George Forman (Cal. Bar No. 047822)
Jeffrey R. Keohane (Cal. Bar No. 190201)
FORMAN & ASSOCIATES
4340 Redwood Highway, Suite E352
San Rafael, CA 94903
Phone: (415) 491-2310
Fax: (415) 491-2313
E-Mail: george@gformanlaw.com
jeff@gformanlaw.com

Attorneys for Defendants:
JOSEPH KENNEDY, ET AL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TIMBISHA SHOSHONE TRIBE, a federally recognized Indian Tribe, EDWARD BEAMAN, Individually and as Vice Chairman of the Timbisha Shoshone Tribe, VIRGINIA BECK, Individually and as Secretary/Treasurer of the Timbisha Shoshone Tribe, and CLEVELAND LYLE CASEY, Individually and as Executive Council Member of the Timbisha Shoshone Tribe,

Plaintiffs,

v.

JOSEPH KENNEDY, Individually and as Member of the Timbisha Shoshone Tribe Tribal Council, MADELINE ESTEVES, Individually and as Executive Council Member of the Timbisha Shoshone Tribe, PAULINE ESTEVES, an Individual, ANGELA BOLAND, an Individual, ERICK MASON, an Individual, and DOES 1 to 100, inclusive,

Defendants.

CASE NO. 1:09-CV-01248-LJO-SMS

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Courtroom: 4
Judge: Hon. Lawrence J. O'Neill

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INTRODUCTION

The defendants in this case are the only group calling itself a Tribal Council that has either a full complement of tribal officers, or that actually runs a tribal government for the Death Valley Timbisha Shoshone Indian Tribe ("Tribe"). The Tribal Council meets in public in various towns where Timbishas reside, but it has its headquarters in the tribal village located near the Visitor Center of Death Valley National Park. There, in the newly constructed Community Center, the tribal government staff, made up almost entirely of Timbisha Indians, carries out the tasks that make a tribal government function and provide services to its people.

The Chairman, Joseph ("Joe") Kennedy and the Vice-Chair, Pauline Esteves, were both elected to their offices in November, 2007. Their election was not appealed to the Election Board. The Secretary-Treasurer, Madeline Esteves, sister-in-law of Pauline, and Angela Boland, Executive Council Member, were elected to office in November, 2008. The final member of the Tribal Council, Erick Mason, the third-place finisher in the 2008 election, was appointed by the Tribal Council on December 27, 2008, to serve out the last 11 months of the term of Margaret Cortez, who had ceased to attend Tribal Council meetings or respond to correspondence. The names of all members of the Tribal Council appear on the March 1978 Base Roll that the Tribe submitted to the Bureau of Indian Affairs ("BIA") when it successfully petitioned for federal recognition. The terms of Joe Kennedy, Pauline Esteves, and Erick Mason will expire at the first seating of the new Tribal Council following the November 10, 2009 general election.

In stark contrast to the Tribal Council, Plaintiffs are three non-members who were mistakenly enrolled in the Tribe during a time of great confusion. Due to repeated disruptions in the conduct of tribal government for several years, the oversight was not corrected until the beginning of this year. In any case, the tribal councils to which Plaintiffs were elected have long since ceased to be. Cleveland Casey was last elected to a seat on tribal council in 2005, meaning that his term expired in December 2007.

Edward Beaman and Virginia Beck walked out of a Tribal Council meeting while proceedings against them were on-going. Under tribal custom and tradition, that demonstrated their intent to resign. Even if they had not resigned, Beck was last elected to a seat on the council in 2005

and Beaman was last elected to a seat on the council in 2006, meaning that their terms ended in 2007 and 2008, respectively. Beck and Casey went through the show of holding their own election in 2007, Beaman did not, so he does not even have that modest fig leaf to cover up for his complete lack of legitimacy. Implicit in Plaintiffs' complaint that their non-member declarants no longer receive services, is the admission that only Defendants, not Plaintiffs, actually provide governmental services on behalf of the Tribe. MPA at 16.

BACKGROUND

The defendants in this case are the only group calling itself a Tribal Council that has either a full complement of tribal officers, or that actually runs a tribal government for the Death Valley Timbisha Shoshone Indian Tribe ("Tribe"): Joseph ("Joe") Kennedy, Chairperson, Pauline Esteves, Vice-Chairperson, Madeline Esteves, Secretary-Treasurer, Angela Boland, Council Member, and Erick Mason, Council Member. With the exception of Erick Mason, who was validly appointed to serve out the remainder of a vacant term, all were elected in the 2007 or 2008 election. Both elections were certified by the Election Board, and neither was appealed to the Election Board. Three members are up for election this November 10, 2009: Joe Kennedy, Madeline Esteves, and Erick Mason. Pauline Esteves' and Angela Boland's terms will expire in 2010.

The roots of this conflict stretch back over a decade to the Tribe's greatest triumph: the Timbisha Shoshone Homeland Act of 2000. Durham Decl. Exh. K (codified at 16 U.S.C. §410aaa (note)). At about the same time as the Homeland Act was passed, tribal casino gaming was expanding in earnest following the passage of California Proposition 5 and 1A. Cal. Gov't Code §98000, et seq.; Cal. Const. Art. IV, §19. As part of the tribal-state compacts between the State of California and the gaming tribes, the State set up the Revenue Sharing Trust Fund ("RSTF"). Non-gaming tribes, such as Timbisha, receive $1,100,000 per year from the fund in quarterly payments.

The Homeland Act provided the Tribe with secure rights to land for the first time since the Nineteenth Century. In Section 5(d) of the Homeland Act, Congress transferred about 7,000 acres of land into trust for the Tribe, and authorized the Secretary of the Interior to purchase a two thousand acre parcel, the Lida Ranch, "or another parcel mutually agreed upon by the Secretary and the Tribe." *Id.*

The Indian Gaming Regulatory Act generally prohibits gaming on Indian lands acquired after 1988. 25 U.S.C. §2719(a). One exception is for lands that constitute a tribe's initial reservation. 25 U.S.C. 2719(b). Gaming developers took note that Section 5(d) of the Homeland Act could be construed to enable the Tribe to obtain a parcel near a major freeway. Since that time, the tribal government has been nearly constantly engaged in discussions with casino developers, which has led frequently to a breakdown in tribal government. Over the past two years, two proposed casino deals have failed, leading to two breakaway factions claiming to represent the Tribe. Neither receives federal funding, and the only visible means of support for them appears to be their would-be casino developers.

A. Timbisha Tribal Government

The 1986 Constitution of the Timbisha Shoshone Tribe provides that, "the governing body of the Tribe shall be the General Council," which consists of all enrolled members of the Tribe, 16 and older. Durham Decl. Exh. C, 3-4. Article II, §1, restricts membership of the Tribe to:

> a. All persons who filed as Timbisha Shoshone Indians and were listed on the genealogy roll prepared as of March, 1978 and used to request federal acknowledgment and recognition of the Tribe;
>
> b. All persons who are lineal descendants of any person designated in subsection (a) above and who possess at least one-fourth (1/4) degree Indian blood of which one-sixteenth (1/16) degree must be Timbisha Shoshone blood;

Id. at 2. Although the tribal constitution theoretically permits adoptions into the Tribe, it is prohibited unless the individual has "at least one-fourth (1/4) degree Indian blood and has been approved by majority vote of the General Council" *Id.* No one ever has been adopted into the Tribe. Goad Decl. at 5, ¶18. Moreover, the tribal constitution recognizes that mistakes may be made in the enrollment of members, and gives the Tribal Council no choice in the matter. Section 6 provides that "[t]he Tribal Council *shall* revoke membership status from *any* individual whom the enrollment committee has determined was erroneously, fraudulently or otherwise incorrectly enrolled." Durham Decl. Exh. C, 3 (emphasis added).

The tribal constitution delegates enumerated executive and legislative powers to the Tribal Council in Article V, Section 2. *Id.* at 6-9. Among them are the authority to enact and enforce laws"

governing conduct of individuals and proscribing offenses against the Tribe; to maintain order, to protect the safety and welfare of all persons within tribal jurisdiction." *Id.* at 8. The tribal constitution also acknowledges the overriding authority of tribal traditions, limiting the authority of the Tribal Council to "take all actions which are necessary and proper for the exercise of the powers enumerated in this document and which are otherwise *consistent with, and in furtherance of*, tribal customs, traditions, and beliefs." *Id.* at 9 (emphasis added).

The tribal constitution identifies three officers of the Tribal Council and identifies their special authorities and duties beyond those of the two regular council members: Chairperson, Vice-Chairperson, and Secretary-Treasurer. *Id.* at 14-18. The Chairman is essentially an executive post; he must preside over all General and Tribal Council meetings, but may only vote in case of a tie. *Id.* at 14. Subject to the approval of the Tribal Council, he has the authority to appoint all non-elected officials and employees of the tribal government and direct them in their work, to establish boards and committees, and to act as the contracting officer of the Tribe, including the authority to retain legal counsel. *Id.* at 14-15. With the consent of the Tribal Council, and in the absence of the Chairperson, the Vice-Chairperson may carry out the duties of the Chairperson. *Id.*

The third officer of the Tribe is the Secretary-Treasurer, who, in addition to such ministerial tasks as calling roll and keeping minutes, has the responsibility of accepting, keeping, and safeguarding tribal funds by depositing them in an insured institution. *Id.* at 15. The Secretary-Treasurer must also keep an accurate record of tribal funds, and report all receipts, expenditures, and the amount of funds in his custody to Tribal and General Council meetings and when requested to do so by either council. *Id.* at 16. Moreover, the Secretary-Treasurer must not disburse the Tribe's funds without Tribal Council approval, approve and sign all checks drawn on Tribal funds, and must have the books and records of the Tribe audited by an independent auditor. *Id.* Thus, the financial health of the Tribe is committed to the care of the Secretary-Treasurer, while the authority to administer the Tribe is committed to the Chairperson.

Any member of the Tribal Council may be removed or recalled from office pursuant to certain procedures. Permissible reasons for removal include absenteeism, neglect of duty, or misconduct. *Id.* at 21. Any member may request removal of a Tribal Council member simply by

submitting a written statement to the Chairperson, or if the accused Tribal Council member is the Chairperson, to the Vice-Chairperson, at least 10 days prior to the next council meeting. *Id.* At the meeting, the person making the charges against the Tribal Council member will present allegations and proof, and the member will have the opportunity to respond. The member may not vote or act as a Tribal Council member in the removal proceedings. *Id.*

The members of the Tribal Council may also be recalled directly by the General Council, through a significantly more burdensome process. A tribal member must circulate a petition requesting a special recall election, and must obtain the signatures of one-third (1/3) of the eligible voters of the General Council before presenting it to the Chairperson, or Vice-Chairperson if the target of the recall petition is the Chairperson. *Id.* at 23. After the signatures are certified as being those of eligible voters, the Tribal Council shall call a special recall election within sixty days. *Id.* A General Council meeting shall be held thirty days after the election has been called where the allegations and proof will be heard, and the target of the recall petition will have an opportunity to reply. *Id.* The official will be recalled if a majority vote for recall, "*provided that two-thirds of the General Council vote in said election*." *Id.* (emphasis added).

Under Article X, the Tribal Council shall declare a Tribal Council position vacant when a member resigns, is removed or recalled, among other reasons. *Id.* at 20-21. The term "resign" is not defined in the tribal constitution. Once a vacancy is declared, the Tribal Council may appoint a General Council member to the vacant seat if there are fewer than 12 months left in the vacant term, and through a special election if there are more than 12 months left in the vacant term. *Id.*

Any action of the Tribal Council, other than properly executed contracts or agreements with third parties, may be modified or repealed by the General Council by referendum pursuant to a process similar to the recall process. A member may cause a special election to be held within 20 days by submitting a petition to the Secretary-Treasurer signed by three Tribal Council members or one-third of the General Council. *Id.* at 24. The petitioned action shall pass if a majority vote for it, provided that two-thirds of the General Council vote in the election. *Id.*

Openness is a hallmark of the tribal constitution. Under Article XIV, Section 4, "Tribal members shall have the right to review all Tribal records, including financial records, at any

reasonable time in accordance with procedures established by the Tribal Council." *Id.* at 27. Under Article VIII, all meetings of the Tribal and General Councils must be open to all members of the Tribe, except where it would invade the privacy of an individual. *Id.* at 18. The Tribal Council must meet once per month, and may only meet more often if the schedule is published. Special meetings may only be called by the Chairperson or by three members of the Council, and the notice of the meeting must be given at least three days in advance and specify the purpose of the meeting. *Id.*

General Council meetings must take place at least once per year on the last Saturday of October, and may be called at other times by the Chairperson or by a petition signed by ten members of the General Council. *Id.* at 19. To establish a quorum at a Tribal Council meeting, a majority of the council members must be present, and at a General Council meeting, a majority of voting members must be present. *Id.* 18-19. For most matters, a simple majority of those voting is required.

Although Article XIII of the constitution (*id*. at 25-26) provides for a judiciary, one has not yet been created by the Tribal or General Council. The constitution provides, however, that the General Council serves as a court of appeals "whenever necessary." *Id.* at 26.

B. The Factions Break Away from the Tribal Council

From 2002-2004, the Tribe suffered through a period of tribal government breakdown caused by different factions being drawn in by different gaming developers: Rinaldo and Nevada Gold. Kennedy Declaration, ¶3. Through arbitration, the various factions of the tribe agreed that a new Tribal Council would be seated in December 2004: Joe Kennedy, Chairperson, Ed Beaman, Vice-Chairperson, Virginia Beck, Secretary-Treasurer, Grace Goad and Cleveland Casey. [IBIA; DURHAM] The new Tribal Council allowed the Rinaldo proposal to die on the vine. Kennedy Declaration, ¶3. The Tribe began looking into other gaming development deals, however. The annual appeals to BIA not to recognize tribal elections ceased at the November 2005 elections. *Id.* The 2006 election was also not challenged.

As gaming developers approached the Tribe with deals, fissures began to grow within the Tribal Council, however. During 2006, a long series of events took place that have a lingering effect today. One example is the mistreatment of staff. Far more grave, however, was the misappropriation and mismanagement of funds by the erstwhile Secretary-Treasurer, Virginia Beck.

E.g., Hunter Decl. at ¶¶5 & 7; Harrison Decl. at ¶¶5 & 9. During her term overseeing the Tribes finances, the trust fund set up for the minor children of the Tribe was set up so that a relative of Beck's obtained an exorbitant fee, paid out of the minors' trust fund. *Id.* at 9. Further, the trust was set up such that it was considered current taxable income for the beneficiaries. *Id.* Also during that time, the Tribe ceased to file form 1099s and W-2s with the IRS or perform required withholding. *Id.* at ¶¶5, 6, 18. The penalties and overdue payments still cast a pall over the Tribe's financial future. Hunter Decl., Exh. H. Eventually Beck was demoted from Secretary-Treasurer to Council Member. *Id.,* Exh. A.

Amid growing concerns regarding the handling of funds forwarded to the Tribe by prospective developers, charges were filed against Ed Beaman and Virginia Beck for neglect of duty and misconduct. Decl. Kennedy at ¶8. The hearing was initially scheduled for July 21, 2007, but was postponed until August 25, 2007. *Id.* Exh. T. A disagreement broke out over whether Beaman and Beck would be permitted to vote on the others removal. *Id.* Exh. U. The two left the council meeting. Council member Casey followed Beaman and Beck, returned, and then left to take a phone call, stating that he would be right back. *Id.* In light of the subject council members' failure to answer pending charges, their departure was deemed an abandonment of office consistent with tribal custom and tradition. *Id.* The Tribal Council appointed Margaret Armitage to fill the vacancy caused by Beck's resignation, because her term was to expire by the end of the year. *Id.*; Decl. Durham Exh. C at 20. The vacancy caused by Beaman's departure was not filled because there were more than twelve months left in the term. *Id.* Council Member Casey did not return to the meeting, giving rise to the Plaintiffs' argument that he had eliminated a quorum when he left to take a phone call, stating that he would be right back. MPA at 3.

Within weeks of that meeting, Beck went to the Tribe's banks and on the strength of a resolution adopted by her, Beaman and Casey, convinced the bank to remove the signatories on the account and replace them with herself. Decl. Kennedy ¶10. She also attempted to remove all of the funds from the Tribe's general account at the Community Bank of the Sierra, but the bank froze the account instead. Three days later, she visited the branch of the Bank of America where the Tribe held its gaming development funds, and wired $46,700, nearly the entire amount the Tribe had at the

bank, to a Wells Fargo account in Las Vegas, not controlled by the Tribe. *Id.* Funds for the support of the tribal government were also wired to this account from a casino developer called Merrion LLC. *Id.* Upon learning of this, the Tribe contacted the bank in Las Vegas, and the bank subjected the funds to an interpleader action. *Id.* The funds still remain frozen in that account.

While Casey threw his lot in with Beaman and Beck, the Tribal Council, Kennedy, Armitage, and Esteves, continued to publish notice of meetings and conduct business as usual in his absence. The Council announced the dates of the general election, and the Election Board prepared and conducted the election for three regularly open council seats and Ed Beaman's former seat. Decl. Durham at ¶16. Joe Kennedy, and Margaret Armitage were returned to the Council, and Pauline Esteves and Margaret Cortez joined them. *Id.* Exh. E.

Plaintiffs continued to meet, generally without giving notice to Kennedy and Esteves with whom they claimed to be on the Tribal Council or to other members of the Tribe. Plaintiffs appointed their own, new Election Board and conducted their own election, which they styled "Election II". Perhaps not surprisingly, both Beck and Casey won the most votes, although the number of votes cast was quite small. Although Casey ran in both Election II and the general election, he did not garner enough votes to obtain a seat on the Tribal Council. Decl. Durham Exh. E.

Both Plaintiffs and the Tribal Council sought recognition from the BIA, which was not forthcoming. Although the BIA does not have the authority to choose most tribal governments, if it decides not to recognize a tribal government, it may cut off funding on which most tribes depend for their core operations. Decl. Hunter ¶16. In effect, BIA's decision not to recognize a government may be tantamount to choosing the government for a tribe that does not have a successful enterprise, such as a casino. During the previous period of government unrest at Timbisha, federal funding for the Tribe fell from $733,009 in fiscal year 2002, to negative $21,767 in fiscal year 2003. *Id.* For the next several years, the amount of funding has gradually increased, at least through this year. *Id.*

Chairperson Kennedy called a General Council meeting for January 20, 2008. Durham Decl. at ¶20; Decl. Kennedy at ¶13. At the meeting, a quorum was established and the General Council voted to ratify the outcome of the Tribal Election held on November 13, 2007 and ratify the actions

taken by the Tribal Council in the period subsequent to August 25, 2007. *Id.* The General Council also voted to construe Beaman's and Beck's departure from the meeting to effect their resignations. *Id.* The BIA rescinded its earlier refusal to recognize the Tribal Council's general election based on the General Council's actions, and Plaintiffs appealed. *Id.* ¶14.

In addition to the votes related to the composition of the Tribal Council, the General Council voted to approve a pre-development agreement with a new gaming developer called Global. *Id.* 15. During the months following the General Council meeting, the Tribal Council considered whether to approve a full-fledged development deal with Global. After deliberations on whether Global had reneged on its promises, the Tribal Council voted to turn down the deal. *Id.* ¶20. Reaction against the vote by a vocal minority and the developer was swift and aggressive. *Id.* ¶¶21-23. Led by George Gholson, and funded by Global, the campaign first attempted to remove and then to recall Chairperson Kennedy. *Id.* To that end they funded a meeting in Las Vegas that purported to remove Kennedy from office and immediately replace him with George Gholson, without holding an election. Although this meeting was not overseen or certified by the Election Board, was not announced early enough to comply with the notice requirements of the tribal constitution, and the vote did not meet the requirement that two-thirds of the General Council must vote in any attempt to recall a council member, Decl. Boldad, the BIA quickly recognized the outcome. *Id.*

This led to a bewildering sequence of BIA decisions that alternatively recognized and withdrew recognition from the Tribal Council led by Kennedy, the same Council let by George Gholson, and then a decision to recognize the 2006 Council consisting of Joe Kennedy, Madeline Esteves, and the Plaintiffs, Beaman, Beck, and Casey, notwithstanding the fact that Beaman and Beck had abandoned their seats, and Casey's term had expired. Even ignoring the deemed resignations of Beaman and Beck, the original terms of office of all three would have expired: Beck and Casey in 2007, and Beaman in 2008.

Taking advantage of the confusion, Gholson seized many of the Tribe's files and computers with the cooperation of the Inyo County Sheriff's Department on October 20, 2008. Decl. Madeline Esteves ¶16. He refused to return the files and computers, even when BIA informed him that his recognition was not effective yet. *Id.* When the BIA again appeared to recognize him, Gholson

returned with a moving van on December 12, 2008, and removed virtually the entire contents of the office. *Id.* ¶19.

Compounding the injuries due to the seized records and computers, the Tribe's bank account was frozen at George Gholson's insistence. Decl. Hunter Exh. C. This set off the cat and mouse game that continues to this day. The Tribe receives funding, and Beaman, Beck, Casey, and Gholson seek to freeze or close the account. Decl. Hunter ¶11-15. As a result of the serial closure or freezing of bank accounts, the Tribe has failed to keep up with its commitments to the IRS. *Id.* ¶18. Further, the Tribe's funding for tribal housing, human, and other tribal member services have been shut down periodically because the funding had been available, but was frozen at the insistence of plaintiffs. Decl. Hunter ¶11. In addition, the Tribe has been unable to fulfill its obligations for those programs as well as environmental and historic preservation programs. Decl. Armitage; Decl. Forhope.

In January 2009, Plaintiffs and Gholson, and other individuals filed suit under the Administrative Procedure Act against the BIA in this court. *Timbisha Shoshone Tribe v. Salazar*, E.D. Cal. Case No. 09-cv-00246. At various times Gholson is Plaintiffs' Chairperson, *e.g.*, MPA, Decl. Gholson; Decl. Casey Exh. B, or their Tribal Administrator. *E.g.*, MPA, Decl. Beck ¶7.

ARGUMENT

This case presents to the Court with the daunting question of whether a tribe may retain control of its government in the face of a combination of monumental bureaucratic incompetence and a well-funded group determined not to lose its access to tribal land for a casino. At base, it is a conflict between individuals who want the Timbishas to retain the political structure that was recognized by the United States in 1983 as the successor to Death Valley Indian political structures, and individuals who want to change the nature of the tribe to encompass Shoshones dispersed through a much larger area of the Great Basin, that may or may not have preserved a political structure. Fortunately, this Court does not need to address such fundamental matters.

The motion before the Court does not meet the standard for granting a preliminary injunction. It is not defendants, but plaintiffs who have been the actual cause of the harms of which they complain. Their actions, taking advantage of the slow speed of the BIA, and the unpredictability of its decisions, have spread confusion among federal agencies and banks in a misguided attempt to

stop the Tribe from functioning, fulfilling its commitments to public and private entities, and providing services to its members. Further, if the Court were to grant a preliminary injunction, it would not relieve any of the harms that the plaintiffs imply would end with an injunction, and would instead impose far greater harms on the Timbishas.

Moreover, Plaintiffs cannot demonstrate that they are likely to succeed on the merits of their Complaint. Plaintiffs rely upon the notion that the BIA may choose a tribal government of its choosing, but that is simply not the state of the law. Further, there are fundamental flaws in the Plaintiffs' case that go to the jurisdiction of this court to hear their claims. The Court is also faced with a set of facts that are not at all clear at this stage of the proceedings, and it is therefore inappropriate to grant a preliminary injunction.

Finally, the conduct of the Plaintiffs in seeking to gain advantage over the Defendants in the matter before the Court, renders the provision of an injunction against Defendants inequitable, and contrary to the public interest. BIA recognized the Timbishas as the successors to a historic Tribe, and Congress provided land to the Tribe on that basis. To give over control of the Timbishas' resources to those who view the Tribe as a stepping stone to their personal wealth, would be a gross miscarriage of justice.

A. Standard for Granting a Preliminary Injunction

Because a "preliminary injunction is an extraordinary and drastic remedy," *Munaf v. Geren*, 128 S.Ct. 2207, 2219 (2008), it "may only be awarded upon a *clear showing* that the plaintiff is entitled to relief." *Pena v. Sillen*, 2009 WL 2849634, at *1 (E.D.Cal. Sept. 2, 2009) (emphasis in original) (citing *Winter v. NRDC, Inc*., 129 S.Ct. 365, 376 (2008)). In *Winter*, the Supreme Court clarified precisely what the moving party must clearly show to merit injunctive relief:

> [1] that he is likely to succeed on the merits,
> [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
> [3] that the balance of equities tips in his favor, and
> [4] that an injunction is in the public interest.

129 S.Ct. at 374 (emphasis and alterations added) (holding that preliminary injunction could not issue on showing of mere "possibility of irreparable injury").

Given the remedy's extraordinary and drastic nature, and the necessity of clearly

demonstrating it is warranted, a preliminary injunction is inappropriate where there are disputed facts relevant to the merits of the case. *See Mayview Corp. v. Rodstein*, 480 F.2d 714, 719 (9th Cir. 1973); *Cartridge Twins, LLC v. Wildwood Franchising, Inc.*, 2009 WL 1690728, at *1 (N.D.Cal. 2009). Nor may the injunction "issue merely because it is possible that there will be an irreparable injury to the plaintiff," *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987), or because a clear violation of the law has occurred. *Am. Trucking v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2008). "[W]hen considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other." *Nken v. Holder*, 129 S.Ct. 1749, 1763 (2009) (Kennedy, J., concurring) (applying the *Winter* test in the context of a stay).

Notwithstanding *Winter*, Plaintiffs contend they need only demonstrate "likelihood of irreparable injury," "serious questions going to the merits," and that "the balance of the hardships tipping sharply" in their favor.[1] This alternative standard is one-half of the sliding-scale standard applied by the Ninth Circuit before *Winter* was decided. *See, e.g., The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). Plaintiffs do not dispute that this alternative test is more lenient than the one required in *Winter*, nor can they. Whereas *Winter* holds that a plaintiff "must establish that he is likely to succeed on the merits," plaintiffs argue that it suffices to raise a "serious question" – one as to which the moving party has a "*fair chance*" of success. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir.1984) (emphasis added). Indeed, plaintiffs go so far as to contend that only a "reasonable probability"[2] of success – not even a 50% chance – is sufficient for preliminary injunctive relief. MPA at 17:7-11.

As plaintiffs' position is irreconcilable with *Winters*, the Ninth Circuit, unsurprisingly, has rejected it. For example, in *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d

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[1] *See* Plaintiffs Memorandum of Points and Authorities ("MPA") at 13:13-19 & n.5.

[2] Quoting *National Meat Ass'n v. Brown*, 2009 WL 426213, at *3 (E.D. Cal. Feb. 19, 2009) (citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1984). *Gilder* preceded *Winter* by 24 years and necessarily offers no support for the appropriate preliminary injunction standard in 2009. *National Meat*, on the other hand, does post-date *Winter*, but it not only fails to mention *Winter* at all, it also recites the very standard for injunctive relief that *Winter* rejected. *See* 2009 WL 426213 at *3 (holding that a preliminary injunction may issue on the "possibility of irreparable harm").

1046 (9th Cir. 2009), the Ninth Circuit considered whether the district court erred in applying the alternative standard urged by plaintiffs here. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 577 F.Supp.2d 1110, 1116 (C.D.Cal. 2008) (reciting the pre-*Winter*, sliding scale test). After reviewing the *Winter* factors set out *supra*, the Ninth Circuit held: "To the extent that our cases have suggested a lesser standard [than set out in *Winter*],[FN10] *they are no longer controlling, or even viable*." *Am. Trucking*, 559 F.3d at 1052 (emphasis added).[3]

Likewise, in *Stormans, Inc. v. Selecky,* 571 F.3d 960 (9th Cir. 2009), the Court reviewed a court's use of the alternative, sliding-scale standard for granting preliminary injunctions from before Winter was decided. Quoting *American Trucking*, the Ninth Circuit held: "'[t]o the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.' Thus, the district court's appropriate application of our pre-*Winter* approach in granting relief is now error. The proper legal standard for preliminary injunctive relief requires a party to demonstrate [the four *Winter* factors]." *Id.* at 978. *See also Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009) (applying *Winter* factors, not the alternative test advocated by plaintiffs).

Most of the district courts in this Circuit that have considered the issue have followed suit. For example, in *Small v. Swift Transp. Co., Inc*., 2009 WL 3052637 (C.D.Cal. Sept. 18, 2009), the petitioner sought a preliminary injunction to enjoin alleged unfair labor practices. Relying on pre-*Winter* precedent, petitioner argued that *Winter*'s should be read to require a clear showing of irreparable harm but not of the three remaining factors; thus, a preliminary injunction could issue on something less than a strong showing of likely success on the merits. *Small*, 2009 WL 3052637 at *4 (citing *Miller v. Cal. Pac. Med. Ctr*., 19 F.3d 449, 460, 462 (9th Cir.1994).

The district court denied the petition, finding it inconsistent with *Winter*'s characterization of a preliminary injunction's as "an extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." *Id.* at *5 (quoting *Winter*, 129 S.Ct. at 375-76). In so ruling, the court noted *American Trucking*'s recitation of the *Winter* factors as mandatory and

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[3] The case cited in footnote 10 of *American Trucking* as illustrative of those decisions that are "no longer controlling, or even viable," is *Lands Council v. McNair*, 479 F.3d 636, 639 (9th Cir. 2007), which sanctioned the alternative standard urged by plaintiffs in this case.

its observation that any lesser standard was not viable. *Id.* Casting the petitioner's arguments in a that-was-then-this-is-now light, *Small* explained,

> **pre**-*Winter* and **pre**-*American Trucking*, Petitioner may have been able to produce only some evidence together with an arguable legal theory to satisfy the first part of the applicable test [success on the merits]. . . . However, post-*Winter* and post-*American Trucking*, Petitioner carries a different burden. *Now, he must establish that he is likely to succeed on the merits of his claims*. Such is necessary in order to clearly show that he is entitled to preliminary injunctive relief. [citing *Winter* and *American Trucking*.] Accordingly, a *failure to establish that he is likely to succeed on the merits of his claim is fatal to Petitioner's petition*.

Id. (emphasis added). Judge Damrell of this Court made the same point more concisely: "Contrary to plaintiff's continued protestations, *Winter* represents the sole, controlling standard for preliminary injunction relief. There is no longer a viable, alternative sliding-scale test." *Earth Island Inst. v. Carlton*, 2009 WL 2905801, at *1 n.2 (E.D.Cal. Sept. 4, 2009).

The district courts outside California agree. In *Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 1636169, at *1 n.1 (D.Ariz. June 10, 2009), the district court held that the alternative standard pressed by plaintiffs here did not survive *Winter*: "In *American Trucking*, consistent with the Supreme Court in *Winter*, the Court of Appeals explicitly overruled this lesser standard." A district court in Washington also recognized that Am. Trucking overruled the more lenient standard. *Doe v. Reed*, 2009 WL 2971761, at *5 (W.D.Wash. Sept. 10, 2009). Two weeks ago, the district court in Nevada also interred the sliding scale test: " In light of the *Winter* decision . . . the Ninth Circuit has indicated, "To the extent our cases have suggested a lesser standard, they are no longer controlling, or even viable." [citing *Am. Trucking*]. Accordingly, this court will require Plaintiff to make a showing on all four of the preliminary injunction requirements." *Matthews v. Legrand*, 2009 WL 3088325, at *3 n.1 (D.Nev. Sept. 22, 2009). *See also G. v. Hawaii, Dept. of Human Services*, 2009 WL 2877597, at *3 n.2 (D.Hawaii Sept. 4, 2009) (observing that the "'serious questions' component of the alternative 'sliding scale' standard" is contrary to the holdings in *Stormans* and *Am. Trucking*).

In sum, the standard urged by Plaintiffs would allow injunctive relief on evidence of only a "fair chance" of success – a more lenient than the "likelihood of success" showing demanded by

Winter. Under *Winter*, *Stormans* and *American Trucking*, that is neither controlling nor viable. Thus, as this court recognized in *Earth Island Institute*, *Winter* sets the sole standard for ruling on plaintiffs' motion for preliminary injunctive.

1. Plaintiffs Have Failed to Show that They are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

Although Plaintiffs have recited a litany of alleged harms, they have failed to note that almost without exception, the harms that they cite are either due to the actions of Plaintiffs, or not harms that could be redressed by a preliminary injunction. By far, the largest number of harms that they assert relate to the cessation of RSTF checks, which are sent to members on a per capita basis. It is axiomatic that if one is not a member of the Tribe, and only members have an entitlement to the per capita payments, then it is not a harm when the payments cease. Economic injury alone, however, is not generally considered irreparable. *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir.1985). Furthermore, such harms must be, by their nature, imminent. *Caribbean Marine Servs. Co ., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir.1988). Non-members were removed from the rolls at the beginning of January 2009. Goad Decl. ¶26. The primary cause of the complained of lack of tribal services is the fact that all of Plaintiffs' declarants are not members of the Tribe, and are therefore not eligible for such services. Even if an injunction were issued against the Tribal Council, it would not change the fact that declarants are not members of the Tribe, and therefore not eligible for services available only to members.

Plaintiffs conveniently forget, however, that their successful efforts to freeze the Tribe's bank accounts have led to the curtailment of services to the Tribe's members. It has also led to the loss of valued employees who could not last long stretches without a paycheck. Decl. Kennedy ¶39. Further, the Tribe is actually employing seven tribal members who would likely lose their jobs as a result of a preliminary injunction. *Id*. ¶62. Further, any harms to Plaintiffs' declarants caused by their removal from the membership rolls last January would pale in comparison to the harms that would be suffered by the hundreds of bona fide tribal members who would lose tribal services such as housing and job placement services. Decl. Armitage; Decl. Sudway.

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2. Likelihood of Success on the Merits

Under *Winter*, Plaintiffs must make a "clear showing" they are *likely* to succeed on the merits of their case. Analyzed under this proper standard,[4] Plaintiffs' are *unlikely* to succeed for three reasons. First, the Court lacks jurisdiction over Plaintiffs claims because (a) Plaintiffs lack standing to press their claims, and (b) Defendants possess sovereign immunity from suit. Second, the BIA's record of recent decisions and tribal law – each of which Plaintiffs rely upon as evidence of their likely success – are inconclusive at best. Based on this record, a preliminary injunction cannot issue.

(a) The Court Lacks Jurisdiction Over Plaintiffs' Causes of Action

(i) Plaintiffs Lack Standing Because They Are Not Tribal Members

Under Article III's case-controversy requirement, a plaintiff must have standing to sue; without it, the Court lacks jurisdiction and must dismiss the case. *Fleck & Assocs,. Inc. v. City of Phoenix*, 471 F.3d 1100, 1103-07 (9th Cir. 2006). Plaintiffs lack standing because, as the undisputed evidence shows, they are not members of the Timbisha Tribe.

The "irreducible constitutional minimum of standing contains three elements": (1) an "injury in fact" – an invasion of a legally protected interest which is . . . concrete and particularized;" (2) "a causal connection between the injury and the conduct complained of" such that the injury is "fairly . . . trace[able] to the challenged action of the defendant;" and (3) "it must be likely . . . that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Plaintiffs' causes of action all stem from the allegation that Defendants have formed an illegal Tribal Council as part of a "conspiracy to violate the Constitution and laws of the Tribe by continuing to divert" tribal funds" the expenditure of which was done without the permission of the "properly constituted Tribal Council." (Complaint at 2:4-5, 7-8.). This conspiracy has supposedly "prevented [Plaintiffs] from directing the Tribe's funding to proper and legal uses," as well as causing other similar harms. (Complaint at 8:3-4.) Plaintiffs' causes of action are premised on their

[4] As explained above, the standard advocate by Plaintiffs – "a reasonable probability, not an overwhelming likelihood," something less than 50% (*see* MPA 17:7-11) – is insufficient as a matter of law.

membership in the Tribe: If Plaintiffs are not members, they necessarily have not suffered an "injury in fact" from Defendants' alleged violations of tribal law.

The evidence shows that Plaintiffs are not tribal members. Article III, section 1 of the Tribe's Constitution provides the only three bases for tribal membership: (1) being listed on the Tribe's genealogy roll of March 1978; (2) lineal descent from persons on the roll; qualifications for tribal membership; (3) persons of Indian blood who are adopted by the Tribe. Decl. Goad ¶16. Section 6 of the Constitution requires the Tribal Council to "revoke membership status from any individual whom the enrollment committee has determined was erroneously, fraudulently or otherwise incorrectly enrolled." Plaintiffs and others were offered a hearing and a chance to offer evidence that they in fact are lineal descendants of the March 1978 Base Roll. Goad Decl. ¶25. Only one, Edward Merchant, responded. *Id.* He did not show up for the hearing. *Id.*; Decl. Kennedy ¶68. Further, although Plaintiffs accuse Defendants of revoking the membership of those with whom it disagrees, it should be noted that the Enrollment Committee is independent of the Tribal Council, and the Tribal Council is bound by the Constitution to revoke erroneous memberships. Durham Decl. Exh. C. at 2. Moreover, many of those who were removed from the rolls had nothing to do with the factions that are attacking the Tribal Council, and some of those who oppose the Council appear on the March 1978 Base Roll and have not been disenrolled.

Because Plaintiffs are not tribal members, they have not suffered from Defendants' alleged violations of tribal law. It necessarily follows that Plaintiffs cannot satisfy the traceability and redressability requirements for standing, either. Accordingly, Plaintiffs lack standing to bring their case, and the Court must dismiss it for lack of jurisdiction.[5]

(ii) Defendants Possess Sovereign Immunity from Suit

"Sovereign immunity limits a federal court's subject matter jurisdiction over actions brought against a sovereign. Similarly, tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." *Alvarado v. Table Mtn. Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007).

[5] Even if the Court concludes that Plaintiffs' tribal membership status is uncertain, that uncertainty cuts against the issuance of the preliminary injunction, which cannot issue absent a "clear showing" that Plaintiffs are entitled to one.

Tribal sovereign immunity also "extends to tribal officials when acting in their official capacity and within the scope of their authority." *Cook v. Avi Casino*, 548 F.3d 718, 727 (9th Cir. 2008). The *Ex Parte Young* doctrine creates an exception to sovereign immunity where the plaintiff "has alleged an ongoing violation of federal law and seeks prospective relief." *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007); *see also Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985). As demonstrated below, Timbisha's sovereign immunity extends to the individual Defendants, and thus necessitates the dismissal of Plaintiffs' complaint for lack of jurisdiction.

Plaintiffs sue the Defendants in their official and individual capacities.[6] Plaintiffs strenuously argue that they, along with Defendants Kennedy and M. Esteves, comprise the only legitimate Council. In doing so, Plaintiffs implicitly acknowledge that Kennedy and M. Esteves *are* Council members. Plaintiffs' Complaint is premised on Defendants' alleged misuse of tribal funds in violation of tribal law. Thus, at least as to Kennedy and M. Esteves, Plaintiffs' suit sues tribal officials acting in their official capacity. Under these circumstances, there can be no serious dispute that Kennedy and Esteeves enjoy immunity from suit.

Plaintiffs make two arguments to avoid this result, but both fail. First, Plaintiffs argue they can sue the Defendants in their official capacity under *Ex Parte Young*, 209 U.S. 123 (1908). That exception does not apply here for several reasons. As an initial matter, *Ex Parte Young* applies only in suits for prospective injunctive relief (which are not treated as actions against the government), yet Plaintiffs' complaint makes clear that they seek reimbursement of the tribal funds that Defendants allegedly misused. (*See, e.g.*, Complaint ¶56 ("Accordingly, Plaintiffs are entitled to restitution from Defendants . . ."); *id.* at 13:18 (praying "that the court award damages in an amount to be determined at trial"). As a matter of law, such relief is unavailable in suits against Defendants in their official capacity.

More fundamentally, *Ex Parte Young* is inapposite because Plaintiffs premise their causes of action on "Defendants' conspiracy to violate the Constitution and laws of the Tribe;" *Ex Parte*

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[6] *Kentucky v. Graham*, 473 U.S. 159 (1985) discusses the distinction between the two.

Young, however, applies only to remedy ongoing violations of *federal law*.[7] *See generally Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). As Plaintiffs' causes of action do not allege violation of any federal rights, the *Ex Parte Young* exception does not apply, and Defendants retain their immunity from suit for acts taken in and within their scope of their official capacity.

Second, Plaintiffs attempt to avoid the sovereign immunity by suing Defendants in their individual capacities. Given that Plaintiffs acknowledge Kennedy and M. Esteves' status as Council members, and complain of actions taken in their role as Council Members, it is evidence that only an official capacity suit may lie against these Defendants. As individuals, the Defendants are incapable of committing the acts alleged against them.

In sum, Defendants' enjoy sovereign immunity from Plaintiffs' causes of action; at worst, Defendants may well be immune from suit, which prevents Plaintiffs from showing the requisite "clear showing" they are likely to succeed on the merits of their Complaint. No preliminary injunction may issue under these circumstances.

(b) Neither the BIA Record nor Tribal Law Demonstrates That Plaintiffs Are Likely to Succeed on the Merits

(i) The BIA Record

Plaintiffs contend that the record of BIA decisions establishes that the Agency likely will conclude that the Agency recognizes the Council elected in November 2006 as the Tribe's present "legitimate government."[8] If the BIA's decisions since 2006 reveal anything, it is the Agency's

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[7] Plaintiffs' Complaint could be understood to contend the BIA's decision recognizing them as Tribal Council members established in them a federal right to these positions, and that Defendants' failure to acknowledge Plaintiffs' council membership status actions violated *Plaintiffs'* federal rights. If that is Plaintiffs position, it fails. Even assuming Plaintiffs are tribal members – as shown above, they are not – their entitlement to serve as Tribal Council members arises under Tribal law, not federal law; the BIA's decision to recognize a particular Council reflects the Agency's considered assessment of how the Tribe has applied its laws internally. Moreover, a BIA decision recognizing a particular group of people as a tribe's governing council members does not create a federal private right of action in a BIA-recognized Council member to enforce that decision unless Congress has expressly created such a right. *See Alexander v. Sandoval*, 532 U.S. 275, 291-93 (2001). Congress has not created a private right of action, so none may be implied (notwithstanding Plaintiffs' suggestions to the contrary).

[8] Plaintiffs contend that if the BIA is likely to determine that they comprise the "lawful majority" of the current Tribal Council, then they necessarily are likely to prevail on their substantive claims before this Court because the basis of each of those claims is that Defendants are acting without lawful authority. (MPA at 21-22.)

apparent incoherent approach to identifying a Tribal Council and the utter hopelessness of predicting what the Agency might decide next. Rhetoric aside, Plaintiffs' recitation of the BIA's pattern of inconsistent decision-making from 2007 through 2009 makes this plain. (MPA at 4-8.)

Plaintiffs assert they are likely to prevail on the merits of their case because the BIA's last decision before being relieved of its responsibility for this case recognized that the 2006 Council.[9] But cherry-picking a favorable result from this smoking train wreck of an administrative process is more than a bit self-serving. Further, Plaintiffs conveniently ignore the fact that Department of the Interior policy is to attempt to avoid interfering with tribal leadership, which is an intra-tribal matter, and the Department should defer to tribal resolution of the matter through the normal electoral process, which moots out such struggles. *See, e.g.*, *Hamilton v. Acting Sacramento Area Director*, 29 IBIA 122, 123, 1996 WL 165057; *Smith v. Pacific Regional Director*, 42 IBIA 224, 2006 WL 1148713. This policy is echoed by the federal courts' general reluctance to intervene in matters of tribal leadership. *See In re Sac & Fox Tribe of Mississippi in Iowa*, 340 F.3d 749, 763 (8th Cir. 2003) (citing cases, including *U.S. v. Wheeler*, 435 US 313, 323-36 (1978)); *see also, Ordinance 59 Ass'n v. U.S. Dept. of Interior Secretary*, 163 F.3d 1150, 1153-59 (10th Cir. 1998).

In sum, given the BIA's schizophrenic decision making thus far, neither side can predict with any certainty how the Agency will eventually resolve the appeal(s) before it on the make-up of the Tribal Council. In fact, given that tribal elections take place each November, it is entirely plausible – certainly no less so than Plaintiffs' predicted outcome – that the BIA will select one of the newly elected Councils. The only thing that seems certain is that the BIA's record up to now has little predictive value. Therefore, the BIA's record is not evidence of a strong likelihood that the BIA will rule in Plaintiffs' favor, and equally insufficient to show they are likely to succeed on the causes of action raised in their complaint.

(ii) Tribal Law

Plaintiffs also contend that Tribal Law demonstrates they are likely to prevail on their claim

[9] Plaintiffs' position calls to mind Judge Leventhals' observation that the invocation of legislative history is like looking over a crowd of people at a party and picking out one's friends.

that they comprise the lawful governing majority of the current Tribal Council. This contention fails on its own terms. The November 2006 election saw the election of Plaintiff Ed Beaman and Defendant Madeline Esteves; they joined three Council Members elected in November 2005 – Defendant Joe Kennedy, Plaintiff Virginia Beck, and Plaintiff Cleveland Casey. Under Timbisha law, Tribal Council members serve staggered two-year terms. (Timbisha Const. Art. VI, §3.) Thus, Beaman's and M. Esteves' terms would have ended in November 2007; Kennedy's, Beck's and Casey's terms would have expired toward the end of 2008. Whatever the BIA ultimately decides, it seems quite unlikely it will decide that the *current* Tribal Council is made up of five members whose terms expired years ago. It seems just as likely, if not more so, that the Agency will continue to recognize the Council elected in November, 2007 and recognized by the BIA in February, 2008, or to recommend that the Tribe conduct a new election this coming Fall.

Ignoring the term issue entirely, Plaintiffs argue that the BIA likely will recognize them as the still-current lawful majority because the "undisputed facts" show that Defendants violated tribal law in various respects. Even if it were undisputed that Defendants had committed these violations, the fact remains that as a matter of Tribal law, Plaintiffs' terms would have ended no later than November, 2008. The reality, however, is that Plaintiff's accusations are very much disputed.

Finally, it is important to remember that when assessing Plaintiffs' likelihood of success on the merits, the relevant "success on the merits" is *not* of Plaintiffs' claim that they comprise the "lawful majority" of the Council. Rather the relevant inquiry is whether Plaintiffs will likely prevail on the causes of action in their Complaint – namely, violation of tribal law, conversion, fraud, breach of fiduciary duty, wrongful interference with economic advantage, and unfair competition. Plaintiffs attempt to elide this distinction by claiming that if they are likely to prevail on the question of whether they comprise the "lawful majority" of the current Tribal Council, then they necessarily are likely to prevail on their substantive claims since the basis of each of those claims is that Defendants are acting without lawful authority. (MPA at 21:21-22:6.). This is far from clear.

Even if Defendants are determined not to have been the properly constituted Council, Plaintiffs must demonstrate they were damaged by the expenditure of federal funds. Plaintiffs will struggle to make that showing because the Tribe benefitted from Defendants' administration of the

federal funds, which Defendants applied for and spent (on tribal services) according to the terms of the federal grant; the funds were not pocketed or used on non-tribal projects. Plaintiffs suggest they were damaged because they were deprived of the ability to spend the federal funds as they would have chosen. But the Tribal Council, as the Tribe's governing body, must spend the federal funds for the benefit of the Tribe and the fact (if it is a fact) that Plaintiffs would have spent the money on one legitimate use is not evidence they were damaged by Defendants' decision to spend the money on a different but equally legitimate use. In other words, assuming Defendants acted as a Council when they should not have does not mean all actions taken on behalf of the Tribe necessarily harmed the Tribe.

3. Equitable and Public Interest Considerations Weigh Against a Preliminary Injunction

As shown above, Plaintiffs have spent a great deal of time seeking to starve the Tribe of funds. By doing so, they have compounded the injuries of their declarants, and the Court should not reward such behavior by granting the extraordinary relief that they seek. The relief that Plaintiffs seek is extraordinary indeed, for while they assure the Court that they only seek a restoration of the status quo pending judgment on the merits of this case, their proposed order and their actions to date belie that supposed intention. Plaintiffs have already purported to remove Chairperson Kennedy from office and replace him with George Gholson, (MPA, Decl. Gholson ¶¶1-3), a non-member of the Tribe. Their continual harassment of the Tribe by freezing its funds through serial threats of litigation, and their willingness to then complain of their campaign's effects on the Tribe and tribal services is brazen to say the least. To take two examples, Virginia Beck, who is most responsible for the Tribe's initial difficulties with the IRS, *see* Decl. Harrison, feigns surprise that her and her comrades' efforts to shut off funding to the Tribe have led to its inability to keep up on its payments to the IRS. MPA, Decl. Beck ¶9. She also strikes an unintentionally humorous tone when she claims that all tribal programs functioned well when she held office. MPA, Decl. Beck ¶13; *Compare*, Decl. Hunter ¶¶5-6; Decl. Harrison ¶¶5-10.

The Court should also consider the public interest as evidenced by the Homeland Act. In the Act, Congress recognized the historic ties of the Tribe to Death Valley, and not very far beyond it.

Decl. Durham Exh. K; Exh. J at 4, 15, 19. Congress' action in enacting the Homeland Act was based on the Draft Secretarial Report and the BIA's recognition of the Tribe as being of and from Death Valley. *Id.* Exh. J at ii-iii, x, 4. In recognizing the Tribe, the Department of the Interior found that the Tribe was derived from several traditional Western Shoshone local political units located in Death Valley and the neighboring mountain ranges. Decl. Kennedy Exh. B at 5. The historic Tribe's territory stretched from north of Stovepipe Wells, including the Grapevine Mountains to the south end of Death Valley and the south end of the Panamint Mountains and the Saline Valley, and approximately 50 miles from the mountains west of Death Valley to the mountains east of it. *Id.* at 18-19. Decl. Kennedy Exh. B at 19.

The Plaintiffs are not from Death Valley, and have no cultural or genealogical connection to it. Small wonder then that they have expressed antipathy to the homeland that is not theirs. *See*, *e.g.*, Plaintiffs' Beck Decl. at para. 12; Leroy Jackson Decl. para. 9; Hunter Decl. ¶7 & 10.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be denied.

Dated: October 6, 2009

Respectfully submitted,

By: /s/ Jeffrey R. Keohane
Jeffrey R. Keohane
FORMAN & ASSOCIATES
Attorneys for Defendants