

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

U.S. Department of Energy

(License Application for Geologic Repository
at Yucca Mountain)

Docket No. 63-001-HLW

ASLBP Nos. 09-876-HLW-CAB-01

09-877-HLW-CAB-02

09-878-HLW-CAB-03

March 3, 2009

AFFIDAVIT OF JOE KENNEDY

I, Joe Kennedy, solemnly affirm and state as follows:

1. I am a member of the Timbisha Shoshone Tribe ("Timbisha"). On behalf of the Timbisha, I have actively participated in the proceedings involving the Department of Energy's ("DOE") License Application for Geologic Repository at Yucca Mountain, and I have personal knowledge of the matters set forth in this Affidavit.

2. In 2007 and again in 2008, I was re-elected as Chairman of the Timbisha Tribal Council.

3. A dispute regarding the Timbisha's official representatives for both government-to-government relations and internal activities arose in 2007. As a consequence of the dispute, several groups have asserted their respective authority to speak for the Timbisha. The competing claims to represent the Timbisha have resulted in several opinions by the Bureau of Indian Affairs ("BIA") regarding tribal elections and representation for government-to-government purposes and, so far, one appeal of those opinions to the Interior Board of Indian Appeals ("IBIA").

4. On November 13, 2007, I was elected as Tribal Council Chairman (with other elected members being Margaret Armitage, Madeline Esteves, Margaret Cortez and Pauline Esteves (together, the "Kennedy Council")). The election was recognized by the BIA in February 2008. On March 17, 2008, Ed Beaman, Virginia Beck, and Cleveland Casey appealed the BIA's recognition of the Kennedy Council (the "Beaman Appeal"), asking that the BIA recognize a purported tribal council selected in a separate election, also conducted on November 13, 2007 (the "Beaman-led Election").

5. After the BIA did not decide the Beaman appeal for several months, Beaman and others filed suit in the United States District Court for the Eastern District of California seeking, among other things, an order directing BIA to decide the Beaman Appeal.

6. On February 17, 2009, before the District Court ruled on the BIA's resolution of the Beaman Appeal, the BIA concluded that the November 2007 election of the Kennedy Council was not effective (the "BIA's February 17, 2009 Opinion"). The BIA provided further that it would continue to recognize for government-to-government relations the Tribal Council elected in November 2007 and comprised of me as Chairman, together with Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Casey. A true and correct copy of BIA's February 17, 2009 Opinion is attached to this Affidavit as Attachment A.

7. On February 24, 2009, I (and others) filed a Notice of Appeal of BIA's February 17, 2009 Opinion to the IBIA (the "IBIA Notice of Appeal"). A true and correct copy of the IBIA Notice of Appeal is attached to this Affidavit as Attachment B.

8. In addition to the purported council elected in the Beaman-led Election, on September 20, 2008, George Gholson purported to hold a "general council" meeting in Las Vegas, Nevada, to recall me from my position as Chairman of the Tribal Council. At this same

meeting, Gholson and his supporters sought to hold an election for seats on the tribal council. However, the Las Vegas meeting was rife with constitutional and procedural errors.

9. Pending concurrently before the BIA is my appeal of an October 17, 2008, opinion by the BIA that Gholson and others were purportedly elected as the Tribal Council on September 20, 2008 (the "Kennedy Appeal"). Answers in the Kennedy Appeal were due to the BIA on February 24, 2009. *See* Attachment A, BIA's February 17, 2009 Opinion, at 9. Although not specifically identifying a date certain, the BIA notes in its February 17, 2009 Opinion that "a decision [on the Kennedy Appeal] is likely to be issued shortly" *Id.*

10. Once the BIA has ruled on the Kennedy Appeal, that ruling, like the BIA's February 17, 2009 Opinion on the Beaman Appeal, may be appealed to the IBIA. Although I do not have any information as to the time within which the IBIA will address the Beaman Appeal (or the Kennedy Appeal, should that also be appealed to the IBIA), I understand that the party not prevailing in the appeal(s) may appeal further to the United States District Court with jurisdiction.

11. Notwithstanding these internal disputes, for purposes of this licensing proceeding, the Timbisha spoke with one voice until late October 2008. Before then, the Timbisha had participated in the pre-application procedures. On behalf of the Timbisha, I and other members submitted numerous documents with the Department of Energy and the Nuclear Regulatory Commission. I have also attended meetings of the Affected Units of Government ("AUG") concerning the Yucca Mountain project, testified before numerous governmental bodies concerning the Yucca Mountain project, hired consultants to oversee the Yucca Mountain project, and petitioned the DOE for oversight funding.

12. Further, on behalf of the Timbisha, I coordinated the Timbisha's request for and receipt of DOE funding to participate as a full party in this docket. In July 2007, the Timbisha were granted Affected Indian Tribe ("AIT") status. The DOE was to fund the Timbisha's active participation in this proceeding, but that DOE funding was not provided until October 2008. On October 15, 2008, on behalf of the Timbisha, I retained Fred C. Dilger as the Timbisha's expert on NEPA-related matters and Loreen Pitchford as the Timbisha person responsible for establishing and supplementing the Timbisha's Documentary Material for the NRC's License Support Network. Both were paid out of funds received from the Timbisha for our active participation in this proceeding. In addition, other members of the Kennedy Council, and Tribal members serving in an official capacity with the Kennedy Council, including Pauline Esteves (a Tribal Elder, a member of the Kennedy Council, and the Cultural Advisor for the Historic Preservation Committee) and Barbara Durham (the Tribal Historic Preservation Officer), assisted the Timbisha's efforts to participate in this proceeding.

13. On and after October 20, 2008, George Gholson and others literally absconded with the Timbisha's records and other resources, including its administrative and fiscal computers and computer files, being used in this proceeding. These individuals have since that time been working with John M. Peebles and Darcy L. Houck of Fredericks Peebles & Morgan LLP, and have filed documents in this proceeding purportedly on behalf of the Timbisha Shoshone Tribe. George Gholson, Ed Beaman and others also persuaded Mr. Dilger and Ms. Pitchford to sever their professional relationships with the Kennedy Council and provide their support to the "Timbisha Shonshone Tribe." Further, George Gholson, Ed Beaman and others successfully froze for a significant period of time the bank account in which were held the DOE's funds earmarked for the Timbisha's use in this proceeding. Notwithstanding these

difficulties in preparing a timely response to the DOE's Application in this proceeding, I (and those many others representing the Timbisha) nonetheless did prepare a timely Petition.

14. Of great concern also is the fact that I and other members of the Kennedy Council have participated in these proceedings for between 10 and 20 years, while Gholson and Beaman and others working with them have only recently shown any interest in this important matter. Moreover, some, like Beaman who lives in Las Vegas, Nevada, do not have strong ties to the Timbisha homeland. I and other members of the Kennedy Council have very deep and strong ties to our homeland.

15. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 3rd day of March 2009.



Joe Kennedy, Tribal Council Chairman
Timbisha Shoshone Tribe



IN REPLY REFER TO:

United States Department of the Interior

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

FEB 17 2009

CERTIFIED MAIL NO. Z 155 874 769
RETURN RECEIPT REQUESTED

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

Dear Mr. Peebles

The purpose of this correspondence is to inform you of my decision regarding the Notice of Appeal (Appeal) dated March 17, 2008, filed pursuant to 25 Code of Federal Regulations (CFR) Part 2, by John M. Peebles, Attorney for Ed Beaman, Virginia Beck, and Cleveland Casey (Appellants), from the Bureau of Indian Affairs, Central California Agency, Superintendent's decision of February 29, 2008, wherein the Superintendent rescinded his letter dated December 14, 2007, and recognized the results of a November 13, 2008 General election conducted by Joe Kennedy and Madeline Esteves. The February 29, 2008 decision recognized the following individuals to be official tribal representatives of the Timbisha Shoshone Tribal Council: Joe Kennedy, Chairman; Margaret Armitage, Vice-Chairman; Madeline Esteves; Secretary/Treasurer, Margaret Cortez; Council Member and Pauline Esteves, Council Member (Kennedy Council).

The Appeal was received on March 18, 2008 and the Appellants' Statement of Reasons was received on April 16, 2008; both were timely filed pursuant to 25 CFR § 2.10. The Administrative Record from the Bureau of Indian Affairs, Central California Agency, Superintendent (Superintendent) was received on December 3, 2008 at this office.

The Appellants are seeking reversal of the Superintendent's decision of February 29, 2008 and assert that the Tribe's Tribal Council consisting of Ed Beaman, Madeline Esteves, Doug Gholson, Virginia Beck and Cleveland Casey, should be recognized. Appellants assert that, as a result of a competing November 13, 2007 General election conducted by Ed Beaman, Virginia Beck and Cleveland Casey, Doug Gholson, Virginia Beck and Cleveland Casey were elected to the three expired terms of the Tribal Council.

We have carefully reviewed the administrative record and documents provided by the parties. Based on our analysis, I am reversing the Superintendent's decision of February 29, 2008,

**TAKE PRIDE
IN AMERICA** 

Attachment A

because the actions taken by Tribal Council members Joe Kennedy and Madeline Esteves lacked a quorum of the Tribal Council. Therefore, the Bureau of Indian Affairs continues to recognize the Tribal Council that was in place prior to the Superintendent's February 29, 2008 decision, consisting of: Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member. We present our analysis as follows:

Finding of Facts

On July 9, 2007 charges were filed by General Council members Wallace Eddie and Margaret Cortez against Tribal Council members Ed Beaman and Virginia Beck requesting their removal from the Timbisha Shoshone Tribal Council (Tribal Council).

On July 21, 2007, the Tribal Council of the Timbisha Shoshone Tribe conducted a Tribal Council meeting at Fish Lake Valley. The Tribal Council members present at the meeting were; Joe Kennedy, Chairman, Virginia Beck, Madeline Esteves, Lyle Casey and on the phone was Ed Beaman. A quorum of the Tribal Council was established. The charges filed by General Council members; Margaret Cortez and Wallace Eddy against Tribal Council members Ed Beaman and Virginia Beck were discussed. Ed Beaman stated that he did not get the July 9, 2007 letter and Virginia Beck said she received her letter on July 20, 2007. Therefore, no removal action was taken by the Tribal Council and the request for removal of Ed Beaman and Virginia Beck from the Tribal Council filed by the General Council members was rescheduled for the next Tribal Council meeting on August 25, 2007 at Bishop, California.

On August 25, 2007, the Tribal Council of the Timbisha Shoshone Tribe conducted a duly called monthly Tribal Council Meeting at Bishop, California. The minutes of the Tribal Council meeting indicate the following members of the Tribal Council were present; Joe Kennedy, Chairman, Ed Beaman, Virginia Beck, Madeline Esteves, and Lyle Casey. A quorum of the Tribal Council was established.

On August 31, 2007, Chairman, Joe Kennedy sent a letter addressed to the Superintendent informing him of the events that occurred during the Tribal Council meeting on August 25, 2007, and of the charges filed against Council members Virginia Beck and Ed Beaman. He explained that in accordance with the Tribe's Constitution, Article XI, Section 1, 3, the Tribal Council member who is the subject of a removal request, shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings. Therefore, their request to vote on each other's removal was denied. Shortly after, both Ed Beaman and Virginia Beck walked out of the meeting. Joe Kennedy indicated that Ms. Armitage replaced Virginia Beck in order to continue with the Tribe's business.

On September 22, 2007, Ed Beaman, Vice-Chairman, Cleveland Lyle Casey and Virginia Beck called a Special Tribal Council meeting to address the actions taken at the August 25, 2007 meeting. The following resolutions were passed: Resolution #2007-24 declared the attempted illegal removal of Ed Beaman and Virginia Beck null and void; Resolution #2007-25 declared the duly recognized Tribal Council as Joe Kennedy, Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Casey, and declared purported Resolution #2007-23 signed by Joe Kennedy

and Madeline Esteves, setting a date for the General Election, null and void; Resolution #2007-26 amended certain provisions of the Timbisha Shoshone Election Ordinance, applicable only to the 2007 General Election, in order to facilitate a General Election in compliance with the Constitution; Resolution #2007-28 appointed an Election Board to supervise and carry out the General Election.

October 15, 2007, letter from Vice-Chairman, Ed Beaman, via facsimile, addressed to the Superintendent requesting a letter stating who the Bureau of Indian Affairs recognizes as the Tribal Council of the Timbisha Shoshone Tribe. A letter dated September 25, 2007, was also attached, addressed to the General Council responding to improper removal actions taken at the August 25, 2007 Tribal Council meeting.

October 29, 2007, letter from Joe Kennedy, Chairman addressed to the Superintendent regarding Virginia Beck and Ed Beaman's relinquishment of their Tribal Council position on August 25, 2007. Included were Virginia Beck and Ed Beaman's removal charges, which were submitted to members of the General Council.

On November 13, 2007, as a result of a dispute within the Tribal Council two General Elections were held; one by Joe Kennedy, Madeline Esteves and Margaret Armitage conducted by Mark Thompson, Indian Dispute Resolution Services, in which 117 ballots were cast with Joe Kennedy, Margaret Cortez, Margaret Armitage, and Pauline Esteves receiving the highest number of votes; the other by Ed Beaman, Virginia Beck and Cleveland Lyle Casey conducted by Joslyn Chvala, of Daniels, Philips, Vaughan, & Bock in which 55 votes were cast with Doug Gholson, Cleveland Lyle Casey, and Virginia Beck receiving the highest number of votes.

November 15, 2007, a copy of a letter from Ed Beaman to the Timbisha Shoshone Election Committee, appealing the Tribe's November 13, 2007 General Election conducted by the Kennedy Council, alleging that the election was not conducted pursuant to the Tribe's Constitution and Election ordinance.

December 3, 2007, letter from Ed Beaman, addressed to the Superintendent regarding the Election Board's report of the Tribe's 2007 General election conducted by Daniels, Phillips, and Vaughan for Ed Beaman, Virginia Beck and Cleveland Casey was valid and recognized the new elected members of the Tribal Council as: Doug Gholson, Cleveland Lyle Casey, and Virginia Beck, with 55 votes cast in the election. The Election Board found that the election conducted by the Kennedy Council was invalid and void.

December 3, 2007, Mark Thompson, Indian Dispute Resolution Services, Inc. sent a facsimile, to the Superintendent regarding the November 13, 2007 Kennedy Council's Election Results. The purpose of the Memorandum was to certify the results of the Timbisha Shoshone Election conducted by Indian Dispute Resolution Services, Inc. in coordination with the Tribal Council Election Board. The results identified the Election procedures that were followed, 117 absentee ballots cast, total votes for each candidate, and that no appeals were received. The results showed that the new council consisted of Joe Kennedy, Margaret Armitage, Margaret Cortez, and Pauline Esteves.

December 4, 2007, Barbara Durham, Election Board Chairman, sent a facsimile to the Superintendent, providing the Report of Tribal Election and Addendum to Kennedy Council Report of Tribal Election held November 13, 2007, certifying the results to be true and correct. Further, stating that four (4) General Council members were elected to the Tribal Council and the purported vacant Vice-Chairman position will be filled at the first Tribal Council meeting to be held on December 15, 2007.

December 11, 2007, letter from Joe Kennedy addressed to the Superintendent, providing additional documentation and the history of where the Tribe was up to that point. Included was documentation regarding legal cases concerning issues similar to Timbisha and what constituted a resignation.

December 14, 2007, letter from the Superintendent in response to Mr. Kennedy's letter of December 11, 2007, regarding the purported resignation of Ed Beaman, Vice Chairman, and Virginia Beck, Executive Council Member at a Tribal Council meeting held August 25, 2007, and the annual general election conducted on November 13, 2007. The Superintendent, after review of the documents submitted, was unable to recognize any of the actions initiated by the Beaman Council or the Kennedy Council. As a result of the above, for the purposes of continuing the government-to-government relationship with the Tribe, the Superintendent continued to recognize the last duly elected Tribal Council as follows:

Joe Kennedy, Chairman
Ed Beaman, Vice-Chairman
Madeline Esteves, Secretary/Treasurer
Virginia Beck, Executive Council Member
Cleveland Lyle Casey, Executive Council Member

In addition, the Superintendent recommended that the Tribe conduct a special general election to comply with the provisions of the Tribe's Constitution for an annual general election to fill the three expired positions, and that Ed Beaman and Madeline Esteves positions should be held over until November 2008.

December 14, 2007, letter via facsimile from Joe Kennedy responding to the Superintendent's letter of December 14, 2007, objecting to the Superintendent's request for a Special Election and listing the duly elected tribal council elected on November 13, 2007 as follows: Joe Kennedy, Margaret Cortez, Margaret Armitage, Madeline Esteves and Pauline Esteves. (2007 Kennedy Council)

December 17, 2007, letter from Lyle Casey to the Agency Superintendent responding to his December 14, 2007, decision not recognizing the actions taken at a Special meeting of the Tribal Council held September 22, 2007, and subsequent election organized and executed by the Ed Beaman, Virginia Beck and Cleveland Lyle Casey.

January 11, 2007, Notice of Appeal filed by Jack Duran, Attorney on behalf of his clients: Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves. The appeal was from the December 14, 2007 decision of the Superintendent for failing to

acknowledge the Tribal Council's determination that Mr. Ed Beaman and Ms. Virginia Beck resigned their tribal council positions at an August 25, 2007 Tribal Council meeting and failing to acknowledge the November 13, 2007, General Council Election whereby Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves were elected to serve as members of the Timbisha Shoshone Tribal Council.

January 18, 2008, memorandum from the Superintendent to the Regional Director, transmitting the January 11, 2008 Notice of Appeal filed by Jack Duran, Attorney on behalf of his clients: Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves. The Superintendent indicated that the Appellant's Statement of Reason, upon receipt, will be forwarded to this office along with the administrative record.

January 20, 2008, a Special meeting of the General Council was held in Hesperia, CA, to address the results of the November 13, 2007 Tribal Council Elections and to seek approval of specific actions that would stabilize the Tribe's government.

February 4, 2008, letter from Joe Kennedy to the Superintendent in which he updated the Superintendent on the most recent actions that occurred with the Timbisha Shoshone Tribe and notifying him of a special meeting of the General Council held on January 20, 2008, at Hesperia, CA. The purpose of the meeting was to find out what the General Council of the Tribe wanted and what direction they felt was appropriate for the Timbisha. In support of the actions taken by Joe Kennedy, Madeline Esteves and Margaret Armitage, the General Council voted and enacted four (4) Tribal Resolutions as follows: Resolution No. 2008-01, Ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Resolution No. 2008-02 Ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Resolution No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council; Resolution No. 2008-04 Authorizing the Tribal Council to Pursue Prospective Gaming Developers. Furthermore, the Agency Superintendent was requested to recognize all actions adopted by the Timbisha Shoshone General Council at the January 20, 2008 Special General Council Meeting.

February 29, 2008, the Superintendent, reversed his December 14, 2007 decision and issued a new letter recognizing the actions of the General Council during a January 20, 2008, General Council meeting, wherein the General Council voted to ratify: Tribal Resolutions No. 2008-01, ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Tribal Resolutions No. 2008-02 ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Tribal Resolutions No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council. Based on the above actions of the General Council the Superintendent recognized the results of the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 election as follows:

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

APPLICABLE TRIBAL LAW

The Tribe is organized and governed under the Constitution of the Timbisha Shoshone Indian Tribe adopted by its membership on February 17, 1986. In analyzing the parties' positions, it is appropriate to look to the Tribe's Constitution as it relates to the actions taken by the parties

Article IV, Section 1, provides that, the powers of the government of the Tribe shall be divided into three distinct branches; the General Council, the Tribal Council and the Tribal Judiciary. No branch, group or person charged with the exercise properly belonging to one of these branches shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document.

Article IV, Governing Body, Section 2, provides that, the governing body of the Tribe shall be the General Council. The General Council shall consist of all tribal members sixteen (16) years of age or older. All members of the General Council shall be able to vote at all General Council meetings and all tribal elections, referenda, initiatives, recalls and repeals.

Article V, Section 1, General Council, a., provides in part that, all powers of the Tribe shall be vested in the General Council, subject to any limitations imposed upon such powers delegated to the Tribal Council, etc..

Article V, Section 1, General Council, b., provides that, The General Council shall exercise its powers of self-government through initiative, referendum, repeal and recall powers as set forth in this document.

Article V, Section 1, General Council, c., provides in part that, the following powers shall be exclusively reserved to the General Council. All powers that are not expressly mentioned in this document or which are not expressly delegated in this document by the General Council to the Tribal Council or any other officer or agency of the Tribe, shall not be abridged but shall be reserved to the General Council.

Article V, Section 3, Reserved Powers of General Council, provides that, the Tribal Council shall have all appropriate powers necessary to implement specific provisions of this document and to effectively govern tribal affairs. All powers heretofore vested in the Tribe, but not specifically referred to in this document, shall not be abridged, but shall be reserved to the General Council.

Article VII, Duties of Officers Section 1, a., provides in part that, the Chairman shall have the following duties:

1. To preside at all meetings of the Tribal and General Councils:
2. To vote at Tribal and General Council meeting only when it is necessary to break a tie vote;

8. The Chairperson shall hold no other Tribal Office or engage in private remunerative employment which may pose a conflict of interest with the Tribe's enterprise or business activities during his term of office;

Article VIII, Meetings Section 1, provides that, all meetings of the General or Tribal Councils shall be open to all tribal members, except in those cases where the matter under discussion would invade the privacy of an individual tribal member.

Article VIII, Meetings Section 2, provides in part that, all meeting of the Tribal Council shall be held in accordance with the following provisions:

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

Article VIII, Meetings Section 3(b), provides that Specials meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of the General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meetings shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.

Article X, Vacancies Section 1, Tribal Council shall fill the vacancy by appointment of a General Council member who qualifies for candidacy for the vacant position. If more than twelve (12) months remain in the vacant term a special election shall be held to fill the vacant position. Such a special election shall be held within thirty (30) days after the Tribal Council declares the position vacant.

Article XI, Removal, Section 1, 1., provides in part that, any member of the Tribe can request removal of any Tribal Council member by submitting a written statement of charges to the Chairperson, etc... Such written statement must be received by the accused Council member no later than ten (10) days before the next regular Council meeting at which he or she is to appear.

Section 1, 2., provides that, at the next regular Tribal Council meeting following the submission of such written statement, the charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the Tribal Council.

Section 1, 3., provides that, after hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is subject to the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings.

DISCUSSION

Review of the minutes of the Tribal Council monthly meeting of August 25, 2007, indicates a quorum had been established with all five (5) Tribal Council members present to, among other things, address removal charges filed by Wallace Eddy, to allow Ed Beaman and Virginia to refute the alleged charges and for the Tribal Council to vote on the matter. Only Wallace Eddy, one of the two General Council members who had filed the charges and requested the removal of Ed Beaman and Virginia Beck from the Tribal Council was present along with 30 General Council members. Ed Beaman and Virginia Beck requested that the removal action be conducted in Executive Session, but the General Council members present opposed their request. Before the charges were presented, a dispute ensued on whether or not Ed Beaman and Virginia Beck could vote on each others removal; Chairman Kennedy referred the matter to the General Council members for a decision. The General Council voted not to allow Ed Beaman and Virginia Beck to vote on each others removal; Chairman Kennedy announced the motion carried. Ed Beaman and Virginia Beck along with Cleveland Lyle Casey left the meeting and did not return. Upon the departure of Tribal Council members Ed Beaman and Virginia Beck along with Cleveland Lyle Casey from the meeting, Chairman, Kennedy stated that Ed Beaman and Virginia Beck leaving before responding to the charges meant they were guilty of the charges. A motion was made by Madeline Frank, General Council member, to remove Ed Beaman and Virginia Beck from the Tribal Council, and seconded by Pauline Esteves, General Council member; however, no vote was taken and the motion died. Another motion was made by Barbara Durham, General Council member, to replace Virginia Beck with Margaret Armitage, General Council member, seconded by Pauline Esteves, General Council member, by a vote of 11 for, 0 against, 0 abstain; the motion carried. Following the motion, Margaret Armitage took a place at the Tribal Council table as an Executive Council member.

The Tribe's Constitution provides specific procedures governing the removal of Tribal Council members. Article XI, Removal, Section 1, Et seq., of the Tribe's Constitution clearly specifies the procedures governing the removal of Tribal Council members, and further specifies that the Tribal Council shall take a vote on whether the accused member shall be removed from office and explicitly states that the Removal of Tribal Council members is delegated to the Tribal Council and not to the General Council. The record indicates that no vote was taken by the Tribal Council to remove Ed Beaman or Virginia Beck from the Tribal Council as required by the Tribe's Constitution. Therefore, Ed Beaman and Virginia Beck both remain members of the Tribal Council.

With the departure of Tribal Council members Ed Beaman, Virginia Beck, and Cleveland Casey, only Joe Kennedy and Madeline Esteves, two of the five Tribal Council members, remained; a quorum no longer existed. No further business of the Tribal Council should have been conducted because Joe Kennedy and Madeline Esteves were the only two of the five Tribal Council members who remained and they did not constitute a quorum. Any action by the Tribal Council without a quorum is a violation of Article VII, Section 2 a., of the Tribe's Constitution, which provides in part, No business shall be conducted in the absence of a quorum.

As the record indicates, two Tribal Councils emerged claiming to be the leadership of the Tribe: Joe Kennedy, and Madeline Esteves, and the other Tribal Council consisting of Ed Beaman,

Virginia Beck and Lyle Casey. Both Tribal Councils conducted separate meetings to prepare for the November 2007 General election. On November 13, 2007, both Tribal Councils conducted their own annual General elections. The record indicates that 55 Tribal members voted in the Beaman Council election and 171 Tribal members voted in the Kennedy Council's election. The Superintendent on December 14, 2007 refused to recognize either election and recommended that the Tribe conduct a special general election to comply with the provisions of the Tribe's constitution for an annual general election to fill the three expired positions.

Joe Kennedy, and Madeline Esteves, on January 20, 2008 conducted a duly noticed General Council meeting at Hesperia, CA; the purpose of the meeting was to seek the Tribe's approval, in particular, the Tribal Council meeting of the August 25, 2007 and the Joe Kennedy and Madeline Esteves' General election results of November 13, 2007. However, as discussed above and based on the record, the actions of August 25, 2007 violated several provisions of the Tribe's Constitution.

CONCLUSION

As the record indicates, the August 25, 2007 actions by Chairman Kennedy and the General Council members were beyond the scope of their constitutional authority and far exceed their powers in their attempts to remove Ed Beaman and Virginia Beck. The ratification of these actions by the General Council on January 20, 2008, was inappropriate and also was beyond their constitutional authority, and these actions clearly violated Ed Beaman and Virginia Beck's rights to due process. Furthermore, it would be inappropriate for the Bureau of Indian Affairs to recognize tribal actions that violate provisions of Tribal laws.

For the reason stated above I am reversing the Superintendent's February 29, 2008 decision. Consequently, the Bureau of Indian Affairs continues to recognize Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member, which was the governing body of the Tribe that was recognized prior to the February 29, 2008 decision.

Please be advised that there is also a pending appeal regarding the November 2008 General election of the Tribe, with answers of interested parties due by February 24, 2009, and a decision is likely to be issued shortly thereafter.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Carl Mair".

Regional Director

cc: See Enclosed Distribution List

DISTRIBUTION LIST

Superintendent
Central California Agency
Troy Burdick
650 Capitol Mall, suite 8-500
Sacramento, CA 95814

Office of the Solicitor,
Pacific Southwest Region
Attn: Karen Koch, Assistance
Regional Solicitor
2800 Cottage Way, Room E-1712
Sacramento, CA 95825-1890

Bureau of Indian Affairs
Deputy Director Indian-Services
1849 C Street, NW., MS-4513-MIB
Washington, DC 20240

Bureau of Indian Affairs
Chief, Tribal Government Services
1849 C Street, NW., MS-4513-MIB
Washington, DC 20240

Lawrence G. Brown
United States Attorney
SYLVIA QUAST
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814

Judith A. Shapiro, Esq.
6856 Eastern Avenue, NW
Suite 206
Washington, DC 20012