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10 UNITED STATES DISTRICT COURT  
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

12 ALBERT P. ALTO, et al.’	)	Civil Case No.: 11cv2276-IEG(BLM)
	)	
13 Plaintiffs,	)	RESPONSE TO MOTION FOR
	)	PRELIMINARY INJUNCTION
14 v.	)	
	)	
15 KEN SALAZAR, Secretary of the	)	Date: October 18, 2011
Department of the Interior, et al.,	)	Time: 10:00 am
	)	Courtroom 1
16 Defendants.	)	
_____	)	

17  
18 **I**

19 **INTRODUCTION**

20 The lawsuit currently before the Court is the most recent in a series of intra-tribal and district  
21 court actions involving the membership practices of the San Pasqual Band of Diegueno Mission Indians  
22 of California (“Band” ). In Caylor v. Bureau of Indian Affairs, 03cv1859-J(JFS)(Southern District of  
23 California), members of the Band sued the Department of the Interior, Bureau of Indian Affairs (“BIA”)   
24 claiming the agency had wrongfully enrolled the descendants of Marcus Alto, Sr. (“Alto Descendants”)   
25 because Marcus Alto, Sr. was not the biological child of the Band members who raised him. In Atilano  
26 v. Bureau of Indian Affairs, 05cv1134-J (BLM)(Southern District of California), members and  
27 prospective members of the Band challenged the Band’s Enrollment Committee’s actions which they  
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1 described as “hijacking” the enrollment process to favor certain factions within the Band. Both suits  
2 were dismissed by the district court on standing and indispensable party grounds.

3 The current case arises from a dispute over the rights of persons claiming to be descendants of  
4 Marcus Alto, Sr. to be enrolled members of the Band. Because the Band’s Constitution involves the  
5 BIA in resolving such disputes, the Assistant Secretary-Indian Affairs considered an appeal by the Band  
6 concerning the rights of the Alto Descendants to be enrolled members. The decision on that appeal is  
7 the basis for this suit.

## 8 II

### 9 FACTUAL BACKGROUND

10 The Band is a formally recognized Indian tribe, registered with the United States Bureau of  
11 Indian Affairs. Indian Entities Recognized and Eligible to Receive Services From the United States  
12 Bureau of Indian Affairs, 67 Fed. Reg. 46,328, 46,330 (July 12, 2002)<sup>1/</sup>; see generally 25 C.F.R. Part  
13 83. Over a long period of time, dating back to at least 1960 (see former 25 C.F.R. Part 48), the Bureau  
14 of Indian Affairs established procedures governing the enrollment of persons in the Band. Initially, the  
15 BIA had authority to prepare the Band’s membership roll as of January 1, 1959, and to maintain the roll  
16 thereafter. See Enrollment of Indians of the San Pasqual Band of Mission Indians in California, 161  
17 Fed. Reg. 31,391 (August 20, 1987). In 1983, the United States Court of Claims granted an award of  
18 funds, known as “Docket 80-A funds,” to be distributed to members of the Band based upon official  
19 membership rolls maintained by the BIA. Id. In accordance with the approved judgment plan, the BIA  
20 promulgated revisions to 25 C.F.R. Part 76 for the explicit purpose of bringing the membership roll of  
21 the Band current to the effective date of the judgment distribution plan (April 27, 1985). Id. In the final  
22 rule published in the Federal Register, the BIA noted that the Band had adopted a constitution and  
23 bylaws. Id. Consequently, the regulations formally recognized the existence of the Band’s Enrollment  
24 Committee and gave it a primary role in bringing the BIA’s membership roll up to date. Pursuant to 25  
25 C.F.R. § 76.11, the Enrollment Committee reviewed every membership application submitted to the  
26 BIA. 25 C.F.R. §§ 76.11(a)&(b). Thereafter, the Enrollment Committee returned the applications to

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27 <sup>1/</sup> The Court may take judicial notice of matters reported in the Federal Register. Federal  
28 Rule of Evidence 201; see Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001) (“court may  
take judicial notice of ‘matters of public record’ . . .”).

1 the BIA with its recommendations regarding whether the applicants were qualified to be enrolled.  
2 Further, the Enrollment Committee was also authorized to suggest deletions from the roll. 25 C.F.R.  
3 §§ 76.11(c)&(d). The BIA was required to accept the Enrollment Committee's recommendations  
4 "unless clearly erroneous." If the Band disputed a decision, the regulations provided a multi-level  
5 appeal process, culminating in a final decision by the Assistant Secretary-Indian Affairs. 25 C.F.R.  
6 §§ 76.12 - 76.14. Final agency decisions may be reviewed by the district courts pursuant to the  
7 Administrative Procedure Act, 5 U.S.C. §§ 701-706.

8 On April 10, 1995, the Assistant Secretary-Indian Affairs denied an appeal by the Band  
9 contesting the BIA's decision, rendered in 1994, that Marcus Alto, Sr. met the requirements for  
10 membership in the Band as set forth in 25 C.F.R. Part 76. (See Exhibit 5 to the Complaint). On July 25,  
11 2008, the Band requested the BIA to approve its decision to dis-enroll the Alto Descendants. (See  
12 Exhibit 6 to the Complaint). On November 26, 2008, the BIA rejected the request. (See Exhibit 7 to  
13 the Complaint). The Band's appeal of that decision was recognized by the Assistant Secretary-Indian  
14 Affairs in a letter dated October 29, 2009. (See Exhibit 8 to the Complaint). After approximately two  
15 and one half years of litigation in the agency, this latest dispute over the membership rights of the Alto  
16 Descendants is once again before the district court.

### 17 III

#### 18 **RESPONSE TO MOTION** 19 **FOR PRELIMINARY INJUNCTION**

20 The Plaintiffs in this action seek an order overturning the decision of the Assistant Secretary-  
21 Indian Affairs which was relied upon by the Band in striking them from the Band's membership roll.  
22 In response to the papers filed by the Plaintiffs, the Court issued a Temporary Restraining Order on  
23 October 4, 2011, containing the following text:

24 Defendants, their officers, agents, servants, employees, and attorneys are hereby  
25 RESTRAINED and ENJOINED from removing Plaintiffs from the tribal membership  
26 roll or from taking any further action to implement the Assistant Secretary's January 28,  
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1 2011 order until the Court rules on Plaintiffs' motion for a preliminary injunction.<sup>2/</sup>

2 Before the Order was issued, the Defendants, more specifically the office of BIA's  
3 Superintendent at the Southern California Agency, worked to implement the Assistant Secretary's  
4 decision. During August and September of this year, the previous membership roll maintained by BIA  
5 was revised in accordance with the decision and submitted to the Band's Business Committee and  
6 Enrollment Committee for review and comment. (Declaration of Robert Eben, ¶4). On September 19,  
7 2011, after discussions with the Band officials, a revised roll was submitted to the Band for review and  
8 approval. As of today's date, the Band has not submitted the revised roll to BIA for approval.  
9 (Declaration of Rober Eben, ¶5). Consequently, there is nothing pending before the BIA to enjoin.  
10 Further, in papers which will be filed by the Band in this case, it appears that the Band disagrees with  
11 the BIA's interpretation of its approval authority and, therefore, the Band may not submit a revised roll  
12 for approval.

13 The Defendants acknowledge the complexity of the issues raised in Plaintiffs' lawsuit. Although  
14 the facial attack is brought under the Administrative Procedure Act, questions of tribal law, the  
15 interpretation of old records, genealogical research, tribal history and customs, to name a few, are  
16 necessarily implicated. Recognizing this, and because there is no action pending before the BIA which  
17 must be enjoined, the Defendants have voluntarily decided to take no further action to implement the  
18 Assistant Secretary's decision pending resolution of this lawsuit by this Court. This will allow for the  
19 assembly of the administrative record supporting the decision and a full discussion of the merits of the  
20 Plaintiffs' claims without the threat of impending action by the BIA.

#### 21 IV

#### 22 CONCLUSION

23 The Plaintiffs seek to enjoin the Defendants from taking action to implement the decision of the  
24 Assistant Secretary. Before the Court's Order, the Defendants took such action, but have now  
25 voluntarily decided to refrain from further action. Specifically, the Defendants have decided not to  
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27 <sup>2/</sup>Although the Court's Order required service of the Order on the Defendants, neither the Office  
28 of the Attorney General nor the United States Attorney's Office have been served with the Order or the  
Summons and Complaint. The Defendants reserve the right to assert lack of personal jurisdiction for  
failure to comply with Fed.R.Civ.P. 4.

1 further process revisions to the membership roll maintained by their agency until the Court rules on the  
2 issues presented in the lawsuit. And from available information, it appears unlikely that the Band will  
3 seek further action by the BIA because it views the BIA's role differently. For all these reasons, the  
4 Defendants respectfully submit that extension of the Temporary Restraining Order or entry of a  
5 Preliminary Injunction is unwarranted and unnecessary.

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DATED: October 11, 2011

Respectfully submitted,  
  
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