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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

JOE KENNEDY, GRACE GOAD, ERICK MASON, PAULINE ESTEVES, MADELINE ESTEVES, JOHN DOE, AND JOHN ROE, Appellants, vs. PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Appellants' Opening Brief On Threshold Issues Docket No. IBIA 14-082

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Appellants Joe Kennedy, Grace Goad, Erick Mason, Pauline Esteves, Madeline Esteves, John Doe, and John Roe (collectively, "Appellants") hereby seek review by the Board of Indian Appeals (Board, IBIA) of a January 6, 2014, decision (Decision) by the Pacific Regional Director (Regional Director), Bureau of Indian Affairs, given to the BIA's Central California Agency Superintendent (Superintendent), authorizing a Secretarial election to be held for the Timbisha Shoshone Tribe, under the provisions of 25 C.F.R. Part 81, on a proposed Constitution for the Tribe. Appellants hereby ask the Board to decide that it has jurisdiction over this matter, that Appellants have standing to pursue this appeal, and that the Decision is, or has become, a final decision ripe for appeal.

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I. BACKGROUND

On January 6, 2014, the Regional Director authorized the Superintendent to hold a Secretarial election to replace the Timbisha Shoshone Tribe's Constitution. The Secretarial Election Board scheduled the election for March 29, 2014. On March 12, 2014, Appellants filed a notice of this appeal from the Regional Director's decision to authorize a Secretarial election, requesting a stay of the election. On March 21, 2014, the Board denied Appellants' request for a stay and placed the Regional Director's decision into effect, and the election occurred as scheduled. On April 2, 2014, Appellants timely contested the election. On May 12, 2014, the Assistant Secretary made a decision rejecting the Appellants' challenges to the election and announced that the Assistant Secretary's decision "is final for the Department of the Interior."[1] On June 6, 2014, the Board issued notice that Mark Levitan, an attorney for the George Gholson-led government of the Timbisha Shoshone Tribe, had provided the Board with a copy of the Assistant Secretary's decision and expressed his hope "that this will negate the need for further action on this matter by the [Board];" the Board suggested that interested parties "address the relevance to the present appeal, if any, of the Assistant Secretary's decision, as part of their briefs in this appeal." On June 17, 2014, Appellants filed with the Board a motion for a ruling on the Board's jurisdiction in light of the Assistant Secretary's decision and for extension of time to file an opening brief. On June 26, 2014 the Board declined to rule on the jurisdictional impact of the

[1] Attached as Exhibit A.

Assistant Secretary's decision alone, but granted an extension of time and directed briefing on the combined threshold issues of jurisdiction, standing and ripeness separately from briefing on the merits.

II. JURISDICTION

A. The Assistant Secretary did not Assume Jurisdiction under 25 C.F.R. § 2.20(c) or 43 C.F.R. § 4.5

On March 12, 2014, Appellants filed a Notice of Appeal with the Interior Board of Indian Appeals seeking review of the Area Director, Pacific Region's decision to authorize a Secretarial election for the Timbisha Shoshone tribe. Under 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b) the Assistant Secretary of Indian Affairs then had 20 days in which to assume, or delegate, jurisdiction over the Appeal. The Assistant Secretary did neither.

As a result of this, the Notice of Appeal became effective upon the expiration of the 20 day window, and the Board assumed full jurisdiction over this matter. *In Interim Ad Hoc Comm. of the Karok Tribe v. Sacramento Area Dir., Bureau of Indian Affairs*, 13 IBIA 76, 85 (1985), the Board held that under long established Departmental precedents, "a decision issued by BIA after a notice of appeal has been filed with the Board is a nullity. The Assistant Secretary would have authority to render a decision in this matter, once an appeal had been properly brought to the Board, only if his decision were made in the exercise of the Secretary's reserved authority under 43 CFR 4.5." *See also Bullcreek v. Western Regional Dir., Bureau of Indian Affairs*, 39 IBIA 100, 102 (2003) (holding that the Superintendent and Regional Director lacked authority to reconsider their decisions in a matter pending before IBIA); *Raymond v. Acting Aberdeen Area Dir., Bureau of Indian Affairs*, 19 IBIA 41, 43 (1990) (holding that an Area Director no longer had jurisdiction over the matter because an appeal had been filed with the Board).

Once the 25 C.F.R. § 2.20(c) window closed, the Board alone held jurisdiction over the matter. After that, the BIA, including the Assistant Secretary, no longer had jurisdiction. The only means for the Agency to regain jurisdiction was through the exercise of the reserved authority of the Secretary under 43 C.F.R. § 4.5(a)(1).

We have found no legal authority or legal action delegating the Secretary's reserved

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authority under 43 C.F.R. § 4.5(a)(1) to the Assistant Secretary. The Assistant Secretary does not cite or refer to any such legal delegation of the reserved authority in this decision of May 12. We do not believe there has been such a delegation.

Even if we assume that the Assistant Secretary could exercise the Secretary's reserved authority, there is no indication in the May 12 decision that he was doing so. The Assistant Secretary stated that he "elected to issue a decision on the challenge [to the election and its results], on behalf of the Secretary" in the first paragraph of his decision, but does not cite to any regulations on this point.

Even if this clause were understood as an attempted invocation of the Secretary's reserved authority, the regulation at 43 C.F.R. § 4.5(c)(1) contains plain requirements for the proper exercise of this authority, including specifically the provision of written notice to parties of the reassumption of jurisdiction, which the Assistant Secretary did not comply with.

The Assistant Secretary's unilateral and unexpected assertion of decisional authority in this matter deprived Appellants of their due process rights in this appeal. This notice requirement is not simply a formalistic matter. It is a fundamental component of due process, and functionally it provides parties with a right and an opportunity to direct briefs to the Assistant Secretary if she or he assumes jurisdiction over their case.[2] The Assistant Secretary here has never properly assumed jurisdiction over this matter.

B. The Appeal and the Contest of the Election are Parts of the Same Matter Properly Before the IBIA.

The Appeal before the Board and the Contest of the election are parts of the same substantive matter, they arise from the same aggregate set of operative facts, and the Contest must be resolved by the IBIA in the context of the existing Appeal over which it has exclusive

[2] Although the Assistant Secretary may have had before him various arguments directed to subordinate BIA officials, the parties have not briefed the full breadth of arguments bearing on the Assistant Secretary's ruling on the validity of the election. For instance, a key issue bearing on the propriety of the Secretarial election that the Assistant Secretary did not address, and which was not—and could have been—addressed in either party's arguments to subordinate BIA officials, is whether Assistant Secretary Echohawk's error in recognizing the George Gholson-led government in 2011 rendered the calling of the Secretarial election unlawful.

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jurisdiction. Even the Assistant Secretary appears to understand both that the Contest and the Appeal are the same matter and that the Board has jurisdiction over the Appeal. Footnote 2 on page 2 of the Assistant Secretary's Decision states that he expects that in light of his decision, "the Board will find that there is no longer a dispute over which it has jurisdiction." This shows that the Assistant Secretary understood that the Contest he purported to decide and the Appeal already before the IBIA are simply different aspects of the same matter, and also that the Board had unquestioned jurisdiction over the Appeal prior to his decision, even though he misapprehended the significance of these facts.

When the Assistant Secretary chose not to exercise jurisdiction over the original appeal, he lost jurisdiction over all aspects of this substantive matter, and the IBIA now has sole jurisdiction. The Assistant Secretary's decision on May 12, 2014 is therefore ultra vires, in violation of the Department's regulations, and a legal nullity.

The IBIA's jurisdiction includes authority over all aspects or components of a matter. Past IBIA decisions support a broad and comprehensive interpretation of what constitutes a "matter." In *Alturas*, the Board determined that when a BIA official was divested of jurisdiction over a "matter" that she previously decided, she no longer had jurisdiction over any of the components of the decision. Thus, even if a BIA decision encompassed different holdings, neither interested parties nor the BIA could choose to "compartmentaliz[e] jurisdiction" on the matter. *Alturas Indian Rancheria v. Pacific Regional Dir., Bureau of Indian Affairs*, 54 IBIA 15, 16 (2011).

By the same token, the IBIA determined that "substantive matter" should not be interpreted narrowly, because such an interpretation could cause every minor decision made by the BIA to fit the definition of "dispositive decision" and thus be appealable to the IBIA. *Picayune Rancheria of the Chukchansi Indians v. Acting Pacific Regional Dir., Bureau of Indian Affairs*, 48 IBIA 241, 244 (2009).

In *Bullcreek*, the IBIA noted with approval that requests to the BIA for actions in a matter already pending before the Board could not be decided by the BIA and should instead be raised in "the context of the existing appeals." *Bullcreek*, 39 IBIA at 102.

Strong policy considerations underlie the divestment of jurisdiction from the BIA once an

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appeal is filed with the Board. The Board has stated that this rule was established to avoid the confusion that would result if two offices simultaneously exercised jurisdiction over the same matter. *Tonkawa Tribe of Oklahoma v. Acting Anadarko Area Dir., Bureau of Indian Affairs*, 18 IBIA 370, 371 (1990). The Board has also further explained that the rule was intended to "ensure that only one forum has authority to act at any particular point in time so that the parties involved know exactly where they stand." *Raymond v. Acting Aberdeen Area Dir., Bureau of Indian Affairs*, 19 IBIA 41, 43 (1990).

On April 2, 2014, pursuant to the procedure in 25 C.F.R. § 81.22, our clients filed a Contest of the Results of the Secretarial Election of March 29, 2014. The Assistant Secretary's decision seems to imply that the filing of the Contest gave him jurisdiction to decide for practical purposes all the issues in the matter, perhaps because 25 C.F.R. § 81.22 contemplates that jurisdiction to decide such election contests lies with the Secretary through the officer in charge of the election. In the present case, however, the IBIA already held full jurisdiction over this matter.[3]

The Board obtained full and exclusive jurisdiction over this Appeal upon the expiration of the 25 C.F.R. § 2.20(c) window. The Appeal and subsequent Contest of the election are parts of the same matter, a matter properly before the Board, and the Assistant Secretary therefore lacked jurisdiction to decide the Contest. His decision is therefore a nullity and must be set aside.

III. STANDING

As individual tribal members, Appellants have standing to challenge the Agency's conduct of this federal election and the inclusion of non-members in the electorate. Appellants are individuals who meet the membership requirements of the Timbisha Shoshone Constitution of 1986 and who are properly enrolled members or citizens of the Tribe. Appellants have suffered an

[3] The filing of the Contest itself could not grant the Secretary or the Assistant Secretary jurisdiction over this matter, including as it does both the original Appeal and the Contest. Jurisdiction is granted by statute or regulation, and may not be conferred by the act of any party. "It is well settled that no action of the parties can confer subject-matter jurisdiction on a tribunal...." *Dunklebarger v. Merit Sys. Prot. Bd.*, 130 F.3d 1476, 1480 (Fed. Cir. 1997). "Jurisdiction is conferred by Congress, not by defendant's arguments in [a prior] court proceeding." *Son Broad., Inc. v. United States*, 42 Fed. Cl. 532, 536 (Fed. Cl. 1998); *see also Palafox St. Associates, L.P. v. United States*, 114 Fed. Cl. 773, 785 (Fed. Cl. 2014).

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injury in fact to their right to vote because of the Agency's decision to conduct a federal election in which non-members are allowed to vote, and this injury could be redressed by a decision to declare this election invalid. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," and the violation of their right to vote through vote dilution generates a right to legal redress. *Coleman v. Miller*, 307 U.S. at 438 (1939). *See also Baker v. Carr*, 369 U.S. 186, 208 (1962).

A. Vote Dilution

In order to have a right to appeal to the Board, an appellant must show that he or she has an interest that is adversely affected by the decision being appealed. *See* 25 C.F.R. § 2.2 (definitions of "appellant" and "interested party"); 43 C.F.R. § 4.331 ("Who may appeal"). "To be 'adversely affected,' within the meaning of the regulations, the injury must be caused by the challenged decision and the injury must be to a legally protected interest held by the appellant." *Emma Lu Reeves v. Great Plains Regional Dir., Bureau of Indian Affairs*, 54 IBIA 207, 212 (2012).

The decision to hold a Secretarial election and the final conduct of that election, contrary to the plain and clear provisions of the valid Timbisha Constitution causes injury to Appellants' legally protected right to vote in federal elections. 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). "[E]lections on the adoption or amendment of tribal constitutions under the Indian Reorganization Act of 1934 are Federal elections for which the Secretary has adopted regulations and for which he is accountable ...." *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt*, 906 F. Supp. 513, 519-20 (D. Minn. 1995), *aff'd*, 107 F.3d 667 (8th Cir. 1997). "The right to vote in this election is a federal right protected by the Federal Constitution." *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt*, 906 F. Supp. 513, 520-21 (D. Minn. 1995), aff'd, 107 F.3d 667 (8th Cir. 1997).

Importantly, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" (footnote omitted). *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Agency's inclusion of non-

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members in the electorate of this federal election diluted the value of Appellants' legitimate votes. "Voting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to be an impairment of the right to vote." *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

The dilution of Appellants' right to vote also directly impairs and diminishes Appellants' interests as citizens or members of the Tribe in the legal and democratic governance of the Tribe. The unrestricted participation of illegitimate voters in an election irrevocably alters the composition of the electorate, rendering the election itself fundamentally defective. Unlawful votes are cast, while the participation and voting of legitimate members is discouraged or chilled. As the Supreme Court recently wrote, "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006).

Voters alleging impairment of their individual federal voting rights have standing to sue. "It would not be necessary to decide whether appellants' allegations of impairment of their votes…will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it." *Baker v. Carr*, 369 U.S. 186, 208, (1962) (noting voters who allege facts showing disadvantage to themselves as individuals have standing to sue (citing *Colegrove v. Green*, 328 U.S. 549 (1946))).

B. Reduction In Tribal Services And Benefits

Additionally, Appellants also have standing for the independent reason that the Regional Director's decision to allow non-members to participate in this federal election inevitably opens the door to their full participation in all aspects of tribal life, including in the receipt of federal benefits reserved exclusively for tribal members. A reduced share in finite tribal benefits is an "imminent harm that is concrete and particular" to these Appellants as lawful members of the Timbisha Shoshone Tribe; it is fairly traceable to the Regional Director's decision confirming the

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status of non-members within the Tribe, and it is likely to be redressed by a favorable decision. *Bond v. U.S.*, 131 S. Ct. 2355, 2366 (2011).

Appellants are not "bringing an action based on a personal assessment of what is or what is not in the best interests of the tribe." *Margene Bullcreek, et al. v. Western Regional Dir., Bureau of Indian Affairs*, 40 IBIA 191, 194 (2005). Nor are they here challenging the validity of a tribal action. *See, e.g., Swab v. Sacramento Area Dir., Bureau of Indian Affairs*, 25 IBIA 205 (1994). Rather, they are challenging the BIA's decision to conduct a federal election without any regard for the valid tribal constitution, including its membership provisions. Appellants allege that the Agency decision to call, conduct and hold this election without any consideration of the Tribe's valid 1986 Constitution resulted in the dilution and impairment of their votes in a federal election through the inclusion of non-members in the electorate. In addition, because the Regional Director's decision confirms the status of non-members in the Tribe, it inevitably carries with it a confirmation of their eligibility for federal benefits reserved for tribal members. The proportional reduction in services and benefits that Appellants will suffer is an imminent and concrete harm independently sufficient to confer standing.

IV. FINALITY AND RIPENESS

The Regional Director's January 6 decision was a dispositive decision on a substantive matter. *See Yakama Nation v. Northwest Regional Dir., Bureau of Indian Affairs*, 47 IBIA 117, 118 (2008). The decision was dispositive at the time it was made, because it was the final action that the Agency took to effect the election; subsequent acts were merely interim and procedural decisions to implement this authorization of a federal election. In the alternative, the subsequent implementation and conduct of the Secretarial election render the decision final; there are no further actions on this matter that the Regional Director could take. The decision concerned a substantive matter, the right to vote in a federal election free from fraud, because the unrestricted inclusion of non-members in the electorate diluted the votes of legitimate voters including Appellants and tainted the entire election.

The Regional Director's decision in the present case was the dispositive decision which initiated the election. There were no further opportunities for the Agency to ensure that this

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federal election was conducted in compliance with the valid and recognized tribal constitution. Subsequent Agency actions were simply the inevitable implementation of the Regional Director's Decision to conduct a Secretarial election without any reference to the valid Timbisha Shoshone Constitution, specifically including its provisions regarding membership and constitutional amendment.

The Regional Director issued her decision on January 6, 2014. This decision laid out clearly and in detail a comprehensive legal framework for the conduct of the Secretarial election. It cited federal case law regarding the Agency's obligation to hold Secretarial elections upon proper request; it enumerated the governing provisions of the Code of Federal Regulations; it even discussed the Agency's internal delegations of authority to review and approve tribal constitutions. At no point, however, did it mention the Tribe's existing, valid constitution, a constitution the Agency has long recognized and interpreted.[4]

The Tribe's simple request for an election on a new constitution had no legal effect on the existing constitution. The Timbisha Constitution's provisions regarding both tribal membership and constitutional amendment were, and still are, valid and binding on the Agency in the conduct of this election, at least to the extent that they do not conflict with federal law. The Regional Director's decision authorized a federal election and established a comprehensive legal framework for its conduct; subsequent Agency actions simply carried out the Regional Director's prescriptions. The Agency's failure to abide by binding provisions of the Timbisha Constitution is the direct product of the Regional Director's decision.

Importantly, since the election has now been completed, there is no further action to be taken except to appeal or contest its results. Therefore, even if the Regional Director's decision was not previously "dispositive," it is now. Legal consequences, a completed Secretarial election, flowed directly and inevitably from the decision. The process it began has been completed and fully implemented. There is no risk of a "piecemeal review which at the least is inefficient and

[4] For instance, in 2011 the Assistant Secretary issued an Order in which he acknowledged the 1986 Constitution and applied it as governing law. *See* Exhibit B, 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.

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upon completion of the agency process might prove to have been unnecessary." *DRG Funding Corp. v. Sec'y of Housing and Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996). The reasons underlying the concern for ripeness have been resolved; there are no further factual developments that could render the case either more concrete or moot.

The Regional Director's decision to hold a Secretarial election without any consideration of the Tribe's existing, valid Constitution directly led to the conduct of an election with unrestricted participation of non-members. The Tribal government was free to place literally anyone it chose on the list of eligible voters without any regard to the only possible relevant legal standard, the Timbisha Constitution. Substantive challenges to this list were impossible. The arbitrary act of placing any person on this list was accepted without inquiry by the Election Board as proof of their rightful inclusion on the list.[5] The Agency therefore permitted the Election Board to register individuals for a federal election who did not and could not possibly meet the membership requirements of the Timbisha Constitution. As a result, Appellants' right to vote was impaired by vote dilution through the inclusion of non-members in the electorate. "[V]oting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to be an impairment of the right to vote." *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) *aff'd*, 553 U.S. 181 (2008).

In addition to being dispositive, an appealable decision must also concern a substantive matter. The Regional Director here decided a substantive, and not a merely procedural matter, namely the right to participate in a federal election. The participation of ineligible voters in the election impaired Appellants' right to vote in a federal election. "The right to vote in this [Secretarial] election is a federal right protected by the Federal Constitution and the results of this election may fundamentally affect federal rights guaranteed to federally recognized tribal 'members.'" *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt*, 906 F. Supp. 513, 520-21 (D. Minn. 1995) *aff'd*, 107 F.3d 667 (8th Cir. 1997).

[5] The Election Board devoted 8 minutes on March 19, 2014 to Appellants' Challenge to the Registered Voters List before rejecting the challenge, noting only that "the list of eligible voters was supplied by the Tribe." *See* Exhibit C, *Election Board Meetings*.

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V. CONCLUSION

The Regional Director's decision to authorize a Secretarial election without consideration of the Timbisha Shoshone Constitution was the dispositive decision regarding a substantive matter—a federal election. As a result of that decision, non-members participated in a federal election and Appellants suffered an injury in fact to their federally protected right to vote, namely, the dilution of their vote. This unrestricted participation of non-members in a federal election fundamentally taints the entire election, and the impairment of Appellants' votes that it caused confers standing. Beyond the harm to their right to vote, the decision also ratifies non-members participation in the Tribe and will inevitably lead to their receipt of finite federal benefits reserved for tribal members. This loss of services is an independent ground of standing. The Board is the only tribunal with jurisdiction over this matter; the notice of appeal was properly filed with the Board, and the Assistant Secretary elected not to assume jurisdiction. Subsequent events in this case, including the Secretarial election are part of the same matter over which the Board holds jurisdiction. The Assistant Secretary's decision was outside of his power under the Agency's own regulations and as a result has no legal force.

Respectfully submitted,

Dated: July 21, 2014

DENTONS US LLP

By: _____
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PROOF OF SERVICE

I, Cynthia Lakes, hereby declare:

I am employed in the City and County of San Francisco, California in the office of a member of the California State Bar at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Dentons US LLP, 525 Market Street, 26th Floor, San Francisco, California 94105.

On July 21, 2014, I caused to be served on the interested parties in this action the following document:

APPELLANTS' OPENING BRIEF ON THRESHOLD ISSUES

by placing a true copy thereof, on the above date, enclosed in a sealed envelope, following the ordinary business practice of Dentons US LLP, as follows:

☒ FEDERAL EXPRESS: I served the within document in a sealed Federal Express envelope with delivery fees provided for and deposited in a facility regularly maintained by Federal Express.

U.S. Department of the Interior
Office of Hearings and Appeals
Interior Board of Indian Appeals
801 N. Quincy Street, Suite 300
Arlington, VA 22203

☒ U.S. MAIL: I am personally and readily familiar with the business practice of Dentons US LLP for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

George Gholson
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2800 Cottage Way
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Office of Public Affairs
MS-3658-MIB
1849 C Street, N.W.
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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed on July 21, 2014, at San Francisco, California.

Cynthia Lakes

82410592

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EXHIBIT A

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY 12 2014

Ms. Amy Dutschke, Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, California 95828

Dear Ms. Dutschke:

This appeal arises from a dispute within the Timbisha-Shoshone Tribe (Tribe) concerning eligibility to participate in a Secretarial election. Earlier this year, you authorized a Secretarial election for the Timbisha Shoshone Tribe, which took place on March 29, 2014. On April 2, 2014, the following tribal members challenged the election results: Joe Kennedy, Grace Goad, Erick Mason, Pauline Esteves, Madeline Esteves, and unnamed members aged 16 and 17 years old (Challengers). Pursuant to discussions with you, Director Michael Black, and the Solicitor's Office, I have elected to issue a decision on the challenge, on behalf of the Secretary.

For the reasons discussed below, I find that none of the Challengers' arguments for vacating the election compel such an action. I approve the Tribe's ratification of a new Constitution. My decision is final for the Department of the Interior (Department).

I. Introduction

An important attribute of tribal sovereignty and self-governance is the right to determine citizenship and the eligibility of its citizens to vote. Indeed, determining the composition of its body politic is one of the most important decisions any government can make. Like the United States, tribal governments determine tribal citizenship through its political and constitutional processes. Tribal sovereignty and self-governance are directly linked to tribal political membership and engagement in political processes. The Federal Government should interfere in such key tribal issues only when the law clearly provides such authority and no other alternative exists.

It is important to remember that, in the exercise of sovereignty and self-governance, tribes have the right, like other governments, to make good decisions, bad decisions, and decisions with which others may not agree. Possessing sovereignty and self-governance means bearing the immense responsibility that comes with the exercise of governmental powers. In other words, like the Federal Government, tribal governments and their citizens may occasionally make mistakes, even about matters as important as enrollment. But such decisions are tribal decisions

to make. The genius of tribal self-governance is that it insures that tribes must live with the consequences of their own decisions, good or bad, rather than the consequences of Federal decisions. One of the most profound lessons of the success of tribal self-governance is that the Federal Government should defer, whenever possible, to decisions made by tribal governments.

In this case, the matter at issue is a Federal matter, a Secretarial election. But also at issue is a decision made by the Tribe, a collective decision made in an election. The substance of the matter goes to the heart of tribal self-governance; it is a dispute about tribal membership. Pending before the Department are assertions that the results of the Secretarial election are invalid. The essence of the Challengers' argument is that certain citizens of the Timbisha Shoshone Tribe should be disenrolled and that those citizens' votes should not be counted in a Secretarial election conducted under Federal law. When the Department is acting pursuant to Federal statutes, the Department will seek to comply with Federal law in the manner that is least intrusive to tribal self-governance.[1] For the reasons described below, I find it unnecessary to intrude on the Tribe's citizenship determinations.

II. Background and Facts Relating to Secretarial Election

On March 29, 2014, the Department conducted a Secretarial election on a proposed Constitution for the Tribe, pursuant to Federal statute (25 U.S.C. § 476) and implementing regulations (25 C.F.R. part 81). The Tribe initially submitted the request for a Secretarial election on October 29, 2013, but withdrew that request when the Federal Government shut-down made compliance with regulatory deadlines impossible. The Tribe submitted their request again pursuant to a Tribal Council Resolution dated December 5, 2013 (Ex. A). The Director, Pacific Regional Office, authorized the election on January 6, 2014, and directed the Superintendent, Central California Agency, to call and conduct the election.[2] (Ex. B). Pursuant to the regulations, a Secretarial Election Board (Election Board)[3] was formed, a list of tribal members was provided by the Tribe, and election information distributed to those members 18 years of age and older, including a form to register to vote in the Secretarial election. (Ex. C).

On March 7, 2014, the Election Board posted the Eligible Voters list, consisting of the names of those individuals who registered to vote in the Secretarial Election. (Ex. D.) As provided for in the regulations, some tribal members challenged the Eligible Voters list on March 14, 2014 (25 CFR. 81.13) (Ex. E). The challengers asserted that qualified tribal members had been

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[1] *Santa Clara Pueblo,* 436 U.S. at 60, 63 (referencing that "a proper respect" for tribal sovereignty "cautions" that we tread lightly; referencing other titles of ICRA "manifest a congressional purpose to protect tribal sovereignty from undue interference").

[2] On March 18, 2014, the Interior Board of Indian Appeals (IBIA; Board) received an appeal of the Regional Director's authorization of the election from the same tribal members whose challenge to the election results is being decided today. On March 31, 2014, the Board issued a Pre-Docketing Notice denying the appellants' request to stay the election and placing the Secretary's authorization into effect. The Board directed the Regional Director to file the administrative record of the decision to authorize the election, which was filed on May 1, 2014. On May 6, 2014, the Board issued a docketing Order setting out a briefing schedule for the appeal. It is my expectation that, in light of today's decision - a final agency decision approving the outcome of the Timbisha Shoshone Secretarial election – the Interior Board of Indian Appeals will find that there is no longer a dispute over which it has jurisdiction.

[3] Pursuant to 25 CFR 81.8, the Chairperson of the Election Board was an employee of the BIA and the other 3 members of Election Board were members of the Timbisha Shoshone Tribe.

wrongly denied inclusion on the list, and that persons ineligible to vote had been included on the list. On March 20, 2014, the Election Board dismissed the challenge. (Ex. F).

The Secretarial election was conducted entirely by absentee ballot. On March 29, 2014, the Election Board counted the ballots and posted the Certificate of Election Results (Certificate). According to the Chairman of the Election Board, the Certificate posted on March 29, 2014, contained an error. The Election Board corrected the error and re-posted the Certificate on March 31, 2014. (Ex. G). According to the Certificate, the proposed Constitution was adopted by a vote of 63 in favor, 22 opposed, and 1 spoiled ballot.

As provided for in the regulations (25 CFR 81.22), tribal members challenged election results within 3 days of the posting of the Certificate. The Challengers asserted that the election was invalid, and therefore the proposed Constitution had not been adopted by the Tribe (Ex. H).

III. Arguments of Challengers

The challengers assert that the election is invalid because it was not conducted in conformity with the Tribe's 1986 Constitution. Specifically, Challengers assert that:

1. The Election Board erred in rejecting the applications for registrations submitted by Tribal members between 16 and 18 years of age.

2. The Election Board erred because 40 people included on the Registered Voters List, and whose names appear on the membership roll supplied to the Election Board by the Tribe, do not satisfy the membership requirements set out in the Tribe's Constitution.

3. The Election Board erred in declaring that the Secretarial election would be valid if 30 percent of the eligible voters took part, versus the 50 percent voter participation requirement for an amendment as set out in the 1986 Constitution.

4. The Bureau of Indian Affairs (BIA) erred in using a "registered voters list" to identify the "eligible voters," instead of listing of all adult members of the Tribe.

5. The Election Board and BIA disseminated false information to tribal members. On March 7, 2014, the Election Board distributed information stating that the date of the election was August 29, 2014. On March 10, 2014, the Election Board distributed corrected information. The Challengers assert that the misinformation "may have misled eligible voters into not voting on time" and "some voters undoubtedly relied on the erroneous August 29, 2014, date."

In addition to the bases for invalidating the election set out above, the challengers requested the opportunity to inspect a ballot that was declared invalid by the Election Board for being "spoiled or mutilated." Challengers assert that a single vote could determine the outcome of the election. As shown below, the outcome of the election is not so close as to be determined by a single vote.

IV. Analysis

Secretarial elections are initiated by tribes or tribal citizens, but are Federal in nature. See generally Nell Jessup Newton, et al, eds., Felix Cohen's Handbook of Federal Indian Law (2012 Ed.) § 4.06[2][a], at 286-87. As a result, most of the applicable law is Federal law and regulations. As noted above, these laws should be interpreted in a manner that best serves tribal self-governance. We address each of the Challengers' arguments in turn.

A. Rejection of Voters Younger Than 18 Is Required by Federal Law

I begin my analysis with Challengers' assertion that 16 and 17 year olds should have been allowed to participate in the Secretarial election. This is the only claim by the Challengers that could increase the pool of eligible voters for this election and therefore its resolution is relevant to the analysis of the other claims. I find that this claim fails as a matter of law. The 18 year old requirement is set by federal law. Case law cited by the Challengers does not permit variance from the Federal requirement. The Challengers purport to distinguish *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085 (8th Cir. 1977) on the basis that *Cheyenne River* dealt with a voting age requirement of tribal law that violated the Federal Constitution. But the Circuit Court did not base its decision on constitutional considerations. In affirming BIA's permitting 18 year olds to vote, despite a tribal law requirement that voters must be 21, the court said, "The Congress, not the Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections, and the Congressional definition of 'adult Indians' in 25 U.S.C. § 479 leaves no doubt that it intended a uniform Federal age qualification for voters in Secretarial elections." 566 F.2d at 1088-89. The Election Board's rejection of tribal members under 18 years of age was required by Federal law and cannot support invalidation of the Secretarial election.

B. Inclusion of Alleged Unqualified Voters, if Error, was Harmless Error

At the heart of this challenge is a long-standing dispute as to the validity of the enrollment of 35 voters.[4] As a general matter, it is not appropriate for the Department to intervene in internal tribal disputes or procedural matters[5] because, absent a Federal statute or express authority in a tribal governing document, the Department has no authority over matters of tribal citizenship.[6] Even in matters in which the Department is acting pursuant to Federal statutes, the Department should exercise its authority in a way that avoids unnecessary intrusion in tribal self-governance.[7]

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[4] The enrollment dispute impacts about 74 people shown on the Tribe's membership roll.

[5] *Cheyenne River Sioux Tribe v. Aberdeen Area Director*, 24 IBIA 55 (1993).

[6] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."). See also Nell Newton, et al., eds, Felix Cohen's Handbook of Federal Indian Law, 3.03[3] at 175-76 (2012 ed).

[7] *Santa Clara Pueblo,* 436 U.S. at 60, 63 (referencing that "a proper respect" for tribal sovereignty "cautions" that we tread lightly; referencing other titles of ICRA "manifest a congressional purpose to protect tribal sovereignty from undue interference"); *Shakopee Mdewakanton Sioux Community v. Babbitt,* 107 F.3d 667, 670 (8th Cir. 1997) (the IRA does not give the Secretary "carte blanche to interfere with tribal elections," limiting Secretarial disapproval for substantive reasons only if the proposals are contrary to Federal law.).

In this matter, the Tribe provided its membership list to the Election Board. Consistent with Federal law, the Department recognizes and defers to the Tribe's fundamental and inherent right to define its own membership. When the Challengers disputed the eligibility of certain voters to participate in the election, the duly appointed Election Board ensured that the voter list matched the tribal roll.

In this case, even if the Challengers' claims regarding voter eligibility were accepted, the election results are sufficiently lopsided that a substantive assessment of the membership challenge is unnecessary.[8] Assuming that all 35 disputed voters voted in favor of the new Constitution, and subtracting 35 from the 63 'yes' votes tallied, the result is 28 to 22. Assuming further that the rejected ballot was a 'no' vote, the result would be 28 to 23 in favor of the proposed Constitution.

In sum, a majority of the eligible voters who are *acceptable to the Challengers* voted to adopt the new constitution.

C. CHALLENGERS CLAIM THAT THE ELECTION BOARD ERRED BECAUSE VOTER PARTICIPATION DID NOT SATISFY THE REQUIREMENTS OF THE 1986 CONSTITUTION IS REJECTED BECAUSE VOTER PARTICIPATION EXCEEDED THE 50 PERCENT DEMANDED BY CHALLENGERS

The Challengers assert that the Indian Reorganization Act's requirement that 30 percent of the eligible voters participate in the election does not apply because the Tribe's 1986 Constitution requires participation by at least 50 percent of eligible voters. Regardless of which requirement applies, as shown below it is clear that participation in the Secretarial election exceeded 50 percent. Accordingly, this claim is denied.

The Election Board received registration forms from 103 individuals whose names appeared on the membership list provided by the Tribe.[9] Ballots were received from 86 of the registered voters (Ex. I). Returns from 86 of the103 voters equals 83 percent voter participation – far above the 50 percent voter participation called for by the Challengers. Of those 86, the vote was 63 to 22 in favor of adopting the new Constitution. There was 1 spoiled ballot.

The Challengers assert that 40 of those individuals listed on the Registered Voters List were not qualified to be members of the Tribe. Of the 85 people from whom ballots were received, 35 were among the 40 people whose qualifications to vote were disputed by challengers. Therefore, even assuming that all the assertions made by the Challengers are correct, voter turnout was 80 percent. (Subtract 35 votes from the 86 cast, which equals 51. Subtract 40 eligible voters from the pool of 103 eligible voters, which equals 63. 51 votes divided by 63 eligible voters equals

[8] Given that Challengers' claim to increase the eligible voter pool is rejected as a matter of law, there is no dispute that at most there are 103 eligible voters and there is no dispute that 86 of those 103 voters participated in the election.

[9] Again, because Challengers' claim to increase the eligible voter pool to add 16 and 17 year olds is rejected as a matter of law, there is no dispute that at most there are 103 eligible voters and there is no dispute that 86 of those 103 voters participated in the election.

80%). Thus, even accepting Challengers' claims, participation far exceeded the 50% voter participation required by the Tribe's 1986 Constitution.

D. THE USE OF A REGISTERED VOTERS LIST IS LEGAL

As noted by Challengers, the IRA directs that any Indian tribe may adopt or revise organic documents, which become effective "when 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)(1). Since 1967, the regulations governing the conduct of Secretarial elections have required the creation of a registered voters list (25 CFR § 52.11), and the use of that list to determine those tribal members who are entitled to vote (25 CFR § 52.6), as well as calculating sufficiency of voter participation (25 CFR § 52.21) (29 F.R. 14359, Oct. 17, 1964)(25 CFR part 52 was redesignated as part 81 in 1982 (47 FR 13326)).

Courts have accepted the process outlined in the regulations:

> The Bureau of Indian Affairs sent out registration packets to the 3,659 voting-eligible LCO [Lac Courte Oreilles] members, advising them of the election and informing them about the need to register, which 1,130 LCO members did. After the registered voter list was posted on January 8, 1992, no objections were made to any persons on the list.

Thomas v. United States, 141 F. Supp. 2d 1185, 1189 (W.D. Wisc. 2001).

Litigation arising from a contested Secretarial election for the Jamul Village resulted in specific acceptance of the BIA's use of a Registered Voters List. In *Rosales v. United States*, the district court for the District of Columbia rejected arguments identical to those raised by the Timbisha Shoshone Challengers respecting the relationship between the Tribe's Constitution and the Part 81 regulations' definition of "qualified voters":

> Under section 81.6(d), when a tribe wants to hold a Secretarial election to amend its constitution, "only members who have duly registered shall be entitled to vote; . . ." The Bureau and the Board read section 81.6(d) to require registration for each particular Secretarial election, and further conclude that only registrants are qualified voters within the meaning of section 81.22.
>
> . . .
>
> [A]gencies are entitled to substantial deference when interpreting their own regulations, especially when those regulations are as detailed as those being relied upon in this case. Moreover, Plaintiffs have not demonstrated that the Board's interpretation of section 81.6(d) conflicts with any statute or regulation. *See Thomas Jefferson Univ.*, 512 U.S. at 512; *Stinson*, 508 U.S. at 45. Accordingly, the Board's interpretation must be upheld.

Rosales v. United States, 477 F. Supp. 2d 119, 128-29 (DDC 2007).

The Election Board's use of a Registered Voters List to identify all those people who are entitled to vote in the election because they registered rather than using a list of all adult members

regardless of registration is required by the Department's regulations, and cannot support the invalidation of the Timbisha Secretarial election.

E. LACK OF EVIDENCE THAT DISTRIBUTION OF ERRONEOUS DATE CAUSED HARM

The Challengers assert that erroneous information respecting the election date "may have" misled some eligible voters, and that some voters "undoubtedly" relied on the erroneous information. The Interior Board of Indian Appeals (IBIA) has affirmed the rejection of such speculative argument:

> 25 CFR § 81.22 requires that an election contest include substantiating evidence in support of the grounds for the contest. Appellant failed to support his allegation with any evidence that the error in the election notice adversely affected the voter turnout or tainted the election results in any way. Accordingly, the Board finds that appellant's challenge to the election was properly rejected, insofar as it was based on the error in the election notice. *Thurman v. Anadarko Area Director*, I.D. LEXIS 133, *17; 26 IBIA 69 (IBIA 1994).

The IBIA's rejection of speculative claims is wise, especially about a matter of such importance, and we adopt the same reasoning. The challengers provided no evidence of any kind to support their speculation that the erroneous date published by the Election Board affected any tribal member's decision or action with respect to this election. Following the IBIA's reasoning in *Thurman*, it would be improper to invalidate the Timbisha Shoshone Secretarial election based on the Challengers' unsubstantiated claims respecting the impact of the erroneous information.

V. Conclusion

Based on the review of the challenge to the Secretarial election conducted by the BIA for the Timbisha Shoshone Tribe, I find that the BIA properly executed the regulatory procedures for holding such elections, and therefore deny all challenges. The proposed Constitution was adopted by a majority of the eligible voters. I therefore approve the "Constitution of the Timbisha Shoshone Tribe," which will supersede the Constitution adopted by the Tribe in 1986.

Sincerely

Kevin K. Washburn
Assistant Secretary – Indian Affairs

Enclosures

cc: Ian Barker, Dentons US LLP
Chairperson George Gholson, Timbisha Shoshone Tribe
Mark A. Levitan, Attorney at Law

EXHIBIT B

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAR 01 2011

JOE KENNEDY, PAULINE ESTEVES, MADELINE ESTEVES, ANGIE BOLAND, AND ERICK MASON, PLAINTIFFS/APPELLANTS	)
v.	)
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEFENDANT/APPELLEE.	)

ORDER

Appellants challenge the February 17, 2009, decision by the Director of the Pacific Region to reject the validity of actions taken by the General Council of the Timbisha Shoshone Tribe at a special meeting held January 20, 2008. For the reasons set out below, the Director's decision is affirmed.[1] Furthermore, as elaborated in Section VIII, I will recognize the government led by George Gholson for the limited purpose of holding a special election.

I. Background

The Timbisha Shoshone Tribe adopted its Constitution in 1986. The Constitution vests government powers in a General Council (GC), which consists of all tribal members over 16 years of age. (Constitution Article IV section 2). Management of the Tribe's affairs is delegated to a five-person Tribal Council (TC) (*Id.*, section 3). The Constitution also authorizes the establishment of a judicial branch of government, (*Id.*, section 1), but so far the Tribe has not established a separate judiciary.

In 2007, the TC broke into political factions. The last meeting held by a TC recognized by the Bureau of Indian Affairs (BIA) occurred on August 25, 2007. Three members of the TC walked out of that meeting (interested parties TC members Beaman, Beck, and Casey). Appellants Chairman Kennedy and TC member M. Esteves stayed at the meeting and purported to continue to conduct business as the TC. In November 2007, both factions purported to hold elections, but the Bureau deemed both elections invalid.

[1] As more fully set out in the "History of Appeals" section below (Section V), Kennedy opponents G. Gholson, M. Cortez, and W. Eddy filed a related appeal with the Regional Director on April 24, 2009, which was consolidated with the current appeal. On February 23, 2010, those parties withdrew their appeal.

The Tribe's General Council met on January 20, 2008, and voted on four resolutions presented by Chairman Kennedy. The first resolution validated the Kennedy faction election from the preceding November. The second resolution approved the acts of Kennedy and M. Esteves subsequent to the August 25 walk-out by Beaman, Beck, and Casey. The third resolution purported to interpret the Constitutional provision regarding "resignation" from the TC. The fourth resolution dealt with gaming development, and is not relevant to this appeal.

On February 17, 2009, at the culmination of the complex appeals history set out in Section II below, the Regional Director (RD) rejected the validity of the GC resolutions of January 2008. Kennedy appealed the Regional Director's decision on February 24, 2009, which appeal is the subject of this Order. According to a decision letter issued by the Superintendent on February 24, 2010, the BIA does not currently recognize the validity of any Tribal Council. In the months leading up to the Tribe's regularly-scheduled elections in November 2010, the BIA attempted to negotiate with the disputing factions to establish a framework for holding a special election. That attempt failed, and the factions held separate elections. To date, the BIA has not recognized the validity of either election.

II. Procedural timeline

December 14, 2007: the Superintendent rejected both factional elections held in November 2007.

January 11, 2008: Kennedy appealed the Superintendent's December 14 decision to the RD.

January 20, 2008: Kennedy held a special meeting of the GC. At that meeting, the GC voted on four resolutions presented by Kennedy, which Kennedy asserts should be accepted as valid acts of the Tribe to resolve their intra-tribal dispute through tribal means.

February 8, 2008: Kennedy filed a Statement of Reasons in support of his January 11 appeal.

February 29, 2008: The Superintendent reversed his December 14 decision, in reliance on the intervening GC meeting on January 20, 2008. Based on resolutions passed by the GC on January 20, 2008, the Superintendent accepted the Kennedy TC as representing the Tribe.

March 17, 2008: TC member Beaman appealed the Superintendent's February 29 decision; Beaman filed his Statement of Reasons on April 14.

February 17, 2009: The RD decided that the acts purportedly taken by the GC on January 20, 2008, exceeded the GC's authority and denied due process to interested parties. The RD reversed the Superintendent's decision, and denied recognition to any TC other than the one put in office via the last valid election, held in November 2006.

February 24, 2009: Kennedy submitted an appeal to the IBIA, appealing the RD's February 17 decision. The Assistant Secretary – Indian Affairs took jurisdiction over the appeal.

April 24, 2009: Interested parties Gholson, Eddy, and Cortez, purporting to be TC members, filed an administrative appeal of a different decision by the RD (see details in Section V, below). The Assistant Secretary took jurisdiction over that appeal (later withdrawn), and consolidated it with the Kennedy appeal.

June 22, 2009: Assistant Secretary signed first scheduling order.

July 13, 2009: Assistant Secretary signed second scheduling order.

February 19, 2010: Assistant Secretary signed third scheduling order.

February 23, 2010: Gholson, Cortez, and Eddy withdrew their appeal.

March 19, 2010: Kennedy filed his substantive brief as mandated by scheduling order.

April 16, 2010: Beaman filed a Response Brief.

April 30, 2010: Kennedy filed a Reply Brief with a box of supporting documents.

III. Applicable law

A. Relevant Federal law

1. The Department of the Interior (Department) has both the authority and the responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the Tribe. *Greendeer v. Minn. Area Director*, 22 IBIA 91, 95 (1992), citing *Reese v. Minneapolis Area Director*, 17 IBIA 169, 173 (1989).

2. "BIA has the authority and the responsibility to decline to recognize the results of tribal actions when those results are tainted by a violation of ICRA." *Greendeer v. Minn. Area Director*, 22 IBIA 91, 97 (1992).

3. "The Secretary of the Interior is charged not only with the duty to protect the rights of the tribe, but also the rights of individual members. And the duty to protect these rights is the same whether the infringement is by non-members or by members of the tribe." *Milam v. Dept. of the Interior*, No. 82-3099; 10 ILR 3013, 3017 (D.D.C. 1982); quoted at *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 137 (D.D.C. 2002).

4. The Federal Government has a duty to recognize, if at all possible, a tribal government with which it can carry on government-to-government relations. *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983).

5. The Secretary of the Interior has a duty to ensure that trust resources belonging to a tribe, or Federal resources allocated to a tribe, are transmitted to an entity that legitimately represents the tribe. *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Milam v. U.S.*, supra.

B. **Applicable Tribal Law**

1. **Timbisha-Shoshone Constitution Article IV (1):** The Tribe's Constitution identifies the three parts of the Tribal government – General Council, Tribal Council, and Judiciary – and provides that none of these branches "shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document."

2. **Timbisha-Shoshone Constitution Article IV section 3:** "The Tribal Council shall exercise, concurrently with the General Council, all the powers delegated to it by the General Council in Article V of this document and otherwise vested in the Tribal Council by this document."

3. **Timbisha-Shoshone Constitution Article VI section 4:** Tribal officers shall hold office for two years.

4. **Timbisha-Shoshone Constitution Article VI section 4(b):** "General elections to vote for tribal council members shall be held annually on the second Tuesday of the month of November. Notice of the general elections shall be posted by the Secretary of the Tribal Council at least 20 days before such election at the Tribe's business office, the voting place, and at three or more additional public places."

5. **Timbisha-Shoshone Constitution Article VIII section 3(b):** "Special meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meeting shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting."

6. **Timbisha-Shoshone Constitution Article VIII section 2(b):** "A majority of the members of the Tribal Council shall constitute a quorum at all Council meetings. No business shall be conducted in the absence of a quorum."

7. **Timbisha-Shoshone Constitution Article X section 1:** "The Tribal Council shall declare a Tribal Council position vacant for any of the following reasons:

   . . .

   b. When a Tribal Council member resigns;

   . . .

   d. When a Tribal Council member is removed from office;
   e. When a Tribal Council member is recalled from office"

8. **Timbisha-Shoshone Constitution Article XI:** This section addresses Removal and Recall of Tribal Council members. Section 1 sets out the procedural requirements for removal of the member by the Tribal Council itself; section 2 sets out the procedural requirements for recall of the TC member by the General Council. Both sections require a public hearing where charges must be articulated and the member permitted to present a defense against those charges (Article XI section 1(d)(2); section 2(c)).

9. **Timbisha-Shoshone Constitution Article XI section 1(d)(3):** "After hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is the subject of the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings."

10. **Timbisha-Shoshone Constitution Article XIV section (5)(h):** "(The Tribe may not) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

IV. Background

A. The August 25, 2007, Tribal Council meeting

The dissolution of the TC occurred at a TC meeting held August 25, 2007. The TC meetings are open to all members of the Tribe, and there were a number of such non-TC members at the August 25 meeting. One item of business for that meeting was to hear charges of misconduct in office against TC members Beck and Beaman, and their defenses to those charges. The Tribe's Constitution directs that "(t)he Tribal Council member who is the subject of the removal request shall not vote nor serve in his or her capacity as a tribal Council member in the removal proceedings." A tribal member at that meeting suggested that Beaman and Beck each be precluded from the removal proceedings of the other. While such a suggestion was plainly contrary to the Constitution's provision, and finds no support in the Tribe's ordinances, Chairman Kennedy put the proposal to the vote of all the tribal members present at the TC meeting. In response to the Chairman's decision, Beaman and Beck walked out of the meeting, as did TC member Casey and some of the other tribal members. After Beaman, Beck, and Casey walked out of the TC meeting, Chairman Kennedy decided that their departure constituted an admission of guilt regarding the charges against them.

The meeting minutes are explicit: immediately after the Chairman "stated" that Beaman and Beck were guilty of the charges against them, a motion was made to declare that Beaman and Beck were removed from the TC, but no vote was taken and the motion died. Nonetheless, the very next act at that TC meeting, as reflected in the minutes, was to replace Virginia Beck with Margaret Armitage as a TC member. Although this was a TC meeting, not a GC meeting, the Chairman permitted all the tribal members present to vote. The vote was 17 – 0 in favor of replacing Virginia Beck with Margaret Armitage.

The Tribe's Constitution requires that the *Tribal Council* must declare that a position on the TC is vacant, and that no business may be conducted by the TC without a quorum. After the departure of Beaman, Beck, and Casey, there was no quorum of the TC, and no possibility of a valid action by the TC. The record also makes it clear that the tribal members who remained at the TC meeting never purported to remove Beaman and Beck from the TC.

Not according to the usual rules

For these reasons, the Superintendent in his December 14, 2007, decision, and the Regional Director in his February 17, 2009, decision, correctly found that the acts by Chairman Kennedy at the August 25, 2007, TC meeting were invalid. — so what?

B. The November 2007 elections

Both factions purported to hold elections in November of 2007. According to Kennedy, there were four seats to fill: the terms in office had expired for himself and Casey; Beaman's term in office did not expire for another year, but he had been removed from office; and Beck had been removed from office and her term had expired. Thus the only carry-over officer was Madeline Esteves. According to the report on the Kennedy election, prepared by Indian Dispute Resolution Services, out of 262 eligible tribal voters, 117 ballots were cast in the Kennedy election of Nov. 13, 2007. The top four vote-getters were placed on the TC: Kennedy (79); M. Cortez (74); M. Armitage (69); P. Esteves (65).[2] Casey was included on the Kennedy faction's ballot, receiving seven votes. Beaman and Beck appealed the Kennedy election to the Election Board established by the Beaman faction via their resolution 2007-28, adopted at a meeting of the Beaman faction on September 22, 2007[3]. but did not

Simultaneous with the Kennedy faction election, the Beaman faction purported to hold an election to fill the three vacancies created by the expiration of the terms in office for Kennedy, Beck, and Casey. Fifty-four ballots were submitted. The top three vote-getters were Doug (not George) Gholson (41); Casey (37); and Beck (30). According to the Beaman faction, these three joined carry-over officers Beaman and M. Esteves on the TC.

The question of which, if either, of these elections was valid, is not the topic of this appeal.[4] Neither the Superintendent nor the RD deemed either election valid prior to the GC meeting of January 20, 2008. The Superintendent specifically rejected both elections in his decision letter of December 14, 2007. The Superintendent's reasoning is sound, and leaves no doubt that the Tribe was suffering from an important intra-tribal dispute after the November 13, 2007, elections, to wit: ?

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[2] Ms. Pauline Esteves has been a key elder in the Tribe for years, playing a vital role in its formation. Indeed, Ms. Esteves was Chairman of the Tribal Council at the time the Constitution was adopted. Evidence in the record shows that P. Esteves was convicted of a felony in 1998; section 4.2 of the Tribe's election ordinance bars a convicted felon from office until "ten years after the completion of any punishment." It is unclear from the record when the ten-year ban on P. Esteves' holding office expires. false in fact

[3] Beaman, Beck, and Casey held a purported TC meeting on September 22, 2007, at which the three of them voted on resolutions. Kennedy and M. Esteves purported to pass TC resolutions via a "polled vote" on September 15. It is clear on the face of the Kennedy faction resolutions that only Kennedy and M. Esteves voted on them.

[4] According to the Notice of Appeal filed February 24, 2009, by counsel for Kennedy, "[t]he decision being appealed is Regional Director Dale Morris's decision of February 17, 2009, reversing Superintendent Troy Burdick's previous order accepting the action of the January 20, 2008, meeting of the Timbisha Shoshone General Council in ratifying the removal of three members of the Timbisha Shoshone Tribal Council." Thus the only question on appeal is whether the resolutions passed by the General Council on January 20, 2008, were valid. On March 19, 2010, counsel for Kennedy submitted a document titled "appeal of the Tribal Council of the Death Valley Timbi-Sha Shoshone Band of California from the February 17, 2009 Decision of the Pacific Regional Director, Bureau of Indian Affairs," which is accepted as the substantive brief called for in the scheduling order of February 19, 2010. ?

Kennedy and his supporters believed that the TC consisted of Kennedy, Armitage, M. Esteves, Cortez, and P. Esteves.

Beaman and his supporters believed that the TC consisted of Beaman, M. Esteves, Doug Gholson, Beck, and Casey.

The BIA continued to recognize Kennedy, Beaman, M. Esteves, Beck, and Casey.

C. The January 20, 2008, General Council meeting

On January 20, 2008, the Tribe held a special meeting of the General Council. Chairman Kennedy submitted four resolutions for approval by the GC. The GC approved the resolutions.

Resolution 2008-01, the first resolution passed by the GC, purported to ratify the Kennedy election of November 2007.

Resolution 2008-02 purported to ratify the actions of the Kennedy-lead TC after August 25, 2007.

Resolution 2008-03 purported to interpret the Tribe's Constitution. The Constitution provides that "[t]he Tribal Council shall declare a Tribal Council position vacant . . .[w]hen a Tribal Council member resigns" Art. X Sec. 1(b). Resolution 2008-03 reads "a Tribal Council member 'walking out' of a meeting, along with any other factors, can be used as the basis in determining the Tribal Council member resigning his or her Tribal office."

(Resolution 2008-04 dealt with gaming development, and is not relevant to this decision).

V. History of appeals

After the TC split in August 2007, both factions purported to wield the authority of the TC. Both factions held elections for tribal office in November 2007. Over the ensuing month, the parties and others sought recognition from the Superintendent. On December 14, 2007, the Superintendent rejected both of the factional elections, and stated the continuing recognition of the last validly-elected government.

On January 11, 2008, Kennedy filed his notice of appeal of the Superintendent's December 14 decision. On January 20, 2008, the GC passed the resolutions that are the focus of this appeal.

On February 9, 2008, the Superintendent reversed his decision, in a decision letter accepting that the Kennedy faction would be recognized as the tribal government, basing his decision on the acts of the GC at the January 20 meeting.

On March 17, 2008, interested parties Beaman, Beck, and Casey appealed the Superintendent's decision to the RD. As explicated in Beaman's Statement of Reasons, filed April 14, 2008, "the sole issue presented in this appeal is whether the General Council may resolve an intra-tribal dispute by adopting resolutions ratifying actions leading up to and including a General Election

that are in violation of the Timbisha Shoshone Constitution." On February 17, 2009, the RD reversed the Superintendent. Kennedy appealed the RD's decision to the Interior Board of Indian Appeals on February 24, 2009. I took jurisdiction over that appeal on March 10, 2010.

On September 20, 2008, Kennedy's opponents, apparently led by George Gholson, purported to hold a special GC meeting. On October 17, 2008, the Superintendent issued a decision letter accepting the actions taken at the September 20, 2008, meeting, and recognized a tribal government headed by George Gholson as Chairman. On November 13, 2008, Kennedy filed an appeal of the October 17 decision (as amended October 20 and 21), with the RD. On December 4, 2008, the RD affirmed the Superintendent's decision, and recognizing the Gholson faction as the TC. On December 22, 2008, however, the RD rescinded his December 4 decision to permit adequate time to file required documents. Kennedy filed all his appeal documents by January 26, 2009. On March 24, the RD reversed the Superintendent, and again stated Bureau recognition of the TC that was elected in 2006. George Gholson, Margaret Cortez, and Wallace Eddy appealed the RD's decision to the Interior Board of Indian Appeals on April 27, 2009. I took jurisdiction over Gholson appeal on May 8, 2009, and consolidated it with the Kennedy appeal.

On February 23, 2010, the Gholson appellants sent a letter to serving as a "formal withdrawal" of their appeal.

VI. Summary assessment of the Regional Director's findings

As stated by appellant Beaman, "the sole issue presented in this appeal is whether the General Council may resolve an intra-tribal dispute by adopting resolutions ratifying actions leading up to and including a General Election that are in violation of the Timbisha Shoshone Constitution." Statement of Reasons filed on behalf of Beaman, Beck, and Casey dated April 14, 2008; page 1.

The Regional Director answered that question in the negative, finding that "the August 25, 2007, actions by Chairman Kennedy and the General Council members were beyond the scope of their constitutional authority and far exceed their powers in their attempts to remove Ed Beaman and Virginia Beck. The ratification of these actions by the General Council on January 20, 2008, was inappropriate and also was beyond their constitutional authority, and these actions clearly violated Ed Beaman and Virginia Beck's rights to due process. Furthermore, it would be inappropriate for the Bureau of Indian Affairs to recognize tribal actions that violate provisions of Tribal laws." RD's decision of Feburary 17, 2009, page 9.

But what about validating the election of 2007?

VII. Analysis

My office has reviewed the extensive administrative record and the filings of the parties in this matter. While 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. In the matter at hand, the Tribe's Constitution permits the TC to "declare" a vacancy on the TC when a member "resigns." The word "resign" is a plain English word, with straightforward dictionary definitions:

- to give (oneself) over without resistance;
- to give up deliberately; esp: to renounce (as a right or position) by a formal act
- to give up one's office or position: QUIT

Webster's 9th New Collegiate Dictionary © 1985

The common thread through all of these definitions is that "resignation" is the voluntary act of the person resigning. One party cannot impose resignation on another party. I do not accept that the Tribe's Constitution permits the GC to distort the plain definition of "resign" such that the TC or GC can expel a TC member from the TC against the will of that member. ?

The Constitution, viewed in its entirety, supports my interpretation. It sets out very explicit procedures to be followed whenever the TC or the GC wishes to expel a TC member against that member's will. The existence of such provisions reinforces the conclusion that the Constitution does not permit "involuntary resignation."

A further point to raise is that the GC never purported to take the specific act that would be necessary in order to accomplish the goal of putting the winners of the Kennedy faction election into office. While resolution 2008-03 purported to interpret "resign" in such a way as to permit the TC or GC to find that Beaman, Beck, and Casey had resigned, the GC never did "declare" that there was a vacancy on the TC. Therefore, there was no formal act by a valid TC or GC that purported to expel Mr. Beaman from his seat on the TC, and the GC's resolutions purporting to validate the Kennedy faction's election cannot accomplish the involuntary removal of Mr. Beaman. — Casey's + Beck's terms ended. So, only Beaman is affected by this issue.

hyper-tech. procedural interp.

While I deem the unconstitutional "resignation" to be sufficient basis for rejecting the emplacement of the Kennedy faction as Tribal Council through the January 20 resolutions, I would also note for the record that the failure to include the four resolutions in the notice of the upcoming Special General Council meeting seriously undermines the validity of the meeting notice itself. Obviously, the Chairman had those resolutions in his possession prior to holding the meeting; distributing them to the members would ensure compliance with the constitutional mandate to "specify the purpose of the meeting" Art. VII sec. 7(3)(b).

The passage of time since the Special General council meeting constitutes a third reason not to give effect to the acts of that meeting. Even if the Department accepted the validity of all the acts purportedly taken by the General Council at that meeting, the fact remains that more than three years have passed since the November 2007 election. Under the Tribe's Constitution, officers serve only two year terms in office. The terms purportedly begun in November 2007 expired more than a year ago; furthermore, a great deal has transpired with the Tribe in the intervening years. For the Department to attempt to recognize those long-past-term officers would not provide the Tribe with a useful resolution to its dispute.) why ?

There was another election in 2010

VIII. Recognition of Gholson government for limited purpose

The final decision on this appeal leaves the long-standing break in government-to-government relations unresolved. But the Department has a duty to recognize a government if at all possible. Since my decision on the appeal has not provided a solution, I must seek another way to reestablish a government-to-government relationship between the United States the Tribe. At present, there are two putative Tribal Councils, one headed by Joe Kennedy, and the other by George Gholson. Where two unrecognized factions hold competing elections, I usually cannot accept that the result of either election expresses the will of entire Tribe. In certain unusual circumstances it may be possible to identify a valid government even when competing elections have been held, but such circumstances are not present in this case.

The Department must use the least intrusive means possible to overcome the obstacles presented by the long hiatus in government-to-government relations. Even though neither of November's elections was sufficiently valid to compel me to recognize the outcome, I find it would be unacceptably intrusive to ignore the elections entirely. That is to say, while I am not bound to recognize the results of either of the two elections, it is permissible for me to do so. The elections provide me with information from which I can make a reasonable inference respecting the will of the majority of the Tribe in a manner that minimizes Federal intrusion into tribal mechanisms. On the other hand, it is very important to have a tribal government that is put in place by valid elections. Therefore, I will recognize one of the two putative governments elected in November, for the limited time of 120 days from the date of this order, and for the limited purpose of carrying out essential government-to-government relations and holding a special election that complies with the tribal law.

For this limited purpose and time, I will recognize the Tribal Council headed by George Gholson. Two reasons support my decision. First, based on the information submitted by the factions, there were approximately 137 votes cast in the Gholson-conducted elections, versus about 74 in the Kennedy election. This very significant difference argues strongly that it is less intrusive to vest limited recognition in the Gholson group than in the Kennedy group.

Second, the Kennedy election was facially flawed by its exclusion of certain Tribe members. I understand very well that Mr. Kennedy believes 74 people shown on the tribal roll were wrongfully enrolled and should be disenrolled; I understand that Mr. Kennedy believes that those people have already been disenrolled. But the Department has consistently and explicitly rejected the validity of those disenrollments on procedural grounds. To be clear, the Department takes no position on the merits of the allegations respecting the qualifications for membership for the 74 members at issue. Disenrollments conducted in compliance with tribal law and Indian Civil Rights Act (ICRA) must be honored by the Federal government. But until such time as the Tribe conducts it disenrollments in a manner consistent with tribal law and ICRA, those members remain on the rolls, and barring them from voting fatally invalidates an election.

IX. Conclusion

The longstanding tribal government dispute within the Timbisha Shoshone Tribe was not resolved by the elections conducted by the competing factions in November 2007, nor by the

unconstitutional resolutions passed by the GC at the special meeting in January 2008. I affirm the Regional Director's decision to reject the validity of the resolutions dated January 20, 2008. In order to fulfill the Department's duty to recognize a tribal government if possible, for purposes of carrying out government-to-government relations, I will recognize the government led by George Gholson for the next 120 days, for the limited purpose of carrying out government-to-government relations and conducting a special election.

Pursuant to 25 C.F.R. § 2.6(c), this decision is final for the Department and effective immediately.

Dated: MAR 0 1 2011

Larry Echo Hawk
Assistant Secretary – Indian Affairs

CERTIFICATE OF SERVICE

I certify that on the 2nd day of March, 2011, I delivered a true copy of the foregoing Order to each of the persons named on the attached list, either by depositing an appropriately-addressed copy in the United States mail, or by hand-delivery.

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EXHIBIT C

1-24-2014 3:06 p.m. – 3:30 p.m.
Ernest Young, Eleanor Jackson, Ray Reyes, Georgia Eliot Kennedy
Election date set: March 29, 2013
Mail out of registration set: February 10, 2014
Deadline for registering to vote: March 6, 2014
Posting of Registered Voters List set: March 7, 2014
Deadline set for ballot return: March 28, 2014
Notes: send a copy of the registration packet to the members of the Secretarial Election Board in Timbisha before mail out. Notify La Homa the Board needs building access on March 29, 2014.

3-5-2014 4:20 p.m. – 4:39 p.m.
Ernest Young, Eleanor Jackson, Ray Reyes, Georgia Eliot Kennedy
Question of accepting registration by other means other that mail or in person
Election Board does not accept facsimiles, emails, or other methods other than mail or by person of Registration. Email voters list to Jeanne at Timbisha on March 29, 2014 at 4:30 p.m. (polls closed)

3-7-2014 3:46 p.m. – 3:51 p.m.
Ernest Young, Eleanor Jackson (Eleanor spoke with the other members regarding issue)
Registration letters were held by the Post Office.
The registration letters were sent to the BIA on March 7, 2014.
The Election Board decided that we would not accept late registrations.
Eleanor will send an email stating their opinions

3-11-2014 3:26 p.m. – 3:27 p.m.
Ernest Young, Eleanor Jackson (Eleanor spoke with the other members regarding issue)
The question from Ian Barker, attorney for Joe Kennedy
Question of receiving a challenge to the Registered Voters list by email
Election Board will only accept challenges by mail or in person

3-17-2014 1:21 p.m. – 1:26 p.m.
Ernest Young, Eleanor Jackson (Eleanor spoke with the other members regarding issue)
Question from Mark Levitan, Timbisha Tribal Attorney: would the Election Board allow the outer envelopes to be separated by whether the individual is challenged or not
The Election Board decided not to allow

3-19-2014 4:22 p.m. – 4:30 p.m.
Ernest Young, Eleanor Jackson, Ray Reyes, Georgia Eliot Kennedy
The Election Board met to decide a Challenge to the Registered Voters List. Challenge letter and representative documentation from 3 ring binder sent to Election Board members in Timbisha on March 18, 2014. The Challenge was composed of two parts: one-challenge to the inclusion of individuals on the list and two-challenge to the exclusion of 16 and 17 year olds.
Challenge one documentation appears to be enrollment documentation. This appears to be an enrollment issue. The list of eligible voters was supplied by the Tribe. Challenge two- exclusion of 16 and 17 year olds. 25 CFR Part 81 requires participants be 18 or older.
The Election Board rejected the challenge.

3-20-2014 1:00 p.m. – 2:01 p.m.
Ernest Young, Eleanor Jackson, Ray Reyes, Georgia Eliot Kennedy
Election Board met to discuss response letter to the challenge
Rejection to challenge to the Registered Voters List mailed

3-29-2014 4:51 – 5:47 pm (Ernest's time: 3:00 pm to 6:00 pm)
Ernest Young, Eleanor Jackson, Ray Reyes, Georgia Eliot Kennedy
Ray Reyes began checking off names of those individuals that submitted the ballot in a sealed envelope with an outer envelope that had the signature of the individual voting and handed the envelope to Georgia Elliot Kennedy.

Georgia Elliot Kennedy opened the outer envelope, removed the sealed envelope containing the the ballot, removed the inner envelope and inserted into the locked ballot box.

Once all the ballots were in the sealed ballot box, Ernest Young removed all the ballots and showed the rest of the Election Board that the ballot box was empty.

Ray Reyes opened the ballots and handed the ballot to Ernest Young, who read out load whether that ballot was a yes vote or a nor vote.

As Ernest Young read the ballots, Eleanor Jackson and Georgia Elliot Kennedy tallied the votes. The vote was 63 Yes, 22 No and one spoiled (the outer envelope was unsigned and the Board was unable to determine who the voter was). The tally sheets were signed, vote count certified and the Results of Election were signed and dated. The election results were posted at the BIA office and Tribal offices. Ernest returned all the materials to his desk and left the building at 6:00 p.m.

3-31-2914 8:00 a.m.
The Election Results counted all the voters and did not mark adopted/rejected. Corrections were made and posted on 3-21-2014. The Election Board was contacted and agreed that the post date is 3-31-2014.