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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMBISHA SHOSHONE TRIBE; JOSEPH ("JOE") KENNEDY; ANGELA ("ANGIE") BOLAND; GRACE GOAD; ERICK MASON; HILLARY FRANK; MADELINE ESTEVES and PAULINE ESTEVES, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, LARRY ECHO HAWK, AMY DUTSCHKE; and TROY BURDICK Defendants.	Case No. 2:11-cv-00995-GEB-GGH **FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date: August 9, 2012 Time: 2:00 p.m. Ctrm: 7 (14th floor) Hon. Morrison C. England, Jr.

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TIMBISHA SHOSHONE TRIBE, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. 2:11-cv-00995-MCE-DAD **FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date: August 9, 2012 Time: 2:00 p.m. Ctrm: 7 (14th floor) Hon. Morrison C. England, Jr.

INTRODUCTION

Plaintiffs are individuals in the Kennedy Faction, one of two factions that have been battling for control over the Timbisha Shoshone Tribe ("Tribe") for years. As this Court explained in one of the previous four federal lawsuits spawned by this dispute, the Kennedy Faction and the other faction (the "Gholson Faction"), funded at various times by dueling casino prospecting businesses, have held separate elections and run parallel and competing tribal

[1] Federal Defendants are the Department of the Interior ("Department"), the Bureau of Indian Affairs ("BIA"), and the three Departmental officials: Donald Laverdure, Amy Dutschke, and Troy Burdick.

governments beginning in 2007. *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1175 (E.D. Cal. 2009). Whenever a BIA official would recognize the validity of one Faction's election, the other Faction would immediately appeal to the next level in the Department, leading the BIA to decide in February 2010 that it could not recognize anyone in dealing with the Tribe for government-to-government purposes. To resolve this impasse, the Department's Assistant Secretary-Indian Affairs, Larry Echo Hawk ("Echo Hawk"), issued a March 1, 2011, decision that recognized the recently-elected Gholson Tribal Council ("2010 Gholson Council") for 120 days for the limited purpose of carrying out essential government-to-government relations and holding a special election that complied with tribal law. The 2010 Gholson Council carried out that election in April 2011, and after the Tribal Election Committee heard and denied the appeals from that election, it certified the top five vote-getters in the election as the new Tribal Council ("2011 Elected Council"). On July 29, 2011, Echo Hawk recognized the 2011 Elected Council for government-to-government purposes.[2]

Plaintiffs' Second Amended Complaint ("SAC"), which once again challenges Echo Hawk's two decisions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, adds the 2011 Elected Council members as defendants and purports to add the Tribe back in as a plaintiff, but is otherwise largely the same as their First Amended Complaint ("FAC"), and it fares no better. There continue to be multiple justiciability and jurisdictional problems with the SAC as a whole and with particular causes of action, and some of the Plaintiffs' claims for relief also fail to state a claim. Accordingly, the Court should dismiss the SAC in its entirety.

STATEMENT OF FACTS

The Tribal leadership dispute giving rise to this lawsuit (the latest in a series of five lawsuits to date) began in 2007 and resulted in a series of agency administrative decisions and appeals, as described in detail in the Court's May 9, 2012 Memorandum and Order dismissing

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[2]Plaintiffs refer to the March decision as "EHD I" and the July decision as "EHD II," and had intended to attach the two decisions as Exhibits A and B to the SAC. SAC ¶ 5. They are attached as Exhibits 1 and 2, respectively, to the Declaration of James Porter in Support of Defendants' Motion to Dismiss First Amended Complaint (ECF No. 48).

the Kennedy Faction's first amended complaint. ECF No. 58. Rather than repeat this history, Federal Defendants will focus on the facts most relevant to this motion.

The EHD I, Tribal Election, And EHD II

On March 1, 2011, Assistant Secretary Echo Hawk issued a decision for the Department resolving the last of the administrative appeals growing out of the Tribal dispute that began in 2007. ECF No. 48 Exhibit 1. However, resolving the issue on appeal – whether it was proper for Defendant BIA Superintendent Burdick to recognize the Tribal Council that the Kennedy Faction elected to a two-year term in 2007 – did not resolve the problem of whom the Department should recognize for government-to-government purposes in 2011. Going beyond his decision on the administrative appeal then, Echo Hawk sought to use the least intrusive means possible to comply with his duty to recognize a government if at all possible. *Id.* at 10. Accordingly, although not bound to recognize either of the two Factions' elections in November 2010, he decided to recognize the 2010 Gholson Council "for the limited time of 120 days from the date of this order, and for the limited purpose of carrying out essential government-to-government relations and holding a special election that complies with tribal law." *Id.* He chose the Gholson Faction because almost twice as many votes were cast in the Gholson election as in the Kennedy Faction election, and the Kennedy election was facially flawed by excluding Tribal members, namely those belonging to the group of 74 people the Kennedy Faction purported to disenroll in 2008. *Id.* He acknowledged that Kennedy believed those individuals to be disenrolled already, but noted that the Department had consistently and explicitly rejected those disenrollments on procedural grounds, and that until those individuals were disenrolled in compliance with Tribal law and the Indian Civil Rights Act, it would consider invalid any election from which they were barred from participating. *Id.*

Within a week of EHD I, the 2010 Gholson Council began preparing for a special election. ECF No. 48 Ex. 3 at 1. It selected three Tribal members to serve on the Election Committee in accordance with the Tribal Constitution, and appointed another three members to serve as the Enrollment Committee for purposes of compiling a list of eligible voters and candidates. *Id.* at 1. The Enrollment Committee submitted a list of 295 individuals eligible to

participate in the election, and the Election Committee mailed notices of the Special Election to the eligible members, as well as information about submitting letters of intent to run as a candidate. *Id*. at 2. There were ultimately eleven candidates, including five of the plaintiffs. *Id.* at 2-3; SAC ¶ 110.

The special election was held on April 29, 2011. SAC ¶ 110; ECF No. 48 Ex. 2 at 2, Ex. 3 at 4, Ex. 4 at 2. In addition to the Election Committee members, an independent observer and Tribal Attorney Joseph Kitto were present. ECF No. 48 Ex. 3 at 4. After the polls closed, the Election Committee began counting the 234 qualified votes; the ballot counting was available for viewing on the Internet. *Id.* The preliminary vote count showed that Defendant Bill Eddy received the most votes (161), Defendant George Gholson was second (159), and Plaintiff Kennedy received the fewest (60). ECF No. 48 Ex. 2 at 2. The Kennedy Faction candidates who lost appealed to the Tribe's Election Committee. ECF No. 48 Ex. 3 at 4-5, Ex. 4 at 2. After holding hearings on the appeals at which each of the five Plaintiffs was given the opportunity to present their views, the Tribe's Election Committee denied the appeals, stating that they did not raise any issue or offer any evidence that raised a genuine question about the validity of the election. SAC ¶ 112; ECF No. 48 Ex. 3 at 5. As set forth in the Tribal Election Ordinance, the decision on the appeals was final and not subject to further review. *Id.*; ECF No. 1, Ex. C at 16. The Election Board sent a final report and certification of the election results to the Tribal Council, which approved it. ECF No. 48 Ex. 3 at 5-6.

On May 23, the Tribe notified the BIA that it had elected a new Tribal Council consisting of defendants Bill Eddy, George Gholson, Margaraet Cortez, Clyde Nichols, and Earl Frank and requested that the BIA recognize that newly-elected Tribal government. ECF No. 48 Ex. 4, Ex. 3 at 6, and Ex. 2 at 2. The BIA reviewed the preparation for and conduct of the special election to determine if the Tribe's actions accorded with Tribal governing documents, and explained in a memorandum dated June 26 that they did. ECF No. 48 Ex. 3 at 1, 6-8; Ex. 2 at 2.

On July 29, after reviewing the June 26 memo and the materials submitted with the Tribe's certification of the election, Echo Hawk recognized the newly elected Tribal Council in EHD II. *Id.* at 1-3; SAC ¶ 113. He noted that the Department had issued a decision denying

federal recognition of any Tribal Council almost a year and a half earlier, and then summarized his previous Order recognizing the 2010 Gholson Council for a limited time and the limited purpose of conducting government-to-government relations necessary for holding a special election. *Id.* at 1-2. He then explained that the BIA had determined that the election was conducted in compliance with Tribal law, and noted that it was the April 29 election – not EHD I – that constituted the resolution of an internal Tribal dispute in a valid Tribal forum. *Id.* at 2-3. He further explained that the Department needed to comply with its duty to recognize a tribal representative for government-to-government purposes if possible, that working with the last undisputed Tribal government was not an option here because it had dissolved into factions four years ago, and that the hiatus in government-to-government relations has had deleterious effects, including the Tribe's inability to access Federal programs. *Id.* at 3-4.

Proceedings To Date In This Lawsuit

Plaintiffs, purporting to speak for the Tribe, filed this action attacking EHD I on April 13, 2011. ECF No. 1. Two weeks later, just three days before the Tribal election, they filed a motion for a preliminary injunction, which the Court denied after a hearing. ECF Nos. 11, 37, 38. The Court questioned whether it had subject matter jurisdiction over Plaintiffs' complaint and whether the Tribe was a necessary party that had to be joined under Fed. R. Civ. P. 19. ECF No. 38. Federal Defendants then moved to dismiss this action on the grounds identified in the Court's order denying the preliminary injunction. ECF No. 40. Rather than opposing the motion to dismiss, Plaintiffs filed an amended complaint, attacking both EHD I and EHD II, but deleting the Tribe as a named plaintiff. ECF No. 45. Federal Defendants once again filed a motion to dismiss on multiple grounds. ECF No. 46. The Court granted the motion, holding that Plaintiffs had failed to join the Tribe and the 2011 Elected Council as indispensable parties, but gave Plaintiffs twenty days to file an amended complaint. ECF No. 58.

Plaintiffs' SAC alleges essentially the same causes of action as the FAC and again challenges EHD I and II pursuant to the APA, which provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

The "First Claim for Relief" alleges that the two decisions violated 25 C.F.R. Part 2 (the Department's regulations regarding administrative appeals for certain types of Indian matters), the Fifth Amendment, and federal common law by recognizing the Gholson Council based on information not included in the administrative record and by not giving Plaintiffs an opportunity to respond to that information by addressing the alleged ineligibility of Gholson and another individual to serve on the Council and "the irrelevance and unreliability" of votes cast in the election one year ago. SAC ¶¶ 127-131. The Second through Fifth Claims each allege that the two decisions violated "DOI Rules" and "Federal Common Law" by: not deferring to interpretations of tribal law and failing to require exhaustion of tribal remedies (Second Claim -- SAC ¶¶ 132-142), interfering in Tribal membership decisions (Third Claim -- SAC ¶¶ 143-154), creating a hiatus in the government-to-government relationship (Fourth Claim -- SAC ¶¶ 155-166), and relying on the wrong factors (Fifth Claim -- ¶¶ 167-183). The SAC adds a new Sixth Claim for Relief alleging that the two decisions violated the APA because they were retaliation for Plaintiff's exercise of the their First and Fifth Amendments rights in connection with a lawsuit in the District of Columbia that the Plaintiffs (with the exception of Plaintiffs Mason and Frank) filed, but that was recently dismissed. SAC ¶¶ 184-191. Plaintiffs seek declarations that the EHD I and II and the so-called "Rollback Rule" violated the APA, and a remand of EHD I and II for further proceedings consistent with federal law. SAC at 48.

ARGUMENT

I. Standards For Deciding Motions To Dismiss

A. Motions to dismiss under F.R.C.P. 12(b)(1)

Jurisdiction is a threshold issue that the Court must address before considering the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-96 (1998). Federal courts are courts of limited jurisdiction and may hear a case only if authorized to do so by the Constitution or by statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citation and quotations omitted). When subject matter jurisdiction is challenged under Federal Rule of [Civil] Procedure 12(b)(1),

the plaintiff has the burden of proving jurisdiction in order to survive the motion. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

A challenge to jurisdiction under Rule 12(b)(1) "can be either facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003); *see also White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a factual challenge, "the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "Without jurisdiction the court cannot proceed at all in any cause, other than announc[e] the fact and dismiss[] the case." *Steel Co.*, 523 U.S. at 94-95 (1998), *quoting Ex parte McCardle*, 74 U.S. 506, 514 (1868) (internal quotation marks omitted).

B. Motions to Dismiss under Fed. R. Civ. P. 12(b)(6).

The purpose of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is to test the legal sufficiency of the complaint. *See North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 580-81 (9th Cir. 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Also, a court is "not . . . required to accept as true allegations that contradict exhibits attached to the Complaint, or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

II. Plaintiffs' Challenge To The Two Echo Hawk Decisions Is Not Justiciable.

Although the SAC makes a host of assertions about the Tribal factional dispute, this case is still fundamentally an APA action in which Plaintiffs seek review of the EHD I, recognizing the 2010 Gholson Council on an interim basis, and the EHD II, recognizing the 2011 Elected Council. See SAC ¶¶ 2, 4-5. All six of the SAC's Claims are APA claims, and the only two agency actions Plaintiffs identify as final, which is a requirement for APA review, are EHD I and II. SAC ¶ 5; *Norton v. Southern Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 61-62 (2004) (in APA action, "the "agency action" complained of must be "*final* agency action"). As relief, they request that the Court declare the two decisions in violation of law and remand them for further proceedings in accordance with law. SAC at 48. Thus, once again in the guise of a suit against the government, Plaintiffs are seeking to have this Court intervene in an internal tribal leadership dispute between competing tribal Factions and ignore the results of a Tribal election in which Plaintiffs were resoundingly defeated. Once again, a key premise of their argument is that people disenrolled under Tribal law were allowed to run as candidates and to vote. SAC ¶¶ 2, 104, 109, 119, 131, 143-154. Their suit continues to be nonjusticiable.

Very early on, the Supreme Court held that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L. Ed. 60 (1803). For example, the Supreme Court deferred to the Federal Government's *de facto* recognition of one of two rival government factions in Mexico, holding that questions of which of two competing governments should be deemed to be the legitimate government of a country "is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). The Supreme Court has also stated that if the Secretary of the Interior and the Commissioner of Indian Affairs had decided to recognize a group of Indians as a tribe, the Court must do the same: "In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." *United States v. Holliday*,

70 U.S. (3 Wall.) 407, 419, 18 L. Ed. 182 (1865). Accordingly, courts have recognized that "'the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'" *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1276 (9th Cir. 2004), *quoting Miami Nation v. U.S. Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (internal quotes omitted).

Although the Department has brought the process of whether to initially recognize a group of Indians as a tribe within the scope of review of the APA by "'canaliz[ing] the discretion of its subordinate officials by means of regulations that require them to base recognition of Indian tribes on the kinds of determination, legal or factual, that courts routinely make,'" *Kahawaiolaa*, 386 F.3d at 1276, *quoting Miami Nation*, 255 F.3d at 348, this has not happened with regard to deciding which of two Tribal factions to recognize for government-to-government purposes. There are no statutes or regulations guiding the legal or factual determinations to be made, and Plaintiffs do not attempt to cite any. Moreover, Plaintiffs have acknowledged that "DOI has some freedom to recognize a government on an interim basis while the Tribe resolves its disputes intramurally." Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction (ECF No. 20) at 8. Courts have repeatedly "characterized election disputes between competing tribal councils as nonjusticiable, intratribal matters" and have rejected APA challenges to BIA decisions to recognize one of two competing tribal councils. *Sac & Fox Tribe of the Mississippi in Iowa v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006) ("*Sac & Fox Tribe")*, citing *In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003), and *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). *See also Potts v. Bruce*, 533 F.2d 527, 530 (10th Cir. 1976) (rejecting as nonjusticiable Tribal members' Fifth Amendment challenge to BIA action in resolving tribal governance stalemate).

Sac & Fox Tribe is directly on point here. In that case, BIA resolved a leadership dispute between rival tribal councils that were holding competing elections by calling for a new election board for the purpose of holding a special election. *Sac & Fox Tribe*, 439 F.2d at 834. Three days after the special election, the BIA recognized the elected council. *Id.* The rival faction's

election board administratively appealed BIA's decision to create a new election board and sought to stay further BIA action, but the Department's Principal Deputy Assistant Secretary of Indian Affairs affirmed the BIA's decision without receiving any briefing or hearing argument from the rival election board. *Id.* The rival election board then brought an APA action challenging the BIA's decision to recognize the newly elected council, and seeking a declaration that BIA had unlawfully interfered with tribal elections and an order requiring the BIA to recognize the rival tribal council. *Id.* The Eighth Circuit upheld the district court's conclusion that it lacked jurisdiction over the case, specifically holding that "the district court lacked jurisdiction to determine which tribal faction rightfully controlled the Sac & Fox Tribe of the Mississippi in Iowa," and noting several other cases in which such matters were held to be nonjusticiable. *Id.* at 835. As this Court has already explained, the reasoning of *Sac & Fox Tribe* is applicable here (ECF No. 38 at 12-13), and the Court should therefore dismiss this case for lack of subject matter jurisdiction. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979-80 (9th Cir. 2007) ("the presence of a political question deprives the court of subject matter jurisdiction").

Plaintiffs' claim that, in recognizing the 2010 Gholson Council on an interim basis and now the 2011 Elected Council, the Federal Defendants have unlawfully turned the Tribe over to a tribal council of disenrolled members elected by disenrolled members (SAC ¶¶ 1, 72-74, 143-154) must also be rejected because it is subject to what the Ninth Circuit has described as the "jurisdictional whammy" of the "lack of federal court jurisdiction to intervene in tribal membership disputes." *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005), citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978). *See also Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994) (per curiam) ("[P]roviding a federal forum for the resolution of [membership] disputes would illegitimately interfere with tribal autonomy and self-government."); *Wheeler v. U.S. Dep't of Interior*, 811 F.2d 549, 551 (10th Cir. 1987); *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 983 (9th Cir. 1983). As the Supreme Court has explained, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately

familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *Santa Clara Pueblo*, 436 U.S. at 72, n.32 (internal citations omitted). Accordingly, Plaintiffs' effort to entangle this Court in their membership dispute with the Gholson Faction is one more reason to hold that their challenge is not justiciable. *See also Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1185 (E.D. Cal. 2009) (in dispute between rival factions of this Tribe and involving many of the same plaintiffs, this Court held that it could not "determine the issue of standing without resolution of the legitimacy of disenrollment" and that neither faction pointed to authority to allow this Court to resolve the issue of disenrollment).

III. The Court Lacks Jurisdiction Over The Second Claim For Relief, Which Is Not Premised On Questions Of Federal Law.

The Second Claim for Relief in the SAC alleges that EHD I and EHD II violate the APA because the Department arbitrarily and capriciously failed to defer to interpretations of tribal law by tribal-law applying bodies and because DOI must not entertain administrative appeals of its own recognition decisions if a party has not exhausted tribal remedies. SAC ¶ 133. It is well-established that the APA alone does not provide a basis for subject matter jurisdiction in the federal courts. *Califano v. Sanders*, 430 U.S. 99, 107 (1977) ("[T]he APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."); *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 929 fn.15 (9th Cir. 2009) (Section 702 of the APA "does not confer federal jurisdiction"); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) ("It is beyond question . . . that the APA does not provide an independent basis for subject matter jurisdiction in the district courts.").

Plaintiffs also allege that there is jurisdiction under 28 U.S.C. § 1331, but this requires the claim to be one "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "A case 'arises under' federal law within the meaning of § 1331 ... if 'a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208, 1219 (9th Cir. 2009), *quoting Empire Healthchoice*

Assurance, Inc. v. McVeigh, 547 U.S. 677, 689-90, 126 S. Ct. 2121 (2006) (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28, 103 S. Ct. 2841 (1983) (brackets omitted)). The only basis for federal question jurisdiction the Second Claim alleges in any detail is "federal common law" in the form of two decisions – *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Wheeler v. Dep't of the Interior*, 811 F.2d 549 (10th Cir. 1987) – but neither of these decisions provides such a basis. Neither decision stands for the proposition that the Department "is bound by the decisions of tribal law-applying bodies, regardless of whether DOI agrees with them" and must defer to them without fail. SAC ¶¶ 134, 133. Nor does either decision stand for the proposition that "parties may not appeal DOI recognition decisions if they have not exhausted their tribal remedies." SAC ¶¶ 141, 133. Accordingly, federal common law does not provide § 1331 jurisdiction over the Second Claim.

The Second Claim also relies on *Santa Clara Pueblo* and *Wheeler* to support the assertion that the Kennedy Faction's Tribal Election Board, Tribal Enrollment Committee, and General Council were "tribal law-applying bodies," but again neither of these cases support this claim. Instead, they both look to tribal law to determine whether there is a forum to interpret tribal law, and in *Santa Clara Pueblo*, the tribal constitution vested judicial authority in the tribal council. *Santa Clara Pueblo*, 436 U.S. at 66 n.22. Here, by contrast, the Tribe's constitution vests the judicial power of the Tribe in the Tribal Judiciary, and the Tribal Council and its boards or committees cannot exercise any powers belonging to the Tribal Judiciary. Complaint Exhibit A at 3, 25 (ECF No. 1). It thus does not appear that any of the Kennedy Faction entities are proper law-applying bodies under either federal or tribal law, and in any event, answering the question of whether they should be recognized as such requires delving deeply into Tribal law, which is beyond the jurisdiction of this Court. *See In re Sac & Fox Tribe of the Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes and not in the district courts"); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (holding that the district court lacked jurisdiction to resolve "disputes involving questions of interpretation of the tribal constitution and tribal law") (citations omitted); *Goodface*

v. Grassrope, 708 F.2d 335, 339 (8th Cir. 1983) ("[T]he district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute."). Accordingly, Plaintiffs' right to relief under this Claim depends on resolution of questions of Tribal – not federal – law and does not fall within the ambit of 28 U.S.C. § 1331. The Court therefore does not have jurisdiction over it and it must be dismissed.

IV. The Court Lacks Jurisdiction Over The Third Claim For Multiple Reasons.

The Third Claim also purports to have federal common law as its jurisdictional basis, asserting that "[f]ederal common law and DOI decisional law prohibit DOI from making any tribal membership decisions without explicit tribal or congressional authority," but again the only case it cites, *Timbisha Shoshone Tribe v. Kennedy*, 687 F.Supp.2d 1171 (E.D. Cal. 2009), does not support such a broad assertion. SAC ¶ 144. In fact, it is well-established that "in discharging its duties under the government-to-government relationship, BIA has the authority and the responsibility to decline to recognize the results of a tribal action when it finds that a violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, has occurred." *Torres v. Acting Muskogee Area Director, Bureau of Indian Affairs*, 34 IBIA 173, 181 (November 22, 1999), and cases cited therein. In any event, it is clear from Plaintiffs' own admissions that it was not the Federal Defendants that added 74 people to the Tribe's membership roll, but the Tribe itself that did this at some point in the mid-1990s, and that it was the Kennedy Faction's Enrollment Committee that purported to disenroll them (including Gholson and other members of his Faction) in 2008 in advance of the Tribal elections. Declaration of Grace Goad (ECF No. 14) ¶¶ 18, 24-26; ECF No. 20 at 4; Declaration of Angie Boland (ECF No.12) ¶ 6. The Department only noted that the Kennedy Faction did not follow the Tribe's own procedures for disenrolling those individuals; it did not address the substance of whether the Tribe should have added them in the first place. The jurisdictional defect in the SAC is that deciding whether the Department's decision was correct will require the Court to delve into (1) Tribal law to determine whether the disenrollments were proper, and (2) Tribal membership questions, which it is barred from doing by controlling Ninth Circuit law. *See supra* at 10-11.

V. The Court Lacks Jurisdiction Over The Fifth Claim For Relief, Which Does Not Cite Any Specific Underlying Law.

The Fifth Claim for Relief in the Complaint also alleges an APA "arbitrary and capricious" claim, faulting the EHD I and EHD II for "relying on irrelevant factors and ignoring relevant factors," but nowhere in this Claim's miscellany of grievances does it identify any specific provision of federal law or even cases the EHD I or II supposedly violated. SAC ¶¶ 167-183.[3] Thus, in addition to failing to provide a basis for federal subject matter jurisdiction under 28 U.S.C. § 1331, it fails on another ground as well. Section 706(2)(A) of the APA "merely provides '[t]he standards to be applied on review . . . . But before any review at all may be had, a party must first clear the hurdle of § 701(a)," which requires that there be "law to apply." *Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 797 (9th Cir. 1996), *quoting Heckler v. Chaney,* 470 U.S. 821, 828 (1985). APA "arbitrary and capricious" claims that "stand free of any other law" are barred because there is no law to apply. *Or. Natural Res. Council,* 92 F.3d at 798-99. Much like the plaintiffs in *Or. Natural Resources Council,* Plaintiffs here fail to allege that any statute, apart from the APA, required the Defendants to consider the factors they allege that were not considered. *Id*. at 795. This is insufficient to establish jurisdiction over this claim, and it must therefore be dismissed.

VI. Plaintiffs' Fourth Claim For Relief Should Be Dismissed.

A. The Echo Hawk Decisions Ended The Hiatus In Federal Recognition Of A Tribal Government.

The Fourth Claim For Relief asserts that the Federal Defendants violated the APA by "manufacturing a hiatus in federal recognition of a tribal government." SAC ¶¶ 155-158. In this regard, it appears to challenge a 2010 scheduling order in the administrative appeal and a decision by Defendant Burdick, but does not allege that either of these is a final agency decision nor are they, which is necessary for an APA claim. *SUWA*, 542 U.S. at 61-62. Indeed, the SAC

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[3]The SAC mentions the Timbisha Shoshone Homeland Act of 2000, asserting that the Department should have considered that the Gholson Faction operates out of Bishop, California, rather than Death Valley, but it identifies nothing in the Act that mandated that the Tribal government be located in Death Valley or that the Department could only recognize those located in Death Valley for government-to-government purposes. SAC ¶¶ 44, 172-173.

specifically alleges that the Burdick decision is still on appeal. SAC ¶¶ 94-95. To the contrary, the only final actions alleged are EHD I or II (SAC ¶¶ 2,5), but it is clear on their face that those decisions ended – not "manufactured" – a hiatus in federal recognition. ECF No. 48 Exhibits 1 and 2; SAC ¶ 113 (acknowledging that EHD II recognizes the 2011 Elected Council for government-to government purposes). Accordingly, this Claim fails to state a cause of action.

It would be moot in any event. "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007) (mootness is a threshold jurisdictional issue). A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). Thus, the basic question in determining mootness is "'whether there exists a present controversy as to which effective relief can be granted.'" *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007) (citation omitted); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998). In general, when an administrative agency has performed the action sought by a plaintiff in litigation, a federal court "lacks the ability to grant effective relief," and the claim is moot. *Rosemere Neighborhood Ass'n v. U.S. Envt'l Prot. Agency*, 581 F.3d 1169, 1172-73 (9th Cir. 2009); *Pub. Utils. Comm'n v. FERC*, 100 F.3d 1451, 1458 (9th Cir. 1996). Here, the Federal Defendants have recognized the 2011 Elected Council, so there is no longer a hiatus in federal recognition, and this Claim is moot.

B. Plaintiffs' Challenge To The So-Called "Rollback Rule" Should Be Dismissed.

The second part of Plaintiffs' Fourth Claim alleges that the Department adopted something they call the "Rollback Rule," which they assert is discussed in a related case, *Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp.2d 1181, 1185 (E.D. Cal. 2010). SAC ¶¶ 159-

166. Although that case does not explicitly refer to a "Rollback Rule," Plaintiffs appear to be referring to Interior Board of Indian Appeals ("IBIA") decisions which have held that when BIA is faced with a tribal leadership dispute, it can continue to recognize the last undisputed tribal officials on an interim basis for government-to-government purposes. *See, e.g., Poe v. Pac. Reg'l Dir.*, 43 IBIA 105, 112 (June 9, 2006) ; *Rosales v. Sacramento Area Dir.*, 32 IBIA 158, 167 (April 22, 1998). (The IBIA is the entity to which parties can administratively appeal BIA decisions.) Indeed, this principle appears to have had its genesis in *Rosales.* As the IBIA has made clear, however, this is not invariably required. *Poe*, 43 IBIA at 112, n.10. The Kennedy Faction now elevates this principle of decisional law to the status of a "rule," christening it the "Rollback Rule" and claiming that it is subject to notice and comment rulemaking under the APA. SAC ¶¶ 159-166. This claim is legally meritless and should be dismissed.

First, federal agencies do not have to go through notice and comment rulemaking procedures before they follow principles of decisional law. Such a requirement would be absurd – agencies are bound by decisional law and it would be a sham to go through the rulemaking process as a result. Second, the IBIA has stated very clearly that BIA is not always bound to continue looking to the last recognized officials, thus other options are not foreclosed. Indeed, the Department did not follow that principle here. As such, this so-called "Rule" is at most an interpretive rule, and there is therefore no requirement to go through rulemaking. *Malone v. BIA*, 38 F.3d 433, 438 (9th Cir. 1994). Third, this principle has been around for at least thirteen years and the Kennedy Faction has known about it since at least April 2003. *See Timbisha Shoshone Tribe v. BIA*, Civ S-03-404-WBS-GGH, 2003 WL 25897083 at *2 (E.D. Cal. Apr. 10, 2003) (discussing the principle in question). The statute of limitations for an APA claim asserting that it should be subject to notice-and-comment rulemaking passed years ago. *Hells Canyon Preserv. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010) (APA claims subject to six-year statute of limitations). Fourth, neither of the actions challenged here rely on this "Rule." As a result, the question of its validity is irrelevant to this lawsuit.[4]

[4]Plaintiffs cite *Goodface* for the proposition that the Department should have recognized the Kennedy Faction as the "logical choice" to oversee the special election (SAC ¶ 165), but the

VII. Plaintiffs' First Claim Fails To State A Claim For Violations of Departmental Regulations Or The Due Process Clause.

Plaintiffs' First Claim for Relief asserts that the EHD I and II violated the Due Process Clause and Departmental appeal regulations by being based "solely on information that was not in the DOI appellate record" and by not giving the parties to the appeal notice and an opportunity to comment on the information in question. SAC ¶ 129, citing 25 C.F.R. § 2.21(b). Plaintiffs fail to state a claim under the Due Process Clause because they fail to allege and identify a liberty or property interest at issue that is constitutionally protected under the Fifth Amendment. *Johnson v. Rancho Santiago Comm. Coll. Dist.*, 623 F.3d 1011, 1029 (9th Cir. 2010) ("To succeed on a substantive or procedural due process claim, the plaintiffs must first establish that they were deprived of an interest protected by the Due Process Clause"); *Kwai Fun Wong v. United States*, 373 F.3d 952, 967-68 (9th Cir. 2004); *Pan-Am. World Airways v. U.S. Dist. Ct. For Cent. Dist. Of CA*, 523 F.2d 1073, 1077 (9th Cir. 1975), citing *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Even if they had identified such an interest, there was no violation of due process or the Department's administrative appeal regulations because neither decision was subject to those regulations – EHD II was self-evidently not part of any administrative appeals and a careful reading of EHD I also reveals that the challenged portion of it, the decision to recognized the 2010 Gholson Council for limited purposes, is not part of an administrative appeal.

EHD I was actually not one, but two decisions. The first decision that Echo Hawk faced was to render a determination in the administrative appeal, *i.e.,* whether to affirm or reverse the Regional Director's decision to reject the validity of the actions taken at the January 20, 2008 General Council special meeting and the Superintendent's resulting decision to recognize the 2007 Kennedy Council for government-to-government purposes. For the reasons explained *supra* at 3 and in considerably more detail in EHD I itself, he decided to affirm the Regional Director. This resolution of the administrative appeal may appropriately be judged by its

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Eighth Circuit in that case rebuked the District Court as having "overstepped the boundaries of its jurisdiction" by addressing the merits of the intratribal dispute. 708 F.2d at 339.

compliance with the Department's appeal regulations, but Plaintiffs do not argue that this resolution relied on information outside of the administrative record or otherwise violated the Department's appeal regulations or, for that matter, the Due Process clause.

Having reached a decision on the appeal that left the Tribe without a federally-recognized government, Echo Hawk faced a second decision: whom should the Department recognize for government-to-government purposes? As he explained, "the Department has a duty to recognize a government if at all possible. Since my decision on the appeal has not provided a solution, I must seek another way to reestablish a government-to-government relationship between the United States [and] the Tribe." ECF No. 48 Ex. 1 at 10. Indeed, as he pointed out, even if he had decided the appeal in the Kennedy Faction's favor, it would not have satisfied this duty, as the 2007 Kennedy Council's two-year terms had all expired before briefing even began on the appeal to Echo Hawk. ECF No. 48 Ex. 1 at 9. In other words, Echo Hawk did not reach this second decision as part of his obligation to decide the administrative appeal, which did not present the question of whom to recognize now in any event, but in response to his duty to recognize a government if at all possible. Since this second decision was not the resolution of an administrative appeal, Echo Hawk was not bound by the Departmental appeal regulations. Plaintiffs cite to no other authority for the proposition that Echo Hawk had a duty to consult with them prior to deciding to recognize the 2010 Gholson Council for a limited purpose and time, or a duty to reveal to them the documentary support for that decision before it was published. Accordingly, this Claim must be dismissed.

VIII. Plaintiffs' Sixth Claim for Relief Fails to State A Claim.

Plaintiffs' Sixth Claim asserts that the two Echo Hawk decisions violated the APA by retaliating against some of them for filing a lawsuit against the government in the District of Columbia, *Timbisha Shoshone Tribe v. Salazar*, D.C. District of Columbia, Case No. 1:10-cv-000968, *on appeal* D.C. Cir. Case No. 11-5049, in violation of their First Amendment speech and petition rights and Fifth Amendment due process rights. SAC ¶¶ 123, 184-191. However, an infringement of the right to free speech or to petition cannot provide the basis for a violation of due process. "[W]here a particular amendment 'provides an explicit textual source of

constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' " *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (Rehnquist, C.J., for plurality) (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). Since the First Amendment provides explicit protection for the right to free speech and petition, Plaintiffs may not additionally base a due process claim on a violation of those rights.

Plaintiffs' First Amendment claim also fails. The SAC is devoid of any allegations that the Echo Hawk decisions had any chilling effect on the exercise of their First Amendment rights. Even if the SAC could be construed to include such an allegation, the allegations in the SAC itself and the court docket in the D.C. case, of which the Court may take judicial notice, contradict the allegations in the Sixth Claim. Plaintiffs assert that "[d]uring the period when DOI recognized and worked with the Kennedy Faction, the Timbisha Tribe, led by the Kennedy Faction sued the DOI" in the District of Columbia, and that "[o]nce DOI installed the Gholson Faction as the officers of the Tribe, DOI moved to dismiss the action in the D.C. District on the ground that the plaintiffs no longer represented the Tribe." SAC ¶ 187. However, elsewhere in the SAC, Plaintiffs admit that the Department stopped recognizing the Kennedy Faction almost four months *before* the Kennedy Factions filed the D.C. district court litigation. SAC ¶¶ 54 (BIA "terminated government-to-government relations with the Tribe" on February 24, 2010) , 94 (same), 104 ("Echo Hawk found that there had been a hiatus in government-to-government relations since February 2010); ECF No. 48 Ex. 1 at 2 (same); *Timbisha Shoshone Tribe v. Salazar*, D.C. D.C. Case No. 1:10-cv-000968 Docket # 1 (complaint filed June 10, 2010). Moreover, the Department argued that plaintiffs in the D.C. case lacked standing to represent the Tribe on January 12, 2011, almost two months before Echo Hawk recognized the 2010 Gholson Council, and won a complete dismissal of the case in the District Court on the same day that Echo Hawk issued EHD I. *Id.* at Docket # 24 (pages 8-10 of the brief) and Docket #33 (March 1, 2011, Memorandum Opinion granting motion to dismiss). The Court need not – and should not – accept as true factual allegations that are contradicted by other allegations in the complaint and

in the judicial record of the D.C. case, and Plaintiffs' inference that EHD I and II were for the purpose of getting out of that lawsuit is unreasonable. Accordingly, the Court should dismiss this cause of action.[5]

CONCLUSION

For the foregoing reasons, the Court should dismiss this case in its entirety.

DATED: June 12, 2012

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[5]Plaintiffs also allege that they "have spoken out for decades against federal actions affecting their lands" and "brought or joined in multiple lawsuits against federal agencies" and "have caused difficulties for the federal government in international forums and the press," but also acknowledge that the Department had recognized and worked with them and their direct predecessors during those same times. SAC ¶¶ 188, 185. They further acknowledge that as late as December 2010, the United States decided to announce its support for a Declaration on the Rights of Indigenous People, which Plaintiff Kennedy alleges he called on the government to ratify. SAC ¶ 126. These allegations do not lend support to Plaintiffs' First Amendment claim.