

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 17, 2011  
Case No. 11-5049

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TIMBISHA SHOSHONE TRIBE, et al.,

Appellants,

v.

KENNETH LEE SALAZAR, Secretary of  
Interior, et al.,

Appellees.

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On Appeal from the United States District Court  
for the District of Columbia  
Case No. 1:10-cv-00968-GK, Judge Gladys Kessler

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**SUPPLEMENTAL BRIEF OF APPELLANTS**

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## SUMMARY

The Defendants-Appellees have presented the Court with an administrative decision rendered over three months ago that is under challenge in another federal court. Kennedy v. Dept. of the Interior, E.D.Cal., Civil Action No. 2:11-cv-00995-MCE-DAD. The plaintiffs in that lawsuit are substantially the same as the Plaintiffs-Appellants in this appeal; a copy of the First Amended Complaint is attached as Exhibit A. The government's claim, on the eve of oral argument, that this decision by the Assistant Secretary for Indian Affairs is relevant to Plaintiffs-Appellants' "capacity to maintain" this lawsuit, was presented to this Court pursuant to Fed. R. App. P. 28(j). That rule requires that the filing be "prompt." The government offered no explanation for waiting to the last moment, perhaps hoping that the late filing would confuse matters or divert the Court's attention from the compelling constitutional issues raised by Plaintiffs-Appellants.

In any event, the complex matter raised by the Assistant Secretary's decision is simply irrelevant to and not before the Court in this appeal – which is an appeal from the granting of a motion to dismiss the complaint. Further, the government and the Assistant Secretary's decision raise a multitude of factual issues and evidence not in the record, which should be limited, of course, to the allegations of the complaint for purposes of this appeal. The government offered no evidence below on these issues; the relevant evidentiary record consists entirely of the complaint and a detailed declaration by Plaintiff Kennedy. JA 153-54.

These reasons provide a more than sufficient basis for proceeding with this

appeal on its merits. But we will also address the substance of the Assistant Secretary's decision and the government's attempts to replace the tribal leadership that brought this action against the government. We want to be clear that the Assistant Secretary's decision is not legally valid and cannot survive judicial scrutiny. It is, if valid at all, a limited decision determining which government the Department of the Interior will recognize for purposes of dealing with the Tribe. This decision does not alter the fact that the Tribe is suing in its own behalf in this case and clearly has standing to assert its right to protect the Tribe's property and money.

## **ARGUMENT**

### **I. The Timbisha Shoshone Tribal Government provides laws and administrative and judicial processes for determining the lawful government of the Tribe.**

The Timbisha Shoshone Tribe has adopted its own written Constitution of the Timbisha Shoshone Indian Tribe (Tribal Constitution) attached as Exhibit B, comprehensive laws, and administrative and judicial processes. The Tribal Constitution, approved by the Secretary of the Interior, establishes the General Council as the supreme governing body of the Tribe, and the Tribal Council as subordinate. Tribal Constitution, Article V, §§ 2-3. The General Council retains *all* governmental powers not enumerated in the Tribal Constitution and also sits as a Court of Appeals whenever necessary. It may hear appeals from the Tribe's Supreme Court, yet to be appointed. Decisions of the Court of Appeals are final and binding upon all parties. Tribal Constitution, Article XIII, § 6.

Article III, § 1, of the Tribal Constitution limits tribal membership to persons "listed on the genealogy roll prepared as of March 1978 [the 1978 Base Roll]" and their "lineal descendants . . . who possess at least one-fourth (1/4) degree Indian blood of which one-sixteenth (1/16) degree must be Timbisha Shoshone blood." As required by Article III, § 6, of the Tribal Constitution, the Tribal Council enacted a comprehensive Enrollment Ordinance governing enrollment procedures, appeals, corrections, adoptions, disenrollment procedures, and other matters.

Under Article VI of the Tribal Constitution, an election board was created to administer and supervise elections and voting matters in accordance with the Tribe's election laws, now a comprehensive Election Ordinance No. 2006-01, adopted on August 19, 2006. Section 12 of the Election Ordinance addresses election appeals, which are final and not subject to further appeal, including procedures for filing such appeals, conducting hearings, and issuing decisions.

**II. The Decision of the Assistant Secretary is in violation of federal law, beyond the Assistant Secretary's authority, and is arbitrary and capricious.**

The decision in question and the prior decision of March 1, 2011 (Appellants' Reply Brief, at 22-23) ignore or overrule the Tribe's own laws and decisions. They are in gross violation of long-standing federal law, as we discuss below. The decisions are part of the Department of the Interior's inconsistent and almost incomprehensible string of actions to get rid of the elected leaders of the Timbisha Shoshone Tribe and to replace them with others. The relevant facts are

only partly and very inadequately reflected in the decision submitted to this Court by Defendants-Appellees. Up until 2007 and at various times after that, the elected Timbisha Tribal Council was duly recognized by the Department of the Interior. But in 2007, a faction (later two) broke away from the elected Council and attempted to hold a competing election for the Tribe. The Bureau of Indian Affairs at first refused to recognize either election but in February, 2008, decided to recognize the results of the Tribe's (Plaintiffs') election. Then in October, the Bureau decided to recognize George Gholson – who is not eligible to be a member of the Tribe by the standards set out in the Timbisha Constitution – and his faction and assisted him in seizing and taking away the Tribe's files, records and equipment, later rescinding that recognition and refusing to recognize any government. Administrative appeals were taken, one of which resulted in the decisions in question. This confusing and nonsensical history is detailed in the First Amended Complaint, attached as Exhibit A, challenging the legality of the decisions. The core issues in the *internal* dispute were the desire by the dissident factions to develop a casino and the disenrollment of 74 persons, including Gholson, who were found to be ineligible for enrollment because they do not meet the requirements of the Timbisha Constitution.

The Assistant Secretary's two decisions violate federal law and are arbitrary in many respects, including the following.

1. The decisions disregard and overrule the membership decisions of the Tribal Enrollment Committee and permit persons to vote and hold office who do

not meet the membership requirements of the Timbisha Constitution.

2. The July 29 decision recognizes the results of an election process that was unlawful, permitted ineligible persons to vote and run for office, and that denied some candidates (Plaintiffs) freedom of speech and an equal opportunity to campaign.

3. The decision goes beyond the Assistant Secretary's authority by calling for, funding, and recognizing the results of an election that is not permitted nor authorized by the Timbisha Constitution nor by federal law.

4. The decisions disregard the results of the Tribe's 2008 and 2009 elections, which were not appealed nor complained of.

5. The decisions denied due process of law by relying on factual material outside the record without notice or opportunity to be heard.

6. The decisions substitute the Assistant Secretary's interpretation of Timbisha tribal law for the decisions of the Timbisha General Council, the Enrollment Committee, and the Timbisha Election Committee.

In addition to the legal violations that are clear on the face of the decisions, there are many factual reasons why the decisions are arbitrary and contrary to law. Factual issues include: whether George Gholson and 73 others meet the membership requirements of the Timbisha Constitution; whether persons not meeting the membership criteria of the Timbisha Constitution were permitted to vote in the special election; whether the Department of Interior officials acted with enmity or bias toward Joe Kennedy and other members of the Timbisha Tribal

Council; whether candidates opposing the Gholson faction were denied freedom of speech and an equal opportunity to participate in the election; and whether the Department of Interior knowingly supported or condoned these unfair and illegal measures.

**III. The Assistant Secretary and the Department of the Interior do not have authority to determine who is the lawful government of the Timbisha Shoshone Tribe.**

Defendants-Appellees erroneously contend that the Assistant Secretary decides who is the lawful government of a tribe and that, therefore, Plaintiffs-Appellants lack authority and capacity to maintain this appeal. This is simply wrong and unsupported by law. The argument disregards nearly two centuries of federal court precedent recognizing inherent tribal authority over internal tribal governance matters.

**A. Tribal self-governance is inherent and generally exclusive.**

The principle that tribes are separate political entities having the inherent right of self-government was recognized by the Supreme Court in Cherokee Nation v. Georgia, 31 U.S. 1, 12, 32-38 (1831), and Worcester v. Georgia, 31 U.S. 515, 559-60 (1832), and the legal rule remains strong today. See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., 554 U.S. 316, 327-28, 128 S. Ct. 2709, 2718-19 (2008) (recognizing restricted tribal authority over nonmembers on the reservation, but affirming that tribes retain power to determine tribal membership and to legislate on the reservation); United States v. Wheeler, 435 U.S. 313, 322 (1978) (tribes have the power to regulate internal and

social relations); United States v. Mazurie, 419 U.S. 544, 557 (1975); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

**B. Federal authority and interference should be extremely limited in tribal self-governance matters.**

The Assistant Secretary lacks authority to determine the lawful government of a tribe. Contrary to the government's claim to this Court, the Assistant Secretary's Letter is neither "relevant" nor dispositive of Plaintiffs-Appellants' lawful status as plaintiffs or appellants in this case. As to tribal self-governance matters, the Assistant Secretary has only limited powers to decide which tribal governments to recognize for purposes of government-to-government relations with the United States and eligibility for Bureau of Indian Affairs-operated programs. See, e.g., Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60810 (Oct. 1, 2010), as supplemented 75 Fed. Reg. 66124 (Oct. 27, 2010).

A tribe's right to hold an internal "election without federal interference is essential to the exercise of the right of self-government." Wheeler v. Swimmer, 835 F.2d 259, 262 (10th Cir. 1987). In general, tribes have inherent and exclusive authority over internal governance, especially membership, tribal voting, and election matters, unless the right is surrendered by a tribe or otherwise taken. See, e.g., Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1463 (10th Cir. 1989); Wheeler v. Swimmer, 835 F.2d at 262; Goodface v. Grassrope, 708 F.2d 335, 339 (8th Cir. 1983). Federal interference is particularly restricted in matters involving

tribal elections where a tribe has in place administrative or judicial processes for handling disputes and contesting the elections. Where a tribe provides such a system, as in this case, the appropriate remedy is the tribal forum. Wheeler v. U.S. Department of Interior, 811 F.2d 549, 553 (10th Cir. 1987). Moreover, federal courts lack jurisdiction to review tribal election disputes, again, especially where a tribe provides administrative and judicial processes for resolving election disputes. Goodface v. Grassrope, 708 F.2d 335, 339 (8th Cir. 1983) (emphasizing that, particularly because the tribe has a tribal court, "[i]t is essential that the parties seek a tribal remedy"). The Supreme Court explicitly held that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1301 *et seq.*, does not confer any authority on federal courts to review tribal voting and election issues. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978). Since Martinez, federal courts have deferred to tribes to make decisions or hear actions related to tribal elections. See, e.g., Wheeler v. Swimmer, 835 F.2d at 261 (declining to review a challenge to a tribal election); Shortbull v. Looking Elk, 677 F.2d 645, 650 (8th Cir. 1982) (recognizing tribe's "right to define who is eligible to run for office and vote in elections"); McCurdy v. Steele, 506 F.2d 653, 656 (10th Cir. 1975) (deferring to tribe on decision of election issue).

#### **IV. The Decision does not affect the Tribe's standing or its capacity to bring this suit.**

The district court decided correctly that recognition by the Department of the Interior is not necessary in order for a tribe to sue in its own behalf. JA 341-45.

See Golden Hill Paugussett Tribe v. Weicker, 39 F.3d 51, 58 (2d Cir. 1994).

Moreover, as we have shown above, the Assistant Secretary does not have the legal authority to designate who does or does not constitute the government of a tribe. Thus, the decision in issue cannot as a matter of law alter the legal authority that has been alleged by the Plaintiffs-Appellants. Of course, it is possible for the Plaintiffs' authority to be challenged, but such a challenge cannot be raised on appeal based on facts outside the record nor in the context of a motion challenging the legal sufficiency of the complaint. See Appellants' Reply Brief at 24-25.

It is important to note that this suit is brought by the Timbisha Shoshone Tribe in its own behalf, not only by elected officials of the Tribe. The standing of the Tribe itself to assert its own right to the money in issue is clear. This case, therefore, presents a case or controversy, and this Court continues to have jurisdiction. For further discussion, see Appellants' Reply Brief at 25-27.

**V. This Court need not and should not attempt to resolve the issues raised by this untimely submission of new factual material not part of the record.**

The administrative decision was made public by the Secretary of the Interior's subordinate *more than three months ago*. This is an untimely and improper attempt to insert new and hotly contested factual allegations into this appeal. It is elementary, of course, that documents not part of the record may not be considered on appeal. United States v. West, 392 F.3d 450, 455 (D.C. Cir. 2004).

Just as important, the legal and factual issues raised by the decision of the Assistant Secretary are presently the subject of a separate lawsuit by the Timbisha Shoshone Tribe, represented by other counsel. Confusion and duplication of effort would result from attempting to decide these same issues on this appeal.

### **CONCLUSION**

The decision of the Assistant Secretary is part of an unlawful pattern of action aimed at disabling the Timbisha Shoshone government and replacing it with a different one. The government's argument is particularly suspect, because the government is attempting to shield its taking of the Tribe's money from any judicial review. This Court should reject the Defendants-Appellees' effort to inject these new factual issues into this appeal.

November 15, 2011

/S/

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**CERTIFICATE OF SERVICE**

I certify this Supplemental Brief of Appellants was served on November 15, 2011 by electronic filing using the Court of Appeals CM/ECF system on the following:

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**CERTIFICATE OF COMPLIANCE WITH PAGE LIMITATION,  
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the page limitation of the Court's Per Curiam Order of November 10, 2011, because this brief contains ten pages of text.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version X3, in Times New Roman 14 point type.

\_\_\_\_\_  
/S/

Robert T. Coulter  
Attorney for Plaintiffs-Appellants

Dated: November 15, 2011

**STATUTORY ADDENDUM**

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## **§ 1301. Definitions**

For purposes of this subchapter, the term--

- (1) “Indian tribe” means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
- (2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
- (3) “Indian court” means any Indian tribal court or court of Indian offense; and
- (4) “Indian” means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

## **§ 1302. Constitutional rights**

(a) In general

No Indian tribe in exercising powers of self-government shall--

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against

himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who--

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall--

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding--

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant--

(1) to serve the sentence--

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term “offense” means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

### **§ 1303. Habeas corpus**

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

\* \* \*

**ATTACHMENTS**

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First Amended Complaint for Declaratory and Injunctive Relief . . . . . Exhibit A  
[Case No. 2:11-cv-00995-MCE-DAD]

Timbisha Shoshone Constitution . . . . . Exhibit B

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOSEPH "JOE" KENNEDY, as Chairman and an  
 individual member of the Timbisha Shoshone  
 Tribe, ANGELA "ANGIE" BOLAND, as Vice  
 Chair and an individual member of the Timbisha  
 Shoshone Tribe, GRACE GOAD, as Secretary-  
 Treasurer and an individual member of the  
 Timbisha Shoshone Tribe, ERICK MASON and  
 HILLARY FRANK, as Tribal Council Members  
 and as individual members of the Timbisha  
 Shoshone Tribe, and MADELINE ESTEVES, an  
 individual member of the Timbisha Shoshone  
 Tribe, and PAULINE ESTEVES, an individual  
 member of the Timbisha Shoshone Tribe,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE  
 INTERIOR, BUREAU OF INDIAN AFFAIRS,  
 LARRY ECHO HAWK, Assistant Secretary of the  
 Interior for Indian Affairs, AMY DUTSCHKE,  
 Director of the Pacific Regional Office of the  
 Bureau of Indian Affairs, and TROY BURDICK,  
 Superintendent of the Central California Agency of  
 the Bureau of Indian Affairs,

Defendants.

CASE NO. 2:11-cv-00995-MCE-DAD

**FIRST AMENDED COMPLAINT  
 FOR DECLARATORY AND  
 INJUNCTIVE RELIEF**

Date:

Time:

Judge: Hon. Morrison C. England, Jr.

## INTRODUCTION

1  
2 1. This case represents another round in the long-term struggle between the Death  
3 Valley Timbisha Shoshone Tribe ("Tribe") and the Department of the Interior ("DOI") over the  
4 character of the Tribe and its government. DOI has interfered in the internal tribal affairs of the  
5 Tribe for the last four years in an effort to install a tribal government more to its liking. DOI has  
6 recognized a quasi-government operating as a wholly-owned and operated subsidiary of a gaming  
7 developer, GIE, that was rejected by the Death Valley Tribal Council in 2008.

8 2. Plaintiffs seek declaratory and injunctive relief from a decision in an administrative  
9 appeal before Defendant Larry Echo Hawk, the Assistant Secretary of the Interior -- Indian Affairs  
10 ("Echo Hawk" or "AS-IA"), styled *Joe Kennedy, Pauline Esteves, Madeline Esteves, Angie Boland,*  
11 *and Erick Mason v. Pacific Regional Director, Bureau of Indian Affairs* issued on March 1, 2011  
12 ("EHD I") and July 29, 2011 ("EHD II") (collectively "EHD"). The EHD originated when three  
13 former Tribal Council members, Edward Beaman, Virginia Beck, and Cleveland Casey ("Beaman  
14 Faction") held an election in 2007 in competition with the Tribal Election Board. When the DOI's  
15 Bureau of Indian Affairs ("BIA") recognized the election held by the Tribal Election Board, the  
16 Beaman Faction appealed ("Beaman Appeal"), seeking recognition of its purported election.  
17 Plaintiffs, individually and as the Death Valley Tribal Council, opposed the Beaman Faction's  
18 appeal. In 2009, the Pacific Regional Office decided against both the Beaman Faction and the Death  
19 Valley Tribal Council.

20 3. The Death Valley Tribal Council appealed to the Interior Board of Indian Appeals  
21 ("IBIA"). The AS-IA, took jurisdiction over the appeal, but waited one year to issue a briefing  
22 schedule and the record on appeal ("Record") and took another year to issue the EHD. In issuing the  
23 EHD, Echo Hawk relied on materials outside of the record without informing the parties and without  
24 providing them an opportunity for further briefing contrary to DOI regulations. The EHD recognized  
25 neither party to the administrative litigation; instead, the EHD recognized the Gholson Faction -- an  
26 entirely new entity formed during the pendency of the appeal that abandoned its own parallel appeal  
27 for recognition to Echo Hawk. The EHD exceeded DOI's legal authority, is based on mistakes of  
28 fact, ignored relevant facts in the Record, relied on facts not in the Record, made significant mistakes

1 of fact and law, and failed to supply sufficient reasons for its conclusions.

2 **JURISDICTION**

3 4. The Court has jurisdiction over the subject matter and parties pursuant to 28 U.S.C. §  
4 1331, in that Plaintiffs seek judicial review and reversal of the EHD, and federal law – the APA, 25  
5 CFR Part 2, and federal case law – is determinative of the issues involved.

6 5. The Court has the authority to review the final decisions made by administrative  
7 agencies of the United States pursuant to 5 U.S.C. §§ 701-705. The EHD is a decision of the AS-IA,  
8 and DOI regulations provide that decisions by the AS-IA are final agency actions for the purpose of  
9 judicial review:

10 Decisions made by the Assistant Secretary-Indian Affairs shall be final  
11 for the Department and effective immediately unless the Assistant  
Secretary-Indian Affairs provides otherwise in the decision.

12 25 CFR § 2.6(c). The EHD is therefore “final so as to constitute Departmental action subject to  
13 judicial review under 5 U.S.C. 704.” *Id.* § 2.6(a).

14 6. The Court has authority to issue declaratory relief pursuant to 28 U.S.C. § 2201, and  
15 to issue preliminary and permanent injunctive relief pursuant to the Court’s equitable powers and  
16 FRCP 65, because Plaintiffs have no plain, speedy or adequate remedy at law.

17 7. Plaintiffs have standing to bring this suit as duly-elected current and past members of  
18 the Death Valley Tribal Council. All Plaintiffs have standing as members of the Tribe who have  
19 suffered direct injuries as a consequence of the EHD. Plaintiffs, with the exception of Hillary Frank,  
20 were appellants in the DOI administrative appeals and have been aggrieved by the AS-IA having  
21 issued the EHD in violation of the APA, DOI’s regulations and federal case law. Plaintiffs have  
22 exhausted their administrative appeals, resulting in a final agency action by the AS-IA, the EHD.  
23 The EHD has caused them direct injuries and injuries traceable to the EHD that this Court may  
24 redress through a declaration of the rights and other legal relations of the parties, an injunction  
25 against Defendants, and remand to DOI for further proceedings.

26 **VENUE**

27 8. Pursuant to 28 U.S.C. § 1391(e), venue is proper in this District in that defendant  
28 Echo Hawk maintains an office in the City of Sacramento, California within this District, BIA

1 Pacific Regional Director Amy Dutschke ("Dutschke") and BIA Central California Agency  
2 Superintendent Troy Burdick ("Burdick") reside in or near the City of Sacramento, California, within  
3 this District, and a substantial part of the events or omissions giving rise to Plaintiffs' claim occurred  
4 in this District. Pursuant to Local Rule 120, intradistrict venue is proper in Sacramento, in that all  
5 defendants maintain offices in Sacramento, and records pertaining to the action are present in  
6 Sacramento.

7  
8 **PARTIES**

9 9. Plaintiff Joe Kennedy is listed on the Tribe's 1978 Base Roll as approved by the BIA  
10 in 1982, is a currently enrolled Tribal Member, and was most recently elected to the Death Valley  
11 Tribal Council in the General Election held in November 2009. He has served as the Tribe's  
12 duly-elected Chairman since 2004. He was the Chairman of the 2007 Death Valley Tribal Council  
13 recognized by Troy Burdick in 2008. He was the Chairman of the 2006 Death Valley Tribal Council  
14 recognized by Dale Morris in 2009. As Chairman, his name is often used to denote the Tribal  
15 Councils on which he sits, but as Chairman he does not vote except to break tie votes of the Tribal  
16 Council or General Council. He was an appellant in the DOI administrative proceedings starting in  
17 2008. His family's adobe home was one of those destroyed by DOI in the 1940s when his father was  
18 serving in WWII.

19 10. Plaintiff Angie Boland is listed on the Tribe's 1978 Base Roll as approved by the BIA  
20 in 1982, and is a currently enrolled Tribal Member. She has served the Tribe in elected and  
21 appointed capacities since the 1980s. She was elected to the Tribal Council in the General Election  
22 of 2008 and most recently in the General Election of 2010. She has served as the Tribe's  
23 duly-elected Vice Chair since 2009. She was an appellant in the DOI administrative proceedings.  
24 HUD froze tribal housing funding on the basis of DOI decisions, preventing the Tribal Housing  
25 Department from rehabilitating the FEMA trailer on the Timbisha Reservation in Death Valley in  
26 which Boland planned to live when she moved back to Death Valley where she works.

27 11. Plaintiff Grace Goad is a Tribal Elder. She helped prepare the Tribe's 1978 Base Roll  
28 approved by the BIA in 1982. Her name appears on the 1978 Base Roll and she is a currently  
enrolled Tribal Member. She has served in various elected and appointed official capacities since

1 the 1970s. She was most recently elected to the Tribal Council in the General Election held in  
2 November 2009, and has served as the Tribe's duly-elected Secretary-Treasurer since 2010. She was  
3 an appellant in the DOI administrative proceedings. She lives on the Timbisha Reservation in Death  
4 Valley, CA, and as a Tribal Elder, depends upon the medical care and air conditioning that were  
5 available at the Tribal Offices and Community Center in Death Valley. Both have been shut down as  
6 a result of the Echo Hawk Decision. She is one of the last native speakers of the Timbisha  
7 Language.

8 12. Plaintiff Erick Mason's name appears on the Tribe's 1978 Base Roll as approved by  
9 the BIA in 1982, is a currently enrolled Tribal Member, and has served on the Tribal Council in the  
10 early 2000s and was most recently elected to the Tribal Council in the General Election of 2009. He  
11 was an appellant in the DOI administrative proceedings. He is a keeper of ancient Timbisha  
12 Shoshone songs and dances and is charged with the organization of traditional gatherings and  
13 celebrations, which are centered on Death Valley.

14 13. Plaintiff Hillary Frank is the daughter of a member listed on the Tribe's 1978 Base  
15 Roll as approved by the BIA in 1982, is a currently enrolled Tribal Member, and was elected to the  
16 Tribal Council in the Tribe's General Election held in November 2010.

17 14. Plaintiff Pauline Esteves is a Tribal Elder. She helped prepare the Tribe's 1978 Base  
18 Roll approved by the BIA in 1982. Her name appears on the 1978 Base Roll and she is a currently  
19 enrolled Tribal Member. She has served as Chairperson and in other tribal elected and appointed  
20 capacities since the 1970s, including serving as Chairperson when the Tribe obtained federal  
21 recognition and when the Tribe obtained passage of the Timbisha Shoshone Homeland Act of 2000.  
22 Most recently she served on the Tribal Council from 2007 through 2009. She was an appellant in the  
23 DOI administrative proceedings. She lives on the Timbisha Reservation in Death Valley, CA, and as  
24 a Tribal Elder, depends upon the medical care and air conditioning that were available at the Tribal  
25 Offices and Community Center in Death Valley. Both have been shut down as a result of the EHD.  
26 She is one of the last native speakers of the Timbisha Language. EHD I falsely accuses her of being  
27 a convicted felon.

28 15. Plaintiff Madeline Esteves is a Tribal Elder, and sister-in-law of Pauline Esteves. She

1 helped prepare the Tribe's 1978 Base Roll approved by the BIA in 1982. Her name appears on the  
2 1978 Base Roll and she is a currently enrolled Tribal Member. She has served in various tribal  
3 elected capacities since the 1970s. Most recently she served on the Tribal Council from 2006 through  
4 2010 as Secretary-Treasurer. She left the Tribal Council in 2010 due to an illness in her family. She  
5 was an appellant in the DOI administrative proceedings. She lives on the Timbisha Reservation in  
6 Death Valley, CA, and as a Tribal Elder, depends upon the medical care and air conditioning that  
7 were available at the Tribal Offices and Community Center in Death Valley. Both have been shut  
8 down as a result of the EHD. She is one of the last native speakers of the Timbisha Language.

9 16. Defendant Department of the Interior is a Cabinet-level department of the federal  
10 government, responsible, among other things for Indian Affairs, which includes protecting tribal trust  
11 assets and tribal sovereignty, economic development, and general tribal welfare. DOI is also  
12 responsible for implementation of the Timbisha Shoshone Homeland Act of 2000. 16 USC § 410aaa  
13 Note. DOI does not have authority to make tribal election or enrollment decisions.

14 17. Defendant Bureau of Indian Affairs is an agency of the Department of the Interior,  
15 responsible for, among other things, protecting tribal trust assets and tribal sovereignty, economic  
16 development, and general tribal welfare. BIA does not have authority to make tribal election or  
17 enrollment decisions.

18 18. Defendant Larry Echo Hawk is the Assistant Secretary of the Interior for Indian  
19 Affairs, and is sued in that capacity. Echo Hawk exercises supervisory authority over the BIA,  
20 Dutschke and Burdick, and rendered the final decision of which Plaintiffs seek judicial review.

21 19. Defendant Amy Dutschke is the Director of the BIA's Pacific Regional Office, and is  
22 sued in that capacity. Dutschke is the successor to former Regional Director Dale Morris, who  
23 rendered the decision overruling Defendant Burdick's decision. Acting beyond his legal authority,  
24 Morris authorized an Inyo County Deputy Sheriff to assist an individual, George Gholson, who was  
25 not elected by the Tribe but had been temporarily recognized by BIA, to remove tribal property,  
26 including all electronic and paper files, from the Tribe's office in Death Valley to a location 160  
27 miles from the Tribe's Reservation. In her capacity as Regional Director, Dutschke carries out the  
28 directives and policies of Echo Hawk and exercises supervisory authority over defendant Burdick.

20. Defendant Troy Burdick is the Superintendent of the BIA's Central California Agency, and is sued in that capacity. Burdick rendered the initial decision to recognize the Tribe's 2007 General Election that was overruled by Dutschke's predecessor Dale Morris. Acting beyond his legal authority, Burdick authorized an Inyo County Deputy Sheriff to assist an individual, George Gholson, who was not elected by the Tribe or recognized by BIA, to remove tribal property from the Tribe's office in Death Valley to a location 160 miles from the Tribe's Reservation.

**THERE ARE NO PERSONS REQUIRED TO BE JOINED IF FEASIBLE  
WHO ARE NOT JOINED IN THIS MATTER**

21. Pursuant to FRCP 19©, Plaintiffs are required to list "the name, if known, of any person who is required to be joined if feasible but is not joined \*\*\* and the reasons for not joining that person." There is no such person, therefore, a statement pursuant to FRCP 19(c) is not required. The only relief that Plaintiffs request in this First Amended Complaint is that the Court remand the EHD to DOI for further proceedings in compliance with the APA and federal regulations. The Court "can[] accord complete relief among existing parties" in their absence because the only relief sought in this Complaint is relief against DOI, BIA, and their employees.

***Brief Description of the Bishop Factions***

22. The Honorable Judge O'Neill of this Court coined the terms Bishop and Death Valley Factions to refer to the Beaman Faction and Plaintiffs, respectively. Although many of the supporters of the Death Valley Tribal Council live in and around Bishop, the coinage was apt because the seat of Tribal Government has always been located in Death Valley, whereas the Factions have been located in Bishop or have had no fixed address.

23. In 2007, the Beaman Faction broke away and unsuccessfully attempted to convince DOI and the public that it represented the Tribe. They met in private and did not attend regularly scheduled Tribal Council meetings. The charges against Beaman and Beck that led to them leaving the Tribal Council were brought by Margaret Cortez and Wallace Eddy. In 2008, George Gholson, Wallace Eddy, and Margaret Cortez ("Gholson Faction") formed their own faction because they disagreed with the Tribal Council's decision to reject a casino deal with GIE. Gholson, Beaman, Beck, and Casey are cousins. Wallace Eddy and Margaret Cortez are siblings.

1           24.    The two Factions were incompatible since, among other things, both Beaman and  
2 Gholson claimed to be the Tribal Chairman. To make it appear that they had five members, the  
3 Beaman and Gholson Factions both claimed different members of the Death Valley Tribal Council as  
4 members of their purported councils. They both held phony elections to fill out their ranks as well.  
5 They did not inform the Death Valley Tribal Council members that they claimed sat on their councils  
6 of meetings of their councils, and the Death Valley Tribal Council members did not recognize either  
7 Faction as legitimate.

8           25.    In 2008-2011, the Beaman and Gholson Factions cooperated to a degree, but also  
9 maintained separate personalities. The Gholson and Beaman Factions sued DOI in this Court, and  
10 the Beaman Faction sued the Death Valley Tribal Council in state court. The Beaman Faction  
11 sought to convince the California Gambling Control Commission to give it the RSTF payments due  
12 to the Tribe, while the Gholson Faction sought to shut down the RSTF payments. The Beaman  
13 Faction sought to gain control of tribal accounts in state court interpleader actions on its own behalf.  
14 When it succeeded temporarily, it distributed the funds to its three members, its gaming partners, and  
15 its law firm rather than using them for tribal purposes or sharing them with the Gholson Faction.  
16 Both took advantage of the Beaman Faction's appeal for recognition from DOI as the vehicle to  
17 permit DOI to refuse to support the Death Valley Tribal Council, using over \$1 Million in gaming  
18 developers' money to support the effort.

19           26.    Unlike the Death Valley Tribal Council, both the Gholson and Beaman Factions were  
20 backed by gaming developers rejected by the Death Valley Tribal Council. The Beaman Faction was  
21 backed by Merrion, and the Gholson Faction was backed by GIE. The Beaman Faction was  
22 represented by the law firm of Fredericks Peebles & Morgan, which was also employed by the  
23 Merrion gaming developer. The Gholson Faction was represented by that firm and also by attorneys  
24 Kitto and Ryan, employed by the GIE gaming developer. The Death Valley Tribal Council was not  
25 backed by any gaming developer and has been represented by pro bono legal counsel since 2008,  
26 including the undersigned.

27           27.    The Gholson and Beaman Factions have no protected interest in an unlawful  
28 administrative process, therefore "disposing of the action in [their] absence" will not "impair or

1 impede” their ability to protect their interests and will not subject the current parties “to a substantial  
2 risk of incurring double, multiple, or otherwise inconsistent obligations.” The Gholson Faction  
3 “would not be prejudiced because [they] have an equal interest in an administrative process that is  
4 lawful.” *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990)

5 **FACTUAL AVERMENTS COMMON TO ALL CLAIMS FOR RELIEF**

6 **HISTORY OF THE TRIBE**

7 28. The Timbisha were just one of six Western Shoshone bands speaking distinct but  
8 cognate languages in an area spanning the California-Nevada border at the time of first contact with  
9 non-Indians. The Timbishas were the only Shohsones in Death Valley, and did not range far from  
10 mountains above it. The Tribe called Death Valley “Timbisha” after an ochre pigment used in their  
11 ceremonies found that was only found on a mountain above the Tribe’s village at Furnace Creek.  
12 Non-Timbisha Western Shoshone bands lived in the Owens, Panamint, Saline Valleys and other  
13 areas between Death Valley and the Sierra Nevada. Their descendants migrated to the Lone Pine,  
14 Big Pine, and Bishop Indian reservations or became landless. Although some were forced to leave to  
15 find work or housing, Timbishas held onto their village in Death Valley despite efforts by DOI to  
16 force them to leave.

17 29. The Tribe has had to resist DOI’s efforts to remove it from Death Valley for most of  
18 the last century. The Tribe’s initial efforts to resist displacement by DOI began when the land under  
19 the Timbisha Village and other important tribal lands were deemed part of the public domain and  
20 granted to miners by the General Land Office of DOI. A short hiatus in DOI’s efforts to eliminate  
21 the Tribe arrived when President Hoover proclaimed Death Valley National Monument in 1933.  
22 DOI encouraged the Tribe to organize, and the Tribe adopted a three-member Tribal Council. DOI  
23 appropriated the site of the Timbisha Village for its Visitor Center, however. It promised the  
24 Timbisha new houses with running water and electricity if they would move to a waterless location  
25 out of sight of the Visitor Center. DOI built the houses and installed a common spigot, but did not  
26 provide running water and electricity for another four decades.

27 30. Beginning in the 1940s, DOI actively sought to evict the Tribe. Methods used by DOI  
28 included using scarce Death Valley water to destroy tribal members’ adobe homes when found

1 “empty”. When Joe Kennedy, Chairman Kennedy’s father, returned from World War II, he found  
2 his house demolished. Without electricity, the Timbishas had no method of cooling their houses, and  
3 so continued their traditional trek to the mountains in the summer. On their return, some found their  
4 houses gone. The Timbisha were forced to remain in their homes to protect them from the federal  
5 government. DOI also prevented any construction, including repairs, in an attempt to drive the  
6 Timbishas out of their homes.

7 31. In the 1960s and 1970s, a group of Timbishas in and out of the tribal government,  
8 including elders and Plaintiffs Madeline Esteves, Pauline Esteves, and Grace Goad, began a  
9 campaign for their rights. Electricity and water were finally provided, but Timbishas could not  
10 obtain their land or the services provided to other tribes because DOI asserted that, notwithstanding  
11 its support of the tribal government organization in the 1930s, the Tribe was not recognized as an  
12 Indian tribe. The Tribe assembled an application for federal re-recognition and submitted it in 1979.  
13 The points of contact for DOI at the Tribe were Pauline and Madeline Esteves whose names appear  
14 in the relevant federal documents.

15 32. As part of the application for federal recognition, the Tribe compiled a base roll of  
16 Timbishas with at least one-quarter Indian blood (“1978 Base Roll”). All members on that list were  
17 either residents of Death Valley or their children who had left for work or housing. The Tribe  
18 considered, and then rejected basing membership on a BIA document called “Indians Living in or  
19 Near Death Valley in March 1936” as being too broad – the 1936 “census” included Paiutes, eastern  
20 Indians, and non-Indians, as well as Shoshones undifferentiated by band.

21 33. In 1982, DOI decided to acknowledge the Timbishas as an Indian tribe. In its  
22 decision, DOI found that the Tribe was the successor to a single autonomous Indian entity composed  
23 of Timbishas living in Death Valley since time immemorial, and to the entity with which DOI dealt  
24 in the 1930s through the three-member Tribal Council representing the Timbisha Village. It found  
25 that all known Timbishas were on the 1978 Base Roll, and that they all descended from about 10  
26 families known from the historic record as having lived within Death Valley.

27 34. DOI’s federal acknowledgment regulations provide that:

28 Upon acknowledgment as an Indian tribe, the list of members  
submitted as part of the petitioners documented petition shall be the

1 tribe's complete base roll for purposes of Federal funding and other  
2 administrative purposes. For Bureau purposes, any additions made to  
3 the roll, other than individuals who are descendants of those on the roll  
4 and who meet the tribe's membership criteria, shall be limited to those  
5 meeting the requirements of Sec. 83.7(e) and maintaining significant  
6 social and political ties with the tribe (i.e., maintaining the same  
7 relationship with the tribe as those on the list submitted with the  
8 group's documented petition).

9 25 CFR 83.12.

10 35. After formal re-recognition, Timbishas continued their activism against federal  
11 policies, joining with other Western Shoshone bands with and without formal recognition. Despite  
12 federal recognition, the Tribe did not have land and were treated as squatters in their Death Valley  
13 homeland and prevented by DOI from carrying out traditional cultural practices within Death Valley.  
14 After many years of protesting against the lack of rights to their own lands, the Timbishas, led by  
15 Plaintiffs Pauline Esteves, convinced Congress to require DOI to study where to locate a reservation  
16 for the Tribe in and around Death Valley. The California Desert Protection Act of 1994 required:

17 The Secretary [of the Interior], in consultation with the Timbisha  
18 Shoshone Tribe and relevant Federal agencies, shall conduct a study, . .  
19 . to identify lands suitable for a reservation for the Timbisha Shoshone  
20 Tribe that are located within the Tribe's aboriginal homeland area  
21 within and outside the boundaries of the Death Valley National  
22 Monument and the Death Valley National Park.

23 16 USC 410aaa-75(b). DOI found that no lands within the three-million acre park could be spared to  
24 provide a reservation for the Tribe.

25 36. The Timbishas, led by Plaintiff Pauline Esteves and other Tribal Elders, resisted.  
26 Among other things, tribal members held protests in Death Valley National Park, in view of  
27 thousands of American and foreign tourists and the press. DOI returned to the negotiating table,  
28 resulting in an agreement implemented by Congress in the Timbisha Shoshone Homeland Act of  
2000 ("Homeland Act"). Pub. L. 106-423, 114 Stat. 1875 (16 USC 410aaa Note). The Homeland  
Act reserved over 7,000 acres of land in trust for the Tribe in and around the Park, including over  
300 acres around the Timbisha Village. The Homeland Act also designated many areas of the  
National Park for special or cooperative Timbisha uses and management to protect and nurture  
Timbisha culture in the Park.

1           37. The hearings on the Homeland Act revealed the long mistreatment of the Timbishas  
2 by DOI and the Tribe's deep ties to Death Valley. The Homeland Act and the congressional hearings  
3 identified preservation of Timbisha culture and language as the purpose for establishing the  
4 Reservation in and around Death Valley and establishing special management areas within the  
5 mountains and valleys of the Park.

6           38. The congressional and DOI understanding of the purposes of the Homeland Act were  
7 further explained by a Legislative Environmental Impact Statement ("LEIS"), which described the  
8 planned development of the new Timbisha Reservation. Planned development in Death Valley  
9 included up to 50 single family homes, tribal offices, recreation facilities, a multi-purpose room and  
10 kitchen, senior and youth facilities, and other tribal needs. In addition, the LEIS proposed an upscale  
11 desert inn with a Timbisha theme, a cultural museum and gift shop, and provision of tribally led  
12 hikes, lectures, and tours. The LEIS also contemplated housing and small scale economic  
13 development on the other parcels outside of the Park, and the purchase of a privately owned ranch  
14 originally developed by a Timbisha family at Lida.

15           39. Section 5(d)(2) of the Homeland Act provides that:

16                   The Secretary [of the Interior] may purchase from willing sellers \*\*\*  
17                   Lida Ranch, Nevada, an area of approximately 2,340 acres, as  
18                   generally depicted on the map entitled 'Lida Ranch' numbered Map #7  
                    and dated April 6, 2000, or another parcel mutually agreed upon by the  
                    Secretary and the Tribe.

19 Lida Ranch is located on ancestral lands of the Timbisha and was formerly owned by members of the  
20 Tribe. It is not near a major population or transportation route.

21           40. As an attorney in private practice, Kevin Gover, who happened to have been the  
22 AS-IA when the Homeland Act was signed, introduced a gaming developer called Rinaldo to the  
23 Tribe. Rinaldo argued that instead of acquiring the Lida Ranch, DOI could accept in trust for  
24 Timbisha a parcel of land in Hesperia, CA, owned by Rinaldo. Hesperia is on the I-15 Freeway, the  
25 route from Los Angeles to Las Vegas, near the Los Angeles Metropolitan Area. Since then, a  
26 succession of gaming developers have promoted the same idea, offering cash, free cars, and other  
27 inducements to attempt to sway Tribal Council members to support their projects.

28           41. The Indian Gaming Regulatory Act of 1988 ("IGRA") generally prevents gaming on

1 parcels acquired in trust for an Indian tribe after 1988. One of the limited exceptions to the ban on  
2 tribal gaming on lands acquired after 1988 is for a tribe's initial reservation. Section 7(c) of the  
3 Homeland Act provides that,

4           Lands taken into trust for the Tribe pursuant to section 5, except for the  
5           Park land described in subsections (b)(1)(A) and (d)(1) of such section,  
6           shall be considered to be the Tribe's initial reservation for purposes of  
7           section 20(b)(1)(B)(ii) of the Indian Gaming Regulatory Act (25  
8           U.S.C. 2719(b)(1)(B)(ii)).

9           42. In April 2007, GIE purchased the Las Flores Ranch in Hesperia, CA, intending to  
10 build a tribal casino on it. After failing to convince other tribes to participate in the scheme, GIE  
11 approached Timbisha in the autumn of 2007, during the Beaman Faction's attempts to gain  
12 recognition. GIE's principal, Grish Akopian, represented that he owned the Ranch "free and clear"  
13 and offered to fund the Tribe through its difficulties to induce Timbisha to enter a predevelopment  
14 agreement. Unknown to the Tribe, a creditor of the former owner of the Ranch sued GIE, Grish  
15 Akopian, and others for fraudulent transfer seeking to set aside the sale of the Ranch. Also unknown  
16 to the Tribe, GIE still owed approximately \$5.4 million under an assumed deed of trust on the land,  
17 which had been due in October 2007. On January 20, 2008, the General Council approved  
18 Resolution 2008-04 authorizing the Tribal Council to negotiate with GIE.

19           43. When the Tribal Council rejected the GIE deal, Akopian funded a three-year  
20 campaign to replace the Tribal Council with the Gholson Faction. Plaintiffs are informed and  
21 believe, and on that basis allege, that GIE has spent at least \$1.1 million to pay George Gholson a  
22 salary, rent him an office across the street from the Bishop Reservation, support lobbyists and  
23 multiple law firms in litigation in the federal and state courts and before DOI in its struggle to take  
24 over the Tribe. In 2010, after three years of litigation, the holders of the deed of trust on the land  
25 foreclosed and took ownership of the Las Flores Ranch. GIE lost the land and its \$2 million down  
26 payment it spent to purchase the land, and the costs of litigation.

27           44. In the predevelopment agreement with the Tribe, GIE loaned funds to the Tribe at a  
28 high rate of interest. After that agreement was terminated by the Tribal Council, it was accepted by  
the Gholson faction in the name of the Tribe. GIE expects the Tribe to pay back with interest the  
cost of supporting the Gholson Faction's campaign to obtain recognition from DOI. Those funds

1 already total more than \$3 Million, not counting the cost of GIE acquiring another parcel of land.

2 45. Unlike the Gholson and Beaman factions, which have received hundreds of thousands  
3 of dollars in funding from one or more gaming developers, the Death Valley Tribal Councils have  
4 had no private source of funding since the 2007 Death Valley Tribal Council terminated the Tribe's  
5 agreement with GIE in June 2008. The Tribal Administration was funded entirely through federal  
6 grants and contracts.

#### 7 **TRIBAL CONSTITUTION AND LAW**

8 46. The Tribe adopted a written Constitution in 1986. The Constitution establishes the  
9 General Council – all members 16 and older – as the supreme authority of the Tribe. The  
10 Constitution also establishes a five-member Tribal Council with delegated authority. The Tribal  
11 Council is composed of a Chairman, Vice Chair, Secretary-Treasurer, and two Council Members.  
12 The Chairman generally represents the Tribe in external affairs, presides over meetings of the Tribal  
13 and General Councils, and may convene General Council meetings, but may only vote if there is a tie  
14 vote in the Tribal or General Councils. The Vice Chair carries out the functions of the Chairman at  
15 Tribal and General Council meetings when he is not present. The Secretary-Treasurer keeps the  
16 Tribe's financial books and other records. Only the Chairman and the Secretary-Treasurer sign  
17 resolutions attesting to their passage by the Tribal or General Council. The Tribal Constitution  
18 reserves to the General Council the right to continue to exercise those powers the Constitution  
19 delegates to the inferior branches of government, and the right to exclusive exercise of all powers not  
20 expressly delegated, including the judicial power until the Tribe creates a judiciary. After creation of  
21 the judiciary, the General Council will continue to serve as the Tribe's highest court of last resort.

22 47. The Constitution defines membership in the Tribe based on the 1978 Base Roll  
23 approved by DOI in 1982. The membership list is made up of those on the 1978 Base Roll and those  
24 who descend from those on the Base Roll. The Tribal Enrollment Committee must annually review  
25 the membership list on August 31 to make any additions due to births or to make deletions based on  
26 deaths. The Constitution requires the Tribal Enrollment Committee to revoke the membership status  
27 of those enrolled erroneously, fraudulently, or otherwise incorrectly. The Enrollment Ordinance  
28 provides for an appeal procedure, including a hearing, and does not prevent disenrollees from

1 reapplying at any time.

2 48. The Constitution requires that the General Election take place on the second Tuesday  
3 of November annually. In preparation for each General Election, the Tribal Election Board must  
4 consult with the Tribal Enrollment Committee to develop the list of registered voters. It adds those  
5 newly eligible and deletes those found ineligible or deceased. Because members of the Tribal  
6 Election Board may only be removed for specific, non-political reasons, the Board generally remains  
7 unchanged year-to-year. The Tribal Election Board administers all Special, General, Recall,  
8 Referenda Elections, and voting at General Council meetings, counts the votes, and announces the  
9 preliminary results. Any tribal member may appeal the outcome of a vote under the Election  
10 Ordinance. The Tribal Election Board may order a new election or reject the appeal. If there is no  
11 appeal, or if the appeal is rejected, the Tribal Election Board certifies the outcome of the election to  
12 the Tribal Council. The Tribal Election Board informs, but does not seek approval of, the BIA.

13 49. The Constitution does not authorize DOI to intervene in tribal elections or tribal  
14 membership matters: “[t]he General and Tribal Councils shall submit Tribal laws and enactments to  
15 the Secretary of the Interior for his review, comment and approval *only when required to do so by*  
16 *federal law.*” Timbisha Constitution, Art. IX, § 4 (italics added).

17 **DOI ANIMOSITY TOWARD PLAINTIFFS**

18 50. As individuals and on behalf of the Tribe, Plaintiffs joined with other Western  
19 Shoshone tribes, the Western Shoshone National Council, Western Shoshone Defense Project,  
20 nonprofit native and environmental organizations, and Shoshone individuals, to bring no less than  
21 five suits against federal agencies pertaining to the Western Shoshone homelands in the last four  
22 years. The lawsuits have sought, among other things: to regain the Western Shoshone ancestral  
23 homelands, which extend from southern Idaho, through Nevada, to eastern California; to prevent  
24 mining on those homelands, particularly on sacred mountains; to prevent storage of high-level  
25 nuclear waste under Yucca Mountain; to force federal agencies to account for funds managed in trust  
26 for the Western Shoshone; and to stop distribution of funds belonging to the tribes. The campaigns  
27 have resulted in press coverage in the United States and abroad.

28 51. Some of the Plaintiffs in this Complaint are also plaintiffs in two lawsuits seeking to

1 prevent mining on Western Shoshone ancestral lands in Nevada and in a third lawsuit in the D.C.  
2 Circuit contesting the federal government's management and disbursement of the Western Shoshone  
3 Claims Judgment. DOI has argued that the EHD and the DOI Election to support its motion to  
4 dismiss the case in the D.C. Circuit.

5 52. Plaintiffs raised human rights violations under international law leading to adverse  
6 findings against the United States first by the Inter-American Commission on Human Rights  
7 (IACHR) of the Organization of American States and later by the United Nations Committee on the  
8 Elimination of Racial Discrimination (CERD). In 2002, the IACHR found that the United States had  
9 failed to provide equal protection of law to Western Shoshones who claimed property rights in the  
10 Western Shoshone ancestral lands, and recommended measures to prevent further violation of  
11 Western Shoshone human rights. The IACHR periodically requests updates, forcing the United  
12 States to publicly refuse to implement the decision of the IACHR.

13 53. In 2006, CERD issued Early Warning and Urgent Action Decision 1(68) under the  
14 International Convention on the Elimination of All Forms of Racial Discrimination to which the  
15 United States is a party. Decision 1(68) found that the United States' actions on ancestral Western  
16 Shoshone homelands had led to a failure to meet the United States' obligations under the  
17 Convention. CERD annually urges the United States to comply with Decision 1(68), forcing the  
18 United States to publicly refuse to comply.

19 54. Plaintiffs have given public testimony in support of the human rights of Timbisha and  
20 the Western Shoshone at United Nations and other international organizations. In all international  
21 travel, Chairman Kennedy uses his Western Shoshone passport, not a United States passport. The  
22 press has taken note of both his statements and the fact that he has traveled on a Western Shoshone  
23 passport, to the chagrin of the United States Department of State. During a summit between the  
24 President of the United States and tribal leaders, Chairman Kennedy gained widespread attention  
25 when he called for the United States to ratify the Declaration on the Rights of Indigenous Peoples.  
26 Since then, in December 2010, the United States announced its support for the Declaration, which is  
27 no longer opposed by any country in the world. Joe Kennedy's actions, however, have earned him  
28 the particular enmity of the federal government.

**DOI'S DECISIONS ON INTERNAL TIMBISHA SHOSHONE TRIBAL AFFAIRS**

55. As sovereigns predating the United States, Indian tribes are not dependent on the recognition of the federal government for their existence or the legitimacy of their governments as a legal matter. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). As a practical matter, however, Indians and tribes are peculiarly susceptible to the actions of DOI bureaucrats because that department has a stranglehold over tribal lands and tribal funding. Poor tribes, such as Timbisha, depend on federal funding to a much greater degree than states or local governments because they have no tax base or economic development. Because tribes generally govern only those lands held in trust for them by DOI, they cannot economically develop without the blessing of those same DOI bureaucrats. Even if a tribe wishes to proceed without federal support, its banks rely on DOI recognition to determine whether to permit the tribe to withdraw funds from its own bank accounts.

56. Because of the danger of displacing tribal decisions with its own, and the importance of developing tribal institutions, DOI is required by federal case law and its own rules to defer to the decisions of tribal institutions. DOI may not hear appeals of its recognition decisions unless the appellant has exhausted its tribal remedies. DOI must dismiss as moot any appeal of a recognition decision during the pendency of which an unappealed tribal election is held. DOI ignored both requirements in the present case. DOI is also forbidden from making tribal membership decisions. Since 2010, DOI has made it clear that the EHD would be based on Echo Hawk's own interpretation of the Tribe's membership standards and procedures.

57. In 2002-2004, two gaming developers that wanted to take advantage of Section 5 of the Homeland Act to build a Timbisha-owned casino in Hesperia, funded competing tribal factions seeking to take control of the tribal government. During that dispute, DOI performed much the same role as it has in the current dispute. DOI did not stay its hand while the Tribal Election Board and General Council resolved the conflict, but entertained appeals from factions who had not pursued their tribal remedies. The conflicting DOI decisions allowed factions to claim to be recognized by DOI as representing the Tribe, exacerbating the conflict rather than settling it.

58. In or about 2003, when the question of their eligibility for membership in the Tribe was raised, some of Gholson's cousins, led by Shirley Summers and Leroy Jackson, removed the

1 membership and other files from the Tribal Office in Death Valley and took them to an office rented  
2 in the name of one of their cousins, Virginia Beck, in Bishop, CA. By that tactic, they were able to  
3 forestall their disenrollment until 2008 when the enrollment files were finally returned to the Tribal  
4 Administration Building in Death Valley.

5 59. The General Council met in 2004 and passed resolutions settling the dispute. Because  
6 DOI did not interfere with the resolution imposed by the Tribe's General Council and the General  
7 Election in 2004, a period of relative stability began for the tribal government that finally ended in  
8 2010 when DOI summarily ceased government-to-government relations and represented that other  
9 federal agencies should terminate funding to the Tribe.

10 60. On November 14, 2006, the Tribal Election Board administered the annual General  
11 Election. It immediately announced the results of the election to the General Council. The Tribal  
12 Election Board received no appeals of the 2006 General Election. Soon thereafter, the Tribal  
13 Election Board certified the election of Edward Beaman and Madeline Esteves to two-year terms.  
14 Together with the members of the Tribal Council whose terms would end in 2007 – Chairman Joe  
15 Kennedy (elected 2005) and Council Members Virginia Beck (elected 2005) and Cleveland Casey  
16 (appointed) – they formed the 2006 Tribal Council.

17 61. In or about July 2007, claims were brought by siblings Margaret Cortez and Wallace  
18 Eddy against Beaman and Beck for mismanagement of funds provided to Beaman by a gaming  
19 developer and other official misconduct. A hearing on the charges was scheduled for the regularly  
20 scheduled Tribal Council meeting on August 25, 2007. A quorum was established. Under Robert's  
21 Rules of Procedure, which govern Tribal Council meetings, a quorum continues until someone calls  
22 attention to the lack of a quorum. Beaman and Beck left after a disagreement about voting on their  
23 removal. Casey left shortly thereafter. Kennedy called a recess. After the recess, Casey, Madeline  
24 Esteves, and Kennedy returned and the meeting resumed. The charges were discussed by the three  
25 Tribal Council members and the audience. Casey left the meeting at some point, stating that he  
26 would be "right back." The remaining members of the Tribal Council found Beaman and Beck's  
27 seats vacant. Pursuant to the Tribal Constitution, Beck's seat was filled by appointment of Margaret  
28 Armitage because her term had less than 12 months remaining in it, while Beaman's seat was left to

1 be filled at the next election because his term had more than 12 months remaining in it.

2 62. After August 25, 2007, the Beaman Faction stopped attending the regularly scheduled  
3 Tribal Council meetings. The Beaman Faction signed various purported resolutions that, if they had  
4 ever been given effect, would have given the three of them control of the tribal government and its  
5 funds. They were supported in their efforts by the Tribe's former gaming partner, Merrion, and the  
6 Tribe's former law firm, Fredericks Peebles & Morgan.

7 63. During the period that the Beaman Faction was holding itself out as the "governing  
8 majority" of the Tribal Council in 2007-2008, the Death Valley Tribal Council continued to govern  
9 the Reservation and seek out economic development opportunities to replace the casino development  
10 proposed by Merrion, which had sided with the Beaman Faction. The Death Valley Tribal Council  
11 was not hindered in its governmental or business dealings, except for the failure of the Merrion deal.  
12 The Death Valley Tribal Council negotiated with a would-be casino developer, GIE, energy  
13 developers, and a tourist inn developer, among others. The Death Valley Tribal Council oversaw the  
14 Housing Department, Environmental Department, Tribal Historic Preservation Office, and provided  
15 education, health, and other tribal member assistance, as well as distributing the RSTF to members  
16 on a per capita basis. Although Merrion supported the Beaman Faction financially, all of the Death  
17 Valley Tribal Council's funds came from grants and contracts with federal and state agencies, which  
18 continued to recognize it as the tribal government.

19 64. In September 2007, the Tribal Election Board, in consultation with the Tribal  
20 Enrollment Committee, produced the new list of registered voters ("2007 Voters List") by adding  
21 newly eligible voters to, and deleting disqualified and deceased voters from, the previous election's  
22 Voters List, and distributed ballots based on the 2007 Voters List.

23 65. The Tribal Election Board conducted a regular annual general election on  
24 November 13, 2007, and announced the results to the General Council immediately. No one  
25 appealed the election results to the Tribal Election Board, and on December 4, 2007, the Board  
26 certified the election of Joe Kennedy, Margaret Armitage, Pauline Esteves, and Margaret Cortez to  
27 join Madeline Esteves on the Council ("2007 Death Valley Tribal Council"). Casey ran as a  
28 candidate on the Tribal Election Board's official ballot, but lost his bid for reelection.

1           66.     Using funds supplied by the Tribe's former gaming developer, Merrion, the Beaman  
2     Faction held its own election, which it styled "Election Mark II." The Beaman Faction sought the  
3     recognition of its election from Defendant Burdick. On December 14, 2007, Defendant Burdick,  
4     asserting that he had the right to interpret tribal law, declined to recognize either election. On  
5     December 19, 2007, Chairman Kennedy called for a special meeting of the General Council to  
6     discuss gaming issues and the leadership conflict. On or about January 14, 2008, Kennedy mailed  
7     the agenda and resolutions to be considered at the Special General Council meeting to the General  
8     Council members.

9           67.     On January 20, 2008, the General Council convened, the Tribal Election Board  
10    confirmed that a quorum existed, and the General Council proceeded to adopt four resolutions by  
11    wide margins, using secret ballots. The Beaman Faction took a vociferous part in the meeting, but  
12    the General Council resolved the dispute against them. As it had done in 2004, the General Council  
13    resolved the conflict. It recognized the 2007 Death Valley Tribal Council that it had elected in  
14    November 2007 as the legitimate Tribal Council. The General Council defined the undefined  
15    constitutional term "resign" in a manner that supported the Tribal Council's interpretation that  
16    Beaman and Beck had resigned. Among other things, the General Council nullified all purported  
17    actions by the Beaman Faction, such as its takeover of tribal funds, and fired the Tribe's former law  
18    firm, which had backed the Beaman Faction, and hired a new one. The General Council also made  
19    the fateful decision to authorize negotiations with GIE. In response, Defendant Burdick recognized  
20    the 2007 Death Valley Tribal Council elected in the 2007 General Election administered and  
21    certified by the Tribal Election Board.

22           68.     On February 29, 2008, Defendant Burdick recognized the Tribal Election  
23    Board-administered General Election of 2007 that resulted in the 2007 Death Valley Tribal Council.  
24    On March 17, 2009, the Beaman faction filed Beaman Appeal with Regional Director Morris seeking  
25    recognition of the Beaman Faction's 2007 election. Notwithstanding the Beaman Appeal, DOI  
26    continued to work with the Death Valley Tribal Council on a government-to-government basis.

27           69.     On June 25, 2008, the Tribal Council deadlocked on whether to terminate the  
28    relationship with GIE. Chairman Kennedy cast the deciding vote in favor of termination. The letter

1 terminating the relationship with GIE cited the firm's complete lack of experience and attempts to  
2 illegally influence the votes of Tribal and General Council members.

3 70. The Death Valley Tribal Council continued its governmental and economic  
4 development work uninterrupted through October 2008. Tribal governmental programs and services  
5 continued, and negotiations with various developers continued.

6 71. GIE, which had been occasionally funding Gholson and other supporters, immediately  
7 began funding a campaign for the recall of Joe Kennedy. The campaign failed and Gholson,  
8 attempted to petition the Death Valley Tribal Council to call a meeting of the General Council. When  
9 the Tribal Council did not call the meeting, he announced it himself for September 20, 2008. GIE  
10 paid for the meeting including paying for lodging and transportation for attendees and paying  
11 individuals to vote, including underage and non-Timbisha voters. Gholson proclaimed himself the  
12 Chairman and entered into the agreement with GIE that the 2007 Death Valley Tribal Council had  
13 rejected on June 25, 2008. Gholson also purported to have installed Wallace Eddy, who had been  
14 instrumental in removing Beaman and Beck from the Death Valley Tribal Council, as Vice Chair.

15 72. On October 17, 2008, Burdick recognized Gholson as Chairman and Wallace Eddy as  
16 Vice Chair based solely on the word of Gholson, and without seeking the views of the members of  
17 the Death Valley Tribal Council, which Burdick still recognized. Burdick made the decision despite  
18 the fact that the meeting obviously did not meet any legal standard. Among other things, it was  
19 convened without the involvement of the duly elected Tribal Council, the Tribal Election Board did  
20 not attend to certify the quorum or supervise the voting, an unelected individual, Gholson, presided  
21 instead of the Tribal Council presided over the meeting, and, as Burdick knew from materials  
22 submitted to him by the Beaman Faction, Wallace Eddy was an admitted felon who could not serve  
23 on the Tribal Council. Pursuant to 25 CFR § 2.6, the decision could not take effect for 30 days,  
24 during which time the Death Valley Tribal Council appealed, suspending the decision indefinitely.

25 73. Despite the fact that his decision to recognize Gholson was ineffective, on October  
26 20, 2008, Burdick encouraged an Inyo County Deputy Sheriff to assist Gholson, over the objections  
27 of the recognized Death Valley Tribal Council members. Based on what Burdick told him, the  
28 Deputy threatened to arrest anyone, including the Elders, who interfered with Gholson's removal of,

1 among other things, the Tribe's financial and administrative computers, containing all of the Tribe's  
2 financial, membership, and other confidential data, from the Tribal Administration Building on the  
3 Reservation to the private office rented for him by GIE over three hours away in Bishop, CA.

4 74. In a letter dated October 20, 2008, Burdick admitted that his October 17, 2008  
5 decision, like all BIA decisions, could not take effect for at least 30 days after it was issued. The  
6 letter confirmed that he continued to recognize the 2007 Death Valley Tribal Council (Kennedy,  
7 Armitage, Madeline Esteves, Pauline Esteves, and Cortez). On November 10, 2008, Burdick issued  
8 a letter that proposed to shift recognition to the 2006 Death Valley Tribal Council (Kennedy,  
9 Beaman, Madeline Esteves, Beck, and Casey), despite the fact that three seats on that Council had  
10 expired in 2007 and the other two terms would expire in a few days.

11 75. On September 25, 2008, the Tribal Enrollment Committee found that 74 individuals  
12 on the Membership List had never supplied proof of eligibility for tribal membership. They were  
13 removed from the list of members as required by the Tribal Constitution and Enrollment Ordinance.  
14 The 74 included both supporters and opponents of the Death Valley Tribal Council, and included  
15 Gholson and Leroy Jackson, who Echo Hawk tasked with carrying out the DOI Election. Gholson  
16 and Jackson and the others received notices of the Tribal Enrollment Committee's decision and their  
17 right to appeal by certified mail but did not respond or appeal. Both were born well before 1978,  
18 and therefore would have to appear on the 1978 Base Roll if they were members. In October 2008,  
19 the Tribal Election Board consulted with the Tribal Enrollment Committee to develop the 2008  
20 Voters List, as it did every year, by adding newly of-age voters to, and deleting disqualified and  
21 deceased voters from, the 2007 Voters List. Thus the 74 disenrollees were removed from the  
22 membership list in September 2008 and from the list of registered voters in October 2008. In  
23 January, after the time for appeal expired, the Tribal Council performed the ministerial act of  
24 adopting resolutions approving of the Tribal Enrollment Committee's revocations.

25 76. The Tribal Election Board distributed ballots for the General Election based on the  
26 2008 Voters List, and on November 11, 2008, the Tribal Election Board conducted the annual  
27 General Election and announced the results to the General Council. No one appealed the results to  
28 the Election Board and on November 20, 2008, the Election Board certified to the Tribal Council

1 that the General Council had reelected Madeline Esteves and elected Angie Boland. The Election  
2 Board informed the General Council and the BIA. The 2008 Tribal Council thus consisted of  
3 Chairman Joe Kennedy, Vice Chair Pauline Esteves, Secretary-Treasurer Madeline Esteves, and  
4 Council Members Angie Boland and Margaret Cortez ("2008 Death Valley Tribal Council").  
5 Neither Gholson nor Beaman Factions held elections. Nor did they appeal the outcome of the  
6 election conducted by the Tribal Election Board.

7 77. Then-Pacific Regional Director Dale Morris received an *ex parte* letter dated  
8 December 3, 2008, from Gholson's lawyer. The letter purported that the Death Valley Tribal Council  
9 would miss an important filing deadline on December 22, 2008, in the proceedings before the  
10 Atomic Safety Licensing Board's concerning the license application for the High Level Nuclear  
11 Waste Repository at Yucca Mountain, NV. The proceedings are of great importance to the Timbisha  
12 because Yucca Mountain is just across the Nevada Border from the Reservation in Death Valley.  
13 Morris did not consult with the Death Valley Tribal Council -- the DOI-recognized tribal government  
14 -- about the status of the Tribe's filings before the Atomic Safety Licensing Board, or even inform it  
15 of Gholson's letter. On December 4, 2008, Morris issued a decision recognizing Gholson effective  
16 immediately under 25 CFR § 2.6. Neither Gholson's attorney nor Morris would provide a copy of the  
17 *ex parte* letter until more than a month later. As a result of Morris's December 4, 2008 decision, both  
18 Gholson and the Death Valley Tribal Council he supposedly chaired submitted filings before the  
19 Atomic Safety Licensing Board leading to confusion and endangering the Tribe's participation.

20 78. On December 12, 2008, Gholson again arrived unannounced at the Tribal  
21 Administration Building in Death Valley. He brought a moving truck, an Inyo County Deputy  
22 Sheriff, and a locksmith. Regional Director Morris encouraged the Deputy Sheriff to assist Gholson  
23 to do what he wanted, notwithstanding the protests of three Tribal Council Members present. The  
24 Deputy again threatened to arrest anyone who interfered with Gholson. His locksmith drilled out the  
25 locks protecting confidential Tribal files, and, over the objections of three Tribal Council members,  
26 Tribal Elders and staff, Gholson took all of the Tribe's office equipment and confidential Indian  
27 Child Welfare Act, personnel, membership, and financial files from the Death Valley Reservation to  
28 the office rented for him by GIE three hours away in Bishop, CA.

1           79.     The Death Valley Tribal Council filed suit to overturn the December 4, 2008 decision,  
2 and on December 22, 2008, Morris rescinded the decision recognizing Gholson. Despite the  
3 supposedly exigent circumstances, Gholson did not file with the Board until after the December 22,  
4 2008 rescission.

5           80.     The Tribe requested that Burdick and Morris assist in retrieving tribal property from  
6 Gholson, but they refused to provide the same assistance to the Death Valley Tribal Council that they  
7 had provided to Gholson. As a direct and proximate result of Burdick's and Morris's decisions, and  
8 their refusal to assist the Death Valley Tribal Council, the Tribe was unable to fulfill its obligations  
9 to the U.S. Internal Revenue Service, the U.S. EPA and DOI, causing the Tribe to incur financial  
10 penalties and loss of grants and contracts under which the Tribe's government had been providing  
11 services to the Tribe's members living in Death Valley and elsewhere. Notwithstanding the removal  
12 of important files and equipment, however, the Death Valley Tribal Council continued to govern the  
13 Reservation and pursue economic development opportunities.

14           81.     On February 17, 2009, Director Morris reversed Superintendent Burdick's decision  
15 recognizing the 2007 Death Valley Tribal Council. On March 24, 2009 Morris reversed  
16 Superintendent Burdick's October 17, 2008 decision recognizing Gholson. Morris's decisions did  
17 not rule in favor of any of the litigants. In both decisions, Morris proposed to recognize the 2006  
18 Tribal Council. Morris did not acknowledge that the last terms of office of the 2006 Tribal Council  
19 had expired in December 11, 2008 at the latest, or that the entire Council had been replaced in the  
20 General Elections of 2007 and 2008. Plaintiffs are informed, believe, and on that basis allege, that  
21 Defendant Dutschke's predecessor, Dale Morris, made his decision to recognize the expired 2006  
22 Tribal Council on the basis that he disagreed with the actions of the Tribal Enrollment Committee in  
23 removing 74 individuals from the membership list in September 2008 and communicated that basis  
24 of his decision to the Beaman and Gholson Factions.

25           82.     The 2008 Death Valley Tribal Council appealed Morris's February 17 decision, and  
26 the Gholson Faction appealed his March 24 decision, to the Interior Board of Indian Appeals  
27 ("IBIA"), thereby suspending the effect of both decisions. The AS-IA then took jurisdiction over  
28 both appeals. On June 22, 2009, Echo Hawk consolidated the appeals, set a briefing schedule, and

1 provided an index of the record on appeal along with what purported to be the record. The pages of  
2 the documents in the record were interleaved making it nearly impossible to discern which  
3 documents were actually provided making it nearly useless for appellants. Eventually, DOI agreed to  
4 provide a useable copy of the record. In litigation before this Court, however, DOI represented that  
5 Echo Hawk's long delay in rendering a decision was due to the request by appellants for more time  
6 to review his administrative record.

7 83. Notwithstanding the appeals, BIA continued to work with the Death Valley Tribal  
8 Council on a government-to-government basis until it rejected the Council's Self-Determination  
9 contract in July 2009. After that point, it still worked with Chairman Kennedy as the representative  
10 of the Tribe, knowing that he acted at the direction of the four voting members of the Death Valley  
11 Tribal Council. During 2009, federal agencies, including the NPS within DOI, HUD, and EPA  
12 entered into cooperative agreements, grant agreements, or contracts with the Death Valley Tribal  
13 Council on behalf of the Tribe to fund the work of the Tribal Departments.

14 84. The 2008 Death Valley Tribal Council, continued to work with DOI and other federal  
15 agencies on a government-to-government basis throughout 2009. DOI and other agencies granted  
16 funds and cooperative agreements to the Death Valley Tribal Council that are only available to tribal  
17 governments and consulted with the Death Valley Tribal Council on a government-to-government  
18 basis. The only conflict, apart from the continuing administrative appeals of the automatically  
19 suspended DOI decisions, was over the annual PL 93-638 contract with BIA to provide tribal  
20 governmental services, which was declined in July 2009. Although the Death Valley Tribal Council  
21 appealed the denial, DOI did not act on the appeal.

22 85. The Gholson and Beaman Factions continued to battle the Death Valley Tribal  
23 Council over control of tribal funds. The Factions' law firm, Fredericks Peebles & Morgan,  
24 successfully froze several bank accounts from which the Death Valley Tribal Council issued the  
25 RSTF per capita payments, including one with over \$90,000 for the Minors' Trust Account. Despite  
26 not being recognized, Gholson still retained the files DOI had enabled him to seize. The frozen  
27 accounts and lack of files made it difficult for the Tribe to meet its obligations to federal agencies,  
28 including the IRS. Despite having sufficient funds to litigate for several years, and claiming to be the

1 legitimate government of the Tribe, neither the Beaman nor Gholson Factions sought to take  
2 responsibility for the Tribe's financial obligations, such as the Tribe's IRS debts dating back to  
3 Beck's time as Secretary-Treasurer. Notwithstanding the difficulties, the Death Valley Tribal  
4 Council continued to govern the Reservation, oversee government programs and deliver services to  
5 members. Although GIE supported the Gholson Faction financially, all of the Death Valley Tribal  
6 Council's funds came from grants and contracts with federal and state agencies.

7 86. In September 2009, the Tribal Enrollment Committee conducted its annual review of  
8 the tribal membership list and consulted with the Tribal Election Board as it prepared the 2009  
9 Voters List, adding newly of-age voters to, and deleting disqualified and deceased voters from, the  
10 2008 Voters List. On November 10, 2009, the Tribal Election Board conducted the annual General  
11 Election for three open Tribal Council seats. The BIA sent two representatives to Death Valley to  
12 observe the Tribal Election Board's administration of the General Election and reported no problems  
13 with the election. The Tribal Election Board informed the General Council of the results, and  
14 received no appeals. On November 17, 2009, the Tribal Election Board certified that the General  
15 Council had elected Joe Kennedy, Erick Mason, and Grace Goad. The Election Board announced  
16 the results to the General Council and the BIA. The 2009 Tribal Council thus consisted of Chairman  
17 Joe Kennedy, Vice Chair Angie Boland, Secretary-Treasurer Madeline Esteves, and Council  
18 Members Grace Goad and Erick Mason ("2009 Death Valley Tribal Council").

19 87. On November 10, 2009, in Bishop, 160 miles from the Reservation, the Gholson  
20 Faction conducted a purported election in which it claimed to have elected five council members.  
21 On February 19, 2010, Defendant Echo Hawk issued a Scheduling Order and an administrative  
22 record ("Record") in an appeal then-styled *Joe Kennedy, Pauline Esteves, Madeline Esteves, Angie*  
23 *Boland, and Erick Mason, Plaintiffs/Appellants, and George Gholson, Wallace Eddy, and Margaret*  
24 *Cortez, Plaintiffs/Appellants, v. Pacific Regional Director, Bureau of Indian Affairs*. Echo Hawk  
25 committed to issuing a decision within 60 days after the last brief filed as required by 25 CFR Part 2.  
26 Also on February 19, 2010, DOI finally provided the administrative record on CD-ROM ("Record").  
27 Chronologically, the most recent document in the Beaman appellate record is dated April 7, 2009;  
28 the most recent in the Gholson record is dated May 22, 2009. The DOI also assembled a list of

1 documents not in either record, the last of which is dated October 5, 2009. The Scheduling Order  
2 declared that DOI would not recognize the September 2008 disenrollments, encouraged the Tribe to  
3 hold a Special Election in which the disenrollees would have the opportunity to vote, and indicated  
4 that Echo Hawk would not recognize the Beaman Faction or the 2007 Death Valley Tribal Council.

5 88. On February 23, 2010, the Gholson Faction withdrew his appeal before Echo Hawk.  
6 On March 19, 2010, in its appellate brief the Tribal Council noted the withdrawal of Gholson and  
7 requested an opportunity to brief issues in that appeal if it proceeded, notwithstanding Gholson's  
8 withdrawal. There was no response to this request. Based on Gholson's withdrawal, the 2009 Death  
9 Valley Tribal Council's brief did not address the reasons why the AS-IA should not recognize the  
10 Gholson Faction.

11 *The February 24, 2010 Decision by Defendant Burdick (to Create a Hiatus in Government to*  
12 *Government Relations between the Federal Government and the Tribal Government ("Burdick*  
*III")*

13 89. In mid-February, Fredericks Peebles & Morgan convinced the Tribe's bank to freeze  
14 its account with scores of per capita payment checks outstanding. Chairman Kennedy asked  
15 Defendant Burdick for a letter recognizing that he was the last recognized Timbisha Chairman so  
16 that he could persuade the bank to unfreeze the Tribe's account and prevent the checks from  
17 bouncing. Instead of helping release the per capita payments to tribal members, on February 24,  
18 2010, Defendant Burdick issued a decision ("Burdick III") finding that there was no recognizable  
19 Timbisha tribal government. Burdick informed Kennedy that Burdick III was written by Jim Porter,  
20 the lawyer in the Office of the Solicitor responsible for the administrative appeals then before Echo  
21 Hawk, and the principal author of the Scheduling Order. Burdick did not make the decision effective  
22 immediately, so Burdick III would not take effect for 30 days. The Death Valley Tribal Council  
23 timely appealed Burdick III to then-Acting Director of the Pacific Regional Office Dale Risling.  
24 Under DOI regulations, the appeal automatically suspended the effect of Burdick III until resolution  
25 of the appeal. Neither Risling, nor his successor Defendant Dutschke, has acted on the appeal.  
26 Thus, pursuant to DOI's own regulations at 25 CFR Part 2, Burdick III never took effect.

27 90. Notwithstanding its legal status, Burdick III had concrete effects. The Tribe's federal  
28 funding agencies and the California Gambling Control Commission ("CGCC") all received copies of

1 Burdick III. The CGCC distributes the Revenue Sharing Trust Fund ("RSTF") to California Indian  
2 tribes with less than 350 slot machines (Timbisha has no slot machines). Other federal agencies  
3 required to consult with the Tribe under the National Historic Preservation Act and the National  
4 Environmental Policy Act were informed that they were no longer required to consult with the Tribe  
5 because it lacked a tribal government.

6 91. During 2010, as a result of Burdick III, the Tribe's Departments had to shut down for  
7 lack of funding. In March, HUD froze funding to the Housing Department. At the time, the Housing  
8 Department was providing mortgage and rental assistance to members on- and off-Reservation, and  
9 making donated FEMA trailers on the Reservation inhabitable. Other Departments, including the  
10 Tribal Historic Preservation Office, which is funded by NPS within DOI, held on to their funding for  
11 longer. In December 2010, EPA froze funding and the Tribal Environmental Department laid off its  
12 staff just weeks after EPA had commended them for their outstanding work. In April 2010, CGCC  
13 began retaining the RSTF in trust for the Tribe pending a decision by DOI. The basis for all the  
14 decisions by the federal agencies and CGCC was Burdick III.

15 92. Plaintiffs are informed and believe, and on that basis allege, that the federal and state  
16 agencies that received copies of Burdick III consulted with DOI concerning the decision, and were  
17 informed by DOI employees, including lawyers in the DOI Office of the Solicitor, that Burdick III  
18 was in effect, notwithstanding the requirements of 25 CFR Part 2.

19 93. Despite the closure of the Departments, the 2009 Death Valley Tribal Council  
20 continued to govern the Reservation and provide non-monetary assistance to tribal members. It also  
21 continued to work with private parties to attempt to generate income to replace federal funding. It  
22 entered into an agreement with a developer for the construction of 20 single family homes on  
23 Reservation lands outside of Death Valley, as part of a solar energy development agreement, and was  
24 in negotiations for another 20 single family homes on another tribal parcel in Nevada. The Death  
25 Valley Tribal Council was also in negotiations for a partnership with an Indian-owned entity to  
26 provide construction supplies and services in federal contracts. Although the Death Valley Tribal  
27 Council's business partners were willing to work with it despite existence of the Gholson and  
28 Beaman Factions, they put negotiations on hold when the EHD was issued on March 1, 2011.

1           94. From March through September 2010, the 2009 Death Valley Tribal Council worked  
2 with BIA to plan a Special Election to be supervised by the Tribe and BIA on the date of the next  
3 General Election – the only time that an entire five-member Tribal Council can be elected, which  
4 was what happened in the successful resolution in the 2004 General Election. The Tribal Election  
5 Board and Tribal Enrollment Committee agreed that the disenrollees could vote if they provided  
6 proof of eligibility for membership in the Tribe. The Tribal Election Board and Enrollment  
7 Committee worked with BIA to winnow down its Voters List for the Special Election which had  
8 more voters on it than there were tribal members. In September 2010, however, then-Acting  
9 Director of the Pacific Regional Office, Dale Risling, delivered an ultimatum from DOI that it would  
10 only agree to a Special Election if the disenrollees were allowed to vote without any proof of  
11 eligibility. The Tribal Election Board renewed its offer to permit the disenrollees to vote if they  
12 provided proof of eligibility. DOI did not respond to the offer, and ceased communications  
13 pertaining to the election without further explanation. DOI had demanded no concessions from the  
14 Gholson or Beaman Factions.

15           95. In the absence of cooperation from DOI to assist with a Special Election, the Tribal  
16 Election Board began preparations for the annual General Election. In September 2010, the Tribal  
17 Enrollment Committee conducted its annual review of the tribal membership list and consulted with  
18 the Tribal Election Board as it prepared the 2010 Voters List, adding newly of-age voters to, and  
19 deleting disqualified and deceased voters from, the 2009 Voters List. On November 9, 2010, the  
20 Tribal Election Board conducted the annual General Election for two open Tribal Council seats. The  
21 Tribal Election Board informed the General Council of the results. On November 18, 2010, the  
22 Tribal Election Board certified that one appeal had been submitted, but then withdrawn, and that the  
23 winners of the election were Angie Boland and Hillary Frank. The Election Board announced the  
24 results to the General Council and DOI. The 2010 Tribal Council thus consists of Chairman Joe  
25 Kennedy, Vice Chair Angie Boland, Secretary-Treasurer Grace Goad, and Council Members Erick  
26 Mason and Hillary Frank (“2010 Death Valley Tribal Council”). DOI did not object to the conduct  
27 of the General Election in any way until EHD I disagreed with it over three months later.

28           96. On March 1, 2011, two years after the AS-IA took jurisdiction over the Beaman

1 Appeal, DOI released EHD I. The decision begins with the assumption that DOI did not recognize  
2 the Death Valley Tribal Council after August 25, 2007. EHD I narrowed the issue presented in the  
3 Beaman Appeal down to whether the Special General Council Meeting on January 20, 2008 had the  
4 authority to “emplace” the 2007 Death Valley Tribal Council, and deliberately ignored the Tribal  
5 Election Board-administered General Election on November 13, 2007. EHD I replaced the General  
6 Council’s interpretation of tribal law with its own, and found that Beaman had not resigned from the  
7 Death Valley Tribal Council until his term ended (in December 2008).

8 97. The EHD ignored the Tribal Election Board-administered General Elections in 2008,  
9 2009, and 2010 despite the fact that they were administered by the same Tribal Election Board that  
10 administered all previous elections recognized by DOI, and despite the fact that none of the elections  
11 had been appealed to the Tribal Election Board under the Tribal Election Ordinance by Beaman,  
12 Gholson, or any other party. Moreover, neither the Beaman nor the Gholson Faction held its own  
13 election in 2008, despite the fact that they both claimed to be the tribal government, and BIA served  
14 as an independent observer of the 2009 General Election. The only election EHD I did consider was  
15 the Tribal Election Board and Gholson elections of 2010 that took place long after the Record closed.

16 98. EHD I found that DOI had the authority to recognize a private entity, the Gholson  
17 Faction, to carry out an election on DOI’s behalf (“DOI Election”). The basis for the EHD  
18 recognition of Gholson was that DOI disagreed with the Tribal Enrollment Committee’s decision  
19 (which it mischaracterized as the decision of the Death Valley Tribal Council) to remove 74  
20 individuals from the membership list. EHD I found that the disenrollment violated tribal law and the  
21 Indian Civil Rights Act (“ICRA”), but did not explain its reasoning. Gholson, one of the 74  
22 disenrollees who refused to appeal the Enrollment Committee’s findings or provide proof of  
23 eligibility, of course, agreed with DOI. DOI recognized him because it knew that it could count on  
24 him to permit the disenrollees to run and vote in the DOI Election. The Death Valley Tribal Council,  
25 bound by tribal law, could not overrule the Tribal Election Board and force it to permit the  
26 disenrollees to vote without providing evidence of eligibility for membership, and therefore DOI  
27 decided not to recognize it to carry out the DOI Election.

28 99. Shortly after issuing EHD I, DOI funded the already well-funded Gholson to conduct

1 an the DOI Election on April 29, 2011. Based on EHD I's assurance that the DOI Election would  
2 comply with tribal law, the Death Valley Tribal Council decided to take part in the DOI Election  
3 rather than immediately challenge the EHD in this Court. Gholson put the names of the members of  
4 the Death Valley Tribal Council on the DOI Election ballot, but only allowed non-Death Valley  
5 Tribal Council candidates to provide campaign statements to the voters, giving the appearance that  
6 the Death Valley Tribal Council had not seen fit to ask for members' votes.

7 100. Plaintiffs are informed and believe and on that basis allege, that when the Death  
8 Valley Tribal Council brought the civil rights violation to the attention of Defendants, some or all of  
9 them informed Gholson that he could do as he pleased. Gholson also threw out the Tribal Election  
10 Board's list of registered voters and created his own, augmenting it with new names, some of which  
11 were not known to the Tribal Enrollment Committee. During the counting of ballots, Gholson  
12 further departed from the long-time practice of the Tribal Election Board by preventing his  
13 opponents from: challenging ballots or voters; examining or even viewing the ballots, envelopes, or  
14 the serial numbers on the ballots and envelopes; or examining any of the documentation after the  
15 election, such as tally sheets, ballots, envelopes, or the voters list; or any of the other means normally  
16 available to voters in a democracy to verify the legitimacy of elections.

17 101. Over 20% of the General Council appealed the outcome of the DOI Election to  
18 Gholson under the Tribal Election Ordinance – without admitting that the DOI Election or Gholson  
19 were legitimate. On the night of the DOI Election, some of the appellants demanded to examine the  
20 ballots, tally sheets, and the voters list and other documents. When Gholson refused on the ground  
21 that they needed to request it in writing, they submitted a handwritten request, which was also  
22 refused. In their appeal, the appellants again demanded copies of the election materials. Gholson  
23 refused to provide the documents and simply declared that many of the most important issues in the  
24 appeal would not be considered at all. Gholson scheduled a so-called hearing at which no documents  
25 were provided and no words were spoken except by the appellants. Gholson did not provide a  
26 response to the appellants. Gholson printed a memo on the election in his newsletter that did not  
27 address the deficiencies of tribal law identified by the appellants. DOI does not appear to have  
28 reviewed the appellants' objections to the DOI Election before declaring that Gholson had

1 reasonably rejected the appeal.

2 102. In contrast, neither Beaman nor Gholson appealed the outcome of the 2007, 2008,  
3 2009, or 2010 General Elections to the Tribal Election Board as required by DOI rules and federal  
4 case law. The Factions simply set up their own committees funded by gaming developers and waited  
5 for DOI recognition while DOI slowly demolished the Tribal Administration in Death Valley.  
6 Although it allowed Beaman to proceed without exhausting his tribal appeals, DOI decided to make  
7 EHD II final immediately to prevent any administrative appeal.

8 103. Just after 5:00 p.m., July 29, 2011, which, as DOI knew, was the day that the Death  
9 Valley Tribal Council planned to file this Amended Complaint with leave of the Court, Echo Hawk  
10 released a decision recognizing the outcome of Gholson's April 29, 2011 election ("EHD II").  
11 EHD II found summarily that Gholson's election complied with tribal law. EHD II found that  
12 Gholson had addressed the appeal by the 20% of voters adequately, presumably referring to the  
13 memo in Gholson's newsletter.

14 104. EHD II did not give its reasoning or the basis for the decision as required by the APA.  
15 It does not acknowledge that Gholson abridged Plaintiffs' right to free speech by preventing the  
16 members the Death Valley Tribal Council from campaigning in the DOI Election, prevented  
17 opponents of the DOI Election from challenging or otherwise verifying any ballots, tally sheets, or  
18 voters lists, or that any of the other violations of tribal law that the Death Valley Tribal Council  
19 brought to DOI's attention took place. DOI prevented Plaintiffs from obtaining any administrative  
20 review of EHD II by making it final for the agency. Therefore, the only means to review EHD II is  
21 in this Court.

22 105. In 2007, 2008, 2009, and 2010, DOI refused to be bound by the certifications of the  
23 independent Tribal Election Board. DOI has now done an about face, and cynically claims to be  
24 bound by the DOI Election. For four years, DOI interfered with internal tribal membership and  
25 election affairs, and the Death Valley Tribal Council could not seek judicial review because none of  
26 DOI's decisions were final. Now DOI has issued a final decision and seeks to prevent review by  
27 cloaking it in a newfound and specious respect for tribal sovereignty.

28 106. As DOI admits, EHD I led "inexorably" to EHD II. DOI did not render a reasoned

1 decision in either EHD I or II. In fact, the February 19, 2010 Scheduling Order, in which Echo Hawk  
2 announced his intention not to recognize the Death Valley Tribal Council or the Factions and not be  
3 bound by the decisions of the Tribal Enrollment Committee, "inexorably" resulted in EHD II. DOI's  
4 actions demonstrate that it has not allowed a legion of factual and legal errors to sway it from the  
5 intentions it announced in February 2010.

6 107. DOI attempted to enforce cooperation by delivering ultimatums to the Death Valley  
7 Tribal Council that it must defy the Tribal Enrollment Committee and Tribal Election Board  
8 concerning the list of registered voters, by representing Burdick III to federal, state, and private  
9 entities as being in effect despite being appealed pursuant to 25 CFR § 2.6, and refusing to recognize  
10 an interim Tribal Council and issue a self-determination contract in violation of federal statutory and  
11 common law.

#### 12 FIRST CLAIM FOR RELIEF

#### 13 Violation of the APA and DOI Regulations and Denial of Due Process of Law (5 USC §§ 14 701-706; 25 CFR Part 2; U.S. Constitution, 5th Amendment, Federal Common Law)

15 108. Plaintiffs hereby incorporate by reference paragraphs 1 through 107 of this Complaint  
16 as if each were set forth herein.

17 109. The EHD is arbitrary, capricious, and otherwise not in accordance with law, violates  
18 Plaintiffs' right to due process of law, is in excess of DOI's legal authority, and fails to comply with  
19 procedures required by law, including DOI's own regulations at 25 CFR Part 2, all in violation of 5  
20 USC §§ 701-706.

21 110. After over three years of litigation and reams of documents submitted to the AS-IA by  
22 Plaintiffs, the EHD recognized the Gholson Faction based solely on information that was not  
23 included in the Record provided by the AS-IA, in violation of Plaintiffs' right to due process of law  
24 and the regulations that govern the AS-IA's decision-making authority at 25 CFR Part 2. DOI's  
25 regulations permit the AS-IA to consider information from outside of the record on appeal, but  
26 requires that if he does, he,

27 [S]hall notify all interested parties of the information and they shall be  
28 given not less than 10 days to comment on the information before the  
appeal is decided. The deciding official shall include in the record  
copies of documents or a description of the information used in

1 arriving at the decision.

2 25 CFR § 2.21(b). The AS-IA neither notified Plaintiffs that he intended to consider information  
3 outside the Record nor gave them an opportunity to file briefs or other evidence addressing the  
4 validity or legal significance of that information.

5 111. As the basis for EHD I, the AS-IA relied upon the fact that allegedly more "votes"  
6 had been cast in the 2010 Gholson election than in the 2010 Tribal Election Board-certified election.  
7 The Gholson election was conducted in a private office in Bishop, three hours from the Reservation,  
8 under no tribal authority. None of the facts concerning the election were part of the Record provided  
9 by the AS-IA, and Plaintiffs did not have any opportunity to contest those facts in an adversarial  
10 process. As the basis of EHD II, the AS-IA relied upon unverified information supplied by Gholson,  
11 a non-party to the administrative appeal, over a year after the Record closed. The information  
12 Gholson supplied is one-sided and was not subjected to adversarial process. Nor did DOI subject  
13 that information to reasoned analysis.

14 112. If Plaintiffs had been given reason to believe that the AS-IA was contemplating  
15 recognizing the Gholson Faction, they would have addressed the invalidity of the Gholson Faction,  
16 the ineligibility of Gholson and Jackson to serve on the Tribal Council, even temporarily, and the  
17 irrelevance and unreliability of the number of purported votes cast in Gholson's "election", among  
18 other things. In their Statement of Reasons submitted to Echo Hawk in March 2010, Plaintiffs noted  
19 that the Gholson Faction had withdrawn its appeal and requested an opportunity to address the  
20 Gholson matter if the AS-IA intended to consider it.

## 21 SECOND CLAIM FOR RELIEF

### 22 **Interference with Internal Tribal Affairs in Excess of DOI's Legal Authority and Failure to** 23 **Defer to Tribal Bodies' Interpretations of Tribal law, both in Violation of the APA, DOI Rules,** **and Federal Common Law (5 USC §§ 701-706; 25 CFR Part 2; Federal Common Law)**

24 113. Plaintiffs hereby incorporate by reference paragraphs 1 through 112 of this Complaint  
25 as if each were set forth herein.

26 114. Federal common law and DOI rules require that in order to protect the  
27 self-determination of Indian tribes, DOI must defer to the interpretations of tribal law by tribal  
28 law-applying bodies and DOI must not entertain administrative appeals of its recognition of a tribal

1 election by a party that has not exhausted its tribal remedies. On its face and implicitly, EHD  
2 flagrantly disregards both rules arbitrarily and capriciously and in excess of DOI's legal authority,  
3 and thus violates the APA.

4 **Failure to Defer to Interpretations of Tribal Law by Tribal Law-Applying Bodies.**

5 115. Under federal common law, DOI is bound by the decisions of tribal law-applying  
6 bodies, regardless of whether DOI disagrees with them. Tribal law-applying bodies may include  
7 tribal courts, General Councils, Tribal Election Boards, or similar bodies. *Santa Clara Pueblo v.*  
8 *Martinez*, 436 U.S. 49 (1978); *Wheeler v. DOI*, 811 F.2d 549 (10th Cir. 1987). That principal has  
9 been confirmed in DOI decision law by the IBIA and AS-IA under the regulations that apply to  
10 appeals to the IBIA and AS-IA.

11 116. Nonetheless, DOI disregarded the decisions of tribal law-applying bodies that existed  
12 long before the current dispute between the Death Valley Tribal Council and DOI began in 2007.  
13 The Tribal Election Board and Tribal Enrollment Committee are both law-applying bodies  
14 independent of the Tribal Council that have existed in their current form since at least 1986. In the  
15 General Elections of 2007, 2008, 2009, and 2010 the Tribal Election Board applied tribal law to  
16 establish the list of registered voters and certified the unappealed General Elections. The General  
17 Council, of course, has existed so long as there have been Timbishas, but has operated in its current  
18 form since adoption of the Constitution in 1986. On January 20, 2008, the General Council  
19 interpreted an undefined term – “resign” – in the Tribe's own Constitution, ratified certain actions of  
20 the Death Valley Tribal Council exercising authority delegated from the General Council, and  
21 confirmed the propriety of the election of the 2007 Death Valley Tribal Council in the 2007 General  
22 Election.

23 117. EHD admitted that it deliberately ignored the 2007 General Election. The EHD  
24 deemed it not to be the issue presented by the Beaman Appeal despite the fact that the Beaman  
25 Appeal specifically sought review of the Tribal Election Board's 2007 General Election and the  
26 Beaman Factions' gaming developer-funded election held on the same day. The EHD completely  
27 ignored the 2008 and 2009 Tribal Election Board-administered and -certified General Elections  
28 despite the fact that they are in the Record and of significant legal import to DOI's authority to

1 continue entertaining the Beaman Appeal, giving no reason for the omission. The EHD also does  
2 not consider the decision of the Tribal Election Board to certify the outcome of the January 20, 2008  
3 Special General Council Meeting, which it overrules *sub silentio*.

4 118. The EHD also admitted that it overruled the decision of the January 20, 2008 Special  
5 General Council Meeting. In fact, the decision by Echo Hawk to disregard the decision of the  
6 General Council is the crux of the EHD. The EHD did not offer any authority for overruling the  
7 decision of a tribal law-applying body, one recognized by the Supreme Court as competent to  
8 interpret tribal law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Nor did the EHD give any  
9 authority for disregarding DOI's own decisional law requiring the agency to defer to the  
10 interpretation of tribal law by tribal law-applying bodies. Thus, the basis for the EHD, Echo Hawk's  
11 disagreement with the General Council violates DOI decisional law, federal common law, and the  
12 APA.

13 119. This Court need not interpret tribal law to find that the EHD disregarded the  
14 interpretation of tribal law by tribal law-applying bodies in violation of DOI rules and federal  
15 common law. The EHD admitted on its face that it rejected the interpretation of tribal law adopted  
16 by the January 20, 2008 Special General Council Meeting. The Tribal Election Board and General  
17 Council decisions appear in the Record. To find that the EHD exceeded DOI's authority, this Court  
18 need only take notice of existence of the fact of those tribal decisions and apply federal common law  
19 and the APA to those facts.

20 120. Ironically, in EHD II, Echo Hawk resurrects the rule that DOI must defer to tribal  
21 interpretations of tribal law. The EHD, however, uses the rule disingenuously in its argument that  
22 DOI must abide by the decision of the Gholson Faction to approve of its own election, even though  
23 both the entity and election were brought into existence by action of DOI in 2011, nearly four years  
24 after the dispute between the Death Valley Tribal Council and DOI arose. By disregarding the  
25 interpretations of tribal law by long-standing tribal entities, and then claiming to be bound by an  
26 entity formed for the purpose of giving DOI a party with which to agree is arbitrary and capricious,  
27 violating the APA.

28 **Failure to Require Exhaustion of Tribal Remedies**

1 121. Pursuant to DOI rules established in adjudications before the IBIA and the AS-IA,  
2 pursuant to DOI regulations governing appeals before the IBIA and AS-IA, DOI may not consider,  
3 and must dismiss, any appeals of a DOI decision to recognize or deny recognition to a tribal  
4 government if the appellant has not exhausted their tribal remedies. Those tribal remedies may be in  
5 a tribal court, the General Council, Tribal Election Board, or other law-applying body.

6 122. Under federal common law, parties may not appeal DOI recognition decisions if they  
7 have not exhausted their tribal remedies. *Wheeler v. DOI*, 811 F.2d 549 (10th Cir. 1987). Tribal  
8 law-applying bodies may include a tribal court, General Council, Tribal Election Board, or similar  
9 body. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

10 123. It is admitted on the face of the EHD that the appellants in the administrative appeals  
11 that resulted in the EHD did not exhaust their tribal remedies. The EHD admitted that the Beaman  
12 Faction did not appeal the 2007 General Election to the Tribal Election Board, which conducted the  
13 2007 General Election and all tribal elections before that. Beaman's attorneys drafted both the  
14 "appeal" and the "decision" by Beaman's election committee created solely for the purpose of  
15 submitting it to DOI to avoid the requirement to exhaust tribal remedies. Thus, from facts appearing  
16 on the face of the EHD, it is clear that it violated both federal common law and DOI decisional law  
17 by not requiring exhaustion of tribal remedies. Moreover, it is uncontested in the Record that the  
18 Beaman Faction did not appeal the outcome of the Special General Council Meeting of January 20,  
19 2008. This Court need not interpret tribal law to find that the Beaman Faction did not exhaust its  
20 tribal remedies, only federal law and the facts in the Record.

21 124. Pursuant to DOI rules established in adjudications before the IBIA and the AS-IA,  
22 pursuant to DOI regulations governing appeals before the IBIA and AS-IA, DOI must dismiss  
23 appeals of DOI recognition decisions as moot if the tribe conducts an election during the pendency of  
24 the administrative appeal that is not itself also appealed through the tribal appeals process, such as a  
25 tribal court, General Council, Tribal Election Board, or other law-applying body. It is  
26 uncontroverted on the Record that no party appealed the 2008 General Election conducted by the  
27 Tribal Election Board. The Tribal Election Board, which had conducted and certified all previous  
28 tribal elections, certified the results of the 2008 General Election. The Record reflects that neither

1 the Beaman Faction nor the Gholson Faction purported to hold an election that year, and did not  
2 appeal the 2008 General Election. This Court need not interpret tribal law to find that the 2008  
3 General Election was not appealed rendering the Beaman Appeal moot, only federal law – DOI  
4 decisional law – and the facts in the Record.

### 5 THIRD CLAIM FOR RELIEF

#### 6 **Interference with Tribal Membership Decisions in Excess of DOI's Legal Authority, Failure to** 7 **Defer to Tribal Bodies' Interpretations of Tribal law, both in Violation of the APA, DOI Rules,** 8 **and Federal Common Law (5 USC §§ 701-706; 25 CFR Part 2; Federal Common Law)**

8 125. Plaintiffs hereby incorporate by reference paragraphs 1 through 124 of this Complaint  
9 as if each were set forth herein.

10 126. DOI decisional rules and federal common law pertaining to tribal membership  
11 absolutely bar DOI interference with tribal membership decisions. Federal common law and DOI  
12 decisional law prohibit DOI from making any tribal membership decisions without explicit tribal or  
13 congressional authority. As this Court noted, DOI committed not to interfere in the disenrollment  
14 dispute. *Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp.2d 1171, 1185 (2009) ("It has long been  
15 the policy of the Department of the Interior and the BIA, in promoting self-determination, not  
16 become involved in the internal affairs of tribal governments.").

17 127. The EHD attempts to circumvent the prohibition against DOI intervention in tribal  
18 membership decisions by asserting (1) that the disenrollments were done by the Tribal Council, (2)  
19 that the Tribal Council was not recognized at the time, and (3) that DOI may therefore ignore those  
20 disenrollments. The Record demonstrates that the disenrolled individuals with whom DOI is  
21 concerned were removed from the membership list not by the Tribal Council, but by the independent  
22 Tribal Enrollment Committee. The Record demonstrates that DOI has never called the legitimacy of  
23 the Tribal Enrollment Committee into question at any time, and that at the time of the disenrollments  
24 in question, the 2007 Death Valley Tribal Council was recognized *de jure* and *de facto* by DOI and  
25 other federal agencies.

26 128. Even if the issue were whether the Death Valley Tribal Council was recognized at the  
27 moment it issued resolutions agreeing with the Tribal Enrollment Committee's finding that the  
28 disenrollees had never demonstrated their eligibility for tribal membership, the Record reflects that

1 the DOI decisions recognizing the 2007 Death Valley Tribal Council were still in effect at that time,  
2 meaning that Tribal Council was recognized *de jure* and *de facto* by DOI.

3 129. The Court need not interpret tribal law, but only review the record and compare it to  
4 DOI's version of the facts in the EHD to find that the basis of the EHD's decision to disregard the  
5 membership decision of the Tribal Enrollment Committee violates the APA.

6 130. The EHD, does far more than just reject the removal of the disenrollees from the list  
7 of registered voters y the Tribal Election Board on procedural grounds. The EHD based the decision  
8 to recognize Gholson on DOI's own substantive tribal membership decision. Echo Hawk found that  
9 he would not recognize the 2010 Death Valley Tribal Council because "Mr. Kennedy" supposedly  
10 prevented the disenrollees from voting in the 2010 General Election. Echo Hawk found that he  
11 would recognize Gholson because he purportedly allowed those disenrollees to vote. Furthermore,  
12 none of the facts pertaining to either 2010 election are in the Record. The EHD did not address the  
13 facts, which are in the Record, that the Tribal Election Board, not the Tribal Council or Mr.  
14 Kennedy, conducts General Elections, generates the list of registered voters, and certifies the results.  
15 The fact that the 2010 General Election was conducted by the Tribal Election Board, like all previous  
16 elections, is not in the Record, but if Echo Hawk had followed the requirements of 25 CFR § 2.21,  
17 Plaintiffs would have briefed the facts of the 2010 General Election for him.

18 131. The EHD makes the substantive tribal membership decision that the disenrollees must  
19 be allowed to vote, and that DOI will not recognize any election in which they are not permitted to  
20 vote, effectively replacing the Tribal Election Board with the AS-IA for the purpose of generating the  
21 list of registered voters. In fact, the disenrollees have more protection for their right to vote than the  
22 registered voters of the Tribe who may still lose their right to vote.

23 132. The EHD makes the substantive tribal membership decision that the disenrollment  
24 violated the Indian Civil Rights Act and tribal law. Both federal common law and DOI decisional  
25 law requires that DOI have explicit tribal or congressional authority before it may make any  
26 membership decisions. The EHD, however, merely referenced the Indian Civil Rights Act and tribal  
27 law without giving any facts or reasoning in support of its finding or identifying a source of authority  
28 for DOI to make such a membership decision, because there is no such support for the decision. Nor

1 does the EHD address the fact that over-expansion of the right to vote (vote dilution), which the  
2 EHD forced on the Tribe, is recognized by federal law as just as grave a violation of the right to vote  
3 as the over-restriction of the franchise. As the Record reflects, the Tribal Election Board only allows  
4 those who have shown eligibility for membership in the Tribe to vote and that the disenrollees could  
5 seek, and may still seek, to be added to the list of registered voters at any time by presenting proof of  
6 eligibility in the Tribe. By preempting that tribal process, DOI has disregarded federal common law  
7 and DOI decisional law (1) requiring that DOI defer to the decisions of tribal law-applying bodies,  
8 and (2) prohibiting DOI from making tribal membership decisions without explicit tribal or  
9 congressional authority, and thus violated the APA.

10 133. This Court does not need to interpret tribal law to find that DOI has overstepped its  
11 authority in tribal membership matters. The EHD on its face demonstrates that DOI made a  
12 membership decision adding 74 disenrollees to the list of registered voters. Neither the EHD nor the  
13 Record contain any tribal or congressional grant of authority to DOI to make tribal membership  
14 decisions.

15 134. Even if the EHD could have lawfully delved into tribal membership decisions, which  
16 it could not absent explicit tribal or congressional authorization, DOI is bound by its own regulations  
17 not to recognize the disenrollees as tribal members. As part the 1982 recognition of the Tribe  
18 pursuant to 25 CFR Part 83, DOI found that the 192 individuals on the 1978 Base Roll represented  
19 all known members of the Tribe, and pursuant to 25 CFR § 83.12, DOI prohibited from recognizing  
20 any individual added to the Tribe's membership list who does not meet the original criteria for  
21 membership approved by DOI. The Record reflects the uncontroverted fact that none of the  
22 disenrollees appear on the 1978 Base Roll, and that Gholson, Jackson, and many other disenrollees  
23 were born long before 1978. Moreover, information supplied by Gholson directly to DOI (1) admits  
24 that he is not on the 1978 Base Roll, and (2) bases his claim for membership on a ground that was  
25 *rejected* as a basis for tribal membership in the Tribe's application for recognition in 1979. That  
26 decision, approved by DOI, is reflected in DOI's findings published in 1982 which are included in  
27 the Record. Thus, based solely on the Record and its own regulations, before even considering tribal  
28 law, DOI could not reasonably find that Gholson and other similarly situated are eligible for

1 membership in the Tribe. Even if it were not arbitrary and capricious and a violation of law for DOI  
2 to make a tribal membership decision, it would be arbitrary and capricious for DOI to make such a  
3 decision without considering its own regulations at 25 CFR Part 83 governing DOI's treatment of  
4 tribal membership, and the facts in the Record pertaining to the membership in the Tribe of  
5 individuals it intended to recognize to carry out an election on its behalf, and would therefore violate  
6 the APA.

#### 7 **FOURTH CLAIM FOR RELIEF**

8 **Interference with Internal Tribal Affairs in Excess of DOI's Legal Authority by Artificially**  
9 **Manufacturing a Hiatus in Federal Recognition of a Tribal Government Notwithstanding the**  
10 **Existence of a Tribal Government, in Violation of the APA, DOI rules, and Federal Common**  
11 **Law (5 USC §§ 701-706; 25 CFR Part 2; Federal Common Law)**

12 135. Plaintiffs hereby incorporate by reference paragraphs 1 through 134 of this Complaint  
13 as if each were set forth herein.

14 136. Under federal common law, DOI may not permit a hiatus in recognition of a tribal  
15 government. *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). Under *Goodface*, the court  
16 found that it had jurisdiction to require BIA to "recognize and deal with some tribal governing body  
17 in the interim before resolution of the election dispute [by the Tribe]," but not to resolve the election  
18 dispute itself. *Id.* The court found that, "the BIA should be required to deal with the [most recently  
19 elected] council as the certified and sworn winners of the tribal election." *Id.* In other words, the  
20 *Goodface* court respected tribal self-government by presuming that the tribe's election board had  
21 conducted a valid election, and that the BIA should recognize the new Tribal Council until the  
22 appeals within the tribe found otherwise.

23 137. Echo Hawk's February 19, 2010 Scheduling Order and Burdick's February 24, 2010  
24 decision ("2010 Decisions"), which were both written principally by the same DOI attorney, take the  
25 position that DOI could not recognize any Timbisha tribal government because the last uncontested  
26 tribal government had been the 2006 Death Valley Tribal Council, which had expired. The 2010  
27 Decisions did not explain why DOI had to create a hiatus in the government-to-government  
28 relationship when DOI had been working with the 2007 and 2008 Death Valley Tribal Councils on a  
government-to-government basis, and could have recognized the Tribal Election Board-certified

1 election of the 2009 Death Valley Tribal Council just three months earlier consistent with *Goodface*.  
2 Inexplicably, the 2010 Decisions did not acknowledge the fact that DOI had been present at and  
3 observed the Tribal Election Board's conduct of the 2009 General Election and had not objected to it  
4 in any way. The 2010 Decisions conflicted with the federal common law and with DOI decisional  
5 law established by the IBIA and AS-IA under the regulations applicable to those offices, which  
6 require that DOI not permit a hiatus in the government-to-government relationship.

7 138. The purpose for creating the lapse in recognition was to force the tribal government to  
8 comply with DOI's wishes that it permit the disenrollees to vote without submitting any proof of  
9 eligibility. That purpose is reflected in the Scheduling Order and in the written and oral  
10 communications received from Deputy AS-IA George Skibine and the then-Acting Director of the  
11 Pacific Regional Office, Dale Risling. Skibine and Risling delivered ultimatums explicitly  
12 demanding that the Tribe not insist on strict compliance with tribal election law, and demanding that  
13 the Tribe permit the disenrollees to vote without demonstrating their eligibility. When the Tribal  
14 Election Board offered to permit disenrollees to vote if they submitted proof of eligibility, DOI  
15 ceased communications. The EHD then used the unnecessary hiatus in the  
16 government-to-government relationship caused by the 2010 Decisions as justification for recognizing  
17 Gholson. Revising the history of the administrative appeals process to better suit DOI's preferred  
18 outcome, and to conceal the deliberate violations of DOI rules and federal common law, is arbitrary  
19 and capricious, and thus violates the APA.

#### 20 Rollback Rule

21 139. At some point between Goodface and the present, DOI adopted a policy that stands  
22 Goodface on its head, and began recognizing a former and uncontested Tribal Council in every case  
23 where there has been an appeal filed under 25 C.F.R. Part 2 challenging DOI acknowledgment of  
24 current tribal election results ("Rollback Rule"). The Rollback Rule implicitly assumes that all tribal  
25 elections are invalid until DOI, not the tribe, finds otherwise pursuant to 25 CFR Part 2. This Court  
26 discussed the Rollback Rule in *Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1185  
27 (E.D. Cal. 2010). The Rollback Rule by definition results in the recognition of an expired Tribal  
28 Council, often for years, while the appeals within DOI are resolved.

1           140. The legitimacy of a tribal government derives from a mandate of the tribal  
2 membership, not from recognition by DOI bureaucrats. Therefore, legitimate Tribal Councils  
3 continue to be elected during the pendency of the appeals within DOI, while DOI persists in  
4 recognizing an expired Tribal Council.

5           141. The Rollback Rule falls within the definition of a “substantive” rule subject to the  
6 notice and comment rulemaking procedures of the APA. The Rollback Rule is an agency statement  
7 of both general and particular application in all current and future cases where an appeal has been  
8 filed challenging DOI recognition of tribal election results. DOI purports to apply the Rollback Rule  
9 uniformly, without regard to the circumstances of an individual case. Under the APA, federal  
10 agencies must promulgate agency rules by providing notice and an opportunity for comment. DOI’s  
11 failure to promulgate its policy as a written rule and provide Indian tribes and the general public an  
12 opportunity to comment is arbitrary, capricious, violates the APA’s rulemaking procedures, and is  
13 subject to judicial review under the APA, 5 U.S.C. §§701-706.

14           142. The February 17, 2009, and March 24, 2009, decisions by then-Director of the Pacific  
15 Regional Office, Dale Morris (“2009 Decisions”), relied upon the Rollback Rule, proposing to  
16 recognize the 2006 Death Valley Tribal Council despite the fact that three seats had expired in  
17 December 2007 and the remaining two expired in December 2008 -- two months before the 2009  
18 Decisions. The 2009 Decisions were ineffective because they had been appealed pursuant to 25 CFR  
19 § 2.6, but Burdick gave them practical effect when he refused to carry out his nondiscretionary duty  
20 to approve the Tribe’s annual self-determination contract in July of 2009.

21           143. Echo Hawk’s February 19, 2010 Scheduling Order and Burdick’s February 24, 2010  
22 decision (“2010 Decisions”), announced that DOI would no longer recognize any Timbisha tribal  
23 government because the last uncontested Tribal Council, the 2006 Death Valley Tribal Council had  
24 expired, implicitly rejecting the Rollback Rule without explanation for the change in direction from  
25 the 2009 Decisions and from the de facto recognition of the Death Valley Tribal Councils. The 2010  
26 Decisions found that DOI could not recognize any Timbisha Tribal Council because by that late date,  
27 not only had the 2006 Death Valley Tribal Council expired, but so had the 2007 Death Valley Tribal  
28 Council, and so would have the Beaman Faction’s purported Tribal Council if it had ever come into

1 existence. Thus, the 2010 Decisions reject the Rollback Rule without explanation.

2 144. If DOI cannot recognize a Tribal Council whose terms have expired, then the  
3 Rollback Rule is per se invalid. If the Rollback Rule is valid, then DOI may recognize expired  
4 Tribal Councils. The two theories are mutually exclusive. The EHD, however, depends on the  
5 validity of both the Rollback Rule and the theory of the 2010 Decisions. The EHD found that DOI  
6 never recognized any tribal government after the 2006 Death Valley Tribal Council. The EHD also  
7 found that it could not recognize any Tribal Council whose members' terms had expired, such as the  
8 2006, 2007, and 2008 Death Valley Tribal Councils and the theoretical 2007 Beaman "Council,"  
9 which does not appear to have ever met. The alternative is that DOI simply refused to recognize any  
10 tribal government, creating a nearly four-year hiatus in government-to-government relations in  
11 violation of *Goodface*. The evidence in the Record rebuts the idea that DOI applied the Rollback  
12 Rule or created a four year hiatus in government-to-government relations. The Record supports the  
13 fact that DOI recognized the 2007, 2008, and 2009 Death Valley Tribal Councils while the appeals  
14 worked their way through DOI, consistent with *Goodface*.

15 145. Under *Goodface*, the logical choice in the EHD would have been to recognize the  
16 only entity continuously elected from 1986 through 2010, the 2010 Death Valley Tribal Council, and  
17 to presume that the Tribal Election Board, which had conducted all of the Timbisha elections ever  
18 recognized by DOI, would conduct its duties properly at the next Special or General Election. The  
19 EHD, however, applied the Rollback Rule to find that there was no valid government for the last  
20 four years. Under the Rollback Rule that would have led to "continued" recognition of the 2006  
21 Death Valley Tribal Council. The EHD, however, dropped the Rollback Rule in favor of finding that  
22 DOI could not recognize an expired Tribal Council. Ignoring the history of the Tribal Election  
23 Board-administered and -certified General Elections from 1986 through 2010, the EHD put the  
24 Gholson Faction, established in 2009 in the middle of the dispute, on an equal dignity and reliability  
25 with the Tribal Election Board, established in 1986, long before the present dispute. As discussed  
26 above, once DOI freed itself to recognize either Gholson or the Tribal Election Board, it decided,  
27 based on facts not in the Record and on DOI's decision on tribal membership matters, to recognize  
28 the Gholson Faction.

1 146. The Rollback Rule was adopted outside of the proper rule making process of the  
2 APA, is arbitrary and capricious, violates federal common law and DOI decisions requiring  
3 deference to tribal law-applying bodies, and thus violates the APA. Because the EHD relies upon the  
4 Rollback Rule and on prior DOI decisions that rely on the Rollback Rule, it is arbitrary and  
5 capricious, violates federal common law and DOI decisions requiring deference to tribal  
6 law-applying bodies, and thus violates the APA. The EHD is also internally inconsistent because it  
7 relies on the Rollback Rule, which would permit the recognition of an expired Tribal Council, and  
8 on the theory that DOI cannot recognize an expired Tribal Council. The internal inconsistency is  
9 arbitrary and capricious, and thus violates the APA.

10 **FIFTH CLAIM FOR RELIEF**

11 **Violation of the APA by Relying on Irrelevant Factors and Ignoring Relevant Factors in**  
12 **Violation of DOI rules, federal common law, and the APA**  
**(5 USC §§ 701-706; 25 CFR Part 2; DOI rules and Federal Common Law)**

13 147. Plaintiffs hereby incorporate by reference paragraphs 1 through 146 of this Complaint  
14 as if each were set forth herein.

15 **The EHD Artificially Limited its Scope to the January 20, 2008 Special General Council**  
16 **Meeting**

17 148. The EHD declares without the support of the Record, that the only question at issue is  
18 whether the January 20, 2008 Special General Council Meeting acted legitimately. In the appeal that  
19 instigated the administrative appeals that culminated in the EHD, however, the Beaman Faction  
20 sought recognition of its own gaming developer-funded 2007 election over the 2007 General  
21 Election conducted and certified by the Tribal Election Board. The EHD was written as if the 2007,  
22 2008, and 2009 General Elections simply did not happen. That omission is arbitrary and capricious  
23 since the gravamen of the EHD is the legitimacy of a tribal election, and thus violates the APA.

24 149. The deliberate ignorance of the 2008 General Election which appears in the Record is  
25 inexcusable because, in addition to the fact that the 2008 General Election was not appealed and was  
26 certified by the Tribal Election Board, neither Bishop Faction purported to conduct an election in  
27 2008. The deliberate ignorance of the 2009 General Election is simply bizarre, since DOI acted as  
28 independent observer of the Tribal Election Board conduct of that election and did not object to the

1 election. The EHD's disregard for the 2007, 2008, and 2009 elections is unreasonable because the  
2 EHD reached out beyond the Record to consider the 2010 elections. The decision to disregard  
3 important relevant information, and to give no legitimate reason for that disregard, both are arbitrary  
4 and capricious, and thus violate the APA.

5 150. The EHD also made many mistakes of fact controverted by the Record. Among other  
6 things, the EHD assumed without explanation that no quorum existed at the August 25, 2007 Death  
7 Valley Tribal Council meeting after Beaman, Beck, and Casey left. The Tribal Council is governed  
8 by Robert's Rules of Order, which hold that once the quorum is established in a legislative body, it  
9 remains until a member of the body questions whether there is still a quorum. The U.S. House of  
10 Representatives and U.S. Senate follow essentially the same rule. The Death Valley Tribal Council  
11 repeatedly brought that fact to the attention of Echo Hawk, but he chose to ignore it. The EHD also  
12 incorrectly assumed that the evidence of only the signatures of Madeline Esteves and Joe Kennedy  
13 on a tribal resolution indicated they were the only two Tribal Council members at the meeting. As  
14 the Record reflects, Death Valley Tribal Council resolutions are only signed by the  
15 Secretary-Treasurer and the Chairman to attest to the legitimate adoption of the resolution.

16 **The EHD Did Not Consider the Violations of Plaintiffs' Civil Rights in the DOI Election**

17 151. Although the EHD finds that it cannot recognize the Death Valley Tribal Council on  
18 the basis of the purported violation of one man's civil rights -- Ed Beaman -- it does not recognize at  
19 all the deprivation of the civil rights of the five Plaintiffs who were candidates in the DOI Election  
20 and of the 20% of voters who appealed the DOI Election. Although Gholson included the Death  
21 Valley Tribal Council members' names on the DOI Election ballot, he refused to include their  
22 campaign statements with the ballots. The campaign statements are generally the only means for the  
23 candidates to communicate with voters, thus the abridgement of the freedom of speech in the DOI  
24 Election was particularly egregious since it censored political speech based on the views expressed in  
25 that political speech. Further, DOI is well aware, soon after EHD I, Gholson gained entry to the  
26 Tribal Administration Building and removed Plaintiffs' postage machine and all of its printer paper,  
27 effectively preventing them from communicating by mail.

28 **The EHD Did Not Consider the Purposes of the Homeland Act**

1           152. The Homeland Act set aside the Timbisha Reservation as the seat of tribal  
2 government, as the area over which the Tribe may exercise its governmental authority, construct  
3 tribal housing, and conduct economic development. The Homeland Act recognized the direct  
4 predecessors of the Death Valley Tribal Council, which have governed the Tribe from Death Valley  
5 since time immemorial.

6           153. In contrast to the Homeland Act, the EHD recognized the Gholson Faction, which  
7 operates out of a private office, in Bishop, CA, rented for it by GIE. It is located 160 miles from the  
8 Reservation, but across the street from the Bishop Paiute Reservation. The Record reflects that the  
9 Bishop Factions, through their words and their actions, have wholly rejected the use of the  
10 Reservation established by the Homeland Act for government, housing, cultural preservation, and  
11 economic development purposes. Their only goal is to obtain a reservation in Hesperia for gaming  
12 purposes. The Homeland Act forms an important basis for any decision concerning Timbisha  
13 because it defines Congress's understanding of the Tribe. Despite the fact that the Bishop Factions'  
14 clear intentions on the Record, the EHD did not consider the purposes of the Homeland Act, which is  
15 arbitrary and capricious, in conflict with the Homeland Act, and thus in violation of the APA.

16           **The EHD Ignored Evidence in the Record of Corruption in the Bishop Faction**

17           154. Plaintiffs are informed, believe, and on that basis allege that Gholson and his cousins  
18 have personally received several hundred thousand dollars in cash, free cars, trips, and other benefits  
19 from gaming developers aimed at inducing them to sign development agreements in the name of the  
20 Tribe without informing the tribal membership. That practice has continued with Gholson's cousins  
21 recently appropriating the contents of a tribal bank account without informing the tribal membership.  
22 Gaming developer interference with internal tribal affairs violates the IGRA, and the Record reflects  
23 evidence of the corruption of the Bishop Factions by gaming developers, but DOI fails to address  
24 those facts despite their importance to whether DOI may reasonably expect the Gholson Faction to  
25 conduct a legitimate election on DOI's behalf, and thus violates the APA.

26           155. Moreover, Plaintiffs are informed, believe, and on that basis allege, that the Gholson  
27 Faction has committed the Tribe to repay over \$1 Million it owes to GIE for its assistance in getting  
28 DOI to recognize the Gholson Faction as the tribal government. Although the facts of the support of

1 the Gholson Faction appears in the Record, the EHD does not address the disruption to a poor tribe  
2 that would be caused by such a large obligation incurred without the agreement of Tribe itself.

3 **The Record and EHD Reveal DOI Animus Toward Plaintiffs**

4 156. Evidence of animus toward Plaintiffs, particularly Chairman Kennedy, is revealed by  
5 the actions of DOI during the pendency of the administrative appeal. Plaintiffs are informed,  
6 believe, and on that basis allege that the EHD is based in significant part on the animus DOI bears  
7 for Plaintiffs in general and Chairman Kennedy and Pauline Esteves in particular for their part in  
8 continually challenging DOI's treatment of the Western Shoshones in general and the Timbishas in  
9 particular over the last four decades in the United States and abroad. A decision motivated by  
10 animus is by definition arbitrary and capricious, and violates the APA.

11 157. The EHD accuses Pauline Esteves of being a felon in order to argue that she was  
12 ineligible for election to the Tribal Council in the 2007 General Election. The accusation is reckless  
13 or deliberately mischaracterizes the facts in the Record, which clearly reflect that Pauline Esteves  
14 pleaded nolo contendere to a misdemeanor. She was charged with a misdemeanor for carrying out  
15 activities in her home, then prohibited by discriminatory park regulations. Those same activities  
16 would not have been considered "criminal" if they had taken place after transfer of the land to the  
17 Timbisha Reservation two years later. Accusing Ms. Esteves of being a felon is reckless and  
18 damaging to the reputation of a revered Tribal Elder. Ms. Esteves was the Chairperson of the Tribe  
19 who worked tirelessly to obtain re-recognition of the Tribe by DOI in 1982 and convinced Congress  
20 to set aside the Timbisha Reservation in 2000. Finally, this incorrect characterization should not be  
21 used to question the legitimacy of the legitimate Death Valley government in 2000 or 2007-09 when  
22 Pauline Esteves was on the Death Valley Tribal Council.

23 158. On the basis of Gholson's word, without any certification from the Tribal Election  
24 Board, Burdick precipitously recognized Gholson as Tribal Chairman on October 17, 2008. Soon  
25 thereafter, Burdick attempted to derail the Tribe's General Election by purporting to recognize the  
26 2006 Tribal Council in a letter dated the day before the election, but after most votes had been cast  
27 by absentee ballot. Burdick's letter was not made effective immediately, however, so it would not  
28 have taken effect until December 10, 2008.

1           159. Despite the lack of an exigent circumstance as defined by 25 CFR 2.6, on  
2 December 4, 2008, Morris decided to recognize Gholson on an *ex parte* basis and make the decision  
3 final for DOI, despite the fact that two appeals from Burdick's decisions pertaining to Timbisha  
4 elections were then pending before Morris. Neither Morris nor Gholson's law firm supplied a copy  
5 of his *ex parte* filing to the Death Valley Tribal Council for over a month after the Death Valley  
6 Tribal Council filed suit to overturn Morris's December 4, 2008 decision in this Court.

7           160. Burdick on October 20, 2008, and Morris on December 12, 2008, represented to an  
8 Inyo County Deputy Sheriff that Gholson had the right to remove tribal property from the Tribal  
9 Administration Building on the Reservation. In both cases the decisions were premature, but even if  
10 they had validly recognized Gholson, Burdick and Morris were both faced with three of five Tribal  
11 Council members vociferously opposing the removal of tribal property by Gholson and the fact that  
12 the Chairman, which Gholson claimed to be, does not have a vote on the Tribal Council. Further, it  
13 is beyond the authority of DOI bureaucrats to give authorization to a state law enforcement official to  
14 use the threat of force to carry out the wishes of even a legitimate tribal chairman. Both Burdick and  
15 Morris refused to assist the Death Valley Tribal Council to regain possession of the Tribe's  
16 confidential files when they no longer recognized Gholson, much less offering the Tribal Council  
17 assistance similar to that offered to Gholson.

18           161. In the EHD I, the discussion of membership is personalized by referring to the  
19 "belief" of "Mr. Kennedy" that the disenrollees are not eligible for membership. Well before DOI  
20 could have reasonably considered the conduct of the DOI Election on April 29, 2011, DOI had  
21 represented to the U.S. Court of Appeals for the D.C. Circuit that the election was valid and treated  
22 Gholson's certification as beyond reproach.

23           162. For four years, DOI entertained the Beaman Appeal, permitting that faction to  
24 respond to every argument offered by the Death Valley Tribal Council in support of the Tribal  
25 General Election conducted by the Tribal Election Board. Rather than allow the Death Valley Tribal  
26 Council to rebut Gholson's arguments in favor of his election, DOI issued EHD II, and made it final  
27 for the agency. Thus, EHD II denies to the Death Valley Tribal Council and the rest of the appellants  
28 who stood ready to appeal if DOI recognized the DOI Election the opportunity to argue their views

1 before a federal agency – even one as predisposed against them as DOI. Further, EHD II does not  
2 supply a reasoned analysis supporting DOI's finding that there was no merit to the appeals of  
3 Plaintiffs and the other 20% of voters who appealed the DOI Election, and thus violates the APA.

4 163. Although DOI refused for four years, in defiance of federal common law and its own  
5 rules, to defer to the certifications of the Tribal Election Board that had conducted all previous  
6 recognized tribal elections, in EHD II, DOI suddenly declared that it was bound by the decision of an  
7 entity created by Gholson for the DOI Election. The EHD did not supply a reasoned analysis for  
8 dismissing the appellants objections to the DOI Election without any substantive consideration; for  
9 DOI's sudden policy change from refusing to accept the certifications of the longstanding Tribal  
10 Election Board to accepting without question the certification of an entity established by the Gholson  
11 Faction; or for the basis of EHD II's recognition of the Gholson Faction. Because it does not supply  
12 a reasoned analysis or the facts on which EHD is based, it violates the APA.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiffs respectfully pray as follows pursuant to all Claims for Relief that  
15 this Court:

- 16 (1) Declare that the EHD violates the APA, because it is arbitrary, capricious, and  
17 otherwise not in accordance with law, violates the Plaintiffs' constitutional right to due process of  
18 law, is in excess of DOI's statutory authorities, and fails to comply with procedures required by law;  
19 (2) Enjoin DOI, BIA, and their officials from implementing the EHD;  
20 (3) Remand the EHD to DOI for further proceedings consistent with federal law;  
21 (4) Award Plaintiffs reasonable fees, expenses, costs, and disbursements, including  
22 attorney fees pursuant to the Equal Access to Justice Act; and  
23 (5) Grant Plaintiffs such further and additional relief as the Court deems just and proper.

24  
25 Dated: August 5, 2011

Respectfully submitted,

26  
27 By: /s/ Jeffrey R. Keohane  
Jeffrey R. Keohane  
FORMAN & ASSOCIATES  
28 Attorneys for Plaintiffs

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**CONSTITUTION OF THE****TIMBISHA SHOSHONE INDIAN TRIBE**

Inyo County

Death Valley, California

**PREAMBLE**

We, the Timbisha Shoshone Indian Tribe, being a sovereign native people, in order to organize for our common good, to maintain and foster our tribal culture, to protect and conserve our land and natural resources, to promote the social, economic and general welfare of our people, to maintain peace and order, and secure the rights and powers inherent in our sovereign status, guaranteed to us by the laws of the United States, do hereby establish and adopt this document in accordance with the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended which from this time forward shall govern the Timbisha Shoshone Indian Tribe.

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**ARTICLE I**

Name

The name of this organization shall be the Timbisha Shoshone Indian Tribe, hereinafter referred to as "the Tribe".

**ARTICLE II**

Territory and Jurisdiction

The jurisdiction of the Tribe shall extend to all lands, water and resources within the exterior boundaries of what shall become the Timbisha Shoshone Indian Reservation and to such other lands, water and resources as may be thereafter acquired by the Tribe.

**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;

c. All persons of Indian blood upon whom membership is conferred by adoption.

## Section 2.

A person who has been allotted or given a land assignment on another

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reservation or is officially enrolled with or is a recognized member of some other tribe or band shall not be enrolled.

### Section 3.

The official membership roll shall be prepared in accordance with an ordinance adopted by the tribal council. Such ordinance shall contain provisions for enrollment procedures, enrollment committees, application form, approval or disapproval of applications, rejection notices, appeals, corrections, adoptions, disenrollment procedures and provisions for keeping the roll on a current basis.

### Section 4.

No person shall be enrolled as an adopted member of the Tribe unless he/she possesses at least one-fourth (1/4) degree Indian blood and has been approved by a majority vote of the General Council.

### Section 5.

Any person who wishes to withdraw from membership in the Tribe must submit his withdrawal in writing to the Tribal Council Chairperson who shall direct the enrollment committee to adjust its records accordingly.

### Section 6.

The Tribal Council shall revoke membership status from any individual whom the enrollment committee has determined was erroneously, fraudulently or otherwise incorrectly enrolled.

## ARTICLE IV

### Governing Body

### Section 1.

The powers of the government of the Tribe shall be divided into three distinct branches; the General Council, the Tribal Council and the Tribal Judiciary. No branch, group or person charged with the exercise of powers properly belonging to one of these branches shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document.

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**Section 2.**

The governing body of the Tribe shall be the General Council. The General Council shall consist of all tribal members sixteen (16) years of age or older. All members of the General Council shall be able to vote at all General council meetings and all tribal elections, referenda, initiatives, recalls and repeals.

**Section 3.**

In addition to the General Council, there shall be elected from the General Council, a Tribal Council. The Tribal Council shall be composed of five (5) persons elected by the General Council. The Tribal Council shall exercise, concurrently with the General Council, all powers delegated to it by the General Council in Article V of this document and otherwise vested in the Tribal Council by this document.

Any member of the Tribe who is eighteen (18) years old or older shall be eligible to serve as a member of the Tribal Council, provided that not more than one additional immediate family member of any person already serving on the Tribal Council may serve on the Tribal Council. For purposes of this section, "immediate family member" shall mean mother, father, brother, sister, spouse or child.

**ARTICLE V****Powers****Section 1. General Council**

a. All powers of the Tribe shall be vested in the General Council, subject to any limitation imposed upon such powers by the laws of the United States, including those powers delegated to the Tribal Council and any such other powers as may in the future be granted or delegated to the Tribe by federal law.

b. The General Council shall exercise its powers of self government through the initiative, referendum, repeal and recall powers as set forth in this document.

c. The following powers shall be exclusively reserved to the General Council. No

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exercise of these powers by the Tribal Council or by any other agency or officer of the Tribe shall be effective unless the General Council has given its consent to such action in accordance with Article V of this document:

1. No sale, disposition, encumbrance of tribal lands, interest in lands or other Tribal assets shall be made without the consent of the General Council.
2. The power to regulate any tribal hunting or fishing rights.
3. The power to revoke, terminate or diminish a right reserved or delegated to the Tribe by federal law.
4. The power to grant or relinquish any tribal jurisdiction to any other government, political subdivision of a government agency, organization, association or person.
5. The power to waive the Tribe's immunity from suit.
6. The power to set compensation for Tribal Council members, officers and committee members, as it believes is advisable.
7. The power to reassume jurisdiction over juvenile matters pursuant to the Indian Child Welfare Act of 1978, Public Law 95-608, 92 Stat. 3069.

All powers that are not expressly mentioned in this document or which are not expressly delegated in this document by the General Council to the Tribal Council or any other officer or agency of the Tribe, shall not be abridged but shall be reserved to the General Council.

## Section 2. Tribal Council

The General Council hereby delegates to the Tribal Council the following enumerated powers subject only to those limitations imposed by this document and the laws of the United States:

- a. On behalf of the Tribe, to consult, negotiate, contract or conclude agreements with federal, state, local and tribal governments and with private persons and organizations;
- b. To employ legal counsel of its choice on behalf of the Tribe or for the benefit of tribal members and to fix the fees for such counsel in accordance with federal law;
- c. To make recommendations to the Secretary of the Interior or to his authorized representative with regard to all appropriation estimates for all projects which are for the benefit of the members of the Tribe, prior to the submission of such estimates to the Office of Management and Budget and Congress, or to the State of California;

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d. To borrow money from public and private sources and to pledge, mortgage or assign tribal assets except as provided in Sections 2, 3, 4, and 5 of this Article;

e. To set aside and to spend tribal funds for tribal purposes;

f. To impose taxes on all persons, property and business activities located or conducted within tribal jurisdiction, provided no tax shall be imposed on real property held in trust by the United States of America;

g. To regulate the use and development of all tribal lands, whether assigned or unassigned, and to manage, lease or otherwise use all unassigned tribal lands. Toward this end the Tribal Council shall, within one year of the effective date of this document, submit for approval to the General Council a land assignment and a land use law;

h. To charter and regulate corporations, cooperatives, associations, special districts, housing authorities, educational and charitable institutions, political subdivisions and other entities;

i. To license and regulate the conduct of all business activities within tribal jurisdiction;

j. To establish business enterprises as branches or agencies of the tribal government and otherwise to engage in business activities and projects which promote the economic well being of the Tribe and its members;

k. To purchase and to acquire in other ways land and other property;

l. To condemn for tribal purposes real property or interest in real property within tribal jurisdiction, provided that the owners of assignments or property condemned by the Tribal Council shall be paid fair market value for the assignment or property and all improvements made thereon by the assignee or owner, and provided further that an assignee of condemned tribal lands shall be assigned alternative tribal lands of comparable condition and value; and provided further that no assignments shall be

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condemned without the approval of the General Council;

m. To manage, develop, protect and regulate the use of water, minerals and all other natural resources within tribal jurisdiction;

n. To enact laws, statutes and codes governing conduct of individuals and proscribing offenses against the Tribe; to maintain order; to protect the safety and welfare of all persons within tribal jurisdiction; and to provide for the enforcement of the laws and codes of the Tribe;

o. To establish tribal courts or courts of Indian offenses from time to time as may be required, and to provide for the court or courts jurisdiction, procedures and a method for the selection of judges;

p. To prescribe conditions under which non- members may enter and remain on the reservation and to establish procedures for the exclusion of non- members from any land within the Tribe's jurisdiction;

q. To assert as a defense to lawsuits against the Tribe, the sovereign immunity of the Tribe, except that no waiver of sovereign immunity can be made by the Tribal Council without prior approval of the General Council;

r. To regulate the domestic relations of members of the Tribe; to provide for the guardianship of minors and incompetent persons within tribal jurisdiction; to provide services for the peace, safety, health, education and general welfare of the members of the Tribe;

s. To regulate the inheritance of all lands within tribal jurisdiction and all property owned by persons within tribal jurisdiction; and to provide for escheat of property to the Tribe, provided that no law, statute, code or ordinance governing the inheritance of property owned by tribal members shall be in violation of federal law;

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t. To enact ordinances consistent with this document establishing procedures for the nomination, election, removal and recall of tribal officers;

u. To appoint, direct and set the compensation of a tribal business administrator or manager; and to establish policies and procedures for the employment of tribal personnel;

v. Subject to any limitations contained in this document to delegate any powers vested in the Tribal Council to subordinate tribal officers, tribal employees or other appropriate persons;

w. To take all actions which are necessary and proper for the exercise of the powers enumerated in this document and which are otherwise consistent with, and in furtherance of, tribal customs, traditions and beliefs, and any other powers which may hereafter be vested in the Tribal Council; and

x. Except as provided in this document, to establish its own rules of procedures.

### Section 3. Reserve Powers of General Council

The Tribal Council shall have all the appropriate powers necessary to implement specific provisions of this document and to effectively govern tribal affairs. All powers heretofore vested in the Tribe, but not specifically referred to in this document, shall not be abridged, but shall be reserved to the General Council.

### Section 4. Limited Power to Transfer Tribal Land Out of Tribal Ownership

The Tribal Council shall not transfer land or interests therein out of tribal ownership by any means unless prior to any such transfer taking effect, such proposed transfer is approved by:

a. A vote of two-thirds (2/3) of the General Council provided that at least

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forty-five (45) people who are entitled to vote are present;

b. The Secretary of the Interior; Provided, however, the Tribal Council may exchange land, prior to it becoming tribal land, however, such exchanges must be approved by a two-thirds (2/3) vote of the General Council before the exchange.

#### Section 5. Limited Power to Encumber Tribal Land

a. Except as permitted by Subsection (b) of this Section, the Tribal Council shall not pledge, mortgage, lease or grant licenses to use land, (whether revocable or irrevocable) or otherwise encumber tribal land or interests therein unless it is approved by the Secretary of the Interior and by a vote of a majority of the General Council voting on the question, Provided that at least forty-five (45) persons who are entitled to vote are present.

b. The Tribal Council may authorize the following encumbrances by a vote of a majority of the entire Tribal Council;

1. Grants of permission to members of the Tribe and qualified non-members in accordance with provisions of this document, to use specified portions of tribal land for residential, agricultural, commercial or industrial purposes.

2. Grants of rights-of-way over tribal land or interests therein; for the purposes of providing municipal services, such as water, sewer disposal, electricity, telephone and roads, to and for the benefit of tribal members, or the heirs and descendants of tribal members who had a land use assignment or lease.

#### Section 6. Limited Power to Develop Natural Resources

The Tribal Council shall not develop on a commercial or industrial basis any natural resources of the Tribe without the consent of a majority vote of the General Council, provided that at least forty-five (45) persons who are entitled to vote are present.

#### Section 7. Principal of Construction

Section 5, 6 and 7 of this Article shall not be construed to deny to the Tribal Council its governmental power and authority to regulate activities on tribal land for the Tribe's general welfare, including, but not limited to, zoning, the regulation of commercial ventures, fishing, hunting and other sports

activities, and for the purpose of promoting the health, safety and welfare of  
tribal members and the conservation and protection of tribal resources.

## **ARTICLE VI**

### **Elections**

#### **Section 1.**

An election board, appointed by the chairperson and approved by the Tribal Council, shall supervise and administer all elections in accordance with the election ordinance enacted by the Tribal Council in accordance with this document, within three months of the effective date of this document.

#### **Section 2.**

Members of the Tribal Council shall be chosen by secret ballot, the form of which shall be established by the election ordinance enacted by the Tribal Council. The Tribal Council shall also make provisions in the election ordinance for absentee voting.

#### **Section 3.**

All present officials shall continue to hold office until the first general election date following the adoption and ratification of this document. The first election of Tribal Council members and officers of the Tribe under this document shall be held on the first general election date following the effective date of this constitution. Procedures for the first election shall be consistent with the provisions of this Article and the election ordinance, should it be established at that time, and be administered by the present officials. Thereafter all elections shall be conducted in accordance with this document and the election ordinance.

At the first election held pursuant to this document, the two members receiving the highest number of votes shall hold office for (3) years and the remaining members shall hold office for two years. Thereafter, the candidate(s) receiving the highest number of votes shall fill the vacancy or vacancies for two year terms of office.

#### **Section 4.**

a. Any qualified member of the Tribe who desires that his or her name be placed on the ballot as a candidate for the Tribal Council shall file with the Tribal secretary a statement of intent stating his or her name and address. Such statement shall be filed thirty (30) days prior to the next general election or special election. If only one qualified member files a statement of intent for a tribal office, a special meeting of the General Council shall be convened for the

purpose of taking nominations from the floor for a candidate or candidates for that office; however, no more than the first three (3) nominations will be accepted from the floor for any one position.

b. General elections to vote for Tribal Council members shall be held annually on the second Tuesday of the month of November. Notice of the general elections shall be posted by the secretary of the Tribal Council at least twenty (20) days before each such election at the Tribe's business office, the voting place, and in three or more additional public places. In case the date of the general election should conflict with a holiday, the election shall be held on the following work day.

c. All newly elected officials shall assume their offices thirty (30) days after the election in which they were elected.

d. A tie vote shall be decided only by holding a general election within thirty (30) days from the date of the previous general election that resulted in a tie. Only those receiving the same number of votes shall be candidates in the subsequent election. The person receiving the highest number of votes for the particular office shall hold that office.

#### Section 6.

After the first election held under this document, Tribal Council members shall elect the following officers from the Tribal Council:

1. Chairperson;
2. Vice Chairperson; and
3. Secretary/Treasurer.

The officers shall be elected by a majority vote and shall serve two year terms.

After all subsequent Tribal Council elections, the Tribal Council members shall

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elect officers from the Tribal Council when the prior officer's term has expired or vacated.

## ARTICLE VII

### Duties of Officers

#### Section 1.

a. The Chairperson shall have the following duties:

1. To preside at all meetings of the Tribal and General Councils;
2. To vote at Tribal and General Council meetings only when it is necessary to break a tie vote;
3. Subject to the approval of the Tribal Council, to appoint all non-elected officials and employees of the Tribal government and direct them in their work, subject only to applicable restrictions embodied in this document or in enactments of the Tribal Council establishing personnel policies or government personnel management;
4. Subject to the approval of the Tribal Council, to establish such boards, committees, or sub-committees as the business of the Tribal Council may require and to serve as an ex-officio member of all such committees and boards;
5. Subject to the approval of all contracts by the Tribal Council, to serve as a contracting officer or agent for the Tribe including the authority to retain legal counsel;
6. Subject to such regulations and procedures as may be prescribed by statute enacted by the Tribal Council and subject to approval by the Tribal Council, to grant pardons or restore Tribal members to eligibility for elective office in the Tribal government;
7. Subject to the approval of the Tribal Council to appoint tribal judges and tribal law enforcement officials as are from time to time required to assure the administration and enforcement of tribal laws;
8. The Chairperson shall hold no other Tribal office or engage in private remunerative employment which may pose a conflict of interest with the Tribe's enterprises or business activities during his term of office;
9. To prepare and cause to be published at least five (5) days before the meetings, an agenda for each General Council meeting. The agenda shall include, but not be limited to:
  - a. A report by the Tribal Secretary/Treasurer on the finances of the Tribal government during the quarter immediately preceding the meeting; and,
  - b. list of all the laws enacted by the Tribal Council during the quarter immediately preceding the meeting, with a short summary explaining each law.

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During the meeting the Tribal Council chair-person will ensure that this agenda, including the financial report, will be available for inspection by any member of the General Council upon request. All items on the agenda will be considered by the General Council before considering new matters from the floor.

#### Section 2.

The Vice-Chairperson shall, with the consent of the Tribal Council, in the absence of the Chairperson, perform all duties and assume all the responsibilities, vested in the chairperson. The vice chairperson shall, upon the request of the chairperson, assist in carrying out the duties of the chairperson. The vice-chairperson shall perform such other duties as the chairperson may direct.

#### Section 3.

The Secretary-Treasurer shall

a. Call the roll, handle all official correspondence of the Tribal Council, keep the minutes of all regular and special meetings of the Tribal and General Councils, and certify to the Superintendent of the Bureau of Indian Affairs, Central California Agency, the duly elected officers of the Tribal and General Councils within fifteen (15) days from the date of any election;

b. Accept, keep and safeguard all funds under the exclusive control of the Tribe by depositing them in a bank insured by an agency of the federal government or in an IIM account or Tribal trust account with the Bureau of Indian Affairs, as directed by the Tribal Council and shall keep or cause to be kept an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his or her custody to the Tribal and General Councils at regular meetings and at such other times as requested by either Council. The Secretary-Treasurer shall not pay or otherwise disburse any funds in the custody of the Tribal Council except when properly authorized to do so by the Tribal Council;

c. At such times as the Tribal Council or General Council may direct, have the books and records of the Tribe audited by a competent independent auditor employed by the Tribal Council.

d. Be present at all meetings of the Tribal and General Councils unless prevented by illness or circumstances beyond his or her control;

e. Required to give a surety bond satisfactory to the Tribal Council if the Tribal Council so desires;

f. Sign and approve all checks drawn on Tribal funds and all vouchers with at least one officer or designated check signer of the Tribe in accordance with a written procedure approved and adopted by the Tribal Council by resolution; and

g. In the absence of the Chairperson and Vice-Chairperson, with the approval of the Tribal Council, the Secretary-Treasurer shall carry out the duties of the Chairperson.

**Section 5.**

The Tribal Council may require all responsible tribal officials and employees to be bonded, the person responsible for the cost of such bonding to be determined by the Tribal Council.

**ARTICLE VIII**

**Meetings**

**Section 1.**

All meetings of the General or Tribal Councils shall be open to all tribal members, except in those cases where the matter under discussion would invade the privacy of an individual tribal member.

**Section 2.**

All meetings of the Tribal Council shall be held in accordance with the following provisions:

a. The Tribal Council shall meet at least once per month. The Council may schedule additional regular meetings as necessary, provided that it shall publish the

schedule of all such meetings.

b. A majority of the members of the Tribal Council shall constitute a quorum at all Council meetings. No business shall be conducted in the absence of a quorum.

c. Special meetings of the Tribal Council may be called by the Chairperson or by any three (3) members of the Council. The notice in regard to any special meeting shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.

d. Each member of the Tribal Council shall have one vote on all matters, and all matters to be acted on at a Tribal Council meeting shall be approved or disapproved by a majority vote of those present and voting, unless provided to the contrary in this document.

### Section 3.

All meetings of the General Council shall be held in accordance with the following provisions:

a. The annual General Council meeting shall be held on the last Saturday of October. The Tribal Council may set more frequent meetings of the General Council as necessary, provided it shall publish a schedule of all such meetings.

b. 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. The notice in regard to any special meeting shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.

c. No business shall be transacted in the absence of a quorum. A majority of the voting members of the General Council shall constitute a quorum at all Council meetings.

**ARTICLE IX**

## Enactments

## Section 1.

All final decisions on matters of general and permanent interest to members of the Tribe shall be embodied in ordinances, such as an enrollment or an election ordinance. Such enactments shall be available for inspection by members of the General Council during normal office hours.

## Section 2.

All final decisions on matters of short term or one time interest where a formal expression is needed shall be embodied in resolution. Other decisions of a temporary nature or relating to particular individuals, officials or committees shall be put in the form of motions and noted in the minutes and shall be available for inspection by members of the General Council during normal business hours.

## Section 3.

All ordinances and resolutions shall be dated and numbered and shall include a certification showing the presence of a quorum and the number of members voting for and against the proposed enactment.

## Section 4.

The General and Tribal Councils shall submit Tribal laws and enactments to the Secretary of the Interior for his review, comment and approval only when required to do so by federal law. Both the General and Tribal Councils may submit any Tribal law or enactment to the Secretary of the Interior for his review, comment and approval if they so desire when not required to do so by federal law. However, the failure of the General or Tribal Councils to submit any Tribal law or enactment to the Secretary or the failure of the Secretary to approve any Tribal law or enactment, when approval is not required by federal law, shall in no way affect the legal validity of such Tribal law or enactment enacted pursuant to this document.

**ARTICLE X**

**Vacancies**

**Section 1.**

The Tribal Council shall declare a Tribal Council position vacant for any of the following reasons:

- a. When a Tribal Council member dies;
- b. When a Tribal Council member resigns;
- c. When a Tribal Council member is convicted of a crime that is classified as a felony by either state or federal law;
- d. When a Tribal Council member is removed from office;
- e. When a Tribal Council member is recalled from office.

If less than twelve (12) months of vacant term remains, the Tribal Council shall fill the vacancy by appointment of a General Council member who qualifies for candidacy for the vacant position. If more than twelve (12) months remain in the vacant term a special election shall be held to fill the vacant position. Such a special election shall be held within thirty (30) days after the Tribal Council declares the position vacant.

**ARTICLE XI**

**Removal and Recall**

**Section 1. Removal**

Any member of the Tribal Council may be removed from office for any of the following reasons:

a. Absence from regular Tribal or General Council meetings three (3) successive, unexcused times, or three (3) unexcused times in any twelve (12) month period;

b. Conviction of a crime involving the moral character of the Tribal Council member;

c. Neglect of duty;

d. Misconduct in office.

1. Any member of the Tribe can request removal of any Tribal Council member by submitting a written statement of charges to the Chairperson of the Tribal Council, or in the case of a request for removal of the Chairperson, to the Vice-Chairperson of the Tribal Council. Such written statement must be received by the accused Council member no later than ten (10) days before the next regular Council meeting at which he or she is to appear.

2. At the next regular Tribal Council meeting following the submission of such written statement, the charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the Tribal Council.

3. After hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is the subject of the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings.

## Section 2. Recall

Every person elected to a position on the Tribal Council or who is an elected officer of the Tribe shall be subject to recall from such office by the General Council as follows:

a. Any member of the Tribe may circulate one or more petitions among the eligible voters of the Tribe requesting a special recall election, which petition(s) shall contain the name(s) of the person(s) whose recall is sought and shall state the charges being preferred against such person(s) in 25 words or less. If one-third (1/3) of the eligible voters of the General Council shall sign the petition(s), such petition(s) shall be presented to the Tribal Council Chairperson, or if charges are being preferred against the Tribal Council Chairperson, to the Vice-Chairperson of the Tribal Council.

b. The Tribal Council Chairperson, or if charges are being preferred against the Tribal Chairperson, the Tribal Council Vice-Chairperson, shall then certify the validity of such signatures of eligible voters maintained by the Tribe. If the required number of valid signatures appear on the recall petition, the Tribal Council shall call a special recall election within sixty (60) days from receipt of the petition(s).

c. Within thirty (30) days after the special recall election has been established a General Council meeting shall be held. The charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the, General Council.

d. The ballot used for a recall election shall contain the question: "Shall [name of member(s)] be recalled from office on the Timbisha (Tribal) Council?". The ballot shall contain a space opposite such question in which the words "Yes-No" shall be printed so that the voter may indicate with a mark whether he or she wishes to vote for or against the recall of the member(s) so named. In the case of a recall of two (2) or more Council members, there shall be a separate ballot for each member being recalled.

e. If a majority of the General Council members voting in a special recall election vote to recall the Council members or any other officer(s) of the Tribe named on the ballot, and provided that two-thirds (2/3) of the General Council vote in said election, the Tribal Council shall immediately declare the Council member(s) or officer(s) to be recalled

from office and his or her seat(s) shall be declared vacant.

## **ARTICLE XII**

### **Referendum and Repeal**

#### **Section 1.**

Upon receipt of a petition signed by three (3) Tribal Council members or at least one-third (1/3) of the General Council members by the Secretary Treasurer of the Tribal Council demanding a referendum or a repeal of any proposed or enacted Tribal law or any action undertaken by the Tribal Council, the action(s) of the Tribal Council shall be either modified, repealed or sustained by the General Council in a general or special election to be held within twenty (20) days after receipt of the petition by the Tribal Secretary Treasurer.

The election shall be called by the Tribal Council Chairperson and the vote of a majority of the members of the General Council voting in such referendum or repeal shall be conclusive and binding on the Tribal Council provided that at least two thirds (2/3) of the members of the General Council are present and cast their ballots therein. No absentee voting shall be allowed.

#### **Section 2.**

No referendum or repeal conducted pursuant to the provisions of Section 1 above shall serve to abrogate, modify or amend any properly executed contract or agreement approved by the Tribal Council and entered into with third parties.

## **ARTICLE XIII**

### **Judiciary**

#### **Section 1.**

The judicial power of the Tribe shall be vested in a Supreme Court and in such other inferior courts as the Tribal Council may from time to time establish. The Tribal Courts shall exercise jurisdiction over all cases and controversies within the Tribe's jurisdiction, in law and equity, whether civil or criminal in nature, that arise under this document, the laws of the Tribe, or which is vested in the Tribal courts by federal law.

Section 2.

The Supreme Court shall consist of a chief judge, appointed by the Tribal Council and confirmed by a majority vote of the General Council.

Section 3.

The duties and procedures of the courts shall be determined by the Tribal Council pursuant to Tribal law.

Section 4.

The tenure and salary of Tribal judges shall be established by statute of the Tribal Council. No person shall be appointed to the office of Tribal judge unless he or she is an enrolled member of the Tribe, not less than twenty one (21) years of age and has never been convicted of a felony or, within one year preceding his or her appointment, of a misdemeanor.

Section 5.

In all criminal prosecutions, the accused shall enjoy the right to a speedy jury trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, the right of cross examination, to have compulsory process for obtaining witnesses in his or her favor, and to have the assistance of an advocate for his or her defense admitted to practice before the Tribal courts.

Section 6.

The General Council shall sit as a Court of Appeals whenever necessary and may hear appeals from the Supreme Court at any regular or special meeting. Whenever the General Council sits as an appellate court, their decision shall be final and binding upon all parties to the suit and not subject to review. The procedures of the General Council sitting as an appellate court shall be determined by the General Council at any regular or special meeting.

**ARTICLE XIV**

Bill of Rights

Section 1.

All members of the Tribe shall enjoy without hindrance, freedom of worship, conscience, speech, press, assembly and association.

Section 2.

This constitution shall not in any way alter, abridge or otherwise jeopardize the rights and privileges of the members of the Tribe as citizens of the State of California or the United states.

Section 3.

The individual property rights of any member of the Tribe shall not be altered, abridged or otherwise affected by the provisions of this document.

Section 4.

Tribal members shall have the right to review all Tribal records, including financial records, at any reasonable time in accordance with procedures established by the Tribal Council.

Section 5.

In accordance with Title II of the Indian Civil Rights Act of 1968 (82 Stat. 77) the Tribe in exercising its powers of self-government shall not:

a. Make or enforce any law prohibiting the full exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

b. Violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

c. Subject any person for the same offenses to be twice put in jeopardy;

d. Compel any person in any criminal case to be a witness against himself;

e. Take any private property for a public use without just compensation;

f. Deny to any person in a criminal proceeding the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, at his own expense, to have the assistance of counsel for his defenses.

g. Require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six (6) months or a fine of \$500.00 or both.

h. Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

i. Pass any bill of attainder or ex post facto law.

j. Deny to any person accused of imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

## **ARTICLE XV**

### **Ratification**

This document shall become effective when it has been ratified by a majority of the eligible voters of the Tribe at a special election called by the Secretary of the Interior in which at least thirty percent (30%) of the eligible voters vote and when it has been approved by the Secretary of the Interior.

**ARTICLE XVI**

Amendments

This document may be amended by a majority vote of the eligible voters of the Tribe in an election called for that purpose by the Secretary of the Interior, provided that at least fifty percent (50%) of those entitled to vote shall vote in such election. Amendments adopted in this way may be submitted for approval to the Secretary of the Interior. The Secretary Treasurer shall call an election on a proposed amendment to the document upon receipt of a petition signed by at least one-third (1/3) of the eligible voters of the Tribe or upon receipt of a resolution of the Tribal Council.

**ARTICLE XVII**

Severability

If any provision of this document shall in the future be declared invalid by a court of competent jurisdiction, the invalid provision shall be severed and the remaining provisions shall continue in full force and effect.

Timbisha Shoshone Tribe  
P.O. Box 206  
Death Valley, Ca. 92328  
(619) 786-2418

CONSTITUTION AND BY-LAWS      RESOLUTION NO. 86-14

WHEREAS,

the Timbisha Shoshone General Council met on January 25, 1986 to review and adopt a Tribal Constitution,  
WHEREAS,

all enrolled members of the Timbisha Shoshone Tribe were mailed copies of the proposed Constitution

WHEREAS,

Timbisha Shoshone Tribal Staff advertised the General Council Meeting in local and regional newspaper

WHEREAS,

all Tribal members in attendance of the General Council Meeting were given an opportunity to voice th

WHEREAS,

upon a vote of the enrolled member in attendance (a list of those attending is made part of this resolutic

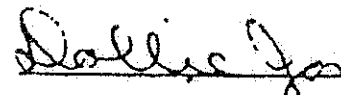
NOW THEREFORE BE IT RESOLVED, that the Timbisha Shoshone Tribal Council does herein attes

C E R T I F I C A T I O N

Feb. 17, 1986



Pauline Esteves, Chairperson



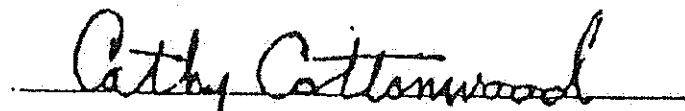
Dollie Jones V



Barbara Durham, Secretary



Grace Goad, Cou



Cathy Cottonwood, Council Member