UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERT P. ALTO, et al., Plaintiffs, vs. KEN SALAZAR, Secretary of the Department of Interior - United States of America, et al., Defendants.	CASE NO. 11cv2276 – IEG (BLM) ORDER GRANTING PRELIMINARY INJUNCTION [Doc. No. 4].

This is an action challenging Assistant Secretary of the Department of Interior for Indian Affairs Larry Echo Hawk's determination that Plaintiffs' names should be removed from the membership roll of the San Pasqual Band of Dieguno Mission Indians ("Tribe" or "Band"). Plaintiffs, collectively known as the "Marcus Alto Sr. Descendants," seek declaratory and injunctive relief from a January 28, 2011 order issued by Defendant Hawk finding that Plaintiffs' original enrollment in the Tribe was based on inaccurate information. Plaintiffs allege that the January 28, 2011 order was arbitrary and capricious in violation of their due process rights under the Fifth Amendment and the Administrative Procedure Act ("APA"). Currently before the Court is Plaintiffs' Motion for Preliminary Injunction. [Doc. No. 4.] Having considered the parties' arguments, including those of the Tribe, who was granted leave to file an *amicus curie* brief, and for the reasons set forth below, the Court **GRANTS** the preliminary injunction.

BACKGROUND

I. San Pasqual Indians

The Band is a federally recognized Indian tribe composed of descendants from Indians who occupied the San Pasqual Valley, along the Santa Ysabel Creek east of San Diego, before the arrival of the Europeans. (Compl., Ex. 10, at 2 [Doc. No. 1-11] (hereinafter, "Jan. 28, 2011 order").) Efforts to provide a reservation for the Band began in 1870, but none were successful until 1910. (*Id.*) Even then, the land actually acquired was in the wrong township and not very arable. (*Id.* at 2-3.) Although the United States trust-patented the land as a reservation for the San Pasqual Indians, none of the San Pasqual Indians actually resided there for the next forty years.

In 1928, Congress passed "An Act Authorizing the attorney general of the State of California to bring suit in the Court of Claims on behalf of the Indians of California," which permitted Indians living in California to sue the United States for all claims arising from the uncompensated taking of Indian lands in California. 45 Stat. 602 (May 18, 1928). The Act also directed the Secretary of the Interior to make a roll of Indians living in California that met the criteria for entitlement to any judgment from litigation provided under the Act. The resulting roll was published in 1933. Marcus Alto Sr., Plaintiffs' ancestor and the individual through whom they claim tribal membership, and Maria Duro Alto, Marcus Alto Sr.'s purported biological mother, were both included on the 1933 roll of California Indians. (Jan. 28, 2011 order, at 3.)

Indians claiming descent from the San Pasqual Indians met in the late 1950s to identify an enrollment committee and formulate criteria for tribal membership. (*Id.*) However, almost from the beginning, disputes developed between the Bureau of Indian Affairs ("BIA") and the tribal members as to how to determine qualifications for Tribe membership. As a result, the Department of the Interior promulgated regulations intended to govern the preparation of the Tribe's membership roll. The final rule was codified at 25 C.F.R. Part 48. *See* Preparation, Approval and Maintenance of Roll, 25 Fed. Reg. 1,829 (Mar. 2, 1960). The Part 48 regulations directed that a person who was alive on January 1, 1959, and who was not an enrolled member of another tribe, qualified for Tribe membership if that person was (a) named as a member of the Tribe on the 1910 San Pasqual census, (b) descended from a person on the 1910 census and possessed at least 1/8

blood of the Tribe, or (c) was able to furnish proof that he or she had 1/8 or more blood of the Tribe. (25 C.F.R. § 48.5 (attached as Exhibit 6 to Strommer Declaration [Doc. No. 10]).) The regulations provided for several levels of review, including appeals to the Commissioner (now the Director of the BIA) and the Secretary of the Interior. (*Id.* §§ 48.6–48.11.) The authority to issue a final decision respecting membership in the Tribe was vested in the Secretary. (*Id.* § 48.11.)

The implementation of the Part 48 regulations resulted in the creation of a membership roll in 1966. Marcus Alto Sr. and his descendants were not included on that roll.

The Tribe voted on its Constitution in November 1970, and the document was approved by the Assistant Secretary in January 1971. Article III of the Tribe's Constitution provides:

> Section 1. Membership shall consist of those living persons whose names appear on the approved Roll of October 5, 1966, according to Title 25, Code of Federal Regulations, Part 48.1 through 48.15.
>
> Section 2. All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance which shall be approved by the Secretary of the Interior.

(Compl., Ex. 1 [Doc. No. 1-2] (hereinafter, "Tribe's Constitution").)

Part 48 regulations were later re-codified in 25 C.F.R. Part 76. In 1987, the regulations were re-written to assist the distribution of a judgment fund pursuant to an award by the United States Court of Claims, known as the "Docket 80-A funds." *See* Enrollment of Indians of the San Pasqual Band of Mission Indians in California, 52 Fed. Reg. 31,391 (Aug. 20, 1987) (to be codified at 25 C.F.R. pt. 76). The goal was to bring current the membership roll of the Tribe to serve as the basis for the per capita distribution of the judgment funds. *Id.* On June 3, 1996, having served its purpose, Part 76 was removed from the Code of Federal Regulations. *See* Enrollment of Indians; Removal of Regulations, 61 Fed. Reg. 27,780 (June 3, 1996). The 1960 regulations, however, are still a part of the Tribe's Constitution. (*See* Tribe's Const., art. III.)

II. 1994/1995 Alto enrollment

As relevant here, Marcus Alto Sr. submitted his application for enrollment in the Tribe on November 15, 1987. He listed Jose Alto and Mario Duro as his parents, both of whom appeared on the 1910 San Pasqual Census Roll. On June 16, 1988, Marcus Alto Sr. passed away. On May 23, 1991, the Superintendent notified the Tribe's Enrollment Committee of his determination that

the descendants of Marcus Alto Sr. were eligible for enrollment in the Tribe. The Tribe's Business Committee rejected the Superintendent's determination, contending that Marcus Alto Sr. was not a "blood" lineal descendant of an ancestor from San Pasqual because he was an adopted son of Jose Alto and Maria Duro. Treating the Business Committee's rejection as an appeal, the Acting Area Director denied it on January 31, 1994. The Acting Area Director relied on Marcus Alto Sr.'s earlier 1928 enrollment application and an accompanying letter in determining that Maria Duro was Marcus Alto Sr.'s mother. The Tribe moved for reconsideration. On April 10, 1995, Assistant Secretary Ada Deer affirmed the rejection of the Tribe's appeal. (*See* Compl., Ex. 5, at 3 [Doc. No. 1-6] (hereinafter, "Apr. 10, 1995 order").) Since Secretary Deer's favorable decision, roughly 100 Marcus Alto Sr. Descendants have been enrolled as members of the Tribe.

III. 2003 and 2005 federal court challenges

In 2003, three members of the Tribe filed a lawsuit against the BIA challenging the decision to enroll descendants of Marcus Alto Sr. *See Caylor v. Bureau of Indian Affairs*, Civ. No. 03cv1859 J (JFS) (S.D. Cal. filed Sept. 8, 2003). Plaintiffs alleged two claims for relief: (1) arbitrary, capricious, and unlawful enrollment under the APA, and (2) breach of trust. The district court dismissed the lawsuit, finding that the APA claim was time-barred and that, in any event, the Tribe was an indispensable party that could not be joined. *Id.*, Doc. No. 29.

In 2005, several members of the Tribe filed another lawsuit against the BIA stemming from the 1995 enrollment of the Marcus Alto Sr. Descendants. *See Atilano v. Bureau of Indian Affairs*, Civ. No. 05cv1134 J (BLM) (S.D. Cal. filed May 31, 2005). Plaintiffs alleged that the BIA's acts and omissions in supervising the enrollment process of the Tribe have deprived them, the Tribe, and the Tribe's prospective members of equal protection of the laws as guaranteed by the Fourteenth Amendment and the Indian Civil Rights Act. The district court dismissed the lawsuit, finding that the plaintiffs lacked standing to sue and that the Tribe was an indispensable party that could not be joined. *Id.*, Doc. No. 13.

IV. 2007 enrollment challenge

In August 2007, a newly enrolled tribal member submitted the present challenge to the qualifications for enrollment of the Marcus Alto Sr. Descendants and provided allegedly new

evidence, including a 1907 baptismal record for one Roberto Marco Alto, showing the baby's parents to be Jose Alto and Benedita Barrios. The Enrollment Committee re-opened the matter and, ultimately, recommended that the Marcus Alto Sr. Descendants be removed from the Tribe's rolls because Marcus Alto Sr. was not a biological son of Maria Duro Alto. (Compl., Ex. 6 [Doc. No. 1-7].) The BIA disagreed, finding that the information previously submitted as well as the newly obtained information did not demonstrate that the prior enrollment was based on "inaccurate" information as required by 25 C.F.R. § 48.14(d) for deletion from the Tribe's membership roll.[1] (Compl., Ex. 7 [Doc. No. 1-8].) With regard to the 1907 baptismal record, the BIA concluded that it could not establish whether the person mentioned on it was Marcus Alto Sr. (*Id.* at 5.) Even if it was, the BIA concluded that he was still eligible to be included on the San Pasqual membership roll as a descendant of Jose Alto. (*Id.*) The BIA also found that the absence of Marcus Alto Sr. from the 1907-13 censuses of San Pasqual Indians did not prove that he was not the son of Jose Alto and Maria Dura. (*Id.*) Similarly, the BIA found that Maria Duro's statement on her 1928 application that she had no "issue" (i.e., children) was not dispositive because Marcus Alto Sr. may have been Jose Alto's son from another relationship. (*Id.*) Finally, the BIA noted that it was "inappropriate for the Committee to continue to raise this issue of the validity of the inclusion of Mr. Alto and his descendants on the Band's membership roll or to attempt to disenroll his descendants and to continue to seek remedy from the BIA." (*Id.* at 8.)

The Enrollment Committee appealed the BIA's decision to Assistant Secretary Hawk, a defendant in this action. After establishing that he had jurisdiction to review the appeal, Defendant Hawk requested additional documentation from the parties. (Compl., Ex. 8 [Doc. No. 1-9].) According to Plaintiffs, in response, the Tribe submitted multiple documents, including a 56-page interpretive report by Dr. Christine Grabowsky and a separate 19-page supplemental memorandum of points and authorities. In a letter to Defendant Hawk, Plaintiffs contended that the Tribe's submittal exceeded the scope of Hawk's request and asked for an opportunity to

[1] 25 C.F.R. § 48.14 governs the procedures for keeping the tribal membership roll current and provides, *inter alia*, that "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary." 25 C.F.R. § 48.14(d).

respond. (Compl., Ex. 9 [Doc. No. 1-10].) According to Plaintiffs, they never received a response to their letter. (Compl. ¶ 43.) On January 28, 2011, Hawk issued his decision, finding that Marcus Alto Sr. Descendants' names must be deleted from the Tribe's membership roll. (Compl., Ex. 10.)

Examining Part 48 regulations, Hawk first determined that the Tribe had the burden of demonstrating by a "preponderance of the evidence" that the enrollment of Marcus Alto Sr. Descendants was based on "inaccurate" information. (Jan. 28, 2011 order, at 8-10.) Hawk then noted that it was undisputed that: (1) the couple who raised Marcus Alto Sr.—Jose Alto and Maria Duro—were full-blooded members of the Tribe, shown on the 1910 census; and (2) the couple raised Marcus Alto Sr. since infancy. (*Id.* at 10.) Therefore, the main question to be determined was whether Marcus Alto Sr. was the biological son of the said couple. (*Id.* at 11.) According to Hawk, to do so required him to resolve several disputed facts.

First, Hawk focused on the year when Marcus Alto Sr. was born. He noted that there were several possible dates: 1903, 1904, 1905, 1906, and 1907. After examining several conflicting pieces of evidence, and relying heavily on the proffered baptismal certificate, Hawk determined Marcus Alto Sr.'s birth year to be 1907. (*Id.* at 12-13.)

Second, Hawk determined that the baptismal certificate proffered by the Tribe was that of Marcus Alto Sr., even though it lists the child's name as "Roberto Alto Marco." (*Id.* at 13.) The baptismal certificate lists "Jose Alto" and "Benedita Barrios" as the child's parents and lists "Franco Alto" and "Litalia Duro" as sponsors. (*See* Compl., Ex. 13, Attach. 14 [Doc. No. 1-14].)

Third, Hawk found unrebutted three affidavits from 1994. The first one was by Dr. Shipek, who stated that she interviewed the San Pasqual elders and that all of them told her that Marcus Alto Sr. was not the biological son of Jose Alto and Maria Duro. The second one was by Ms. Duenas, who asserted that Marcus Alto Sr.'s biological mother was named "Venidita."[2] The third was by Felix S. Quisquis, who claimed to be a childhood friend of Marcus Alto Sr. Felix related a story, that one day he observed Marcus traveling to Arlington (Riverside County) to visit his mother. Maria Duro, however, did not reside in Arlington. On the other hand, Benedita (Barrios) Rodriguez did reside in Riverside County. (Jan. 28, 2011 order, at 14.)

[2] In Spanish, letters "b" and "v" sound alike and therefore are interchangeable.

Fourth, Hawk identified as new evidence six affidavits executed in 2004 as part of the *Caylor* lawsuit, which asserted that Marcus Alto Sr. was not the biological son of Jose Alto and Maria Duro, but rather that he was "Mexican." (*Id.* at 14-15.)

Fifth, Hawk found the absence of Marcus Alto Sr. from BIA censuses of San Pasqual Indians for 1907 through 1913 to be "very weighty evidence" that the couple who raised him did not consider him to be their biological son. (*Id.* at 15.)

Sixth, Hawk gave little weight to Marcus Alto Sr.'s 1928 application for inclusion on the 1933 California Roll of Indians because it was unlikely that Marcus himself reviewed the application, seeing that it contained a number of mistakes and contradictions. (*Id.* at 15-16.)

Seventh, Hawk gave significant weight to Maria Duro's 1928 application for inclusion on the 1933 California Roll of Indians, which stated that she had "no issue." (*Id.* at 16-17.)

Eighth, Hawk determined that even though the 1907 baptismal certificate listed "Jose Alto" as the child's father, the preponderance of the evidence established that it was either a different "Jose Alto" or that he was not Marcus Alto Sr.'s biological father. (*Id.* at 17-19.)

Finally, Hawk rejected Plaintiffs' reliance on DNA evidence showing certain degree of Indian blood because of the disputed accuracy of such testing as well as the fact that it only showed general degree of Indian blood, not necessarily San Pasqual Indian blood. (*Id.* at 19.)

In response to Defendant Hawk's decision, Plaintiffs sent a request for reconsideration, which was denied on June 3, 2011. (Compl., Exs. 11, 12 [Doc. Nos. 1-12, 1-13].) Plaintiffs subsequently sent three more requests for reconsideration with supporting evidence. (Compl., Exs. 13, 14, 15 [Doc. Nos. 1-14, 1-15, 1-16].) Plaintiffs allege that, to date, they have not received any response to these requests for reconsideration. (Compl. ¶¶ 53, 56-58.)

Plaintiffs assert that following the January 28, 2011 order, the Tribe (1) cancelled Plaintiffs' health care benefits; (2) removed some of them from elected and appointed offices; (3) barred them from attending and voting at any general council meetings; (4) stopped their per capita gaming income payments, which collectively amounted to approximately $250,000 per month; and (5) converted over $3 million that were vested and required to be held in segregated trust accounts for the minor Plaintiffs. (Compl. ¶¶ 130-133.)

V. Present case

Plaintiffs[3] filed their complaint on September 30, 2011, alleging four causes of action: (1) declaratory relief based on the doctrine of *res judicata*; (2) declaratory relief on the basis that Defendant Hawk violated the enrolled Plaintiffs' right to procedural due process; (3) declaratory relief and reversal of agency's January 28, 2011 order based upon arbitrary and capricious action; and (4) injunctive relief based on the agency's failure to act. [Doc. No. 1.] Plaintiffs also filed an *Ex Parte* Motion for Temporary Restraining Order ("TRO") and a Motion for Preliminary Injunction. [Doc. Nos. 3, 4.] On October 4, 2011, the Court granted Plaintiffs' motion for a TRO and set the preliminary injunction motion for a hearing. [Doc. No. 5.]

Defendants filed a response on October 11, 2011. [Doc. No. 7.] Defendants assert that prior to the TRO order being issued, they worked to implement the January 28, 2011 order. As a result, during August and September of this year, they prepared a revised membership roll and submitted it to the Tribe for review on September 19, 2011. To date, the Tribe has not submitted the revised roll to the Secretary for final approval.[4] Accordingly, Defendants assert that there is nothing pending before the BIA for the Court to enjoin. Moreover, Defendants indicate that they "have voluntarily decided to take no further action to implement the Assistant Secretary's decision pending resolution of this lawsuit by this Court." [*Id.*, at 4.]

On October 11, 2011, the Tribe filed a request with the Court to appear specially and an accompanying motion to dismiss this action under Federal Rule of Civil Procedure 19. [Doc. No. 10.] On October 12, 2011, the Court denied the Tribe's request to appear specially, but allowed for the Tribe's motion to be docketed as an *amicus curiae* brief. [Doc. No. 11.] The Court also ordered both parties to respond as to whether this action should be dismissed pursuant to Rule 19.

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[3] Plaintiffs separate themselves into five groups of Marcus Alto Sr. Descendants: (A) adult individuals identified on the Tribe's membership roll as duly enrolled members of the Tribe; (B) representatives of the families of deceased individuals identified on the Tribe's membership roll; (C) individuals who have attained the age of majority and otherwise meet the membership requirements, but whose applications have not been processed yet; (D) minor individuals, through their guardians *ad litem*, identified on the Tribe's membership roll; and (E) minor individuals, through their guardians *ad litem*, who otherwise meet the membership requirements, but whose applications have not been processed yet. (Compl. ¶¶ 13-18.)

[4] It appears that because the Tribe disagrees with Defendants as to who has the final approval authority, the Tribe is not likely to re-submit the revised roll to the Secretary.

The Court extended the TRO and moved the hearing on the preliminary injunction.

On October 28, 2011, both Plaintiffs and Defendants filed their responses to the Court's order. According to Defendants, with respect to claims one, two, and three of the complaint, the Court can proceed without the Tribe's participation, and therefore dismissal under Rule 19 is not required. (Def. Supp. Briefing, at 1-5 [Doc. No. 14].) However, because claim four of the complaint seeks relief that would directly impact the Tribe's interests, Defendants believe dismissal of that portion of the complaint is required by Rule 19. (*Id.* at 5-6.) Plaintiffs, on the other hand, assert that dismissal under Rule 19 is not warranted at all. [Doc. No. 15.]

On November 4, 2011, the Tribe sought leave from the Court to file a supplemental brief. [Doc. No. 16.] The Court denied that request on November 7, 2011. [Doc. No. 17.] The Court heard oral argument on Plaintiffs' motion for preliminary injunction on November 15, 2011.

LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" and is "never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22, 24 (2008). Thus, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. As long as all four *Winter* factors are addressed, an injunction may issue where there are "'serious questions going to the merits'" and "a balance of hardships that tips sharply towards the plaintiff." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

DISCUSSION

Plaintiffs' complaint raises four causes of action: (1) *res judicata* of the 1995 decision; (2) violation of procedural due process; (3) arbitrary and capricious agency action; and (4) injunctive relief based on the agency's failure to act. Plaintiffs seek a preliminary injunction that: (a) prohibits Defendant Robert Eden from removing the enrolled Plaintiffs from the rolls until the case is determined or, in the alternative, requiring the BIA to rescind the newly created supplemental roll; (b) requiring Defendant Hawk to issue an interim order allowing adult Plaintiffs access and

voting rights on all general council tribal matters until the case is determined; (c) requiring Hawk to issue an interim order allowing Plaintiffs access to the Indian Health Care services until the case is determined; (d) requiring Hawk to issue an interim order requiring the Tribe to make the per capita payments due to Plaintiffs from December 1, 2010 until January 28, 2011; and (e) requiring Hawk to issue an interim order requiring the Tribe to escrow the minor Plaintiffs' Trust and the per capita payments that would be otherwise due to Plaintiffs. **(***See* Compl. ¶¶ 134-138.)

I. Success on the merits

A. *Res judicata*

In their first cause of action, Plaintiffs assert that Secretary Deer's 1995 decision was entitled to *res judicata* effect because it involved the same issue of whether Benedita Barrios was Marcus Alto Sr.'s mother and whether Marcus Alto Sr. was adopted. Plaintiffs further assert that Defendant Hawk's determination that Marcus Alto Sr. was not the biological son of Jose Alto and Maria Duro was contrary to several prior administrative decisions.

The doctrine of *res judicata* is applicable "'whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties.'" *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011). It applies with equal force to administrative as well as judicial decisions "[w]hen an administrative agency is acting in a judicial capacity . . . resolv[ing] disputed issues of fact properly before it." *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). However, the Ninth Circuit has cautioned that "the principle of res judicata should not be rigidly applied in administrative proceedings." *Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995); *accord Vasquez v. Astrue*, 572 F.3d 586, 597 (9th Cir. 2009). Therefore,

> [w]hen applied to administrative decisions, the res judicata doctrine is not as rigid as it is with courts; there is much flexibility which is intended to adapt the doctrine to the unique problems of administrative justice.

Stuckey v. Weinberger, 488 F.2d 904, 911 (9th Cir. 1973) (en banc). For example, where the subsequent proceedings concern issues not previously raised, *res judicata* may not apply. *See, e.g.*, *Lester*, 81 F.3d at 827-28 (concluding that the Commissioner of the Social Security Administration could not apply *res judicata* where the claimant's second application for disability

benefits raised the existence of a mental impairment not considered in the previous application); *Gregory v. Bowen*, 844 F.2d 664, 666 (9th Cir. 1988) (declining to apply *res judicata* where the claimant's second application for benefits raised the new issue of psychological impairments).

In this case, serious questions exist as to whether Secretary Deer's 1995 determination was entitled to a *res judicata* effect. On the one hand, arguably, additional evidence has been obtained since Secretary Deer's 1995 determination that would suggest *res judicata* is inapplicable, including: (1) the 1907 baptismal certificate; (2) additional affidavits from tribal members executed in 2004 as part of the *Caylor* lawsuit; and, to an extent, (3) the affidavits of Dr. Shipek, Ms. Dueans, and Mr. Quisquis executed in 1994, but apparently not considered by Secretary Deer in rendering the 1995 decision. (*See* Jan. 28, 2011 order, at 13-15, 19-20.) Where such new evidence is present, *res judicata* may not be appropriate. *See Lester*, 81 F.3d at 827-28; *Gregory*, 844 F.2d at 666; *see also Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985) (suggesting that *res judicata* may be inappropriate where the claimant has presented new facts to demonstrate that a prior determination of non-disability may have been incorrect).

On the other hand, it is unclear to what extent this "new" evidence sets forth new facts. First, as far as the affidavits of Dr. Shipek, Ms. Duenas, and Mr. Quisquis are concerned, those were executed in 1994 and were presumably considered by Secretary Deer in reaching her decision. (*See* Apr. 10, 1995 order, at 3 (noting that "[a]ll available documentation involving this case has been thoroughly reviewed").) Second, there is a dispute as to whether the 1907 baptismal certificate is for Marcus Alto Sr. at all. Third, there is reason to question the self-serving nature of the additional affidavits executed as part of the *Caylor* lawsuit. Finally, even accepting all of the above "new" evidence, the claimant in the 2007 challenge is essentially attempting to re-argue the same question that was determined in the 1994/1995 challenge: whether Marcus Alto Sr. was the biological son of Jose Alto and Maria Duro. Accordingly, if the above evidence was not new, *res judicata* might have been appropriate. *See Stuckey*, 488 F.2d at 911 (noting that despite flexibility, "the doctrine [of *res judicata*] retains full force when applied to adjudications of 'past facts, where the second proceeding involves the same claim or the same transaction'" (citation omitted)).

More importantly, even if *res judicata* does not apply, there are serious questions as to

whether collateral estoppel applies, which would preclude the re-adjudication of individual *issues* previously determined, as opposed to the *cause of action*. *See Montana v. United States*, 440 U.S. 147, 153 (1979). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.* In this case, the *causes of action* are arguably different because the 1994/1995 proceedings dealt with Marcus Alto Sr. Descendants' attempt to have their names included on the membership roll, for which they had the burden of proof, while the 2007 proceedings deal with the Tribe's attempt to have the Descendants' names removed from the membership roll, for which the Tribe has the burden of proof. Some of the *issues* determined in the two proceedings, however, appear to be identical: (1) the weigh to be given to Marcus Alto Sr.'s and Mario Dura's 1928 applications for inclusion on the 1933 California Roll of Indians; (2) the weight to be given to Marcus Alto Sr.'s absence from the 1907-13 censuses; and, to the extent they were considered in 1995, (3) the weight to be given to the three affidavits from 1994. It does not appear that Defendant Hawk gave any weight to the agency's prior determination of these issues. Accordingly, Plaintiffs have at the very least demonstrated that there are serious questions going to whether collateral estoppel attached to some of the issues adjudicated in Secretary Deer's April 10, 1995 order.

B. Violation of procedural due process

Plaintiffs assert that Defendant Hawk's failure to issue a briefing order on appeal or to grant Plaintiffs' request to respond to the Tribe's supplemental evidence denied them due process in violation of the Fifth Amendment and the APA.

Due process requires that a party have a full and fair opportunity to litigate its case. *Crocog Co. v. Reeves*, 992 F.2d 267, 270 (10th Cir. 1993). A "full and fair opportunity" means that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer v. Chem Constr. Corp.*, 456 U.S. 461, 481 (1982). In deciding whether agency procedures comport with due process, the Court does not defer to the agency. *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003).

Here, it is not likely that Plaintiffs will be able to demonstrate that they were not provided

with a full and fair opportunity to litigate their case. Plaintiffs were represented by an attorney, they submitted evidence at the lower BIA levels, and they were not expressly precluded from submitting additional evidence to the Secretary. Notably, when Defendant Hawk requested certain documents regarding the Tribe's appeal, he directed the request to *both* parties. (*See* Compl., Ex. 8.) The Court does not doubt that, as Plaintiffs allege, the Tribe submitted excessive documentary evidence in response to Hawk's request. Plaintiffs, however, fail to point to any express or implied agency regulation that precluded them from doing the same. Moreover, nothing prevented Plaintiffs from providing the supplemental documents that they wanted Hawk to consider in their May 3, 2010 letter to him.[5] (*See* Compl., Ex. 9.) "The fact that [Plaintiffs] failed to avail [themselves] of the full procedures provided by [the agency] does not constitute a sign of their inadequacy." *See Kremer*, 456 U.S. at 485.

Plaintiffs' argument that the failure to provide them with an opportunity to respond was a clear violation of the APA similarly misses the mark. 5 U.S.C. § 554(c)(1) provides that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . . [t]he agency shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." As already noted, Plaintiffs had the *opportunity* to submit the facts and arguments for Hawk's consideration when (1) Hawk addressed his request for additional documents to both parties, (*see* Compl., Ex. 8), and (2) nothing prevented Plaintiffs from submitting those documents with their April 29, 2010 response to Hawk's request or their May 3, 2010 letter objecting to Tribe's submissions, (*see id.*, Ex. 9). Accordingly, Plaintiffs are not likely to demonstrate that their procedural due process rights were violated.

C. Arbitrary and capricious action

Plaintiffs next assert that Hawk's determination of several facts and issues must be set

[5] Indeed, after Defendant Hawk issued his adverse decision, Plaintiffs' new counsel submitted a request for reconsideration, to which he attached the supplemental documents Plaintiffs wanted Hawk to consider. (*See* Compl., Ex. 13.) Plaintiffs have failed to explain why they could not have submitted these same materials to Hawk sooner. Indeed, Plaintiffs had almost eight months from when the Tribe responded to Hawk's request (some time before May 3, 2010) and when Hawk issued his decision (January 28, 2011). (*See* Compl., Exs. 9, 10.)

aside as violating the APA. In deciding whether Plaintiffs are likely to succeed on the merits of this claim, the APA sets forth an additional layer of review. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). Thus, under the APA, "a reviewing court may set aside only agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (citation omitted); *see also* 5 U.S.C. § 706(2)(A). Review under this standard is narrow, and the Court may not substitute its own judgment for that of the agency. *Carlton*, 626 F.3d at 468. "All that is required is that the agency have 'considered the relevant factors and articulated a rational connection between the facts found and the choices made.'" *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005) (citation omitted).

Nonetheless, while the review is deferential, it is not toothless. *Id.* As such, the Court's inquiry "must be 'searching and careful' to ensure that the agency decision does not contain a clear error of judgment." *Id.* (citation omitted). An agency action must be reversed as arbitrary and capricious where 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.'" *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "In performing this inquiry, the court is not allowed to uphold a regulation on grounds other than those relied on by the agency." *Ranchers Cattlemen*, 415 F.3d at 1093.

1. Reliance on the 1907-13 censuses.

Plaintiffs first assert that Hawk's determination that the San Pasqual censuses were "particularly probative" was not supported by the record or any reasoned explanation. Plaintiffs contend that the 1907-13 censuses are wholly untrustworthy because they contain numerous inaccuracies on their face. For example, Plaintiffs point to the following inaccuracies:

- Jose Alto is listed as age "50" on the 1907, 1908, 1909, and 1910 censuses;
- Maria Alto is listed as age "45" on the 1907, 1909, 1910, and 1911 censuses, as age "46" on the 1912 census, and as age "52" on the 1908 census; and

- Frank Alto is listed as age "25" on the 1907 and 1910 censuses, as age "24" on the 1908 census, as age "26" on the 1909 and 1911 censuses, and as age "27" on the 1912 census.

(*See* Compl., Ex. 13, Attach. 8.) On the one hand, despite the above inaccuracies, the failure of these censuses to list Marcus Alto Sr. as living with Jose Alto and Maria Duro at the relevant time significantly undercuts Plaintiffs' argument that he is the couple's biological son. *Cf. Ecology Ctr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009) (noting that "an agency need not respond to every single scientific study or comment" for its choice to be upheld as reasonable). Thus, if the censuses were otherwise probative, it could not be said that reliance on them was a "clear error of judgment" so as to make Defendant Hawk's determination arbitrary and capricious. *See, e.g.*, *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 383-85 (1989) (the agency's determination was not "arbitrary and capricious" where the agency conducted a reasoned evaluation of the relevant information and reached a reasonable decision, even though another decisionmaker might have reached a different result). Plaintiffs, however, raise serious questions as to the probative nature of these censuses. As Plaintiffs point out, by consistently listing inaccurate and inconsistent ages for the individuals surveyed, the 1907-13 censuses do not appear to be trustworthy.

Moreover, as the BIA Regional Director indicated in his decision denying the Tribe's challenge, the census data is conflicting on this issue. For example, it appears the 1920 federal census *does* list Marcus Alto Sr. as Maria Alto's son. (*See* Compl., Ex. 7, at 5.) Hawk's rejection of this inconsistency is not reasonable. Hawk acknowledges that Marcus Alto Sr. is listed as living with Jose Alto and Maria Duro on the 1920 federal census, but attributes it to Marcus Alto Sr.'s adoption. (*See* Jan. 28, 2011 order, at 15 ("I find the adoption theory to be the most logical explanation for the fact that Marcus Alto is not listed with his parents on the Indian censuses, but does appear on the Federal census of 1920.").) Early in his order, however, Hawk expressly determined that it was undisputed that Marcus Alto Sr. was raised by Jose Alto and Maria Duro "since infancy." (*Id.* at 10; *see also id.* at 15 (quoting a handwritten paragraph at the bottom of Marcus Alto Sr.'s 1987 enrollment application, which stated that he was given to Jose Alto and Maria Duro "'on the 3rd day after his birth'").) As such, any adoption would have taken place way before 1920, and there is no reason why Marcus Alto Sr. would appear on that census but not on

the earlier Indian ones. Accordingly, Plaintiffs have demonstrated that there are at least serious questions as to the propriety of Hawk's reliance on the 1907-13 censuses.

2. Reliance on the several affidavits.

Plaintiffs next contend that Hawk's decision was arbitrary and capricious because it gave substantial weight to several affidavits stating that Marcus Alto Sr. was a non-Indian and not the biological son of Jose Alto and Maria Duro, while ignoring contrary affidavits and certified DNA test evidence provided by Plaintiffs. The agency has a broad discretion in resolving issues of conflicting evidence. *See Trout Unlimited v. Lohn*, 559 F.3d 946, 958 (9th Cir. 2009) ("When not dictated by statute or regulation, the manner in which an agency resolves conflicting evidence is entitled to deference so long as it is not arbitrary and capricious."). In this case, however, there are at least serious questions as to whether Hawk properly relied on the affidavits submitted by the challengers, while at the same time discounting the sworn affidavits from 1928. For example, Hawk noted that the 2004 affidavits stated that Marcus Alto Sr. was "Mexican," and not "Indian." (Jan. 28, 2011 order, at 14-15.) However, the probative nature of these statements is called into question by the DNA test evidence submitted by Plaintiffs, which suggests that Marcus Alto Sr. Descendants possess Native American blood. (*See* Compl., Ex. 13, Attach. 11 (showing that Ray E. Alto, grandson of Marcus Alto Sr., possesses between 1/5 and 2/5 of Native American blood).) Similarly, Hawk's reliance on the 1994 affidavits, which indicate that Maria Duro was not Marcus Alto Sr.'s biological mother, appears to completely disregard the BIA Regional Director's conclusion that the evidence suggests that Marcus Alto Sr. might have been the biological son of Jose Alto from a previous relationship. (*See* Compl., Ex. 7, at 5.)

In sum, if Marcus Alto Sr. is indeed the biological son of Jose Alto from a previous relationship, the fact that he is not the biological son of Maria Duro has no effect on his eligibility for Tribe's membership, and therefore the 1994 and the 2004 affidavits were entitled to little, if any, weight. In light of that, Plaintiffs have at the very least raised serious questions as to the propriety of Hawk's reliance on the disputed affidavits.

3. Reliance on the statement that Maria Duro had "no issue."

Plaintiffs next argue that Hawk's finding that Maria Duro had "no issue" was precluded by

the 1995 proceedings, wherein Secretary Deer rejected a similar claim. Plaintiffs also contend that this finding is inconsistent with Hawk's statement that "[t]hree of the affiants claim blood relationship to Maria Duro Alto." (*See* Jan. 28, 2011 order, at 14-15.)

A review of the 1995 decision reveals that it does not discuss the "no issue" language in Maria Duro's 1928 application. (*See* Compl., Ex. 5.) Nonetheless, there are serious questions as to whether Hawk should have given significant weight to this single statement. As Plaintiffs point out, three of the 2004 affiants claimed blood relationship to Maria Duro, which appears to be inconsistent with Mario Duro declaring that she had no children. At the very least, it demonstrates that there are serious questions as to the reasonableness of Hawk's reliance on Mario Duro's statement that she had "no issue." *See Motor Vehicle Mfrs.*, 463 U.S. at 43 (noting that an agency's determination is arbitrary and capricious where the agency "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").

4. Determination that Marcus Alto Sr. was born in 1907.

Plaintiffs assert Hawk's determination that Marcus Alto Sr. was born in 1907 is arbitrary in light of the conflicting evidence in the record. The agency, however, has broad discretion in resolving issues of conflicting evidence. *See Lohn*, 559 F.3d at 958. Here, Hawk acknowledged that there was conflicting evidence as to the year when Marcus Alto Sr. was born, with potential choices being 1903, 1904, 1905, 1906, and 1907. (Jan. 28, 2011 order, at 12-13.) After examining the conflicting evidence in the record, Hawk determined that 1907 was the likely year based on the crossed-out age on Marcus Alto Sr.'s marriage certificate, his baptismal certificate, and his Social Security Death Index. (*Id.*) Hawk rejected 1905 because its use was rationally explained by Marcus Alto Sr.'s desire to hide the fact that he was under-age at the time of marriage. (*Id.*) Because Hawk's determination that Marcus Alto Sr. was born in 1907 was based on a reasoned evaluation of the relevant information, it was not arbitrary and capricious, even though another decisionmaker might have reached a different result. *See Marsh*, 490 U.S. at 383-85.

5. Finding that Quisquis's statement corroborated the 1907 birth year.

Plaintiffs argue that Hawk's finding that Quisquis's statement corroborated the 1907 birth

year is inconsistent with Hawk's reliance on the 1907-13 censuses because there is no child identified as Felix Quisquis on those censuses. This potentially might detract from Hawk's reliance on Quisquis's statement. However, Hawk's reliance on the 1907-13 censuses was primarily due to the fact that Jose Alto's son from another relationship, Frank Alto, was listed on those censuses, while Marcus Alto Sr. was not—thereby indicating that Jose Alto and Maria Duro considered Marcus Alto Sr. to be adopted. (*See* Jan. 28, 2011 order, at 15.) The fact that Felix Quisquis might not be listed on those census does not have the same weight.

6. Disregard of Marcus Alto Sr.'s 1928 application.

Plaintiffs assert that Hawk's decision to disregard Marcus Alto Sr.'s 1928 application as an unsubstantiated affidavit was arbitrary and capricious. However, as Hawk notes, the 1928 application contains several incorrect entries, such as listing Jose Alto as "non Indian" and listing Marcus Alto Sr.'s birth year as 1903, as well as several blank fields that Marcus Alto Sr. would have filled out. (*See id.* at 15-16.) Based on this evidence, Hawk reasonably concluded that the 1928 application was likely filled out without Marcus Alto Sr. ever reviewing it or correcting it. As such, it was reasonable for Hawk to give less weight to this application, even though another decisionmaker might have reached a different conclusion. *See Marsh*, 490 U.S. at 383-85.

7. Reliance on letters signed by Frank Alto.

Plaintiffs argue it was an abuse of discretion to rely on several letters signed by Frank Alto, which make no mention of Marcus Alto Sr. However, it is unclear how much weight Hawk gave to the Frank Alto letters. (*See id.* at 18.) To the extent he considered them as further corroborative evidence, such decision appears to be rational. *See Lohn*, 559 F.3d at 958.

8. Inconsistent findings regarding the 1907 baptismal record.

Plaintiffs assert that Hawk's finding that the 1907 baptismal record was that of Marcus Alto Sr. is inconsistent with his subsequent rejection that the "Jose Alto" listed on that record is the biological father of Marcus Alto Sr. Hawk based this determination on Plaintiffs' apparent concession that "'[t]here were many Jose Altos during [that] time.'" (Jan. 28, 2011 order, at 17 n.17 (citation omitted).) This explanation, however, is conclusory and lacks any "rational connection" to the facts. *See Yerger v. Robertson*, 981 F.2d 460, 463 (9th Cir. 1992) ("An agency

decision is arbitrary and capricious if, in reaching it, the agency failed to consider all relevant facts or to articulate a satisfactory explanation for the decision, including a rational connection between the facts found and the choice made." (citation and internal quotation marks omitted)).

More importantly, even the evidence submitted by the Tribe suggests that the "Jose Alto" listed on the certificate was the Jose Alto who raised Marcus Alto Sr.—i.e., a full blooded San Pasqual Indian. Specifically, the baptismal certificate lists "Franco Alto" and"Litalia Duro" as sponsors. (Compl., Ex. 13, Attach. 14.) In her "Analysis of the Marcus Alto, Sr. Enrollment Challenge," prepared on behalf of the Tribe, Dr. Grabowski states that both of these individuals were San Pasqual Indians and most likely were related to either Jose Alto or Maria Duro. (*See* Strommer Decl., Ex. 19, at 28-29.) As Plaintiffs contend, it would be highly unlikely that two San Pasqual Indians related to the San Pasqual couple that raised Marcus Alto Sr. would act as sponsors to a baptismal of a child of Benedita Barrios (a Mexican) and some other "Jose Alto." Thus, because Hawk "offered an explanation for [his] decision that runs counter to the evidence before the agency," and because that explanation is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," Plaintiffs have raised serious questions as to the reasonableness of Hawk's determination that "Jose Alto" listed on the baptismal certificate is not the "Jose Alto" that later raised Marcus Alto Sr. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

Finally, Hawk's alternate conclusion that "Jose Alto" listed on the certificate might have been the Jose Alto that raised Marcus Alto Sr., but at the same time was *not* his biological father is hardly plausible. It is plainly inconsistent, on the one hand, to accept as true that the "mother" listed on the baptismal certificate (Benedita Barrios) is the child's biological mother, while, on the other hand, insisting that the "father" listed on the same baptismal certificate (Jose Alto) is *not* that child's biological father. Either both parents listed on the baptismal certificate are correct, or both of them are not. Accordingly, Hawk's determination to the contrary is plainly inconsistent, and therefore was likely arbitrary and capricious. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

Overall, Plaintiffs have demonstrated sufficient errors and inconsistencies in Hawk's determinations that serious questions have been raised as to whether those determinations amount to "a clear error of judgment." *See Ranchers Cattlemen*, 415 F.3d at 1093. Moreover, Plaintiffs

have sufficiently demonstrated that the agency's decision with respect to some of the issues "entirely failed to consider an important aspect of the problem," "offered an explanation that runs counter to the evidence before the agency," or "[wa]s so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See Carlton*, 626 F.3d at 468-69 (internal quotation marks and citation omitted). Thus, at the very least, Plaintiffs have raised serious questions as to whether Hawk's January 28, 2011 order was arbitrary and capricious.

D. Federal Rule of Civil Procedure 19

The Tribe, appearing as *amicus curiae*, asserts that the whole action should be dismissed under Federal Rule of Civil Procedure 19 because the Tribe is a necessary party that cannot be joined because of sovereign immunity. The absence of a necessary party may be raised at any stage in the proceedings and may be raised *sua sponte* by the Court. *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911-12 (9th Cir. 1991). Rule 19 provides in relevant part:

> (a) Persons Required to Be Joined if Feasible.
>
> > (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> > >
> > > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > > >
> > > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
>
> . . . .
>
> (b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. . . . .

In making a Rule 19 determination, the Court engages in three successive inquiries. *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1078 (9th Cir. 2010). First, the Court must determine whether a non-party should be joined under Rule 19(a). *Id.* If so, the second inquiry is

whether joinder would be feasible. *Id.* Third, if joinder is not feasible, the Court must determine under Rule 19(b) "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* The moving party has the burden of persuasion in arguing for dismissal under Rule 19. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990). Moreover, because "the burdens at the preliminary injunction stage track the burdens at trial," the non-moving party bears the burden to show a likelihood that its affirmative defense will succeed. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *accord Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007).

1. Should the Tribe be joined under Rule 19(a)?

Relying on Rule 19(a), the Tribe asserts that it is a required party because: (A) in its absence, complete relief cannot be accorded among the existing parties; and (B) the Tribe claims an interest that would be impaired if the action proceeds in its absence or that would result in the government incurring multiple or inconsistent obligations.

The Ninth Circuit has observed that "[t]here is no precise formula for determining whether a particular non-party is necessary to an action." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Rather, "'[t]he determination is heavily influenced by the facts and circumstances of each case.'" *Id.* (citation omitted).

i. Complete relief

In the present case, complete relief may be accorded among the parties in the Tribe's absence. First, with respect to claims one, two, and three, complete relief can be accorded because those claims focus solely on the propriety of the Secretary's determinations. Those claims seek only declaratory relief regarding the procedures used by the Secretary. Accordingly, the Tribe's absence does not prevent Plaintiffs from receiving their requested relief. *See Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1261-62 (9th Cir. 2000) (concluding that the Barona Group was not an indispensable party to plaintiffs' action to compel the Secretary to issue a ruling regarding their right to share in the portion of Barona Group's gaming revenue); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) ("Because plaintiffs' action focuses solely on the propriety of the Secretary's determinations, the absence of

the Wyandotte Tribe does not prevent the plaintiffs from receiving their requested declaratory relief (i.e., a determination that the Secretary acted arbitrarily and capriciously . . .).").

Second, with respect to claim four, complete relief can also be afforded among the parties in the Tribe's absence. In claim four, Plaintiffs seek injunctive relief directing the Secretary to reconsider his January 28, 2011 order in light of the additional evidence submitted and to restore the status quo in the interim. Both of these can be achieved without the Tribe's participation in this suit. Specifically, the Tribe's Constitution delegates to the Secretary the final authority over all enrollment challenges. (*See* Tribe's Const., art. III, § 2 ("All membership in the band shall be approved according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15 . . . ."); *see also* 25 C.F.R. § 48.11 ("The decision of the Secretary on an appeal shall be final and conclusive . . . ."); *id.* § 48.14(d) ("Names of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from the roll, subject to the approval of the Secretary.").) Moreover, the Secretary has authority to enter interim orders directing the Tribe to comply with its own Constitution. As Plaintiffs demonstrate, Defendant Hawk did exactly that when the Tribe prematurely suspended Marcus Alto Sr. Descendants' benefits while the administrative appeal was pending. (*See* Compl., Ex. 8, at 3-4 (directing the Tribe to reinstate the tribal benefits to Marcus Alto Sr. Descendants during the pendency of the appeal, or risk enforcement action by the National Indian Gaming Commission).)

The cases relied upon by the Tribe are distinguishable. In those cases, the Ninth Circuit concluded that complete relief could not be accorded among the existing parties where the requested remedy, if granted, would fail to bind the absent Indian tribe who was in a position to act in direct contravention of that remedy. Thus, in *Confederated Tribes*, various Indian tribes brought an action against federal officials challenging the United States' continued recognition of the Quinault Indian Nation as the sole governing authority of the Quinault Indian Reservation. 928 F.2d at 1497. The Ninth Circuit affirmed the dismissal under Rule 19(a), holding that complete relief was not possible in the absence of the Quinault Indian Nation because "[j]udgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation." *Id.* at 1498.

Similarly, in *Pit River Home & Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1092 (9th Cir. 1994), the plaintiff sought judicial review of the Secretary of Interior's designation of the Pit River Tribal Council as the beneficiary of reservation property. The Ninth Circuit affirmed the dismissal under Rule 19(a), concluding that "even if the [plaintiff] obtained its requested relief . . . it would not have complete relief, since judgment against the government would not bind the Council, which could assert its right to [the property]." *Id.* at 1099.

Finally, in *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150, 1153 (9th Cir. 2002), the plaintiff, a member of the Hopi Tribe, sued the Salt River Project Agricultural Improvement and Power District ("SRP") for utilizing a hiring preference policy in violation of Title VII of the Civil Rights Act of 1964. Plaintiff alleged that SRP's lease with the Navajo Nation required it to preferentially hire Navajos at the Navajo Generating Station. *Id.* The Ninth Circuit upheld the dismissal under Rule 19(a) because the Navajo Nation was an indispensable party. Specifically, the court noted that even if plaintiff was granted the requested relief and hired by the SRP, the Navajo Nation would not be bound by the determination and could even seek termination of its lease with the SRP. *Id.* at 1155-56.

In this case, unlike the above cases, there *are* enforcement mechanisms in place to ensure that the Tribe complies with any determination by the Secretary. First, the Tribe's Constitution provides that the Secretary has the final authority over all enrollment challenges. In the past, the Tribe has demonstrated that it was willing to submit the enrollment challenges to the BIA and the Secretary, and to abide by their decisions—most notably the 1994/1995 enrollment challenge, which was resolved adversely to the Tribe. Thus, if the Secretary were to reject the Tribe's current enrollment challenge, it is presumed the Tribe would comply with that determination. *See Yellowstone County v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996) (concluding that the Tribe was not a necessary party where it could be presumed that the tribal courts would comply with a binding pronouncement of the federal court); *cf. In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982) ("[I]t is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion.").

Moreover, all of Plaintiffs' claims in this case focus on the procedures the Secretary

followed in upholding the Tribe's enrollment challenge. Because these procedures are subject to judicial review under the APA, this Court has the authority to grant complete relief without the Tribe's presence. *See Makah Indian Tribe*, 910 F.2d at 559 (concluding that other tribes were not necessary parties to the Makah Indian Tribe's complaint seeking review of the Secretary's promulgation of regulations and prospective injunctive relief, where the procedures the Secretary followed in promulgating the challenged regulations were subject to judicial review under the Fishery Conservation and Management Act of 1976 and the APA); *see also Hein*, 201 F.3d at 1261-62 (concluding that the Barona Group was not an indispensable party to plaintiffs' action to compel the Secretary to issue a ruling regarding their right to share in the portion of Barona Group's gaming revenue). Accordingly, complete relief can be accorded.

ii. Legally protected interest that would be impaired

The Tribe also does not have a legally protected interest that would be impaired in its absence. The governing inquiry is whether the Tribe will be adequately represented by existing parties. *See Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998). "A non-party is adequately represented by existing parties if: (1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect." *Id.*

In this case, although the Tribe may claim a legally protected interest, the United States can adequately represent the Tribe. "The United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe." *Id.* at 1154. The Court must look at both the ability of the federal government to represent the tribe and its willingness to do so. *See id.* Here, the federal government and the Tribe share a strong interest in defeating Plaintiffs' suit on the merits and ensuring that the Secretary's January 28, 2011 order is upheld. *See id.* (concluding that the United States could adequately represent the Salt River Pima-Maricopa Indian Community where both shared a strong interest in defeating the plaintiff's suit on the merits); *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (concluding that Indian tribes were not necessary parties to actions filed by the State of Washington against the Secretary

of Commerce and the tribes challenging regulation allocating groundfish catches to tribes, inasmuch as the Secretary and the tribes had virtually identical interests and the United States could adequately represent the tribes). The United States has also indicated its willingness to represent the Tribe's interests in this case. (*See* Def. Supp. Briefing, at 4.)

Finally, "an absent party has no legally protected interest at stake in a suit merely to enforce compliance with administrative procedures." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California*, 547 F.3d 962, 971 (9th Cir. 2008); *see also Makah*, 910 F.2d at 559 ("The absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful."). In this case, Plaintiffs' complaint focuses on whether the Secretary complied with administrative procedures in upholding the Tribe's enrollment challenge. Accordingly, there is no legally protected interest that will be impaired.

The Tribe's arguments to the contrary are not persuasive. For example, the Tribe argues that the government would not represent the Tribe adequately because the government did not fully support the Tribe's motion to dismiss under Rule 19. This argument is "circular," however, because it essentially bootstraps the government's representation that it *would* adequately represent the Tribe, and therefore the Tribe is not a "required" party, to argue that the government will *not* adequately represent the Tribe. *See Southwest Ctr.*, 150 F.3d at 1154 (rejecting a similar argument). Similarly, the fact that the government will not make all of the Tribe's arguments is irrelevant because the Court's review of an agency decision is necessarily limited to the grounds relied on by the agency. *See Ranchers Cattlemen*, 415 F.3d at 1093. Finally, the Tribe's argument that this is an "intertribal" dispute is erroneous because Plaintiffs are still members of the Tribe,[6]

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[6] According to the Title 25 Regulations, which are incorporated into the Tribe's Constitution, *see* Tribe's Const., art. III, § 2, the BIA Director must re-submit the final version of the membership roll to the Secretary for approval before the roll is "approved." *See* 25 C.F.R. § 48.12 ("Upon notice from the Secretary that all appeals have been determined the Director shall prepare in quintuplicate a roll of members of the Band, arranged in alphabetical order. The roll shall contain for each person: Name, address, sex, date of birth, and degree of Indian blood of the Band. *The Director shall submit the roll to the Secretary for approval.* Four (4) copies of the approved roll shall be returned to the Director who shall make one (1) copy available to the Chairman of the Tribal Council and one (1) copy available to the Chairman of the Enrollment Committee." (emphasis added)). In this case, there is no indication that the Director has already prepared the final roll in quintuplicate, that he submitted it to the Secretary for final approval, or that the Secretary approved the final roll. Accordingly, although the Secretary has determined that Marcus Alto Sr. Descendants' names should be removed

and therefore the dispute is not "between a tribe and non-tribe groups or individuals." *See Rosales v. United States*, 89 Fed. Cl. 565, 586 (Fed. Cl. 2009); *see also Pit River*, 30 F.3d at 1101.

iii. Inconsistent obligations

Finally, the Tribe asserts that proceeding without the Tribe can give rise to inconsistent obligations by the government because any attempt by the Secretary to interfere with the Tribe's rights to govern its internal affairs would likely give rise to tribal litigation against the BIA. However, any such possibility of inconsistent obligations is speculative at the moment, and therefore not sufficient to make the Tribe a required party. *See Southwest Ctr.*, 150 F.3d at 1154 (rejecting possibility of conflict arising from government's "potentially inconsistent responsibilities" where parties failed to demonstrate "how such a conflict might actually arise in the context of [the action at hand]"); *Norton*, 240 F.3d at 1259 ("'The key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy the Rule 19(a) criteria.'" (citation omitted)). Moreover, even if the Court ultimately rules in Plaintiffs' favor, any interference with the Tribe's rights in this case would be pursuant to the Tribe's own Constitution, which makes the Secretary the final arbiter of enrollment disputes. (*See* Tribe's Const., art. III, § 2.) Finally, as can be seen from the two prior federal lawsuits concerning the enrollment challenges to Plaintiffs' tribal membership, dismissing the action pursuant to Rule 19 seems to have no effect on any future litigation. *See Southwest Ctr.*, 150 F.3d at 1155 (noting that Rule 19's proviso against multiple or inconsistent obligations was not implicated where future litigation could result even if the lawsuit was dismissed).

2. Mandatory injunction

One additional argument merits consideration. Both the Tribe and the government suggest that requiring the Secretary to issue interim orders closely resembles a mandatory injunction—i.e., an injunction that "orders a responsible party to 'take action'"—rather than a prohibitory injunction that simply preserves the status quo. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009) (citation omitted). "A mandatory injunction

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from the Tribe's membership roll and a revised roll was submitted to the Tribe for approval, it appears that Plaintiffs are still members of the Tribe.

goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored." *Id.* at 879 (citation and internal quotation marks omitted). Thus, in general, mandatory injunctions "'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages.'" *Id.* (citation omitted); *see also Stanley v. Univ. of Southern Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) ("When a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." (citation and internal quotation marks omitted)).

In this case, the Court does not believe that requiring the Secretary to issue interim orders would constitute an issuance of a mandatory injunction. However, even if it does, the Court believes such relief is appropriate in this case. It is true that the Tribe is entitled to sovereign immunity from suit and that, had Plaintiffs been fully disenrolled as tribal members, the Secretary would have no further duty to them. But, that is not the case. Despite what seems like clear failings on behalf of Plaintiffs or their counsel to protect their own interests, the Court cannot ignore the Secretary's heavy reliance on the Tribe's briefing in adjudicating this case against Plaintiffs. As the preceding pages demonstrate, Plaintiffs have shown that serious questions arise as to the propriety of Defendant Hawk's adjudication. Moreover, as the Court has determined, under the Tribe's Constitution, the Marcus Alto Sr. Descendants are still on the rolls and, therefore, are still members of the Tribe. As such, the Secretary has continuing fiduciary duties and obligations to them. *See Seminole Nation v. United States*, 316 U.S. 286, 295-96 (1942). One such obligation is to protect the individual members' interests until this dispute is fully adjudicated. The Secretary previously acted to protect Plaintiffs' interests while the administrative proceedings were pending. (*See* Compl., Ex. 8, at 3-4 (directing the Tribe to reinstate the tribal benefits to Marcus Alto Sr. Descendants during the pendency of the appeal, or risk enforcement action by the National Indian Gaming Commission).) There is no reason why, if Plaintiffs have shown that they are otherwise entitled to a preliminary injunction, the Secretary should not be forced to similarly act while this lawsuit is pending. Were this Court to uphold Plaintiffs' appeal and send this matter back to the Secretary, the Secretary would be required to issue the interim orders restoring the status quo, assuming the Tribe's Constitution has not been amended by that

time. Therefore, the Court cannot accept the government's argument that the Secretary should not be required to do so in the interim. The Court will not put form over substance.

3. Conclusion

For the foregoing reasons, because complete relief can be accorded in the Tribe's absence, because the Tribe's interest may be adequately represented by the federal government, and because the federal government is unlikely to suffer inconsistent obligations, the Court concludes that the Tribe is not a required party under either Rule 19(a)(i) or Rule 19(a)(ii).

In light of the above determination, the Court need not consider whether the Tribe's joinder is feasible and, if not, whether the action can proceed in the Tribe's absence. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983). Accordingly, at least at this stage, the Court need not determine whether the Tribe has waived its sovereign immunity from suit by either providing in its Constitution for the Secretary's review of the enrollment challenges or by actively participating in the administrative proceedings giving rise to this suit.

II. Irreparable harm

To be entitled to a preliminary injunction, a plaintiff must also show the likelihood—rather than a mere "possibility"—of irreparable harm. *Winter*, 555 U.S. at 20-21. Here, Plaintiffs allege that they have already been stripped of their California Indian Health Care services, elected and appointed offices, per capita checks based on the gambling income, and over $3 million in trust funds for the minor Plaintiffs. (*See* Mem. of P.&A. ISO Motion for Prelim. Inj. Relief, at 18 [Doc. No. 4-1]; Raymond J. Alto Decl. ¶¶ 11-13 [Doc. No. 15-1].) They assert that any further delay will result in further irreparable harm. Moreover, Plaintiffs contend that the Tribe is now in the process of amending its Constitution. (*See* Ray E. Alto Decl. ¶ 11 (attached as Exhibit L to Thor Declaration [Doc. No. 15-4]); Compl., Ex. 19.) According to Plaintiffs, the proposed amendment, if successful, would limit tribal membership to only those who are actually named on the 1966 membership roll, or who are born to someone named on that membership roll. Because they do not satisfy either of the criteria, but were instead added pursuant to Title 25 Part 76 as blood descendants of San Pasqual tribal members who were identified in the 1910 census, Plaintiffs contend they will be "forever precluded from enrollment, irrespective of their lineage and the

proof provided." (Mem. of P.&A. ISO Motion for Prelim. Inj. Relief, at 19.)

Plaintiffs have demonstrated that irreparable harm is likely. "It is true that economic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award." *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). In this case, however, the removal of Plaintiffs from the membership roll has resulted in their removal from elected and appointed positions. It has also resulted in their loss of health insurance benefits. "Like the loss of one's job, the loss of one's job benefits 'does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.'" *Collins v. Brewer*, 727 F. Supp. 2d 797, 812 (D. Ariz. 2010), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); *see also Indep. Living Ctr. of Southern Cal, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 657-58 (9th Cir. 2009) (holding that state Medicaid beneficiaries were likely to be irreparably harmed by a reduction in their benefits), *cert. granted in part*, 131 S. Ct. 992 (2011); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (holding that a denial of needed medical care creates a risk of irreparable injury). Accordingly, the Court concludes that Plaintiffs have demonstrated a likelihood of irreparable harm.[7]

The government responds that there is no immediate harm because there is nothing

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[7] The Court, however, rejects Plaintiffs' argument that the possibility of the Tribe voting on the constitutional amendment amounts to irreparable harm. First, as the Tribe demonstrates, it is still uncertain when any such vote would take place, (*see* Strommer Decl., Exs. 2, 28), and, therefore, at most, this presents a *possibility* of irreparable harm, which is insufficient. *See Winter*, 555 U.S. at 20-21. Moreover, any harm is speculative because the Secretary would need to approve any final changes to the Tribe's Constitution. (*See* Tribe's Const., art. X.) Finally, the actual text of the proposed constitutional amendment undermines Plaintiffs' claim. Plaintiffs assert that the constitutional amendment, if successful, would limit tribal membership to only those who are actually named on the 1966 membership roll, or who are born to someone named on that membership roll. Because they do not satisfy either of the criteria, but were instead added pursuant to Title 25 Part 76 as blood descendants of San Pasqual tribal members who were identified in the 1910 census, Plaintiffs contend they will be "forever precluded from enrollment, irrespective of their lineage and the proof provided." (*See* Mem. of P.&A. ISO Motion for Prelim. Inj. Relief, at 19.) The proposed constitutional amendment, however, specifically provides that the membership of the Band shall consist of:

> Those living person whose names appear on the approved Membership Roll of October 5, 1966, *according to Title 25, Code of Federal Regulations, Part 48.1 through 48.15 (which incorporates the Census Roll dated June 30, 1910).*

(Compl., Ex. 19 (emphasis added).) Accordingly, the plain text of the proposed constitutional amendment would *include* Plaintiffs. Plaintiffs, therefore, have failed to demonstrated a likelihood of irreparable harm on the basis of the proposed constitutional amendment.

currently pending before the BIA to enjoin. Moreover, the government asserts that it has voluntarily decided not to take any further action to implement the January 28, 2011 order while this action is pending. Defendants' voluntary cessation of challenged conduct, however, is not sufficient to moot Plaintiffs' application for a preliminary injunction. *See F.T.C. v. Affordable Media*, 179 F.3d 1228, 1237 (9th Cir. 1999) ("[I]t is actually well-settled 'that an action for an injunction does not become moot merely because the conduct complained of was terminated, *if there is a possibility of recurrence*, since otherwise the defendant[s] would be free to return to their old ways.'" (citation omitted)). In this case, there is a possibility of recurrence because there is no guarantee that the government will not change its mind in the middle of the litigation.[8]

Finally, the Tribe alleges that Plaintiffs create a false state of emergency because nine months had already passed since the Secretary issued his January 28, 2011 order, and that Plaintiffs have been deprived of all of the above-described benefits for this period of time. However, as Plaintiffs' response demonstrates, Plaintiffs spent the past nine months exhausting their administrative remedies by trying to convince Defendant Hawk to reconsider his decision. (*See* Pl. Mem. of P.&A. in opp. to. MTD, at 19 [Doc. No. 15].)

Accordingly, Plaintiffs have demonstrated the likelihood of irreparable harm.

III. Balance of hardships

"To qualify for injunctive relief, the plaintiffs must establish that 'the balance of equities tips in their favor.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (citation omitted). "In assessing whether the plaintiffs have met this burden, the district court has a 'duty ... to balance the interests of all parties and weigh the damage to each.'" *Id.* (citation omitted). In this case, the balance of hardships tips heavily in Plaintiffs' favor. They have already been

[8] Indeed, it appears the government has already changed its mind on at least one aspect of this lawsuit. In its opposition to Plaintiffs' motion for a preliminary injunction, filed on October 11, 2011, the government indicated that there existed a disagreement between it and the Tribe as to "the BIA's interpretation of its approval authority." (Gov't Response to Motion for Prelim. Inj., at 4; *see also id.* at 5 ("And from available information, it appears unlikely that the Band will seek further action by the BIA because it views the BIA's role differently.").) However, at the November 15, 2011 hearing on preliminary injunction, in an apparent change of position, the government asserted that it all along agreed with the Tribe that the January 28, 2011 order was immediately effective. (*See also* Response to Pl. "Reply," at 1-2 [Doc. No. 20].) The government's view now is that the submittal of the revised roll to the BIA for final approval is merely a "ministerial" task. (*Id.* at 2.)

deprived of their appointed and elected offices, numerous benefits, per capita payments, and the like. On the other hand, since Defendants already indicated that they have voluntarily decided not to take any further action to implement the January 28, 2011 order, it does not appear that Defendants would suffer any hardship if the Court grants Plaintiffs' motion for a preliminary injunction. Moreover, although the issuance of the preliminary injunction might interfere with the Tribe's sovereignty, as previously indicated, this interference is expressly provided for in the Tribe's Constitution and is pursuant to the APA. Accordingly, the balance of hardships tips heavily in Plaintiffs' favor. *See Lopez v. Heckler*, 713 F.3d 1432, 1437 (9th Cir. 1983) ("Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.").

IV. Public interest

The public interest factor requires the Court to consider "'whether there exists some critical public interest that would be injured by the grant of preliminary relief.'" *Maxwell-Jolly*, 572 F.3d at 659 (citation omitted). On the one hand, the public undoubtedly has a strong interest in ensuring that tribal members are not arbitrarily disenrolled due to conflicts among tribal factions, especially when such disenrollment results in loss of benefits and potentially permanent loss of heritage. Similarly, the Secretary presumably has an interest in having its determination and procedures deemed constitutional. On the other hand, there is an equally strong interest in preserving the Tribe's sovereignty over enrollment issues. Nonetheless, as previously stated, any interference with the Tribe's sovereignty in this case is pursuant to the Tribe's own Constitution. Accordingly, the Court concludes that the public interest in having the Secretary's determination and procedures reviewed on the merits outweighs any possible interference with the Tribe's sovereignty.

V. Bond

Federal Rule of Civil Procedure 65 provides in relevant part: "The court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). District courts have discretion to determine the amount of security, if any. *Barahona–Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir.1999). In this

case, Plaintiffs assert that they are indigent as a result of the Tribe's withholding of their per capita funds pursuant to the January 28, 2011 order. Waiver of the bond requirement is permissible where the plaintiffs are indigent. *See V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1123 (N.D. Cal. 2009); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 n.42 (C.D. Cal. 1982). Moreover, the Court believes that in this case the cost to the government and the Tribe, in the event they are found to have been wrongfully enjoined, would be minimal. Accordingly, the Court will exercise its discretion to waive the bond requirement in this case. *See* Fed. R. Civ. P. 65(c).

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs have at the very least shown serious questions going to the merits of their claims, likelihood of irreparable harm, a hardship balance that tips sharply toward them, and that an injunction would be in the public interest. *See Winter*, 555 U.S. at 20; *Alliance for the Wild Rockies*, 632 F.3d at 1135. Accordingly, the Court **GRANTS** their motion for a preliminary injunction and **ORDERS** as follows:

(1) Defendants, their officers, agents, servants, employees, and attorneys are hereby RESTRAINED and ENJOINED for the duration of this lawsuit from removing Plaintiffs from the San Pasqual Tribe's membership roll and from taking any further action to implement the Assistant Secretary's January 28, 2011 order.

(2) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the duration of this lawsuit, the adult Plaintiffs access to, and voting rights at, the general council meetings to the same extent as was enjoyed during the pendency of the administrative proceedings and before the issuance of the January 28, 2011 order.

(3) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the duration of this lawsuit, Plaintiffs access to the Indian Health Care services to the same extent as was enjoyed during the pendency of the administrative proceedings and before the issuance of the January 28, 2011 order.

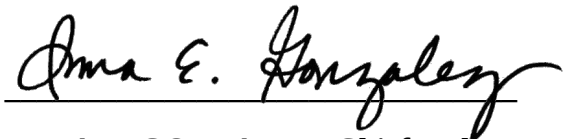
(4) Defendant Echo Hawk is hereby ENJOINED to issue an interim order requiring, for the duration of this lawsuit, the Tribe to make the per capita distributions of gaming revenue to Plaintiffs to the same extent as was required during the pendency of the administrative

proceedings and before the issuance of the January 28, 2011 order.

(5) Defendant Echo Hawk is hereby ENJOINED to issue an interim order requiring, for the duration of this lawsuit, the Tribe to escrow the minor Plaintiffs' per capita trust funds to the same extent as was required during the pendency of the administrative proceedings and before the issuance of the January 28, 2011 order.

IT IS SO ORDERED.

Date: December 19, 2011



IRMA E. GONZALEZ, Chief Judge
United States District Court