No. 14-56909

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

S.M.R. JEWELL, Secretary of the Department of the Interior,
KEVIN K. WASHBURN, Assistant Secretary – Indian Affairs,
AMY DUTSCHKE, Regional Director of the Bureau of Indian Affairs ("BIA"),
and ROBERT EBEN, Superintendent of the Southern California Agency of BIA,

Defendants-Appellees.

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

ANSWERING BRIEF OF THE FEDERAL DEFENDANTS

JOHN C. CRUDEN
Assistant Attorney General

Of Counsel:

BARBARA N. COEN
Office of the Solicitor
U.S. Department of the Interior

KATHERINE J. BARTON
REUBEN S. SCHIFMAN
JOHN L. SMELTZER
Attorneys
Environment & Natural Resources Division
Post Office Box 7415
U.S. Department of Justice
Washington, D.C. 20044
(202) 305-0343
john.smeltzer@usdoj.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

FEDERAL STATUTES:

FEDERAL RULES AND REGULATIONS:

LEGISLATIVE HISTORY:

TRIBAL LAW:

MISCELLANEOUS:

STATEMENT OF JURISDICTION

Plaintiffs-Appellants Tiffany L. Aguayo (Hayes) *et al.* (the "Aguayo Plaintiffs") brought this action against the Regional Director of the Bureau of Indian Affairs Pacific Region and other Department of the Interior officials ("Federal Defendants"), asking the district court to review, under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706, a June 12, 2013 decision by the Assistant Secretary–Indian Affairs (ER 147-169). That decision affirmed a June 7, 2012 decision by the Regional Director (ER 313-314) recommending that the Pala Band of Mission Indians not remove the Aguayo Plaintiffs from its membership rolls, but declining to take further action. For reasons explained *infra* (pp. 26-35), the district court lacked jurisdiction to review these decisions because the Aguayo Plaintiffs' tribal law claims are not subject to federal-court review, and because any federal authority to intervene in the tribal membership matters is "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2).

On November 18, 2014, the district court granted summary judgment for the Federal Defendants. ER[1] 1-33; 137-146. The Aguayo Plaintiffs timely filed a

[1] "ER" citations are to the Aguayo Plaintiffs' Excerpts of Record (April 10, 2015); "SER" citations are to the Federal Defendants' Supplemental Excerpts of Record filed with this brief.

notice of appeal. ER 140-44 (Dec. 2, 2014); *see also* 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Federal Defendants' decision to take no enforcement action for alleged violations of tribal law – beyond recommending that the Pala Band of Mission Indians not disenroll the Aguayo Plaintiffs – is outside this Court's subject matter jurisdiction or "committed to agency discretion by law" and thus not subject to review under the APA, 5 U.S.C. § 701(a)(2); and
2. Assuming, *arguendo*, that the Federal Defendants' decision is subject to review under the APA, whether the Federal Defendants reasonably declined to declare the Pala Band's disenrollment of the Aguayo Plaintiffs void, given the absence of specific federal authority to make tribal-enrollment decisions and the Assistant Secretary's reasonable determination that the Pala Band had reclaimed enrollment authority previously assigned to federal officials under tribal law.

STATEMENT OF THE CASE

A. Introduction

The Aguayo Plaintiffs were enrolled in the Pala Band of Mission Indians ("Pala Band" or "Band") as descendants of Margarita Britten, a Pala member born circa 1856. In 2012, the Executive Committee of the Pala Band ("Executive Committee") disenrolled the Aguayo Plaintiffs for allegedly insufficient Indian blood quanta, after the Executive Committee determined – against the recommendation of the Regional Director of the Bureau of Indian Affairs ("BIA") and contrary to a 1989 BIA finding – that Ms. Britten was a half-blood Indian and not a full-blood Indian as claimed on the Aguayo Plaintiffs' enrollment applications. Although the Regional Director's recommendation was in their favor, the Aguayo Plaintiffs appealed to the Assistant Secretary–Indian Affairs, contending that the Regional Director had final enrollment authority under the Pala Band's 1961 enrollment ordinance and acted arbitrarily in failing to enforce prior enrollment decisions. The Assistant Secretary denied relief, finding, *inter alia*, that the 1961 Ordinance was superseded by a 2009 tribal-enrollment ordinance that provides the Regional Director an advisory role only.

In this appeal, the Aguayo Plaintiffs contend that the 2009 Ordinance is not in effect because the 1997 Pala tribal constitution, under which the ordinance was adopted, was not properly ratified under tribal law. Alternatively, the Aguayo

Plaintiffs contend that the Pala Executive Committee misapplied the 2009 Ordinance when revisiting pre-2009 enrollments, and improperly failed to accord the 1989 finding res judicata effect. The Aguayo Plaintiffs claim that the Assistant Secretary's decision was arbitrary and capricious in the face of these (alleged) violations of tribal law. As explained (pp. 26-35, *infra*), this Court lacks subject-matter jurisdiction over the Aguayo Plaintiffs' claims under tribal law, and the Assistant Secretary's authority (if any) under federal law to intervene in matters of tribal membership is committed to agency discretion and is not subject to APA review. As further explained (pp.35-59, *infra*), even if the Assistant Secretary's decision is subject to review, it was reasonable under the circumstances and should be affirmed.

B. Tribal Sovereignty

Under federal law, "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). Congress charged the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, with the "management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2; *see also* 43 U.S.C. § 1457 (charging Secretary with the

supervision of "public business" relating to "Indians"). This delegation includes authority to carry out government-to-government relations and to acknowledge tribal governments for such purpose. *See generally Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 937 (D.C. Cir. 2012); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). Under a reorganization of the Department of the Interior, the duties of the Commissioner of Indian Affairs are now carried out by the Assistant Secretary-Indian Affairs.

In 1934, Congress enacted the Indian Reorganization Act ("IRA") to enable Indians residing on the same reservation to organize for their common welfare. *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1205 (9th Cir. 2001). Section 476(a) of the IRA states that "[a]ny Indian tribe[2] shall have the right to organize for its common welfare, and *may* adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when – (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and call by the Secretary under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary pursuant to subsection (d) of this section." 25 U.S.C. § 476(a) (emphasis added); *see also* 25 C.F.R.

[2] The term "tribe" was defined to include the "Indians residing on one reservation," whether or not already organized. 25 U.S.C. § 479.

§§ 81.1-81.24 (regulations governing approval of and amendments to constitutions adopted under the IRA or other federal statute).

The IRA does not *require* tribes to organize via constitutions approved under IRA-prescribed procedures, however. Rather, section 476(a) provides a "safe harbor." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1264 (D.C. Cir. 2008). If a tribe adopts governing documents in an election called by the Secretary and conducted under election procedures prescribed by the Secretary, the Secretary "shall approve" the documents "unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws." 25 U.S.C. § 476(d). In 2004, Congress clarified that "[n]otwithstanding any other provision of [the IRA], each Indian tribe shall retain inherent sovereign power to adopt governing documents other than those specified in [section 476(a)]." 25 U.S.C. § 476(h).[3]

More importantly for present purposes, when enacting the IRA, Congress included an opt-out provision. In section 478, Congress directed the Secretary, within one year of the IRA's 1934 enactment, to call special reservation-specific

[3] Section 476(h) was added in 2004 as a "technical" amendment to the IRA, *see* Pub. L. 108-204, § 103, 118 Stat. 543; *see also* H.R. Report No. 108-374 at 1-2 (2003) ("Section 103 clarifies that Indian tribes that accepted the Indian Reorganization Act are not required to adopt constitutions pursuant to that law and are free to organize their governing bodies in a manner that they determine.")

referendum elections on the applicability of the IRA. 25 U.S.C. § 478. Congress stated that the IRA "shall not apply to any reservation wherein a majority of the adult Indians, voting at [such election], shall vote against [the IRA's] application." *Id.*; *see also United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980).

C. Pala Band and Governing Documents

The Pala Band is a federally recognized Indian tribe, *see* 80 Fed. Reg. 1942, 1945 (Jan. 14, 2015),[4] with an approximately 12,000-acre reservation in northern San Diego County. The Secretary of the Interior issued a trust patent for the Pala Reservation in 1893, pursuant to the Mission Indian Relief Act of 1891. *See Escondido Mut. Water Co. v. F.E.R.C.*, 692 F.2d 1223, 1225-26 (9th Cir. 1982) (citing Act of Jan. 12, 1891, §§ 2-3, 26 Stat. 712), *rev'd in part on other grounds Escondido Mut. Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, 466 U.S. 765 (1984). The Pala Reservation is home to the Luiseño and Cupeño Indians, who consider themselves to be one people, the "Pala." *See* http://www.palatribe.com/about/the-history. In an IRA-referendum election called in December 1934, the Pala Indians voted ***against*** application of the IRA. *See* THEODORE HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A., 14 (U.S. Indian Serv. 1947).

[4] In 1994, Congress directed the Secretary of the Interior to maintain a list of federally recognized Indian tribes. Pub. L. 103-454, § 103(6)-(7), 108 Stat. 4792 (1994); *see also id.* § 104 (codified at 25 U.S.C. § 479a-1) (duty to publish list).

1. 1960 Articles of Association

Approximately 25 years after rejecting the IRA, the Pala organized under their own procedures. At a tribal membership meeting in August 1959, by a vote of 21 in favor and none opposed, the Pala adopted Articles of Association, ER 367, for the purpose of "hav[ing] our tribal organization formally recognized by the Commissioner of Indian Affairs and to establish rules of procedure governing our tribal authority and jurisdiction." ER 361 (preamble to Articles); *cf. Anderson*, 625 F.2d at 916 (similar history).

Although they organized under their inherent authority, the Pala sought and obtained BIA approval for their governing document. Specifically, the Pala drafted Articles that would take effect, and could be amended by the Pala "General Council," only upon the "approval of the Commissioner of Indian Affairs." ER 367. In March 1960, the Commissioner approved the Articles, conditioned on one change, ER 368, which the Pala General Council adopted in March 1961. ER 369. The General Council later adopted additional amendments, again with the Commissioner's approval. ER 360, 370-378.

The Articles of Association limited membership in the Pala Band to "those persons whose names appear on [federal] Pala Allotment Rolls" in 1895 and 1913; any "descendants" of such persons, provided they have "one-sixteenth (1/16) or more degree of Indian blood of the Band;" and others "adopted" by the Pala Band

with BIA approval. ER 361 (Art. 2.A). The Articles created two governing bodies: (1) the "General Council," composed of all members 18 years of age or older, and (2) an "Executive Committee," consisting of an elected Tribal Chairperson and five other elected officers. ER 362 (Art. 3). Among other enumerated powers, the Articles gave the General Council power to "enact ordinances, consistent with [the] Articles of Association, [to] govern[] future membership, loss of membership and adoption of members." ER 364 (Art. 6.A(3)).

2. 1961 Membership Ordinance

In 1961, the Pala General Council adopted the Pala Band's first membership ordinance (the "1961 Ordinance"). ER 380-83. The 1961 Ordinance directed the Pala Executive Committee to review each membership application and submit a report and recommendation for decision by the BIA Area Director. ER 381 (§§ 3-4). If the Area Director denied any application, the applicant could appeal to the Commissioner of Indian Affairs and ultimately to the Secretary, whose decision would be "final and conclusive." ER 382 (§ 5). The 1961 Ordinance also directed the Executive Committee to maintain the membership roll, including by "correcting dates of birth, degree of Indian blood, family relationships, etc.," but stated that these "corrections" must be "supported by satisfactory evidence" and "submitted to the Area Director for approval." *Id.* (§ 6). In October 1961, the BIA

Area Director approved the 1961 Ordinance, thus accepting the federal role stated therein.[5] ER 383.

3. Pala Constitution

In December 1994, the Pala Election Committee advised the Superintendent of the Southern California Agency that the Pala had voted at their November 1994 tribal elections, by a vote of 131 in favor and 65 opposed, to adopt a new tribal constitution. ER 385. The constitution retained the two governing bodies, the General Council and the Executive Committee. ER 391-98 (Art. III, V), and the preexisting membership criteria. ER 390 (Art. II, § 1); *see also* ER 361 (Articles) (Art. 2). Among other changes, however, the constitution gave the Executive Committee – as opposed to the General Council – authority "to amend and/or replace [the] existing Enrollment Ordinance with an Ordinance [or ordinances] governing adoption, loss of membership, disenrollment, and future membership, provided that such ordinances are in compliance with this Constitution." ER 391 (Art. II, § 5).

In April 1995, the Superintendent acknowledged receipt of the constitution, but advised the Pala Chairman that it constituted an amendment to the Articles of

[5] The Articles of Association did not require BIA approval of ordinances or BIA involvement in enrollment decisions. *See* ER 361-64.

Association, requiring BIA approval. SER 51.[6] The Superintendent then forwarded the constitution to the Sacramento Area Office. ER 387. In June 1996, the Area Director wrote the Pala Chairman recommending certain changes, not affecting membership or the power to enact membership ordinances. SER 38-44. The Southern California Agency thereafter worked with the Pala Band to prepare a revised document.[7] SER 34.

Like the 1994 version, the 1997 constitution (hereinafter, the "Pala Constitution") provided that it would "become effective immediately after its approval by a majority vote of the voters voting in a duly-called election at which this Constitution is approved by the Bureau of Indian Affairs." ER 399 (Art. IX, § 1). At a special meeting on November 19, 1997, the Pala General Council "adopt[ed]" the Pala Constitution via Resolution 97-36. ER 73, 401. The Resolution referenced the 1994 tribal election vote to "revise the Pala Tribal Articles of Association into the Pala Tribal Constitution," ER 401, and declared the Pala Band's intention, exercising its "inherent rights as a sovereign, federally-

[6] Simultaneously with this brief, the Federal Defendants/Appellees have filed a Motion for Leave to Supplement the Record on Appeal to disclose certain BIA correspondence pertinent to matters on appeal that was inadvertently left out of the administrative record compiled for the district-court proceedings.

[7] Changes to the 1994 version are denoted in the Pala Constitution by underlining. *See* ER 389-99 (Pala Constitution); *see also* SER 35 (explaining underlining).

recognized tribe," to "hereby adopt the Pala Tribal Constitution to supersede the Articles of Association." ER 401.

Shortly thereafter, the Superintendent forwarded Resolution 97-36 and the Pala Constitution to the Area Director. ER 403. The Sacramento Area Office referred the matter to the Pacific Regional Office. In December 1999, the Regional Director wrote the Pala Chairman with additional recommended changes. SER 28-29. Based on an opinion by the Department of the Interior's Regional Solicitor (regarding a different non-IRA tribe), the Regional Director advised the Pala Chairman that BIA was "not required" to "review and approv[e]" the Pala tribal constitution. SER 29. Noting that the "Pala General Council had already adopted the constitution by resolution" in November 1997, the Regional Director added, however, that, "if the Tribe decide[d] to incorporate [the Region's] recommendations and changes and re-submit the constitution," the Pacific Region would provide approval, "retroactive to" the date of Resolution 97-36. *Id.*

On July 18, 2000, the Pala Chairman wrote the Superintendent, stating that the Pala Band "decided *not* to incorporate [the Pacific Region's] comments," but nonetheless "would like to have [the Pala Constitution] approved immediately." SER 24. On July 28, 2000, the Regional Director issued a "Certificate of Approval," stating that the "Constitution of the Pala Band of Mission Indians is hereby approved retroactive to the date of adoption on November 12, 1997;

PROVIDED, that nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal law." ER 404; *see also* ER 405 (letter forwarding Certificate of Approval).

4. 2009 Enrollment Ordinance

Pursuant to authority under the Pala Constitution, the Executive Committee adopted a new enrollment ordinance in July 2009. ER 413-422. In a prefatory paragraph, the Executive Committee stated that it "[did] not intend to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the membership roll of the Pala Band." ER 414. But the 2009 Ordinance gave the Executive Committee authority to remove an approved member from the tribal roll "[s]hould the Executive Committee subsequently find that an applicant . . . misrepresented or omitted facts that might have made him/her ineligible for enrollment." ER 418-19 (§ 6.A).

The 2009 Ordinance also reclaimed the Pala Band's authority to make final enrollment decisions. The 2009 Ordinance directs the Executive Committee to submit any membership application to BIA for a "*recommendation* based on a review of [BIA] records," ER 417 (§ 5.A) (emphasis added), and gives any person whose application is denied, or who is disenrolled, a right to appeal to the Regional Director for a "*recommendation* to the Executive Committee." ER 419 (§ 8.A)

(emphasis added). Under the 2009 Ordinance, "[t]he decision of the Executive Committee shall be final." ER 420 (§ 8.A).

D. Pala Gaming

Congress enacted the Indian Gaming Regulatory Act ("IGRA") in 1988 to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 966 (9th Cir. 2008) (quoting 25 U.S.C. § 2702(1)); s*ee also In re Indian Gaming Related Cases*, 331 F.3d 1094, 1095-97 (9th Cir. 2003). Under IGRA, Class III (casino-style) gaming is permissible if: (1) the gaming is conducted under a tribal ordinance that meets specified statutory requirements and has been approved by the National Indian Gaming Commission ("NIGC"), 25 U.S.C. § 2710(d)(1)(A); (2) the gaming is located in a State that otherwise permits such gaming, *id.* § 2710(d)(1)(B); and (3) the gaming is conducted in "conformance" with a "Tribal-state compact" between the tribe and the State where the gaming will occur. *Id.* § 2710(d)(1)(C).

IGRA also limits the use of tribal gaming revenues to specified purposes, including to fund tribal government and to provide for the "general welfare of the . . . tribe and its members." *Id.* §§ 2710(b)(2)(B), (d)(2)(A). Tribes may make per capita payments from gaming revenues only when such payments are made under

a revenue-allocation plan approved by BIA. *Id.* § 2710(b)(3)(B); 25 C.F.R. §§ 290.2, 290.5, 290.6.

The Pala Band conducts Class III gaming on its reservation, under a compact with the State of California[8] and a tribal ordinance approved by the NIGC.[9] The Pala Band makes per capita payments to members under a BIA-approved revenue allocation plan. IGRA and IGRA regulations, however, do not give BIA direct involvement in the handling of gaming revenue, in making per capita payments, or in supervising these activities. *Cf.* 25 C.F.R. § 290.23 (directing tribes to establish forum for resolving "disputes arising from the allocation of net gaming revenue and the distribution of per capita payments"); *see also Smith v. Babbitt*, 100 F.3d 556, 558-59 (8th Cir. 1996) (regulation governing revenue allocation plans provide no cause of action for resolving membership dispute).

E. Descendants of Margarita Britten

1. Initial Eligibility Dispute

In 1913, as part of its allotment obligations under the Mission Indian Relief Act, *see generally Arenas v. United States*, 322 U.S. 419, 421-22 (1944) (describing statute), BIA prepared a "Pala Allotment Roll." *See* ER 151. This handwritten roll included the name of Margarita Britten, but did not include

[8] Available at: http://www.cgcc.ca.gov/?pageID=compacts.

[9] Available at: http://www.nigc.gov/Reading_Room.aspx.

information on Indian blood quantum. ER 224. Individual history cards from 1910 list Margarita's children as one half Cupa, suggesting that Margarita was full Cupa. *See* ER 429. It is undisputed that Margarita's mother was full Cupa. But the history cards do not name Margarita's father. *Id.* In a 1940 tribal census, BIA calculated the blood quantum for most of Margarita's descendants based on the understanding that Margarita was only half Cupa, because her father's identity was "unknown." *Id.*

In the early 1960s – as part of preparing the initial membership roll required under the Articles of Association, *see* ER 369 – BIA reconstructed the 1913 "base roll" using the 1913 roll and other BIA records. ER 429. On the reconstructed (typewritten) roll, Margarita Britten is listed as 4/4 Cupa and her children as 1/2 Cupa. However, someone later made pen-and-ink edits, changing those numbers, respectively, to 1/2 and 1/4. *Id.*

On February 22, 1984, the handwritten changes to the typewritten roll were raised at a meeting of the Pala General Council. *Id.* Meeting minutes reflect concerns by individual Pala members that federal agents had made changes without notice to the Pala Band. SER 11-12. The General Council voted – by a vote of 29 in favor and 25 opposed – to restore Margarita's designated blood quantum to full blood. *Id.*; ER 429. Based on this vote, various individuals who were denied enrollment (per the provisions of the 1961 Ordinance giving BIA final

say in enrollment decisions) appealed their membership denials to the Area Director. *See* SER 11. In a July 29, 1985 transmittal memorandum, Tom Dowell, then Superintendent of the Southern California Agency, recommended against enrolling the applicants on the basis of a General Council vote, citing insufficient evidence to establish the identify of Margarita Britten's father. *Id.*

2. Assistant Secretary's 1989 Decision

The issue of Margarita Britten's blood quantum was ultimately appealed to the Assistant Secretary. ER 428-430. In a May 1989 decision, the Assistant Secretary rejected Superintendent Dowell's recommendation and made a finding that Margarita Britten was full Cupa. *Id.* The Assistant Secretary relied on the 1910 history cards for Margarita's children (*supra*) and testimony from a 1921 probate hearing regarding the estate of Merced Nolasquez. ER 430. At that hearing, Carolina Nolasquez, Merced's daughter, testified that Merced and Margarita Britten shared the same father, a full-blood Indian. ER 429-430. In September 1989, following a protest from the Pala Chairperson, the Assistant Secretary reiterated his finding that Margarita Britten was full blood Cupa and that his decision was final per the 1961 Ordinance. ER 223-24.

3. 2011-2012 Disenrollment Decisions

Thereafter, more than 150 descendants of Margarita Britten who claimed a 1/16 Pala blood quantum traceable to Ms. Britten were enrolled in the Pala Band,

based on the Assistant Secretary's 1989 finding that Margarita was a full-blood Pala. ER 148. These persons were thereafter recognized as Pala Band members, including for purposes of per capita distributions of gaming revenues.

In June 2011, the Pala Executive Committee invoked authority under the 2009 Ordinance to revisit past applications and announced the disenrollment of eight of these Britten descendants. ER 211-12. As grounds, the Executive Committee cited Superintendent Powell's 1985 determination that there was insufficient evidence to establish Margarita Britten's father as a Pala Indian. ER 211; *see also* ER 324 (Pala Band's brief to Assistant Secretary). On February 3, 2012, the Executive Committee sent disenrollment notices to an additional 150 Britten descendants – including Tiffany L. Aguayo – declaring that each also was "no longer a member" of the Pala Band. *See, e.g.*, SER 14. All notices alerted the recipients of their right to appeal to the BIA Regional Director. *Id.*

F. Federal Administrative Review

1. Appeal to Regional Director

More than 100 persons appealed their disenrollment notices to the Regional Director. ER 148. In a February 24, 2012 decision with respect to the first group of eight (ER 257-58), the Regional Director found that, while the 2009 Ordinance "[did] not provide [BIA] with the authority to decide enrollment appeals," it did give BIA authority to "review and a make a recommendation." ER 257. Because

the Assistant Secretary, in 1989, had determined Margarita Britten to be a full-blood Cupa Indian, and because such decision was "final for the Department of the Interior," the Regional Director "recommend[ed]" that the Band "change its disenrollment decision" and leave the eight individuals on the Pala membership roll. ER 258.

On June 7, 2012, the Regional Director reiterated this recommendation with respect to the larger group of persons disenrolled in February 2012. ER 314. Noting again that BIA lacked authority "to decide enrollment appeals," the Regional Director determined that there was "no required federal action" on the appeal requests. *Id.* But citing the absence of "evidence . . . to support . . . disenrollment" of the Britten descendants, the Regional Director again recommended that the Band "continue to recognize the membership status of the [affected] individuals." *Id.* The Regional Director sent the recommendation to counsel for the disenrolled members, *id.*, and to the Pala Chairman. ER313.

2. Appeal to Assistant Secretary

Two groups of disenrolled members – Tiffany Aguayo *et al.* (the Aguayo Plaintiffs in this appeal) and Gina Howard *et al.* – administratively appealed the Regional Director's June 7, 2012 decision to the Interior Board of Indian Appeals and to the Assistant Secretary. After the IBIA determined that it lacked jurisdiction, the Assistant Secretary consolidated the appeals for briefing and

resolution. ER 148-49. In their brief, the Aguayo Plaintiffs asked the Assistant Secretary to hold: (1) that the Pala Constitution was never ratified in a proper tribal election and therefore that the 1961 Ordinance still "controls" membership decisions; (2) that the Assistant Secretary's 1989 finding on Margarita Britten's blood quantum was "final," and (3) that the Executive Committee acted contrary to the terms of the 2009 Ordinance by revisiting membership decisions made prior to the ordinance's adoption. ER 170-71. The Aguayo Plaintiffs asked the Assistant Secretary to issue a "declaratory relief order" advising the Pala Band that the "Aguayo [Plaintiffs] remain on the federally maintained roll and are federally recognized tribal members" and to refer "IGRA violations" to the NIGC. ER 184.

3. Assistant Secretary's Decision

The Assistant Secretary denied the requested relief by decision memo dated June 12, 2013. ER 147-169. The Assistant Secretary found that the 2007 Constitution is the Pala Band's "governing document" because any challenge to the Regional Director's July 28, 2000 approval of the Pala Constitution was time-barred under the six-year statute of limitations (28 U.S.C. § 2401(a)), ER 158, and because it is generally inappropriate for the Department to "intervene in internal tribal disputes or procedural matters." ER 159. The Assistant Secretary also observed that the Pala Constitution did not define the type of election required for ratification and that the Pala Band had previously amended the Articles of

Association, according to its terms, via majority vote at General Council meetings. ER 159-161. In addition, the Assistant Secretary found that, even if the Pala Constitution required a special referendum election (as opposed to a meeting vote) for its ratification, "an election occurred in 1994." ER 160.

With respect to the Executive Committee's interpretation of the 2009 Ordinance, the Assistant Secretary noted that there is no federal statute specifically authorizing Department officials to intervene in disputes over the application of tribal law, ER 163-65, and, in any event, that the operative terms of the 2009 Ordinance expressly gave the Executive Committee authority to revisit past applications, notwithstanding the prefatory language disclaiming an intent to alter the membership status of already enrolled persons. ER 162. As for res judicata, the Assistant Secretary observed that the Regional Director's recommendation adhered to the 1989 finding regarding Margarita Britten's blood quantum and that the estoppel argument was properly directed toward the Pala Band. ER 164. The Assistant Secretary concluded that the Department had "no authority under Federal or tribal law to decide enrollment issues for the Band." ER 169.

Finally, in the course of resolving miscellaneous procedural matters, *see* ER 165-69, the Assistant Secretary declined to add, "as named parties" to the administrative appeal, two minors not named in the Regional Director's decisions. ER 166-67

G. District-Court Proceedings

The Aguayo Plaintiffs (65 persons) initiated the present action on June 19, 2013.[10] ER 34, 37. In their complaint (ER 34-54), the Aguayo Plaintiffs asked the district court to "set aside" four determinations made (or allegedly made) in the Assistant Secretary's June 12, 2013 decision: (1) the determination that the statute of limitations on any challenge to the approval of the Pala Constitution "began to run" on the date of approval in July 2000 (ER 44-45); (2) the determination that the "Pala Band used the terms 'elections' and 'meetings' interchangeably" in its governing documents (ER 46-50); (3) the determination that the 2009 Ordinance applies to persons already enrolled on the date of the ordinance's adoption (ER 50-51); and (4) the determination that two minors had not appealed their disenrollment to the Regional Director (and thus were not properly parties to the appeal to the Assistant Secretary). ER 51-52.

The parties filed cross-motions for summary judgment. *See* ER 2. On November 18, 2013, the district court issued a memorandum and order holding that the Assistant Secretary did not act arbitrarily and capriciously with respect to any of the four challenged determinations. ER 10-32. The district court issued its final judgment on the same date. ER 137-39.

[10] The Aguayo Plaintiffs filed two earlier complaints, both dismissed in light of the continuing administrative processes. *See* ER 36 (complaint) (noting earlier cases).

SUMMARY OF ARGUMENT

The Assistant Secretary's decision on appeal from the Regional Director's recommendation was not agency action. It was a decision not to act, i.e., a decision not to provide declaratory relief, as requested by the Aguayo Plaintiffs, to remedy the Pala Executive Committee's alleged violations of Pala tribal law. The district court lacked subject-matter jurisdiction to review this inaction because there is no federal jurisdiction to review tribal-law claims against tribal officials, and because the Assistant Secretary's authority (if any) to enforce such violations is committed to agency discretion by law. It is true that Pala tribal law (the 1961 Ordinance) historically gave the Assistant Secretary a final say over individual membership applications. But the Pala Executive Committee acted pursuant to the 2009 Ordinance, which superseded the 1961 Ordinance. The Assistant Secretary cannot declare the 1961 Ordinance applicable without finding the Pala Constitution void due to (alleged) violations of tribal law. These are matters for the Pala Band. The Aguayo Plaintiffs do not contend that the Pala Constitution was adopted in violation of federal law, and no federal statute provides BIA with any specific authority or duty to enforce the alleged tribal-law violations.

Assuming, *arguendo*, that the Secretary's decision to acknowledge the Pala Constitution is subject to review, it should be upheld as reasonable. The Aguayo Plaintiffs asked the Assistant Secretary to disregard the Pala Constitution and the

2009 Ordinance adopted under the Pala Constitution – and thus continue to recognize the 1961 Ordinance – on the grounds that the 1997 General Council resolution adopting the constitution was not a referendum election, as (allegedly) required under the constitution's terms. The Assistant Secretary reasonably declined to so declare for two reasons.

First, BIA expressly approved the Pala Constitution in 2000, retroactive to the 1997 date of the General Council resolution. Because a judicial challenge to the 2000 approval decision would be barred by the statute of limitations, the Assistant Secretary reasonably determined that the Aguayo Plaintiffs' present challenge to the constitution's adoption came too late. The Aguayo Plaintiffs' challenge to the adoption and approval of the Pala Constitution is a procedural challenge that accrued on the date of approval or the date the Aguayo Plaintiffs had constructive notice that the Pala Constitution was in effect. The Assistant Secretary reasonably determined that a 2003 General Council vote to distribute the constitution to each member upon turning 18, and a 2003 election to amend the constitution, provided constructive notice of the constitution's effectiveness, even if earlier notice was somehow lacking.

Second, the Assistant Secretary also reasonably concluded that the adoption of the Pala Constitution complied with Pala law. The Pala electorate voted in favor of the Pala Constitution at tribal elections in 1994. Although there were changes to

the text of the constitution (based on BIA recommendations) after the 1994 vote, the Pala Constitution does not require any specific form of election for ratification and the Pala Band adopted and amended its previous Articles of Incorporation by majority vote at General Council meetings. Accordingly, the Pala General Council was free to determine, via the 1997 meeting vote, that the meeting vote coupled with the 1994 election were sufficient for ratification purposes. The Assistant Secretary did not act arbitrarily in deferring to that determination, given the deference owned to tribes in the application and interpretation of tribal law.

Having reasonably concluded that the Pala Constitution and 2009 Ordinance were in effect, the Assistant Secretary did not act arbitrarily in declining to take action to remedy the Pala Executive Committee's alleged misapplication of the 2009 Ordinance and failure to give res judicata effect to the Assistant Secretary's 1989 finding on Margarita Britten's Indian blood quantum. The scope of the 2009 Ordinance and the preclusive effect to be given to the Assistant Secretary's decisions under the 1961 Ordinance are both questions of Pala tribal law. Because federal law gives the BIA and Assistant Secretary no specific authority or duty to intervene in tribal membership disputes, the Assistant Secretary reasonably left the disenrollment dispute to tribal processes.

STANDARD OF REVIEW

This Court determines de novo if the Assistant Secretary's decision is subject to judicial review under the APA, *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1082 (9th Cir. 2014), and, if so, whether summary judgment is appropriate on the merits. *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 903 (9th Cir. 2014). Under the APA's review standard, the Assistant Secretary's decision must be affirmed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting 5 U.S.C. § 706(2)(A)).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE ASSISTANT SECRETARY'S DECISION NOT TO ENGAGE IN THE PALA MEMBERSHIP DISPUTE.

The principal effect of the Assistant Secretary's June 12, 2013 decision was to affirm the Regional Director's recommendation to the Pala Executive Committee that the Pala Band retain the Aguayo Plaintiffs on its membership roll. ER 169. The Aguayo Plaintiffs do not and cannot challenge this *recommendation* because they are not aggrieved by it, *see Shell Gulf of Mexico, Inc. v. Center for Biological Diversity, Inc.*, 771 F.3d 632, 636 (9th Cir. 2014), and because it is not "final agency action" "from which legal consequences will flow." *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014).

The Aguayo Plaintiffs instead challenge the Assistant Secretary's decision to deny additional "declaratory relief." ER 189. In their administrative appeal, the Aguayo Plaintiffs argued that the Regional Director erred in providing a recommendation only, and that the Aguayo Plaintiffs were entitled to an order declaring the Pala Band's disenrollment actions to be void. *Id.* The Aguayo Plaintiffs filed the present APA action upon the Assistant Secretary's refusal to provide the demanded declaratory relief. In their complaint, the Aguayo Plaintiffs asked the district court to "set aside" specified "decisions" within the Assistant Secretary's June 12, 2013 decision memo. *See* ER 42, 45-52 (citing 5 U.S.C. § 706(2)(A)). But the challenged decisions are not themselves agency actions; they are reasons provided by the Assistant Secretary for not granting the requested declaratory relief. *See* pp. 20-21, *supra*. Thus, although the Aguayo Plaintiffs did not specifically cite 5 U.S.C. § 706(1), their complaint is properly construed as an action to "compel agency action [allegedly] unlawfully withheld." *Id.* The district court lacked jurisdiction to hear that claim for two reasons.[11]

[11] Although the district court declined to dismiss for lack of jurisdiction (ER 10, n. 10), "defects in subject-matter jurisdiction 'may be raised at any time,'" *MTB Enterprises, Inc. v. ADC Venture 2011-2, LLC*, 780 F.3d 1256, 1258 (9th Cir. 2015) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011)), and this Court may affirm on any ground supported by the record. *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 756 (9th Cir. 2015).

A. Federal Courts Lack Jurisdiction to Adjudicate Tribal Membership Disputes.

First, federal courts lack subject matter jurisdiction to hear claims against tribes for violations of tribal law. "A Tribe's right to define its own membership for tribal purposes," in particular, "has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Respecting that sovereign right, this Court has held that federal courts have no jurisdiction to adjudicate tribal membership disputes. *Lewis v. Norton*, 424 F.3d 959, 961-63 (9th Cir. 2005). In *Lewis*, a group of plaintiffs – much like the Aguayo Plaintiffs – sought declaratory and injunctive relief against federal officials to enforce the plaintiffs' alleged right to tribal enrollment in the Table Mountain Rancheria and a share of revenue from that tribe's casino. *Id*. at 960. While "deeply troubl[ed]" by the tribe's refusal to acknowledge the plaintiffs' "strong" membership claims, this Court affirmed the district court's dismissal for lack of subject-matter jurisdiction. *Id.* at 960, 963.

In so doing, this Court cited the tribe's sovereign immunity and the absence of any relevant statutory waiver (abrogation) of such immunity or other statutory basis for suit. *Id.* at 961-63. This Court observed that the narrow waivers of tribal sovereign immunity in IGRA do not cover membership disputes, and that IGRA regulations leave disputes concerning the allocation of gaming revenues to tribal

forums. *Id.* at 962-63 (citing 25 C.F.R. § 290.23). This Court further noted that, while the Indian Civil Rights Act ("ICRA") prohibits tribes from "exercising powers of self-government" in any manner that "den[ies] the equal protection of its laws" or "deprive[s] any person of liberty or property without due process of law," 25 U.S.C. § 1302(a)(8), ICRA does not provide a federal cause of action for declaratory or injunctive relief against tribes or tribal officials.[12] *Lewis*, 424 F.3d at 961 (citing *Santa Clara Pueblo*, 436 U.S. at 72).

After finding no federal cause of action for adjudicating disputed membership claims against tribes or tribal officials, *id.*, this Court determined that there also is no such action against the "agencies responsible for the regulation of tribal affairs." *Id.* at 963. This Court reasoned that an action against federal officials would constitute an inappropriate "end run" around tribal sovereign immunity, because "tribes, not the federal government, retain authority to determine tribal membership." *Id.* (quoting *Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y*, 163 F.3d 1150, 1159-60 (10th Cir.1998)).

To be sure, *Lewis* did not involve a BIA recommendation or an appeal decision affirming a BIA recommendation. But, as just explained, such decisions are not agency "actions" for APA purposes. *See Columbia Riverkeeper*, 761 F.3d

[12] ICRA provides an express remedy only via writ of *habeas corpus*. *See* 25 U.S.C. § 1303.

at 1094. Thus, as in *Lewis*, the Aguayo Plaintiffs seek to compel a federal enforcement action. The Aguayo Plaintiffs seek such a result on the grounds that, unlike the tribe in *Lewis* (or most tribes), the Pala Band did not "retain authority to determine tribal membership," *cf. Lewis*, 424 F.3d at 963, but instead assigned such authority, via the 1961 Ordinance, to federal officials. The Aguayo Plaintiffs cite *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013) (*Brief* at 23), a post-*Lewis* case, in which this Court held that a disenrollment decision under a tribal ordinance similar to the Pala Band's 1961 Ordinance was subject to APA review.

Alto, however, is not on point. *Alto* involved a disenrollment action by the Assistant Secretary, *id.* at 1117, where the Assistant Secretary's authority to make a final membership determination under tribal law was undisputed. *Id.* at 1127. In that context, this Court determined that judicial review of the Assistant Secretary's action would not implicate review of tribal actions and would not "undermine" the tribe's exercise of sovereign authority.[13] *Id.* at 1129.

[13] *Alto* specifically held that the tribe was not a "necessary" party, under Fed. R. Civ. P. 19, to the action to set aside the federal disenrollment decision. *Id.* at 1125-29. *Alto* did not address whether a tribe would be deemed necessary, under Rule 19, to a suit to compel agency action to enforce tribal law. This Court need not address that issue here, however, because there is no law compelling agency action. Rather, as explained *infra* (pp. 31-35), the Assistant Secretary's authority (if any) to intervene in the Pala disenrollment dispute is committed to agency discretion by law.

In contrast, the Aguayo Plaintiffs challenge disenrollment actions by tribal officials (the Pala Executive Committee) under a 2009 Ordinance that gives the Regional Director an advisory role only. While the Aguayo Plaintiffs insist that the 2009 Ordinance is "void" (due to procedural errors by the Pala Band in ratifying of the Pala Constitution), and that the 2009 Ordinance was misapplied, these claims assert violations of tribal law by tribal officials in a context where no law (tribal or federal) specifically authorizes federal-agency involvement or oversight. Unable to bring a direct action to enforce tribal law against the Pala Band or the Pala officials, the Aguayo Plaintiffs petitioned for agency intervention and then filed the present suit to compel agency enforcement against the Pala Band. This maneuver is precisely the sort of "end run" that this Court disallowed in *Lewis*. *See* 424 F.3d at 963.

B. Any Federal Authority to Intervene in the Pala Membership Dispute Is Committed to Agency Discretion by Law.

Second, whether or not the Pala Band's sovereign immunity precludes litigation of the tribal-law claims in this case, the Assistant Secretary's decision not to intervene in the Pala membership dispute is non-reviewable for lack of any governing standard. The APA does not apply to actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Because the APA "embodies" a "basic presumption of judicial review," *Pinnacle Armor, Inc. v. United States*, 648 F.3d

708, 718 (9th Cir. 2011) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–41 (1967)), this exception is narrowly construed. *Id.* at 719; *see also Drake's Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1081 (9th Cir. 2014). Agency action is not unreviewable merely because the relevant statute or statutes leave the agency with discretionary authority. *Pinnacle Armor*, 648 F.3d at 719.

Nonetheless, § 701(a)(2) will preclude judicial review where there is "no law to apply," *id.* (quoting *Webster v. Doe*, 486 U.S. 592, 596 (1988)), *i.e.*, where there is "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Moreover, an agency's decision not to exercise enforcement authority "is a decision generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831.

Here, the Assistant Secretary ultimately concluded that he had "no authority under Federal or tribal law to decide enrollment issues for the Band." ER 169. When an agency declines to act "based solely on the belief that it lacks jurisdiction," review of the threshold jurisdictional question might be available, even though the agency would possess "absolute discretion" in the exercise of any authority the agency is found to possess. *Heckler*, 470 U.S. at 833 n.4; *see also Drakes Bay Oysters*, 747 F.3d at 1083 (court may review "whether the Secretary misunderstood his authority" under federal statute).

Viewed in context, however, the Assistant Secretary's conclusion was not a declaration of a complete absence of statutory authority. As this case demonstrates, to aid tribes in organizing, and pursuant to the Assistant Secretary's general authority over tribal affairs (25 U.S.C. § 2), BIA has, in various cases, negotiated for or accepted the power to make enrollment decisions. *See also, e.g.*, *Alto*, 738 F.3d at 1116 (noting federal role in membership decisions for San Pasqual Band). As part of the Pala Band's first enrollment ordinance in 1961, BIA agreed to exercise definitive authority over Pala enrollment applications. ER 381-382 (§§ 4, 5), ER 383 (approval). The principal issue in this case was whether the Federal Defendants had any specific authority or duty to continue to exercise this historic role (per the 1961 Ordinance) – despite changes in tribal law made by the Pala Constitution and 2009 Ordinance – as a remedy for the alleged procedural irregularities in the ratification of the Pala Constitution. In finding no specific authority or duty, the Assistant Secretary did not merely review federal and tribal law, he determined the standards to be applied to review actions by Pala tribal officials in their adoption and execution of tribal law and their exercise of self-government. *See*, *e.g.*, ER 159, 161.

When an agency possesses and exercises policy judgment in declining to take enforcement action, there is a presumption of non-reviewability. *Heckler*, 470 U.S. at 831; *Paulsen v. CNF, Inc.*, 559 F.3d 1069, 1085 (9th Cir. 2009); *Pacific*

Gas & Elec. Co. v. F.E.R.C., 464 F.3d 861, 867 (9th Cir. 2006). This presumption is overcome only where a "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Paulsen*, 559 F.3d at 1085-86 (quoting *Heckler*, 470 U.S. at 832-33).

The only specific standards identified by the Aguayo Plaintiffs are standards imposed by tribal law. In *Alto*, this Court reasoned that tribal-law standards were sufficient to enable review of the Assistant Secretary's disenrollment action – despite the absence of any controlling federal law – because, when acting as trier of fact under tribal law, the Assistant Secretary was bound to "apply the tribe's . . . enrollment criteria." 738 F.3d at 1124.

The Assistant Secretary in the present case, however, took no affirmative action controlled by tribal law. Rather, he *declined* to take enforcement action in circumstances where the Pala Band's compliance with tribal law was only a potentially relevant factor. For example, a determination that the Pala Band failed to ratify the Pala Constitution in conformity with tribal law would not necessarily require a withdrawal of federal approval. Similarly, a determination that BIA erred in approving the Pala Constitution would not necessarily dictate the vacatur of disenrollment actions under the 2009 Ordinance. There is no law on these questions.

Indeed, there are no federal statutes dictating when the Assistant Secretary may or must intervene in membership or organizational disputes involving non-IRA tribes, nor any statute dictating the review standard to be applied when tribal officials are alleged to have acted in contravention of tribal law. Although the Assistant Secretary's generic authority, per 25 U.S.C. § 2, to "manage[] . . . all Indian affairs," includes discretionary authority to review tribal governance and enrollment decisions in certain limited circumstances – *e.g.*, when necessary for carrying out other duties, such as distributing judgment trust funds – the statute provides no meaningful guidelines for exercising such authority in the present case.

II. THE ASSISTANT SECRETARY REASONABLY DECLINED TO INTERVENE IN THE ENROLLMENT DISPUTE.

If the absence of federal claims and governing standards does not preclude judicial review, it must inform this Court's review. The Assistant Secretary reasonably declined to intervene in the Pala membership dispute precisely because he had no specific statutory authority or duty to do so.

A. The Assistant Secretary Reasonably Declined to Revisit Approval of the Pala Band's Constitution

When the Pala Executive Committee disenrolled the Aguayo Plaintiffs in 2012, the Committee invoked the Pala Band's 2009 Ordinance, which was adopted

under authority of the Pala Constitution. *See* pp. 10-14, *supra*. The Aguayo Plaintiffs asked the Assistant Secretary to void the 2009 Ordinance and subsequent disenrollments, on the theory that the Pala Constitution was never properly ratified under tribal law. Whether or not a timely challenge to the Pala Constitution would have suggested federal intervention on the disenrollments, the Assistant Secretary reasonably determined that the challenge here came too late.

Upon the request of the Pala Band, the Regional Director expressly "approved" the Pala Constitution in July 2000. ER 404. Although the Regional Director did not then specifically confirm the Pala Band's compliance with ratification procedures in tribal law, *see* SER 28-29 (review of substantive terms), the Regional Director approved the Pala Constitution "retroactive" to the date of the General Council Resolution 97-36. *See* ER 404 (approval decision), ER 401 (resolution). This approval decision amounted to an implicit determination that any ratification requirements (in addition to BIA approval) had been satisfied.

As the Assistant Secretary observed (ER 158), by the time of the Aguayo Plaintiffs' disenrollment appeal, any judicial challenge to the BIA's July 2000 approval of the Pala Constitution would have been time-barred by the 6-year statute of limitations in 28 U.S.C. § 2401(a). ER 158. Although the statute of limitations does not apply to administrative proceedings *per se*, *see* 28 U.S.C. § 2401(a) (barring "civil actions"), the Assistant Secretary cannot be seen to have

acted arbitrarily in declining to reconsider an administrative approval that no longer was subject to challenge in the courts. *See* ER 158-59. The approval of a tribal constitution affects all subsequent acts of tribal self-governance, implicating significant reliance and finality interests. In contrast, the Aguayo Plaintiffs raise no persuasive theory (*Brief* at 27-29) for why their challenge to the Pala Constitution's approval should not be deemed time-barred.

First, although the Aguayo Plaintiffs claim to have had no notice of BIA's approval decision (*Brief* at 27-28), they fail to acknowledge, much less rebut, the Assistant Secretary's findings on this point. The Assistant Secretary correctly observed that the limitations period runs from the date the "plaintiffs knew or *should have known* the facts upon which their claims are based." *Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, N.D. & S.D. v. United States*, 895 F.2d 588, 594 (9th Cir. 1990) (emphasis added); *Ute Distribution v. Secretary of the Interior*, 584 F.3d 1275, 1281 (10th Cir. 2009). Although the July 2000 approval letter was not published, *see* ER 404-05, the Assistant Secretary found that the applicability of the Pala Constitution was made known through other actions.

Specifically, in 2003, tribal leaders offered amendments to the Pala Constitution that were approved by the Pala Band, and, in the same year, the Pala General Council passed a motion directing that the constitution be distributed to all

members when they reach the age of 18. *See* ER 158.[14] The Assistant Secretary reasonably found that such actions – along with the text of the Pala Constitution expressly requiring BIA approval – provided constructive notice that BIA approval had been obtained. ER 158.

Second, the Aguayo Plaintiffs err (*Brief* at 28) in asserting that there is "no prescribed statutory time" for challenging an allegedly "void" constitution. The Aguayo Plaintiffs rely on *Cabazon Band of Mission Indians v. City of Indio*, 694 F.2d 634 (9th Cir. 1982), which involved an attempt by a city to annex land on a tribal reservation. *Id.* at 635. The city argued that the annexation became valid, despite the city's failure to obtain required federal approval, upon the running of the limitations period for filing suit prescribed by California law. *Id.* at 636-38. This Court disagreed, principally on preemption grounds, holding that "a state statute of limitations may not bar the assertion of federal Indian rights." *Id.* at 638.

This Court also observed that the state statute of limitations did not apply because the "attempted [unlawful] annexation" was "void ab initio" under state

[14] Although he provided no record citation (ER 158), the Assistant Secretary evidently relied on a pleading filed by the Regional Solicitor (SER 8, n. 20), which cited exhibits attached to a motion filed by the Federal Defendants in earlier district court litigation brought by the Aguayo Plaintiffs. *See* n. 9, *supra.* Those exhibits are minutes from Pala General Council meetings in June 2003 and July 2004. SER 16-18. The Federal Defendants have moved to include the exhibits in the record on appeal in this case. *See* note 4, *supra*.

law. *Id.* But this holding was unique to the California statute at issue. This Court relied on *People ex rel. Forde v. Town of Corte Madera*, *id.*, which held that a city's attempt to annex lands already annexed by another city – an act void under California law – could not be rendered valid by the running of the state statute of limitations. *Corte Madera*, 251 P.2d 988, 991-992 (Cal. App. 1st Dist. 1952). This interpretation of the conflicting California statutes was applicable by analogy in *Cabazon Band*. 694 F.2d at 638.

But *Corte Madera* has no relevance here. The Aguayo Plaintiffs challenge the Federal Defendant's decision to recognize a tribal constitution that allegedly was not properly ratified under tribal law. Unlike in *Cabazon Band* or *Corte Madera*, there is no basis for interpreting the tribal-law requirement – the alleged need for a referendum election to bring the Pala Constitution into effect – as trumping the federal statute of limitations for challenging BIA's approval decision.

Third, the Aguayo Plaintiffs also err in relying on *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991). *Wind River* holds that when an agency applies a rule or decision in a manner substantively "exceeding constitutional or statutory authority," the limitations period for the as-applied challenge runs from the "date of the adverse application [of the rule] to the challenger," and not from the date the rule is first adopted. *Id.* at 715. Citing this rule, the Aguayo Plaintiffs argue (*Brief* at 28-29) that the statute of limitations did

not begin to run in the present case until June 7, 2012, when the Regional Director recognized the validity of the 2009 Ordinance and first applied the allegedly void Pala Constitution against their interests.

But the Aguayo Plaintiffs do not contend that any substantive provision of the Pala Constitution is contrary to federal or tribal law. Rather, the Aguayo Plaintiffs assert that the Pala Constitution is void due to noncompliance with a tribal-law procedural requirement, *i.e.*, the alleged need for a referendum election. As this Court noted in *Wind River*, when a plaintiff brings a purely procedural challenge to the adoption of a rule, the limitations period runs from the date of the rule's adoption. 946 F.3d at 715.

The Aguayo Plaintiffs' contention (*Brief* at 29) that they lacked an "injury in fact" in relation to the Pala Constitution until 2012 proves too much. Because constitutional standing is not a prerequisite to the running of the limitations period, *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1365 (9th Cir, 1990); *see also Garcia v. Brockway*, 526 F.3d 456, 464 (9th Cir. 2008), the professed lack of injury prior to the 2012 disenrollment decision serves only to illustrate the tenuous connection between the Aguayo Plaintiffs' disenrollment and their constitutional claims.

The Aguayo Plaintiffs do not seek to set aside any substantive provision of the Constitution or the 2009 Ordinance as contrary to federal law. They seek to

void these documents solely as an expedient to cure the injury directly caused by the Executive Committee's alleged misapplication of the 2009 Ordinance and the failure of the Executive Committee to honor the Assistant Secretary's 1989 finding regarding Margarita Britten's blood quantum. *See* pp. 52-59, *infra*. In this context, and for the other reasons stated, the Assistant Secretary did not act arbitrarily in concluding that the Aguayo Plaintiffs' challenge to federal recognition of the Pala Constitution came too late.

B. The Record Sufficiently Demonstrates Tribal Ratification.

The Assistant Secretary also reasonably determined that the Pala Constitution was properly ratified. As noted (pp. 34-35, *supra*), there is no statute requiring BIA to refuse to recognize the Pala Constitution, based solely on a belated finding that tribal ratification procedures were not followed. But compliance with tribal law presumably would be relevant to federal recognition. In this light, the Assistant Secretary reasonably considered the Pala Band's ratification efforts and reasonably determined that tribal law was followed.

Two provisions of tribal law were at issue: (1) Art. 11 of the Articles of Association, which permitted the Articles to be amended "by a majority vote of the General Council," ER 367, and (2) Art. IX, § 1 of the Pala Constitution, which provided that the Constitution would "become effective immediately after its approval by a majority vote of the voters voting in a duly-called elections [*sic*]. . ."

ER 399. The Aguayo Plaintiffs do not deny that the Articles could be amended by majority vote at a General Council meeting. The Aguayo Plaintiffs contend, however (*Brief* at 29-40), that the Pala Constitution required a referendum "election" that tribal leaders allegedly never held.

As explained (pp. 10-13, *supra*), the Pala Band ratified the Pala Constitution via General Council Resolution 97-36. *See* ER 401. The resolution begins with two "whereas" clauses, one invoking the Pala Band's "inherent powers" as a "federally recognized tribe," and the other referencing the Pala Band's vote, during the November 1994 "General Election of the Tribe" to "revise" the Articles into the constitution. *Id.*; *see also* ER 385 (certifying election results). The resolution then declares "NOW THEREFORE BE IT RESOLVED" that "effective the twelfth day of November 1997, the Pala Band of Mission Indians, exercising our inherent rights as a sovereign federally-recognized Tribe, do hereby adopt the Pala Tribal Constitution to supersede the Articles of Association . . . ." ER 401 (capitalization in original). All six members of the Pala Executive Committee certified by signature that the resolution was "passed at a duly call[ed] meeting of the Pala . . . General Council" by a vote of 27 for and 0 against, "with a quorum present."

The resolution manifests the Pala General Council's intention to "adopt" the Pala Constitution "effective" upon the Council's vote at the "duly call[ed]"

General Council "meeting . . . with a quorum present." *Id.* The resolution likewise reflects the General Council's understanding that it possessed authority to ratify the constitution in this manner, either through the meeting vote alone, or in combination with the referenced vote at the 1994 tribal elections. ER 401. The Assistant Secretary reasonably deferred to this tribal interpretation of tribal law.

1. The Pala Constitution Did Not Dictate Election Requirements.

The Aguayo Plaintiffs are mistaken in supposing (*Brief* at 29-31) that the "plain language" of the Pala Constitution required an election distinct from a General Council meeting vote. Art. IX, § 1 specifies only the need for "a majority vote of voters voting at a duly called election." ER 399. Because the Pala General Council includes the Pala Band's entire voting population, ER 362, 391, a tribal "election" to ratify the Pala Constitution reasonably could be held either at a General Council meeting, or under different election procedures (*e.g.*, with multiple polling places and absentee ballots). Either method could be consistent with the ordinary meaning of "election." The text of Art. IX, § 1 does not mandate any particular balloting procedures or election format. ER 399.

Nor do other provisions of the Constitution speak to the ratification requirements. The Pala Constitution prescribes distinct procedures for General Council "meetings," ER 393, and tribal "elections," ER 394, but the latter provisions cannot be seen to apply to the ratification election. Specifically, Art. V,

§ 3 of the Pala Constitution requires "secret ballot[s]" solely for "all elections *of Executive Committee members*." *Id.* (emphasis added). Likewise, while Article IV, § 1 requires "*all* nominations and elections" (emphasis added) to be conducted in accordance with an election ordinance establishing "polling places" and procedures for "absentee ballots," ER 394, the reference to "nominations and elections" again speaks to the elections of tribal officers. *Id.* (Art. V, § 3). Further, because the ratification of the Pala Constitution logically had to precede the adoption of any election ordinance per the Pala Constitution, the duty to conduct "*all* . . . elections" in accordance with such an ordinance (Article V, § 5) cannot plausibly apply to the ratification election.[15]

The only other language of the Pala Constitution that informs the meaning of the term "election" in Art. IX, § 1, is the language in Art. IX, § 2, addressing the requirements for "future amendments." That provision states that the Pala Constitution "may be amended [only] by a two-thirds (2/3) vote of the voting members of the Pala Band at an election duly-called for this purpose in which not less than half of the eligible members of the Pala Band cast their ballots." ER 399.

[15] While the Articles of Association also required elections to be conducted pursuant to an ordinance, ER 362 (Art. 4), the Articles could be amended by "majority vote of the General Council," ER 367 (Art. 11), an evident reference to General Council meeting vote. ER 365 (Art. 7). Thus, there was no preexisting ordinance governing the adoption or amendment of governance documents.

As the Assistant Secretary observed (ER 161), this language works *against* the Aguayo Plaintiffs. The Aguayo Plaintiffs argue (*Brief* at 31) that Resolution 97-36 was insufficient for ratification because the 27 "yes" votes (in the General Council vote of 27-0) did not amount to "a majority of the adult voting tribal members." But in stark contrast to Art. IX, § 2 (governing amendments), Art. IX, § 1 (governing the Constitution's effective date) contains no minimum participation requirement. When "'particular language'" is included "in one section of a statute but omit[ted] . . . in another,'" the courts presume that a "difference in meaning" is intended. *Loughrin v. United States*, 134 S.Ct. 2384, 2390 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). In sum, as the Assistant Secretary correctly determined, Resolution 97-36 did not contravene any express requirements of the Pala Constitution.

2. The Aguayo Plaintiffs' Failed to Timely Raise Concerns About Meeting Notice.

In addition to arguing that the General Council vote on Resolution 97-36 was not an "election" for purposes of Art. IX, § 1, the Aguayo Plaintiffs contend (*Brief* at 33) that the resolution is invalid because tribal leaders failed to provide sufficient notice of the meeting. The Articles of Association required General Council meetings to be "publicly noticed for fourteen (14) days." ER 365. According to tribal meeting minutes, there was "tribal announcement[]" at a

General Council meeting on November 12, 1997, of a special General Council meeting one week later on the "Articles of Association." ER 72. The Aguayo Plaintiffs argue (*Brief* at 33) that this announcement failed to provide fourteen days' notice and failed sufficiently to apprise tribal members of the intention to adopt a new constitution.

Parties appearing before an agency, however, must "alert" the agency "to their position and contentions." *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1081 (9th Cir. 2011) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)). In their administrative appeal, the Aguayo Plaintiffs failed to raise any concerns about meeting notice. ER 13-15. Thus, they cannot now contend that the Assistant Secretary acted arbitrarily in disregarding the alleged insufficiency of notice. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764–65 (2004).

In any event, the minutes do not convey the full substance of the announcement regarding the November 19, 1997 meeting and do not reveal whether notice was otherwise provided. ER 72. Given the deference accorded to tribal governments, the Assistant Secretary could not reasonably declare the Pala Constitution invalid, based solely on questions regarding the adequacy of meeting notice, which were raised on an incomplete record more than 15 years after the meeting occurred.

3. Resolution 97-36 Was Consistent with Tribal Custom and Practice.

The Assistant Secretary reasonably determined that Resolution 97-36 was consistent with tribal custom and practice. In their brief (pp. 35-38), the Aguayo Plaintiffs rely on declarations from Elsie Lucero, a retired BIA employee who had worked with the Pala Band on enrollment issues (ER 193-94), and King Freeman, a Pala member who previously served as chairman and in other Executive Committee offices (ER 55-59),[16] to show that that the Pala Band's custom and practice was to hold special elections – not meeting votes – for the adoption and amendment of governing documents.

As the Assistant Secretary recognized, however (ER 161), the only established practice at the time of the adoption of the Pala Constitution was the Pala Band's practice under the Articles of Association. Tribal records show that the Articles were first adopted (in 1959) and twice amended (in 1961 and 1973) by the General Council at "duly called general meeting[s]." ER 369, 375, 377. A 1976 amendment was adopted at a "duly called Referendum Election . . . at the Pala Tribal Hall," which could mean something other than a general meeting, but

[16] The Aguayo Plaintiffs submitted the Lucero declaration in their administrative appeal, but produced the Freeman declaration for the first time in district court. ER 14-15. To the extent the Freeman declaration asserts arguments or evidence not before the Assistant Secretary, it need not be considered. *See Northern Plains Resource Council*, 668 F.3d at 1081.

the balloting procedures employed at the election are not described. ER 378. As the Assistant Secretary reasonably determined (ER 159-160), this history is equivocal and does not support the proposition that the Pala Constitution *necessarily* required a ratification election different from the voting procedures the Band used for adopting and amending the Articles.

4. Resolution 97-36 Affirmed the 1994 Election Vote.

Moreover, as the Assistant Secretary observed (ER 160), even if the Pala Band's custom and practice was to hold elections for substantial changes to governing documents, that practice was followed in this case. Tribal records show that the Pala Band voted for the Pala Constitution, by a vote of 131 in favor and 65 opposed, during annual tribal elections in 1994. ER 385. When reaffirming and "adopting" the Pala Constitution (via Resolution 97-36) – after working with BIA to incorporate certain recommended changes – the Pala General Council specifically invoked the 1994 election. ER 401.

Disregarding the reference to the 1994 election and the BIA review that *preceded* the 1997 General Council vote, the Aguayo Plaintiffs' suppose (*Brief* at 31) that Resolution 97-36 was not a vote to ratify the Pala Constitution, but instead was a vote to send the Pala Constitution back to BIA for further review and recommendation, with a referendum election to follow. The Aguayo Plaintiffs suggest that the Pala leaders simply failed to follow up with a referendum election

after BIA approved the Pala Constitution (in July 2000). And the Aguayo Plaintiffs proffer two documents (*Brief* at 38) to show that Pala leaders (allegedly) did not believe the Pala Constitution to be in effect: (1) a 1999 tribal gaming ordinance stating that the Pala Band "is governed by Articles of Association approved by the Commissioner of Indian Affairs" (ER 217); and (2) a snapshot of the Band's website from February 2012 also stating that the Band "is organized under Articles of Association." (ER 355-56).

As already noted, however, Pala records show that the Pala Band amended the Pala Constitution in 2003, ER 158; SER 16-18, and that the Pala General Council voted, in the same year, to provide a copy of the Pala Constitution to all members upon their 18th birthday. ER 158, SER 16-18. These events belie the notion that tribal leaders believed the Articles of Association to then be in effect. The 1999 gaming ordinance (ER 217) came *before* BIA approval, and thus shows only that the General Council honored the BIA-approval requirement. The Pala Band's website, while inconsistent with tribal ratification and BIA approval of the Pala Constitution (*see* ER 355-56), cannot trump the unequivocal terms of a tribal resolution and the subsequent acts of tribal governance thereunder.

At bottom, the 1994 election vote lends support to the notion that the Pala Band had (or was developing) a practice to provide an election for substantial changes to governance documents. But the language of Resolution 97-36 also

shows that the General Council deemed the 1994 election, as affirmed by the 1997 General Council resolution, to be sufficient for ratification of the Pala Constitution under tribal law. Of course, *if* Art. IX, § 1 is strictly construed as requiring a referendum election on the final (1997) draft of the Pala Constitution, the expedient employed by the Pala General Council in Resolution 97-36 would have been insufficient under tribal law. But, as just explained (*supra*), the text of Art. IX, § 1 did not compel any particular election procedures and the only binding tribal law at the time of Resolution 97-36 was the provision of the Articles of Association, which allowed amendment by General Council vote. Accordingly, the General Council was free to determine that tribal-law ratification requirements were met.

5. The Ratification Procedures Were Sufficient for Federal Recognition.

Although the Aguayo Plaintiffs do not assert any federal-law ratification requirement – and no federal statute establishes requirements or guidelines for non-IRA tribes – BIA arguably would act arbitrarily if it were to approve a tribal constitution that was adopted without sufficient tribal support. For example, in *California Valley Miwok*, the D.C. Circuit held that the Secretary of the Interior had authority to refuse to recognize a constitution that was adopted by a tiny fraction of a tribe's members and thus did not enjoy "sufficient support" from a

tribe's membership. 515 F.3d at 1267. Assuming, *arguendo*, that the Assistant Secretary had a parallel *duty* to apply a "sufficient support" requirement to approval/recognition of the Pala Constitution, the Assistant Secretary complied with that duty here.

In its 1994 tribal elections, the Pala Band voted in large numbers and by a substantial majority (131-65) to adopt the Pala Constitution. ER 385. In 1997, via Resolution 97-36, the Pala General Council unanimously adopted certain changes recommended by BIA and reaffirmed the prior vote. SER 34. The constitutional power at issue in this case – the Executive Committee's power to enact a membership ordinance – was not among the changes. *See* pp. 10-13, *supra*. This means that there was a referendum election (in 1994) and General Council vote (in 1997) in support of the change in governance that ultimately enabled the Aguayo Plaintiffs' disenrollment.

In addition, tribal records indicate that when the Pala Band adopted amendments to the Pala Constitution in 2003, the Band did so in accordance with the election procedures set out in Art. IX, § 2, *i.e.*, with a yes vote of two-thirds of at least half of the Band's eligible voters. SER 16-18. By thus amending the Pala Constitution, the tribal voters effectively validated the ratification votes that had come before.

C. The Assistant Secretary Reasonably Determined that He Lacked Grounds to Disturb the Executive Committee's Application of the 2009 Ordinance.

For the reasons stated *supra*, the Assistant Secretary reasonably concluded that the Pala Constitution is the governing document of the Pala Band. The Aguayo Plaintiffs acknowledge that, if the Pala Constitution is valid, the 2009 Ordinance governs and that the BIA's role is advisory. This leaves the Aguayo Plaintiffs with two claims: (1) that the Executive Committee misconstrued the 2009 Ordinance in determining that the ordinance granted authority to reevaluate pre-2009 membership applications (*Brief* at 41-42); and (2) that, even if the 2009 Ordinance grants such power, the Executive Committee was bound, as a matter of res judicata, to honor the Assistant Secretary's 1989 finding on Margarita Britten's blood quantum (*Brief* at 42-49). Neither claim asserts a grievance against BIA or an injury that BIA had specific authority or a duty to remedy.

1. The Assistant Secretary Has No Duty to Enforce Alleged Tribal Errors in Applying the 2009 Ordinance.

As explained (pp. 13, *supra*), Section 6 of the 2009 Ordinance gives the Executive Committee authority to reevaluate enrollment decisions upon a finding that an applicant misrepresented or omitted facts relevant to eligibility. ER 418-19 (§ 6). Citing a prefatory "whereas" clause that disclaims "inten[t] to alter or change the membership status" of already enrolled members, *see* ER 413, the

Aguayo Plaintiffs contend (*Brief* at 41-42) that Section 6 of the 2009 Ordinance is properly construed as applying prospectively only (*i.e.*, to enable the reevaluation of enrollment decisions made under the 2009 Ordinance). As the Assistant Secretary noted, however, prefatory clauses are nonbinding and do not override the operative terms of a statute or rule. ER 162 & n. 51 (citing *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 174 (2009)). Here, both the Assistant Secretary and the district court construed Section 6 as providing authority to reevaluate pre-2009 enrollments. ER 32, 162.

In any event, the Pala Executive Committee's alleged misapplication of the 2009 Ordinance does not, by itself, give rise to any federal duty. As explained *supra* (pp. 28-29), this Court has held that there is no federal cause of action to enforce a tribe's noncompliance with tribal membership law. *Lewis*, 424 F.3d at 961-63. To the extent the Aguayo Plaintiffs allege that federal obligations arose solely as a result of the Pala Band's misapplication of the 2009 Ordinance or other tribal membership law, their claims are indistinguishable from the claims in *Lewis* and must be dismissed. *Id.* at 963.

2. The Assistant Secretary Correctly Determined that the Res Judicata Question Belonged to the Pala Band.

The Aguayo Plaintiffs also err in supposing (*Brief* at 42-52) that the law of res judicata distinguishes this case from *Lewis*. Res judicata is a judge-made

doctrine, predicated on questions of public policy, which applies under the law of the forum where an issue is presented for reconsideration. *See generally Murray v. Alaska Airlines, Inc.*, 522 F.3d 920, 923 (9th Cir. 2008). Whether the Assistant Secretary's 1989 factual finding regarding Margarita Britten's blood quantum was entitled to preclusive effect on the Pala Band is a question that arose as a matter of tribal law and policy, in the tribal proceedings initiated by the Pala Executive Committee under the 2009 Ordinance.

As the Aguayo Plaintiffs' argue (*Brief* at 42-47), and consistent with the Regional Director's recommendation, there were compelling reasons for the Pala Executive Committee to honor the Assistant Secretary's 1989 finding. This Court has observed that state law might give preclusive effect to a federal administrative finding, even when the federal agency is not specifically applying state law. *See Murray*, 522 F.3d at 922-23. Here, the Assistant Secretary in 1989 applied tribal law by express delegation. *See* pp. 9-10. 17, *supra*. Nonetheless, because the res judicata question arose in the tribal forum as a matter of tribal law, it was not the Assistant Secretary's question to decide. Because the Assistant Secretary had no authority, under the 2009 Ordinance, to issue a final membership determination for the Pala Band, the Assistant Secretary had no authority to determine associated legal questions, including questions of estoppel.

3. The Assistant Secretary Had No Trust Duty to Enforce the 1989 Finding.

Nor is there any authority for the Aguayo Plaintiffs' argument (*Brief* at 23-27, 50-52) that the Assistant Secretary has a common-law trust duty, arising from the general trust obligation owed to Indians, to "enforce" the 1989 finding. How the Assistant Secretary could enforce the 1989 finding against the Pala Band, the Aguayo Plaintiffs do not say. Nor do they address how this Court can craft relief to enforce the 1989 finding consistent with the Pala Band's sovereign immunity. *Cf. Alto*, 738 F.3d at 1125-29 (explaining that Fed. R. Civ. P. 19(b) did not require dismissal in that case where there was a federal disenrollment action that could be set aside and no dispute over tribal law). But in any event, the professed common-law trust duty does not exist.

Although the federal government has long been deemed to hold "trust obligations" to Indian people, *see Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), the "trust relationship alone" does not give rise to enforceable duties. *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 924 (9th Cir. 2008) (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468 (2003)); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006). Rather, courts will find enforceable trust obligations only where informed by particular statutory or regulatory prescriptions. *Marceau*, 540 F.3d at 921-24;

see also United States v. Navajo Nation, 537 U.S. 488, 506 (2003). The only statute cited by the Aguayo Plaintiffs (*Brief* at 24) is 25 U.S.C. § 2, which contains no particular prescriptions.

The Aguayo Plaintiffs misplace reliance (*Brief* at 25) on a BIA webpage that acknowledges a "legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources" and a "duty to carry out the *mandates* of federal law with respect to American Indian . . . tribes." BIA FAQs, *available at* http://www.bia.gov/FAQs/ (emphasis added). Contrary to the Aguayo Plaintiffs' argument, this statement only underscores the absence of an enforceable duty here. The Aguayo Plaintiffs ultimately seek a per capita share of tribal gaming revenues. *Brief* at 49-50. But IGRA does not require federal officials to manage or distribute gaming revenues. *See* 25 U.S.C. § 2710(b)(3)(B) (requiring only the approval of a revenue allocation plan); *see also Smith*, 100 F.3d at 558-59 (IGRA regulations provide no cause of action for addressing membership dispute). Thus, this is not a case where a trust duty arises from federal management or control of trust assets. *Cf. United States v. Mitchell*, 463 U.S. 206, 225-26 (1983); *Seminole Nation*, 316 U.S. at 297; *see also Marceau*, 540 F.3d at 924 (citing *White Mountain Apache Tribe*, 537 U.S. at 474-75). And the Aguayo Plaintiffs fail to identify any other pertinent statutory "mandate" governing BIA officials.

Moreover, the general trust relationship between the United States and Indian tribes cannot provide any guidance for resolving a dispute between a tribe and its members, where there are multiple parties to whom a trust duty is arguably owed and conflicting policy interests. Here, the Aguayo Plaintiffs contend (*Brief* at 24, 49-50) that they are owed duties as individual Indians because they were enrolled in the Pala Band as a result of the Assistant Secretary's 1989 finding regarding Margarita Britten's blood quantum. But when making this finding, the Assistant Secretary applied membership criteria dictated solely by tribal law. There is no federal law requiring the Pala Band (or any other tribe) to recognize persons with 1/16 degree of Indian blood to be tribal members. *Cf.* 25 U.S.C. § 479 (defining "Indian" for purposes of the IRA to mean, *inter alia*, any person of Indian descent who is a member of a federally-recognized tribe or who is "*one-half* or more Indian blood" (emphasis added)). And even when BIA officials exercised authority to decide Pala enrollment applications, BIA did so under tribal law, and the ultimate authority to determine membership remained with the Pala Band as part of its inherent sovereign powers.

The Pala Executive Committee has since reclaimed the Pala Band's full authority to make enrollment decisions, and, in the exercise of such authority, has found the evidence insufficient to establish Margarita Britten's degree of Pala blood as greater than one half. ER 211, 324. The Assistant Secretary cannot

declare a different result without impinging upon the Pala Band's exercise of self-government.

The Aguayo Plaintiffs cite no precedent authorizing or supporting federal intervention in such a dispute. The Aguayo Plaintiffs cite two cases involving federal decisions to recognize or not recognize tribal governments following a lapse in tribal organization. *See Brief* at 26-27 (citing *California Valley Miwok*, 515 F.3d at 1263-65; *and Morris v. Watt*, 640 F.2d 404, 414-15 (D.C. Cir. 1981)). But these cases involved statutes not applicable to the Pala Band, as a non-IRA tribe. *See California Valley Miwok*, 515 F.3d at 1264-66 (applying IRA); *Morris*, 640 F.2d at 408-410 & nn.10-12 (applying statutes governing the reorganization of Oklahoma tribes). And neither case recognized a federal duty to intervene in tribal enrollment or governance decisions. In *California Valley Miwok*, the D.C. Circuit affirmed a federal refusal to recognize a constitution and government adopted by a "tiny minority" of a tribe. *See* 515 F.3d at 1265-1268. In *Morris*, the D.C. Circuit set aside federal actions approving new tribal constitutions and governments, in part, because the constitution-reform procedures that federal officials helped implement did not "limit[] the input of federal . . . officials . . . to ensure [tribal] self-determination." 640 F.2d at 414-15.

In sum, the present case implicates competing interests – *res judicata* interests in the Assistant Secretary's 1989 finding versus the sovereignty claims of

the Pala Band – in an area within the Assistant Secretary's general authority (under 25 U.S.C. § 2), but where there are no specific statutory provisions directing federal action. When agency action "requires a complicated balancing of a number of factors which are peculiarly within the agency's expertise, including the prioritization of agency resources, likelihood of success in fulfilling the agency's statutory mandate, and compatibility with the agency's overall policies," this Court will find the action "committed to agency discretion by law" under APA § 701(a)(2). *Center for Policy Analysis on Trade & Health v. Office of the U.S. Trade Representative*, 540 F.3d 940, 944 (9th Cir. 2008) (quoting *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir.2000)) (internal parentheticals deleted).

III. THE ASSISTANT SECRETARY REASONABLY DECLINED TO ADD TWO MINORS TO THE APPEAL

As explained (p. 18, *supra*), the Pala Executive Committee disenrolled most of the Aguayo Plaintiffs, including Patricia Walsh, in February 2012. According to the Aguayo Plaintiffs (*Brief* at 11, 53), the Executive Committee disenrolled two minor children of Patricia Walsh approximately one year later, in January 2013. This tribal action came after the Regional Director's 2012 recommendations on the prior disenrollments (ER 257-58, 311-15), but while the Aguayo Plaintiffs' appeal to the Assistant Secretary remained pending. The Assistant Secretary denied a request to include the two minors in the pending appeal, on the grounds that their

disenrollment was not addressed in the Regional Director's 2012 recommendations. ER 166-167.

This procedural determination was not an abuse of discretion. For reasons stated (*supra*), the Assistant Secretary correctly determined that *no* disenrolled member had a right of appeal from the Regional Director's recommendation. ER 163. In any event, the Aguayo Plaintiffs contend (*Brief* at 11, 53) that the two minors filed a timely appeal with the Regional Director, which remains pending. Accordingly, the two minors can pursue any and all relief obtained by the named appellants, if this Court were to reverse and remand for further administrative action.

* * *

The Regional Director advised the Pala Band that there was "no evidence" to support the disenrollment of the Aguayo Plaintiffs and that the Band should "continue to recognize [their] membership status." ER 314. In declining to intervene beyond making this recommendation, the Assistant Secretary properly adhered to the longstanding federal policy to promote tribal sovereignty and self-government and "to engage in . . . key tribal issues," like tribal membership, "only when the law clearly provides such authority." ER 147. The law provided no specific authority or duty in this case.

CONCLUSION

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

JOHN C. CRUDEN
Assistant Attorney General

Of Counsel:

BARBARA N. COEN
Office of the Solicitor
U.S. Department of the Interior

KATHERINE J. BARTON
REUBEN S. SCHIFMAN
JOHN L. SMELTZER
Attorneys
Environment & Natural Resources Division
Post Office Box 7415
U.S. Department of Justice
Washington, D.C. 20044
(202) 305-0343
john.smeltzer@usdoj.gov

July 9, 2015
DJ No. 90-2-4-14003

STATEMENT OF RELATED CASES

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

/s/ John L. Smeltzer

John L. Smeltzer
Attorney
United States Department of Justice
Post Office Box 23795
Washington, DC 20026-3795
(202) 305-0343
john.smeltzer@usdoj.gov

CERTIFICATE OF COMPLIANCE
(No. 15-56909)

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:

   Proportionately spaced, has a typeface of 14 points or more and contains **13,776** words (exclusive of the table of contents, table of authorities, and certificates of counsel).

July 9, 2015
Date

s/ John L. Smeltzer
John L. Smeltzer

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing *Answering Brief of the Federal Defendants* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **July 9, 2015.**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ John L. Smeltzer

JOHN L. SMELTZER
Appellate Section
Environment & Natural Resources Division
United States Department of Justice
Post Office Box 23795
Washington, DC 20026-3795
(202) 305-0343
john.smeltzer@usdoj.gov