No. 12-56145

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT P. ALTO, *et al.*,

Plaintiffs-Appellees

v.

KEN SALAZAR, *et al.*,

Defendants-Appellees,

SAN PASQUAL BAND OF MISSION INDIANS,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
The Honorable Judge Irma E. Gonzalez

REPLY BRIEF FOR INTERVENOR-APPELLANT SAN PASQUAL BAND OF MISSION INDIANS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

INTRODUCTION

The San Pasqual Band of Mission Indians ("Tribe") appeals to preserve its self-governance right to interpret tribal law governing the enrollment of tribal members and the Tribe's role in that process. Although the Tribe is not a party to the action, the Appellees/Plaintiffs, descendents of Marcus R. Alto, Sr. ("Alto Sr. descendents"), seek a ruling binding on the Tribe on the merits of the Tribe's disenrollment action approved by the Assistant Secretary-Indian Affairs, Department of the Interior ("Assistant Secretary"), acting pursuant to authority delegated to him by the Tribe pursuant to the Tribe's law.

The Tribe appeals from the district court's denial of the Tribe's Motion to Dissolve the Preliminary Injunction (PI),[1] which directs the Assistant Secretary to recognize the Alto Sr. descendents as members of the Tribe and to order the Tribe to also recognize them as members of the Tribe and to grant them rights of tribal membership. Although the Alto Sr. descendents filed suit against the Federal Appellees (Federal Defendants, United States or U.S.), officials of the Department of the Interior and the Bureau of Indian Affairs (BIA), their real target is the Tribe: they seek review of a tribal enrollment action made pursuant to the Tribe's law, involving the interpretation and application of the Tribe's law, and seek relief in the form of rights and benefits of tribal membership that can only be afforded by

[1] Excerpts of Record Volume I (ER I) 1–9 (June 13, 2012 Order).

the Tribe under tribal law. The district court's denial of the Tribe's Motion to Dissolve the PI is an abuse of discretion because the court questioned its subject matter jurisdiction over the Fourth Cause of Action under which the injunction was sought and found that the Tribe has met the criteria demonstrating that it is a required party pursuant to FED. R. CIV. PRO. 19 ("Rule 19").[2] The grounds for dissolving the PI are inextricably intertwined with the Tribe's motion to dismiss all causes of action set forth in the First Amended Complaint (FAC), and the Tribe asks this Court to dissolve the injunction and exercise its pendent jurisdiction to dismiss the underlying action.

Membership in the Tribe is governed by Article III of the Tribe's Constitution, which incorporates by reference the terms of former federal regulations, 25 C.F.R. Part 48.[3] Under the Tribe's governing law, the Tribe's Enrollment Committee determined the Alto Sr. descendents should be disenrolled based on evidence demonstrating that the information supplied with the enrollment

[2] The Federal Defendants claim that the district court's June 13, 2012 order shifted the basis for the preliminary injunction from the Fourth Cause of Action to the first three causes. *See* Answering Brief of the Federal Appellees (U.S. Brief) at 3 n.2, 34–36. This is not an accurate characterization of the order, which grants the specific relief requested in the Fourth Cause of Action.

[3] *See* Excerpts of Record Volume II (ER II) at 125–129 (Exh. 6 to October 11, 2011 Declaration of Geoffrey D. Strommer in Support of the San Pasqual Band of Mission Indians' Motion to Dismiss ("Strommer Declaration I"), 25 C.F.R. Part 48).

application of Marcus Alto Sr. was inaccurate or incomplete. *See* ER II at 129 (Exh. 6 to Strommer Declaration I, 25 C.F.R. § 48.14(c) and (d)). In accordance with tribal law, this decision was submitted to the BIA, and the Assistant Secretary upheld and approved the Tribe's decision on January 28, 2011. *See* ER II at 141–160 (Exh. 21 to Strommer Declaration I ("January 28, 2011 Decision")). This is a tribal enrollment action, and the review exercised by the Assistant Secretary was authorized pursuant to the Tribe's law, not federal law.

Given the nature of the Alto Sr. descendents action as a challenge to the Tribe's disenrollment action, the Alto Appellees' Brief in Response to Intervenor's Appeal (Alto Brief) focuses on their interpretation of the membership criteria and enrollment procedures in the Tribe's law. The extended discussion of the Tribe's governing law in the Alto Brief, *see, e.g.*, at 1–3, 15–21, 28–30, 32–36 and 49–50, demonstrates and ratifies the Tribe's position that the Alto Sr. descendents' claims arise under and are rooted in tribal law. Their principal argument is that the Tribe has surrendered "absolute authority" over enrollment to the BIA and thus the Tribe's enrollment process should be interpreted as if it involves questions of federal law. *See* Alto Brief at 17–21.

In its brief the U.S. writes as if on a clean slate, but the Tribe notes the remarkable evolution in the Federal Defendants' position regarding the Tribe's law from prior litigation in this district court, in which it successfully argued that the

Tribe was a required party to a challenge to the BIA's role in the Tribe's enrollment process (cases not even cited or discussed in the U.S. Brief),[4] to and including shifts in position during the course of the current litigation, in which it now opposes dissolution of the injunction and dismissal of the FAC. Further, because the U.S. has admitted that it cannot represent the Tribe's interests on matters involving tribal law, the U.S. Brief disingenuously tries to scrub the case clean of questions of tribal law. As set forth below, the U.S. effort fails and is without merit.

The Tribe is not divested of its interest in membership decisions or the membership process by the fact that the BIA has a role in that process. This was confirmed in *Caylor* and *Atilano*.[5] Like the Alto Sr. descendents in the present case, the plaintiffs in *Caylor* argued that "enrollment decisions are left to the BIA—operating under strict and unambiguous standards." *Caylor*, ER II at 190. The *Caylor* court, however, observed that the plaintiffs "fail to address the fact that the regulations relied upon were repealed over eight years ago and exist now only

[4] *See Caylor v. Bureau of Indian Affairs*, Civ. No. 3:03cv1859-J, Order: Granting Defendant's Motion to Dismiss Complaint (S.D. Cal. April 22, 2004), ER II at 180–95 ("*Caylor*"); *Atilano v. Bureau of Indian Affairs*, Civ. No. 3:05cv01134-J, Order Re: Granting Defendants' Motion to Dismiss (S.D. Cal. Dec. 1, 1995), ER II at 196–208 ("*Atilano*").

[5] Although these cases did not involve a final agency action, the court's findings regarding the Tribe's interest in the interpretation and application of tribal membership law apply to the present case.

as part of the tribal constitution." *Id*. The *Caylor* court found that by "challenging BIA's involvement in this process, Plaintiffs are directly, and exclusively, implicating the Band's constitution." *Id*.

Regarding the Tribe's interest in its enrollment law, the court in *Caylor* adopted the argument made by the BIA that the Tribe has a legal interest "in preserving its right to determine its membership" and thus the Tribe "has a strong interest in [the] litigation" based on the regulations that are in the Tribe's Constitution.[6] "That the Band chose, through its constitution, to delegate final enrollment approval to the BIA does not change the nature of its interest in controlling and defining membership in the Band." *Caylor*, ER II at 190. Further, "[b]y challenging BIA's involvement in this process, the Plaintiffs are directly, and exclusively, implicating the Band's constitution. The Band has a strong interest in [the] litigation." *Id*.

Initially, before the district court in this case, the U.S. did not actively oppose the injunction, but did "observe[]" that injunctive relief was not available under the APA, *see* U.S. Brief at 9–10, and thus the Tribe was a required party to consideration of the relief that was requested by the Alto Sr. descendents and

[6] *Caylor*, ER II at 189–90. As set forth below at 17–18, the U.S. Brief, at 31–32 and 51, argues opposite what it successfully argued in *Caylor*. In *Caylor*, the court found that the Tribe had a strong interest in the litigation. This change of position by the U.S. should be barred by judicial estoppel. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

which was ultimately imposed by the court in the PI. After the Tribe moved to dissolve the injunction and dismiss the FAC, the U.S. opposed dismissal of the first three claims but did not otherwise oppose the Tribe's motions. In this appeal, however, the U.S. now opposes dissolution of the injunction and dismissal of the FAC across the board.[7]

The U.S. acknowledges that the Assistant Secretary applied the Tribe's law in his decision upholding the disenrollment, but argues that the Tribe is not a required party to this case under Rule 19 because the first three causes of action "are grounded in federal law," not tribal law, and involve a challenge to "the Assistant Secretary's decision-making procedures and factual findings, not any action by the [Tribe]," and thus the U.S. can adequately represent the Tribe's interests. U.S. Brief at 26, 30. Not true. This case challenges the merits of the Assistant Secretary's application of tribal law to a tribal enrollment action. There is no federal law governing the Tribe's enrollment action and, as the *Caylor* court found, based on arguments made by the U.S. in that case, the Secretary's authority derives solely from tribal law, the Tribe maintains a sovereign interest in the interpretation and application of its enrollment law, and the U.S. cannot represent

[7] The U.S. asserts that the injunction was effectively revised to issue on the basis of the first three causes of action, and that the Tribe has no interest sufficient to make it a required party under Rule 19, including the continuing imposition of the PI, *see* U.S. Brief at 30, a baseless argument analyzed below in Section I.A.1 of the Argument.

the Tribe's interests. The interests of the BIA and the Tribe conflict on the source of the Secretary's authority and the interpretation of some aspects of the enrollment procedures,[8] and the Tribe has a right to "to make known [its] interests and legal theories" regarding the fundamental aspects of the Tribe's law. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (citing *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986)).[9]

ARGUMENT

The Court of Appeals has jurisdiction to consider the merits of the Tribe's appeal regarding the injunction, and pendent jurisdiction to consider the Tribe's related claims for dismissal of all causes of action in the FAC. We organize our reply to the arguments in the U.S. Brief and the Alto Brief with regard to the discrete elements of the Tribe's motions.

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[8] For example, before the Assistant Secretary the Tribe argued that the BIA should have applied a clear and convincing standard rather than a preponderance of the evidence standard and that the burden of proof should be on the individual to prove membership, but the Assistant Secretary declined to adopt the Tribe's interpretation. *See* ER II at 148–50 (January 28, 2011 decision).

[9] Additionally, the U.S. Brief seeks to avoid the application of the rule that the U.S. cannot represent the interests of a tribe in a case involving a group of tribal members with conflicting interests, by trying to rewrite the district court's explicit ruling that the Alto Sr. descendents are "still members of the Tribe" and that the "Secretary has continuing fiduciary duties and obligations to them." ER I at 46 (Order Granting Preliminary Injunction ("PI Order"). According to the law of this Circuit, the U.S. cannot represent the interests of the Tribe in this litigation. *See, e.g., Pit River Home & Agr. Cooperative Ass'n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994).

I. The District Court Abused its Discretion by Denying the Tribe's Motion to Dissolve the PI and Declining to Dismiss the Fourth and Fifth Causes of Action.

A. The Court of Appeals has Jurisdiction to Review and Dissolve the PI.

The Court of Appeals clearly has jurisdiction to review the district court's orders which are the subject of appeal[10] based on 28 U.S.C. § 1292(a)(1). The order entered on June 13, 2012, ER I at 1–9, declined to dissolve the injunction entered on December 19, 2011 (ER I at 20–52). The Tribe's request to dissolve the PI is "inextricably intertwined" with the Tribe's motion to dismiss the FAC pursuant to FED. R. CIV. P. 12(b)(7) ("Rule 12(b)(7)") and FED. R. CIV. P. 12(b)(1) ("Rule 12(b)(1)"), and therefore this Court has jurisdiction to consider *all* issues in the appeal.[11]

1. U.S. Opposition to Dissolution of the Injunction.

The U.S. now directly opposes the Tribe's request to dissolve the PI and suggests that the question of the district court's jurisdiction over the Fourth and Fifth Causes of Action is not before this Court. The U.S. acknowledges that the PI

[10] *See* orders entered on June 13, 2012 (ER I at 1–9) and December 19, 2011 (ER I at 20–52).

[11] *See Meredith v. Oregon*, 321 F.3d 807, 812 (9th Cir. 2003), *amended sub nom. Meredith v. State of Oregon*, 326 F.3d 1030 (9th Cir. 2003) (pendent jurisdiction to review rulings "inextricably intertwined" with or "necessary to ensure meaningful review of" decisions over which the court has jurisdiction (citing *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995)).

enforces the request for relief in the Fourth Cause by directing the Assistant Secretary to issue "interim orders" to the Tribe to provide the Alto Sr. descendents access to meetings (and voting rights), and to make per capita payments to them the same as to other members. *See* U.S. Brief at 7–8, 34–35. The U.S. makes the convoluted claim that the court, in its June 13, 2012 order, effectively amended the injunction by substituting the first three causes of action for the Fourth Cause as the foundation for the injunction, with the result that the injunction merely preserves the "status quo" pending district court review of the first three causes. *See* U.S. Brief at 35. In effect, the U.S. bootstraps its argument that the court has jurisdiction over the first three causes, and that the Tribe is not a required party to consideration of those claims, into a conclusion that the Tribe is also not a required party to consideration of the injunction.

Even if accurate, which it is not, this claim exalts form over substance. In fact, the district court did not amend the form, terms of, or basis for the injunction. The terms of the court's PI, drawn specifically from the Fourth Cause, remain exactly the same. Moreover, the "interim orders" imposed by the Assistant Secretary remain in place. Before the district court the U.S. argued that the Tribe was a required party to consideration of injunctive relief. The U.S. admitted that it cannot and will not represent the self-governance interests of the Tribe. Addressing Rule 19, the U.S. stated that its ability to adequately represent the

Tribe's interests did not extend beyond any APA aspects of the Complaint. *See* ER II at 115, lines 1–4 (Hearing Transcript from November 15, 2011 Hearing ("Hearing Transcript")). The U.S. clarified that the Fourth Cause directly affects the Tribe's self-governance and that the Tribe would be a necessary party to consideration of that claim. *Id.* The U.S. also argued that complete relief cannot be accorded regarding the claims seeking relief requiring the Assistant Secretary to issue "interim orders" directing the Tribe to, *inter alia*, make per capita payments to the Alto Sr. descendents and escrow certain funds. *See* ER II at 123 (Supplemental Briefing Pursuant to Court's Order). These statements address the substance of the court's order directing the Assistant Secretary to issue "interim orders" that directly affect the Tribe, no matter which cause of action they might be framed under.

In fact, in the June 13, 2012 order, the court second-guessed its conclusions in the PI Order regarding the application of Rule 19 for purposes of injunctive relief, and made sufficient findings that each of the three criteria, by which the Tribe could be established as a required party under Rule 19(a), has been met for the purposes of the Fourth Cause, *see* ER I at 7–8 (June 13, 2012 Order), even though the court refused to dissolve the injunction. These factors would still be determinative even if the court considered the merits of an injunction based on the

first three causes of action.[12] Clearly, the Tribe's appeal from the court's refusal to dissolve the PI implicates the Fourth Cause and is before this court for review.

2. The Alto Sr. Descendents' Claim that the Tribe's Appeal is Subject to Dismissal under Rule 12(b)(1).

The Alto Sr. descendents make an argument that the appeal should be dismissed because the Court of Appeals lacks jurisdiction, citing Rule 12(b)(1). *See* Alto Brief at 9–14. However, that rule governs subject matter jurisdiction regarding claims filed originally in federal district courts and has no application to appellate jurisdiction. The Tribe has not intervened for the purpose of asserting any substantive claim in the district court, so that rule is simply not applicable. The Alto Sr. descendents' jurisdictional arguments are without merit. The court's refusal to dissolve the PI continues the direct impact on the Tribe's interests and is appealable pursuant to 28 U.S.C. § 1292(a)(1).

B. The District Court Abused its Discretion by Refusing to Dissolve the PI and Declining to Dismiss the Fourth and Fifth Causes of Action.

1. The PI Should be Dissolved.

The Alto Sr. descendents make a number of flawed arguments to support their assertion that the PI should not be dissolved: circumstances since the

[12] In its extended discussion of Rule 19 to the first three causes, U.S. Brief at 36–59, the U.S. does not explain why the Tribe is not a required party to consideration of the injunction. Of course, interpretation of the Tribe's law was the predicate for the preliminary injunction, *see* ER I at 44 and n.6 (PI Order), and adjudication of the first three causes would also be rooted in the Tribe's law.

December 19, 2011 order have not changed to affect the Tribe's interests; the injunction does not affect the Tribe's governmental interests because the Tribe has granted "absolute authority" to the BIA to determine the Tribe's membership; and a claim to compel the BIA to take action under the Tribe's law gives rise to a federal question. *See* Alto Brief at 16. These arguments are without merit.

The Assistant Secretary's January 12, 2012 Memorandum Order ("Memorandum Order") (ER II at 108–110), issued to implement the PI impacts the Tribe's governmental and economic interests substantially, by directing actions to require the Tribe to recognize the Alto Sr. descendents as members, under threat of enforcement actions by the BIA and other agencies. While refusing to dissolve the injunction, the district court recognized that that the PI Order and the Memorandum Order have "impacted the relationship between the [BIA] and the Tribe." *See* ER I at 9 (June 13, 2012 Order).

Moreover, the Alto Sr. descendents' claims turn on the interpretation and application of the Tribe's membership law. Two issues of conflicting interpretation of tribal law are prominent. First, they support the court's ruling that they remain members until a supplemental roll is approved, an interpretation that conflicts with the Tribe's and BIA's interpretation. Second, the Alto Sr. descendents claim that an approved roll under 25 C.F.R. § 48.12 is required for disenrollment per 25 C.F.R. § 48.14, Alto Brief at 18–19, despite the plain

language of the section that an approved roll is required only for distribution of "tribal assets," not for implementation of a disenrollment action. *See* ER II at 129 (25 C.F.R. § 48.14(d)). The Tribe is a necessary party to the determination of legal issues regarding that authority and the imposition of remedies requiring tribal actions pursuant to tribal law.

In fact, even though the court declined to dissolve the injunction, in its June 13, 2012 Order the court made sufficient findings that each of the three criteria by which the Tribe could be established as a required party under Rule 19(a) has been met for the purposes of the Fourth Cause. *See* ER I at 7–8 (June 13, 2012 Order).

The Alto Sr. descendents make two unsupported arguments that Rule 19 does not require dissolution of the injunction. First, they appear to argue that the court's "bifurcation" of the Fourth and Fifth Causes relieves the court of the obligation to address Rule 19 issues except as they relate to the first three causes of action. *See* Alto Brief at 25. In fact, the PI is still in effect. Second, the Alto Sr. descendants argue that the Tribe's grant of authority to the BIA waived its sovereign immunity "as to agency actions relating to its membership." *Id.* at 34 and 49–51. Clearly, the Tribe has not waived its sovereign immunity from suit.[13]

[13]Granting the Secretary a role in reviewing enrollment decisions does not constitute the required unequivocal waiver of the Tribe's sovereign immunity, and the Tribe's voluntary participation in the administrative proceedings did not waive immunity. *See Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994). *See also* Tribe's Brief at 26–28.

There is simply no legal basis for continuing the injunction, and it should be dissolved.

2. The Fourth and Fifth Causes of Action Should be Dismissed.

As noted above, the district court has questioned the existence of federal question jurisdiction regarding the Fourth and Fifth Causes, *see* ER I at 7–8 (June 13, 2012 Order), a practical acknowledgement that the Alto Sr. descendents *have not met* their substantial jurisdictional burden. This conclusion alone warrants dismissal of the Fourth and Fifth Causes of Action. *See* Tribe's Brief at 29–31.[14]

The Alto Sr. descendents argue that the court has jurisdiction over the Fifth cause based on the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, and the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301 *et seq.*. Alto Brief at 38–49. Both arguments fail. The BIA does not have authority to enforce the Tribe's Revenue Allocation Plan (RAP). *See* 25 C.F.R. § 290.10. It is also clear that federal courts do not have authority to enforce ICRA except with respect to claims for habeas corpus review. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61–62 (1978).

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[14] The U.S. opposes dismissal of these causes of action but acknowledges that the court lacks jurisdiction to issue the injunctive relief under the APA, the alleged basis for jurisdiction over the first three causes of action in the FAC.

The Alto Sr. descendents have not met their burden to demonstrate federal jurisdiction and standing over the Fourth and Fifth Causes of Action and they should be dismissed.

II. The District Court's Denial of the Tribe's Motion to Dismiss the First Three Causes of Action Should be Reversed.

A. Rule 19 Requires Dismissal of the First Three Causes of Action.

With respect to the first three causes of action, the district court concluded that the Tribe is not a required party pursuant to Rule 19 on the grounds that "the Tribe does not have a legally protected interest that would be impaired in its absence" because "[t]he United States can and will adequately represent the Tribe's interest in upholding the Assistant Secretary's decision." ER I at 7 (June 13, 2012 Order).[15] In our opening brief we show that the court's ruling is an abuse of discretion because the claims in the first three causes do not turn on whether the Assistant Secretary followed a particular federal procedural process, but rest on whether the Alto Sr. descendents meet the Tribe's substantive enrollment criteria. Thus these claims are not purely administrative or procedural, and they are distinguishable from the Ninth Circuit cases which draw a clear distinction between a tribe's interest in the substantive merits of a claim before the court and

[15] As demonstrated in our opening brief, under Rule 19(a) the Tribe does claim a legally protected interest in the action and disposing of the action in the absence of the Tribe would impair and impede the Tribe's ability to protect its interest, and the U.S. cannot adequately protect that interest. Tribe's Brief at 38–54.

administrative or procedural issues raised by a claim. *See Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) (upholding the dismissal of claims challenging aspects of federal regulations establishing the Pacific Fishery Management Council on which the tribes have competing interests, but reversing the dismissal of claims seeking prospective injunctive relief limited to the future conduct of the administrative process on the grounds that the tribes have an equal interest in an administrative process that is lawful); *Washington v. Daley*, 173 F.3d 1158, 1169, n.12 (9th Cir. 1999) (finding that where the merits of a case rest on whether the absent Tribes have treaty rights in the area and the plaintiff was not seeking a prospective procedural remedy, the challenge to the regulations was not a procedural claim); *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 971–72 (9th Cir. 2008) (finding that the absent tribes did not have a legally protected interest in their potential "market share" of gaming licenses issued by a state under gaming compacts because the potential interest did not arise out of the terms of the compact and, unlike *Makah* where the resource at issue was finite, the gaming compacts did not constrain the number of potential licenses generally available). In this case, the Alto Sr. descendants challenge the merits of the Secretary's decision and seek restoration of membership in the Tribe. The Tribe's sovereign interest in its membership and its interest in the interpretation of its membership law are directly at stake. The Alto

Sr. descendents and the U.S. cite these cases, *see* Alto Brief at 26 and U.S. Brief at 38, 43 and 47, but fail to address the critical distinction between substantive and procedural claims, and the nature of the Tribe's interest.

As noted above, the U.S., for the first time, argues that the source of the Secretary's authority is federal and is governed by federal law, *see* U.S. Brief at 31–32, and that the extent to which the Secretary's factual findings and legal determinations are subject to judicial review, they are matters of federal law, not tribal law.[16] *See* U.S. Brief at 51. The U.S. is arguing the opposite position it successfully made in *Caylor*, and this argument violates the principles of judicial estoppel. In *New Hampshire v. Maine*, the U.S. Supreme Court set forth three considerations that inform the decision to apply judicial estoppel: (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair

[16] The U.S. argues that 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." U.S. Brief at 31. Subsequently the U.S. argues that that 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 review, are matters of federal law, not tribal law." *Id*. at 51.

advantage or impose an unfair detriment on the opposing party if not estopped. 532 U.S. at 750–51 (internal quotations and citations omitted). Consideration of these three factors demonstrates that the doctrine should be applied here to bar the U.S. from arguing that the source of the Secretary's authority is federal law, that his actions are governed by federal law, and that the U.S. can adequately represent the Tribe.

In *Caylor*, the court adopted the argument made by the BIA in the case that the Tribe has a legal interest "in preserving its right to determine its membership" based on the regulations that are in the Tribe's Constitution, which are tribal law, not federal law. *Caylor*, ER II at 189–90. On the basis of the U.S. argument that the BIA, as a "matter of policy," operated solely pursuant to the Tribe's Constitution, the district court in *Caylor* found that the Tribe maintains a strong interest in its right to determine its membership. *Id*. The position argued now in the U.S. Brief is clearly inconsistent with the position argued by the U.S. in *Caylor*, and adopted by the court in that case to dismiss on the basis of Rule 19. The U.S. should be barred from taking this inconsistent position.

The U.S. argues that there is no relevant dispute over the Tribe's law, ignoring completely how the court has interpreted the claims in the case to date.

As we have already demonstrated, Tribe's Brief at 36–45, the first three causes of action, in the same fashion as the Fourth and Fifth Causes, implicate the

Tribe's membership law as interpreted by the Tribe and BIA. The First Cause requests that the court apply the doctrine of res judicata, contrary to the express language of the Tribe's law providing for disenrollment "of individuals whose enrollment was based on information subsequently determined to be inaccurate." ER II at 129 (25 C.F.R. § 48.14(d)). This cause rests entirely on the court's interpretation of the Tribe's law. The Second Cause is cast as a constitutional due process claim, alleging that the Assistant Secretary was obligated to provide procedural rights not provided as a matter of tribal law.[17] The Third Cause seeks review of more than 30 allegations regarding the merits of the Assistant Secretary's evaluation of evidence, which would require the court to interpret applicable tribal law and apply it to an extensive record that in large part was compiled and evaluated by the Tribe.

In short, the FAC does not draw a distinction between any relevant federal law procedural claim and the substantive effort to re-litigate the merits of the Tribe's enrollment decision made under tribal law. As demonstrated above, the Alto Sr. descendents seek to impose interpretations of the Tribe's law at variance with the interpretations of both the Tribe and the BIA.[18] The United States has

[17] The district court found that the Alto Sr. descendents would likely not be able to demonstrate they were not provided full and fair opportunity to litigate their case before the Assistant Secretary. *See* ER I at 31–32 (PI Order).

[18] The Alto Sr. descendents cite general authority for the rule that APA review is of the record "as a whole," Alto Brief at 27, citing *Mayes v. Massanari*, 276 F.3d 453,

admitted that the Secretary cannot represent the Tribe's legally-protected interest in the interpretation of its law. *See* ER II at 112, lines 23–24; 113, lines 11–17 (Hearing Transcript). The new U.S. argument that the Secretary's actions were governed by tribal law is a new development which presents another significant disagreement between the Tribe and the U.S. The Tribe's ability to protect its sovereign interests in the interpretation and implementation of its membership law would be impaired if this case proceeds in the Tribe's absence.

Because the U.S. is unwilling to represent the Tribe's interests with respect to the interpretation of tribal law, the U.S. is forced to argue that there is no relevant dispute over tribal law. However, that claim does not square with the facts. Most notably, the court has already ruled on the effective date of the disenrollment as the basis for imposing the preliminary injunction. The U.S. attempts to deflect this issue by construing the court's ruling on this issue as *dicta*, and suggesting that the court "need not interpret tribal law" to resolve the first three claims. U.S. Brief at 52–54. The Alto Sr. descendents, on the other hand, reject this argument and claim the court's ruling is binding on the U.S. *See* Alto Appellees' Motion to Consider Supplemental Authority (Alto Supplemental Brief)

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459 (9th Cir. 2001), implying that the Tribe will not be prejudiced in its absence because the court will review the entire record, including, presumably, the evidence and legal argument the Tribe provided before the agency. However, the Tribe is entitled "to make known [its] interests and legal theories" regarding the fundamental aspects of the Tribe's law. *See Shermoen*, 982 F.2d at 1317.

at 2. The court's interpretation of tribal law directly impacts the Tribe's protected sovereign rights to interpret its own law, and the U.S. will not protect those rights.

The U.S. also acknowledges that it cannot properly represent a tribe in a dispute involving intertribal conflicts. Under the law of this Circuit, a dispute between factions of Indians within the same tribe constitutes an intertribal conflict. *See* U.S. Brief at 49; *Pit River Home & Agri. Coopertive Ass'n*, 30 F.3d at 1101; *Rosales v. United States*, 89 Fed. Cl. 565, 586 (2009). The district court, in the PI Order, explicitly ruled that the Alto Sr. descendants "are still members of the Tribe" and that "the Secretary has continuing fiduciary duties and obligations to them."[19] ER II at 46 (PI Order). This creates a direct conflict between the interests of the Tribe and the Alto Sr. descendents, and under the law of the Ninth Circuit, the U.S. cannot represent the Tribe's interests in this litigation. To avoid the application of the intertribal conflict rule, the U.S. argues that the court's ruling is *dicta*, *see* U.S. Brief at 52–54, an argument belied by the terms of the Memorandum Order, which directs all officers and employees of the Department of Interior to recognize the Marcus Alto Sr. descendants as members. ER II at 110 (Memorandum Order). As a result, the U.S. cannot represent the Tribe's interests

[19] Because the Tribe is not a party to this litigation, the district court's ruling does not bind the Tribe.

in this case because there is an intertribal conflict between the Tribe and the Alto Sr. descendents.

The Alto Sr. descendents' argument that the re-litigation of the merits of the membership decision does not create inconsistent obligations again rests on their mistaken conclusion that the Tribe has surrendered "absolute authority" over enrollment to the BIA. As explained above, the Tribe has not forfeited its governmental interest in the substantive and procedural requirements of the Tribe's law, and the U.S. cannot represent the Tribe's interests. Any determination regarding the validity of the Assistant Secretary's disenrollment decision in this case without the Tribe as a party would not be binding on the Tribe, and any attempt by the BIA to enforce such a decision would create the potential for litigation between the Tribe and the BIA. *See Davis v. United States*, 199 F. Supp. 2d 1164, 1177 (W.D. Okla. 2002), *aff'd sub nom. Davis ex rel. Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003).

The district court's finding that it could not provide complete relief under the Fourth and Fifth Causes, *see* ER I at 7–8 (June 13, 2012 Order), applies as well to the first three causes of action. The BIA is obligated to defer to the Tribe's reasonable interpretation of its law, and prior to the PI Order the BIA did so. *See* ER II at 116–117 (Response to Plaintiffs' "Reply" dated November 17, 2011). *See also Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director*, 38

IBIA 244, 246–47 (2002). The Assistant Secretary has acknowledged the conflict between the terms of court's PI Order and the BIA's trust obligations, *see* ER II at 109 (Memorandum Order), and any ruling in this case interpreting or applying tribal law would expose the BIA to a potential conflict with the Tribe.

The first three causes of action should be dismissed pursuant to Rule 19.[20]

B. The First Three Causes of Action Should be Dismissed for Lack of Jurisdiction and Standing.

The U.S. argues that the court has jurisdiction over the first three causes of action under the APA, but its analysis does not support the claim. The U.S. acknowledges that the APA is not an independent grant of jurisdiction, and thus argues that 25 U.S.C. § 2, the authority for promulgating the original BIA regulations in 25 C.F.R. Part 48, provides federal question jurisdiction for purposes of 28 U.S.C. § 1331. *See* U.S. Brief at 33–34. The U.S. recognizes that this is not a sufficient predicate because § 2 does not provide a "meaningful standard" for review, citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), and so asserts that the

[20] The U.S. suggests that this Court remand to the district court for an analysis of dismissal under Rule 19(b), *see* U.S. Brief at 55, but we have demonstrated that the Tribe cannot be joined and thus dismissal is clearly warranted, Tribe's Brief at 53–54, and this court can dismiss pursuant to 28 U.S.C. § 1292. In addition, in the controlling decision in the *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) this Circuit has also found that if a tribe has sovereign immunity, there may be little need for balancing the Rule 19(b) factors, because immunity is viewed as the compelling factor. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

BIA "committed" to following the former regulations "as a matter of federal law" when it approved the Tribe's Constitution that incorporated the regulations as tribal law. *Id*. at n.13. As described above, this convoluted argument is contrary to the position the U.S. successfully argued in *Caylor*, and should be barred by the principles of judicial estoppel. Moreover, this bootstrap theory does not withstand scrutiny, even if it is considered. The U.S. does not and cannot cite any express statement of this "commitment" to act according to federal law.[21] Moreover, the provisions of Part 48, as incorporated in the Tribe's Constitution, apply in this case as a matter of tribal law, not federal law, and the BIA does not act in this case by virtue of some implied reservation of federal law under Section 2.

The district court does not have jurisdiction to resolve the Alto Sr. descendents' claims that are rooted in tribal law and which would require that the court resolve nonjusticiable tribal matters. The authority the Tribe granted the BIA under tribal law does not provide federal question jurisdiction. Any claims the Alto Sr. descendents raise against the BIA under the APA are inseparable from questions of tribal law and it is clear that *any* relief afforded the Alto Sr. descendents would require enforcement directly against the Tribe.

Federal courts have consistently held that they lack jurisdiction over such matters. *See, e.g., Martinez v. Southern Ute Tribe*, 249 F.2d 915, 921 (10th Cir.

[21] In fact, the regulations were deleted from the C.F.R. as "no longer required" for any federal purpose. *See* 61 Fed. Reg. 27,780 (June 3, 1996).

1957) *cert. denied*, 356 U.S. 960 (1958). The district court in the *Atilano* case concluded that once the BIA repealed the federal regulations, it lost any statutory authority it had, and thus "any consultative role the BIA plays in the Tribe's membership enrollment process is that authorized by the Tribe's Constitution . . . which is the sole source of power over the Tribal enrollment process." *Atilano*, ER II at 202. The Alto Sr. descendents have not met their burden to establish federal question jurisdiction or standing as to the first three causes of action, and those claims should be dismissed.

CONCLUSION

The Tribe respectfully requests that the district court's denial of its Motion to Dissolve be reversed and the Preliminary Injunction be dissolved, and that the district court's order denying in part and deferring in part the Tribe's Motion to Dismiss be reversed and the First Amended Complaint be dismissed.

Respectfully submitted this 24th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2012, the *Reply Brief for Intervenor-Appellant San Pasqual Band of Mission Indians* was served via the court's electronic CM/ECF filing system, which will send notification of such filing to counsel of record:

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October 24th, 2012

STATEMENT OF RELATED CASES

The Tribal Intervenor-Appellant is not aware of any related cases pending in this court.

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