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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CINDY ALEGRE, et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA;
DEPARTMENT OF INTERIOR;
BUREAU OF INDIAN AFFAIRS;
RYAN ZINKE, Secretary of the
Department of Interior, United States of
America; MICHAEL BLACK, Acting
Assistant Secretary of the Department of
Interior - Indian Affairs, United States of
America; WELDON LOUDERMILK,
Director Bureau of Indian Affairs; AMY
DUTSCHKE, Pacific Regional Director,
Department of Interior - Indian Affairs,
United States of America; JAVIN
MOORE, Superintendent of the
Department of Interior Indian Affairs,
Southern California Agency; DOES 1
through 200, inclusive,

Defendants.

Case No.: 17-CV-0938-AJB-KSC

**ORDER GRANING PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER**

(Doc. No. 6)

1 Plaintiffs, collectively referred to as the Martinez Descendants, seek declaratory
2 relief that their ancestors are full blood San Pasqual Indians and that all Plaintiffs have no
3 less than 1/8 San Pasqual blood, thereby satisfying the Band's enrollment criteria.¹
4 Currently before the Court is Plaintiffs' ex parte request for temporary restraining order.
5 (Doc. No. 6.) Plaintiffs assert they gave notice to Defendants of their intent to file the
6 instant request. (Doc. No. 6-2 ¶¶ 3-4.) Having considered Plaintiffs' arguments, and for
7 the reasons set forth below, the Court **GRANTS** the request for temporary restraining order
8 and **SCHEDULES** a telephonic status conference for Monday, May 22, 2017, at 3:00 p.m.
9 to set a briefing schedule and hearing on a motion for preliminary injunction.

10 BACKGROUND

11 This lawsuit centers on a century-old dispute over tribal identity. Plaintiffs'
12 grievances are two pronged. One issue concerns Plaintiffs' ancestry and Defendants'
13 conduct. The other concerns the ancestry of other members of the Band.

14 *I. Historical Background and the Trask Descendants*

15 Plaintiffs' dispute dates back to the late 1800s and early 1900s. After the Band was
16 driven from its aboriginal land, the United States government designated land in another
17 township for the Band. (Doc. No. 1 at 17.)² Though the land was filled with rocks and had
18 little or no water, it was still valuable, and squatters remained problematic. (*Id.* at 17-18.)
19 To deal with this issue, Amos Frank, then Indian Superintendent of the Mesa Grande Tribe,
20 hired a man named Frank Trask as a "police private and judge" to preserve the San Pasqual
21 reserve. (*Id.*; Doc. No. 1-2 at 24-25.) Frank Trask was the son of Rosewell Trask, a white
22 man, and Mattiana Martha Warner Trask, a Mexican woman. (Doc. No. 1 at 17.) Frank
23 Trask married Lenora LaChappa, a Mesa Grande Indian woman. (*Id.*) Accordingly, while
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26 ¹ This is a companion case to 16-CV-2442. All citations are to the docket filings in the
27 instant matter unless otherwise noted.

28 ² The Court cites to the blue CM/ECF-generated docket and page numbers located at the
top of each page.

1 Trask descendants have some Indian blood, Plaintiffs allege they have no San Pasqual
2 Indian blood.³

3 Amos Frank relocated Frank Trask and his family onto the San Pasqual reserve in
4 1910. (*Id.* at 18; *see* Doc. No. 1-15.) Though Frank Trask’s employment ended within a
5 year, the Trask family remained on the land as squatters for the next 40 years and prevented
6 the Band from coming onto the reservation. (Doc. No. 1 at 18–19; Doc. No. 1-2 at 25.)

7 In the 1950s, the Band started to formally organize itself. (Doc. No. 1-2 at 25.) The
8 Band worked with anthropologist Dr. Florence Shipek to assemble the documentation
9 necessary to establish Band membership. (*Id.*) Dr. Shipek worked with the Band’s
10 Enrollment Committee, which was then comprised mainly of members who were
11 unquestionably of San Pasqual descent. (*Id.*) However, it also included two members not
12 of San Pasqual descent, including Florence Wolf Trask, the daughter of Frank and Lenora
13 Trask. (Doc. No. 1 at 17; Doc. No. 1-2 at 25–26.)

14 In or around 1959, the Band approved an enrollment statute, which required that
15 persons seeking enrollment in the Band must possess no less than 1/8 blood of the Band.
16 (Doc. No. 1 at 21; *see* Doc. No. 1-19.) Following the Band’s approval of the proposed
17 regulation, and unbeknownst to the Band, the rule that was ultimately codified and
18 published at 25 C.F.R. § 48 on March 2, 1960, differed in a significant respect from that
19 which the Band approved. (Doc. No. 1 at 21–22; Doc. No. 1-2 at 26–27.) The added
20 section, codified at 25 C.F.R. § 48.5(f), read in pertinent part as follows:

21 A person who meets the requirements of paragraph (a), (b), or (c) of this
22 section, but whose name has been carried on the census roll of another
23 reservation shall be declared ineligible for enrollment unless he can establish

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25 ³ In 1955, the California state legislature held hearings regarding the California Indians, at
26 which Pacific Regional Director Leonard Hill testified that the Trask family is not of San
27 Pasqual descent and could not deprive the Band of its patented land. (Doc. No. 1 at 19–
28 20.) Hill echoed this thought in 1966: “The [BIA] is aware that the members of the only
family which has occupied the reservation for many years are not members of the San
Pasqual Band.” (Doc. No. 1-2 at 30–31.)

1 that he has been affiliated with the San Pasqual Band for a continuous period
2 of at least one year immediately prior to January 1, 1959, evidenced by
3 residence on the reservation or through active participation in tribal affairs
4 such as attendance at tribal meetings, and being permitted to vote on matters
relating to the San Pasqual Reservation.

5 (Doc. No. 6-11 at 3–4; *see* Doc. No. 1-2 at 26–27.)

6 After 25 C.F.R. § 48 was published, the Enrollment Committee recommended that
7 several Trask Descendants be denied enrollment. (Doc. No. 1 at 22.) However, the BIA
8 found the Trask Descendants were eligible for enrollment. (*Id.*) In 1966, the BIA had
9 prepared and approved the Tribal Membership Roll of the Band, which included several
10 non-San Pasqual people due to § 48.5(f) and a secretarial construction of the phrase “blood
11 of the Band” as used in the C.F.R. to mean “total Indian blood of a person named on the
12 basic membership Roll dated June 30, 1910.” (*Id.*; Doc. No. 1-2 at 23–24.) The Band
13 objected to the use of the 1910 census because it included Frank and Lenora’s children,
14 even though Lenora and her parents were listed on multiple census rolls for the Mesa
15 Grande Tribe. (Doc. No. 1-2 at 26, 29.) These actions and interpretations resulted in the
16 admission of Trask Descendants to the Band. (*Id.* at 28–30.)

17 ***II. Plaintiffs’ Denial of Enrollment in the 2000s***

18 Plaintiffs are the descendants of Jose Juan Martinez, Guadalupe Martinez, and their
19 daughter Modesta Martinez Contreras. (Doc. No. 1 at 9.) On September 12, 2005, the
20 Band’s Tribal Counsel and Enrollment Committee approved Plaintiffs for enrollment in
21 the Band. (*Id.* at 10; Case No. 16-CV-2442, Doc. No. 13-3 at 14–15, *see* Doc. No. 13-10.)
22 Ten days later, the Enrollment Committee submitted a letter to Superintendent James
23 Fletcher of the Bureau of Indian Affairs (“BIA”), requesting that the BIA correct Modesta
24 Martinez Contreras’s blood degree from 3/4 to 4/4 degree San Pasqual blood. (Doc. No. 1
25 at 10–11.)⁴

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28 ⁴ The Enrollment Committee now is not comprised of the same individuals as the
Committee that approved Plaintiffs’ enrollment applications. Plaintiffs allege that in or

1 The BIA did not respond to this letter until December 8, 2005. (*Id.* at 11.) In its
2 response, the BIA stated “the preponderance of the evidence does not sufficiently
3 demonstrate that Modesta (Martinez) Contreras is full blood.” (*Id.*; Doc. No. 1-10 at 3.)
4 The letter was sent only to the Pacific Regional Director, Amy Dutschke. (Doc. No. 1 at
5 12; Doc. No. 1-10 at 2.) Plaintiffs and the Tribe were not sent the letter. (Doc. No. 1 at 12.)
6 On January 31, 2006, Dutschke concurred with the BIA that Contreras was not a full blood
7 San Pasqual Indian. (*Id.*) 25 C.F.R. § 48.9 required Dutschke to provide Plaintiffs with
8 notification of this determination, but she did not. (*Id.* at 12–13.) Plaintiffs assert that
9 between 2005 and the present, they were never provided written notice of the BIA’s and
10 Dutschke’s determination. (*Id.* at 13; Case No. 16-CV-2442, Doc. No. 13-3 at 18–19.)

11 On or about October 1, 2014, Plaintiffs filed a request pursuant to the Freedom of
12 Information Act to ascertain the status of their applications. Sometime between December
13 8, 2014, and January 1, 2015, in response to the FOIA request, the letter of denial dated
14 April 7, 2006, was finally produced to Plaintiffs. (Doc. No. 1 at 16.) The amended
15 complaint in 16-CV-2442 deals with Defendants’ failures to provide Plaintiffs with notice
16 of the denial of their applications, as well as the underlying determination that Modesta
17 Martinez Contreras is not a full blood San Pasqual Indian.

18 ***III. Present Day Issues Between Trask Descendants and Plaintiffs***

19 Presently, there are several Trask Descendants in positions of power within the
20 Band, including the Enrollment Committee. (*Id.* at 23.) Plaintiffs’ filing of the complaint
21 in 16-CV-2442 has only exacerbated tensions between the Trask Descendants and
22 Plaintiffs. On April 9, 2017, a General Council meeting took place on the reservation where
23 the Trask Descendants moved to implement a moratorium on enrollment until a new
24 enrollment ordinance can be put in place. (Doc. No. 1 at 24; Doc. No. 1-2 at 36–37; Doc.
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27 around January 2006, the Trask Descendants “wrongfully dismissed the Constitutionally
28 installed Enrollment Committee[] and installed an illegal Enrollment Committee,” which
Trask Descendants now head. (Case No. 16-CV-2442, Doc. No. 13-3 at 23.)

1 No. 6-5 ¶¶ 2, 5.) Plaintiffs assert the new ordinance will remove federal government
2 oversight of the enrollment process. (Doc. No. 1-2 at 34.) Plaintiffs fear that if this occurs,
3 the Trask Descendants can take action to deny Plaintiffs enrollment and/or disenroll those
4 already enrolled in the Tribe.⁵ (*Id.* at 34, 37.) Should such occur, Plaintiffs will have no
5 recourse with the U.S. government or the courts. (*Id.*)

6 On May 8, 2017, Plaintiffs instituted the instant action, seeking injunctive relief to
7 prevent Defendants from taking any action to approve any proposed changes to the San
8 Pasqual Constitution and/or enrollment procedures. (Doc. No. 1; Doc. No. 1-2 at 32.)
9 Plaintiffs filed the instant ex parte request for temporary restraining order (“TRO”) on May
10 16, 2017. (Doc. No. 6.)

11 LEGAL STANDARD

12 A temporary restraining order is a form of preliminary injunctive relief. Its sole
13 purpose is to preserve the status quo pending hearing on the moving party’s application for
14 a preliminary injunction. *Granny Goose Foods, Inc. v. Bd. of Teamsters & Auto Truck*
15 *Drivers Local No. 7*, 415 U.S. 423, 439 (1974); *Guajardo v. Mukasey*, No. C 08-1929 PJH,
16 2008 WL 1734517, at *1 (N.D. Cal. Apr. 11, 2008). “Status quo” means “the last
17 uncontested status which preceded the pending controversy.” *GoTo.com, Inc. v. Walt*
18 *Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (quoting *Tanner Motor Livery, Ltd. v.*
19 *Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963)).

20 A preliminary injunction is an “extraordinary remedy” and is “never awarded as of
21 right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v.*
22 *Geren*, 553 U.S. 674, 689–90 (2008)). To obtain this relief, the moving party bears the
23 burden of demonstrating four factors: (1) likelihood of success on the merits, (2) likelihood
24 of irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in

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27 ⁵ Twenty-two of Plaintiffs’ cousins, who were also approved for enrollment by the Tribe
28 on April 22, 2005, were enrolled in the Tribe. (Case. No. 16-CV-2442, Doc. No. 13-3 at 21.)

1 the moving party’s favor; and (4) “an injunction is in the public interest.” *Id.* at 20.

2 Although a plaintiff must satisfy all four of the *Winter* requirements, the Ninth
3 Circuit employs a sliding scale whereby “the elements of the preliminary injunction test
4 are balanced, so that a stronger showing of one element may offset a weaker showing of
5 another.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).
6 Accordingly, if the moving party can demonstrate the requisite likelihood of irreparable
7 harm and show that an injunction is in the public interest, a TRO may issue so long as there
8 are serious questions going to the merits and the balance of hardships tips sharply in the
9 moving party’s favor. *Id.*

10 DISCUSSION

11 In this case, Plaintiffs contend they will be irreparably harmed if Defendants take
12 action to affirm any proposed changes to the Band’s Constitution and enrollment criteria.
13 Should Defendants do so, federal government review of enrollment into, and disenrollment
14 from, the Band will be removed. This would leave the Martinez Descendants with no
15 recourse should they be improperly disenrolled from, or improperly blocked from enrolling
16 in, the Band. This is sufficient to establish a likelihood of irreparable harm. *Alto v. Salazar*,
17 No. 11cv2276-IEG (BLM), 2011 WL 4591944, at *1 (S.D. Cal. Oct. 4, 2011) (finding
18 plaintiffs alleged they would be “irreparably harmed if the San Pasqual Tribe is allowed to
19 amend the Tribe’s Constitution without their participation” because it would result in them
20 “forever [being] precluded from enrollment, irrespective of their lineage and the proof
21 provided”).

22 For this reason, Plaintiffs have established that the balance of hardships tips sharply
23 in their favor, at least at this stage of the litigation. If the Court does not grant a TRO,
24 Plaintiffs may forever face preclusion from enrollment. On the other hand, any harm to
25 Defendants or the Band is negligible. If Defendants ultimately prevail on this action and
26 its companion case, Defendants can then affirm, should they choose to, any changes to the
27 Band’s Constitution and enrollment procedures that the Band promulgates.

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1 Furthermore, Plaintiffs have demonstrated that, at the very least, there are serious
2 questions going to the merits. For example, Plaintiffs allege Defendants failed to follow
3 the procedures set forth in 25 C.F.R. § 48.9, which required them to provide Plaintiffs with
4 written notice of the enrollment denial within thirty days. (Doc. No. 1 at 12–13.) Without
5 such notice, Plaintiffs contend they were denied due process of law, as they could not
6 appeal a denial about which they were unaware. Plaintiffs further contend they were
7 deprived of their property interest in federal housing grants and education and per capita
8 payments, among other things. (Case. No. 16-CV-2442, Doc. No. 13-3 at 22, Doc. No. 13-
9 4 at 44.) *See Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983).

10 Plaintiffs also allege they have documentation establishing that their ancestors are
11 full blood San Pasqual Indians, which they allege the BIA arbitrarily disregarded in
12 denying their applications. (Case No. 16-CV-2442, Doc. No. 13-3 at 2–4.) The Court finds
13 these contentions sufficient to create serious questions going to the merits of Plaintiffs’
14 claims. *Alto*, 2011 WL 4591944, at *2 (finding serious questions going to the merits existed
15 where plaintiffs alleged that Assistant Secretary Hawk “failed to consider all of the relevant
16 factors, ignored some factors while giving substantial weigh[t] to others, and failed to
17 articulate a rational connection between the facts found and the conclusions made” (citing
18 *Latino Issues Forum v. U.S. E.P.A.*, 558 F.3d 936, 941 (9th Cir. 2009); *Envtl. Def. Ctr.,*
19 *Inc. v. U.S. E.P.A.*, 344 F.3d 832, 858 n.36 (9th Cir. 2003))).

20 Finally, there does not appear to be any “critical public interest” that would be
21 injured by granting a TRO and setting the case for a hearing on whether a preliminary
22 injunction should be granted. *See Alliance for the Wild Rockies*, 632 F.3d at 1138; *Alto*,
23 2011 WL 4591944, at *2.

24 CONCLUSION

25 In sum, because Plaintiffs have demonstrated they are likely to be irreparably
26 harmed if a TRO is not issued and the balance of hardships tips sharply in their favor, and
27 because there are serious questions going to the merits of Plaintiffs’ claims, the Court
28 **GRANTS** their request for temporary restraining order. Defendants are hereby

1 **RESTRAINED** and **ENJOINED** from taking any action to affirm any proposed changes
2 to the San Pasqual Band's Constitution and/or enrollment criteria and/or procedures until
3 the Court rules on the propriety of a preliminary injunction. Plaintiff's counsel is
4 **ORDERED** to serve a copy of the request for TRO and this order on Defendants forthwith.

5 Furthermore, the Court sets a telephonic status conference on Monday, May 22,
6 2017, at 3:00 p.m. to discuss a briefing schedule and hearing on a motion for preliminary
7 injunction. Plaintiff's counsel is **ORDERED** to contact Defendants and coordinate the
8 conference call. Plaintiff's counsel *must* email the call-in information to the Court at
9 efile_battaglia@casd.uscourts.gov no later than 5:00 p.m. on Friday, May 19, 2017.

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11 **IT IS SO ORDERED.**

12 Dated: May 18, 2017

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14 Hon. Anthony J. Battaglia
15 United States District Judge
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