks arguably required under the 1960 Regulations to give effect to the Disenrollment Order. Thus, the district court can fully adjudicate the Plaintiffs' claims challenging the Disenrollment Order, without addressing when or if the Order formally took effect under tribal law.

Moreover, although the district court already opined on the effective date of the Disenrollment Order (ER I:44-45, n. 6) (preliminary injunction order), the court's analysis is not binding against the Band (as a non-party) and is arguably *dicta*.[20] If the issue arises in connection with some future tribal proceeding or

[20] The district court addressed the effective date of the Disenrollment Order to rebut the Band's claim that this case involves an "intertribal" dispute. ER I:44. The district court reasoned that there is no intertribal dispute because "Plaintiffs are still members of the Tribe." ER I:44 & n. 6. This reasoning erroneously presumes that there would be a dispute among Indians – and conflicting federal trust obligations – if the Plaintiffs were disenrolled. As already explained, if the Plaintiffs are disenrolled, they are not Indians to whom any trust duty can apply.

claim in any forum, the Band will be free to take the position that the Disenrollment Order took immediate effect.

Contrary to the Band's assertion (*Brief* at 51), the preliminary injunction is not "in direct conflict" with "the [Band's] interpretation of its law," *i.e.*, the determination that the Disenrollment Order took immediate effect. In granting the preliminary injunction, the district court acted to preclude the Federal Defendants from implementing or otherwise relying on the Disenrollment Order when carrying out the United States sovereign- to-sovereign relations with the Band, pending judicial review of the Plaintiffs' objections. This purpose was served whether or not the Disenrollment Order was in effect or about to go into effect at the time of the preliminary injunction. Likewise, the district court could issue a final judgment prospectively setting aside the Disenrollment Order and remanding the matter to the Assistant Secretary, without resolving whether the Disenrollment Order was ever formally in effect. Because the district court need not interpret tribal law as to the effective date of the Disenrollment Order to resolve or provide relief on Plaintiffs' first three causes of action, the Band's interpretation of tribal law cannot be a "necessary element" to the adjudication. *See Salt River Project*, 672 F.3d at 1180.

B. Dismissal Is Not Required under Rule 19(b)

The district court found that the Band is not a "required party" under Rule 19(a) and therefore declined to address, under Rule 19(b), whether the case should proceed in the Band's absence, even if the Band is a required party. ER I:45. For reasons stated, this Court should affirm. *See Daley*, 173 F.3d at 1169 ("Because we conclude that the Tribes are not necessary parties, we need not consider whether they are indispensable parties under Rule 19(b).") Alternatively, if this Court determines that the district court abused its discretion in applying Rule 19(a), this Court should either remand to the district court for a Rule 19(b) analysis or should perform its own 19(b) analysis and affirm on that basis. *See Walsh v. Centeio*, 692 F.21d 1239, 1241 (9th Cir. 1982) ("In most cases, we prefer . . . to defer to the district court's discretion.")

In arguing that Rule 19(b) compels dismissal (*Brief* at 28, 53-54), the Band relies exclusively on the Supreme Court's decision in *Pimentel*, an interpleader action involving disputed claims to assets of Ferdinand Marcos, former president of the Republic of the Philippines (the "Republic"). 553 U.S. at 857-859. The brokerage firm holding the assets named, among other defendants: (1) a group of human rights victims who had obtained a class-action judgment against Marcos, (2) a corporation founded by Marcos, and (3) the Republic. *Id.* This Court determined that the Republic was a required party under Rule 19(a) that could not

be joined due to sovereign immunity, but that the action could proceed under the balancing test of Rule 19(b), because the Republic's claim had "little likelihood of success." *Id.* at 860. The Supreme Court reversed, finding that the Republic's claim was not frivolous and that it was error for this Court to effectively decide that claim on the merits, in contravention of the Republic's sovereignty and sovereign-immunity interests. *Id.* at 864-869.

In reaching this conclusion, the Supreme Court cited, *inter alia*, precedent involving federal property claims and the United States' sovereign immunity. *Id.* at 867. The Court described these cases as "instruct[ing] . . . that where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 867 (citing *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 373–375 (1945); *Minnesota v. United States*, 305 U.S. 382, 386–388 (1939)). Contrary to the Band's argument (*Brief* at 28, 54), however, the Supreme Court did not thereby announce a *per se* rule that Rule 19(b) balancing is unnecessary whenever an absent sovereign is determined to be a "required party" under Rule 19(a). Rather, the Supreme Court expressly analyzed all of the Rule 19(b) factors and concluded, after doing so, that this Court had failed to give "sufficient weight" to the Republic's sovereign-immunity interests. *Id.* at 865-872. Further, the Court emphasized that joinder issues are "complex" and that the

application of Rule 19 is "case specific." *Id.* at 862-63; *see also Dawavendewa*, 276 F.3d at 1162 ("Ninth Circuit has . . . consistently applied the four part balancing test to determine whether Indian tribes are indispensable parties.")

On the unique facts of the present case, Rule 19(b) counsels against dismissal of the Plaintiffs' first three causes of action. The first consideration under Rule 19(b) is the extent to which a judgment would prejudice absent or existing parties. *See* Fed. R. Civ. P. 19(b)(1). Here, there is no potential prejudice to existing parties and only minimal (if any) potential prejudice to the Band. As explained *supra*, the Band itself chose the federal administrative process as the mechanism for making tribal enrollment decisions. The Assistant Secretary will be present in the judicial proceedings to defend his administrative actions and, under the APA, the district court's review of those actions is "highly deferential." *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011) (quoting *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)). The district court may not "substitute its judgment" for that of the Assistant Secretary and decide the enrollment dispute *de novo*. *Id.* Rather, the district court must uphold the Disenrollment Order, as long as the Assistant Secretary followed proper procedure and made his factual findings on "substantial evidence." *Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury*, 686 F.3d 965, 976 (9th Cir. 2012). Further, if any defect is found, the

matter must be remanded to the Assistant Secretary. If the Assistant Secretary alters his decision in a manner adverse to the Band, the Band would be free to bring its own APA challenge. Altogether, these circumstances significantly mitigate (if not eliminate) any threat to the Band's interests.

The second factor for consideration under Rule 19(b) is the extent to which prejudice can be lessened or avoided by "protective provisions in the judgment," "shaping the relief," or "other measures." Fed. R. Civ. P. 19(b)(2). Here, the district court can lessen any potential prejudice to the Band's self-government interests by limiting any adverse judgment to the declaratory and injunctive relief sought in the first three causes of action and not undertaking to exercise any additional jurisdiction the court might possess, *e.g.*, to compel the delivery of membership benefits or to remedy alleged harms from the non-delivery of benefits (matters the Band did not grant to the Secretary in its Constitution).[21] *See* Fed. R. Civ. P. 19(b)(2).

The third factor under Rule 19(b) is whether a judgment without the absent party would be "adequate." Fed. R. Civ. P. 19(b)(3). For reasons stated (*supra*), the district court can render meaningful relief on the first three causes of action by setting aside the Disenrollment Order and remanding to the Assistant Secretary, if cause for such relief is found.

[21]The Federal Defendants do not concede such jurisdiction. *See* pp. 9-10, 14, *infra*.

The fourth factor is whether the Plaintiffs would have an adequate remedy if the action were dismissed for nonjoinder. Fed. R. Civ. P. 19(b)(4). Here, the Plaintiffs have no other remedy to redress alleged improper or arbitrary actions by the Assistant Secretary. There is no tribal forum for review of the Assistant Secretary's decision and the Assistant Secretary would be immune from suit in any tribal forum if it existed. *Aminoil U. S. A., Inc. v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982) (APA waiver limited to federal court). Although the absence of an alternative forum does not prevent a court from dismissing in favor of tribal sovereignty interests, *see Dawavendewa*, 276 F.3d at 1162, a court must be "extra cautious" where no alternative forum exists. *Id.* Further, there is a "strong presumption that Congress intends judicial review of administrative action." *Pinnacle Armor*, 648 F.3d at 718 (quoting *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)). Dismissal here would be contrary to that strong presumption. Altogether, the balance of the equities tips in favor of judicial review.

* * *

It is the policy of the United States to recognize and promote tribal sovereignty and tribal self-government. *See* 25 U.S.C. §§ 476(h), 3601(3)-(4). In the foundational exercise of its sovereignty and self-government, the San Pasqual Band adopted a constitution that gives federal officials final authority over

enrollment matters. Thus, as the Assistant Secretary observed in the Disenrollment Order, "the paradoxical consequence of Federal deference to tribal sovereignty" on the unique facts of this case "is Federal involvement in the Band's membership determinations." ER II:147. For reasons stated, this includes federal judicial review of the Assistant Secretary's final disenrollment action. In acknowledging the availability of judicial review, however, the Federal Defendants do not concede any flaw in the Assistant Secretary's consideration of the recommendation from the Band's Enrollment Committee nor in the Disenrollment Order itself.

CONCLUSION

For the foregoing reasons, the district court's order should be upheld.

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STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending in this Court.

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CERTIFICATE OF COMPLIANCE
(No. 10-35904)

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, the attached answering brief is:

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October 10, 2012 — Date

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