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TIMBISHA SHOSHONE TRIBE, ET AL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TIMBISHA SHOSHONE TRIBE, a federally
recognized Indian Tribe as represented by Joe
Kennedy, Chairman, Timbisha Shoshone Tribe,
Pauline Esteves, Council Member, Timbisha
Shoshone Tribe, Madeleine Esteves, Council
Member, Timbisha Shoshone Tribe,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of the United
States Department of the Interior, UNITED
STATES DEPARTMENT OF THE INTERIOR,
GEORGE T. SKIBINE, Acting Assistant Secretary
for Indian Affairs, JERRY GIDNER, Director of
the Bureau of Indian Affairs, DALE MORRIS,
Pacific Regional Director-Bureau of Indian Affairs,
and DOES 1-5.

Defendants.

CASE NO. 2:08-CV-03060-MCE-DAD

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

DATE:

TIME:

COURTROOM:

JUDGE: Hon. Morrison C. England, Jr.

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1 I. INTRODUCTION

2 Plaintiffs herein represent an entire tribal community, terrified and angered by a decision
 3 issued by the Bureau of Indian Affairs-Pacific Region on December 4, 2008, that is already
 4 destroying livelihoods and vitally important governmental services provided to tribal members who
 5 live near or below the poverty line in Death Valley, California. Notwithstanding a pending
 6 administrative appeal, that decision was issued wholly *ex parte*, in utter disregard of basic principles
 7 of Due Process and fundamental fairness, in flagrant violation of agency rules, and with a consequent
 8 ignorance of the facts and circumstances that, if known, would have undermined the arguments put
 9 forth in support of the decision. The December 4, 2008 "decision" is no more than an arbitrary and
 10 capricious action by an official blatantly abusing his discretion. Moreover, this decision exacerbates
 11 the situation already created by a series of decisions by inferior officials of the Bureau of Indian
 12 Affairs, leading up to the December 4, 2008 decision. Taken together, the actions of the agency have
 13 driven the plaintiffs – and an entire people subject to the trust responsibility of the United States – to
 14 the brink of disaster, led to untimely and irreconcilable decisions, and undermined certainty of
 15 leadership, all of which has resulted in the freezing of tribal bank accounts, the removal of tribal
 16 property, including tribal enrollment files, from the tribal office, and the potential failure of a
 17 functioning tribal government. These untenable actions require immediate correction to avoid
 18 irreversible consequences.

19
 20 II. SUMMARY OF ARGUMENT

21 Plaintiffs are the tribal council members of the Timbisha Shoshone Tribe ("Tribe"):
 22 Chairman Joe Kennedy, Secretary Madeline Esteves and Pauline Esteves. The Tribe's trust lands,
 23 tribal office and community center are located in the arid and blisteringly hot lands located within the
 24 Death Valley National Monument, in Inyo County, California.

25 The Tribe first acquired federal recognition in 1983, having successfully negotiated the
 26 rigorous Federal Acknowledgment Process administered by the United States Department of the
 27 Interior. 25 C.F.R. Part 83. In 1986, soon after completing the federal recognition process, the Tribe
 28 finalized its governing Constitution, which provides procedures for determining tribal membership

(enrollment criteria through an identified 1978 "base roll") and for overall tribal governance. (*See* Decl. of Judith A. Shapiro, Exh. 1 (attached to Application for TRO submitted herewith)). Even though recognized, the Tribe was landless, and only later secured statutory authority to re-establish a homeland within its traditional Death Valley homelands via the Timbisha Shoshone Homeland Act of 2000. 16 U.S.C. §410aaa. Pursuant to the Homeland Act, Congress established for the Tribe, who had previously been displaced, the ability to establish a several thousand acre homeland within and outside the Death Valley National Monument, their ancestral homeland. Unfortunately, almost immediately subsequent to the statutory promise of a tribal land base, tribal factions arose and placed the tribal leadership into virtual chaos.

Between 2000 and 2008, numerous tribal leadership disputes have resulted in numerous lawsuits, Bureau of Indian Affairs decisions, attempts at leadership mediation and Interior Board of Indian Appeals (IBIA) decisions. One year ago, the Tribal Council, led by duly elected tribal Chairman, Joe Kennedy, and the tribal council persons named above, was embroiled in a dispute with those who sought to establish a competing tribal council, to be led by a former vice-chairman and two disgruntled council members.

That leadership dispute was resolved by an interim decision rendered on February 29, 2008, by Central California Agency Superintendent Troy Burdick, who recognized a government led by Chairman Kennedy.¹ Subsequent to this decision, and immediately after Chairman Kennedy's Council had voted to reject a proposed gaming development contract it believed disadvantageous to tribal interests, disgruntled tribal members, financed and assisted by the rejected gaming developers, staged a "coup d'etat" via a purported General Council meeting in September 2008, in Las Vegas, Nevada. During that meeting, at which none of the Tribal Constitutional procedures were observed, various charges were presented against Chairman Kennedy (in his absence) and thereafter Chairman

¹ The "resolution" of that dispute was also pending appeal until dismissed as moot by the December 4, 2008 Order. In that instance, the basis for the BIA superintendent's ruling in favor of Chairman Kennedy and his Council was the outcome of a meeting of the General Council, the adult membership of the Tribe, acting pursuant to constitutional procedures to ratify the results of an election. (*See* Exhibit A).

1 Kennedy was illegally "removed" from the Tribal Council.² Mr. George Gholson and Wallace
 2 Eddy, who led the coup and are being financed by casino developers whom Chairman Kennedy's
 3 government found unfit to conduct business with the Tribe, were voted in as Tribal Chairman and
 4 Vice-Chair respectively, with Pauline and Madeline Esteves retaining their council seats, along with
 5 council member Margaret Cortez. The second action of the "General Council meeting," once George
 6 Gholson had usurped the Chairmanship, was to approve the previously rejected Gaming
 7 Management Contract.³

8 Subsequent to the September 2008 Las Vegas coup, Mr. Burdick issued another interim
 9 decision initially recognizing Mr. Gholson's council. Exhibit B, Burdick Decision, October 17,
 10 2008. This decision, despite being appealable and non-final pursuant to BIA regulations (25 C.F.R.
 11 §2.6), prompted Mr. Gholson, on October 20, 2008, to immediately seize and remove two computers
 12 from the tribal office in Death Valley, one containing fiscal information; the other, the Tribe's
 13 administrative computer, containing enrollment data, employment data, and significant sensitive
 14 information.

15 Mr. Gholson was aided in his seizure of the Tribe's computers by Mr. Burdick's assurance to
 16 the local sheriff that Mr. Gholson was entitled to do so as the beneficiary of the October 17, 2008
 17 order recognizing his substitution as Chairman. Only after Chairman Kennedy protested the removal
 18 of the equipment to higher officials in the Bureau of Indian Affairs, did Mr. Burdick reissue/clarify
 19 his ruling to specify rights of appeal and non-finality of the decision until appeal rights had been
 20 exhausted. Mr. Burdick subsequently informed Chairman Kennedy that he had instructed Mr.

21 ² The Timbisha Shoshone Tribal Constitution and Election ordinance provide procedural safeguards to ensure that
 22 any election, and particularly one seeking to recall a tribal officer, is verifiably the product of an election at which voter
 23 eligibility, and the existence of a quorum are protected through the oversight of the Election committee validating voter
 24 identity, quorums and ballots. The September 20 meeting met none of those requirements, and violated additional provisions,
 as well.

25 ³ Note that the Indian Gaming Regulatory Act prohibits the Chairman of the National Indian Gaming Commission
 from approving a Gaming Management Agreement if the Chairman determines:

26 The management contractor has, or has attempted to, unduly interfere or influence for
 27 its gain or advantage any decision or process of tribal government relating to gaming
 activity.

28 25 U.S.C. §2711(e)(3).

1 Gholson to return the property to the Death Valley Office, but that he had no authority to enforce the
 2 return of that property, which was no longer on trust land, but had instead been transported 165 miles
 3 away, to an office rented by the Gaming Contractors for Mr. Gholson. Superintendent Burdick's
 4 revised view on rights to the Tribe's property had no effect on Mr. Gholson's behavior; despite
 5 numerous promises to the contrary, he continued to retain the Tribe's computers. (*See* Decl. of Joe
 6 Kennedy, Exhibit C).

7 On November 13, 2008, the Tribe filed a Notice of Appeal of Mr. Burdick's decision
 8 pursuant to 25 C.F.R. §2.9 with Pacific Regional Director, Dale Morris, well within the prescribed
 9 30 day time period.⁴ The regulations permit Mr. Kennedy to file his "Statement of Reasons" within
 10 30 days of that notice of appeal (25 C.F.R. §2.10(c)), and Mr. Kennedy was fully expecting to do so,
 11 in order to lay out the basis, under tribal law, that the BIA must reject the actions of a "general
 12 council meeting" that failed to follow the safeguards of the tribal constitution for protecting the
 13 integrity of its governmental actions.

14 Pending resolution of appeals of both of Superintendent Burdick's decisions, Chairman
 15 Kennedy retained control of the Death Valley offices, and with his administrative staff, continued
 16 operating federally and tribally funded programs, including NAHASDA housing, Toyiabe elders'
 17 programs, Toyiabe Indian Health Program, EPA grant administration, administration and program
 18 distributions to tribal members of moneys available from the Tribe's share of the California Revenue
 19 Sharing Trust Fund ("RSTF"), and continuation of the Tribe's efforts to exercise its rights as an
 20 Affected party to comment on the United States proposal to establish a nuclear repository site at
 21 Yucca Mountain, located close to Timbisha Shoshone and within its traditional homeland area.
 22 Those efforts have been substantially halted by Mr. Morris' premature and ill-considered decision of
 23 December 4, 2008, immediately placing Mr. Gholson in control of the Tribe without soliciting or
 24 reviewing any of the reasons not to do so. (*See* Dale Morris Decision, Exhibit D). Regional Director

25
 26 ⁴ As required by 25 C.F.R. §2.12(a), copies of the Notice of Appeal were served upon all interested parties, through
 27 service upon known counsel to the each of the two factions competing to unseat Chairman Kennedy. (Beaman faction had
 28 appealed the February, 2008 decision, that appeal was fully briefed and awaiting the Regional Director's attention since
 March, 2008, served in this appeal as courtesy; Gholson faction interested in current appeal). 25 C.F.R. §2.12(a) states, in
 pertinent part: "[p]ersons filing documents in an appeal must serve copies of those documents on all other interested parties
 known to the person making a filing."

1 Morris based his decision entirely on information received from Mr. Gholson's legal counsel, in *ex*
 2 *parte* fashion, and without even the slightest interest in consulting or reviewing Mr. Kennedy's
 3 position, interest or evidence concerning the matter. Counsel for Mr. Gholson did not notify Mr.
 4 Kennedy or his Counsel of the request for an immediate ruling, nor did they serve any of the
 5 documents relied upon by Mr. Morris in making his decision. Mr. Gholson's counsel flagrantly
 6 violated Section 2.12(a) by failing to serve Chairman Kennedy's counsel; Mr. Morris himself
 7 violated Section 2.12(f), when he did not correct the first failure of service:

8 When an official deciding an appeal determines that there has not been
 9 service of a document affecting a person's interest, the official shall
 10 either serve the document on the person or direct the appropriate legal
 counsel to serve the document on the person *and allow the person an*
 opportunity to respond.

11 25 C.F.R. §2.12(f) (emphasis added).

12 According to his ruling, Mr. Morris acted, on December 4, in response to communications
 13 directed to him on December 2 and December 3, 2008, from Mr. Gholson's Counsel. At no time was
 14 Chairman Kennedy's Counsel served, contacted, or given an opportunity to respond, in the two days
 15 before Director Morris rendered his decision.

16 Mr. Morris did not consider, request or accept documentation in opposition to Mr. Gholson's
 17 documentation, nor did he provide Mr. Kennedy with Mr. Gholson's submission that constituted the
 18 sole basis of his December 4, 2008, decision. Because he still has not done so, this motion is filed
 19 without benefit of seeing the "evidence" proffered to Mr. Morris. Most egregious is that Mr. Morris'
 20 sole justification for his immediate ruling, without consultation, and with immediate effect, is based
 21 on Mr. Gholson's allegation of "exigent circumstances" related to the Tribe's participation in and
 22 oversight of, the Yucca Mountain Nuclear Repository ("YMP") licensing process, specifically
 23 participation on the Yucca Mountain Licensing Support Network ("LSN") and the alleged need to
 24 "protect the Tribe's trust assets." (*See* Dale Morris decision, Exhibit D). These supposed exigent
 25 circumstances simply do not exist.

26 Had Mr. Morris withheld his decision until hearing from Mr. Kennedy, he would have had a
 27 chance to understand that Chairman Kennedy was competently and diligently protecting the Tribe's
 28 interests in oversight of the Yucca Mountain Project. Had Mr. Morris paused to consider Chairman

1 Kennedy's information, he would have realized that Chairman Kennedy not only was himself
2 principally responsible for the Tribe securing Affected Indian Tribe ("AIT") Status and the
3 subsequent obtaining of federal funding necessary to carry out the Tribe's responsibilities in
4 overseeing the YMP licensing process, but has continued to be aware of every critical date and
5 document necessary to fulfill his responsibilities to the Tribe in order to oversee the YMP licensing
6 process. Moreover, it would not have taken long for Mr. Morris to learn, had he solicited Chairman
7 Kennedy's input, that the steps proposed by Mr. Gholson to protect the Tribe were, quite simply, to
8 hijack the expert assistance that Chairman Kennedy had already contracted, on the Tribe's behalf, to
9 undertake the next steps in the continuing process. The difference, however, is that Mr. Gholson,
10 with no previous involvement in the project, lacks the expertise to effectively direct those experts to
11 complete the task that Chairman Kennedy has long borne.

12 In short, had Mr. Morris considered Mr. Kennedy's expertise and involvement in the YMP
13 licensing process, he would have discovered that not only was there no existing exigency upon which
14 to base his decision, but that the exigency was completely and entirely fabricated by Mr. Gholson
15 and his legal counsel, and worse, that the abrupt and unjustified change of control now threatens to
16 create new and truly exigent circumstances and pose a greater threat to the public safety and trust
17 assets of the Tribe than anything the December 4, 2008 decision purported to cure.

18 The Regional Director's December 4, 2008 decision, prompted Mr. Gholson's renewed
19 attempt to confiscate tribal funds from tribal bank accounts. Presently tribal bank accounts are now
20 completely frozen. (*See Exhibit E, Ltr S. Hale of Union Bank of California*). Mr. Gholson has also
21 moved to shut down tribal government communications (phone, fax and e-mail) at the Death Valley,
22 California Tribal Offices, shut down government communications (fax, phone and satellite) at
23 Chairman Kennedy's home; had Chairman Kennedy's government issued cell phone turned off; and
24 contacted Tribal consultants who now are reluctant to work for the government in relation to the
25 Yucca Mountain project oversight, and sent the Tribe's Yucca Mountain legal counsel a "cease and
26 desist" letter.

27 Most recently, on December 12, 2008, Mr. Gholson, along with Mr. Eddy, accompanied by
28 several Deputy Sheriffs from the Inyo County Sheriff's office and National Park Service police, laid

1 siege to the Death Valley tribal offices, and using the Regional Director's decision as the basis of his
 2 authority, gained entry into the office and removed considerable tribal property, including the Tribe's
 3 fiscal data (computers and paper files) and interestingly, the Tribe's enrollment information and
 4 files.⁵

5 When Chairman Kennedy arrived at the scene, he was informed by the Inyo County Sheriff's
 6 Deputy that if he touched anything, they would consider it unlawful and subject him to arrest. (*See*
 7 Decl. of Joe Kennedy, Exhibit C).

8 As a result of the removal of this tribal government property, including federally funded
 9 program information, much needed and necessary tribal programs are now in jeopardy and on the
 10 brink of failure. Ironically the YMP oversight project, the project Mr. Morris allegedly wishes to
 11 protect, as the basis of his decision, is in significant peril. Plaintiff's hereby request a Temporary
 12 Restraining Order vacating the December 4, 2008 decision which, while not immediately solving the
 13 Tribe's leadership issues, could restore and maintain the status quo until a time at which the merits
 14 and basis of the Regional Director's decision can be reviewed and corrected. This order should
 15 require the immediate return of tribal property misappropriated by Mr. Gholson, in the wake of the
 16 Regional Director's decision, and the additional property taken in October, after the Superintendent's
 17 first decision. Most importantly, a Temporary Restraining Order, followed by a preliminary
 18 injunction, would ensure that vitally important and life sustaining tribal programs could continue to
 19

20 ⁵ Mr. Gholson had received notice from the Tribe's Enrollment Committee that, upon a review of tribal enrollment
 21 in preparation for certifying eligible voters in the last election, they had each been determined to have been erroneously
 22 enrolled. The Enrollment Committee had determined that a number of individuals failed to meet the constitutional criteria
 23 for enrollment, which require proof of descendency from individuals on the 1978 roll, a condition of membership that cannot
 24 be waived. Both the Constitution and the Tribe's enrollment ordinance require the disenrollment of individuals who do not
 25 meet the constitutional criteria established at the time of federal recognition. Along with the notice, the Enrollment
 26 Committee invited the affected individuals to provide evidence rebutting their conclusion, including an appeal to the tribal
 27 council. Neither Mr. Gholson nor Mr. Eddy responded within the 30-day window for such appeals. As individuals ineligible
 28 for tribal membership, neither is qualified to serve on the government of the Timbisha Shoshone Tribe. It is telling that their
 first goal in the Tribal Office was to remove the Tribe's enrollment files. The same information, of course, may be verified
 elsewhere, even if the Tribe's original information is somehow "lost" through its removal from the office. Because Mr.
 Gholson removed all enrollment files from the office, plaintiffs cannot, at this time, provide copies of pertinent documents
 reflecting the mandatory disenrollment of individuals unable to prove eligibility criteria. *See* Exhibit F, Decl. B. Durham.
 Dale Morris issued his emergency decision, effective immediately, on December 4, the deadline for Mr. Gholson and others
 to document their enrollment eligibility or face disenrollment. Because Plaintiffs have not yet seen the documents submitted
 justifying the emergency decision, they cannot assess whether that coincidence of timing played any role in the expedited
 emergency decision.

1 serve tribal members.

2
3 III. THE TRIBE'S APPLICATION MEETS THE STANDARD
4 FOR ISSUING INJUNCTIVE RELIEF

5 A. Legal Standard.

6 Federal Rule of Civil Procedure 65(b) provides that a court may issue a temporary restraining
7 order where "specific facts in an affidavit or a verified complaint clearly show that immediate and
8 irreparable injury or loss or damage will result to the applicant. The underlying purpose of a
9 temporary restraining order is to preserve the status quo and prevent irreparable harm during the
10 abbreviated period before a preliminary injunction hearing may be held. *Granny Goose Foods, Inc.*
11 *v. Bd. Of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974); *see also, Reno Air Racing*
12 *Assn. v. McCord*, 452 F.3d 1126, 1130-1131 (9th Cir. 2006).

13 To obtain a temporary restraining order, the applicant must demonstrate "either: (1) a
14 combination of probable success on the merits and the possibility of irreparable harm; or (2) serious
15 questions are raised and the balance of hardships tips in its favor." *A&M Records, Inc. v. Napster,*
16 *Inc.*, 239 F.3d, 1004, 1013 (9th Cir. 2001). "These two formulations represent points on a sliding
17 scale in which the degree of irreparable harm increases as the probability of success decreases." *Id.*,
18 *see also State of Alaska, Yukon Flats School Dist. v. Native Village of Venetie*, 856 F.2d 1384, 1389
19 (9th Cir. 1988). In addition, within the Ninth Circuit, a court must also consider the public interest
20 when it assesses the propriety of issuing injunctive relief. *Sammartino v. First Judicial District*
21 *Court*, 303 F.3d 959, 974 (9th Cir. 2002).

22 The circumstances presented by the Timbisha Shoshone Tribe satisfy the four factors the
23 Ninth Circuit traditionally considers in determining whether to grant a Temporary Restraining Order,
24 and demonstrate that such order must issue immediately in order to prevent grave and irreparable
25 injury to a population ill-equipped to recover from such injury.

26 Applying this standard to the present case, plaintiffs submit that the Court, pending the final
27 resolution of this case, must restore and preserve the status quo that existed immediately prior to the
28 Regional Director's decision of December 4, 2008, until the merits of the decision can be litigated at

1 trial. Plaintiffs request that the Court issue an order that will vacate or stay the December 4, 2008
 2 decision of Dale Morris, restore and maintain the status quo, in order to provide plaintiffs access to
 3 tribal funds with which to fund and run tribal programs, feed and clothe elderly tribal members
 4 ("Tyioyabe Elders Program"), continue to provide housing assistance and housing improvement
 5 assistance ("Tribal Housing Program"), continue to operate the Tribal Environmental Protection
 6 Agency ("EPA"), Historic Preservation Office ("THPO"), Water Office, examine and treat tribal
 7 members medical issues (Tyioyabe Indian Health Program and tribal exercise program).
 8 Additionally, immediate injunctive relief is necessary to ensure that the Yucca Mountain Project
 9 oversight moves forward as required, under Chairman Kennedy's guidance. Unless such TRO is
 10 issued, the Tribe and its programs face significant and imminent peril.

11 B. Plaintiffs' Irreparable Harm.

12 As a result of the Pacific Regional Director's decision, the Timbisha Shoshone people face
 13 many levels of significant economic and human suffering. Some of these threats are imminent. As
 14 noted in the Declaration of Roberta Hunter, the Tribe's housing program cannot operate without
 15 access to housing funds to assist with numerous housing assistance clients and needs. Some of those
 16 clients may lose their homes. The Native American Housing Assistance and Self Determination Act
 17 ("NAHASDA") Housing program, a federally funded program, will be thwarted because of the
 18 inability to access Tribal bank accounts to operate tribal and federally funded programs and the
 19 program's inability to access funding for housing clients. (*See Decl. of Roberta Hunter, Exhibit G*).

20 Presently, the frozen bank accounts make it impossible to draw down funding necessary to
 21 provide rental and housing assistance to tribal members in general, and will result in the Bank
 22 refusing to honor housing assistance checks, for needy, elderly and handicapped members, issued
 23 prior to December 4, 2008, and prevent assistance payments from being issued subsequent to
 24 December 4, 2008. (*See Id.*). The program's housing down-payment assistance and home acquisition
 25 assistance programs are similarly impaired, unable to meet commitments for projects recently
 26 approved and pending loan closing. (*See Id.*). Finally, the Tribe is awaiting the delivery of four (4)
 27 Federal Emergency Management Agency ("FEMA") trailers that were allocated in 2007, however,
 28 the because the delivery contract stipulates "payment upon delivery" – delivery is now impossible as

1 a result of the frozen bank accounts. These trailers may not be delivered to qualified tribal members
2 and those qualified tribal members, relying on that assistance, may have difficulty finding alternative
3 housing.

4 Concerning the Tribe's fiscal accounts, as noted by Tribal Fiscal Officer Tameka Vasquez,
5 outstanding checks drawn on the frozen bank accounts will be either held or prevented from being
6 paid, due to the frozen bank accounts. The outstanding checks include payment to tribal employees
7 dated December 3, 2008 for the Tribal Administrator, EPA Program Director, EPA Assistant and
8 other individuals, for work already performed. The Tribe is placed at great risk of losing moderately
9 compensated and experienced tribal employees, who cannot continue to forego compensation while
10 this matter is being litigated. At the same time, those experienced tribal employees are facing
11 significant economic hardship, including a holiday season suddenly without income. The Tribe will
12 also continue to lack telephone, cellular and utility service unless these vendors receive immediate
13 payment. (*See Decl. of Tameka Vasquez, Exhibit H*).

14 In addition to payroll issues, the frozen bank accounts also will immediately affect the Tribe's
15 Internal Revenue Service ("IRS") tax payments. As soon as the Tribe is unable to fulfill its
16 responsibility for Electronic Funds Transfers ("EFTs"), which require monthly installment payments
17 to the IRS and Employment Development Department ("EDD"), penalties will begin to accrue
18 immediately. Moreover, existing IRS and EDD contracts are subject to being rendered void due to
19 the non-payment and/or the amounts owed being accelerated and immediately due and payable by
20 the Tribe. The amounts owed to the IRS and EDD appear to be in excess of \$50,000 and could
21 venture as high as \$100,000.00. If accelerated IRS and EDD payments are imposed, the Tribe could
22 be devastated. In addition to the immediate fiscal issues, the inability to draw down government
23 funds from the frozen accounts imperil the functionality of all tribal government programs and the
24 receipt of services and products from vendors of services and products expecting invoices to be paid.
25 (*See Decl. of Tameka Vasquez, Exhibit H*).

26 Finally, as noted above, Chairman Kennedy has been for years the prime mover of Timbisha
27 Shoshone's efforts on the Yucca Mountain project, even before assuming the position of Chair in the
28 Tribe. As noted in the declarations, his personal expertise and dedication has been invaluable and

1 essential to the Tribe's success to date. Disrupting his efforts, even as new deadlines loom, threatens
 2 the outcome of a decade's work. Not only was there no reason to disturb the status quo, but the
 3 disruption itself threatens the very trust asset for which the Defendants purported to seek protection.
 4 So long as Director Morris' decision is permitted to remain effective, the irreparable harm has begun,
 5 and will continue to escalate to devastating and irreparable results. Injunctive relief is desperately
 6 needed to restore and preserve the status quo, in which the Tribal programs were operating, Tribal
 7 members were being served and the Tribe's trust assets protected. (See Decl. of Joe Kennedy,
 8 Exhibit C).

10 IV. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

11 A. The Regional Director's Decision Was Arbitrary and Capricious, Contrary to 12 Applicable Statute and Regulations and Wholly Violative of Due Process and Fundamental Fairness.

13 As set forth above, the Regional Director Morris failed to comply with applicable regulations
 14 in issuing his December 4, 2008 decision. Although he may have satisfied himself that an
 15 emergency justified him in making his ruling effective immediately, the process by which he
 16 satisfied himself ignored the basic administrative requirements by which he was bound. Although 25
 17 C.F.R. §2.6 may, in some circumstances, permit an official to make a ruling below immediately
 18 effective, rather than waiting for subsequent review, nothing in the regulations permitted Director
 19 Morris to dispense with the requirement that other parties to an appeal be served, or even advised
 20 that the Director was considering an application directly affecting the outcome of that pending
 21 appeal. Nothing in the regulations excuses the Director from permitting the proponent of an appeal
 22 from at least responding to documents seeking that an appeal be dismissed before any of the merits
 23 of the principal appeal are before the decision maker, and before the appellant may answer what
 24 became a successful motion to dismiss the appeal. BIA regulations expressly provide for summary
 25 dismissal of an appeal, but not on circumstances present here. 25 C.F.R. §2.17 provides for
 26 summary dismissal if the Notice of Appeal is not timely filed, and if appellant fails to inform the
 27 decision maker of the basis for an appeal or fails to post a required bond. No other summary
 28 dismissal is contemplated. Here, the appeal was filed timely, no bond was required, and appellant

1 was denied the customary opportunity to present the basis of the appeal.

2 In effect, Director Morris provided Mr. Gholson and his counsel with a forum that conducted
 3 business in violation of traditional principles of fundamental fairness and due process. He accepted
 4 an *ex parte* application on behalf of one side in a pending matter. He did not notify appellants of the
 5 adverse application in their pending matter, and provided no opportunity to answer the application.
 6 Citing "exigent circumstances" that still have not been subject to review, and which, upon inspection,
 7 are wholly baseless, he circumvented normal agency appellate review, and made his decision
 8 immediately effective. The immediate effect has been dramatic and bodes further disaster. This is
 9 the action of an agency official acting in a matter that is wholly arbitrary and capricious, and contrary
 10 to law and constitutional protections. Each party to an administrative adjudication "must have a full
 11 and fair opportunity to litigate the issues to be decided by the agency." *Trident Seafoods, Inc. v.*
 12 *National Labor Relations Board*, 101 F.3d 111, 116 (D.C. Cir. 1996). "It is a basic tenet of
 13 administrative law that each party to a formal adjudication have a full and fair opportunity to litigate
 14 the issues to be decided by the agency." *Id.* On December 4, 2008, Director Morris denied
 15 Chairman Kennedy and the Timbisha Shoshone people the opportunity to address whether alleged
 16 "exigent circumstances" justified the immediate cessation of adjudication of the rightful government
 17 of the Tribe. Under the Administrative Procedure Act, 5 U.S.C. §706(2), this court must vacate that
 18 order and immediately restore the status quo as it existed before December 4, 2008.

19 B. The Regional Director's Decision Was Erroneously Issued – the Justifying
 20 "Emergency" Did Not Exist Because Chairman Kennedy Was Fully Advancing the
Tribe's Interest in Yucca Mountain Oversight.

21 The Regional Director's December 4, 2008, in addition to its improper *ex parte* basis, is
 22 erroneous because the decision is based entirely upon a wholly fictitious claim to exigent
 23 circumstances – that the Tribe would be harmed through lack of participation in oversight of the
 24 YMP licensing process. Had Chairman Kennedy been provided the ability to present evidence to
 25 Mr. Morris via the BIA's appeal process, the evidence would have demonstrated that his government
 26 had not only participated in the YMP oversight process, but had launched a complete oversight
 27 program. Had the Regional Director treated Chairman Kennedy fairly, he would have discovered
 28 that Chairman Kennedy was the principal driving force behind the Tribe's acquisition of AIT

1 (Affected Status) having participated to acquire AIT status for over ten years, in addition to:

- 2 (a) Engaged other similarly situated AIT Status government entities;
- 3 (b) Participated in Yucca Mountain project working groups, specifically those
4 groups that include Indian tribes;
- 5 (c) Submitted responses to Department of Energy issued environmental
6 documents, including the 2007 Rail Alignment and Facility SEIS and EIS
7 documents (comments submitted January 2008);
- 8 (d) Participated as a member and attended numerous meetings of the Affected
9 Units of Local Government ("AULG") concerning Yucca Mountain oversight
10 activities;
- 11 (e) Testified before numerous government bodies concerning the Tribe's Yucca
12 Mountain Nuclear Repository concerns;
- 13 (f) Petitioned the United States Department of Energy for Yucca Mountain
14 project oversight funding;
- 15 (g) Hired environmental consultants to assist the Tribe's oversight activities,
16 including the contracting of Dr. Fred Dilger;
- 17 (h) Provided responses concerning the "scope" of additional Department of
18 Energy issued environmental documents to be issued in 2009 (comments
19 submitted on November 24, 2008);
- 20 (i) Provided comments concerning the Yucca Mountain projects Draft Complex
21 Transformation ("SPEIS");
- 22 (j) Contacted and engaged the appropriate Department of Energy officials, to gain
23 training and access to the LSN; and
- 24 (k) Recently retained legal counsel to assist with the Tribe's Yucca Mountain
25 oversight activities.

26 As noted above Chairman Kennedy, was not only participating in the Yucca Mountain
27 oversight process, but initiated the Tribe's participation over the course of his ten years' involvement
28 and was virtually the only member of the Tribe who consistently participated in Yucca Mountain

oversight activities.⁶ Additionally, Chairman Kennedy was already preparing to meet all filing requirements necessary to protect the Tribe's interests in the Yucca Mountain project, so no exigent circumstances existed to justify intervention in the ongoing governmental functions of the Tribe. (See Decl. of Joe Kennedy, Exhibit C).

C. The Regional Director's Decision Is Erroneous Because it Is Based upon an "Exigency" Fabricated Due to the Interference of Mr. Gholson and His Legal Counsel.

As outlined above, soon after Mr. Burdick issued his October 17, 2008 decision recognizing the Gholson Council, Gholson and his legal counsel, Darcie Houck, began a campaign to discredit and derail Chairman Kennedy's Yucca Mountain oversight project activities. Ms. Houck personally contacted Chairman Kennedy and his legal counsel, Judith Shapiro, and exhorted them to give her sole authority to act on behalf of the Tribe's interest concerning the YMP oversight activities. (See Decl. of Joe Kennedy).

Most egregious, the pair contacted Dr. Fred Dilger, a consultant selected by Chairman Kennedy and with whom Chairman Kennedy contracted with on behalf of the Tribe specifically to prepare YMP oversight contentions. Mr. Gholson and Ms. Houck's interference so disturbed Dr. Dilger that he refused to attend a meeting with Chairman Kennedy previously scheduled for December 2, 2008, in Las Vegas, Nevada, to discuss work that was required to be completed by the end of December. Ironically, the interruption of this work apparently provides the foundation for the Regional Director's determination of "exigent circumstances" upon which he based his December 4, 2008, decision and its immediate effectiveness. In short, by interfering in the Tribe's YMP oversight activities and oversight program, resulting in the hijacking of the Tribe's consultant, Gholson and Houck fabricated – or created – the exigent circumstances upon which the December 4, 2008 decision is based. (See Decl. J. Kennedy, Exhibit C).

Based on the above, the Regional Director's Decision should be vacated, or at a minimum enjoined, with all tribal property confiscated by Mr. Gholson immediately returned to the Tribe's

⁶ Ms. Houck, presently Counsel for Mr. Gholson, was well aware of Chairman Kennedy's central role, having assisted him in some of those efforts when she had previously been employed by the Tribe. Because neither Mr. Kennedy nor his counsel have seen Ms. Houck's submission, we do not know if she acknowledged Mr. Kennedy's continuing involvement, nor do we know if she admitted her own ignorance of efforts that continued after she ceased to be involved.

1 Death Valley office.

2
3 V. THE REGIONAL DIRECTOR'S DECISION SHOULD BE VACATED BECAUSE
4 THERE EXISTED AN ALTERNATIVE TO THE DRASTIC AND UNNECESSARY
5 ACTION OF MAKING THE DECISION IMMEDIATELY EFFECTIVE

6 Defendant's failure to follow Agency policy and procedure concerning pending appeals
7 results in an erroneous decision, lacking due process and although not required to prove the merits of
8 the appropriateness of a preliminary injunction, the fact that alternatives existed that the agency
9 could have utilized that could have mitigated the potential harm to the Tribe and its members is
10 important. The Federal Defendants could have permitted the appeal filed by Chairman Kennedy to
11 immediately proceed to the Interior Board of Indian Appeals ("IBIA"). By making the decision
12 immediately appealable, the IBIA could have issued an order enjoining the parties from further
13 action which would have maintained the status quo during the pendency of the appeal process. Both
14 parties would have been advised that although the decision was in the process of appeal, their
15 actions, or inaction carried with it a certain degree of risk to them and the government.

16 Defendant could have also made the decision without making it "immediately effective"
17 under 25 C.F.R. §2.6, doing so would have also eliminated Mr. Gholson's incentive to raid the tribal
18 office which permitted the government and important federally funded programs to face the risk of
19 failure that it presently faces. In fact, on December 12, 2008, while Mr. Gholson was raiding the
20 office, legal counsel to Chairman Kennedy, Rosette & Associates, PC, made such a plea to Mr.
21 Morris personally, however, this plea was rejected.

22 VI. GRANTING THE TEMPORARY RESTRAINING ORDER IS IN THE PUBLIC INTEREST

23 Preservation of the status quo during the pendency of the judicial review of the BIA's
24 decision is in the public interest. Over a hundred tribal members, many of whom receive vital
25 government services are at risk due to a non-functioning government and government programs that
26 are on the brink of failure. The public interest favors preservation of the status quo, not the
27 destruction of the government or its programs. Chairman Kennedy, and Council Members Pauline
28 and Madeline Esteves only ask that their concerns with the manner in which the December 4, 2008

1 decision was issued be reviewed and that the government and its programs be permitted to operate
 2 during the pendency of this action.

4 VII. NO BOND SHOULD BE REQUIRED

5 The Court has discretion to determine the amount, if any, of the appropriate security to be
 6 given under Fed. R. Civ. P. 65(c). *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999);
 7 *State of California v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985). The
 8 plaintiffs have brought the action to protect rights and interests they have long enjoyed. They are
 9 tribal officials with obligations to their tribal members requiring the continued operation of tribal
 10 programs. They are also tribal members, some elderly, handicapped and indigent who are at the
 11 mercy of the tribal government to provide them food, shelter and medical care. As described
 12 previously, there will be no injury to defendants if the injunction issues. Even if there were possible
 13 injury, it is unquantifiable, and it is not economic.

14 An applicant for preliminary injunction need not post any security where requiring security
 15 would effectively deny access to judicial review (*Tahoe Regional Planning Agency*, 766 F.2d at
 16 1325); *Natural Resources Defense Council v. Morton*, 337 F.Supp. 167, 168 (D.D.C. 1971); where
 17 the high probability of success on the merits favors dispensing with the security requirement (id.);
 18 and where it appears unlikely that the defendant will incur any significant cost or damages as a result
 19 of the preliminary injunction (*Baca v. Moreno Valley Unified School Dist.*, 936 F.Supp. 719, 738
 20 (C.D. Cal. 1996). These criteria are met. Further, numerous courts have recognized the
 21 appropriateness of relief from giving security where the grant of an injunction carries no risk of
 22 monetary loss to the party enjoined. *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d
 23 1461, 1462 (10th Cir. 1987); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir.
 24 1974); *Urbain v. Knapp Brothers Manufacturing Co.*, 217 F.2d 810, 816 (6th Cir. 1954); *Hurwitt v.*
 25 *City of Oakland*, 247 F.Supp. 995, 1005-1006 (N.D. Cal. 1965).

26 ///

27 ///

28 ///

VIII. CONCLUSION

For the foregoing reasons, plaintiffs' motion should be granted.

Dated: December 19, 2008

Respectfully submitted,

By:


Jeffrey R. Keohane
FORMAN & ASSOCIATES
Attorneys for Plaintiffs

EXHIBIT A



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814

IN REPLY REFER TO

FEB 29 2008

Mr. Joe Kennedy, Chairman
Timbisha Shoshone Tribe
785 North Main Street, Suite Q
Bishop, California 93514

Dear Mr. Kennedy:

The purpose of this correspondence is to provide a response to your written request dated February 4, 2008, wherein you requested that I, as Agency Superintendent, acknowledge or recognize all actions of the Timbisha Shoshone General Council at the special General Council meeting held on January 20, 2008.

In light of the recent actions at that meeting, where the General Council voted to ratify the November 13, 2007, General Election, actions and authority of the Tribal Council subsequent to August 25, 2007, and the interpretation of what constitutes a resignation from the Tribal Council, I hereby rescind my letter dated December 14, 2007.

Therefore, the Bureau of Indian Affairs, Central California Agency, recognizes the following individuals to be official tribal representatives of the Timbisha Shoshone Tribal Council:

Joe Kennedy, Chairman
Margaret Armitage, Vice-Chairman
Madeline Esteves, Secretary/Treasurer
Margaret Cortez, Council Member
Pauline Esteves, Council Member

Please contact Carol Rogers-Davis, Tribal Operations Officer, at (916) 930-3794 should you require further assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Burdick", is written over a horizontal line.

Troy Burdick
Superintendent

cc: Acting Regional Director, Pacific Region, Bureau of Indian Affairs

REC'D MAR 03 '08

EXHIBIT B



BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO

Mr. Joe Kennedy
Timbisha Shoshone Tribe
Post Office Box 206
Death Valley, California 92328

OCT 17 2008

Mr. George Gholson
1349 Rocking W Drive
Bishop, California 93514

RECEIVED OCT 21 2008

Dear Mr. Gholson and Mr. Kennedy:

The purpose of this correspondence is to provide a response to documentation submitted on September 26, 2008, regarding the removal of Mr. Joe Kennedy, Chairman of the Timbisha Shoshone Tribe, at a General Council meeting held September 20, 2008, in Las Vegas, NV.

The Central California Agency is also in receipt of documentation submitted by Mr. Joe Kennedy on October 1, 2008, and supporting documentation in regards to the recent actions taken during the September 20, 2008, General Council meeting.

Article VIII, Section 3. (b) of the Tribe's constitution states that Special meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of General Council members to the Tribal Council requesting a special meeting. It is evident this process was followed in accordance with the Tribe's constitution; however, the validity of (2) two handwritten signatures were challenged by the Tribal Council, which declined to call a meeting of the General membership to recall and replace the Chairman.

After review of the General Council Meeting Petition and of the two (2) printed names and signatures, it can be documented that the same individuals printed and signed their names in the same manner for a General Council meeting previously held in January 2008, under similar circumstances. Therefore, I believe there was no basis to deny the petition given the fact that the same two (2) signatures had been accepted by the Tribal Council in a previous meeting and acknowledge the petition as valid.

Because the Tribal Council declined to call a meeting, the General Council moved forward and continued the process of holding the September 20, 2008, meeting to conduct business. According to meeting minutes, a hand vote was taken to remove Joe Kennedy as Tribal Chairman. The results were 91-Yes, 29-No, 16-Abstain.

Case 2:08-cv-00060-MGE-DAD Document 6-8 Filed 12/19/2008 Page 26 of 71

...and vote, a further ballot vote was disseminated to voting members. Each member was instructed to write "Removal of Joe Kennedy" on the ballot. Once this process was completed, the ballots were counted and reconciled. The results of the vote on the resolution to remove Joe Kennedy as Tribal Chairperson were as follows: 130-Yes, 5-No, 1-Abstain.

The Tribe has reported that it has 252 voting members in which 136 participated, constituting a quorum. In accordance with Article VIII, Section 3.(c), No business shall be transacted in the absence of a quorum. A majority of the voting member's of the General Council shall constitute a quorum at all Council Meetings. Therefore, the results of the General Council meeting confirm that a quorum was established.

During this time, it was acknowledged that Ms. Margaret Armitage had resigned as Vice-Chairperson; therefore, opening up nominations for the Tribal Chairperson and Vice Chairperson seats. Oral nominations were taken for both positions. The person receiving the highest number of votes would be the Tribal Chairperson and the person receiving the second higher number votes would be the Vice-Chairperson. In conclusion, the total of each of the counts were reconciled. Minutes of the meeting reflect the results as George Gholson, Chairman with 106 votes, Wallace Eddy- 53 votes, Jacob Parra-50 votes and Ed Beaman-27 votes. Therefore, it was concluded that George Gholson would serve as the Tribe's Chairman and Wallace Eddy, Vice-Chairman.

After careful review of the above General Council actions taken at the September 20, 2008, General Council meeting, I am acknowledging the actions taken by the General Council at this meeting. Therefore, the Bureau of Indian Affairs, Central California Agency will recognize the following individuals to be official tribal representatives of the Timbisha Shoshone Tribal Council with the understanding that this council may change due to mandated elections in November 2008.

George Gholson, Chairman
Wallace Eddy, Vice-Chairman
Madeline Esteves, Secretary/Treasurer
Margaret Cortez, Council Member
Pauline Esteves, Council Member

It is my sincere hope that this acknowledgement of General Council actions will bring stability to the Tribe and I strongly encourage the Tribal Council to work together for the benefit of all tribal members.

Please contact Carol Rogers-Davis, Tribal Operations Officer at (916) 930-3794, should you have additional questions, or need further assistance.

Sincerely,



Troy Burdick
Superintendent



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO
.....

OCT 20 2008

CERTIFIED MAIL NO. 7001 2510 0009 4494 1169
RETURN RECEIPT REQUESTED

Mr. Joe Kennedy
HC 72 Box 05002
Dyer, Nevada 89010

9/12 000

Dear Mr. Kennedy:

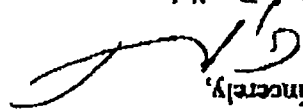
The purpose of this correspondence is to provide you with information concerning 25 CFR, Part 2-Appeals From Administrative Actions, following a letter issued to Mr. George Gholson and yourself, dated October 17, 2008, wherein the Bureau of Indian Affairs, Central California Agency (Agency), acknowledged recent actions taken at a General Council meeting held September 20, 2008.

We inadvertently left out the Appeal procedures and are providing you with a copy of Part 2-Appeals from Administrative Actions. The decision may be appealed to the Regional Director, Pacific Regional Office, Bureau of Indian Affairs, 2800 Cottage Way, W-2820, Sacramento, California 95825. In accordance with the regulations in 25 CFR Part 2 (copy enclosed). Your notice of appeal must be filed in this office within 30 days of the date you receive this decision. The date of filing or notice is the date it is post marked or the date it is personally delivered to this office. Your notice of appeal must include your name, address and telephone number. It should clearly identify the decision to be appealed. If possible, attach a copy of the decision. The notice of appeal and the envelope which it is mailed, should be clearly labeled "NOTICE OF APPEAL." The notice of appeal must list the names and address of the interested parties known to you and certify that you have sent them copies of the notice.

You must also send a copy of your notice to the Regional Director, at the address given above.

If no timely appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

If you have any questions, please do not hesitate to contact Carol Rogers-Davis, Tribal Operations officer at (916) 930-3794, should you have any questions in regard to this matter.

Sincerely,

Troy Burdick
Superintendent

Enclosure

907.003



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO

OCT 21 2008

To Whom It May Concern:

The purpose of this correspondence is to provide notice that my decision of October 17, 2008, to acknowledge the actions taken by the General Council of the Timbisha Shoshone Tribe on September 20, 2008, is not yet effective.

Consistent with 25 CFR 2.6, my decision shall not be effective until the time for filing a notice of appeal has expired and no notice of appeal has been filed. A notice of appeal must be filed within 30 days from receipt of my decision, in accordance with 25 CFR 2.9. Consistent with 25 CFR 2.19, if my decision is timely appealed, the Regional Director shall render a written decision regarding the appeal within 60 days. A decision by the Regional Director may thereafter be appealed within 30 days after its issuance to the Interior Board of Indian Appeals (IBIA), consistent with 25 CFR 2.19.

Regulations governing appeals to the IBIA at 43 CFR Part 4, provide that no decision of a BIA official that is subject to appeal will be considered final so as to constitute agency action unless made effective by a decision and order of the IBIA, at which time the agency decision may be considered final and effective pursuant to 43 CFR 4.314.

Therefore, for purposes of government-to-government relations, the recognized Tribal Council for the Timbisha Shoshone Tribe continues to be:

Joe Kennedy, Chairman
Margaret Armitage, Vice-Chairman
Madeline Esteves, Secretary/Treasurer
Margaret Cortez, Council Member
Pauline Esteves, Council Member

Should you have any question in this matter, please contact my office at (916) 930-3776.

Sincerely,

Troy Burdick
Superintendent



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO

NOV 10 2008

Mr. Joe Kennedy, Chairman
Timbisha Shoshone Tribe
P.O. Box 206
Death Valley, California 92328-0206

Dear Mr. Kennedy:

The purpose of this correspondence is to clarify that, for government-to-government purposes, the Bureau of Indian Affairs (BIA) continues to recognize Mr. Joe Kennedy, Mr. Ed. Beaman, Ms. Madeline Esteves, Ms. Virginia Beck, and Mr. Cleveland Casey, members of the Tribal Council of the Timbisha Shoshone Tribe that were in office prior to the General Council meeting of January 20, 2008, as the governing body of the Tribe. The results of subsequent Tribal elections have been acknowledged by the BIA. However, as explained below, these decisions to acknowledge Tribal action are not final for the Department of the Interior until the opportunity for appeal is exhausted. Consequently, until decisions regarding acknowledgment of recent Tribal election activities are final, the BIA continues to recognize Mr. Kennedy and Mr. Beaman, and the Council seated prior to January 20, 2008, for purposes involving the Federal government.

Previously, by correspondence dated February 29, 2008, I acknowledged the actions by the Timbisha Shoshone General Council at a Special General Council meeting held on January 20, 2008, wherein the General Council voted to ratify the November 13, 2007, General Election, seating Margaret Armitage and Margaret Cortez. Consequently, my decision of February 29, 2008 to acknowledge the results of January 20, 2008 meeting was appealed and therefore is not yet final.

On October 17, 2008, I provided my response to documentation submitted on September 26, 2008, regarding the removal of Mr. Joe Kennedy, Chairman of the Timbisha Shoshone Tribe, at a General Council meeting held September 20, 2008 and acknowledged the actions taken at the September 20, 2008 meeting. Consequently, my decision of October 17, 2008, is again subject to appeal in accordance with 25 CFR, Part 2.

Both of my prior decisions to acknowledge the General Council's election actions are subject to appeal in accordance with 25 CFR, Part 2, which provides that no decision I make is effective until the time for filing a notice of appeal has expired and no notice of appeal has been filed within the 30 day period for filing an appeal. If my decision is

timely appealed, the Regional Director must then render a written decision regarding the appeal within 60 days. A decision by the Regional Director may thereafter be appealed to the Interior Board of Indian Appeals (IBIA). Regulations at 43 CFR Part 4 govern appeals to the IBIA, and provide that no decision of a BIA official that is subject to appeal will be considered final so as to constitute agency action unless made effective by a decision and order of the IBIA.

To summarize, both my February 29, 2008 and October 17, 2008 decisions are subject to appeal to the Regional Director, Pacific Regional Office, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825 in accordance with regulations at 25 CFR part 2 (copy enclosed). Any notice of appeal must be filed in this office within 30 days of the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to this office. Your notice of appeal must include name, address and telephone number. It should clearly identify the decision to be appealed. If possible, attach a copy of the decision. The notice of appeal and the envelope which it is mailed should be clearly labeled "NOTICE OF APPEAL." The notice of appeal must list names and addresses of the interested parties known to you and certify that you have sent them copies of the notice. You must also send a copy of your notice to the Regional Director, at the address given above. If no timely appeal is filed, these decisions will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

If you have any questions, please do not hesitate to contact Carol Rogers-Davis, Tribal Operations Officer, at (916) 930-3794.

Sincerely,



Troy Burdick
Superintendent

cc: Regional Director, Pacific Region, Bureau of Indian Affairs
John M. Peebles, Esq. 1001 Second Street, Sacramento, CA 95814
Mike Anderson, Esq. 300 Independence Ave., SE, Washington, D.C. 20003 ✓
Judith A. Shapiro, Esq. 6856 Eastern Ave., NW, Ste. 206, Washington, D.C. 20012
Timbisha Shoshone Tribe, P.O. Box 206, Death Valley, CA 92328

JUDITH A. SHAPIRO, ESQ.

7064 EASTERN AVENUE, NW
WASHINGTON, DC 20012
202-723-6400

jshapirolaw@earthlink.net

November 13, 2008

Superintendent Troy Burdick
Central California Agency
Bureau of Indian Affairs
659 Capitol Mall, Suite 8-500
Sacramento, CA 98514-4170

RE: NOTICE OF APPEAL

Dear Superintendent Burdick:

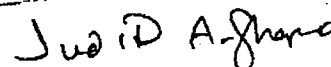
PLEASE TAKE NOTICE, that this NOTICE OF APPEAL is filed at the direction of the Timbisha Shoshone Tribal Council whose members are Chairman Joe Kennedy, Timbisha Shoshone Tribal Council Members Madeline Esteves (Secretary/ Treasurer) Pauline Esteves, and Margaret Cortez. This APPEAL challenges the decision of Superintendent Troy Burdick dated October 17, 2008, attached hereto as Exhibit A. Superintendent Burdick subsequently amended that letter on October 20, 2008 and October 21, 2008, to set forth appeal rights and clarify status pending appeal. For completeness, those subsequent letters, which do not affect the substance of the decision, are attached as Exhibit B and C, respectively.

Appellants' address is P.O. Box 206, Death Valley, California 92328-0206 (760) 786-2374. Any correspondence concerning this appeal should be copied to Judith A. Shapiro, 7064 Eastern Ave., NW, Washington, DC 20012, (202) 723-6400, attorney for Appellants.

DECISION BEING APPEALED

The decision being appealed is Superintendent's Troy Burdick's decision of October 17, 2008, acknowledging the results of a purported meeting of the Timbisha Shoshone General Council as removing Joe Kennedy as Chairman of the Timbisha Shoshone Tribe and installing George Gholson as Chairman and Wallace Eddy as Vice Chairman.

Respectfully Submitted,



Judith A. Shapiro, Esq.
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on November 13, 2008, I caused to be deposited for mailing in the United States Postal Service postage prepaid, true and correct copies of the foregoing NOTICE OF APPEAL, addressed as follows:

SUPERINTENDENT

Troy Burdick
CENTRAL CALIFORNIA AGENCY
Bureau of Indian Affairs
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

REGIONAL DIRECTOR

Dale Morris
PACIFIC REGION
Bureau of Indian Affairs
2800 Cottage Way, Rm W-820
Sacramento, CA 95825

Interested Parties

Service was made on the attorneys representing the following interested parties:

- I. Mr. George Gholson
Mr. Wallace Eddy

c/o Michael J. Anderson, Esq.
Anderson, Tuell, LLP
300 Independence Ave. SE
Washington, DC 20003

- II. Mr. Ed Beaman
Ms. Virginia Beck
Mr. Cleveland Lyle Casey

c/o John Peebles, Esq.
Fredericks, Peebles & Morgan
1001 Second Street
Sacramento, CA 95814

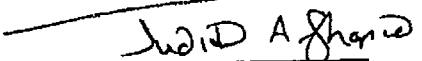

Judith A. Shapiro

EXHIBIT C

1 JEFFREY R. KEOHANE (Cal. Bar No. 190201)

2 GEORGE FORMAN (Cal. Bar No. 047822)

3 FORMAN & ASSOCIATES

4 4340 Redwood Highway, Suite E352

5 San Rafael, CA 94903

6 Phone: (415) 491-2310

7 Fax: (415) 491-2313

8 Email: jeff@gformanlaw.com

9 *Local Counsel*

10 Judith A. Shapiro

11 APPLICATION FOR ADMISSION PRO HAC VICE PENDING

12 (D.C. Bar No. 376153)

13 7064 Eastern Ave., NW

14 Washington, DC 20012

15 Phone: (202) 723-6400

16 Fax: (202) 207-3329

17 Email: jshapirolaw@earthlink.net

18 Attorneys for Plaintiffs:

19 TIMBISHA SHOSHONE TRIBE

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**UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA**

17 TIMBISHA SHOSHONE TRIBE, a federally
18 recognized Indian Tribe as represented by Joe Kennedy,
19 Chairman, Timbisha Shoshone Tribe, Pauline Esteves,
20 Council Member, Timbisha Shoshone Tribe, Madeleine
21 Esteves, Council Member, Timbisha Shoshone Tribe
22 Plaintiffs,

23 v.

24 DIRK KEMPTHORNE, Secretary Of The United States
25 Department Of The Interior, UNITED STATES
26 DEPARTMENT OF THE INTERIOR, GEORGE T.
27 SKIBINE, Acting Assistant Secretary for Indian Affairs,
28 JERRY GIDNER, Director of the Bureau of Indian
Affairs, DALE MORRIS, Pacific Regional Director-
Bureau of Indian Affairs, and DOES 1-5.

Defendants.

CASE No. 08-03060-MCE-DAD

**DECLARATION OF JOE
KENNEDY IN SUPPORT OF
TEMPORARY RESTRAINING
ORDER**

DECLARATION OF JOE KENNEDY

I, Joe Kennedy, hereby affirm:

1. Each of the facts stated below is within my personal knowledge, and I would so testify if called as a witness at hearing.

2. I am the duly elected Chairman of the Timbisha Shoshone Tribe ("Tribe") and an enrolled member of the Tribe pursuant to the Tribe's Constitution, Enrollment Ordinance and Election Ordinance.

3. On December 4, 2004, the Pacific Regional Director of the Bureau of Indian Affairs, Dale Morris, issued a decision recognizing a tribal council consisting of Mr. George Gholson, Mr. Wallace Eddy, Ms. Madeline Esteves, Ms. Margaret Cortez and Ms. Pauline Esteves. (See Attached December 4, 2008, Pacific Regional Director's Order).

4. The Regional Director's Order was made effective immediately pursuant to 25 C.F.R. 2.6, and was based upon alleged "deadlines" for participating in comments on the proposed Yucca Mountain Project, a Department of Energy project to be located in central Nevada and upon which the Tribe was granted AIT Status as a result of my efforts. That status, which I obtained for the Timbisha Shoshone Tribe as a result of several years' efforts (described below) permits the Tribe ---- on a basis equal to all other potentially affected tribes and local governments. Mr. Morris, in his decision, specifically alleged that because the Tribe must have a "Licensing Support Network" ("LSN") website up and running immediately, an "exigency" existed which required him to act to protect the Tribe's trust assets and resources. (See Id.) I am unaware of any exigency concerning the LSN or other Yucca Mountain project filing deadlines that would immediately result in harm, irreparable or otherwise to the Tribe, as a result of permitting me to continue to pursue my efforts on the Tribe's behalf.

1 5. The Regional Director's decision recognizing Mr. Gholson as chairman and the other
2 tribal council members was made on an "ex parte" basis, neither I, nor my counsel were served, and
3 to date, we still have not seen the documents upon which the Regional Director based his decision.
4 Mr. Morris evaluated that submission and issued his decision without consulting me or my
5 government concerning the alleged "exigent circumstances" and absent any inquiry by Mr. Morris
6 concerning what actions the Tribe had taken thus far to participate in the Yucca Mountain Project
7 licensing effort, specifically the facility licensing process and LSN participation.
8

9 6. Had the Regional Director consulted with me he would have found out that the
10 Timbisha Shoshone Government, through my efforts, has only recently received much needed federal
11 funds from the Department of Energy, with which to begin Yucca Mountain project licensing
12 activities, including the Tribe's participation and activities related to the LSN.
13

14 7. The Regional Director would have also found out that I was the person principally
15 responsible for the Tribe's receipt of AIT status which I worked diligently to receive over the last ten
16 (10) years. In addition to my participation in the acquisition of AIT status, my government has taken
17 the following actions on behalf of the Tribe to participate in Yucca Mountain project licensing
18 activities:

- 19 a. Engaged other similarly situated government entities, other Indian tribes, local
20 governments;
21 b. Participated in Yucca Mountain project working groups, specifically those groups
22 that include Indian tribes;
23 c. Submitted responses to Rail Alignment and Facility environmental documents
24 issued by the Department of Energy (comments submitted January 2008);
25 d. Participated as a member and attended numerous meetings of the Affected Units of
26 Local Government (AULG) concerning Yucca Mountain oversight activities;
27
28

- e. Testified before numerous government bodies concerning the Tribe's Yucca Mountain Nuclear Repository concerns;
- f. Petitioned the United States Department of Energy for Yucca Mountain project oversight funding;
- g. Hired environmental consultants to assist the Tribe's oversight activities, including entering into a contract, on October 15, 2008, with Black Mountain Research Fred Dilger, Ph.D, the individual charged with preparing the oversight program to monitor DOE and NRC Transportation developments and planning and coordination for meetings, data and information gathering, compilation, interview preparation, coordination and facilitation etc.;
- h. Provided responses concerning the "scope" of additional environmental documents to be issued in 2009 (comments submitted on November 24, 2008);
- i. Provided comments concerning the Yucca Mountain projects Draft Complex Transformation (SPEIS);
- j. Contacted consultants, NWOP Consulting, inc. (Loreen Pitchford), to gain training and access to the LSN;
- k. With DOE funding, retained legal counsel to assist with the Tribe's Yucca Mountain oversight activities.
- l. Pushed for support of resolutions at the National Congress of American Indians in support of my efforts with the affected status with the YMP

I myself was responsible for all of these activities in furtherance of the Timbisha Shoshone Government's interests, either personally or through oversight of those acting on the Tribe's behalf. Mr. George Gholson has never been involved in any efforts related to Yucca Mountain.

1 8. Immediately prior to the December 4, 2008, decision, on December 2, 2008, a meeting
2 was scheduled in Las Vegas, Nevada that included myself, Yucca Mountain legal counsel, Rosette &
3 Associates, PC, and our contracted Yucca Mountain consultant, Fred Dilger, Ph.D. The purpose of
4 the meeting was to discuss the submission of important documents related to the Yucca Mountain
5 project scheduled for later this month. Unfortunately on December 2, at 2:45 p.m., I received an
6 email from Fred. Dilger Ph.D., who stated he would not participate as a consultant until our "tribal"
7 dispute was resolved. Dr. Dilger's refusal to meet resulted in travel expenses incurred for Barbara
8 Durham our Tribal Historic Preservation Office (THPO) officer, myself and our legal counsel who
9 had flown to Las Vegas, Nevada, from Sacramento, California, to attend the meeting.
10

11 9. Mr. Dilger was aware of the tribal dispute because of his direct contact from Mr.
12 Gholson and from Fredericks, Peebles and Morgan attorney, Darcie Houck. Moreover, during the
13 end of October 2008, I received word, via a tribal newsletter, issued by Mr. Gholson, identifying Ms.
14 Houck as his retained attorney. Shortly thereafter, Ms. Houck and Mr. George Gholson contacted Mr.
15 Dilger claiming to be the representatives of the Timbisha Government causing Mr. Dilger to become
16 very confused and distant with our THPO officer and myself. Barbara Durham and myself continued
17 to reassure Mr. Dilger that we were in control and we were the ones that he was to work with through
18 a signed contract and payment for his services. In the second week of November Darcie Houck
19 contacted our government attorney, Judith Shapiro at a Las Vegas conference concerning the Yucca
20 Mountain project
21
22

23 10. I am aware that prior to the December 4, 2008 order, Ms. Houck also contacted
24 Department of Energy representatives, representing herself as the tribe's attorney, and submitted
25 several documents. Ms. Houck represented herself as the Tribe's attorney when she was aware she
26 was not, given that the latest notice from the BIA informed all parties that I continued to function as
27 Chair of the Tribe pending resolution of existing appeals. Finally, Mr. Gholson and Ms. Houck's
28

1 activities, reached a point of sabotage on their part, with the relationship of our consultants and DOE
2 representatives that I worked so hard to build concerning the YMP. I immediately sent Darcie and
3 Mr. Gholson a "cease and desist" letter as I considered their contact to be interference with the
4 activities of our government.

5
6 11. Ms. Houck is the same attorney who I believe interjected herself into our Yucca
7 Mountain oversight meeting scheduled for December 2, 2008, interjected herself in tribal affairs, and
8 has now falsely alleging that an exigency existed necessitating the December 4, 2008 decision, a
9 basis utilized by Mr. Morris to make his decision without notice, consultation, and on an emergency
10 basis without delay pending appeal, as would otherwise be required under the regulations. Mr.
11 Morris made his decision without consulting me to learn of the actions that I, through my
12 government, had taken to participate in the Yucca Mountain project and licensing process, which
13 includes participation on the LSN, as noted above, which Ms. Houck and the Regional Director cited
14 as the need for emergency action.

15
16 12. Neither did Mr. Gholson wait until the emergency Decision purported to transfer the
17 government to him effective immediately. He had already interfered with existing Tribal
18 Government in a dramatic and shocking way. As soon as Central California Agency Superintendent-
19 Troy Burdick, recognized Mr. Gholson as tribal chairman on October 17, 2008, a decision that Mr.
20 Burdick noted the following Monday, October 20, 2008, was not yet in effect, Mr. Gholson appeared
21 at the Tribal Office in Death Valley and misappropriated two computers and other equipment, one
22 containing fiscal information, another administration information. Mr. Gholson eventually returned
23 the fiscal computer, but refused to return the administrative computer.

24
25 13. As a direct result of the Regional Director's December 4, 2008, decision, Mr. Gholson
26 has attempted to effectively shut down the tribal government.

27
28 14. Mr. Gholson has:

- a. Attempted to confiscate tribal funds from tribal bank accounts-tribal bank accounts are now completely frozen;
- b. Shut down tribal government communications (email) at our Tribal Offices in Death Valley, California;
- c. Had my government cell phone turned off;
- d. Contacted Tribal consultants who now are reluctant to work for us;
- e. Sent our Yucca Mountain legal counsel a "cease and desist" letter.

15. On December 12, 2008, as a direct result of the Regional Director's Decision, along with others assisting him, with the support of the Deputy Sheriff and with the fresh consent of Regional Director Morris, Mr. Gholson initiated a siege upon the Death Valley offices, to effectively shut down the government. He and his colleagues loaded the Tribe's computers, files, and other equipment into a truck over my objections and over the objections of council women and elders Pauline Esteves and Madeleine Esteves. Although our office is on trust land, and although the sheriff's deputy lacks civil jurisdiction on that land, the Deputy told me that if we interfered with the removal of materials from our office, he would arrest us. -. While the tribal leadership dispute is ongoing, our tribe will likely suffer irreparable harm as all programs are presently run out of the Death Valley Tribal Office. The programs presently at risk of complete cessation or failure consist of:

- a. Tribal Historic Preservation Office (THPO);
- b. Tribal Water program;
- c. Tribal Environmental Protection Agency (TEPA);
- d. Toiyabe Indian Health Project (TIHP);
- e. Tribal Housing Program;

- f. Toiyabe Elders Program;
- g. Numerous BIA funded grants;
- h. Toiyabe Healthy Heart Program.
- i. Indian Health Service (IHS) for homes that are being built

16. Additionally, all of these services are either federally or tribally funded, and many if not all the programs have ongoing projects, client obligations, service requirements, and/or serve tribal members that required immediate attention, bookkeeping and/or funding to continue. For example, concerning the tribal housing program, checks have been written to fund Senior rental assistance, student rental assistance for college housing, home improvements, move in assistance, if the Timbisha Government bank accounts continue to be inaccessible, with checks not being accepted by our banking institution, these programs will immediately cease and tribal members housing assistance needs will be immediately affected. Finally, any change in government will effect all medical visits from the Toiyabe Indian Health Project, whose medical doctors evaluate, treat and provide prescriptions to tribal members on a weekly basis at the Tribal Community Center, located within the Death Valley Tribal Office.

17. If the Regional Director's decision is permitted to stand, and the status quo is not maintained during the pendency of the appeal, Mr. Gholson will be permitted to retain the tribal property he has confiscated. Moreover, those computers contain data that is subject to protection, including sensitive personal information about tribal members and employees, now at risk of improper disclosure.

18. Finally, if via the Regional Director's decision, Mr. Gholson is permitted to retain control over the tribal property during the pendency of our appeal of the decision, in my humble and professional opinion, having served as a long standing member of the Timbisha council and having

1 built and run the government, the Timbisha and all tribal services, will, for all intent and purpose,
2 cease operations.

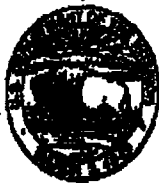
3 //
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5
6 I declare under penalty of perjury under the laws of the United States of America that the
7 foregoing statement is true and correct.

8 Executed this 16th day of December, 2008 at Fish Lake Valley, Nevada,
9

10 /s/Joe Kennedy
11 Joe Kennedy
12 Chairman-Timbisha Shoshone Tribe
13 [Rosette & Associates retains a copy of the
14 executed signature]
15
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EXHIBIT D



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

DEC 04 2008

CERTIFIED MAIL NO. 7006 3450 0002 4647 5049
RETURN RECEIPT REQUESTED

John M. Peebles, Esq.
Fredericks Peebles & Morgan LLP
Attorneys at Law
1001 Second Street
Sacramento, CA 95814

CERTIFIED MAIL NO. 7006 3450 0002 4647 5056
RETURN RECEIPT REQUESTED

Judith A. Shapiro, Esq.
Attorney for Appellants
2001 N Street, Suite 100
Sacramento, CA 95814

CERTIFIED MAIL NO. 7006 3450 0002 4647 5032
RETURN RECEIPT REQUESTED

Darcie L. Houck, Esq.
Fredericks Peebles & Morgan LLP
Attorneys at Law
1001 Second Street
Sacramento, CA 95814

Subject: Timbisha Tribal Council Composition for Government-to-Government Purposes

Dear Mr. Peebles, Ms. Shapiro, and Ms. Houck:

The purpose of this correspondence is to inform you of my decision regarding the Notice of Appeal dated March 17, 2008, which was filed By John M. Peebles, Esq., Attorney for Ed Beaman, Virginia Beck, and Cleveland Casey, and the Notice of Appeal dated November 13, 2008, filed by Judith A. Shapiro, Esq., on behalf of Mr. Joe Kennedy, Ms. Madeline Estaves, and Ms. Pauline Esteves, pursuant to 25 CFR § 2.9 (a).

The Notice of Appeal dated March 17, 2008, concerned the Bureau of Indian Affairs, Central California Agency, Superintendent's (Superintendent) decision of February 29, 2008, acknowledging the results of

**TAKE PRIDE
IN AMERICA** 

a General Council meeting held on January 20, 2008 concerning the composition of the Tribal Council.

The Notice of Appeal dated November 13, 2008, concerned the Superintendent's October 17, 2008, decision to acknowledge the results of a General Council meeting held on September 20, 2008 concerning the composition of the Tribal Council.

Based on the record before me, I affirm the Superintendent's decision of October 17, 2008, to acknowledge the results of a Special meeting of the Timbisha Shoshone General Council held on September 20, 2008. Therefore, for the government to government purposes, I recognize the following individuals as the official tribal representatives of the Timbisha Tribal Council:

George Gholsen, Chairman
Wallace Eddy, Vice-Chairman
Madolins Esteves, Secretary/Treasurer
Margaret Cortez, Council Member
Pauline Esteves, Council Member

This decision affirming the Superintendent's decision of October 17, 2008, regarding the composition of the Tribal Council, renders moot the Notice of Appeal dated March 17, 2008, which was filed By John M. Peebles, Esq., Attorney for Ed Beaman, Virginia Beck, and Cleveland Casey.

By correspondence dated December 2, 2008, and December 3, 2008, a request was received from Darcie Houck on behalf of the members of the Tribal Council who were acknowledged by the Superintendent's decision of October 17, 2008, asking that my decision affirming the Superintendent's decision be made effective immediately pursuant to 25 CFR 2.6. Section 2.6 provides that decisions may be immediately finalized by the Department due to reasons relating to public safety, protection of trust resources, or other public exigency. Ms. Houck cites correspondence from the Assistant Secretary - Indian Affairs, dated June 29, 2007, which grants the Timbisha Shoshone Tribe status as an "Affected Indian Tribe" (AIT) pursuant to the Nuclear Policy Waste Act (NPWA). She includes declarations stating in paragraph 6 that: "In order to participate in the Yucca Mountain Project the Tribe must have a licensing system network ("LSN") website certified by the NRC immediately, and the Tribe must intervene and file its contentions regarding the Yucca Mountain Project with the NRC by December 22, 2008." Ms. Houck also declares that consultants are unsure whom they should consult with and will cease work on the Yucca Mountain Project if internal Tribal issues are not resolved.

In the June 29, 2007 correspondence from the Assistant Secretary, the Tribe was granted AIT status in the Yucca Mountain Project because effects of the Project may be both substantial and adverse to the Tribe. Based on the Tribe's AIT status, and the deadlines for participation in the Yucca Mountain Project, I find there are grounds for making my decision recognizing the composition of the Tribal Council immediately effective pursuant to 25 CFR 2.6 in order that the Tribe may protect trust resources through participation in the licensing process for the Yucca Mountain Project. Accordingly, the Department immediately recognizes the Tribal Council representatives listed above for government-to-government purposes.

This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203 in accordance with regulations in 43 CFR§ 4.310 4.340. Your Notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your Notice of Appeal to (1) The Assistant Secretary - Indian Affairs, 4160 MIB, U.S. Department of the Interior, 1849 C Street, N. W., Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your Notice of Appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Sincerely,



Regional Director

cc: Superintendent, Central California Agency

EXHIBIT E



GOVERNMENT SERVICES DIVISION

December 11, 2008

Mr. Joe Kennedy
Post Office Box 206
Death Valley, CA 92328

Mr. George Gholson
1349 Rocking W. Drive
Bishop, CA 93514

RECEIVED DEC 18 2008

Re: **Dispute Over Control of Accounts of the
Timbisha Shoshone Tribe**

Dear Mr. Kennedy and Mr. Gholson:

You have both notified Union Bank of California, N.A. ("Union Bank") that a dispute has arisen as to the current composition of the Tribal Council of the Timbisha Shoshone Tribe (the "Tribe"), and accordingly, over control of the deposit accounts of the Tribe at Union Bank. You have both requested that the deposit accounts be restrained at this time.

This is to confirm that a restraint has been placed to prevent withdrawals from the accounts until the composition of the Tribal Council has been resolved or until Union Bank has received clear evidence, satisfactory to Union Bank in its sole discretion, setting forth those authorized to act on behalf of the Tribe and to control the deposit accounts.

Union Bank has the additional authority to impose a restraint on the accounts in circumstances such as these as set forth in unequivocal terms in the written agreement for the accounts (the "Account Agreement") entered into by and between Union Bank and the Tribe when the accounts were opened. The written agreement consists of the signature card and the brochure entitled *All About Business Accounts and Services Disclosure and Agreement*. The Account Agreement, as amended from time to time, states the following:

Conflicting Demands/Disputes -- If there is any uncertainty regarding the ownership of an account or its funds, there are conflicting demands over its ownership or control, we are unable to determine any person's authority to give us instructions, or we believe a transaction may be fraudulent or may violate any law, we may, at our sole discretion: (a) freeze the account and refuse transactions until we receive written proof (in form and substance satisfactory to us) of each person's right and authority over the account and its funds; (b) refuse transactions and return checks, marked "Refer to Maker" (or similar language); (c) require the signatures of all authorized signers for the withdrawal of funds, the closing of an account, or any change in the account, regardless of the number of authorized signers on the account; (d) request instructions from a court of competent jurisdiction at your expense regarding the account or transaction; and/or (e) continue to honor checks and other instructions given to us by persons who appear as authorized signers according to our records. The existence of the rights set forth above shall not impose an obligation on us to assert such rights or to deny a transaction.

Union Bank is not in a position to resolve the dispute relating to the composition of the Tribal Council or control over the accounts. For this reason, Union Bank will neither honor requests for withdrawal of funds from the accounts, nor pay checks drawn against the accounts and presented to Union Bank for payment, unless and until it receives evidence satisfactory to Union Bank that the dispute over authority to give the bank instructions has been resolved, or an appropriate authority has issued a final

Mr. Joe Kennedy and Mr. George Sholson
December 11, 2008

Page 2

ruling determining those authorized to give the bank instructions. Union will continue to allow deposits to the accounts.

This position is one that Union Bank must take in order to remain neutral in the ongoing dispute. Union Bank currently intends to maintain the funds in the accounts subject to the restraint in order to minimize the inconvenience and expense to the parties involved. However, should conflicting demands continue to be made upon us, or should you fail to promptly resolve your dispute, Union Bank reserves the right to take any additional legal action. Union Bank will seek reimbursement for any additional costs it incurs from the funds in the accounts, including all costs and attorneys' fees which it may incur in such an action.

Very truly yours,

Union Bank of California, N.A.

By: Susan Hale

Susan Hale
Vice President

cc: Judith Shapiro, Esq. (via e-mail)
Joseph Kitto, Esq. (via e-mail)

EXHIBIT F

1 JEFFREY R. KEOHANE (Cal. Bar No. 190201)
2 GEORGE FORMAN (Cal. Bar No. 047822)
3 FORMAN & ASSOCIATES
4 4340 Redwood Highway, Suite E352
5 San Rafael, CA 94903
6 Phone: (415) 491-2310
7 Fax: (415) 491-2313
8 Email: jeff@gformanlaw.com
9 Local Counsel

10 Judith A. Shapiro
11 APPLICATION FOR ADMISSION PRO HAC VICE PENDING
12 (D.C. Bar No. 376153)
13 7064 Eastern Ave., NW
14 Washington, DC 20012
15 Phone: (202) 723-6400
16 Fax: (202) 207-3329
17 Email: jshapirolaw@earthlink.net

18 Attorneys for Plaintiffs:
19 TIMBISHA SHOSHONE TRIBE, ET AL

20 **UNITED STATES DISTRICT COURT FOR**
21 **THE EASTERN DISTRICT OF CALIFORNIA**

22 TIMBISHA SHOSHONE TRIBE, a
23 federally recognized Indian tribe,

24 Plaintiffs

25 v.

26 DIRK A. KEMPTHORNE, Secretary,
27 UNITED STATES DEPARTMENT OF
28 THE INTERIOR, GEORGE T. SKIBINE,
Acting Assistant Secretary for Indian
Affairs, JERRY GIDNER, Director,
Bureau of Indian Affairs, DALE MORRIS,
Regional Director, Pacific Region,
Bureau of Indian Affairs
and DOES 1-5,

Defendants

CASE No. 08-03060-MCE-DAD

**DECLARATION OF BARBARA
DURHAM IN SUPPORT OF A MOTION
FOR A TEMPORARY RESTRAINING
ORDER**

**DECLARATION OF BARBARA DURHAM IN SUPPORT OF A MOTION FOR A TEMPORARY
RESTRAINING ORDER**

DECLARATION OF BARBARA DURHAM

I, BARBARA DURHAM, hereby declare:

1. Each of the facts stated below is within my personal knowledge, and I would so testify if called as a witness at hearing.

2. I am an enrolled member of the Timbisha Shoshone Tribe (Tribe) and have lived in Death Valley all of my life.

3. I assisted with the Tribe's federal recognition process and served as the spokesperson for the Timbisha Land Restoration Committee. The Committee was principally responsible for the placement into trust of over 7,000 acres of land within and outside the Death Valley National Monument, the Tribe's traditional homeland, via the Timbisha Shoshone Homeland Act that was signed into law on November 1, 2000, by President William J. Clinton.

4. During my life I have held various positions with the tribal government. I presently serve as a member of the Tribe's Election Committee and I presently serve as the Tribe's Historic Preservation Officer (THPO). As Director of THPO I am reliant on federal funding to run my office and program. I have a committee of five (5) elders who meet once a month and conduct historic preservation site visits as part of our responsibilities. Due to the blocked tribal bank accounts our THPO program is on the brink of collapse, as we don't have any money to pay the salaries of staff, including myself or the various consultants who are under contract to THPO for preservation services. We are presently working on project consulting agreements with federal agencies, and we will likely have to cease our work if we do not receive funding to complete the work very soon.

5. As a tribal member and government officer, I am also aware of many programs that are presently near or on the brink of collapse due to lack of funds. The Tioyabe Indian

1 Health Program, evaluates and treats tribal patients in our community center in Death Valley. In
2 addition to providing health care services the program distributes meals to our elderly and
3 indigent members.
4

5 6. I am aware that during the course of the review of Mr. George Gholson's election
6 application the Enrollment Committee reviewed his tribal enrollment records. Their review
7 determined that he cannot trace his lineage to the Base Membership Roll, required for tribal
8 membership. On November 4, 2008, he was provided notice of the Committee findings and
9 provided him thirty (30) days to request a hearing in which he would present evidence disputing
10 our findings. As of the date of this declaration, the thirty (30) day period has elapsed, with Mr.
11 Gholson failing to request a hearing of the findings. Thus, it appears, if these findings are
12 ratified by the Tribal Council, that Mr. Gholson is not a tribal member eligible for benefits, much
13 less to hold a position in tribal government. Pursuant to our tribal Constitution, persons who are
14 enrolled incorrectly, must be dis-enrolled from tribal membership. (see attached notice from
15 Enrollment Committee to Mr. George Gholson).
16
17

18 7. As a member of the Election Committee, we also ensure that tribal elections are
19 conducted according to our Constitution. We recently held a tribal Council election on
20 November 11, 2008, with two persons Angie Boland and Madeline Esteves elected to the Tribal
21 Council. No appeals were filed as a result of the election and the election was certified as being
22 consistent with our tribal laws.
23
24

25 8. I am aware that an alleged General Council meeting, that included a tribal election
26 was held in Las Vegas, Nevada this past September. To the best of my knowledge, no member
27 of the Tribe's Election Committee was present at that meeting to ensure that the election was
28 conducted pursuant to tribal law. The Enrollment Committee was also not present to verify that
everyone participating in voting activities was in fact a tribal member. In the absence of the

1 Election and Enrollment Committee's presence at the Las Vegas General Council meeting, it is
2 highly doubtful that the alleged election was conducted pursuant to tribal law.
3

4 I hereby declare under penalty of perjury under the laws of the United States of America
5 that the foregoing statement is true and correct. Executed this 16TH day of December, 2008 at
6 the Death Valley, California.
7

8
9 /S/Barbara Durham
10 Barbara Durham
11 Tribal Historic Preservation Officer
12 [Rosette & Associates retains a copy of the
13 executed signature]
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November 4, 2008

Attachment C

Joe Kennedy
Chairperson

Margaret Armitage
Vice-Chairman

Madeline Esteves
Secretary/Treasurer

Pauline Esteves
Council Member

Margaret Cortez
Council Member

Dear Mr. George Dean Gholson:

In Reviewing your application to be elected to the Tribal Council your eligibility to run for office was processed by the Election Committee. It appears you have been erroneously enrolled in the tribe.

The review of your enrollment record indicates that you are not a lineal descendant of the original March 1978 Membership Roll. As you may be aware, lineal descendancy from this Roll is a requirement for membership in the Timbisha Shoshone Tribe. Refer to Article III, Section 1 of the Timbisha Shoshone Tribal Constitution and Section 1 and Section X, of the Enrollment Ordinance attached.

We must take this action to protect the integrity of our tribal identity. A person enrolled as a member of our Tribe must be Timbisha Shoshone Indian. It is necessary and vital that our culture and history is protected by us and that only Timbisha Shoshone Indians are allowed enrollment in the Tribe.

If desired, the affected party may request an appeal with the Tribal Council. A denial maybe appealed to the Tribal Council within thirty (30) days following receipt of the rejection notice. This hearing must be held within thirty (30) days of the request hearing. If a hearing is requested, the Tribal Council shall review the appeal and give written notice of its decision to the appellant within thirty (30) days of the request for hearing. If no hearing is requested, the Council shall review the determination of the Enrollment Committee, and give written notice of the decision to the applicant within thirty (30) days.

Timbisha Shoshone Tribe

785 N. Main Street, Suite Q • Bishop, CA 93514 • PH: (760) 873-9003 • FAX: (760) 873-9004
Post Office Box 206 • Death Valley, California • 92328-0206 • PH: (760) 786-2374 • FAX: (760) 786-2376

The appeal must be submitted in writing and include facts justifying a reconsideration of the determination. The appeal should include any additional information or pertinent documents which support the claim. The burden of proof of establishing enrollment eligibility is on the appealing party. Appeal process section VI of the Enrollment Ordinance attached.

Any request for an appeal to the Tribal Council should be sent to:

Timbisha Shoshone Tribal Council
Attn: Joe Kennedy Chairman
P.O. Box 206
Death Valley, CA
92328

Thank you for your understanding of this vital Enrollment issue.

Sincerely,


Enrollment Committee Chairperson

Enrollment Ordinance:

Section I. - Eligibility Requirements for Membership

Membership in the Timbisha Shoshone Indian Tribe shall consist of the following:

- a. All persons who filed as Timbisha Shoshone Indians and were listed on the genealogy roll prepared as of March 1978 and used to request federal acknowledgment and recognition of the Tribe;
- b. All persons who are lineal descendants of any person designated in subsection (a) above and who possess at least one-fourth ($1/4$) degree Indian blood of which one-sixteenth ($1/16$) must be Timbisha Shoshone blood;

Section X. - Membership Obtained Through Error or Fraud

The Tribal Council shall revoke membership status from any individual whom the Enrollment Committee has determined to be erroneously, fraudulently or otherwise incorrectly enrolled. Upon direction from the Tribal Council, the Enrollment Committee shall correct the membership roll accordingly.

Timbisha Shoshone Constitution:

Article III:-Membership

Section 1.

Membership in the Timbisha Shoshone Indian Tribe shall consist of the following:

- a. All persons who filed as Timbisha Shoshone Indians and were listed on the genealogy roll prepared as of March 1978 and used to request federal acknowledgment and recognition of the Tribe,
- b. All persons who are lineal descendants of any person designated in subsection (a) above and who possess at least one-fourth ($1/4$) degree Indian blood of which one-sixteenth ($1/16$) degree must be Timbisha Shoshone blood

ENROLLMENT ORDINANCE

Section VI. - Appeals

Any person disapproved for enrollment shall have the right to appeal their denial and shall be informed of this right and of the appeals process. A denial may be appealed to the Tribal Council within thirty (30) days following receipt of the rejection notice. The appeal must be submitted in writing and include facts justifying a reconsideration of the denial. The appeal should include any additional information or pertinent documents which support the claim. The burden of proof in establishing enrollment eligibility is on the applicant or the applicant's representative.

If desired, an applicant may request a hearing in order to present his appeal to the Tribal Council. This hearing must be held within thirty (30) days of the request for hearing. If a hearing is requested, the Tribal Council shall review the appeal and give written notice of its decision to the appellant within thirty (30) days after the hearing. If no hearing is requested, the Tribal Council shall review the appeal and give written notice of its decision to the applicant within thirty (30) days of receipt of the appeal.

The decision of the Tribal council shall be final and the applicant shall have no other appeal rights.

EXHIBIT G

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10 Judith A. Shapiro
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18 Attorneys for Plaintiffs:
19 TIMBISHA SHOSHONE TRIBE, ET AL

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

16 TIMBISHA SHOSHONE TRIBE, a
17 federally recognized Indian tribe, as
18 represented by Joe Kennedy, Chairman
19 Timbisha Shoshone Tribe, Pauline Esteves,
20 Council Member, Timbisha Shoshone Tribe,
21 Madeline Esteves, Secretary/Treasurer of
22 Timbisha Shoshone Tribe
23
24 Plaintiffs

25 v.

26 DIRK KEMPTHORNE, Secretary,
27 UNITED STATES DEPARTMENT OF
28 THE INTERIOR, GEORGE T. SKIBINE,
Acting Assistant Secretary for Indian
Affairs, JERRY GIDNER, Director,
Bureau of Indian Affairs, DALE MORRIS,
Regional Director, Pacific Region,
Bureau of Indian Affairs
and DOES 1-5,

Defendants

CASE No. 08-03060-MCE-DAD

**DECLARATION OF ROBERTA HUNTER
IN SUPPORT OF A MOTION FOR A
TEMPORARY RESTRAINING ORDER**

**DECLARATION OF ROBERTA HUNTER IN SUPPORT OF A MOTION FOR A TEMPORARY
RESTRAINING ORDER**

DECLARATION OF ROBERTA HUNTER

I, ROBERTA HUNTER, hereby declare:

1. Each of the facts stated below is within my personal knowledge, and I would so testify if called as a witness at hearing.

2. I am the Director of the Timbisha Shoshone (Tribe) Tribal Housing Program. This program is a federally funded program and funded in its entirety via the United States Department of Housing and Urban Development (HUD) pursuant to the Native American Housing And Self Determination Act (NAHASDA) of 1996.

3. As Director of the Tribe's Housing program, I have firsthand knowledge of the housing programs funding, funding needs and requirements, funding disbursement procedures, program vendors, contracts, and various HUD funding programs, in addition to remaining aware of the Tribal members who are eligible to receive services by our various programs.

4. The Tribe's NAHASDA housing program is based on assisting tribal members with down-payment assistance, Student and Senior Rental Assistance, Home Acquisition Assistance and home improvement or rehabilitation assistance. The program cannot continue to provide tribal members assistance without access to the tribal bank accounts that were frozen on December 10, 2008.

5. As it stands currently, rental assistance payments to three (3) tribal members cannot be provided due to the blocked accounts. Down payment assistance for home ownership purchases to three (3) qualified members also cannot be made, again due to the blocked accounts. Additionally, on-going home improvements for handicapped, elderly and indigent members is also presently unavailable due to the inability to purchase materials or pay the contractor due to the blocked accounts. One priority housing project in particular, concerns an elderly handicapped lady and the replacement of a roof due to leakage and the renovation of a

1 bathroom and installation of a handicapped shower, toilet and flooring, has been halted or will be
2 abandoned completely if project funding is not available soon. The housing program also has
3 three (3) students receiving student housing assistance on a monthly basis who will not receive
4 housing assistance due to the blocked accounts. Finally, we have one Senior Rental Assistance
5 client whose rent is paid on a monthly basis. As of today, due to the blocked accounts she will
6 not receive her December or January assistance payment. All of the above tribal members likely
7 face eviction and/or homelessness if their housing assistance payments are not provided by the
8 housing program.
9
10

11 6. Since Mr. Morris's order, issued December 4, 2008, the Tribe's NAHASDA
12 housing program has been impacted severely, because all eight (8) on-going and pending
13 housing projects have been placed on hold due to a lack of access to blocked tribal bank
14 accounts. The frozen bank accounts impact the housing program because we are required by
15 federal regulations to draw down funds and within a three day period disburse the funds and we
16 are unable to release funds once drawn due to the blocking of the account. I cannot draw funds
17 knowing that I will not comply with the three day requirement.
18

19 7. Additionally, the lack of Internet service at the Tribe's Death Valley office
20 continues to greatly impact the housing program. I have electronic mail coming in that I cannot
21 now access and it will continue to affect my almost daily contact with our HUD grant manager
22 and other representatives. It also affects my ability to conduct my housing responsibilities
23 because I cannot access information for on-site training, new program guidance regulations,
24 procurement regulations, financial management programs and required housing policies-all of
25 which are required and necessary to fulfill HUD's requirement of maintaining compliance with
26 the regulations. I am also required to obtain certification for the training of housing programs for
27
28

1 all staff and Tribal Council participants, but cannot comply. I anticipate that continued
2 disruption of Internet and land line phone service will severely impact the Tribe's compliance
3 with HUD regulations.
4

5 8. Finally, four tribal members qualified for and were awarded Federal Emergency
6 Management Agency (FEMA) housing trailers in 2007. The contract for these trailers includes
7 "a payment upon delivery" clause that we will not be able to satisfy. If we cannot pay the
8 transport costs on these trailers, the recipients, which include an elderly member, will have to
9 wait, who knows how long, if ever, for delivery of their homes, until we are able to pay the
10 shipping charges. The trailers are anticipated to be delivered by the end of December for the first
11 allocation of homes and the second round of homes will come in January.
12

13
14 I hereby declare under penalty of perjury under the laws of the United States of America that the
15 foregoing statement is true and correct. Executed this 16th day of December, 2008 at the Big
16 Pine, California.
17

18
19 /s/Roberta Hunter

20 Roberta Hunter

21 Director-Timbisha Shoshone Tribal Housing
22 Program

23 [Rosette & Associates retains a copy of the
24 executed signature]
25
26
27
28

EXHIBIT H

1 JEFFREY R. KEOHANE (Cal. Bar No. 190201)

2 GEORGE FORMAN (Cal. Bar No. 047822)

3 FORMAN & ASSOCIATES

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12 Attorneys for Plaintiffs:

13 TIMBISHA SHOSHONE TRIBE, ET AL

14 **UNITED STATES DISTRICT COURT FOR**

15 **THE EASTERN DISTICT OF CALIFORNIA**

16
17 TIMBISHA SHOSHONE TRIBE, a federally
18 recognized Indian Tribe as represented by Joe Kennedy,
19 Chairman, Timbisha Shoshone Tribe, Pauline Esteves,
20 Council Member, Timbisha Shoshone Tribe, Madeleine
21 Esteves, Council Member, Timbisha Shoshone Tribe

22 Plaintiffs,

23 v.

24 DIRK KEMPTHORNE, Secretary Of The United States
25 Department Of The Interior, UNITED STATES
26 DEPARTMENT OF THE INTERIOR, GEORGE T.
27 SKIBINE, Acting Assistant Secretary for Indian Affairs,
28 JERRY GIDNER, Director of the Bureau of Indian
Affairs, DALE MORRIS, Pacific Regional Director-
Bureau of Indian Affairs, and DOES 1-5.

Defendants.

CASE No. 08-03060-MCE-DAD

**DECLARATION OF TAMEKA
VASQUEZ IN SUPPORT OF
TEMPORARY RESTRAINING
ORDER**

DECLARATION OF TAMEKA VASQUEZ

I, Tameka Vasquez, hereby declare:

1. Each of the facts stated below is within my personal knowledge, and I would so testify if called as a witness at hearing.

2. I am the Fiscal Officer for the Timbisha Shoshone Tribe ("Tribe") and have been employed in this position for the last ninety (90) days. In my capacity as Fiscal Officer I am aware of the Tribe's finances and available assets, and financial position on a daily basis.

3. I am aware of the current financial position of the Tribe having conducted an inventory of the Tribe's assets and financial accounts subsequent to Mr. Gholson's visit to the tribal office on December 12, 2008. As a result of my inventory of the Tribe's assets I provide the following information:

Vendors

- The Tribe conducts business with numerous vendors, for example for insurance, the Tribe has purchased insurance coverage through State Farm. Unless these coverages are maintained and paid, insurance over tribal vehicles will be terminated. Other possible terminations or interruptions of service will likely occur with the following vendors, if payments are not made immediately:
 - HughesNet-Internet service
 - AT& T-phone service
 - Verizon Conferancing-tele-conferancing
 - So. Cal Edison-power and electricity for the Death Valley Office
 - Schat.net-website hosting.

- 1 • The Tribe also currently maintains installment agreements with the Internal Revenue
2 Service (IRS) to pay off past due payroll deposits. The current IRS agreement will be
3 rendered null and void if it is not paid on time. If it is rendered void past due deposits
4 that were to be paid in installments will likely be accelerated and due in a lump sum,
5 which the Tribe is presently unable to afford to pay. If the lump sum payment is not
6 made, the IRS will then likely begin seizing tribal assets, bank accounts, grants, etc.,
7 in order to recoup the late payment amounts.
- 9 • I believe that the indebtedness to the IRS and EDD is somewhere between \$50-
10 100,000 dollars that is due and was being paid via the installment agreements.

11 **Bank Accounts**

- 12 • The Tribe was recently informed by Union Bank of California that all tribal
13 bank accounts have been frozen. Therefore, checks and other financial obligations of
14 the Tribe that were paid via check prior to December 4, 2008, will not be honored by
15 the bank and likely be returned. Moreover, tribal programs such as the NAHASDA
16 Tribal Housing, Toyiabe Indian Health, Elders, EPA and Historic Preservation office,
17 will not be able to pay their vendors, their employees and most importantly tribal
18 members, who rely on these programs for benefits or assistance checks will have to go
19 without. Most significantly, the Elder's program, which provides meals and food to
20 tribal elders, handicapped and indigent, will not be able to purchase food for
21 distribution to tribal members.

23 **Tribal Data**

- 24 • I am aware that on or about October 20, 2008, two computers seized by Mr.
25 George Gholson. These computers contained tribal fiscal files and records. As a
26 result of the loss of data, the Tribe will be unable to complete several projects that are
27 currently due. For example, the IRS was awaiting a form 433B to be completed and
28

1 sent in on December 15, 2008. Because of the removal of the computer we will not be
2 able to complete the project. Additionally, year-end reports for all tribal programs
3 such as Tribal Housing (HUD), Historic Preservation (THOP), Bureau of Indian
4 Affairs (BIA), will not be completed or submitted, which will greatly impair the
5 Tribe's ability to acquire or continue available grant funding.
6

7 **Outstanding Invoices and Draw Down Orders**

- 8 • As of the date of this declaration the following approximate amounts are
9 outstanding and are required to be paid to various vendors and tribal members for
10 services and assistance, but cannot be drawn down due to the blocked accounts:

11 \$17,000.00-Tribal Historic Preservation;

12 \$7,000.00 NAHASDA Housing;

13 \$7,000, Tribal EPA.
14
15

16 I declare under penalty of perjury under the laws of the United States that the foregoing is true
17 and correct. Executed this 16th day of December, 2008 at the Timbisha Shoshone Tribal Office, 900
18 Indian Springs Rd, Death Valley, California.
19
20

21 /s/Tameka Vasquez

22 Tameka Vasquez

23 Fiscal Officer

24 [Rosette & Associates retains a
25 copy of the executed signature]
26
27
28