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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Cindy Alegre, an individual, et. al., Plaintiffs, vs. RYAN ZINKE, Secretary of the Department of the Interior, in his official capacity, et. al. Defendants.	Case No. 17-CV-0938-A.B.-K.C. **PLAINTIFFS' OPPOSITION AND RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION AND COMPLAINT SEEKING A PERMANENT INJUNCTION FOR LACK OF SUBJECT MATTER JURISDICTION; OR DENY PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION** DATE: August 10, 2017 TIME: 2:00 P.M. CTRM: 4A JUDGE: Hon. Anthony J. Battaglia

COMES NOW PLAINTIFFS in Opposition and Response to Defendants' Motion to Dismiss Plaintiffs' Request for a Preliminary Injunction and Complaint seeking a Permanent Injunction for lack of subject matter jurisdiction; or, Deny Plaintiffs' Request for a Preliminary Injunction. [Fed.R.Civ.P. 12(b)(1)].

I
STATEMENT OF RELEVANT FACTS

Plaintiffs have brought three separate cases against the Defendants that relate to membership disputes and violation of civil rights.[1] As the Ninth Circuit stated in *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013):

> Such membership disputes have been proliferating in recent years, largely driven by the advent of Indian gaming, the revenues from which are distributed among tribal members. See generally Suzianne D. Painter-Thorne, *If you Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 Lewis & Clark L. Rev. 311, 313 & nn.8-10, 320 (2010); see *also Alverado v. Table Mountain Rancheria*, 509 F.3d 1008, 1014-15 (9th Cir. 2007; *Lewis,* 424 F.3d at 960.

On April 10, 2005, the San Pasqual Tribal Council met and approved the enrollment of the Plaintiffs, who are Jose Juan and Guadalupe Martinez and

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[1]Alegre v. U.S., 16-CV-2442 [Case 1]; Alegre v. U.S. 17-CV-0938 [Case 2]; Alvarado v. U.S., 17-cv-01149 [Case 3]. Plaintiffs request this Court take Judicial Notice of 16-cv-2442 and 17-cv-01149. Plaintiffs have recently moved this Court to consolidate the three cases.

Modesta (Martinez) Contreras' descendants, into the San Pasqual Mission Band of Indians. [PCI ¶5; Exhibits 2, 3]. Pursuant to the Tribe's Constitution which incorporates 25 CFR §48, the Business Committee/Tribal Council forwarded Plaintiffs' approved applications to the DOI-BIA on or about September 12, 2005. [PCI[2] ¶ 5; Ex 4] [FAC ¶ 6-9, Ex 3,4; ¶ 10]. Although the Defendants were required to review and adjudicate Plaintiffs' applications within thirty (30) days, they never adjudicated these applications. [PCI ¶ 8; Ex 8 (25USC §48)] [FAC ¶ 24, Ex. 9]. Instead, on or about December 8, 2005,the Defendants returned Plaintiffs' applications to the Enrollment Committee without notifying Plaintiffs that their applications were not adjudicated. [PCI ¶7; Ex. 6].

Prior to December 8, 2005, but after September 12, 2005, the Enrollment Committee sent a letter on September 22, 2005, [FAC ¶¶11-13, Ex. 2,6] to the Defendants asking the Defendants to adjust the blood degree of Modesta (Martinez) Contreras from 3/4 to 4/4 blood of San Pasqual Indian. [PCI ¶6; Ex. 5]. On or about January 31, 2006, Defendant DUTSCHKE, Pacific Regional Director, made a determination, based on unvetted, unreliable, faulty and incorrect data, that Modesta (Martinez) Contreras was not a full blood San Pasqual Indian. [PCI ¶8; Ex. 7][FAC ¶¶14, 18-19; 24-25, Ex. 7,9]. In violation of statutory mandate,

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[2]"PCI" refers to Plaintiffs' complaint for Injunction: 17-cv-0938; "FAC" refers to Plaintiffs' First Amended Complaint in case 16-cv-2442.

Defendants have never given Plaintiffs notice of this decision. It was not until Plaintiffs' received responses on October 1, 2014 and May 27, 2015 to their FOIA requests that Plaintiffs discovered that DUTSCHKE denied the Tribal Council's request to increase their ancestor Modesta (Martinez) Contreras' blood degree to 4/4 blood of San Pasqual Indian. [PCI ¶¶9-12; Exs. 9,10] [FAC ¶¶14-21, 22-23, Ex.1].

In 1966 the Tribal Council/Enrollment Committee denied Trask descendants' applications [PCI ¶26; Ex. 19] for federal recognition in the San Pasqual Mission Band of Indians. [PCI ¶¶ 20-24; Exs. 11,12, 13, 14]. But, over the objections of the true San Pasqual Indians [PCI ¶26; Ex. 19] the Defendants enrolled the Trask family members into the BAND. [PCI ¶¶24-28; Exs. 16-21, 23, 26]. In the 1990's the BIA overturned the Tribal Council's rejection of the Trask Descendants' enrollment applications and enrolled the Trask descendants in violation of 25 CFR §48. [PCI ¶221; Ex. 29]. True San Pasqual members of the BAND have continued their objections to the Trask enrollment in their BAND without recognition from the Defendants. [PCI Ex. 21, 27]. Since the Defendants wrongfully enrolled the Trask descendants who have no San Pasqual blood, Allen Lawson, Jr. [alleged descendant of Frank Trask] who possesses no San Pasqual blood at all is the Tribal spokesman. [PCI ¶¶ 28-32; Ex. 21]. Under Lawson's

control, the Tribal Council has issued illegal Moratoriums on enrollment. [PCI ¶ 30-32; Ex. 22,23]. This was done during the litigation of the *Alto*[3] case on August 27, 2009 and June 23, 2011. The Enrollment Committee put the Moratoriums in place after there was a request to the BIA not to enroll the Trask descendants. [PCI ¶30-32; Exhibits 22,23]. These actions are in violation of the Tribe's Constitution and enrollment statute, Title 25 CFR §48. Yet, the Defendants have done nothing to correct this situation. Furthermore, since Plaintiffs' have filed their first complaint on September 28, 2016, [PCI ¶¶228-230] Lawson, as Tribal spokesman, and other tribal leaders who are mostly Trask descendants, issued another illegal Moratorium and started making plans to change the BAND's Constitution and enrollment criteria. [PCI ¶232-240]. [See attached Declarations] Although Javin Moore stated in his declaration dated March 27, 2017 that the Southern California Agency forwarded 87 partial enrollment applications to the Enrollment Committee of the Band for their review on March 7, 2017, Plaintiffs have not had the opportunity to present their evidence to the BIA.

On or about April 9, 2017, a Constitutionally mandated General Council meeting took place on the San Pasqual reservation. While the unconstitutional and illegal enrollment Moratorium had expired, the Trask family and their political

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[3] Request for Judicial Notice – *Alto v. Salazar* (District Court Case No. 11cv2276 Southern District of California; See, *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013].

cronies moved to begin a new unconstitutional and illegal Moratorium on enrollment until a new enrollment ordinance could be put in place: One which will require an amendment to the San Pasqual Constitution. (In violation of 25 CFR §48.14 which requires the rolls be kept current). This is being done to eliminate 25 CFR §48 as the Tribe's enrollment statute thereby removing oversight by the DOI-BIA. Removing the DOI-BIA from oversight of the Enrollment process will prevent the true San Pasqual Plaintiff descendants from being enrolled in their own tribe.[See Declarations of Attorney Alexandra R. McIntosh, James Quisquis, Rick Cuevas, Larry Blacktooth and other enrolled members, incorporated herein]. It is these acts by the Tribal Council that have to be approved by the Defendants that have caused the Plaintiffs to bring their Complaint for Injunction. [PCI ¶¶232-240]. [See, *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013]. The threat of irreparable harm looms over all Plaintiffs' future if 25 CFR §48 is altered or removed from the Tribe's Constitution.

The third case [*Alvarado v. U.S.A., et. al.,* 17-cv-1149] which was filed on June 8, 2017, against the same Defendants is brought by eighteen (18) enrolled members of the San Pasqual Mission Band of Indians. This complaint is based on

the same historical background, Tribal Constitution, U.S. Constitution, laws and statutes as cases One and Two. [AC ¶¶1-10, 12-21, 51-139, 141-146, 148-167, 168-187, 189-192, 194-196, 198-201]. Because other tribes in the area have dis-enrolled legitimate members of their tribe after removing the DOI-BIA oversight on enrollment actions, Plaintiffs are fearful that they, too, will be dis-enrolled if the Defendants are not enjoined from approving any changes to the Tribe's Constitution.[See attached Declarations of Alexandra McIntosh, Lajean Miller, Paul Contreras, III, Larry Blacktooth, and Rick Cuevas].

II
ARGUMENT

A THIS COURT HAS JURISDICTION TO ADJUDICATE PLAINTIFFS' COMPLAINT FOR INJUNCTION

1. The Basis For Defendants' Motion To Dismiss

In their Motion to Dismiss, the Defendants assert: 1) "[I]n the absence of final agency action, federal courts lack subject matter jurisdiction [SMJ] to consider the request." [Defendants' Motion to Dismiss (MD) 5:17]; 2) "[A] request for injunction, even against a credible threat of future harm, must be dismissed for lack of subject matter jurisdiction if the claim is not ripe." [MD5:21-23]; 3) "There must be both a waiver of sovereign immunity, and a statutory

authority vesting a district court with SMJ." (Cites APA) [MD6:9-25; 7:1-6]; 4) Plaintiffs fail to point to any agency action which might provide the court jurisdiction over Plaintiffs' injunction requests [MD7:22-23]; and 5) Even if the Court has SMJ, it should deny Plaintiffs' request for Preliminary Injunction relief because: a) Plaintiffs have no chance of success on the merits; b) Plaintiffs are not likely to suffer irreparable harm; and, c) The balance of the equities and the public interest preclude a preliminary injunction. This Court should Deny Defendants' Motion for the reasons stated in this Response and Opposition paper.

2. Standard For District Court Review

In deciding the Defendants' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) this Court may consider affidavits and other evidence in order to be satisfied that jurisdiction exists. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003). The Court must accept as true all well-pleaded facts and allegations in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). See also, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,322 (2007) (stating that courts "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to

dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.")

3. Permanent Injunctions Are Meant To Preserve A Status Of Action Or Inaction Permanently.

Case law and practice have established that permanent injunctions are meant too preserve a status of action or inaction permanently. As discussed in this response Plaintiffs are seeking a permanent injunction preventing the DOI-BIA from approving any changes to the San Pasqual Tribal Constitution that would alter or remove 25 CFR §48 from their Constitution thereby removing BIA oversight of the enrollment process. Once BIA oversight is removed by removing 25 CFR §48 Plaintiffs have absolutely no remedies to seek redress for illegal, unconstitutional, and discriminatory enrollment decisions. If this should take place while Plaintiffs are in litigation on these three complaints, they would be denied the jurisdiction of this Federal Court to seek relief because they cannot sue the Tribe in Federal Court.

The Defendants base their entire motion to Dismiss Plaintiffs Complaint for Injunction on the defense of "lack of agency" action under the APA. As will be discussed below, there is prospective relief that this Court can grant to Plaintiffs in order to protect them from irreparable harm. *Assuming arguendo*, there is lack of

agency action under the APA, Defendants' violation of statutory mandates and Plaintiffs' civil rights give this Court the jurisdiction to issue a prospective Permanent Injunction [and/or Preliminary Injunction] because this Court can issue an Injunction based on a federal question. In their companion cases which have been discussed above, Plaintiffs have stated facts that raise federal questions thereby giving this Court the jurisdiction to Issue a valid Injunction. The Court stated in *Alto v. Black*:

> [T]he tribe's own governing documents vest the United States Department of Interior, Bureau of Indian Affairs with ultimate authority over membership decisions. . . . We hold that the exercise of jurisdiction was proper, and that the Band is not a required party for the adjudication of the claims underlying the preliminary injunction, as they concern solely the propriety of final agency action. *Alto v. Black*, supra.

4. An Injunction May Give Prospective Relief When There Is A Federal Question.

A plaintiff may ask a court for either declaratory or injunctive relief before suffering actual injury. Both are prospective remedies. *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974). An Injunctive remedy should advance some substantive or constitutional purpose. In the alternative to an Injunction, declaratory judgment is a remedy or a procedural tool hiding behind a remedy. It may serve as a

foundation for an injunction or damages. Plaintiffs are embroiled in an actual controversy with the Defendants concerning the Defendants' position over tribal enrollment pursuant to 25 CFR §48. Although the tribal council has not yet petitioned the Defendants for a change in their Constitution and enrollment procedures and criteria, when that is done, the Plaintiffs will be left without any legal remedies to correct the harm that has been perpetuated upon them by the Defendants. In the alternative, a declaratory judgment in this case would be a final determent clarifying and setting legal relations by telling the parties to this controversy what their rights and obligations are. There is no reason why the Defendants will not stipulate to "keep the status quo" pending the litigation of the three companion cases in front of this Court, unless they know something that Plaintiffs do not know.

5. The Propriety Of Agency Action Is A Federal Question.

The central issue in this suit concerns tribal membership and its attendant rights and privileges. In *Algere* 16-CV-2442 Plaintiffs seek review by this Court under the APA's arbitrary and capricious standard of the Assistant Secretary's [AS] action in failing to adjudicate their applications for federal recognition that had been approved by the BAND and the AS's failure to give Plaintiffs notice of

her actions. This Court has jurisdiction to review agency action under the APA even when the agency applies tribal law. *Alto v Black*, 738 F.3d 1111 (9th Cir. 2013) citing *Moapa Band of Paiute Indians v. U.S. Department of Interior*, 747 F.2d 563, 565-66 (9th Cir. 1984); *Baciarelli v. Morton*, 481 F.2d 610, 612 (9th Cir. 1973) (per curiam); *Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226-29 (9th Cir. 2013) ("We have jurisdiction to review final agency action, 5 U.S.C. §704.) See also, *Runs After v. United States*, 766 F.2d 347, 351 (8th Cir. 1985); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983); *Shenandoah v. U.S. Department of Interior*, 159 F.3d 708n (2d Cir. 1998). "Decisions of the BIA made at the level of Assistant Secretary or above are apparently reviewable in district court." *Kaw Nation v. Norton*, 405 F.3d 1317, 1325 n.10 (Fed.Cir.2005).

The *Alto* Court stated:

> The APA provides that "[a] person **suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.**" *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (quoting 5 U.S.C. §702). APA ¶704, in turn, specifically provides for judicial review of final agency action 'for which there is no other adequate reedy in a court." 5 U.S.C. §704. As these provisions reflect, Congress's understanding in

> passing the APA was that "judicial review should be widely available to challenge the actions of federal administrative officials." *Califano v. Sanders*, 430 U.S. 99, 104 (1977). The APA therefore creates a "strong presumption that Congress intends judicial review of administrative action. *Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 670 (1986), see also *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). . . **It is common ground that if review is proper under the APA, the District Court ha[s] jurisdiction under 28 USC §1331**. *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988); see also *Sharkey v. Quarantillo*, 541 F.3d 75, 83-84 (2d Cir. 2008). . . . See, *South Delta Water Agency v. U.S. Department of Interior, Bureau of Reclamation*, 767 F.2d 531 (9th Cir. 1985). [Emphasis added].

Defendants contend that there was no final agency action, therefore there this court does not have jurisdiction to issue a Temporary Injunction or a Permanent Injunction. They are incorrect. On July 24, 2015 [FAC ¶47; Exhibit 14] the BIA, Southern California Agency wrote: "This April 7, 2006 [FAC ¶4; Exhibit 1] decision is final for the Department." Therefore, this Court has jurisdiction under the APA's arbitrary and capricious standard to review the following agency's actions and/or inactions: 1) April 7, 2006 denial of the Band's request to increase Modesta (Martinez) Contreras' blood degree from 3/4 to 4/4; 2) Failure to give Plaintiffs notice of this decision; 3) Failure to follow statutory mandates under 25 CFR §48 to review and adjudicate Plaintiffs legally approved applications; and 4) Failure to notify Plaintiffs they returned their applications to the Band without adjudicating or reviewing them.

If this Court does not issue at least a Temporary Injunction to preserve the status quo during this litigation the Plaintiffs will suffer irreparable in the form of being denied any legal remedies in addition to their federal status as blood of San Pasqual Indian and all benefits that accrue from that status. 5 U.S.C. §705 states:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court may issue all necessary and appropriate process to postpone the effective date of an agency action **or to preserve status or rights pending conclusion of the review proceedings**. [Emphasis added].

Under the last portion "to preserve status or rights pending conclusion of the review proceedings" this Court has the jurisdiction to issue an Injunction or Temporary Injunction to preserve Plaintiffs status and standing pending review of Plaintiffs claims as stated in their complaints.

B THIS COURT HAS JURISDICTION TO ADJUDICATE PLAINTIFFS' MOTION FOR TEMPORARY [PRELIMINARY] INJUNCTION.

1. Defendants' Basis For Motion To Dismiss

The Defendants argue that this Court should deny Preliminary Injunctive relief because it is an extraordinary remedy [MD11:9-12], Plaintiffs have no

chance on the merits, Plaintiffs will not suffer irreparable harm, and the balance of the Equities and the Public Interest Preclude a Preliminary Injunction.[MD 12-16].

2. Federal Rule Of Civil Procedure 65(a) Permits Federal Courts To Issue Preliminary Injunctions.

Preliminary/Temporary Injunctions are generally meant to preserve a status quo of action or inaction, pending a final decision of a case. The rule specifies neither the purpose of nor the conditions necessary for granting such injunctive relief. The grant or denial of a preliminary injunction is left to the trial court's discretion, which is guided by historic principles of equity. Courts, then, generally do not issue injunctive relief unless a remedy at law is inadequate and an injunction is necessary to preserve the status quo.[4] Courts typically invoke the traditional test, which requires the balancing of four factors: 1) Whether the petitioner has demonstrated probable success on the merits; 2) Whether the petitioner will suffer irreparable harm if injunctive relief is denied; 3) Whether

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[4]See, D. Dobbs, Remedies 52 (1973); Plater, Statutory Violations and Equitable Discretion, 70 Cal.L.Rev. 524, 533-45 (1982); Developments in the Law-Injunctions, 78 Harv. L.Rev. 994, 1056-59 (1965); Wright & A. Miller, Federal Practice and Procedure §2944 at 392, §2947, at 423, §2948 at 463-64 (1973).

such harm will outweigh any injury that respondent will suffer if injunctive relief is granted; and 4) whether granting injunctive relief will best serve the public interest. *Id.* Fn7.

Some courts issue preliminary injunctive relief when the moving party has proven either: (1) a combination of probable success and the possibility of irreparable injury; **or** (2) that serious questions are raised and the balance of hardships favors injunctive relief. *See, e.g.*, *United States v. Akers*, 785 F.2d 81, 818 (9th Cir. 1986); *City of Tenakee Springs v. Block*, 778 F.2d 14022, 14077 (9th Cir. 1985). "[I]t is clear that a party seeking a preliminary injunction in the federal courts must, at a minimum, demonstrate 'irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The *Romero-Barcelo* Court also recognized that there is the existence of a rebuttable presumption of injunctive relief for substantial procedural violations of statutes. *Id.* This presumption is founded on the understanding that the irreparable harm associated with a substantial procedural violation is the failure to comply with the decision making process mandated by statute.

Where a procedural statute is involved, as opposed to a substantive statute, a

three factor test should be used, rather than the traditional test: 1) Probable success on the merits should be established; 2) irreparable harm which could lie in the procedural harm; 3) Public interest should be defined by the statute. [This test was established as a result of land conservation acts. See *Amoco Production Co. v. Village of Gambell*, 106 S.Ct. 2274 (1986)]. The Ninth Circuit Court of Appeals first confronted the issue of whether and to what extent procedural statutes affect the courts' power to invoke the traditional test for issuance of a preliminary injunctions for a probable violation. See *Lathan v. Volpe*, 455 F.2d 1111, 1116-17.

3. Plaintiffs Seek To Maintain The Status Quo.

In order to avoid suffering irreparable harm, Plaintiffs seek to maintain the status quo during these proceedings. As a general rule, a party must exhaust available administrative remedies before judicial relief will be granted. *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938). A different problem arises when a party seeks judicial intervention not to challenge the validity of the agency's action, but rather merely to maintain the status quo during the process. Interim relief is ordinarily granted in order to prevent irreparable harm to the party who would suffer injury.

When the presence and extent of irreparable injury are evident, this Court

may grant interim relief without requiring exhaustion of administrative remedies. Interim relief concerns the propriety of a court exercising its power to preserve the status quo until the prescribed administrative action is completed. The court is not asked to make a binding determination on the merits of a particular proceedings, but rather to prevent irreparable damage while the administrative decision still remains pending and uncertain.

The leading case which appears to provide the basis for the doctrine of granting interim relief to maintain the status quo pending administrative action is *West India Fruit & Steamship Co. v. Seatrain Lines, Inc.* 170 F.2d 775 (2d Cir. 1948), petition for *cert. dismissed*, 336 U.S. 908 (1949) (on motion of petitioner). In this case, the Court concluded that the stay requested (by the agency itself) was not in deterioration of the administrative process but rather in assistance of that process. In *Isbandsten Co. v. United States*, 81 F.Supp. 544, 547 (S.D.N.Y. 1948) the Court found an "equitable power . . . to preserve the status quo to protect the rights of all concerned.. . . " See, *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965); *FTC v. Dean Foods Co.,* 384 U.S. 597, 604 (1965); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *Smith v. Resor*, 406 F.2d 141 (2d

Cir. 1969)(Judicial power to maintain the status quo pending final agency action).

4. Interim Relief Is A Compliment To The Process

The Court in *Murray v. Kunzig*, portrayed interim relief as a complement to the administrative process, not in contravention with the requirements of the exhaustion doctrine, and equated the power to grant such relief with the power to preserve the status quo pending judicial reviews. *Murray v. Kunzig*, 462 F.2d 8712 *rehearing denied*, 462 F.2d 883 (D.C.Cir. 1972) (opinion rendered) *(cert. granted)* 41 USLW 3493 (U.S. Mar. 19, 1973)

C. PLAINTIFFS SATISFY THE CRITERIA NECESSARY FOR THIS COURT TO ISSUE A PRELIMINARY/TEMPORARY INJUNCTION AND/OR A PERMANENT INJUNCTION.

1. Traditional Test[5]

a. Likelihood of Success on the Merits - Defendants, instead of agreeing to a stipulation to preserve the status quo or stipulating to having the BIA agree to adjudicate Plaintiffs' applications for membership based on new evidence presented, keep filing motions to dismiss in the hopes that they can bar Plaintiffs from seeking relief in Federal Court. They are doing this

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[5]*In re Korean Air Lines Co.*, 642 F.3d 685, 691 n.3 (9th Cir. 2011); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

because they know that if the Plaintiffs "get their foot in the door" they are in trouble. They will have to account for not only the recent statutory violations and violations of Plaintiffs' civil rights but for the wrongful enrollment of non-San Pasqual persons into the San Pasqual Mission Band of Indians. There is a great likelihood of Plaintiffs' being successful on the merits of their cases.

b. Potential for Irreparable Harm if No Injunction Issued - If the Defendants approve the Tribe's proposed Enrollment Ordinance it would eliminate oversight by the BIA ad their approval for enrollment in the San Pasqual Mission Band of Indians by the Assistant Secretary-Indian Affairs. Should this provision be approved by the BIA and put in place it would not only eliminate the Assistant-Secretary from oversight of enrollment in the BAND, but it would, by operation of law, remove the Federal Court as an avenue for the San Pasqual Indians to turn to for future abuses. This change would eliminate 25 CFR §48 which would remove BIA oversight and allow the white European non-San Pasqual Trask Descendants free rein to run the tribal business, take Casino income, place illegal moratoriums on enrollment, control enrollment without federal review and dis-enroll others at a whim. This is exactly what has happened

to the Pala Band of Mission Indians. They had an enrollment regulation similar to the San Pasqual enrollment regulation. They drafted a new enrollment ordinance and amended their tribal constitution removing the bureau of Indian Affairs, which was approved by the Assistant Secretary. No sooner had the Assistant Secretary given approval to the new enrollment ordinance and the tribal constitution than the Pala Band began to dis-enroll Federally recognized Pala Tribal Members. There was nothing that anyone could do because these members no longer had recourse in the court system. If this happens while Plaintiffs cases are being litigated, their cases will become moot because there will be no access to the Federal Courts. [See Declaration of Paul Contreras, III, Lajean Miller, James Quisquis].

The same thing happened to members of the Pechanga Tribe. Rick Cuevas writes:

> I am a Pechanga Indian, a lineal descendant of Paula Hunter, an original Pechanga Temecula Person, who was bon circa 1838 and died in 1899. . . . I am a Pechanga Indian and for 49 years, I was a member of the Temecula Band of Luiseno Indians. I was disenrolled by the Pechanga Band in 2006 along with 94 additional adults and over 30 children under age 18. Our disenrollment was a result of politicians and greed. . . . Essentially, non-Pechanga people have the rights as Federally recognized natives, while true Pechanga natives were terminated from the tribe. . . . Losing my heritage has been painful to experience and to watch as my family deteriorates, without receiving justice. The case of *Santa Clara Pueblo v. Martinez*, 436 U.S. 19 (1978) applies to enrollment in my tribe. The Bureau of Indian Affairs did not oversee our enrollment. As a result, we have no ability to come to court

> for any type of redress; no matter how wrongful, corrupt or fraudulent the actions of a corrupt tribal government. . . We lost the right to vote on matters that affect us and all tribal issues. Our reserved water rights were given to a tribe controlled by non-native criminal families. We lost our healthcare . . . COBRA, AHCA . . tribal school . . cemetery burial . . . financial repercussions were enormous. Each Hunter family lost income that totaled, individually, $268,000.00 a year. . . we have been scorned. [See Declaration of Rick Cuevas].
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> Larry Blacktooth writes: "
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> I am a Cupe˜no Indian. My great-grandfather was the last Captain of the Cupeno Indians before they were removed from our aboriginal land at Warner Sprints. In 1903, my ancestors were forcibly removed at gunpoint from our aboriginal land and forced to relocate on the Pala Reserve. . We are now part of the Pala Band of Mission Indians. The Pala Band had an enrollment ordinance that was promulgated by the Bureau of Indian Affairs, like the San Pasqual Indians . . .A few years ago the BIA approved a new enrollment ordinance and Tribal constitution for the Pala Band. The Assistant Secretary-Indian Affairs had to approve of the change. After their new enrollment ordinance and constitution was put in place, and the BIA were removed from the Pala Enrollment regulations the disenrollments of the Cupeno Indians started. . . . leaving our people with no where to go for help. [See Declaration of Larry Blacktooth].

See, Declaration of Alexandra McIntosh incorporated herein as if fully quoted.

c. Harm to Parties - Plaintiffs can see no harm to the Defendants by granting a Temporary Injunction to maintain the status quo pending the outcome of Plaintiffs' three cases. The harm to the Plaintiffs is outlined above

and in paragraph (b). Furthermore, Plaintiffs refer this Court to the following articles: Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*. 14 Lewis & Clark L.Rev. 311 (2010); Gabriel S. Galanda and Ryan D. Dreveskrach, *Curing the Tribal Disenrollment Epidemic: In Search of A Remedy*, 57 Ariz. L.R. 383 (2015); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1014-15 (9th Cir. 2007). These articles detail the hardships endured by those who the BIA can not or will not enroll.

d. Public Policy Consideration - Public Policy Consideration should include only one class of persons: San Pasqual Indians, enrolled and not yet enrolled. Success in these cases will give relief to not only San Pasqual Indians, but also to persons of other tribes who have experienced illegal dis-enrollment and take over by other tribes and persons because the BIA approved changes in their Constitution.

2. In the alternative Plaintiffs urge this Court to use the *Romero-Barcelo* test.

The *Romero-Barcelo* test is a much simpler test: a) A combination of probable success and the possibility of irreparable injury -or- b) Serious questions are raised and the balance of hardships favors injunctive relief. Plaintiffs urge this

Court use the Romero-Barcelo test based on the facts stated above in Paragraph C(1)(d). *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). In addition, Plaintiffs urge this Court to apply a rebuttable presumption of Injunctive Relief for substantial procedural violations of statutes such as the violations that have occurred in these three cases.

D. RIPENESS

If the issue presented involves purely a question of law or a concrete factual context that would not be enhanced by further factual development, there is a greater chance of finding the claim to be ripe. In contrast, ripeness is less likely when the factual record does not permit necessary interest balancing or a necessary assessment of the effect of the challenged law on the plaintiff's conduct. For example, in *Socialist Labor Party v. Gilligan*, the Court found unripe a challenge to a law alleged to have made it more difficult to place the name of a candidate on the ballot for election. The Court noted that the record was "extraordinarily skimpy" and offered insufficient evidence of the effect of the law on plaintiff's efforts. Clearly, the Plaintiffs have developed and filed a very detailed a factual record as possible to support their contention that the issue is

ripe. *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972).

In general, the greater the potential hardship from denying review, the greater the chance the case is ripe. Plaintiffs have stated the hardships they would suffer if this Court does not issue at least Temporary Injunction to keep the status quo.

III
CONCLUSION

For the reasons stated above, this Court should deny Defendants' Motion to Dismiss in its entirety, Issue a Temporary Injunction to preserve the status quo in order to protect Plaintiffs from irreparable harm. Or, enter Declaratory relief clarifying what is expected of the BIA. As stated by the Ninth Circuit: "[T]he federal government, including the Secretary, has a trust responsibility to the Tribe[]," as a trustee, which obligates the Secretary to protect the Tribe['s] interests in this matter. *Alto v. Black*, 738 F.3d 1111, citing *Washington v. Daley,* 173 F.3d 1158, 1168 (9th Cir. 1999).

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Respectfully submitted:

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