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April 2, 2014

BY FEDEX & EMAIL
URGENT

Troy Burdick
Superintendent
Central California Agency
Bureau of Indian Affairs
650 Capital Mall, Suite 8-500
Sacramento, CA 95814-4710

Re: Contest of the Results of Secretarial Election of March 29, 2014

Dear Superintendent Burdick:

Dentons US LLP files this Contest on behalf of objecting parties Joe Kennedy, the last lawfully elected Chair of the Timbisha Shoshone Tribal Council, along with former tribal officials Grace Goad, Erick Mason, Pauline Esteves, Madeline Esteves, John Doe, and John Roe[1] (collectively, "Objectors"). Objectors hereby contest the results of the Secretarial Election conducted for the Timbisha Shoshone Tribe, held on March 29, 2014 (hereinafter the "Election"). *See* Notice - Result of Secretarial Election Timbisha Shoshone Tribe, dated March 29, 2014, posted March 31, 2014, attached hereto as Exhibit A. All of these individuals are enrolled members of the Timbisha Shoshone Tribe (hereinafter the "Tribe") and their names are listed on the 1978 Base Roll approved by the Bureau of Indian Affairs ("BIA") in 1982 (except John Doe and John Roe who are members because they are direct descendants of persons listed on the 1978 base roll). *See* Members of Death Valley Timbi-sha Shoshone Band as of March 1978 ("1978 Base Roll"), attached hereto as Exhibit B. All but John Doe and John Roe have served in various tribal elected capacitates, including serving as elected members of the last lawfully elected Tribal Council elected between 2008-2010.

1. **The BIA and Election Board Erred In Failing To Conduct The Election In Conformity With The Tribe's Governing Constitution.**

In the undated decision of Election Board Chairman Ernest Young to Ian Barker, Dentons US LLP, effective, by its terms, March 19, 2014 ("Young Decision") (attached hereto as Exhibit C), Chairperson Young rejected Objectors' objection to the list of eligible voters ("List") (*see* Notice of Registered Voters, Timbisha Shoshone Tribe Secretarial Election, dated March 7, 2014, by Ernest Young, Chairman, Secretarial Election Board, attached hereto as Exhibit D) proposed to be used for purposes of conducting the Election. Chairperson Young's decision appears to be based, in part, on the erroneous determination that the BIA and Election Board are bound by federal law, but not tribal law, when conducting a Secretarial Election for the Tribe. (Exhibit G, Barker Declaration, ¶ 3.) While Secretarial Elections are

[1] John Doe and John Roe are minors who are given fictitious names to protect their identities and to prevent reprisal due to their involvement in this matter. Counsel can provide identifying information about John Doe and John Roe upon request, provided that such information may be confidentially maintained.

generally governed by federal law (the Indian Reorganization Act ("IRA")), the BIA was not permitted to ignore or override the express will of the Tribe, to wit: the 1986 Timbisha Shoshone Constitution ("1986 Constitution") (attached hereto as Exhibit E), in conducting the Election. In fact, the BIA's failure to follow the 1986 Constitution not only violates well established precedent requiring that the BIA acknowledge—and in some cases, enforce—a tribe's own laws, but also constitutes a violation of the IRA—the very law from which the BIA derives its authority to conduct the Election.

The principle that tribes are independent sovereign entities, predating the United States, and having the inherent right of self-government remains strong today, and the Supreme Court's view concerning the inherent right of tribes to form their own governments and exercise internal self-governance has been virtually unwavering. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 327, 128 S. Ct. 2709, 2718 (2008) (recognizing restricted tribal authority over nonmembers on the reservation, but affirming tribes retain power to determine tribal membership and to legislate on the reservation); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (tribes "remain 'a separate people, with the power of regulating their internal and social relations,'" including the right to prescribe and enforce laws applicable to tribal members). Indeed, the IRA was passed to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically" (*Morton v. Mancari,* 417 U.S. 535, 542 (1974)), and "to encourage Indians to revitalize their self-government, to rehabilitate their economic life, and to reverse government policy which had destroyed Indian social and political institutions" (*Feezor v. Babbitt*, 953 F. Supp. 1, 5 (D.D.C. 1996) (internal citations omitted)), as matters of self-government—including membership—which are central to tribal existence. *See, e.g., King v. Norton*, 160 F. Supp. 2d 755, 760 (E.D. Mich. 2001); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (membership is a matter of tribal, not federal law).

In promoting self-government and self-determination, the BIA must tread lightly when addressing internal tribal issues, as unnecessary federal intrusions in internal tribal affairs must be avoided. *See, e.g., Wheeler v. U.S. Dept. of Int.*, 811 F.2d 549, 552 (10th Cir. 1987) (noting that while some special situations require Department action, federal officials should generally err in favor of tribal self-government instead of federal interference). And while it is clear that the BIA has "both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe" (*Ransom v. Babbitt,* 69 F.Supp.2d 141, 150 (D.D.C.1999) (internal quotation omitted)), it is equally clear that the BIA must exercise restraint in undertaking to interpret tribal law, doing so only when necessary to carrying out of government-to-government relations. *See, e.g., Decorah v. Minneapolis Area Director*, 22 IBIA 98, 102 (1992) (where BIA is not required to render a particular decision by the government-to-government relationship, BIA should exercise restraint before interpreting tribal law to avoid conflicts with tribal self-determination and rights to interpret their own laws); *Anna Thompson v. Area Director*, 17 IBIA 39, 1989 (1989) (BIA has a trust responsibility to ensure that actions taken by an Indian tribe comply with its constitution); *United Keetoowah Band of Cherokee Indians,* 22 IBIA 75, 80 (1992) (acknowledging "responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe").

This is not to say, however, that in conducting a Secretarial Election, federal authority is utterly lacking. Secretarial elections are federal elections conducted under the authority of federal law. *Cheyenne River Sioux Tribe v. Andrus,* 566 F.2d 1085, 1088 (8th Cir.1977), *cert. denied,* 439 U.S. 820, (1978). Indeed, it is precisely because the Election is a federal election conducted under federal authority that the BIA and Election Board have an obligation to fully implement 25 CFR § 81.13, which mandates that they make a reasoned determination regarding "any written challenge of the right to vote of anyone whose name is on the [voters] list."

Finally, and importantly, while the IRA created a mechanism by which tribes can reorganize with new constitutions (25 U.S.C. § 476(a)), it expressly recognizes that tribes also retain inherent sovereign authority to adopt governing documents, such as the 1986 Constitution, outside of the IRA. It further clarifies that "nothing in this Act invalidates any constitution or other governing document adopted by any Indian tribe." 25 U.S.C. § 476(h). Accordingly, only tribal law that directly conflicts with federal law governing the Election would be preempted, and only to the extent of the inconsistency. Thus, in order to conform to the IRA's explicit savings clause regarding constitutions adopted outside its structure, and to effectuate the IRA's purpose of encouraging self-government, the 1986 Constitution must be given full effect in all other respects. Specifically, the existing membership and amendment provisions of the current Constitution must be upheld.

By ignoring provisions of the 1986 Constitution governing membership standards, the repeal of enacted tribal laws and the amendment of the tribal constitution, the BIA and Election Board wholly ignore these well-established principles and, as a result, have undoubtedly acted arbitrarily and capriciously, in abuse of the BIA's discretion. *See Wheeler v. U.S. Dept. of Int.*, 811 F.2d 549, 552 (10th Cir. 1987) (federal officials should generally err in favor of tribal self-government instead of federal interference); *see also Cherokee Nation v. Georgia*, 31 U.S. 1, 12, 32-38 (1831) (recognizing the Cherokee nation as "a distinct political society, separated from others, capable of managing its own affairs and governing itself. . . ."); *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 327 (2008) (recognizing restricted tribal authority over nonmembers on the reservation, but affirming tribes retain power to determine tribal membership and to legislate on the reservation); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (tribes "remain 'a separate people, with the power of regulating their internal and social relations,'" including the right to prescribe enforce laws applicable to tribal members).

As discussed in detail below, the Young Decision appears to have ignored the Tribe's actual Constitution, by accepting a voters list from the Tribe's purported government without reviewing whether it comports with the Tribe's governing Constitution. The BIA and Election Board then compounded this error by certifying the election results without considering whether the Tribe's Constitution's requirements for a valid constitutional amendment had been met.

At least one federal court has held that an agency decision, like the Young Decision and the BIA and Election Board's subsequent certification of the Election results, which simply accepts a position on tribal leadership without engaging in any meaningful analysis could not withstand judicial review, even when considered under a highly deferential standard. *Tarabell v. U.S. Dep't of Int.*, 307 F.Supp. 2d 409 (N.D.N.Y. 2004). In *Tarbell*, the federal district court vacated and remanded four challenged administrative determinations by the Department of the Interior regarding who the federal government should recognize as tribal leadership. The court held that "the agency actions in question were not the product of a considered analysis of the leadership dispute, but instead resulted from a misconception that the agency had been ordered by another court to reject the plaintiff's position." *Id.* at 410. The court noted that a process could be envisioned that would afford interested parties a meaningful opportunity to express their contentions, followed by an agency decision stating both its conclusion and reasoning. *Id.* at 423. This would have the advantage of providing any reviewing body the benefit of the agency's rationale. Citing a prior ruling, the court noted that, "by not determining for themselves whether or not the Constitution was valid, Defendants were derelict in their responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe and the principles of tribal sovereignty." *Id.* at 424 (quoting *Ransom*, 69 F. Supp. 2d at 153).

Furthermore, as discussed above, the purpose of the IRA was "to encourage Indians to revitalize their self-government, to rehabilitate their economic life, and to reverse government policy which had

destroyed Indian social and political institutions." *Feezor v. Babbitt*, 953 F. Supp. 1, 5 (D.D.C. 1996) (*internal citations omitted*). The Tribe revitalized its self-government and established its political institutions through the unanimous adoption of the 1986 Constitution, and the BIA has subsequently acknowledged, interpreted, and applied this Constitution when carrying out government-to-government relations with the Tribe. For instance, in 2011 in a case arising from these same underlying facts, the Assistant Secretary issued an Order in which he acknowledged the 1986 Constitution and applied it as governing law. *See* Exhibit F (*Order, Assistant Secretary-Indian Affairs, March 1, 2011 in matter of Joe Kennedy, et al. and George Gholson et. al v. Pacific Regional Director, Bureau of Indian Affairs*). While Objectors contend that certain portions of the Assistant Secretary's Order are wrong, the Assistant Secretary's view of the 1986 Constitution is clearly correct: "[w]hile it is a very important principle of Indian law that the Federal government should defer to decisions of a tribal government when attempting to resolve internal disputes, such a presumption of deference can never permit the Federal government to accept actions by a tribal entity that are plainly contrary to the Tribe's own laws." *Id.* at 8 (acknowledging, interpreting, and applying provisions of Timbisha Constitution).

The BIA and Election Board cannot simply ignore the plain language of the 1986 Constitution, disregard the BIA's own past practice with regard to the 1986 Constitution, and set aside valid tribal law and binding federal law. Relevant provisions of the 1986 Constitution that do not conflict with federal law governing the conduct of the Secretarial Election must be applied, including but not limited to, the provisions of the 1986 Constitution governing membership, and amendment and repeal of the Tribe's Constitution. Accordingly, the BIA should not recognize the results of the Election, as such an action would undoubtedly be subject to invalidation. *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1350 (6th Cir.1994) ("Courts may invalidate agency adjudication or rulemaking which is 'inconsistent with the statutory mandate or frustrate[s] the policy that Congress sought to implement.'" (*quoting Federal Election Comm'n v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 32, (1981)). To the extent that the BIA and Election Board believe that federal regulations actually prohibited them from recognizing the 1986 Constitution for purposes of the Secretarial election, the Secretary retains authority to waive or make exceptions to the federal regulations "in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." 25 C.F.R. § 1.2. Giving effect to the unanimous voice of the enrolled members of the Tribe voting on the enactment of the 1986 Constitution calls for such an exception or waiver.

2. The BIA and Election Board Erred In Certifying The Election Despite The Lack Of The Quorum The Tribe's Governing Constitution Requires.

The IRA clearly defines "those entitled to vote" in a special election called by the Secretary as the adult members of the Tribe:

> Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when: 1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe. . . .

25 U.S.C. § 476(a).

The language in the rules and regulations prescribed by the Secretary must be read consistent with the statute. Here, the BIA and Election Board are clearly erroneous in giving 25 C.F.R. § 81.7[2] a cramped reading that results in an unreasonable interpretation: that "those entitled to vote" are only those that voluntarily registered to vote in the Secretarial Election and that the total vote cast in the Election need be only 30% of those who so registered.

Section 476(a)(1) of the IRA calls for a majority vote of the adult members of the Tribe at a special election, and not the minimum vote of 30% of the adult members of the Tribe who chose to register for the Election. The current Election failed to meet this threshold under federal law.

As demonstrated in Section 1, the Tribe's 1986 Constitution must be applied to determine who is entitled to vote. BIA and Election Board have wholly ignored the governing 1986 Constitution's provisions on who is eligible to be a member and restrictions on constitutional amendment and repeal. Doing so undermines the Tribe's self-governance, is contrary to the clear intent and purpose of the IRA, is inconsistent with the BIA's prior, longstanding recognition of the validity of the 1986 Constitution, and therefore must be overruled. *See, e.g., Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1350 (6th Cir.1994) (stating that courts may invalidate an Agency adjudication or rulemaking if it is "*inconsistent with the statutory mandate or* frustrate[s] the policy that Congress sought to implement.").

Specifically, the 1986 Constitution provides that:

> This document may be amended by a majority vote of the eligible voters of the Tribe in an election called for that purpose by the Secretary of the Interior, provided that at least fifty percent of those entitled to vote shall vote in such election....

Exhibit E, 1986 Constitution, Art. XVI.

Again, those entitled to vote under the 1986 Constitution are all eligible voters of the Tribe. The BIA and Election Board have allowed the Election to proceed without recognizing and enforcing the requirements established by the Tribe's own governing laws. The BIA and Election Board simply ignored the constitutional requirement that an amendment can only be approved by a majority vote of eligible voters of the Tribe, provided that at least 50% of those entitled to vote are actually voting in such election. Given that the BIA and Election Board sent registration forms to over 300 persons they deemed eligible to vote (Exhibit G, Barker Declaration, ¶ 2), the 85 persons who actually voted represent just a fraction of the 50% threshold the Constitution sets.

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[2] 25 C.F.R. § 81.7, "Adoption, ratification, or revocation by majority vote," reads in pertinent part:

> Except as it may be further limited by this part, a constitution and bylaws, amendments thereto, or charter and charter amendments shall be considered adopted, ratified, or revoked if a majority of those actually voting are in favor of adoption, ratification, or revocation. **The total vote cast, however, must be at least 30 percent of those entitled to vote, unless, with regard to amendments, the constitution provides otherwise**. The names of persons appearing on the registration list who have not reached eighteen years of age by the date of the election, shall be removed from the list of registered voters when determining whether the required percentage of participation has been achieved. Unless the existing constitution or charter provides otherwise, none of the actions cited in this section shall become effective until they are approved by the Secretary. The validity of any charter ratification shall be dependent upon the tribe first having reorganized. Duly ratified charters shall be revoked or surrendered only by Act of Congress. (Emphasis Added)

In sum, regardless of whether the validity of the Election is measured against the IRA or the Tribe's Governing Constitution, the Election is flawed and must be overturned.

3. The BIA and Election Board Erred By Permitting Persons Not Meeting The Governing Constitution's Membership Requirement To Vote.

Objectors renew their objection to the inclusion on the List of individuals who do not meet the membership requirements of the Tribe (hereinafter "Nonmember Voters") as established in the 1986 Constitution, and object on this basis to the BIA and Election Board's certification of the Election results. (The names of the Nonmember Voters whom the BIA and Election Board have erroneously placed on the List are compiled in Exhibits H & I hereto.) The BIA and Election Board erred, and irrevocably tainted the Election, by failing to review the accuracy of the List. This error requires a new Election in which only persons who are members under the definition set forth in the Tribe's actual Constitution may vote.

A. The BIA and Election Board Permitted Nonmembers To Vote To Overturn The Constitution Foreclosing Their Membership.

The 1986 Constitution, Art. III, §§ 1 & 4, establishes three enrollment criteria:

- Section 1(a): "All persons . . . listed on the genealogy roll prepared as of March 1978 and used to request federal acknowledgment and recognition of the Tribe." (There were 199 members on the 1978 Base Roll (Exhibit B).)

- Section 1(b): "[L]ineal descendants" of the 199 members on the 1978 Base Roll, provided that they "possess at least one-fourth (1/4) degree Indian blood of which one-sixteenth (1/16) degree must be Timbisha Shoshone blood."

- Section 1(c): A person may be adopted into the Tribe who "possesses at least one-fourth (1/4) degree Indian blood and has been approved by a majority vote of the General Council." Art. III, § 4 (emphasis added).

The Nonmember Voters are not members of the Tribe because they do not qualify under any of the constitutionally established categories of persons who may be members. In fact, the Tribe has already adjudicated the membership status of nearly every one of the Nonmember Voters (each of those listed in Exhibit H), determining they are not members of the Tribe under the Tribe's laws. (*See* Exhibit J (Timbisha Disenrollment Files for each of the Nonmember Voters listed in Exhibit H).) Indeed, none of the disenrolled Nonmember Voters even completed the Tribe's process for appealing their disenrollment.

Although certain of the Nonmember Voters, those listed in Exhibit I , do not appear to have been disenrolled, neither they, nor the Nonmember Voters listed in Exhibit H, appear on the 2010 or 2011 Membership Rolls (attached hereto as Exhibits K and L, respectively), the last membership rolls prepared at the direction of the duly elected Tribal Council, nor do any appear on the Tribe's 1978 base roll. (Exhibit B.)

The absence of Nonmember Voters from the 1978 Base Roll is telling. This is because (1) the recognition regulations at 25 C.F.R. Part 83 required the Tribe to generate a list of all members of the Tribe, which was the 1978 Base Roll; (2) nearly all of the Nonmember Voters were born well before 1978; and (3) none of the Nonvoting Members appear on the Base Roll, meaning none can be members except by adoption by the full General Council, which has never occurred.

In the end, quite paradoxically, this Election accomplished something that no Secretarial election can legally do: harness the votes of the Nonmember Voters to alter the very provision of the 1986 Constitution that precludes them from becoming members (and from voting in Secretarial elections), and thereby bootstrap those Nonmember Voters into the Tribe. Thus, the Election essentially "constitutionalized" the takeover of the Tribe by the Nonmember Voters and their allies and the unlawful provision of benefits and services to individuals who are not now eligible to be members of the Tribe.

Objectors also raise their prior objection to the eligible voters list on the basis that it contains inadequate information to permit evaluation of whether the persons listed are properly members of the Tribe. For instance, some of the names on the list (e.g., Shawn Shaw and Rachel Wilcox) consist of common first and last names not accompanied by further identifying information, such as city of residence, date of birth, or middle name or initial.

B. The BIA and Election Board's Failure To Conduct The Required Review Of The Eligible Voters List Irrevocably Taints The Election.

Application of the Tribe's established membership and voting criteria is not only relevant, but in fact critical to any meaningful election conducted by or for the Tribe, whether it be a tribal election or a Secretarial Election, and the 1986 Constitution is plain and clear as to who is eligible to be enrolled in the Tribe and who is eligible to vote. Despite the clear and binding requirements of the 1986 Constitution, the purported Enrollment Committee of the Tribe issued a list of eligible voting members without regard for the clear standards of the 1986 Constitution. This is plainly unreasonable, and triggers a federal responsibility to interpret existing tribal law regarding membership in order to facilitate the government-to-government relationship. And while Chairperson Young asserts that the IRA does not require that the BIA conduct "enrollment audits" (Young Decision, at 1-2), simply accepting the purported Enrollment Committee's list of eligible voters falls far short of the reasoned review 25 C.F.R. § 81.13 requires.

The blind acceptance of the proffered voter list also violates the terms of the Tribe's recognition under the Part 83 regulations. 25 C.F.R. Part 83. Pursuant to the 1983 recognition of the Tribe by the Secretary of the Interior, the 1978 base roll submitted to the Department included, as required by the regulations, "all known current members of the group." 25 C.F.R. § 83.7(e)(2). "For Bureau purposes, any additions made to the roll...shall be limited to those...maintaining the same relationship with the tribe as those on the list submitted with the group's documented petition." 25 C.F.R. § 83.12(b). Thus, BIA may only acknowledge individuals added to the membership roll who descend from the same Indian tribe or tribes that "functioned as a single autonomous political entity," and "maintain[] significant social and political ties with the tribe," or both. *Id.* (citing 25 C.F.R. § 83.7(e)). By allowing scores of individuals who neither descend from the base roll, although most were born prior to 1978, nor meet the membership standards in the Tribe's "documented petition" for acknowledgement to vote in the secretarial election, BIA has violated both tribal and federal law governing membership and elections. In essence, the BIA decision would recognize a new, unorganized tribe in order to displace the existing, tribal law organization of the Tribe. *See California Valley Miwok Tribe v. Pacific Reg. Dir.*, 51 IBIA 103 (2010).

As evidenced by Chairman Young's statement that "the election board, by necessity, must rely on the list of enrolled members provided by the...Enrollment Committee" (Young Decision, Exhibit C at 2), the BIA and Election Board have taken no action whatsoever to verify that those participating in the Election were, in fact, members of the Tribe. Instead, the BIA and Election Board verified only that individuals registered to vote were on the erroneous List. Here, it is particularly arbitrary and capricious for the BIA and Election Board to ignore the 1986 Constitution by assuming a purely ministerial role and refusing to confirm that those eligible to participate in the Election could validly participate under tribal law.

Indeed, the BIA and Election Board's stance that they must, irrespective of the circumstances raised by Objectors' objection to the List, rely on the list of enrolled members provided by the purported Enrollment Committee effectively eviscerates the right guaranteed under the IRA to challenge the right to vote of anyone whose name is on a registered voters list and denies such challengers any semblance of meaningful due process provided under federal law. To be sure:

- Relying on the erroneous List, the BIA notified "members" of the Tribe that 103 individuals registered to vote in the Election. *See* List, Exhibit D.

- The Young Decision ignored the Objectors' contention that 40 individuals on the List are, in fact, ineligible for membership in the Tribe. *See* Letter to Ernest Young, Chairperson, Secretarial Election Committee, from Ian Barker, Dentons US LLP, Objecting to List of Eligible Voters For Timbisha Shoshone Tribe Secretarial Election, dated March 14, 2014, attached hereto as Exhibit M (exhibits attached thereto excluded).

- According to the Notice of Results, only 86 registered voters participated in the Election, of which 63 voted to adopt the proposed constitution. *See* Exhibit A.

- Consequently, it is a real possibility that 40 of the 63 individuals voting to accept the proposed constitution were, in fact, ineligible to participate in the election as a matter of federal (25 C.F.R. § 81.6 (providing that only duly registered members are entitled to vote)), and tribal law.

- It is then a real possibility that the BIA and Election Board allowed adoption of the proposed constitution by just a fraction of the Tribe's lawfully voting members, in violation of tribal—and, in fact, federal—law. 1986 Constitution, Art. XVI (requiring that amendments to the tribe's constitution be adopted by a majority of the Tribe's voting membership); 25 U.S.C. § 476(a) (requiring a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe).

Considering the impact on the integrity and well-being of the Tribe occasioned where nonmembers of the Tribe are allowed to vote themselves into a Tribe from which they are constitutionally excluded, the BIA and Election Board's failure to determine the written and documented challenges by looking to the 1986 Timbisha Shoshone Constitution taints the fairness, regularity, and lawfulness of the entire Secretarial election.

4. The BIA and Election Board Erred By Denying Sixteen- And Seventeen-Year-Old Voters Eligible To Vote Under The Governing Constitution Of Their Right To Vote.

Compounding the erroneous inclusion of Nonmember Voters in the voting pool, the BIA and Election Board have prevented members who actually meet the membership and voting requirements of the Tribe from voting in the Election. Specifically, the BIA and Election Board prohibited 16- and 17-year-old members of the Tribe from voting, in direct violation of the governing 1986 Constitution and law of the Tribe. *See* Young Decision at 2 (concluding that "[t]he federal regulations for conducting a Secretarial election require all voters to be at least eighteen," and that "[i]t is not within the discretion of the election board to make exceptions to the federal regulations.").

The 1986 Constitution provides that it only "may be amended by a majority vote of the eligible voters of the Tribe." 1986 Constitution (Exhibit E), Art. XVI. The 1986 Constitution authorizes the entire membership of the General Council "to vote at all General Council meetings and all tribal elections, referenda, initiatives, recalls and repeals," and defines the "General Council" as "all tribal members sixteen (16) years of age or older." 1986 Constitution (Exhibit E), Art. IV, § 2 (emphasis added); *see* 25 C.F.R. § 81.6(d); *Thomas v. United States*, 141 F. Supp. 2d 1185, 1201-02 (W.D. Wis. 2001) (recognizing that Secretarial election voting pool must comport with voting age specified in tribal constitution). Nothing in the Secretarial election regulations, much less the IRA, prohibits voting by persons authorized to vote under tribal law. Nor is this an instance where tribal law arguably violates a constitutional requirement: there is no constitutional prohibition on 16- and 17-year-old persons voting in a federal election. *See Cheyenne River Sioux Tribe*, 566 F.2d at 1089 (holding that, under the Twenty-Sixth Amendment, the Secretary may disregard a tribal rule prohibiting persons under 21 years of age from voting).

John Doe, age 16, and John Roe, age 17, are members of the Tribe and direct descendants of persons on the 1978 base roll. Nevertheless, the BIA and Election Board refused to send them, or any other eligible voters aged 16 or 17, election notices or voter registration forms, and denied them their right to vote. Objectors therefore object to the exclusion from the List of 16- and 17-year-old persons who qualify as members of the Tribe under its governing Constitution.

5. The BIA and Election Board Issued Election Materials Containing False Statements That Misled Voters Regarding The Date Of The Election.

Finally, Objectors contest the results of the Election on the grounds that the BIA and Election Board's included in the Election materials a false date for the election, which may have misled eligible voters into not voting on time. Specifically, the March 7, 2014 letter to "voters" of the Tribe stated that the Election was to take place on "August 29, 2014"—five months *after* the date of the actual election, March 29, 2014. *See* Exhibit N. Consequently, eligible voters of the Tribe may have been denied the opportunity to participate in the election, as some voters undoubtedly relied on the erroneous August 29 date in making arrangements to review and vote upon the proposed constitution.

6. Objectors Request The Right To Review The Allegedly "Spoiled Or Mutilated" Ballot.

The Certificate of Results of Election indicates that a single ballot cast was "found to be spoiled or mutilated." *See* Exhibit A. Without further explanation, it is impossible for Objectors to evaluate whether the BIA and Election Board accurately made a determination that they could not count this vote (which, if cast as a "No" vote, and excluding the votes of Nonmember Voters, could be the deciding vote). Accordingly, Objectors demand the right to review the purportedly "spoiled or mutilated" ballot, and object to it not being counted as a "No" vote.

7. Conclusion

The BIA and Election Board are poised to undo and displace the duly enacted Constitution of a federally recognized Indian tribe, purporting to replace it through an Election that completely ignores that very Constitution. Not only did the BIA and Election Board completely fail to evaluate whether a quorum existed as the Constitution requires to ensure an election reflects the political will of the Tribe, the Election turns on the votes of nonmembers of the Tribe, while excluding voters entitled to vote under the Tribe's

law. These numerous violations of the Tribe's law and federal law irrevocably taint the Election, and foreclose certification of the results.

Sincerely,

Ian R. Barker
Senior Managing Associate

Enclosures (as stated, via FedEx)

cc: Amy Dutschke, Pacific Regional Director, Bureau of Indian Affairs (via US Mail)
Kevin Washburn, Assistant Secretary—Indian Affairs (via US Mail)

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