

Timothy C. Seward
California State Bar Number 179904
Hobbs, Straus, Dean & Walker, LLP
1903 21st Street, 3rd Floor
Sacramento, CA 95811
Telephone: (916) 442-9444
Facsimile: (916) 442-8344
Email: tseward@hobbsstrauss.com

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BY *[Signature]* DEPUTY

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OCT 11 2011

Geoffrey D. Strommer (pro hac vice application pending)
Hobbs, Straus, Dean & Walker, LLP
806 SW Broadway, Suite 900
Portland, OR 97205
Telephone: (503) 242-1745
Facsimile: (503) 242-1072
Email: gstrommer@hobbsstrauss.com

Attorneys for the San Pasqual Band of
Mission Indians

BY FAX

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALBERT P. ALTO, ANDRE E. ALTO,)
ANTHONY ALTO, BRANDON ALTO,)
CHASITY ALTO, CHRISTOPHER J.)
ALTO, DANIEL J. ALTO, JR.,)
DANIEL J. ALTO, SR., DOMINIQUE N.)
ALTO, RAYMONDALTO, SR.,)
RAYMOND E. ALTO, RAYMOND J.)
ALTO, ROBERT ALTO, ROLAND J.)
ALTO, SR., VICTORIA (ALTO))
BALLEW, ANGELA (MARTINEZ-)
MCNEAL) BALLON, JUAN J. BALLON,)
RECECCA (ALTO) BALLON, RUDY)
BALLO, JANICE L. (ALTO))
BANDERAS, PETER BANDERAS,)
VICTOR BANDERAS, DAVID A.)
BROKIEWICZ, DIANA BROKIEWICZ,)
PATRICIA D. (ALTO) BROKIEWICZ,)
MONICA (SEPEDA) DIAZ, ANTHONY)
FORRESTER, DUSTIN FORRESTER,)
JOHANNA (ALTO) FORRESTER,)
SARAH FORRESTER, ERNEST)
GOMEZ, HENRIETTA (ALTO) GOMEZ,)

CASE NO. 11-cv-2276 – IEG (BLM)

SAN PASQUAL BAND OF
MISSION INDIANS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
THEIR MOTION TO DISMISS

JUDGE: Honorable Irma E.
Gonzalez, Chief Judge
COURTROOM: 1
DATE: October 18, 2011
TIME: 10:00 a.m.

CP

KATHLEEN M. GOMEZ, HUMBERTO)
 GREEN, LYDIA (ALTO) GREEN, PAUL)
 ANTHONY GREEN, MAYR JO (ALTO))
 HURTADO, JUSTIN A. ISLAS,)
 CYNTHIA (SEPEDA) LEDESMA,)
 DESTINY C. LEDESMA, AMANDA M.)
 (ALTO) MINGES, ISABELLE M. (ALTO))
 SEPEDA, LUPE SEPEDA, DEBORAH L.)
 (ALTO) VARGAS, DESIREE VARGAS,)
 JEREMIAH VARGAS, JESSIAH)
 VARGAS, and TERRY E. WEIGHT,)
 individuals; JASON ALTO, CAROL)
 EDITH (ALTO) CAVAZOS, AIMEE)
 RENAE DIAZ, DANIEL GOMEZ, LISA)
 GOMEZ HUNTOON, CHRISTINE)
 MARTINEZ, MARLENE M. MARTINEZ,)
 and CASSANDRA SEPEDA, individuals;)
 RAYMOND J. ALTO as Representative for)
 BEN ALTO, deceased, MARCUS M.)
 ALTO, deceased, MARCUS R. ALTO,)
 deceased, DAVID GOMEZ, deceased,)
 SUSAN MARTINEZ, deceased; PAMELA)
 J. ALTO as Guardian Ad Litem for)
 MARCUS M. GREEN, a minor; PEDRO)
 BANDERAS as Guardian Ad Litem for)
 REINA A. BANDERAS, a minor; DAWN)
 CASTILLO as Guardian Ad Litem for)
 ALEXIS N. LEDESMA, a minor and)
 JESSE LEDESMA a minor; MARIA A)
 PEREZ-ROLON as Guardian Ad Litem)
 for ROLAND J. ALTO JR., a minor;)
 MARTIN DIAZ as Guardian Ad Litem for)
 JESSICA DIAZ, a minor, TONI L. DIAZ, a)
 minor and JACOB SEPEDA, a minor;)
 DONALD MARTINEZ as Guardian Ad)
 Litem for DONELLE MARTINEZ, a)
 minor, JUSTINE MARTINEZ, a minor,)
 and SABRINA MAARTINEZ, a minor,)

Plaintiffs,)

vs.)

KEN SALAZAR, Secretary of the)

TRIBE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Department of Interior – United States of)
America, LARRY ECHO HAWK, Assistant)
Secretary of the Department of Interior –)
Indian Affairs – United States of America,)
MICHAEL BLACK, Director of the Bureau)
of Indian Affairs of Department of)
Interior – United States of America, and)
ROBERT EBEN, Superintendent of the)
Department of Interior Indian Affairs,)
Southern California Agency, in their official)
capacity; and DOE Defendants 1 through)
10, inclusive,)
Defendants.)

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I. INTRODUCTION

The San Pasqual Band of Mission Indians (“Tribe”) has moved for an order dismissing this action under Federal Rule of Civil Procedure 19 on the basis that the Tribe is a required party which cannot be joined because of sovereign immunity, thus requiring dismissal of this action.

Plaintiffs nominally seek relief against officials of the Bureau of Indian Affairs (BIA), but their real target is the Tribe. This is made clear by the October 4, 2011 letter the Plaintiffs’ attorney sent to the Tribe’s Spokesman immediately after the ex parte Temporary Restraining Order (TRO) was signed, demanding that, based on the Order, the Tribe allow the Plaintiffs to attend and vote in the Tribe’s General Council meeting on October 9. *See* Letter dated October 4, 2011 from Emblem to Lawson (Exhibit 1) (hereafter all references to exhibits are to the Declaration of Geoffrey D. Strommer). This letter makes it clear that the Marcus Alto descendants intend to use the TRO and this action against BIA officials to alter the membership of the Tribe’s governing body (General Council), interfere with the Tribe’s inherent right of self government, and impact the Tribe’s ability to carry out governmental services. *See* Letter dated October 9, 2011 from Lawson to Emblem (Exhibit 2).

In their Complaint, the Plaintiffs have made up a false state of emergency, claiming that a TRO was necessary to prevent loss of benefits if the BIA was not enjoined from signing the Tribe’s supplemental membership roll. That is not the case. In fact, the Tribe disenrolled the Plaintiffs and terminated their rights and benefits effective on the date of the January 28, 2011 decision, more than eight months ago without any objection from the BIA. *See* Letter dated January 28, 2011 from Lawson to Alberto Alto

1 (Exhibit 3). In the more than eight months since the Assistant Secretary's decision, the
2 Marcus Alto descendants have not been allowed to attend any tribal meetings and have
3 not been eligible for any benefits from the Tribe.
4

5 Some four months after the disenrollment action by the Tribe, and after the
6 Assistant Secretary denied reconsideration, *see* Letter dated June 3, 2011 from Echo
7 Hawk to Strommer (Exhibit 4), the Plaintiffs emerged with a new attorney once more
8 seeking to reopen the final decision based on "new" evidence, which the Plaintiffs have
9 not proffered to the Tribe in accordance with the governing process incorporated in the
10 Tribe's Constitution.¹ The exchanges of correspondence between the Plaintiffs' and the
11 Tribe's attorneys and the Assistant Secretary reflect that Plaintiffs and their new counsel
12 were well aware of the finality of the Tribe's January 28 disenrollment action. *See*
13 Exhibits 8-16. Plaintiffs are not seeking to maintain the status quo, they are seeking to
14 require the Tribe to rescind or reverse a final tribal enrollment action.
15
16

17 In another example, the Complaint alleges that an injunction is necessary to
18 prevent the Tribe from considering a proposed constitutional amendment at the October 9
19 General Council meeting. Complaint, ¶ 59, 133. This is not a true statement. The
20 subject of a constitutional amendment was not on the agenda for the October 9 meeting.
21 *See* Agenda for San Pasqual General Council meeting October 9, 2011 (Exhibit 28).
22 Moreover, the Tribe cannot simply amend its Constitution at a regular tribal meeting.
23

24
25 ¹ *See* August 8, 2011 Letter from Lawson to Stevens at 4 (Exhibit 7). The BIA's role in
26 the Tribe's disenrollment action at issue in this case is based solely on a provision in the
27 Tribe's Constitution, which incorporates the terms of a federal regulation in Article III.
28 Thus, the BIA's role is solely a function of Tribal law, not federal law. *See* Constitution
(Exhibit 5) and regulations (Exhibit 6).

1 The Tribe's Constitution was adopted pursuant to 25 U.S.C. § 476, and therefore can be
2 amended only through an election carried out by the Secretary of the Department of the
3 Interior called for that purpose. *See* Constitution, Article X (Exhibit 5). The Tribe has
4 held tribal member meetings for the sole purpose of discussing a new constitution but has
5 not requested a Secretarial election, and no such election is scheduled. *See* Letter dated
6 October 9, 2011 from Lawson to Emblem (Exhibit 2).
7

8 Virtually every claim for relief asserted by Plaintiffs directly targets the Tribe.
9 Among other things, Plaintiffs request that the Court issue a preliminary injunction
10 ordering the BIA to issue an "interim Order" to (1) allow the adult Plaintiffs access and
11 voting rights on all General Council tribal matters; (2) allow the Plaintiffs access to
12 Indian Health Care services; (3) require the Tribe to make per capita payments from
13 December 1, 2010 through January 28, 2011; and (4) require the Tribe to escrow the
14 minor's trust and per capita payments that would be due absent the Assistant Secretary's
15 January 28, 2011 Order. These are all relief that can only be afforded by the Tribe, not
16 the BIA,² in accordance with applicable tribal and federal law.
17
18

19 Although packaged as a challenge to the Assistant Secretary's January 28
20 decision, Plaintiffs seek to reverse a final enrollment action made by the Tribe pursuant
21 to the years-long review process set forth in tribal law, and to require the Tribe to grant
22 the rights and privileges of tribal membership to the Plaintiffs and to refrain from
23

24 _____
25 ² The named Plaintiffs also include several individuals who only recently submitted
26 enrollment applications to the Tribe's Enrollment Committee, which has not yet acted on
27 them as required by the Tribe's governing regulations. *See* September 2, 2011 letter
28 transmitting applications, raising virtually identical issues before the Enrollment
Committee that are raised in the Complaint (Exhibit 17).

1 exercising its fundamental right to govern its internal affairs. This suit thus implicates
2 the Tribe's right to define its own membership for tribal purposes, a right long
3 "recognized as central to its existence as an independent political community." *Santa*
4 *Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).
5

6 The Tribe's disenrollment action is at the heart of this action, and the Tribe is the
7 target of the Plaintiffs' requests for relief. Because the Tribe's presence in this litigation
8 as a party is required for full and fair adjudication of the Tribe's disenrollment action, and
9 because the Tribe cannot be joined as a party, this action cannot be heard in equity and
10 good conscience in the absence of the Tribe and should be dismissed.
11

12 II. FACTS

13 Plaintiffs, descendants of Marcus Alto, Sr. (Marcus Alto descendants), were
14 disenrolled by the Tribe immediately following the issuance of the Assistant Secretary's
15 decision dated January 28, 2011, affirming the 2008 determination by the Tribe's
16 Enrollment Committee to disenroll them. A copy of the January 28, 2011 decision is
17 attached as Exhibit 21. Alto, Sr. was erroneously enrolled in the Tribe by the BIA in
18 1995 based on a finding that he was the biological son of Tribe member Maria Duro Alto.
19 The Tribe's Enrollment Committee's determination,³ affirmed by the Assistant Secretary
20
21

22
23 ³ The Enrollment Committee's decision is supported by an extensive and detailed record,
24 including formal analyses provided by a professional anthropologist. *See, e.g.*, Christine
25 Grabowski, Ph.D., "Analysis of the Marcus Alto, Sr. Enrollment Challenge of Ron Mast
26 August 27, 2007," dated June 16, 2008 (without exhibits) (hereafter "Report I") (Exhibit
27 19); Christine Grabowski, Ph.D., "Response to the BIA Letter of November 26, 2008
28 Regarding the Request for Disenrollment of the Enrollment Committee of the San
Pasqual Band of Mission Indians," dated December 13, 2008 (without exhibits) (Report
III) (Exhibit 20).

1 in the January 28 decision, concluded that Alto, Sr., and those members of the Tribe
2 claiming enrollment through him, have no biological relation to a member of the Tribe
3 and are not eligible for membership. The review by the BIA, as authorized under tribal
4 law by the terms of the Tribe's Constitution, included proceedings before the BIA
5 Regional Director in Sacramento and the Assistant Secretary, and involved review of an
6 extensive documentary record and argument submitted by both the Tribe and the Marcus
7 Alto descendants.⁴

9
10 The Tribe's existing laws establish and govern the Enrollment Committee's
11 responsibility and authority to take actions necessary to maintain a current tribal roll.
12 The Tribe's laws also establish and govern the BIA review and approval of certain
13 enrollment actions and membership decisions. Article III of the Tribe's Constitution
14 provides that the membership of the Tribe shall consist of living persons named on the
15 approved October 5, 1966 roll and other persons enrolled in accordance with the terms of
16 25 C.F.R. Part 48 (1960), federal regulations that are no longer in effect as federal law,
17 but which are incorporated as tribal law by reference into Article III.⁵ A copy of the
18 federal regulations is attached as Exhibit 6.
19
20
21
22

23 ⁴ The Alto descendants had at least three opportunities to present evidence: to the
24 Enrollment Committee, to the Regional Director, and to the Assistant Secretary,
25 including the response to the specific and comprehensive search request initiated by the
26 Assistant Secretary in the October 29, 2009 letter, which identified categories of
27 information, types of documents and possible locations to be searched.

28 ⁵ The Constitution was adopted by voters on November 29, 1970, and approved by the
Secretary of the Interior on January 14, 1971. Article III reads as follows:

1 The membership criteria specify that a person is entitled to membership if he or
2 she (1) is named on the June 30, 1910 Census roll, (2) is a descendant of a person named
3 on the 1910 roll and possesses one-eighth (1/8) or more degree of Indian blood of the
4 Tribe, or (3) is a person who can otherwise establish he or she possesses one-eighth (1/8)
5 or more degree of Indian blood of the Tribe.⁶ The standard for applicants claiming
6 entitlement to enrollment in the Tribe is provided in 25 C.F.R. § 48.5(d): “The burden of
7 proof rests upon the applicant to establish that he is of the degree of Indian blood of the
8 Band as claimed in the application.”
9

10
11 25 C.F.R. Part 48 was promulgated by the Department in 1960 for the purpose of
12 preparing a roll of members as of January 1, 1959.⁷ That roll was developed and
13 approved by the Secretary on October 5, 1966, as referenced in the Constitution. These
14 regulations were in effect when the Constitution was approved in 1971, incorporating the
15 terms of the regulations as tribal governing law. There were no subsequent amendments
16 to the roll or changes in the regulations prior to 1987, when the BIA amended the federal
17 regulations, renumbered as 25 C.F.R. Part 76, in order to allow the BIA to prepare a roll
18

19 Section 1. Membership shall consist of those living persons whose names appear
20 on the approved Roll of October 5, 1966, according to Title 25, Code of Federal
21 Regulations, Part 48.1 through 48.15.

22 Section 2. All membership in the band shall be approved according to the Code
23 of Federal Regulations, Title 25, Part 48.1 through 48.15 and an enrollment ordinance
24 which shall be approved by the Secretary of the Interior.

25 ⁶ See 25 C.F.R. § 48.5. Article III also provides for the adoption of an enrollment
26 ordinance to govern membership, subject to approval by the Secretary of the Interior.
27 The Tribe has not adopted a membership ordinance.

28 ⁷ See 25 Fed. Reg. 1,830 (March 2, 1960), redesignated as 25 C.F.R. Part 76, at 47 Fed.
Reg. 13,327 (March 30, 1982).

1 for the declared purpose of serving as a basis for the distribution by the BIA of federal
2 judgment funds awarded to the Tribe by the U.S. Court of Claims.⁸ These regulations
3 were deleted from the Code of Federal Regulations in 1996 on the basis that the purpose
4 for which the rules had been promulgated, preparation of the judgment roll to distribute
5 federal funds, had been fulfilled and the rules were “no longer required.”⁹
6

7 There is no federal law or regulation requiring the Tribe to submit its enrollment
8 or membership determinations for review or approval by the BIA. The BIA regulations
9 are no longer in force as a matter of federal law, but the relevant terms of the 25 C.F.R.
10 Part 48 version of the rules apply as a matter of tribal law because they are specifically
11 incorporated into Article III of the Constitution. While the Tribe and BIA agree that the
12 pertinent terms of the regulations are those that appear in their original form in 25 C.F.R.
13 Part 48, as adopted in 1960 and in effect in 1971 when the Constitution was approved, the
14 Tribe and BIA fundamentally disagree about the manner in which these regulations
15 should be applied under tribal law. *See* January 28 decision at 8-10 (Exhibit 21).
16
17

18 25 C.F.R. § 48.14, incorporated into Article III of the Tribe’s Constitution,
19 describes actions that the Enrollment Committee must take in order to maintain a current
20

21
22 ⁸ *See* 52 Fed. Reg. 31,392 (August 20, 1987). Funds to satisfy the award were
23 appropriated by Congress January 3, 1984. The judgment fund distribution plan was
24 developed pursuant to the Judgment Fund Distribution Act of 1973, 25 U.S.C. § 1401 *et*
25 *seq.*, and became effective April 27, 1985. The revised regulations were adopted
26 pursuant to the authority in this Judgment Fund Act.

27 ⁹ *See* 61 Fed. Reg. 27,780 (June 3, 1996). The supplementary information noted the
28 narrow purpose for the regulations: “Members of the San Pasqual Band have been
enrolled as required in satisfaction of judgments of the United States Claims Court docket
80-A”. *Id.*

1 roll for tribal purposes, including, among others, correcting the roll with regard to dates
2 of birth, degrees of Indian blood, and family relationships; and deleting the names of
3 persons who were enrolled “based on information subsequently determined to be
4 inaccurate.” 25 C.F.R. § 48.14(c) and (d). Subsections (c) and (d), as incorporated in
5 tribal law, thus direct the Enrollment Committee to correct the tribal roll or to disenroll
6 individuals based on information or documentation which demonstrates that information
7 supplied at the time of application for enrollment was inaccurate or incomplete.¹⁰
8

9
10 Thus, under tribal law, it is the Enrollment Committee – not the BIA – which
11 takes action to maintain the tribal roll and to disenroll individuals as warranted and
12 appropriate pursuant to the standards set out in the regulations incorporated under the
13 Tribe’s Constitution. *See* discussion in Letter dated August 8, 2011 from Lawson to
14 Stevens at 3-5 (Exhibit 7).

15
16 In 2008, the Enrollment Committee initiated a process to review the status of Alto
17 Sr. (and the Marcus Alto descendants claiming enrollment through him), who had been
18 placed on the Tribe’s roll by the BIA during the process to develop a roll for distribution
19 of federal judgment fund. Alto Sr. did not apply for membership and was not included on
20 the Tribe’s initial roll approved in 1966 under the regulations at 25 C.F.R. Part 48. Alto
21 Sr. filed an application for inclusion on the judgment fund distribution roll on November
22 15, 1987, three days before the deadline for filing an application pursuant to 25 C.F.R.
23 Part 76, the BIA’s procedures for updating the roll in order to serve as the basis for a per
24

25
26 ¹⁰ 25 C.F.R. § 48.14 provides: “The roll shall be kept current by,” among other actions,
27 corrections to the roll and the deletion of names of individuals previously enrolled based
28 on inaccurate information, subsections (c) and (d).

1 capita distribution of judgment funds awarded by the United States Claims Court in
2 Docket 80-A. Alto Sr. died a few months later, before the BIA approved the application
3 based on a finding that he was the biological son of Tribe member Maria Duro Alto. Alto
4 Sr.'s descendants were also placed on the Tribe's roll based on approval of that
5 application. *See* Report I, at 10-17 (Exhibit 19).
6

7 The form was incomplete and lacked appropriate documentation to support
8 parentage.¹¹ Based on insufficient proof of parentage, the Tribe's General Council
9 rejected amendments to its roll that included Alto Sr. and those claiming membership
10 through him. In 1991 Marcus Alto, Jr., son of Alto Sr., appealed the Tribe's rejection to
11 the BIA under the procedures incorporated into tribal law under Article III of the Tribe's
12 Constitution. In 1994 the BIA ruled that Alto Sr.'s descendants were entitled to inclusion
13 on the roll to share in the judgment fund award, a decision that was upheld by the
14 Assistant Secretary in 1995. Not in the 1995 decision, nor since, has the BIA ever
15 explained why it approved Alto Sr.'s application, even though the application was
16 incomplete and without documentation of parentage.
17
18

19 Many tribal members never accepted the enrollment of Alto Sr. or the Marcus
20 Alto descendants. In 2008, following a formal challenge and after a thorough review of
21 new evidence, including an independent anthropological report, the Enrollment
22 Committee – after providing the Marcus Alto descendants opportunities to be interviewed
23 by the independent anthropologist tasked with looking into these issues, to present any
24
25

26
27 ¹¹ *See* Report I at 10-14 (Exhibit 19).
28

1 additional evidence and be heard by the Committee¹² – concluded that new evidence
2 conclusively established that Alto Sr. was not the biological son of Maria Duro Alto.
3 Based on detailed findings, supported by an extensive record of decision, the Committee
4 determined that individuals descended from Alto Sr. do not qualify for membership in the
5 Tribe.
6

7 The Tribe's Constitution provides for BIA review of the Committee's
8 membership decisions so the Committee's disenrollment determinations were forwarded
9 to the BIA for review. The Regional Director, in a November 26, 2008 decision,
10 disapproved the Enrollment Committee's decision, and the Tribe appealed to the
11 Assistant Secretary. In its appeal the Tribe challenged the Regional Director's decision
12 with regard to the proper burden of proof, the standard of review, and some dozen
13 specific factual findings. *See* Tribe's Memorandum in Support of Notice of Appeal at
14 9-17 (Exhibit 22). The Assistant Secretary disagreed with the Tribe on the proper
15 interpretation of the burden of proof and standard of proof to be applied under the
16 regulations incorporated under tribal law,¹³ but affirmed the Enrollment Committee's
17 determination after conducting additional review and requesting additional research and
18 reports from the parties to the appeal. Notably, the Assistant Secretary applied a more
19 stringent standard of proof than that advocated by the Tribe but still upheld the Tribe's
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24 ¹² *See* January 28, 2011 decision at 6. The Enrollment Committee provided the Marcus
25 Alto descendants an opportunity to submit information and Dr. Grabowski, during
26 preparation of her analysis, offered to consider information or documents. *See* Report I at
27 2 (Exhibit 19).

28 ¹³ *See* January 28 decision at 8-10 (Exhibit 21).

1 disenrollment determination. *See* January 28 decision at 8-10. The Tribe immediately
2 implemented the affirmed disenrollment determination on January 28, 2011. Since that
3 date the Plaintiffs have not been members of the Tribe and have not enjoyed any of the
4 rights and privileges of membership.
5

6 The Marcus Alto descendants sought reconsideration of the Assistant Secretary's
7 decision, which was denied on June 3, 2011 (Exhibit 4). Undeterred, the Marcus Alto
8 descendants, represented by their new attorney, again requested reconsideration, claiming
9 they had newly discovered evidence bearing on the decision. Pursuant to tribal law, if the
10 Marcus Alto descendants, who were disenrolled on January 28, 2011, wish to submit new
11 applications for membership in the Tribe based upon new evidence, they must submit
12 those applications to the Tribe for consideration by the Tribe's Enrollment Committee.
13

14 The Plaintiffs sought and obtained an *ex parte* Temporary Restraining Order
15 (TRO) in this case, to (among other things) prevent the BIA from carrying out its
16 ministerial duty of certifying a supplemental roll documenting the disenrollment, a
17 document the Tribe and BIA have been working on finalizing for several months, and
18 which has no bearing on the legal effect of the disenrollment decision that became
19 automatically effective the date of the January 28 decision. Importantly, the BIA has to
20 date not objected to the Tribe's implementation of the decision effective January 28,
21 despite the fact that Plaintiffs' claim that the decision is not effective until a new roll is
22 certified. *See, e.g.*, Letter dated August 8, 2011 from Lawson to Stevens at 5 (Exhibit 7).
23

24 Against this backdrop, the Plaintiffs now seek a preliminary injunction against the
25 BIA, which requests relief in the form of an interim order directing the BIA to force the
26
27
28

1 Tribe to allow the Plaintiffs to participate as voting members in the Tribe's governing
2 body and share in distribution of the Tribe's assets.

3
4 **III. ARGUMENT: RULE 19 REQUIRES DISMISSAL OF THIS ACTION
BECAUSE THE TRIBE IS A NECESSARY AND INDISPENSABLE PARTY**

5 Federal Rule of Civil Procedure 19 governs the joinder of persons necessary for a
6 suit's just adjudication. *See* FED. R. CIV. P. 19. Under Rule 19, a court must dismiss an
7 action if: (1) an absent party is required; (2) it is not feasible to join the absent party; and
8 (3) it is determined "in equity and good conscience" that the action should not proceed
9 among the existing parties.¹⁴ *See* FED. R. CIV. P. 19; *Republic of Philippines v. Pimentel*,
10 553 U.S. 851, 862 (2008).

11
12 Although the Plaintiffs fashioned the Complaint as a procedural challenge against
13 the BIA, the Complaint and the actions of the Plaintiffs make it clear that the Tribe is the
14 true target of this action. The Plaintiffs request relief that would require the Tribe to
15 perform, or refrain from performing, certain acts. Even if the Court were to grant the
16 Plaintiffs' requested relief, the Court cannot grant complete relief because the Tribe is not
17 a party and would not be bound by the Court's order. The Plaintiffs' legal counsel
18 underscored the necessity of the Tribe as a party when he sent a letter to the Tribe's
19 Spokesman seeking to enforce the Temporary Restraining Order against the Tribe prior to
20 the General Council's October 9 meeting (Exhibit 1).
21
22
23

24
25 ¹⁴ When Rule 19 was amended in 2007, the word "necessary" was replaced by "required"
26 and the word "indispensable" was removed. The changes were intended to be "stylistic
27 only" and "the substance and operation of the Rule both pre- and post-2007 are
28 unchanged." *Republic of Philippines*, 553 U.S. at 556-57 (quoting the Advisory
Committee).

1 The Tribe is also a necessary party because this action implicates the most
2 fundamental interests of the Tribe: its ability to govern its internal affairs and interpret its
3 own laws, including, among others, those pertaining to membership issues. As this Court
4 has observed, attempts to preclude certain actions by a tribe necessarily implicates the
5 Tribe's sovereign immunity and plaintiffs may not make an "end run" around tribal
6 sovereign immunity by suing the United States. *Rosales v. U.S.*, No. 07CV0624, WL
7 4233060, at *4 (S.D. Cal. Nov. 28, 2007 attached as Exhibit 30, *citing Lewis v. Norton*,
8 424 F. 3d 959, 963 (9th Cir. 2005). Similarly, the Plaintiffs' attempt to make an "end
9 run" around the Tribe's sovereign immunity in this case must fail.
10
11

12 Having determined that the Tribe is a necessary party, Rule 19 requires courts to
13 determine whether the Tribe could be joined to this action. There is no dispute that the
14 Tribe is a federally recognized Indian tribe and enjoys sovereign immunity.¹⁵ Thus the
15 Tribe cannot be joined as a party to this action without its consent, which cannot be
16 required. Based on the factors set forth in Rule 19(b), this action cannot proceed in
17 equity and good conscience absent the Tribe because a judgment rendered in the Tribe's
18 absence would subject the Tribe to substantial prejudice, and the prejudice could not be
19 lessened by shaping the relief. Any relief fashioned by the Court would necessarily
20 conflict with the Tribe's right to preserve its sovereign immunity and with the Tribe's
21 fundamental right to govern its internal affairs. Therefore, adequate relief cannot be
22 granted in the absence of the Tribe.
23
24
25

26 _____
27 ¹⁵ The Tribe is a federally-recognized Indian tribe. 75 Fed. Reg. 60,810-60,814 (Oct. 1,
28 2010).