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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSEPH HOLLEY INDIVIDUALLY AND ON BEHALF OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA as Tribal Council Chairman,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS; and DARRYL LA COUNTE, as Director of the Bureau of Indian Affairs,

Defendants.

Case No. 2:24-cv-01629-GMN-DJA

PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY UNDATED DECISION FROM DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS OR, ALTERNATIVELY, EMERGENCY MOTION FOR PRELIMINARY INJUNCTION [ECF NOs 10; 13]

I. INTRODUCTION

Federal Defendants' Response only serves to confirm that a stay and related injunctive relief must be granted. Instead of digging into the merits, Federal Defendants spend most of their pages advocating in favor of deference. To defer, however, there must be an alternative forum to defer to. As Plaintiffs demonstrated, the IBIA already rejected Plaintiffs' request for a stay, ruling that such relief is exclusively within the purview of this Court. Additionally, Plaintiffs' request for expedited review before the IBIA (assumed by AS-IS) remained pending

despite their knowledge of the impending election deadlines. Left with no other option, Plaintiffs filed in this Court and moved for an emergency stay.

Ignoring the inevitable irreparable harm that will result with two competing elections, the Federal Defendants also argue in favor of deference to a post-election challenge in the CFR Court. Again, there is nothing to defer to. The Regional Director's July 10, 2024, letter decision revoking the Tribal Court is not yet effective. (*See* 25 CFR 2.300; *see also* Ex. 34, Mot. to Make Decision Effective Immediately.) Thus, the Tribe has been placed in judicial purgatory immediately before its 2024 election. After the Director upended the Tribe's executive and administrative branches less than a month before the time for the Council to enact the resolution for the election schedule – and two months after the schedule was already published – the Regional Director called the legitimacy of the Tribe's long-standing judicial branch into question by "revoking" her multiple prior recognition decisions. Again, there is no other forum for Plaintiffs to pursue.

The express language of the APA and relevant regulations from the Department of Interior are clear. This Court has jurisdiction and is empowered to issue the relief Plaintiffs seek. While Federal Defendants claim the Motions require interference in internal Tribal matters, the opposite is true. Plaintiffs are asking the Court to exercise its authority and remove the Bureau's well-intentioned (but counterproductive) obstacle to the Tribe's effort to resolve its intra-tribal dispute for itself.

The express language of the APA and relevant regulations are also clear that Plaintiffs have standing, both in their individual capacity, and as representatives for the Tribe as whole, to challenge the Director's Decision and preserve the status and integrity of the election. In the Director's own words, "there are only two possible Tribal Councils for me to choose between: the ["Holley Council"] … or the "Garcia-Ike Council." (ECF No. 12-2 at pg. 30 (033)). The Director chose the "Garcia-Ike Council." The consequences of the Decision include, among others, the loss of outside recognition by the "Holley Council" and the imminent loss of voting rights for the Tribe. Thus, the "Holley Council" is an interested party and "participant" as that term is defined in the relevant regulations. (*See* 25 C.F.R. § 2.101 "Participant means the

appellant, any interested party who files a response as provided for in § 2.209, and any Tribe that is an interested party.").

As the parties to this case all agree, the best way for the Tribe to move forward from its current intra-tribal dispute is with a valid 2024 election. A stay of the Director's Decision and related injunction serves that purpose. If the Director was correct about the "Garcia-Ike Council," Ike and its three other members would be doing everything they could to ensure that a peaceful and valid election occurs on October 8, 2024 – a date scheduled six months ago. Instead, the "Garcia-Ike Council," and the individuals allied with them, are doing everything they can to disrupt the election and sow confusion with voters. This includes standing behind a self-appointed one-man "Election Committee" purporting to represent three of the four bands and self-empowered to determine who may and may not cast a valid vote. An "Election Committee" responsible for tearing down public information about the actual election and posting outdated and inaccurate voter registration rolls and other information that will only serve to confuse voters. This is not Plaintiffs' speculation. The individual at the center of these actions informed the Bureau himself of his plans. However, the Bureau has thus far turned a blind eye and Federal Defendants now largely ignore these facts in their Response.

Plaintiffs are grateful for the Court's willingness to review this matter as an emergency. Plaintiffs respectfully request that the Court act now and enter a stay of the Decision and related injunction in the manner set forth in Plaintiffs' proposed Order.

II. ARGUMENT

A. The Court is Empowered to Review the Decision and Issue Emergency Relief.

1. Plaintiffs Do Not Seek a Leadership Determination.

Citing *U.S. Bancorp v. Ike*, Federal Defendants argue that the Court should deny Plaintiffs' Motions because they require the Court to interpret Tribal law and intervene in an internal Tribal matter. 171 F. Supp. 2d 1122, 1124 (D. Nev. 2001). However, *U.S. Bancorp v. Ike* confirms that the Court can, and should, exercise jurisdiction here. *U.S. Bancorp* was an interpleader case wherein the Plaintiff bank sought to relieve itself of any liability regarding the

Te-Moak accounts because it could not determine the rightful leadership of the Tribe. Within that case, one of the disputed groups filed crossclaims challenging a decision from the Court of Indian Offenses enjoining the group from accessing the Tribal headquarters. *Id.* at 1125.

The court agreed that it did "not have jurisdiction to determine which group is the governing body of the Te–Moak … [because] [d]eciding a question involving a tribal election dispute is solely a matter of tribal law, and we do not have jurisdiction to address this question." *Id.* However, the Court "also agree[d] … that we do have jurisdiction to determine if the Court of Indian Offenses exceeded its jurisdiction when it issued a restraining order against the Mose Group." *Id.*

Federal Defendants also rely on the Eighth Circuit's decision in *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983). *Goodface* specifically confirmed the federal court's jurisdiction to review the Bureau's recognition decision – ultimately ruling that the Bureau abused its discretion by recognizing dual competing de facto governments simultaneously. 708 F.2d at 338 ("The final BIA action subject to judicial review is its decision to recognize both tribal councils only on a de facto basis.").[1]

Here, Plaintiffs are not asking the Court to decide the 2021/2022 tribal election. Nor do Plaintiffs seek an order "empowering" the "Holley Council" as Federal Defendants Claim. Indeed, by way of these Motions, Plaintiffs just want the Bureau to get out of the way. The date for the 2024 election was already set prior to the Decision. The "Holley Council" already issued the schedule and passed a Resolution with the election dates. (ECF No. 12-6; *see also* Ex. 35, Resolution). The Council's role is largely concluded. As the Tribe's Constitution and Election Ordinance make clear, actual organization and operation of the Band and Chairman elections is handled by the Bands' Election Commissions and the Tribe's Election Council, respectively.

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[1] In *Grassrope*, the Eighth Circuit ultimately concluded that "the district court possessed jurisdiction only to order the BIA to recognize, conditionally, either the new or old council so as to permit the BIA to deal with a single tribal government. That recognition should continue only so long as the dispute remains unresolved by a tribal court." *Goodface*, 708 F.2d at 339.

(ECF No. 12-6 at Art. 7, Sects. 9-10; ECF No. 12-7 at Sects. 13-4-3; 13-4-5 ("Each Band Election Committee shall have the responsibility ....").

The Election Committee members have already been appointed by their respective Bands. (Ex. 36, Resolutions; *see also* ECF No. 12-31.) These are the bodies "empowered" to "ensure that the election is conducted objectively and fairly by secret ballot, and shall certify the results of such election…." (ECF No. 12-7 at Sect. 13-4-5.)

Plaintiffs are challenging, and by way of these Motions, seeking a stay, of the Director's Decision (pending an ultimate decision as to its validity) because it is being totally misused and abused by the "Garcia-Ike Council" to legitimize their illegal actions and lend credence to their sham election. The examples of Ike and her allies past abuse of the recognition decisions from the Regional Director and Director are detailed in Plaintiffs' Motions. Most pressing, for purposes of these Motions, is the 2024 election. The evidence of this abuse is overwhelming.

As shown, the "Garcia-Ike Council" has purportedly placed Steve McDade ("McDade") in charge of its competing election. Citing the Decision and quoting its contents, McDade wrote an email to Bureau representatives, including the Regional Director and AS-IS, on July 12, 2024, claiming to be the "TeMoak Election Board Chairman" and purporting to "step in and hold the election of the bands by the TeMoak Election Board." (ECF Nos. 12-27 at pg. 2 (228)). McDade informed the Bureau that "it is within my authority as TeMoak Election Board Chairman to step in and hold the election of the bands by the TeMoak Election Board." *Id.* "It is also within my authority to NOT ALLOW individuals who have committed election fraud in the past to be no where [sic] within the election of 2024." *Id.* According to McDade, the Bureau should recognize his actions and thus "give full support of Director Lacounte decision." *Id.*

Two months later, on September 20, 2024, McDade wrote to these Bureau representatives again claiming to be the "TeMoak Election Board Chairman" and that he was tasked to "oversee the band elections for Battle Mountain, Southfork and Wells band …." (ECF No. 12-28 at pg. 1 (230)). McDade went on to list the candidates that he was recognizing which consist of only six names for the Southfork Band, one name for the Battle Mountain Band, and five names for the Wells Band. *Id.* According to McDade, "[t]hese are the only candidates that

will be recognized by the TeMoak council of Garcia/Ike and will be listed as candidates for October 12, 2024." *Id.*

As Plaintiffs have shown, McDade and the "Garcia-Ike Council's" other allies have torn down public postings regarding the October 8, 2024, election and replaced them with the "date of events" calendar for their own October 12, 224, sham election, neglecting to even identify the precise address of the polls or places for voting. (ECF Nos. 12-29; 12-30; *see also* Ex. 37, candidate posting.) McDade and these other allies have also publicly posted outdated voter registration lists containing names of individuals who are no longer Band members and individuals who have passed away. (ECF No. 12-33.)

Additionally, someone affiliated with the "Garcia-Ike Council" recently published a "Legal Notice" in the Elko daily newspaper claiming that "the BIA recognized the Garcia/Ike Council as the valid Te-Moak Tribal Council" and warning that anyone that "engages" with the "imposters" "does so at their own risk." (Ex. 38, Legal Notice). This published notice claims that "the official Te-Moak Band Elections are October 12, 2024 at each Band location." *Id.*

The problems with these actions are apparent and numerous. Again, the Tribe already set the election for Tuesday October 8, 2024, six months ago. Tribal records going back to 2009 demonstrate that elections have always been held on Tuesdays. Notification of this date first went out on April 17, 2024. (ECF No. 12-26.) The Tribe passed a Resolution on July 17, 2024, recognizing this date. (Ex. 35.) The October 8, 2024, schedule complies with the Tribe's Constitution and Election Ordinance. Moreover, the Band Election Committees, voter lists, and candidate lists issued in anticipation of the October 8, 2024, election all comply with the Tribe's Constitution and Election Ordinance.

According to these governing documents, Band Election Committees must be appointed by their respective Band Council and be comprised of three or more persons. (ECF No. 12-6 at Art. 7, Sect. 9; *see also* Ex. 36.) The Tribal Election Board shall be composed of one of the members from each of the Band Election Committees. *Id.* at Art. 7, Sect. 10. The Tribal Election Board members are selected by their respective Band Election Committees. (ECF No. 7 at Section 13-14-1.)

Election Committees must maintain updated voter lists and post the names of qualified candidates at each respective Band Council Office and at the Tribal Administration Office at least ten days before the election. (ECF No. 12-7 at Sects. 13-3-6; 13-5-4.) They may also post throughout each Band area on bulletin boards, if available. *Id.* "The place of voting shall be at a Polling Place designate by the respective Band Council … where balloting takes place …." *Id.* at Sect. 13-6-1. Of course, a Tribe member's status as a registered voter, and right to vote, may only be revoked under very limited circumstances. *Id.* at Sect. 13-3-5. Ultimately, the actual Band Councils must be comprised of seven members each. *Id.* at Sect. 13-4-5.

In defiance of these requirements, the competing election date appears to have been unilaterally set by McDade, or others, only recently, and possibly as recently as September 20, 2024. The competing election date is Saturday October 12, 2024, which is obviously not on a Tuesday, and is on a weekend. Plaintiffs can only assume that the Saturday setting was chosen in an effort by the "Garcia-Ike Council" and McDade to circumvent the 24-hour election challenge period, since any such challenge would have to be made on a Sunday, a day when the Band Offices are generally closed.

Moreover, the competing dates were not set by any valid Resolution.[2] McDade has failed to identify the specific location of any polling locations. While the various notifications state voting is to occur at "each Band location," McDade fails to specify where that is. (*See* Ex. 38 ("at each Band location")). McDade also fails to explain how he can serve as the sole member of the Election Committee for three different Bands and as the sole member of the Election Board. Of course, McDade lacks authority to "NOT ALLOW" anyone who he choses not to vote. The legal infirmities corrupting the October 12, 2024, competing election are almost too numerous to identify.

Again, Plaintiffs do not ask the Court to determine Tribal leadership. Through these

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[2] Plaintiffs are informed and believe that the "Garcia-Ike Council" has failed to meet the quorum or Chairman requirements for a valid meeting since July/August 2023 and have sought to get around these requirements by going into "recess" since this time instead of adjourning. This is a clear violation of the Robert's Rules of Order, which have been adopted by the Tribe via Resolution.

Motions, they ask the Court to mitigate the threat to the Tribe's election from the "Garcia-Ike Council" and its allies by staying the Decision and issuing a related injunction. The Court may clearly exercise its powers of judicial review and do so. *See Goodface*, 708 F.2d at 339 (ordering district court to "direct the BIA officials, if necessary to do so, to recognize as tribal officials those persons who are recognized as the tribal council entitled to govern the Tribe pursuant to a judgment entered by a tribal court.").

Ultimately, the Court does not need to resolve the intra-tribal dispute. As Plaintiffs will ultimately demonstrate, the dispute has already been resolved and decided by the Tribe's long-standing court (ECF No. 12-17), which was subsequently upheld by the Tribal Supreme Court of Appeals on October 6, 2022.

2. The APA and Relevant Regulations Empower the Court to Grant the Requested Relief.

Federal Defendants' argument for abstention also largely ignores the express language of the APA as well as the regulations empowering the Court to hear this dispute. As the Court is aware, the APA states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C.A. § 704. Additionally, "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court … may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C.A. § 705.

In an effort to ensure expedited review, the Department of Interior recently updated its regulations. Among other things, these updated regulations permit immediate judicial review of certain determinations from the Director. 25 C.F.R. § 2.700 ("The purpose of this subpart is to expedite administrative review of a Bureau decision to recognize, or to decline to recognize, a Tribal representative.")

Specifically, under 25 C.F.R. § 2.714:

> The reviewing official's decision is immediately effective, but not final for the Department. Therefore, any participant may appeal the reviewing official's decision as provided for in this part, ***or pursue judicial review in Federal court***. Notwithstanding any other regulation, the reviewing official's Tribal representative recognition decision shall remain in effect and binding on the Department unless and until the reviewing official's decision is reversed by superior agency authority ***or reversed or stayed by order of a Federal court***.

(Emphasis added.)

Additionally, 43 C.F.R. § 4.314 states that, "[n]o decision of an … BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, ***unless it has been made effective pending a decision on appeal by order of the Board***." (Emphasis added).

As shown, the Director's Decision is "immediately effective." (ECF No. 12-2 at pg. 31 (034)). Thus, the express language of the relevant regulations permit Plaintiff's sought after relief. While Federal Defendants argue that Plaintiffs should be forced to continue their appeal before the IBIA (which was assumed by the AS-IS), the IBIA has already rejected Plaintiff's request for a stay, ruling that such relief is within the exclusive purview of the Court. (ECF No. 12-4 at pg. 4 (041)) ("While § 2.714 acknowledges that such a decision may be stayed pending appeal by order of a Federal Court (and that BIA's decision may be appealed directly to a Federal district court, without further exhaustion of administrative remedies), it prevents the Board from staying the BIA review official's decision under 43 C.F.R. § 4.21.").

Coupled with the AS-IA's failure to act on Plaintiffs' request for expedited consideration, Plaintiffs had no choice but to proceed with this action as the election has long been scheduled for October 8, 2024. *Id.* at pg. 3 (040) ("Order Taking Request for Expedited Consideration Under Advisement").[3]

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[3] Notably, Plaintiffs also reached out to the Bureau's Tribal Government Officer, Jocelyn Beard, on July 11, 2024, in an effort to seek the Bureau's assistance with the issues created by the Decision and the "Garcia-Ike Council's" interference with the election. However, based on the advice of counsel, Ms. Beard was unable to assist. (Ex. 39, July 11, 2024, Email).

Moreover, the relevant regulations specifically contemplate parties to the administrative appeal filing a subsequent challenge in Federal court. *See* 25 C.F.R. § 2.300(b) ("When an agency decision is effective pursuant to paragraph (c) of this section or § 2.714, the administrative appeal will proceed unless an interested party challenges the agency decision in Federal court.") Following this, the AS-IS stayed the consolidated administrative appeal in deference to this Court on September 16, 2024. (ECF No. 22-3.)

In sum, there can be no dispute that Plaintiffs are in the correct forum. Proving this, Federal Defendants resort to arguing in favor of deference to a post-election challenge before the CFR Court. However, this argument ignores the irreparable harm faced by Tribe voters if the dueling elections are permitted to move forward. It also ignores the fact that jurisdiction over Tribal cases has not been transferred back from the Tribal Court as the Regional Director's July 10, 2024, Decision "revoking" the prior recognition (ECF No. 12-32) has been appealed and is, therefore, stayed automatically. 25 C.F.R. § 2.300(a) ("Agency decisions that are subject to further administrative appeal become effective when the appeal period expires without an appeal being filed."); *see also* 43 C.F.R. § 4.314.

B. Plaintiffs Have Standing to Challenge the Director's Decision.

Relying on 25 C.F.R. § 2.714, Federal Defendants claim Plaintiffs lack standing to pursue judicial review because they did not appeal the Regional Director's October 17, 2023, letter decision. (ECF No. 12-18.) According to Federal Defendants, Plaintiffs are not a "participant" as that term is used in § 2.714 ("Therefore, any participant may appeal the reviewing official's decision as provided for in this part, or pursue judicial review in Federal court.").

However, Federal Defendants ignore 25 C.F.R. § 2.101's definition of a "participant" as "the appellant, any interested party who files a response as provided for in § 2.209, and any Tribe that is an interested party." *See also* 25 C.F.R. § 2.209 ("Any interested party may file a response to the statement of reasons, thereby becoming a participant. The decision-maker may also file a response to the statement of reasons."); *see also* § 2.101 (Defining "interested party" as "a person or entity whose legally protected interests are adversely affected by the decision on appeal or may be adversely affected by the decision of the reviewing official.").

As 25 C.F.R. § 2.200 makes clear, "[y[ou have a right to appeal a decision made by an Indian Affairs official if you can show, through credible statements, that you are adversely affected by the decision." Plaintiffs clearly fall within the broad definition of a "participant" and can, and have, demonstrated that they are adversely affected by the Decision's findings and effects.

Federal Defendants also disregard the APA's definition of standing which states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C.A. § 702. Given the Director's Decision to recognize the "Garcia-Ike Council" over the "Holley Council," and resulting consequences, including the "Garcia-Ike Council's" seizure of Tribal funds and the imminent threat to the election and voting rights, Plaintiffs clearly meet the requisites for Article III standing. As the only other option to lead the Tribe, and "losers" under the Director's Decision, the "Holley Council" clearly suffered a "concrete and particularized" injury which is "actual and imminent" and "fairly traceable to" the action of the Federal Defendants. Plaintiffs have also demonstrated that the injury is "likely redressable by a favorable decision from the court." *Hawai"i Orchid Growers Ass'n v. U.S. Dep't of Agr.*, 436 F. Supp. 2d 45, 50 (D.D.C. 2006) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

In short, Plaintiffs' standing is beyond dispute. Federal Defendants' arguments otherwise are fundamentally flawed.

C. The Court Should Consider All the Evidence.

Federal Defendants also seek to limit the record before the Court. However, the law is clear that the Court may consider material outside the administrative records:

> 1) where the extra-record evidence is "necessary to determine whether the agency has considered all relevant factors and has explained its decision";
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> 2) where "the agency has relied on documents not in the record";
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> 3) where "supplementing the record is necessary to explain technical terms or complex subject matter"; or
>
> 4) where "plaintiffs make a showing of agency bad faith."

E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1107 (N.D. Cal. 2018). These exceptions "operate to identify and plug holes in the administrative record." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

District courts frequently permit supplementation when faced with a record lacking in factual information on the issues central to a court's determination. *See e.g., Hunters v. Marten*, 470 F. Supp. 3d 1151, 1166–67 (D. Mont. 2020) ("In order to determine whether the Forest Service's decision to use existing routes in the roadless area is arbitrary and capricious, the Court must be able to assess whether these routes are reasonably passable."); *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (holding that a reviewing court may require supplementation of the administrative record if it is incomplete); *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996) (holding that a "court is supposed to make its decision on the basis of the administrative record," but that "[t]here are exceptions") (citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988)); *Midwest Tube Fabricators, Inc. v. United States*, 104 Fed. Cl. 568, 575 (2012) ("Additionally, Midwest Tube may submit declarations … providing information not now available concerning the supply of fire extinguishers and panel marker signals for the BII Kits.").

Despite Federal Defendants' claim to the contrary, district courts even occasionally permit limited discovery. *See e.g,, Midwest Tube Fabricators, Inc.*, 104 Fed. Cl. at 574 ("Here, Mr. Alber is the contracting officer who made the relevant decisions, and the most expeditious course of action would be to allow his deposition.").

Here, the Director's findings with respect to the qualifications of the "Garcia-Ike Council" to serve as the "government" of the Tribe for purposes of inter-government communications and handling the election are extremely thin. According to the Director, the "Garcia-Ike Council's" "filings in this appeal" demonstrated their "commitment to a fair election" and "authority to conduct that election under Tribal law." (ECF No. 12-2 at pg. 31 (034)). However, the Director fails to identify the substance of those "filings" or *any* factual basis to support his findings. Instead, the Director focused almost exclusively on casting blame

on the "Holley Council" – which the Director apparently just assumed was comprised of the same individuals both now and in 2021 – for the dispute surrounding the 2021/2022 Tribal election.[4] Thus, the Court should be permitted to review the actual evidence demonstrating the "Garcia-Ike Council's" fitness, or lack thereof, to serve as the "government" of the Tribe and prepare for the election.

The Director waited over ***eight months*** after the Regional Director issued the October 17, 2023, letter decision before issuing his Decision on or about June 26, 2024, and then reissuing it as dated on July 18, 2024. The Director should not benefit from this self-imposed delay. During this significant delay, the "Garcia-Ike Council" took actions in response to the Regional Director's findings and the Tribe predictably took actions related to the 2024 election.

As Plaintiffs have shown, Ike responded to the Regional Director's limited recognition by immediately abusing her putative authority. This includes an October 2, 2023, letter attempting to take control of the account holding funds belonging to the Tribe's Housing Authority, and October 16, 2023, letter to the Nevada Department of Motor Vehicles misrepresenting her position and authority in the Tribe. (ECF Nos. 12-19; 12-20).

On February 19, 2024, Ike issued an "Executive Order" purporting to "revoke" the "Sovereign Immunity" of almost 50 members of the Tribe as well as "any other individual(s) working in concert" with them. (ECF No. 12-22.) It is thus far unclear whether this information is contained in the administrative record. However, it directly contradicts the Director's self-purported trust in the "Garcia-Ike Council."

Also relevant is contrasting the "Holley Council's" continued and consistent leadership over the Tribe and operations with the "Garcia-Ike Council's" efforts to undermine the Tribe's operations and election. (*See* ECF Nos. 12-24; 12-25.) Most importantly for purposes of this Motion, the "Holley Council" set the 2024 election schedule in April 2024, and passed the

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[4] As detailed above, the Tribal Council plays a very limited role with respect to the Tribal election as primary responsibility falls on the Band Election Committees and the Tribal Election Board. Moreover, the 2021 delay was caused, at least in part, by the ongoing COVID-19 pandemic.

election Resolution in July 2024. (ECF No. 12-26; Ex. 35.) In accordance with this schedule, the Band Councils have established their Election Commissions, and the required postings have gone out. (Ex. 36.)

In stark contrast, the "Garcia-Ike Council" stands behind McDade's illegal attempts to seize control of the election, which are summarized in detail above. Notably, McDade self-reported his unconstitutional plans to the Bureau. (ECF Nos. 12-27; 12-28). Unlike the Bureau, the Court should consider this evidence that directly ***proves*** that the Director's self-professed premise for his Decision is ***not*** being served; it's being ***undermined***.[5]

D. The Motions Should Be Granted With or Without the Supplemental Documents.

Even if the Court determines to exclude any information that could not have been considered by the Director, Plaintiffs must still prevail. Even a limited record proves the Director exceeded his scope of review and issued a Decision that does not serve, and instead injures, its stated purpose.

1. The Director Exceeded His Review Authority.

To begin, the Court need only review the applicable regulations to determine that the Director exceeded his authority. Again, the Director's Decision stems from the appeals of the Regional Director's October 17, 2023, letter decision. These regulations provide that appeals from decisions by regional directors ***must*** be taken to the IBIA "except where a specific section of this part sets out a different appellate hierarchy." 25 CFR § 2.202 & Table. As the IBIA confirmed when it denied Plaintiffs' request for a stay, the Director's review authority is sourced in 25 CFR Part 2, Subpart G ("Special Rules Regarding Recognition of *Tribal Representative*"). (Emphasis added). Pursuant to 25 CFR § 2.700, "[t]he purpose of this subpart is to expedite administrative review of a Bureau decision to recognize, or to decline to recognize, a *Tribal representative*." (Emphasis added.)

In her October 17, 2023, letter decision, the Regional Director recognized Ike as the

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[5] The Court may no doubt consider the timing of any new evidence when considering its weight.

"Tribal *representative*" for the sooner of ninety days or until a chairman is elected. (ECF No. 12-18 at pg. 12 (183) (emphasis added). The Director abused his scope of review and, in so doing, issued a determination on the "government" of the Tribe that is potentially unlimited in time. As the relevant regulations make clear, the "Holley Council," and others, were not provided notice of the risk of any such action. *Id.* at pg. 13 (184) ("In accordance with 25 CFR Part 2, Subpart G, this decision may be appealed to the Director of the BIA ….").

Further, such elaboration directly involves the Director deciding the intra-tribal dispute as to the proper government for the tribe, something he is precluded from doing, especially given that the Tribal Court had long since reviewed the 2021-2022 elections and had already made such decision.

Because the Director exceeded the scope of his specialized review, the Decision must be struck down. Federal Defendants' reliance upon *Timbisha Shoshone Tribe v. U.S. Dep't of Interior* is misplaced. That decision predates the Department of Interior's new regulations and is devoid of any discussion regarding the authority for the recognition determinations addressed in the case. *See Timbisha Shoshone Tribe v. U.S. Dep't of Interior*, 824 F.3d 807, 813 (9th Cir. 2016).

2. The Decision Does Not Serve Its Express Purposes.

Additionally, a limited record also proves the patent flaws in the Director's Decision. As shown above, the Director spends little time in the Decision discussing the qualifications or conduct of the "Garcia-Ike Council."

As the Director was aware, the "Garcia-Ike Council" was comprised of less than the constitutionally required nine members and did not represent all four of the Tribe's Bands. (ECF No. 12-2 at pg. 31 (034) (the "Garcia-Ike Council" "does not meet the Constitutional requirements for a Tribal Council.").[6] In contrast, and as the Director was also aware, the "Holley Council" is comprised the constitutionally required nine members representing all four

[6] Strangely, the Director included Garcia in his head count of "Garcia-Ike Council" members despite acknowledging that he had "passed away in January 2024." (ECF No. 12-2 at pg. 31 (034)).

of the Tribe's Bands.

Characterizing the "Holley Council" as a "holdover" council, the Director failed to consider that the majority of the "Holley Council" was elected in the same 2021/2022 Band elections recognized as valid in the Regional Director's letter decision. (ECF No. 12-18.) While the Elko Band members had "held over," they did so because of an order from the Tribal Court. (ECF No. 12-17.)

Ultimately, the Director's determination against the "Holley Council" appears to be based primarily upon the perceived delay with respect to passing a resolution setting the 2021 election schedule and the fact that a Tribal Chairman election never went forward. (ECF No. 12-2 at pg. 20 (023)). However, and again, the Tribal Chairman election never went forward because the Elko Band did not seat any new members on the Council and would, therefore, not be represented in the leadership election. Moreover, primary responsibility for determining election dates lies with the Band Election Committees. (ECF No. 12-7 at Section 13-4-7 ("The Dates of Events shall be established by the Election Committee or Election Board in their initial meeting for a specific election ….). The "Holley Council" cannot be held exclusively at fault for any delay, which was largely the product of the ongoing COVID-19 pandemic.

Besides these prior election issues, the Director also relies on written statements that are not even attributable to Joseph Holley, or anyone on the "Holley Council," and the fact that Joseph Holley identified himself as "Chairman" on a December 16, 2022, Resolution. (ECF No. 12-2 at pg. 20 (023) ("… *Judge Hayes* mischaracterized the scope of the RD's recognition of Holley ….") (emphasis added). Thus, the evidence against the "Holley Council" is scant, at best.

In contrast, members of the "Garcia-Ike Council," including Ike herself, were responsible for felony conduct intended to seize control of the Tribl Council by force. Specifically, Ike and Garcia led a break-in of the Tribe's administrative offices on December 28, 2021, taking files, letterhead, seals, and other items used to impersonate the Tribe's Council. (V.Cmplt., ¶ 28.) Thereafter, Garcia Ike, and their allies, purported to hold a "chairperson election" on January 26, 2022, in total derogation of the Tribe's Election Law and Procedure, with only three "candidates" participating (Garcia, Ike, and Chauna Cota). *Id.*

Less than two months later, on February 24, 2022, Garcia and his allies attempted to break into the South Fork Band offices. (V.Cmplt., ¶ 32.) At the time of his death, Garcia was facing criminal charges in the Te-Moak Tribal Court and had been detained in the Bureau's federal detention center.

This information was all available to the Director as was the fact that the Regional Director's "recognition of Ms. Ike for purposes of disbursing federal funds to the Tribe, and [Housing Authority] … in particular, had failed." (ECF No. 12-2 at pg. 19 (022). According to the Housing Authority, "Ms. Ike is anything but inobtrusive. She attempted to take possession of the [Housing Authority's] … investment account funds without any authority whatsoever." *Id.* at pg. 29 (032).

Despite this overwhelming evidence, and the stark contrasts between the "Holley Council" and the "Garcia-Ike Council," the Director chose the "Garcia-Ike Council." In doing so, the Director clearly abused his discretion. *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130, 1136 (5th Cir. 2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.") (quoting *FCC v. Prometheus Radio Project*, – U.S. –, 141 S. Ct. 1150, 1158 (2021)); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, (1962)).

This is particularly true given the Bureau's past recognition of the "Holley Council" for purposes of establishing the Tribal Court. The Director fails to adequately explain the reversal in course. *See Wages & White Lion Invs., L.L.C.*, 16 F.4th at 1139 ("The law requires more. 'When an agency changes course, ... it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.') (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020)).

E. Federal Defendants' Arguments Regarding Irreparable Harm and Public Interest are Unpersuasive.

1. The Status Quo Under the Director's Decision is Chaos.

Federal Defendants are correct that Plaintiffs seek a return to the status as it existed immediately before the Director's Decision (*i.e.*, the status quo ante). Case law and the relevant regulations confirm the Court's power to do so. 25 CFR § 2.714 ("… the reviewing official's Tribal representative recognition decision ***shall remain in effect and binding*** on the Department ***unless and until*** the reviewing official's decision is reversed by superior agency authority or reversed ***or stayed by order of a Federal court***."); *Salt Pond Assocs.*, 815 F. Supp. at 775 ("… staying the Order will preserve the status quo ante.").

Indeed, Federal Defendants' position that a stay can't be granted because the Director's Decision is "immediately effective" would render the express language in 25 CFR § 2.714 permitting the Court to issue a stay meaningless. *Salt Pond Assocs.*, 815 F. Supp. at 772 ("Under the terms of the Administrative Procedure Act … district courts are only authorized to review final agency decisions."); *Wages & White Lion Invs., L.L.C.*, 16 F.4th at 1143 ("Because the Court finds no contrary legislative intent, the statutory language is binding.").

As Federal Defendants fail to recognize, the "Holley Council" has been governing the Tribe ***since the 2021/2022 elections***. A period spanning almost three years. Prior to the Director's Decision, the Regional Director's October 17, 2023, letter recognition of Ike as the Tribe's "representative" was stayed pending appeal. As shown, the Director waited ***eight months*** to issue his expansive Decision. Again, the "Holley Council" continued to govern the Tribe throughout those months. During this lapse of ***eight months***, the Tribe, through the Bands and Council, scheduled the election and prepared for the Tuesday October 8, 2024, election date.

Had the Tribe waited on the Director, a timely election would likely not been feasible. Indeed, by the time the Director reissued a dated Decision on July 17, 2024, the Council had already enacted the required Resolution for the election date. Since the Decision, (citing the Decision as their authority to do so) the "Garcia-Ike Council" and its allies have done everything they could to disrupt the October 8, 2024, election, including tearing down public notifications

and scheduling a competing election for Saturday October 12, 2024. Ike has also continued with her efforts – now further emboldened – to seize Tribal funds and property. Notably, at the precise time Plaintiffs' counsel was preparing this brief, Plaintiffs received the reports and photographs provided as **Exhibit 41**. As these documents show, Ike, McDade, and others allied with them, broke into a building belonging to the Tribe's Housing Authority (and containing Housing Authority property) on Friday, September 27, 2024. The plywood was removed from the front door in order to break in. When staff of the Housing Authority responded, these individuals resorted to physical violence. (Ex. 41 ("Angie behind Steve sucker punched Corrina on the left side of her face.")).

By these Motions, Plaintiffs want a return to pre-Decision conditions. As detailed above, the "Garcia-Ike Council" has already ***proved*** that they won't facilitate valid 2024 elections. In fact, they are doing everything in their power to ensure that this ***won't*** happen.[7]

2. A Stay and Related Injunction Will Serve the Public Interest.

The public interest at stake is again obvious. The mere presence of a competing election jeopardizes voting rights. Moreover, and as shown, the competing October 12, 2024, election has too many Constitutional and electoral infirmities to count. The "Garcia-Ike Council" – through McDade and others – have made their plans clear and expressed them in writing to the Bureau. These plans veer drastically from the Decision's purpose and would injure the Tribe's voter rights. A stay and related injunction must be granted.

Indeed, the Federal defendants acknowledge that "[t]he Tribe and its members Would benefit if the dispute between the factions ended." (Opp'n at pg. 21, lns 16 – 17.) Yet, they advocate a position that decreases the Tribe's chances of finding a resolution and that immediately jeopardizes the rights of the Tribe and its members.

F. The Court Should Not Defer to the AS-IS.

Finally, Federal Defendants advocate in favor of the Court accepting only limited

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[7] In the underlying action, and after a review of the full record and decision on the merits, Plaintiffs seek reversal of the Director's Decision and an order that the Bureau recognize the "Holley Council" for purposes of inter-government communications.

jurisdiction to rule on the pending Motions and then immediately stay this case in favor of the AS-IS. However, judicial efficiency and fairness is not served by litigating between two forums.

The interested parties have all been apprised of this action and may seek to intervene. (Ex. 40, Notice.) The IBIA already rejected Plaintiffs' request for a stay, directing Plaintiffs to this Court's doorstep. After the IBIA, and then AS-IS, failed to rule on Plaintiffs' request for expedited consideration, Plaintiffs were forced to file here. By way of these Motions, the Court will largely be up to speed on the facts and circumstances surrounding this dispute and the sought-after relief. The interested parties should litigate these issues here. *Goodface*, 708 F.2d at 338 ("We know of no statute precluding judicial review of BIA actions, and therefore we determine that the district court could review the agency action under the arbitrary or capricious standard enunciated in 5 U.S.C. § 706(2)(A).").

III. CONCLUSION

The law and facts all favor emergency judicial intervention. For all the foregoing reasons, Plaintiffs respectfully requests for the Motions to be granted.

Dated this 2nd day of October, 2024.

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CERTIFICATE OF SERVICE

I am employed by the law firm of Semenza Rickard Law in Clark County, Nevada. I am over the age of 18 and not a party to this action. The business address is 10161 Park Run Drive, Suite 150, Las Vegas, Nevada 89145.

On the 2nd day of October, 2024, I served the document(s), described as:

PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY UNDATED DECISION FROM DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS OR, ALTERNATIVELY, EMERGENCY MOTION FOR PRELIMINARY INJUNCTION [ECF NOs 10; 13]

☒ by sending ☐ an original ☒ a true and correct copy as follows:

☐ a. via **CM/ECF System** *(You must attach the "Notice of Electronic Filing", or list all persons and addresses and attach additional paper if necessary)*

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Attorneys for Defendants

☐ b. **BY U.S. MAIL.** I deposited such envelope in the mail at Las Vegas, Nevada. The envelope(s) were mailed with postage thereon fully prepaid. I am readily familiar with Semenza Rickard Law's practice of collection and processing correspondence for mailing. Under that practice, documents are deposited with the U.S. Postal Service on the same day which is stated in the proof of service, with postage fully prepaid at Las Vegas, Nevada in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated in this proof of service.

☐ c. **BY PERSONAL SERVICE.**

☐ d. **BY DIRECT EMAIL.**

☐ e. **BY FACSIMILE TRANSMISSION.**

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Olivia A. Kelly
An Employee of Semenza Rickard Law