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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Case No.: 17-cv-0938-AJB-KSC MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO: 1) DISMISS PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION AND THE COMPLAINT SEEKING A PERMANENT INJUNCTION FOR LACK OF SUBJECT MATTER JURISDICTION; OR 2) ALTERNATIVELY DENY PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION DATE: July 25, 2017 TIME: 9:00 a.m. CTRM: 3B JUDGE: Hon. Anthony J. Battaglia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Other

I. INTRODUCTION

On May 8, 2017, plaintiffs Cindy Alegre, an individual, et al. ("Plaintiffs") filed a Complaint seeking a permanent injunction enjoining the United States and certain of its agencies and employees (collectively "Defendants," "United States," or "U.S.") from approving any changes to the enrollment procedures of the San Pasqual Band of Mission Indians (the "Band" or the "Tribe"). (ECF No. 1.) Plaintiffs allege this suit is a companion case to Alegre, et al. v. Zinke, et al., S.D. Cal. Case No. 16-cv-2442-AJB-KSC (the "Companion Suit"). (ECF No. 1; ¶ 1.) Additionally, Plaintiffs filed a request for a temporary restraining order ("TRO") and a preliminary injunction ("PI") seeking similar relief. (ECF No. 6.) The Court granted the TRO request ex parte, without receiving input from Defendants, and ordered Defendants to file their motion to dismiss the PI request by June 19, 2017. (ECF Nos. 7, 10.)

In the Companion Suit, Plaintiffs seek various remedies to help them become members of the Band. They bring this suit for injunctive relief because they are concerned that if the Band amends its Constitution, it would preclude their potentially receiving a remedy which would assist their becoming members of the Band. But, as explained more fully below, Plaintiffs' request to enjoin Defendants from approving any changes to the Band's Constitution is premature. The Band has not requested any steps be taken by Defendants to amend its Constitution, or even indicated the Band is considering doing so. See Ex 1 (Long Decl.), ¶ 7. Even if the Band begins the process to amend its Constitution in the future, any proposed amendment would have to be (i) approved by its members in an election coordinated by the Bureau of Indian Affairs ("BIA") and (ii) approved by the BIA. See id. ¶¶ 8-10. At that point, there would be a final agency action which Plaintiffs could potentially seek to challenge pursuant to the APA. See id. ¶¶ 11-12. Until a final agency action is taken and the issue is ripe, however, this Court lacks jurisdiction to hear Plaintiffs' Complaint or request for a PI.

Therefore, the Court should now dismiss Plaintiffs' request for a PI and the Complaint.[1] The United States has not waived its sovereign immunity over these claims since there has been no final agency action, and because the issue of Defendants' approval of the Band's enrollment procedures is not ripe. Accordingly, the Court lacks subject matter jurisdiction over both Plaintiffs' Complaint, and over Plaintiffs' request for a PI. Even if the Court could reach the merits of the PI, however, it should not grant it because Plaintiffs have no chance of success and they face no risk of irreparable injury.

II. FACTS ALLEGED BY PLAINTIFFS[2]

In the First Amended Complaint ("FAC")[3] of the Companion Suit, Plaintiffs allege 14 causes of action based on similar facts as alleged in the Complaint in the instant suit for injunctive relief.

In their Complaint seeking injunctive relief in the instant suit, Plaintiffs allege[4] that on September 22, 2005, the Band's Enrollment Committee sent a letter to the BIA, Southern California Agency ("SCA") Superintendent (the "Superintendent") petitioning him to increase the blood degree for Modesta (Martinez) Contreras from 3/4 to 4/4 degree blood of the Band. (ECF No. 1, ¶ 6; ECF No. 1-9.) Previously, on September 12, 2005, the Band's Enrollment Committee submitted the enrollment applications of the Plaintiffs listed in paragraphs 40-173 of the Complaint (the "non-Band Plaintiffs"), along with a letter indicating the Committee's (initial) approval, to the Superintendent. (ECF No. 1, ¶ 5; ECF No. 1-8.) The basis of non-Band Plaintiffs' enrollment applications was that they were

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[1] Because the Court lacks subject matter jurisdiction over both Plaintiffs' request for a PI and Plaintiffs' Complaint seeking a permanent injunction for the reasons discussed in this motion, Defendants move to dismiss both herein. If the Court fails to grant the requested relief, Defendants intend to file additional bases for dismissing Plaintiffs' Complaint before answering the Complaint.

[2] By stating facts alleged by Plaintiffs, Defendants do not indicate that they agree that the alleged facts are accurate.

[3] All references to FAC in this brief refer to the First Amended Complaint in the Companion Suit, 16-cv-2442, ECF # 13.

[4] For purposes of this motion Defendants will limit their discussion of Plaintiffs' allegations to those related to their request for an injunction (preliminary and permanent) preventing Defendants from approving any changes to the Band's enrollment procedures.

great-grandchildren of Modesta Contreras; therefore if Modesta Contreras was 4/4 blood of the Band, her grandchildren would each be at least 1/8 blood of the Band. (ECF No. 1, ¶¶ 2, 40-173; 16-cv-2442 ECF No. 13-3, ¶ 291; 16-cv-2442 ECF No. 13-74.)

The non-Band Plaintiffs' applications were forwarded to BIA pursuant to 25 C.F.R. Part 48 (which is no longer operative as federal regulations),[5] which has been incorporated into the Band's Constitution, and therefore is Tribal law. (ECF No. 1, ¶¶ 10, 236.) These regulations address the Band's enrollment criteria, including the process for applying to enroll in the Band. (ECF No. 1-12.)[6]

In a memorandum dated December 8, 2005, the Superintendent told the BIA's Pacific Region Regional Director (the "Director") that he concluded that: "The preponderance of evidence does not sufficiently demonstrate that Modesta (Martinez) Contreras is fullblood." (ECF No. 1-10 at 3.)[7] In a letter dated January 31, 2006, the Director stated that it agreed with the Superintendent "that the evidence does not substantiate the blood degree change for Modesta (Martinez) Contreras, [and] therefore [the Director] recommend[ed] disapproval." (ECF No. 1-11 at 2-3.) In a letter dated April 7, 2006, the United States Department of the Interior, Office of the Secretary, told the Band's Chairman that it concurred with the Director and the Superintendent "that there is insufficient evidence to

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[5] "The [Band's] Constitution . . . expressly incorporates federal regulations, adopted in 1960 [that were] formerly codified at 25 C.F.R. §§ 48.1-48.15 . . . , [These] Regulations have since been removed from the Code of Federal Regulations, but the reference to them remains in the Tribe's Constitution." Alto v. Black, 738 F.3d 1111, 1116 (9th Cir. 2013).

[6] Former 25 C.F.R., Part 48 includes the following sections pertinent to enrolling in the Band:

48.4 – procedures for applicants to apply to enroll in the Band;

48.5 – Qualifications to enroll in the Band;

48.7 – Procedures for Band to Review applications for enrollment and send to BIA;

48.8 – Procedure for BIA Director to make determination regarding eligibility of applicants for enrollment

48.9 – Procedures for appeals when Director determines applicant not eligible for enrollment.

(ECF No. 1-12 at 3-4.)

[7] Page number citations are to the blue CM/ECF-generated docket and page numbers located at the top of each page.

warrant an increase from 3/4 to 4/4 degree San Pasqual Indian blood for Modesta (Martinez) Contreras." (ECF No. 1-5 at 3.) Also, according to the current Superintendent, BIA returned Plaintiffs' enrollment applications to the Band without making any decision. (ECF No. 13, ¶ 21 (citing 16-cv-2442 ECF No. 9-2 at 2-3 (¶ 5).) Plaintiffs allege this statement is disingenuous. (ECF No. 13, ¶ 21.)

Plaintiffs allege that after the FAC was filed in the Companion Suit on April 11, 2017, the Band issued a moratorium on enrollment and began planning to put in place a new enrollment ordinance. (ECF No. 1-2, ¶¶ 230, 232.) Plaintiffs further allege that they believe the Band is planning to remove BIA and the Department of the Interior from the Enrollment Process. (ECF No. 1-2, ¶¶ 232, 239.) Plaintiffs allege any such change to the enrollment procedures would require an amendment to the Band's Constitution, which would require the approval of the Assistant Secretary of Indian Affairs. (ECF No. 1-2, ¶ 234.) Plaintiffs allege that if such a change to the Band's Constitution was approved, it would harm their right to have their claims in the Companion Suit adjudicated. (ECF No. 1-2, ¶ 240.) Plaintiffs allege this entitles them to a TRO/PI/permanent injunction enjoining Defendants from approving such a change. (ECF No. 1-2 at 38.)

III. DISCUSSION

A. The Court Must Dismiss Plaintiffs' Requests for Preliminary and Permanent Injunctive Relief Due to Lack of Subject Matter Jurisdiction

1. Relevant Legal Standards for Motion to Dismiss by United States for Lack of Subject Matter Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction may be brought by a defendant pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. "A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).

By contrast, in a factual attack, the challenger may rely on evidence extrinsic to the complaint. See Safe Air for Everyone, 373 F.3d at 1039; see also Tritz v. U.S. Postal Service, 721 F.3d 1133, 1141 n.6 (9th Cir. 2013) (court may properly consider declaration

submitted with motion to dismiss for lack of subject matter jurisdiction in factual attack). The Ninth Circuit has explained:

> In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff's allegations. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction."

Safe Air for Everyone, 373 F.3d at 1039 (internal citations omitted and emphasis added); see also U.S. ex rel. Meyer v. Horizon Health Corp., 565 F.3d 1195, 1200 n.2 (9th Cir. 2009) (in "a factual, as opposed to facial, motion to dismiss for lack of subject-matter jurisdiction" court "'need not presume the truthfulness of the plaintiffs' allegations' and may 'look beyond the complaint . . . without having to convert the motion into one for summary judgment.'").

Here, the attached declaration supports Defendants' factual attack of the Court's subject matter jurisdiction over Plaintiffs' Complaint and their request for a PI. Defendants appropriately move to dismiss a request for injunctive relief on the ground that in the absence of final agency action, federal courts lack subject matter jurisdiction to consider the request. See Rattlesnake Coal. v. U.S. E.P.A., 509 F.3d 1095, 1099, 1104 (9th Cir. 2007); City of San Diego v. Whitman, 242 F.3d 1097, 1102 (9th Cir. 2001) (vacating preliminary injunction due to lack of subject matter jurisdiction because agency's action did not constitute final agency action). Similarly, a request for an injunction, even against a credible threat of future harm, must be dismissed for lack of subject matter jurisdiction if the claim is not ripe. See Addington v. U.S. Airline Pilots Ass'n, 606 F.3d 1174, 1177 (9th Cir. 2010) (reversing district court's grant of permanent injunction because court lacked jurisdiction over unripe claim); Sonoma Cty. Law Enf't Ass'n v. Cty. of Sonoma, 379 F. App'x 658, 659-70 (9th Cir. 2010) (unpublished) (affirming dismissal of claims for declaratory and injunctive relief because claims not ripe); Viet Hoang Duong v. Colvin, No. 13CV2705-WQH-NLS, 2014 WL 2758751, at *4, *7-*8 (S.D. Cal. June 16, 2014) (dismissing claims

for preliminary and permanent injunction challenging agency action that has not yet become final because such claims do not adequately allege a constitutionally ripe case or controversy and even if they did, Court would decline to exercise jurisdiction under prudential ripeness doctrine); Flagship Fed. Sav. Bank v. Wall, 748 F. Supp. 742, 749 (S.D. Cal. 1990) (dismissing injunction claim because agency action not final and therefore controversy not ripe).

2. The Court Lacks Subject Matter Jurisdiction Because There Has Been No Final Agency Action, and Therefore No Waiver of Sovereign Immunity Pursuant to the APA

To confer subject matter jurisdiction in an action against a sovereign, there must be both a waiver of sovereign immunity, and a statutory authority vesting a district court with subject matter jurisdiction. See Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007). "The plaintiff always bears the burden of establishing subject matter jurisdiction. In effect, the court presumes lack of jurisdiction until the plaintiff proves otherwise." Robinson v. Salazar, 885 F. Supp. 2d 1002, 1015 (E.D. Cal. 2012).

Federal courts normally lack jurisdiction regarding the adjudication of tribal disputes, especially controversies pertaining to tribal membership, because Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government, including membership. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (noting Indian tribes are unconstrained by constitutional provisions limiting federal or state authority, including the Fifth Amendment); see also Alto v. Black, 738 F.3d 1111, 1115 (9th Cir. 2013) ("In view of the importance of tribal membership decisions and as part of the federal policy favoring tribal self-government, matters of tribal enrollment are generally beyond federal judicial scrutiny."). A federal court may sometimes indirectly review a tribal enrollment decision under the Administrative Procedure Act ("APA") when the BIA takes a final agency action in reviewing a tribe's membership determination.[8] See

[8] Such review is strictly limited to adverse enrollment actions when the tribal governing document provides an appeal right to the BIA regarding the specific action taken. See 25 C.F.R. § 62.2; Cahto Tribe of Laytonville Rancheria v. Dutschke, 715 F.3d 1225, 1228 (9th Cir. 2013) (since tribal governing document only provided BIA right to review

5 U.S.C. §§ 702, 704, 706; Miranda v. Jewell, No. EDCV 14-00312-VAP (DTBx), 2015WL 226024, at *6 (C.D. Cal. Jan. 15, 2015). In such a case, section 704 of the APA (5 U.S.C. § 704) acts as a waiver of sovereign immunity allowing judicial review, but only if the claim challenges "final agency action for which there is no other adequate remedy in a court." See City of Oakland v. Lynch, 798 F.3d 1159, 1166 (9th Cir. 2015), cert. denied sub nom. City of Oakland, Cal. v. Lynch, 136 S. Ct. 1486 (2016) (emphasis in original).

An agency action will be considered final if it (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is "one by which rights or obligations have been determined or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotations marks and citations omitted). The first prong of the test is satisfied if the agency "has rendered its last word on the matter." Or. Natural Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 984 (9th Cir. 2006). It is not satisfied if the agency's action is "of a merely tentative or interlocutory nature." Bennett, 520 U.S. at 178. The second prong requires that the agency's decision directly change the plaintiff's rights and obligations, rather than leaving the plaintiff's status unchanged until a later action is taken, because agency action that does not immediately impose an obligation, deny a right, or fix some legal relationship is not judicially reviewable due to lack of finality.[9] See Fairbanks N. Star Borough v. U.S. Army Corps of Engineers, 543 F.3d 586, 593-97 (9th Cir. 2008). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 797 (1992).

Here, Plaintiffs fail to point to any final agency action which might provide the Court jurisdiction over Plaintiffs' injunction requests. They cannot do so because not only has BIA not rendered any final agency action regarding any request by the Band to change its

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rejected applications for enrollment, no APA review of disenrollment decision).

[9] Therefore, "[n]ot every agency 'decision . . . [that] has immediate financial impact,' or even 'profound [economic] consequences' in the real world, is final agency action." Fairbanks N. Star Borough, 543 F.3d at 596.

constitutional enrollment procedures, but BIA has even been asked to do so. Any change to the Band's enrollment procedure would require an amendment to the Band's Constitution. See Ex 1 (Long Decl.), ¶ 5. Any amendment proposing to change the enrollment criteria would first require a majority of the Band's General Council to request BIA hold a Secretarial election to vote on the amendment. See id. ¶¶ 4, 6. Next, at least 30% of the Band's eligible voters would have to participate in the Secretarial election, and a majority of those voters would have to approve the amendment. See id. ¶ 6. Thereafter, BIA would have to resolve any challenges brought by eligible voters to the election results, and then determine if the election met the standards of the Band's Constitution or conflicted with federal law before approving the election. See id. ¶¶ 8-10. None of these things have occurred. Indeed, BIA has not only not received a request to conduct a Secretarial election to adopt a constitutional amendment by the Band, it has not received any indication the Band is even considering amending their Constitution. See id. ¶ 7. Therefore, the BIA has certainly not taken action marking the "consummation of [its] decisionmaking process," or taken any action through which Plaintiffs' "rights or obligations have been determined or from which legal consequences will flow." See Bennett, 520 U.S. at 177-78. Accordingly, Plaintiffs' requests for preliminary and permanent injunctive relief must be dismissed for lack of subject matter jurisdiction since the United States has not waived its sovereign immunity over such claims though the APA or any other statute.

3. The Court Lacks Subject Matter Jurisdiction Because Plaintiffs' Requests for Preliminary and Permanent Injunctive Relief Are Not Constitutionally or Prudentially Ripe

The United States Constitution limits Article III federal courts' jurisdiction to deciding "cases" and "controversies." U.S. Const. art. III, § 2. "Ripeness is one component of the Article III case or controversy requirement." Oklevueha Native Am. Church of Hawaii, Inc. v. Holder, 676 F.3d 829, 835 (9th Cir. 2012). "[R]ipeness is . . . a question of timing, designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000). "Ripeness is . . . applicable to cases

involving motions for preliminary injunction." Nextel Commc'ns of Mid-Atl., Inc. v. City of Margate, 305 F.3d 188, 192 (3d Cir. 2002)." "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990).

Specifically with regard to suits against the government, the ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 807–08 (2003) (emphasis added). With regard to efforts to gain equitable remedies against government agencies, since "injunctive and declaratory judgment remedies are discretionary, . . . courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." Nat. Res. Def. Council v. Abraham, 388 F.3d 701, 705 (9th Cir. 2004). "[T]he ripeness inquiry contains both a constitutional and a prudential component." Thomas, 220 F.3d at 1138.

a) Plaintiffs' Injunction Requests Are Not Constitutionally Ripe

Constitutional ripeness "mandates that prior to a federal court's exercise of jurisdiction there must exist a constitutional case or controversy, such that the issues presented are "definite and concrete, not hypothetical or abstract." Oklevueha Native Am. Church of Hawaii, Inc., 676 F.3d at 835. Here, Plaintiffs' request for an injunction preventing Defendants from approving any changes to the Band's enrollment procedures does not arise in sufficiently definite and concrete circumstances to make the matter ripe for adjudication. Not only have Defendants not rendered any formal decision either approving or disapproving any change to the Band's enrollment procedures, they have not even been asked to. See Ex 1 (Long Decl.), ¶ 7. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not

occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998). Because Plaintiffs request permanent and preliminary injunctions over matters not yet ripe for adjudication, the Court must dismiss their claims for lack of subject matter jurisdiction.

b) Plaintiffs' Injunction Requests Are Not Prudentially Ripe

The prudential component of the ripeness doctrine requires a court to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Thomas, 220 F.3d at 1141; see also Oklevueha Native Am. Church of Hawaii, Inc., 676 F.3d at 837. "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. In interpreting the finality requirement, a court looks to whether the agency action represents the final administrative word to insure that judicial review will not interfere with the agency's decision-making process." Winter v. Cal. Med. Review, Inc., 900 F.2d 1322, 1325 (9th Cir. 1989) (internal citations and quotation marks omitted); see also Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1132 (9th Cir. 2015) ("A question is fit for decision when it can be decided without considering 'contingent future events that may or may not occur as anticipated, or indeed may not occur at all.'"). "To meet the hardship requirement, a litigant must show that withholding review would result in 'direct and immediate' hardship and would entail more than possible financial loss." Id.

Plaintiffs cannot satisfy either of these requirements. Clearly, the BIA has not given its final administrative word on the issue of any changes to the Band's enrollment procedures since it has not even been asked to initiate the process through which such a change might be made. See Ex 1 (Long Decl.), ¶ 7. That alone is sufficient for the Court to conclude that Plaintiffs' request for injunctive relief lacks ripeness. Even if, however, Plaintiffs' claims were fit for decision, they lack ripeness because Plaintiffs do not face immediate hardship. Rather, even if the BIA were asked at some future time to approve a change to the Band's enrollment procedures, the agency might deny the request. Even if the BIA approved any requested changes, however, that decision would be subject to review pursuant to the Administrative Procedures Act. See Ex 1 (Long Decl.), ¶ 12. For all of

these reasons, the Court should dismiss Plaintiffs' requests for preliminary and permanent injunctive relief as their claims are not prudentially ripe.

B. Even If the Court Has Subject Matter Jurisdiction, It Should Deny Plaintiffs' Request for Preliminary Injunctive Relief

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010). Plaintiffs have the burden to prove by clear and convincing evidence that a preliminary injunction is appropriate. See Granny Goose Foods, Inc. v. Bd. of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423, 442–43 (1974). Because they are extraordinary remedies, a plaintiff seeking a PI "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter v. NRDC, 555 U.S. 7, 20 (2008); see also Mazurek v. Armstrong, 520 U.S. 968, 971, 976 (1997) (overturning a preliminary injunction issued when a plaintiff had established only a "fair chance of success on the merits" of his claim).

The Ninth Circuit recognizes the Supreme Court's Winter test. See Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). However, the Ninth Circuit has also articulated an alternate version of this test whereby "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this approach, "serious questions going to the merits" require more than showing that "success is more likely than not"; it requires a plaintiff to demonstrate a "substantial case for relief on the merits." Leiva-Perez v. Holder, 640 F.3d 962, 967-68 (9th Cir. 2011). And even where success on the merits is likely or "serious questions" are raised an injunction "is not a remedy which issues as of course." Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (citation omitted).

Plaintiffs cannot meet the standard for a preliminary injunction. For the same reasons that the Court should dismiss this case for lack of subject matter jurisdiction, Plaintiffs have no chance of success on the merits. In addition, because any potential harm to Plaintiffs will come only after several distinct steps and an opportunity to seek judicial review, there is no irreparable harm.

1. Plaintiffs Have No Chance of Success on the Merits

As described above, this Court can, and should, dismiss this case now. Even if the Court allows the case to proceed, however, Plaintiffs have not shown, and cannot show, any likelihood of success on the merits. In order to prevail on their PI request, Plaintiffs must identify a final government action within the statute of limitations and prove that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To meet this standard, Plaintiffs must satisfy the "heavy burden of showing that 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[10] Managed Pharmacy Care v. Sebelius, 716 F.3d 1235, 1244 (9th Cir. 2013) (quoting Med Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, (1983)).

Plaintiffs devote less than a page of their 58-page PI request to arguing success on the merits, and do not even articulate which of the 14 claims for relief in the FAC warrants a preliminary injunction. Indeed, their brief does not state how they meet any legal standard. Rather, Plaintiffs simply allege that Defendants inappropriately (i) excluded Plaintiffs from

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[10] As Judge Bashant found in an earlier membership challenge involving the Band, the "Court's role in this situation is 'not to substitute its judgment for that of the agency,' but rather to examine whether there is a 'rational connection between the facts found and the choice made' by the agency." Alto v. Jewell, No. 11-cv-2276-BAS, 2015 WL 5734093, at *22 (S.D. Cal. Sept. 30, 2015) (quoting Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687 (9th Cir. 2007)). She concluded that the plaintiffs there had not met their burden under the "highly deferential" standard, in part because they did not address the "substantial deference afforded to agency decisions." Id.

the Band, and (ii) enrolled unentitled individuals into the Band. (ECF No. 6-1 at 17-18.) As explained in the motion to dismiss Plaintiffs' FAC (16-cv-2442 ECF No. 20), the first claim simply misunderstands the facts, while the second attacks decisions made decades ago–long past the running of the statute of limitations and any realistic chance of unwinding them. Plaintiffs have not even attempted to show that a particular, final government action was arbitrary and capricious, and so have not satisfied their burden to demonstrate a sufficient chance of success on the merits to allow PI relief. This failure is fatal to Plaintiffs' PI request, and the Court should therefore deny the request. See Winter, 555 U.S. at 20.

2. Plaintiffs Are Not Likely to Suffer Irreparable Harm

Plaintiffs cannot show any irreparable harm relevant to a preliminary injunction analysis. The harm they assert would only result from a cascade of adverse results and after a chance for judicial review becomes ripe.

To show irreparable harm sufficient to warrant a preliminary injunction, the movant must "do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Boardman v. Pacific Seafood Group, 822 F.3d 1011, 1022 (9th Cir. 2016) (quoting Caribbean Marine Servs. Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988)). In this analysis, "[s]peculative injury" does not count. Id. Nor do "unsupported and conclusory statements" regarding potential harm. Herb Reed Enter., LLC v. Florida Entm't Mgmt., Inc., 736 F.3d 1239, 1250 (9th Cir. 2013). Instead, the movant must offer "evidence sufficient to establish a likelihood of irreparable harm." Id. at 1251. To allow a preliminary injunction on a lesser showing would be "inconsistent" with the "characterization of injunctive relief as an extraordinary remedy. . . ." Winter, 555 U.S. at 22.

As this Court indicated, the harm asserted in Plaintiffs' brief is a serious one: to be excluded from the Band with no recourse. (ECF No. 7 at 7.) But Plaintiffs provide no evidence of the likely harm, only unsupported, conclusory statements. Nor can they show an "immediate threatened injury." See Boardman, 822 F.3d at 1022. The harm Plaintiffs

fear can only come about through a series of actions by the Band and Defendants–and an opportunity for an appropriate APA challenge to those actions in court.

First, there is no evidence that the Band has actually developed a constitutional amendment, which would be necessary to change enrollment procedures prescribed by 25 C.F.R. Part 48, in accordance with Article III of the Band's Constitution. Plaintiffs' brief suggests that the Band is proceeding with an amendment. However, Plaintiffs do not provide any documentation. Instead, they offer three declarations of individuals who attended an April 2017 Band meeting. In essentially the same words, the three declarants indicate they are "informed and believe and thereon allege that the Enrollment Ordinance the San Pasqual Band is trying to put forward would remove the Bureau of Indian Affairs from oversight of enrollment in our Band." (ECF Nos. 6-3 at 3 (¶ 5); 6-4 at 3 (¶ 5); 6-5 at 3 (¶ 6).) Thus, the declarants do not have direct knowledge of any proposed amendment. Instead, Plaintiffs ask for an injunction based on a proposed amendment that may not exist or that may not do what they fear.

Second, any amendment of the Band's Constitution cannot take effect until approved by a majority vote of Band members at least 21 years old, in an election in which at least 30% of eligible voters participate. (ECF No. 6-32 at 7 (Art. X).) Such elections are known as Secretarial elections and are conducted by BIA. See Ex 1 (Long Decl.), ¶ 6. For the Band to request a Secretarial election, a majority vote of the Band General Council is required. See id. No amendment can proceed without a majority vote from the Council and the Band membership. See id. The Band has not yet requested a Secretarial election. See Ex 1 (Long Decl.), ¶ 7.

Third, any amendment cannot take effect until approved by the BIA. By regulation, BIA assesses whether the election met the standards in the Band's Constitution and whether the amendment conflicts with federal law. See Ex 1 (Long Decl.), ¶ 10.

Fourth, any approval of an amendment changing the Band's enrollment criteria would be considered final agency action in accordance with 25 C.F.R. § 81.45(f), making it ripe for review pursuant to the Administrative Procedures Act. See Ex 1 (Long Decl.),

¶¶ 11, 12. Therefore, presuming Plaintiffs have sufficient standing to challenge BIA's approval and meet other prerequisites to making such a challenge, they would then have a ripe APA claim upon which to seek review.

The harm Plaintiffs rely on here is entirely speculative. It requires that the Band write an adverse amendment, have the Council vote to request a Secretarial election, have the membership support the amendment, and have the BIA approve the amendment. This type of "speculative" injury cannot support a preliminary injunction. See Boardman, 822 F.3d at 1022. Therefore, Plaintiffs cannot show irreparable harm sufficient to warrant a PI, and the Court should deny their request for one.

3. The Balance of the Equities and the Public Interest Preclude a Preliminary Injunction Here

After addressing the likelihood of success and evidence of irreparable harm, a court must also consider the balance of the equities between the parties and the public interest. See, e.g., Arc of California v. Douglas, 757 F.3d 975, 991 (9th Cir. 2014). Where one party is the United States, those analyses can be merged. See Nken v. Holder, 556 U.S. 418, 435 (2009). The public interest analyses must also account for the impact on non-parties. See CTIA-The Wireless Association v. City of Berkeley, California, 854 F.3d 1105, 1124 (9th Cir. 2017). Here the balance weighs against a preliminary injunction, particularly given the highly uncertain nature of Plaintiffs' potential injury.

Plaintiffs' brief simply asserts that the case is a "private matter" and that the public is not involved. (ECF No. 6 at 15.) Obviously, the public interest is at play because the United States is a party. More specifically, there is harm to Defendants (and the public) in ignoring the requirements of the agency's internal process and the APA. On behalf of the public, Congress established procedures for judicial review of administrative actions, but only after the agency process is complete and a full record established. Review only after exhaustion of administrative process and a final decision is thus a means "of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the

courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." Tamosaitis v. URS Inc., 781 F.3d 468, 478 (9th Cir. 2015) (quoting Weinberger v. Salfi, 422 U.S. 749, 765 (1975)). By seeking to freeze that administrative process until the Court is able to rule on the merits, Plaintiffs would reverse the order established by Congress and put judicial review before a final agency decision.

An injunction also impacts the interests of the Band.[11] Federal law recognizes "Indian tribes as distinct, independent political communities, qualified to exercise many of the powers and prerogatives of self-government." Plains Commerce Bank v. Long Family & Cattle Co., 554 U.S. 316, 327 (2008). Central among those powers is the authority to "determine tribal membership." Id. "An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress." Williams v. Gover, 490 F.3d 785, 789 (9th Cir. 2007); see also Santa Clara Pueblo, 436 U.S. at 72 n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

Here, again, Congress has established the process. The Band has control over tribal membership—subject to BIA oversight. The proper time for a challenge to that process is after the Band has acted and BIA has ratified that choice. Thus a preliminary injunction would harm both the public interest and the Band's interest in controlling its own membership by putting an additional restriction on the Band. Instead, the balance of the equities and public interest compel a ruling that allows the Band and BIA to undergo their typical process, and withholds any right to challenge the outcome until after that process has been completed.

IV. CONCLUSION

For the reasons stated above, the Court should grant Defendants' 12(b)(1) motion to dismiss Plaintiffs' motion for a preliminary injunction, and Plaintiffs' Complaint seeking a

[11] To be clear, neither Defendants, nor the attorneys appearing on their behalf, represent the Band in this litigation. Defendants merely point out that the "public interest" the Court must analyze includes entities other than the parties to this litigation, including the Band.

permanent injunction, for lack of subject matter jurisdiction. For the same reasons, the Court should rescind the TRO. Alternatively, the Court should deny Plaintiffs' request for a PI and rescind the TRO.

DATED: June 19, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, an individual, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al. Defendants.	Case No.: 17-cv-0938-AJB-KSC CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of:

NOTICE OF MOTION AND MOTION TO: 1) DISMISS PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION AND THE COMPLAINT SEEKING A PERMANENT INJUNCTION FOR LACK OF SUBJECT MATTER JURISDICTION; OR 2) ALTERNATIVELY DENY PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

along with all associated documents (memorandum of points and authorities, exhibits, etc.) on the following party(ies) by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Alexandra Riona McIntosh
Law Office of Alexandra McIntosh
2214 Faraday Avenue
Carlsbad, CA 92008
Email: alexandra_mcintosh@yahoo.com

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 19, 2017

s/ George Manahan
George V. Manahan
Assistant U.S. Attorney
Email: george.manahan@usdoj.gov
Attorney for Defendant