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**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

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

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

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

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

12 Section 2. All membership in the band shall be approved according to the Code
13 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.

14 (Compl., Ex. 1 [Doc. No. 1-2] (hereinafter, “Tribe’s Constitution”).)

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

24 **II. 1994/1995 Alto enrollment**

25 As relevant here, Marcus Alto Sr. submitted his application for enrollment in the Tribe on
26 November 15, 1987. He listed Jose Alto and Mario Duro as his parents, both of whom appeared
27 on the 1910 San Pasqual Census Roll. On June 16, 1988, Marcus Alto Sr. passed away. On May
28 23, 1991, the Superintendent notified the Tribe’s Enrollment Committee of his determination that

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

11 **III. 2003 and 2005 federal court challenges**

12 In 2003, three members of the Tribe filed a lawsuit against the BIA challenging the
13 decision to enroll descendants of Marcus Alto Sr. *See Caylor v. Bureau of Indian Affairs*, Civ. No.
14 03cv1859 J (JFS) (S.D. Cal. filed Sept. 8, 2003). Plaintiffs alleged two claims for relief: (1)
15 arbitrary, capricious, and unlawful enrollment under the APA, and (2) breach of trust. The district
16 court dismissed the lawsuit, finding that the APA claim was time-barred and that, in any event, the
17 Tribe was an indispensable party that could not be joined. *Id.*, Doc. No. 29.

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

26 **IV. 2007 enrollment challenge**

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

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

19 The Enrollment Committee appealed the BIA's decision to Assistant Secretary Hawk, a
20 defendant in this action. After establishing that he had jurisdiction to review the appeal,
21 Defendant Hawk requested additional documentation from the parties. (Compl., Ex. 8 [Doc. No.
22 1-9].) According to Plaintiffs, in response, the Tribe submitted multiple documents, including a
23 56-page interpretive report by Dr. Christine Grabowsky and a separate 19-page supplemental
24 memorandum of points and authorities. In a letter to Defendant Hawk, Plaintiffs contended that
25 the Tribe's submittal exceeded the scope of Hawk's request and asked for an opportunity to
26

27 ¹ 25 C.F.R. § 48.14 governs the procedures for keeping the tribal membership roll current and
28 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).

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

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

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

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

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

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

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

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

7 Sixth, Hawk gave little weight to Marcus Alto Sr.’s 1928 application for inclusion on the
8 1933 California Roll of Indians because it was unlikely that Marcus himself reviewed the
9 application, seeing that it contained a number of mistakes and contradictions. (*Id.* at 15-16.)

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

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

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

18 In response to Defendant Hawk’s decision, Plaintiffs sent a request for reconsideration,
19 which was denied on June 3, 2011. (Compl., Exs. 11, 12 [Doc. Nos. 1-12, 1-13].) Plaintiffs
20 subsequently sent three more requests for reconsideration with supporting evidence. (Compl., Exs.
21 13, 14, 15 [Doc. Nos. 1-14, 1-15, 1-16].) Plaintiffs allege that, to date, they have not received any
22 response to these requests for reconsideration. (Compl. ¶¶ 53, 56-58.)

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

1 **V. Present case**

2 Plaintiffs³ filed their complaint on September 30, 2011, alleging four causes of action: (1)
3 declaratory relief based on the doctrine of *res judicata*; (2) declaratory relief on the basis that
4 Defendant Hawk violated the enrolled Plaintiffs' right to procedural due process; (3) declaratory
5 relief and reversal of agency's January 28, 2011 order based upon arbitrary and capricious action;
6 and (4) injunctive relief based on the agency's failure to act. [Doc. No. 1.] Plaintiffs also filed an
7 *Ex Parte* Motion for Temporary Restraining Order ("TRO") and a Motion for Preliminary
8 Injunction. [Doc. Nos. 3, 4.] On October 4, 2011, the Court granted Plaintiffs' motion for a TRO
9 and set the preliminary injunction motion for a hearing. [Doc. No. 5.]

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

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

23
24 ³ Plaintiffs separate themselves into five groups of Marcus Alto Sr. Descendants: (A) adult
25 individuals identified on the Tribe's membership roll as duly enrolled members of the Tribe; (B)
26 representatives of the families of deceased individuals identified on the Tribe's membership roll; (C)
27 individuals who have attained the age of majority and otherwise meet the membership requirements,
28 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.

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

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

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

12 LEGAL STANDARD

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

22 DISCUSSION

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

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

7 **I. Success on the merits**

8 **A. *Res judicata***

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

14 The doctrine of *res judicata* is applicable "whenever there is (1) an identity of claims, (2)
15 a final judgment on the merits, and (3) privity between parties." *United States v. Liquidators of*
16 *European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011). It applies with equal force to
17 administrative as well as judicial decisions "[w]hen an administrative agency is acting in a judicial
18 capacity . . . resolv[ing] disputed issues of fact properly before it." *See United States v. Utah*
19 *Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). However, the Ninth Circuit has cautioned that
20 "the principle of *res judicata* should not be rigidly applied in administrative proceedings." *Lester*
21 *v. Chater*, 81 F.3d 821, 827 (9th Cir. 1995); *accord Vasquez v. Astrue*, 572 F.3d 586, 597 (9th Cir.
22 2009). Therefore,

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

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

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

4 In this case, serious questions exist as to whether Secretary Deer's 1995 determination was
5 entitled to a *res judicata* effect. On the one hand, arguably, additional evidence has been obtained
6 since Secretary Deer's 1995 determination that would suggest *res judicata* is inapplicable,
7 including: (1) the 1907 baptismal certificate; (2) additional affidavits from tribal members
8 executed in 2004 as part of the *Caylor* lawsuit; and, to an extent, (3) the affidavits of Dr. Shipek,
9 Ms. Dueans, and Mr. Quisquis executed in 1994, but apparently not considered by Secretary Deer
10 in rendering the 1995 decision. (See Jan. 28, 2011 order, at 13-15, 19-20.) Where such new
11 evidence is present, *res judicata* may not be appropriate. See *Lester*, 81 F.3d at 827-28; *Gregory*,
12 844 F.2d at 666; see also *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985) (suggesting that *res*
13 *judicata* may be inappropriate where the claimant has presented new facts to demonstrate that a
14 prior determination of non-disability may have been incorrect).

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

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

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

18 B. Violation of procedural due process

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

22 Due process requires that a party have a full and fair opportunity to litigate its case.
23 *Crocog Co. v. Reeves*, 992 F.2d 267, 270 (10th Cir. 1993). A “full and fair opportunity” means
24 that the “state proceedings need do no more than satisfy the minimum procedural requirements of
25 the Fourteenth Amendment’s Due Process Clause.” *Kremer v. Chem Constr. Corp.*, 456 U.S. 461,
26 481 (1982). In deciding whether agency procedures comport with due process, the Court does not
27 defer to the agency. *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003).

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

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

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

23 C. Arbitrary and capricious action

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

26 ⁵ Indeed, after Defendant Hawk issued his adverse decision, Plaintiffs' new counsel submitted
27 a request for reconsideration, to which he attached the supplemental documents Plaintiffs wanted
28 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.)

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

11 Nonetheless, while the review is deferential, it is not toothless. *Id.* As such, the Court’s
12 inquiry “must be ‘searching and careful’ to ensure that the agency decision does not contain a clear
13 error of judgment.” *Id.* (citation omitted). An agency action must be reversed as arbitrary and
14 capricious where the agency has “‘relied on factors which Congress has not intended it to consider,
15 entirely failed to consider an important aspect of the problem, offered an explanation for its
16 decision that runs counter to the evidence before the agency, or is so implausible that it could not
17 be ascribed to a difference in view or the product of agency expertise.’” *Pac. Coast Fed’n of*
18 *Fishermen’s Ass’n, Inc. v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001)
19 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).
20 “In performing this inquiry, the court is not allowed to uphold a regulation on grounds other than
21 those relied on by the agency.” *Ranchers Cattlemen*, 415 F.3d at 1093.

22 1. *Reliance on the 1907-13 censuses.*

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

- 27 - Jose Alto is listed as age “50” on the 1907, 1908, 1909, and 1910 censuses;
28 - 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

1 - Frank Alto is listed as age “25” on the 1907 and 1910 censuses, as age “24” on the
2 1908 census, as age “26” on the 1909 and 1911 censuses, and as age “27” on the
3 1912 census.

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

17 Moreover, as the BIA Regional Director indicated in his decision denying the Tribe’s
18 challenge, the census data is conflicting on this issue. For example, it appears the 1920 federal
19 census *does* list Marcus Alto Sr. as Maria Alto’s son. (See Compl., Ex. 7, at 5.) Hawk’s rejection
20 of this inconsistency is not reasonable. Hawk acknowledges that Marcus Alto Sr. is listed as
21 living with Jose Alto and Maria Duro on the 1920 federal census, but attributes it to Marcus Alto
22 Sr.’s adoption. (See Jan. 28, 2011 order, at 15 (“I find the adoption theory to be the most logical
23 explanation for the fact that Marcus Alto is not listed with his parents on the Indian censuses, but
24 does appear on the Federal census of 1920.”).) Early in his order, however, Hawk expressly
25 determined that it was undisputed that Marcus Alto Sr. was raised by Jose Alto and Maria Duro
26 “since infancy.” (*Id.* at 10; *see also id.* at 15 (quoting a handwritten paragraph at the bottom of
27 Marcus Alto Sr.’s 1987 enrollment application, which stated that he was given to Jose Alto and
28 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

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

3 2. *Reliance on the several affidavits.*

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

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

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

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

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

4 A review of the 1995 decision reveals that it does not discuss the "no issue" language in
5 Maria Duro's 1928 application. (See Compl., Ex. 5.) Nonetheless, there are serious questions as
6 to whether Hawk should have given significant weight to this single statement. As Plaintiffs point
7 out, three of the 2004 affiants claimed blood relationship to Maria Duro, which appears to be
8 inconsistent with Mario Duro declaring that she had no children. At the very least, it demonstrates
9 that there are serious questions as to the reasonableness of Hawk's reliance on Mario Duro's
10 statement that she had "no issue." See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (noting that an
11 agency's determination is arbitrary and capricious where the agency "offered an explanation for its
12 decision that runs counter to the evidence before the agency, or is so implausible that it could not
13 be ascribed to a difference in view or the product of agency expertise").

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

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

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

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

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

8 6. *Disregard of Marcus Alto Sr.’s 1928 application.*

9 Plaintiffs assert that Hawk’s decision to disregard Marcus Alto Sr.’s 1928 application as an
10 unsubstantiated affidavit was arbitrary and capricious. However, as Hawk notes, the 1928
11 application contains several incorrect entries, such as listing Jose Alto as “non Indian” and listing
12 Marcus Alto Sr.’s birth year as 1903, as well as several blank fields that Marcus Alto Sr. would
13 have filled out. (*See id.* at 15-16.) Based on this evidence, Hawk reasonably concluded that the
14 1928 application was likely filled out without Marcus Alto Sr. ever reviewing it or correcting it.
15 As such, it was reasonable for Hawk to give less weight to this application, even though another
16 decisionmaker might have reached a different conclusion. *See Marsh*, 490 U.S. at 383-85.

17 7. *Reliance on letters signed by Frank Alto.*

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

22 8. *Inconsistent findings regarding the 1907 baptismal record.*

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

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

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

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

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

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

7 D. Federal Rule of Civil Procedure 19

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

13 (a) Persons Required to Be Joined if Feasible.

14 (1) Required Party. A person who is subject to service of process and
15 whose joinder will not deprive the court of subject-matter jurisdiction must
be joined as a party if:

16 (A) in that person’s absence, the court cannot accord complete relief
among existing parties; or

17 (B) that person claims an interest relating to the subject of the action
18 and is so situated that disposing of the action in the person’s absence
may:

19 (i) as a practical matter impair or impede the person’s ability
20 to protect the interest; or

21 (ii) leave an existing party subject to a substantial risk of
22 incurring double, multiple, or otherwise inconsistent
obligations because of the interest.

23

24 (b) When Joinder Is Not Feasible. If a person who is required to be joined if
25 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
26 dismissed.

27 In making a Rule 19 determination, the Court engages in three successive inquiries. *EEOC*
28 *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

1 whether joinder would be feasible. *Id.* Third, if joinder is not feasible, the Court must determine
2 under Rule 19(b) “whether, in equity and good conscience, the action should proceed among the
3 existing parties or should be dismissed.” *Id.* The moving party has the burden of persuasion in
4 arguing for dismissal under Rule 19. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.
5 1990). Moreover, because “the burdens at the preliminary injunction stage track the burdens at
6 trial,” the non-moving party bears the burden to show a likelihood that its affirmative defense will
7 succeed. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006);
8 *accord Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007).

9 *I. Should the Tribe be joined under Rule 19(a)?*

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

14 The Ninth Circuit has observed that “[t]here is no precise formula for determining whether
15 a particular non-party is necessary to an action.” *Confederated Tribes of Chehalis Indian*
16 *Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Rather, “[t]he determination is
17 heavily influenced by the facts and circumstances of each case.” *Id.* (citation omitted).

18 *i. Complete relief*

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

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

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

19 The cases relied upon by the Tribe are distinguishable. In those cases, the Ninth Circuit
20 concluded that complete relief could not be accorded among the existing parties where the
21 requested remedy, if granted, would fail to bind the absent Indian tribe who was in a position to act
22 in direct contravention of that remedy. Thus, in *Confederated Tribes*, various Indian tribes
23 brought an action against federal officials challenging the United States’ continued recognition of
24 the Quinault Indian Nation as the sole governing authority of the Quinault Indian Reservation.
25 928 F.2d at 1497. The Ninth Circuit affirmed the dismissal under Rule 19(a), holding that
26 complete relief was not possible in the absence of the Quinault Indian Nation because “[j]udgment
27 against the federal officials would not be binding on the Quinault Nation, which could continue to
28 assert sovereign powers and management responsibilities over the reservation.” *Id.* at 1498.

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

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

16 In this case, unlike the above cases, there *are* enforcement mechanisms in place to ensure
17 that the Tribe complies with any determination by the Secretary. First, the Tribe’s Constitution
18 provides that the Secretary has the final authority over all enrollment challenges. In the past, the
19 Tribe has demonstrated that it was willing to submit the enrollment challenges to the BIA and the
20 Secretary, and to abide by their decisions—most notably the 1994/1995 enrollment challenge,
21 which was resolved adversely to the Tribe. Thus, if the Secretary were to reject the Tribe’s current
22 enrollment challenge, it is presumed the Tribe would comply with that determination. *See*
23 *Yellowstone County v. Pease*, 96 F.3d 1169, 1173 (9th Cir. 1996) (concluding that the Tribe was
24 not a necessary party where it could be presumed that the tribal courts would comply with a
25 binding pronouncement of the federal court); *cf. In re Justices of Supreme Court of Puerto Rico*,
26 695 F.2d 17, 23 (1st Cir. 1982) (“[I]t is ordinarily presumed that judges will comply with a
27 declaration of a statute’s unconstitutionality without further compulsion.”).

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

1 followed in upholding the Tribe's enrollment challenge. Because these procedures are subject to
2 judicial review under the APA, this Court has the authority to grant complete relief without the
3 Tribe's presence. *See Makah Indian Tribe*, 910 F.2d at 559 (concluding that other tribes were not
4 necessary parties to the Makah Indian Tribe's complaint seeking review of the Secretary's
5 promulgation of regulations and prospective injunctive relief, where the procedures the Secretary
6 followed in promulgating the challenged regulations were subject to judicial review under the
7 Fishery Conservation and Management Act of 1976 and the APA); *see also Hein*, 201 F.3d at
8 1261-62 (concluding that the Barona Group was not an indispensable party to plaintiffs' action to
9 compel the Secretary to issue a ruling regarding their right to share in the portion of Barona
10 Group's gaming revenue). Accordingly, complete relief can be accorded.

11 *ii. Legally protected interest that would be impaired*

12 The Tribe also does not have a legally protected interest that would be impaired in its
13 absence. The governing inquiry is whether the Tribe will be adequately represented by existing
14 parties. *See Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir.
15 1998). "A non-party is adequately represented by existing parties if: (1) the interests of the
16 existing parties are such that they would undoubtedly make all of the non-party's arguments; (2)
17 the existing parties are capable of and willing to make such arguments; and (3) the non-party
18 would offer no necessary element to the proceeding that existing parties would neglect." *Id.*

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

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

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

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

22
23 ⁶ According to the Title 25 Regulations, which are incorporated into the Tribe's Constitution,
24 *see* Tribe's Const., art. III, § 2, the BIA Director must re-submit the final version of the membership
25 roll to the Secretary for approval before the roll is "approved." *See* 25 C.F.R. § 48.12 ("Upon notice
26 from the Secretary that all appeals have been determined the Director shall prepare in quintuplicate
27 a roll of members of the Band, arranged in alphabetical order. The roll shall contain for each person:
28 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

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

3 *iii. Inconsistent obligations*

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

21 *2. Mandatory injunction*

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

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28 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.

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

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

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

3 3. *Conclusion*

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

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

14 **II. Irreparable harm**

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

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

2 Plaintiffs have demonstrated that irreparable harm is likely. “It is true that economic injury
3 alone does not support a finding of irreparable harm, because such injury can be remedied by a
4 damage award.” *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d
5 597, 603 (9th Cir. 1991). In this case, however, the removal of Plaintiffs from the membership roll
6 has resulted in their removal from elected and appointed positions. It has also resulted in their loss
7 of health insurance benefits. “Like the loss of one’s job, the loss of one’s job benefits ‘does not
8 carry merely monetary consequences; it carries emotional damages and stress, which cannot be
9 compensated by mere back payment of wages.’” *Collins v. Brewer*, 727 F. Supp. 2d 797, 812 (D.
10 Ariz. 2010), *aff’d sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); *see also Indep. Living*
11 *Ctr. of Southern Cal, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 657-58 (9th Cir. 2009) (holding that state
12 Medicaid beneficiaries were likely to be irreparably harmed by a reduction in their benefits), *cert.*
13 *granted in part*, 131 S. Ct. 992 (2011); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982)
14 (holding that a denial of needed medical care creates a risk of irreparable injury). Accordingly, the
15 Court concludes that Plaintiffs have demonstrated a likelihood of irreparable harm.⁷

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

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18 ⁷ The Court, however, rejects Plaintiffs’ argument that the possibility of the Tribe voting on
19 the constitutional amendment amounts to irreparable harm. First, as the Tribe demonstrates, it is still
20 uncertain when any such vote would take place, (*see Strommer Decl.*, Exs. 2, 28), and, therefore, at
21 most, this presents a *possibility* of irreparable harm, which is insufficient. *See Winter*, 555 U.S. at 20-
22 21. Moreover, any harm is speculative because the Secretary would need to approve any final changes
23 to the Tribe’s Constitution. (*See Tribe’s Const.*, art. X.) Finally, the actual text of the proposed
24 constitutional amendment undermines Plaintiffs’ claim. Plaintiffs assert that the constitutional
25 amendment, if successful, would limit tribal membership to only those who are actually named on the
26 1966 membership roll, or who are born to someone named on that membership roll. Because they do
27 not satisfy either of the criteria, but were instead added pursuant to Title 25 Part 76 as blood
28 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.

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

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

16 Accordingly, Plaintiffs have demonstrated the likelihood of irreparable harm.

17 **III. Balance of hardships**

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

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24 ⁸ Indeed, it appears the government has already changed its mind on at least one aspect of this
25 lawsuit. In its opposition to Plaintiffs' motion for a preliminary injunction, filed on October 11, 2011,
26 the government indicated that there existed a disagreement between it and the Tribe as to “the BIA's
27 interpretation of its approval authority.” (Gov't Response to Motion for Prelim. Inj., at 4; *see also id.*
28 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.)

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

11 **IV. Public interest**

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

23 **V. Bond**

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

1 case, Plaintiffs assert that they are indigent as a result of the Tribe's withholding of their per capita
2 funds pursuant to the January 28, 2011 order. Waiver of the bond requirement is permissible
3 where the plaintiffs are indigent. *See V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1123 (N.D. Cal.
4 2009); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385 n.42 (C.D. Cal. 1982). Moreover, the
5 Court believes that in this case the cost to the government and the Tribe, in the event they are
6 found to have been wrongfully enjoined, would be minimal. Accordingly, the Court will exercise
7 its discretion to waive the bond requirement in this case. *See Fed. R. Civ. P. 65(c)*.

8 CONCLUSION

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

- 14 (1) Defendants, their officers, agents, servants, employees, and attorneys are hereby
15 RESTRAINED and ENJOINED for the duration of this lawsuit from removing Plaintiffs
16 from the San Pasqual Tribe's membership roll and from taking any further action to
17 implement the Assistant Secretary's January 28, 2011 order.
- 18 (2) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the
19 duration of this lawsuit, the adult Plaintiffs access to, and voting rights at, the general
20 council meetings to the same extent as was enjoyed during the pendency of the
21 administrative proceedings and before the issuance of the January 28, 2011 order.
- 22 (3) Defendant Echo Hawk is hereby ENJOINED to issue an interim order to allow, for the
23 duration of this lawsuit, Plaintiffs access to the Indian Health Care services to the same
24 extent as was enjoyed during the pendency of the administrative proceedings and before
25 the issuance of the January 28, 2011 order.
- 26 (4) Defendant Echo Hawk is hereby ENJOINED to issue an interim order requiring, for the
27 duration of this lawsuit, the Tribe to make the per capita distributions of gaming revenue to
28 Plaintiffs to the same extent as was required during the pendency of the administrative


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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**