

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

JOHN DAUGOMAH, an adult Member)
of the Kiowa Indian Tribe,)

Case No.: 16-cv-1045-D

Plaintiff,)

v.)

1. LARRY ROBERTS, Acting Assistant)
Secretary, United States Bureau of)
Indian Affairs, in his official capacity,)

2. DAN DEERINWATER, Regional)
Director of the United States Bureau of)
Indian Affairs, Southern Plains Region,)
in his official capacity;)

3. BIA ELECTION BOARD including)
JESSIE DURHAM, Chairperson,)
BILL WALKER, Member, AMY)
DUTSCHKE, Member, SHERRY)
LOVIN, Member, and ANDREA)
PHILLIPS, Member, in their official)
capacities;)

4. MIKE SMITH, Deputy Director,)
United States Bureau of Indian Affairs,)
in his official capacity,)

Defendants.)

**MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION, AND PERMANENT INJUNCTION**

COMES NOW John Daugomah, Plaintiff, and respectfully moves the Court to grant Plaintiff's **Motion For Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction** ("Plaintiff's Motion") for his causes of action against Defendants who have unilaterally called, and who are in the process of conducting, a *tribal* election, not a federal election, designed to install an entirely new Business Committee ("Business Committee") for the Kiowa Tribe ("Tribe").¹ Plaintiff's Motion is supported by the following Brief in Support.

BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

INTRODUCTION

On June 24, 2016, Larry Roberts, the Acting BIA Assistant Secretary ("BIA Assistant Secretary") issued a decision directing the BIA to call and conduct a "special" *tribal* election for the Tribe ("Special Tribal Election") to be held on September 17, 2016 for the purpose of electing a new Business Committee.² The BIA Assistant Secretary

¹ The Business Committee is the governing body of the Tribe's government and includes a Chairman and Vice Chairman. *See*, The Constitution and Bylaws of the Kiowa Indian Tribe ("Constitution") Art. III, §§1 and 2. *See* Doc. 1-1 - Constitution. The exhibits relied upon in this Motion are attached as Exhibits to the Complaint, and rather than clutter the record with the same document twice, the exhibits are referenced to those attached to the Complaint.

² On January 26, 2015, nearly eighteen months prior to the BIA's recent January 24th decision that is the subject of this case, the BIA Regional Director, Dan Deerinwater, made an initial decision for BIA to call and conduct a *tribal* election for all seats on the Business Committee. In his letter addressed generally to the "Kiowa Indian Tribe of Oklahoma", the Regional Director attached two alleged Business Committee resolutions that on their face, are defective for failing to meet the five-member quorum requirement in the Constitution, and despite the BIA declaration that the Tribe suffers from more than "...4 years of broken government,...". *See* Doc. 1-2 – January 26, 2015 letter. Multiple

claimed that the "...Kiowa people have indicated they wish to hold an election", but then cited only two names of individuals who requested such an election. The BIA Assistant Secretary explained that the purpose of his decision is to "...recognize Tribal leadership", and that his decision was based on "...the authority vested in BIA official (sic) under Article IV of the Kiowa Constitution." *See* Doc. 1-3 – June 24, 2016 memo.

BIA Assistant Roberts, and the BIA-appointed election board ("BIA Election Board") carrying out Mr. Roberts' decision, have based their authority to call and conduct a *tribal* election on the mistaken belief that the Tribe's Constitution somehow vests *tribal* legal authority completely in BIA officials to conduct the Special Tribal Election for the Business Committee. The BIA Assistant Secretary made the decision to call the Special Tribal Election arbitrarily, and the BIA Regional Director subsequently made, both directly and indirectly, arbitrary appointments of five BIA employees to the BIA Election Board to conduct the Special Tribal Election. The BIA Election Board in turn arbitrarily issued the one-time election rules ("One-Time Election Rules") without any notice and comment rulemaking and has arbitrarily conducted the Special Tribal Election to date by issuing two different election notices and by failing to follow its own One-Time Election Rules.

parties filed administrative appeals of Mr. Deerinwater's decision to the Interior Board of Indian Appeals ("IBIA"), putting the entire matter on hold pending the outcome of the appeal. On February 17, 2016, the IBIA dismissed all pending appeals, and subsequently, the BIA Assistant Secretary issued his June 24, 2016 decision to again have the BIA call and conduct a *tribal* election for all Business Committee seats for the Tribe. *See* Doc. 1-3 – June 24, 2016 memo.

At the same time and in a separate matter, the BIA has refused to process a petition for a Secretarial Election³ on a new constitution for the Tribe (“New Constitution”), proposed by more than five hundred adult members of the Tribe as an exercise of self-determination and inherent sovereignty.⁴ The New Constitution is designed to bring modern structural reforms to the Tribe’s government including requiring a new election for all officials within thirty days of its adoption. In a recent letter from Acting BIA Assistant Secretary Roberts to Mrs. Johnson regarding his decision to refuse to honor the Petition, Mr. Roberts explained that adopting a new constitution “...is one of the most significant decisions that a tribe can make...”, and that he preferred to use the “framework” from the Tribe’s Constitution to “address the Tribe’s challenges” because other “tribal solutions still exist”, namely his decision for the BIA to call and conduct a *tribal* Business Committee election. *See* Doc. 1-4 – August 4, 2016 letter. Thus, where the BIA had no authority to act, the BIA acted by calling the Special Tribal Election, and where the BIA has a federal legal obligation to act to call a Secretarial Election, the BIA has failed to act. Rather than honoring the Kiowa Peoples’ efforts to resolve their governmental issues themselves, the BIA has instead interjected itself into the middle of the Tribe’s affairs by unilaterally

³ A “Secretarial Election” is a *federal* election authorized and conducted by the U.S. Secretary of the Interior or her designee pursuant to federal law and regulations that provides a mechanism for members of Indian tribes to decide whether to adopt constitutions and/or corporate charters, and amendments thereto, for the tribe.

⁴ A member of the Tribe, Anita Onco Johnson, on behalf of 546 petition signatories, recently filed a federal lawsuit against the BIA for refusing to process a petition for a Secretarial Election (“Petition”) on the proposed New Constitution for the Tribe. *See, Johnson v. Bruner, et al.*, 5:16-cv-01038-M.

calling and arbitrarily conducting the Special Tribal Election, thereby selecting the BIA's preferred course of action.

This case presents a straightforward question of law. The facts are not in dispute as the BIA has issued at least three written decisions explaining the legal basis for its (flawed) decision. The single question of law that will decide this case is whether the BIA may base its decision to unilaterally call and arbitrarily conduct the Special Tribal Election exclusively on alleged legal authority "vested in the BIA by the Kiowa Tribe's Constitution" and exercised by federal officials acting "under tribal law".

FACTS

On July 19, 2016, the BIA "Election Board for the Special Tribal Election of the Kiowa Business Committee" issued an Election Notice ("Election Notice #1") announcing the Special Tribal Election to elect a new Business Committee Members (including the Chairman and Vice Chairman) for the Tribe. *See* Doc. 1-5 – Election Notice #1. The BIA Election Board mailed Election Notice #1 along with a Voter Registration Form to the adult members of the Tribe using an outdated voter's list.⁵ No other forms or information, including a Declaration of Candidacy Form or the One-Time Election Rules, were included in the Election Notice #1 mailing.

On July 19, 2016, the BIA held a meeting of selected "interested" parties in Oklahoma City, Oklahoma, to announce the decision to call and conduct the Special Tribal Election. At the meeting, the BIA provided the One-Time Election Rules and related

⁵ On information and belief, the Tribe is comprised of approximately nine thousand (9,000) adult members.

documents to those persons in attendance. *See* Doc 1-6 – One Time Election Rules at 18-24.

On July 20, 2016, the BIA Election Board issued an *amended* Election Notice (“Election Notice #2”) altering key deadlines in the election process. *See* Doc. 1-7 – Election Notice #2. The BIA Election Board did not mail Election Notice #2 to the adult members of the Tribe citing the cost of postage. The decision of the BIA Election Board to issue the *amended* Election Notice #2, including the decision *not* to mail such notice to the members of the Tribe, violates Mr. Daugomah’s right to due process of law under the U.S. Constitution.

On August 18, 2016, Plaintiff Daugomah filed an appeal of the BIA Election Board’s decisions to issue two different election notices, to summarily issue the One-Time Election Rules without following the notice and comment rule-making requirements of the Administrative Procedures Act, and to otherwise conduct the Special Tribal Election without following the One-Time Election Rules. *See* Doc. 1-8 – Daugomah Appeal.

On August 25, 2016, the IBIA issued a decision questioning whether it had jurisdiction over Plaintiff Daugomah’s appeal. The IBIA set a briefing schedule for the parties to address the jurisdictional issues. *See* Doc. 1-9 – August 25, 2016 IBIA Order.

On August 26, 2016, the BIA Assistant Secretary made the highly unusual decision to assume jurisdiction over Plaintiff Daugomah’s pending IBIA appeal, and to summarily dismiss such appeal. Importantly, *inter alia*, the BIA Assistant Secretary tied his decision to assume jurisdiction and dismiss Plaintiff Daugomah’s appeal with his decision to refuse to assume jurisdiction over the Johnson appeal (of BIA’s refusal to process the petition for

a Secretarial Election) because “...tribal solutions still exist”. *See* Doc. 1-10 – August 26, 2016 letter. In other words, the BIA Assistant Secretary chose the “tribal solution” to call the Special Tribal Election while refusing to honor the other “tribal solution”, *i.e.*, the right of the People to petition the BIA for a Secretarial Election.

The BIA Defendants have based their actions to call and conduct the Special Tribal Election “under tribal law” on alleged *tribal* authority *delegated* to the BIA. For example, in several recent decisions, the BIA Defendants and/or the IBIA has written the following:

- (i) “This is a unique provision in the Tribe’s Constitution and one that provides BIA the authority to call an election in limited situations.” (Emphasis added). (June 24, 2016 memo from the BIA Assistant Secretary to Defendant Smith). *See* Doc 1-3 – June 24, 2016 memo.
- (ii) “...the tribal constitution provides for the Department to take action,...” (Emphasis added). (June 24, 2016 memo from the BIA Assistant Secretary to Defendant Smith). *See* Doc 1-3 – June 24, 2016 memo.
- (iii) “Therefore, I a directing you to assist the Kiowa Tribe in holding an election, pursuant to authority vested in BIA official (sic) under Article IV of the Kiowa Constitution, to fill all the seats on the Kiowa Business Council (sic).” (Emphasis added). (June 24, 2016 memo from the BIA Assistant Secretary to Defendant Smith). *See* Doc 1-3 – June 24, 2016 memo.
- (iv) “...the tribe’s Constitution that confers on the BIA the authority to call an election in limited circumstances.” (Emphasis added). (July 8, 2016 letter

from Defendant Smith to attorney Martin Clare). *See* Doc. 1-11 – July 8, 2016 letter.

- (v) “It is important to note that the Kiowa special election is not a Secretarial election under 25 C.F.R. Part 81. The purported decisions that you appeal were issued by Deputy Regional Director Jessie Durham in her capacity as Chairperson of the Special Election Board, pursuant to authority vested in her by the Tribe’s Constitution, not by any provision within Chapter 1 of Title 25 of the Code of Federal Regulations.” (Emphasis added). (August 26, 2016 letter from the BIA Assistant Secretary to attorney Martin Clare). *See* Doc. 1-12 – August 26, 2016 letter.
- (vi) “Mr. Daugomah challenges the validity of certain actions taken by the Bureau of Indian Affairs officials who are conducting a special election for the Kiowa Tribe of Oklahoma(Tribe) under tribal law.” (Emphasis added). (August 26, 2016 letter from the BIA Assistant Secretary to attorney Martin Clare). *See* Doc. 1-12 – August 26, 2016 letter.
- (vii) “...noting in the Election Board notices (or in the Assistant Secretary’s directive) indicates that the notices were issued under the regulations in 25 C.F.R. On the contrary, as Appellant (Daugomah) concedes, the Election Board’s actions were based on its understanding, albeit one disputed by Appellant, that the Tribe’s Constitution delegated authority and power to the BIA to act.” (Footnote omitted). (August 25, 2016 IBIA Order). *See* Doc. 1-9 – August 25, 2016 IBIA Order.

I. THE BIA’S RELIANCE ON A DELEGATION OF THE KIOWA TRIBE’S LEGAL AUTHORITY TO EXECUTE ITS FEDERAL DUTIES REPRESENTS A FUNDAMENTAL MISUNDERSTANDING OF THE RELATIONSHIP BETWEEN INDIAN TRIBES AND THE FEDERAL GOVERNMENT AS WELL AS THE SOURCE AND SCOPE OF FEDERAL POWER.

The BIA does not derive its authority from an Indian tribe. A tribe’s constitution is not the source of the BIA’s legal authority to act, rather, federal law and federal regulations are the source of BIA’s authority to act. While the long, convoluted relationship between Indian tribes and the federal government has taken many turns including abruptly shifting policies, this case cuts to one of the basic tenants of American democracy, *i.e.*, federal authority. This case presents a straightforward issue based on the U.S. federal constitutional structure and democracy. In the absence of a federal law or regulation authorizing Agency (executive) action in this matter, the BIA is without the appropriate legal authority to act. U.S. Const., Art. II.

There can be no doubt that the BIA Assistant Secretary relied on the alleged legal authority derived from the Kiowa Tribe’s Constitution to call and conduct the Special Tribal Election, and the BIA is currently acting “under tribal law”. The BIA Assistant Secretary cited no federal statutory or regulatory authority to call and conduct the Special Tribal Election. By relying on the Tribe’s Constitution as its legal authority to call the Special Tribal Election, the BIA Assistant Secretary violated the U.S. Constitution.⁶

⁶ If an Indian tribe may insert federal responsibilities and duties into its constitution, then the BIA will find itself in the impossible predicament of deciding which tribal constitutional obligations to follow and which ones to ignore. For example, a tribe could include in its constitution a requirement that the BIA conduct all elections for the

II. THE BIA HAS MADE MULTIPLE, ARBITRARY DECISIONS IN THIS MATTER.

The BIA has made unilateral and arbitrary decisions to call the Special Tribal Election, to appoint an Election Board comprised exclusively of BIA employees, to establish the One-Time Election Rules, and in the actual conduct of the election to date. First, the BIA Assistant Secretary made the arbitrary decision to call the Special Tribal Election based on the alleged request of only two members of the Tribe. *See* Doc. 1-3 – June 24, 2016 memo from Larry Roberts. Indeed, the Tribe itself made no official request to the BIA for the Special Tribal Election. This is not a situation where the Tribe has taken an official action to request the BIA to act, or where the Tribe has made an official request or decision that subject to BIA approval (such as a land lease, for example), rather, here the BIA *itself* has decided to take unilateral action to decide whether and when to call and conduct a *tribal* election.

Second, the BIA Regional Director made the unilateral decision to summarily appoint the BIA Election Board, comprised exclusively of BIA officials and employees, none of whom are members of the Kiowa Tribe. The BIA Election Board is not created or authorized pursuant to federal law or regulation, rather, the BIA relied on tribally-delegated authority to create such Board. The BIA simply and summarily announced the establishment of the BIA Election Board as well as the individuals selected to serve on such Board. *See* Doc. 1-6 - One-Time Election Rules. The BIA's decision to arbitrarily

tribe, not just for unique situations where the tribe's governing body is unable to obtain a quorum.

appoint BIA employees to serve as the new BIA Election Board violates Mr. Daugomah's right to participate in the Tribe's government, to have his voice heard on the enactment of new laws and the appointment of new officials, his right to due process of law, and his consent to be governed by properly selected officials of the Tribe.

Third, the BIA Election Board summarily announced the enactment of the One-Time Election Rules to be utilized at the Special Tribal Election without providing any opportunity for notice and comment rule-making in violation of the Administrative Procedures Act ("APA"). 5 U.S.C. §§ 701-706. The One-Time Election Rules generally track the Secretarial Election Regulations (25 C.F.R. Part 81) that the BIA uses to conduct Secretarial Elections, although the One-time Election Rules include significant and substantive differences from the Part 81 Regulations.⁷ The BIA Election Board's decision to copy and unilaterally modify the Part 81 Regulations to create the One-Time Election Rules violates the APA. The BIA Election Board's decision to rely on *tribal law*, rather than *federal law*, as the basis to promulgate the One-Time Election Rules has had, and will continue to have, an adverse impact on all members of the Tribe including Plaintiff Daugomah. As one example, the One-Time Election Rules require voters to separately register to vote by mailing a Voter Registration Form to the BIA within a 30-day time period, which is a new requirement that has never been used in a *tribal* election in the past. The BIA Election Board has also failed to follow its own One-Time Election Rules when

⁷ See Doc. 1-12 - August 26, 2016 letter from BIA to attorney Martin Clare ("While the Kiowa special election is not a Secretarial election governed by the regulations at 25 C.F.R. Part 81, the practical and policy consideration that guided the Secretary of the Interior's recent revisions to Part 81 apply to the conduct of the Kiowa special election.").

it accepted the hand-delivery of a voter registration form despite an express prohibition to do so written in red ink on the form itself. *See* Doc. 1-8 - August 18, 2016 Daugomah Appeal at 3.

Fourth, on July 19, 2016, the BIA Election Board issued Election Notice #1 announcing the Special Tribal Election to elect new Business Committee Members (including the Chairman and Vice Chairman) for the Tribe. *See* Doc. 1-5 – Election Notice #1. The BIA Election Board mailed Election Notice #1 along with a Voter Registration Form to the adult members of the Tribe and included no other forms or information such as a Declaration of Candidacy Form or the One-Time Election Rules. Tellingly, the One-Time Election Rules call for challenges to the election to be decided *by the BIA* including any challenges to the manner in which the BIA has conducted the election.

On July 20, 2016, the BIA Election Board issued (but did not mail) an *amended* Election Notice #2. *See* Doc. 1-7 – Election Notice #2. The Election Notice #2 altered key deadlines in the election process. The decision of the BIA Election Board to unilaterally change the election rules and to issue the *amended* Election Notice #2, including the decision *not* to mail such notice to the members of the Tribe, violates Mr. Daugomah's right to due process of law under the U.S. Constitution.

As further evidence of the BIA's *ad hoc* approach to this matter, the BIA Regional Director made the unilateral decision to initially call a Business Committee election in 2015. *See* Doc.1-2 – January 26, 2015 letter. More than one year later, the BIA Assistant Secretary unilaterally made the same decision without any guidance or authority from federal law or regulations. *Even if* the Tribe had the authority to delegate its authority to

federal officials (which it does not), the BIA has issued no rule or shown any evidence of regulatory acceptance of such tribally-delegated authority, nor demonstrated that any regulatory guidance exists to avoid the *ad hoc* exercise of such delegated authority.

The BIA, upon its own admission, has determined that the Tribe has suffered from governmental collapse for “several years”. *See* Doc. 1-3 - June 24, 2016 memo. Yet, despite identifying the problems experienced by the Tribe’s government for years, the BIA chose not to act, but instead engaged in a series of interim recognitions of “officials” of the Tribe for limited purposes. *See* Doc. 1-3 - June 24, 2016 memo, footnote 2. When the BIA finally decided to act, it did so in an arbitrary manner by summarily announcing its decision to call a *tribal* election on two different occasions and by unilaterally setting the One-Time Election Rules.

The BIA’s actions in this matter represent nothing more than dictatorial fiat. While the goal of electing a Business Committee may be lofty, the BIA simply lacks the legal authority to do so. Overall, the BIA’s arbitrary decisions in this matter (indicated above) violate Plaintiff Daugomah’s right to due process of law under the U.S. Constitution.

III. THE U.S. CONSTITUTION, THE U.S. BILL OF RIGHTS, AND FEDERAL LAW APPLY TO FEDERAL OFFICIALS WHO ARE ACTING “UNDER TRIBAL LAW”.

The BIA acts pursuant to federal law at all times. An Indian tribe is not the source of BIA authority to execute federal laws enacted by Congress. Absent a federal law, the BIA, like any federal agency, lacks the authority to take action. Here, the BIA is expressly and unequivocally asserting an alleged right to take action based on “tribal law”, not federal

law. For the reasons stated above, Plaintiff Daugomah refutes BIA's assertion and exercise of "tribal law".

Even if the BIA had the authority to call the Special Tribal Election pursuant to *tribal law*, the BIA Election Board cannot conduct the election in violation of the U.S. Constitution or federal law. For example, the BIA Election Board cannot conduct the Special Tribal Election in an arbitrary or haphazard manner such as, here, issuing two different election notices or violating its own One-Time Election Rules. The BIA must act in accordance with the U.S. Constitution and laws regardless of whether it derived the power to call and conduct the Special Tribal Election from the Tribe's Constitution. Federal officials are not exempt from the application of federal law or the U.S. Constitution *including the U.S. Bill of Rights* simply because they are allegedly exercising tribally-delegated authority.

The U.S. Supreme Court, however, has held that the U.S. Bill of Rights does not apply to Indian tribes. Talton v. Mayes, 163 U.S. 376 (1896). The election of the Tribe's officials at issue in this case goes to the core of the Tribe's notions of civil rights and due process, including how it will elect its leaders and resolve election disputes. Plaintiff Daugomah has a direct stake in the proper functioning of the Tribe's government including whether elections are conducted in accordance with Kiowa law and equity. When the BIA acts "under tribal law" and exercises *tribally-delegated* authority, the BIA officials are nonetheless bound to follow the U.S. Bill of Rights, which otherwise would not apply against the Tribe's government or to the Tribe's election issues. The BIA's decision to call and conduct the Special Tribal Election effectively applies the U.S. Bill of Rights to the

Tribe through the “back door”, *i.e.*, the BIA officials are bound by the U.S. Bill of Rights even when exercising tribally-delegated authority, although the Tribe itself would not be bound by the U.S. Bill of Rights when the Tribe conducts the same Business Committee election under “tribal law”. The BIA Assistant Secretary’s decision to call and conduct the Special Tribal Election and the *de facto* application of the U.S. Bill of Rights violates the principles established by the U.S. Supreme Court in Talton and should be disallowed.

IV. THE COURT SHOULD EXPEDITE THE REVIEW OF THIS MATTER GIVEN THE IMPENDING SPECIAL TRIBAL ELECTION.

The BIA Election Board has scheduled the Special Tribal Election for September 17, 2016. The recent decision by the BIA Assistant Secretary to abruptly assume jurisdiction and dismiss Plaintiff Daugomah’s IBIA appeal, and communicated to Mr. Daugomah’s legal counsel on August 26, 2016, has left Plaintiff Daugomah with no other option but to seek immediate federal court review of this matter. Simply put, the BIA cannot legally operate “under tribal law” or exercise *tribally-delegated* powers, especially in the absence of any federal law or regulation proscribing such actions.

If the BIA is permitted to proceed with the Special Tribal Election and a new Business Committee is certified and seated by the BIA, and subsequently Plaintiff Daugomah prevails on his claims, then the “unseating” or de-certifying the newly-seated Business Committee officials will cause greater harm and disruption not only to the Tribe and its members, but also to Plaintiff Daugomah specifically, by requiring the BIA officials and likely police officers to enforce the Court’s decision and “undo” or cancel the certified election results leaving the Tribe’s government with greater instability and a lack

governance. By answering the straightforward question of law presented in this case, the Court can help the BIA and Tribe avoid such a result.

V. BIA VIOLATED PLAINTIFF'S RIGHT TO DUE PROCESS.

The BIA's decision to act "under tribal law" and pursuant to tribally-delegated authority violates the Article II of the U.S. Constitution. The BIA's decision to arbitrarily call and conduct the Special Tribal Election by exercising "tribal law" also violates Plaintiff's right to due process of law under the U.S. Constitution.

VII. STANDARD TO ISSUE TRO/PRELIMINARY INJUNCTION

The purpose of a temporary restraining order ("TRO") is to "preserve the status quo and prevent irreparable harm, just so long as is necessary to hold a hearing, and no longer." Granny Goose Foods, Inc. v. Bhd of Teamsters & Auto Truck Drivers, 15 U.S. 423, 439 (1974). Any temporary restraining order, therefore, is a temporary measure to protect rights until a hearing can be held. Similarly, a preliminary injunction is designed to maintain the status quo until a final determination of the matter on its merits can be made. Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

To prevail on a request for TRO or preliminary injunction, the burden is on party seeking the injunction to establish:

- (1) the moving party will suffer irreparable injury unless the injunction issues;
- (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party;
- (3) the injunction, if issued, would not be adverse to the public interest; and
- (4) there is a substantial likelihood that the moving party will eventually prevail on the merits.

Amoco Oil Co. v. Rainbow Snow, Inc., 809 F.2d 656, 661 (10th Cir. 1987).

The level of proof necessary for issuance of a preliminary injunction will vary, but, generally, the stronger the first three elements necessary for proof are, the more lenient a court will be in evaluation of the fourth element. The moving party must then merely demonstrate that there are “questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation. Kids ‘N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1283 (10th Cir. 1996).

Plaintiff Daugomah meets the requirements for issuance of a TRO/Preliminary Injunction.

A. Irreparable Harm

Plaintiff Daugomah will suffer, and continues to suffer, irreparable harm, and (non-monetary) equitable relief is the only available remedy available to ensure that no further damage occurs to Plaintiff. For example, The BIA Assistant Secretary’s unilateral decision to call the Special Tribal Election will effectively result in the installation of a new government for the Tribe that will likely have long-standing, generational consequences. The BIA Assistant Secretary’s unilateral decision to call and conduct the Special Tribal Election using the One-Time Election Rules has caused great disruption in the Tribe by creating a new, “One-Time” election process. The new Business Committee will have the power to make immediate decisions directly impacting the members of the Tribe and Plaintiff Daugomah, such as the expenditure of the Tribe’s funds and the operation of the Tribe’s casino enterprise, even though the new Business Committee will have been elected

through an unlawful exercise of “tribal law” (and arbitrary administrative decisions) by federal officials.

B. Plaintiff will Suffer Greater Injury than any Perceived Injury the Injunction may Cause Defendants.

Defendants will not be prejudiced by any relief granted in favor of Plaintiff because the avoidance of an unlawful election conducted by federal officials acting “under tribal law” is repugnant to the Constitutional structure and laws of the United States. The federal government and federal officials do not derive their authority from a tribe’s constitution. The BIA readily admits that it has called the Special Tribal Election pursuant to authority from the Tribe’s Constitution and “...not by any provision [of 25 C.F.R.]”. *See* Doc. 1-12 – August 26, 2016 letter. Any harm that the halting of the Special Tribal Election may cause is far outweighed by the conduct of an election that is later determined to be unlawful. The issuance of the injunction will cause no meaningful harm to Defendants than, at most, the cost of another election that would be conducted entirely through the U.S. mail.

C. Granting the Injunction Serves the Public Interest.

The public and Plaintiff Daugomah have the right to be treated fairly by federal officials and in accordance with the laws of the United States. The unlawful exercise of “tribal law” by federal officials violates the U.S. Constitution and the right to due process of law. In calling the Special Tribal Election, the BIA has acted without any federal law or regulation to authorize or guide its actions, rather, the BIA has expressly and improperly relied on “tribal law” for its actions.

The BIA's actions in calling and conducting the Special Tribal Election in an arbitrary manner violates the U.S. Constitutional guarantees of equal protection of the laws. By expressly acting without any federal law to guide their conduct, and by unilaterally creating the One-Time Election Rules and then violating their own rules, the BIA and the BIA Election Board cannot guarantee Plaintiff Daugomah or other members of the Tribe equal protection of the laws.

D. Plaintiff has a Substantial Likelihood of Prevailing on the Merits.

The law is clear – federal officials exercise federal authority. Federal officials cannot act pursuant to delegated tribal authority or “under tribal law”.

The Defendants, as federal officials, are bound to follow federal law, regardless of whether they are exercising tribally-delegated powers. Federal officials are not permitted to engage in conduct that violates an individual's equal protection and due process rights. By arbitrarily calling and conducting the Special Tribal Election without federal legal authority, the Defendants have violated Plaintiff Daugomah's rights under the U.S. Constitution and federal law; therefore, Plaintiff has a substantial likelihood of prevailing on the merits of his claims.

CONCLUSION

For the reasons set forth herein, the Court should grant a temporary restraining order and temporary injunction expeditiously.

WHEREFORE, the specific relief sought by Plaintiff is as follows:

1. An immediate temporary restraining order enjoining Defendants from conducting the Special Tribal Election on September 17, 2016.

2. Preliminary and permanent injunctions requiring Defendants to refrain from calling and conducting another special election pursuant to any authority contained in the Tribe's Constitution.

3. Pursuant to the Equal Access to Justice Act, an order awarding attorney's fees and costs in bringing this action, which is necessary to enforce the clear mandates of federal regulations.

4. A finding that for good cause the security requirement of Fed.R.Civ.P. 65(c) is waived, and that Plaintiff is not required to post security.

5. Plaintiff respectfully requests a hearing and oral arguments in this matter.

DATED September 9, 2016

Respectfully submitted,

/s/ Jason Aamodt

Jason Aamodt

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2016, I electronically transmitted the attached documents to the Clerk of the Court using the ECF System for filing. I hereby certify that a true and correct copy of the foregoing was mailed via First Class U.S. mail on September 9, 2016, to the following:

Larry Roberts, Acting Assistant Secretary
Bureau of Indian Affairs
U.S. Department of the Interior
1849 "C" Street NW
Washington, D.C. 20240
(202) 208-7163

Dan Deerinwater, BIA Regional Director
Southern Plains Regional Office
WCD Office Complex
PO Box 368
Anadarko, Oklahoma 73005
Telephone: (405) 247-6673

BIA Election Board, Jessie Durham, Chairperson,
Bill Walker, Member, Amy Dutschke, Member,
Sherry Lovin, Member, and Andrea Philips, Member
Bureau of Indian Affairs
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WCD Office Complex
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Mike Smith, Deputy Director,
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/s/ Jason Aamodt