

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:

**Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell**

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|-------------------------------|---|----------------------------|
| In the Matter of |) | Docket No. 63-001-HLW |
| U.S. DEPARTMENT OF ENERGY |) | ASLBP No. 09-892-HLW-CAB04 |
| (High Level Waste Repository) |) | September 6, 2011 |
| |) | |

**THE DEPARTMENT OF ENERGY'S RESPONSE TO THE TIMBISHA SHOSHONE
TRIBAL COUNCIL'S MOTION FOR RECOGNITION AS THE LEGITIMATE
REPRESENTATIVE OF THE TIMBISHA SHOSHONE TRIBE**

EXHIBIT A

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MASON, HILLARY FRANK, MADELINE
8 ESTEVES, and PAULINE ESTEVES

9 UNITED STATES DISTRICT COURT

10 EASTERN DISTRICT OF CALIFORNIA

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

18 Plaintiffs,

19 v.

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

24 Defendants.
25
26

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

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

Date:

Time:

Judge: Hon. Morrison C. England, Jr.

1 INTRODUCTION

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

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

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

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

2 **JURISDICTION**

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

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

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

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

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

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

26 **VENUE**

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

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

7 **PARTIES**

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

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

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

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

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

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

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

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

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

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

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

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

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

1 20. Defendant Troy Burdick is the Superintendent of the BIA's Central California
2 Agency, and is sued in that capacity. Burdick rendered the initial decision to recognize the Tribe's
3 2007 General Election that was overruled by Dutschke's predecessor Dale Morris. Acting beyond
4 his legal authority, Burdick authorized an Inyo County Deputy Sherriff to assist an individual,
5 George Gholson, who was not elected by the Tribe or recognized by BIA, to remove tribal property
6 from the Tribe's office in Death Valley to a location 160 miles from the Tribe's Reservation.

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

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

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

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

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

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

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

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

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

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

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

6 **HISTORY OF THE TRIBE**

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

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

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

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

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

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

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

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

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

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

6 25 CFR 83.12.

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

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

18 16 USC 410aaa-75(b). DOI found that no lands within the three-million acre park could be spared to
19 provide a reservation for the Tribe.

20 36. The Timbishas, led by Plaintiff Pauline Esteves and other Tribal Elders, resisted.
21 Among other things, tribal members held protests in Death Valley National Park, in view of
22 thousands of American and foreign tourists and the press. DOI returned to the negotiating table,
23 resulting in an agreement implemented by Congress in the Timbisha Shoshone Homeland Act of
24 2000 ("Homeland Act"). Pub. L. 106-423, 114 Stat. 1875 (16 USC 410aaa Note). The Homeland
25 Act reserved over 7,000 acres of land in trust for the Tribe in and around the Park, including over
26 300 acres around the Timbisha Village. The Homeland Act also designated many areas of the
27 National Park for special or cooperative Timbisha uses and management to protect and nurture
28 Timbisha culture in the Park.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 **TRIBAL CONSTITUTION AND LAW**

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

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

1 reapplying at any time.

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

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

17 **DOI ANIMOSITY TOWARD PLAINTIFFS**

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

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

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

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

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

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

DOI'S DECISIONS ON INTERNAL TIMBISHA SHOSHONE TRIBAL AFFAIRS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 reasonably rejected the appeal.

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

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

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

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

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

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

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

12 **FIRST CLAIM FOR RELIEF**

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

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

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

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

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

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

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

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

21 SECOND CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 **THIRD CLAIM FOR RELIEF**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 **FOURTH CLAIM FOR RELIEF**

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

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

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

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

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

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

20 **Rollback Rule**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 **PRAYER FOR RELIEF**

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

- 16 (1) Declare that the EHD violates the APA, because it is arbitrary, capricious, and
17 otherwise not in accordance with law, violates the Plaintiffs’ constitutional right to due process of
18 law, is in excess of DOI’s statutory authorities, and fails to comply with procedures required by law;
- 19 (2) Enjoin DOI, BIA, and their officials from implementing the EHD;
- 20 (3) Remand the EHD to DOI for further proceedings consistent with federal law;
- 21 (4) Award Plaintiffs reasonable fees, expenses, costs, and disbursements, including
22 attorney fees pursuant to the Equal Access to Justice Act; and
- 23 (5) Grant Plaintiffs such further and additional relief as the Court deems just and proper.
- 24

25 Dated: August 5, 2011

Respectfully submitted,

26
27 By: /s/ Jeffrey R. Keohane
Jeffrey R. Keohane
FORMAN & ASSOCIATES
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