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8
9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**
11 **FRESNO DIVISION**

12 TIMBISHA SHOSHONE TRIBE, a federally-
recognized tribe, EDWARD BEAMAN,
13 Individually and as Vice Chairman of the
Timbisha Shoshone Tribe, VIRGINIA BECK,
14 Individually and as Secretary/Treasurer of the
Timbisha Shoshone Tribe, and CLEVELAND
15 LYLE CASEY, Individually and as Executive
Council Member of the Timbisha Shoshone
16 Tribe,

17 Plaintiffs,

18 v.

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

23 Defendants.
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) Case No. 1:09-cv-1248-LJO-SMS

) **PLAINTIFF'S MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF THEIR MOTION FOR**
) **PRELIMINARY INJUNCTION**

) **[Fed. R. Civ. P. 65]**

) Date: October 15, 2009
) Time: 8:30 a.m.
) Dept.: Courtroom No. 4
) Judge: Hon. Lawrence J. O'Neill

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1 **I. INTRODUCTION**

2 The instant action arises out of a dispute concerning the lawful leadership of the Timbisha
3 Shoshone Tribe (“Tribe”) and Plaintiffs EDWARD BEAMAN, CLEVELAND LYLE CASEY, and
4 VIRGINIA BECK’s (collectively “Plaintiffs”) rightful status as the lawful governing majority of the
5 Tribe’s governing body – the Tribal Council. The instant motion seeks to restore the status quo of the
6 tribal governmental leadership by requiring Defendants JOSEPH KENNEDY, MADELINE
7 ESTEVES, PAULINE ESTEVES, ERICK MASON and ANGELA BOLAND (collectively
8 “Defendants”) to acknowledge and abide by the terms of the Tribe’s laws, and various decisions
9 issued by the Department of Interior, Bureau of Indian Affairs (“BIA”) which recognize Mr. Beaman,
10 Mr. Casey, Ms. Beck, and Defendants Joseph Kennedy and Madeline Esteves, as the only lawful
11 governing majority of the Tribal Council, which constitutes the Tribe’s governing body.¹ For the
12 following reasons, Plaintiff’s respectfully request that this Court issue a preliminary injunction
13 preserving the *status quo* leadership of the Tribe, as recognized by the BIA, pending final
14 adjudication of administrative proceedings, and any subsequent appeal therefrom.

15 **II. FACTUAL BACKGROUND**

16 **A. Tribal Governmental Structure.**

17 The General Council consists of all enrolled members of the Tribe who are at least sixteen
18 (16) years of age or older, and this body elects the Tribal Council. (Declaration of Edward Beaman
19 (“Beaman Decl.”), at ¶ 1, 2; Request for Judicial Notice In Support of Plaintiff’s Motion for
20 Preliminary Injunction (“PRJN”), Ex. 31, Articles IV & V.) The Tribal Council is the Tribe’s
21 governmental body, which is composed of five (5) members at a duly called election, which is
22 charged with the day-to-day administration of the affairs of the Tribe, including the administration
23 and distribution of Tribal funding. (*Id.*, at ¶¶ 3, 4; PRJN, Ex. 31, Articles VI & V.) Pursuant to the
24 Tribe’s Constitution, no business of the Tribal Council may take place in the absence of a quorum,
25

26 ¹ Defendants are not entitled to the Tribe’s sovereign immunity as officials of the Tribe, as they have been sued both in
27 their individual and official capacities, and the complaint sufficiently alleges that these purported Tribal officials have
28 acted beyond the scope of authority that the Tribe is able to bestow upon them. *Crowe & Dunlevy, P.C. v. Stidham*, 609
F.Supp.2d 1211, 1216-1217 (N.D. Okla. 2009) (entering preliminary injunction against tribal judge under *Ex Parte Young*
doctrine).

1 which consists of at least three (3) Tribal Council members. (*Id.*, at ¶ 4; PRJN, Ex. 31, Article VIII,
2 § 2(b).)

3 **B. Procedural History of Tribal Council Elections and Subsequent BIA**
4 **Recognitions.**

5 **i. The General Council Elects a Tribal Council in November 2006.**

6 In November 2006, the Tribe Conducted a Tribal Council election, which resulted in Plaintiffs
7 Edward Beaman, Virginia Beck, Cleveland Lyle Casey, and Defendants Joseph Kennedy and
8 Madeline Esteves' election (hereinafter "2006 Council"). (Beaman Decl., at ¶ 5.) Mr. Kennedy was
9 elected to the Chairperson position, Mr. Beaman was elected to the position of Vice-Chairperson,
10 Ms. Esteves was elected to the position of Secretary/Treasurer, and Mr. Casey and Ms. Beck were
11 elected to the positions of Executive Council members. (*Id.*) Under the laws of the Tribe, the Tribal
12 Council constitutes the governing leadership of the Tribe. (*Id.*, at ¶¶ 1-4.) Unfortunately, this
13 election was the Tribe's last undisputed and lawful election of members of the Tribal Council.

14 **ii. Defendant Kennedy Attempts to Remove Ms. Beck and Mr. Casey**
15 **From Tribal Council Office in Violation of Tribal Law.**

16 On August 25, 2007, the Tribal Council held a special meeting, during which removal charges
17 against Mr. Beaman and Ms. Beck were scheduled to be heard. (Beaman Decl., at ¶ 6; PRJN, Ex. 1.)
18 These charges were improperly filed with the Tribe's housing director by tribal member Wallace
19 Eddy, Sr., nor was any proof or evidence offered to support the charges. (*Id.*) Prior to these charges
20 being heard at the scheduled meeting, the members of the Tribal Council met to discuss the
21 procedures to be utilized at the hearing. (*Id.*) At that meeting, Mr. Beaman advised Mr. Kennedy
22 that he had to maintain order at the meeting and follow the Tribal law in conducting the meeting.
23 (*Id.*) At the August 25, 2007 meeting, Mr. Eddy presented the alleged charges against Mr. Beaman
24 and Ms. Beck. (Beaman Decl., at ¶ 7; PRJN, Ex. 1.) After Mr. Eddy presented his charges, the
25 members of the Tribal Council disagreed as to which members would be permitted to vote on the
26 removal charges. (*Id.*) Mr. Kennedy failed to maintain order at the meeting, and as a result of this
27 dispute and the resulting disorder, Ms. Beck, Mr. Casey and Mr. Beaman left the meeting, leaving the
28 Tribal Council with an insufficient number votes under Tribal law to continue with the removal

1 proceedings. (*Id.*; RJN, Ex. 1.) Thereafter, Mr. Kennedy declared that leaving the meeting
 2 constituted guilt of the charges made, and a motion was made to remove Ms. Beck and Mr. Casey
 3 from their Tribal Council offices, which was ultimately never voted on. (*Id.*, at ¶ 8; PRJN, Ex. 1.) In
 4 a blatant attempt to circumvent Tribal law governing quorum requirements at Tribal Council
 5 meetings, Mr. Kennedy purported to replace Ms. Beck with another tribal member, Margaret
 6 Armitage, to continue the meeting. (*Id.*) Ultimately, a Tribal Council vote was never undertaken on
 7 the charges supporting removal, and Mr. Kennedy did not maintain order at the meeting, or properly
 8 follow Tribal law in conducting the proceedings. (*Id.*)

9 **iii. Defendants Kennedy and Esteves Refuse To Abide By Tribal Law**
 10 **and Attempt to Install a Rogue Tribal Government Without The**
 11 **Approval of the 2006 Tribal Council.**

12 As a result of this meeting, two political factions of the Tribal Council emerged—one faction
 13 led by Mr. Beaman, Ms. Beck and Mr. Casey, Plaintiffs in this action, and the other led by
 14 Mr. Kennedy. As the governing majority of the Tribal Council, Mr. Beaman, Ms. Beck and
 15 Mr. Casey called a special Tribal Council meeting on September 22, 2007, at which votes were taken
 16 to (1) declare the removal of Ms. Beck and Mr. Beaman void, (2) affirm that the Tribal Council
 17 consisted of Mr. Beaman, Ms. Beck, Mr. Kennedy, Ms. Esteves, and Mr. Casey; (3) declared any
 18 efforts by Mr. Kennedy and Ms. Esteves to hold a Tribal Council election for Mr. Beaman and
 19 Ms. Beck's offices as null and void; and (4) amend the Tribal election ordinance and appoint an
 20 election board in anticipation of the 2007 Tribal Council elections. (Beaman Decl., at ¶ 9; PRJN,
 21 Exs. 11 & 15 (outlining history of present dispute).)

22 Rather than abide by the vote of the governing majority of the Tribal Council to permit
 23 Ms. Beck and Mr. Casey to retain their offices, Mr. Kennedy set out to constitute his own rogue
 24 Tribal government. On November 13, 2007, Mr. Kennedy purported to call a meeting of the General
 25 Council to conduct an election for four (4) positions on the Tribal Council, other than his. (Beaman
 26 Decl., at ¶ 10; PRJN, Exs. 11 & 15.) At this invalid election, the following tribal members were
 27 purportedly elected to the Tribal Council: (1) Margaret Armitage (Vice-Chairperson); (2) Madeline
 28 Esteves (Secretary-Treasurer); (3) Margaret Cortez (Executive Council Member); and (4) Pauline
 Esteves (Executive Council Member). (*Id.*, at ¶¶ 10 & 11.) On that same day, the governing

1 majority of the Tribal Council conducted a separate Tribal Council election for those seats that had
2 expired resulting in the election of Doug Gholson (Chairperson), Mr. Casey (Executive Council
3 Member), and Virginia Beck (Executive Council Member). At this election, the Election Board
4 appointed by the governing majority of the Tribal Council declared Mr. Kennedy's purported election
5 as null and void. (*Id.*, at ¶ 11, PRJN, Exs. 11 & 15.)

6 **iv. Defendants Kennedy and Esteves and the 2006 Council Seek**
7 **Recognition of Their Actions From the BIA.**

8 Both factions of the Tribal Council sought recognition of these separately conducted Tribal
9 Council elections from the BIA. (Beaman Decl., at ¶ 12, PRJN, Exs. 1, 11 & 15.) On December 14,
10 2007, Troy Burdick, the Superintendent of the Central California Agency of the BIA refused to
11 recognize the results of either election on the grounds that they were conducted in violation of Tribal
12 law. (*Id.*; PRJN, Ex. 1.) Superintendent Burdick also concluded that the purported removal of
13 Ms. Beck and Mr. Casey from their offices was inconsistent with Tribal law. (*Id.*, at ¶ 10; PRJN,
14 Ex. 1.) Accordingly, Superintendent Burdick continued to recognize the Tribal Council elected in
15 2006 consisting of Mr. Kennedy, Mr. Beaman, Ms. Esteves, Ms. Beck and Mr. Casey ("2006
16 Council") as the only legal Tribal Council under Tribal law. (*Id.*, at ¶ 12; PRJN, Ex. 1.)
17 Mr. Kennedy appealed from Superintendent Burdick's decision to Dale Morris, Pacific Regional
18 Director of the BIA, seeking recognition of the purported removals on August 25, 2007, and the
19 purported Tribal Council election conducted by Mr. Kennedy on November 13, 2007. (*Id.*, at ¶ 13;
20 PRJN, Ex. 2.)

21 As before, instead of abiding by the decisions of the BIA while his appeal was pending,
22 Mr. Kennedy engaged in a campaign to flout tribal law and install a series of rogue tribal
23 governments to silence tribal members who were critical of his leadership by disenrolling them, all
24 without the approval of the governing majority of the Tribal Council. (PRJN, Exs. 32 & 33 (election
25 and enrollment ordinances).) In support of these efforts, Mr. Kennedy conducted a special General
26 Council meeting on January 20, 2008 at which votes were taken to purportedly: (1) ratify the results
27 of the November 13, 2007 Tribal Council election; (2) ratify the results of the illegal removals of
28 Mr. Beck and Mr. Casey from their offices at the August 25, 2007 Tribal Council meetings; and (3)

1 ratify a legal interpretation of Mr. Beck and Mr. Casey's departure from the August 25, 2007 Tribal
 2 Council meeting as resignations from the Tribal Council. (Beaman Decl., at ¶ 14.) On February 4,
 3 2008, Mr. Kennedy sought recognition of the actions taken at the January 20, 2008 from
 4 Superintendent Burdick. (*Id.*, at ¶ 15; PRJN, Ex. 2.) Even though the appeal of the December 14,
 5 2007 decision was still pending before Regional Director Morris, Superintendent Burdick rescinded
 6 that decision and recognized Mr. Kennedy's actions at the January 20, 2008 special General Council
 7 meeting, in a letter decision dated February 29, 2008. (*Id.*; PRJN, Ex. 2.)

8 On March 17, 2008, Plaintiffs, the governing majority of the 2006 Council, appealed the
 9 February 29, 2008 decision to Regional Director Morris. (Beaman Decl., ¶ 16; PRJN, Ex. 3.)
 10 Superintendent Burdick acknowledged receipt of this appeal on April 14, 2008. (*Id.*; PRJN, Ex. 4.)
 11 As a result of Plaintiffs' timely appeal, Superintendent Burdick's decision did not become final and
 12 effective under the federal regulations governing BIA proceedings. *See* 25 C.F.R. § 2.6(b)
 13 ("Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for
 14 filing a notice of appeal has expired and not notice of appeal has been filed"). Accordingly, the status
 15 quo of Tribal leadership remained with Plaintiffs as the numerical majority of the 2006 Council and
 16 legitimate governing body of the Tribe. On June 10, 2008, Defendants answered the March 17, 2008
 17 appeal urging Regional Director Morris to affirm the February 29, 2008 decision. (*Id.*, at ¶ 16.)

18 **v. The General Council Removes Defendant Kennedy From His**
 19 **Position as Tribal Chairperson.**

20 While the foregoing appeals were still pending before Regional Director Morris, a petition
 21 signed by ten (10) members of the General Council authorized a special General Council meeting to
 22 be held on September 20, 2008. (Beaman Decl., ¶ 17.) At that meeting, the General Council voted to
 23 remove Mr. Kennedy from his position of Tribal Chairperson. (*Id.*) The General Council satisfied
 24 the quorum requirements of Tribal law by voting 130-5-1 to remove Mr. Kennedy from this office, as
 25 136 of 252 members participated in this vote. (*Id.*) At this meeting, the General Council also
 26 accepted the resignation of Margaret Armitage from Mr. Kennedy's purported Tribal Council, and
 27 voted to elect the following individuals to the Tribal Council: (1) George Gholson (Chairperson); (2)
 28 Wallace Eddy (Vice-Chairperson); (3) Madeline Esteves (Treasurer-Secretary); (4) Margaret Cortez

1 (Executive Council Member); and (5) Pauline Esteves (Executive Council Member) (hereinafter
 2 “Gholson Council”). (*Id.*, at ¶ 18.) Thereafter, on October 17, 2008, Superintendent Burdick issued
 3 a letter recognizing the Gholson Council as the BIA recognized Tribal Council. (*Id.*, at ¶¶ 18-19;
 4 PRJN, Ex. 5.)

5 **vi. In a Convoluted Series of Decisions, the BIA Repeatedly**
 6 **Recognizes and Rescinds Recognition of Various Tribal Councils,**
 7 **Ultimately Concluding That the 2006 Council is the Tribal Council**
 8 **Entitled to Recognition.**

9 After this latest round of decisions from the BIA reversing and then recognizing yet another
 10 Tribal Council, Superintendent Burdick issued a series of letters adding to the disarray. On
 11 October 20, 2008, Superintendent Burdick issued a letter clarifying that the interested parties’ appeal
 12 rights concerning the October 17, 2008 decision recognizing the Gholson Council. (Beaman Decl., at
 13 ¶ 21; PRJN, Ex. 6.) On October 21, 2008, Superintendent Burdick issued another letter clarifying
 14 that his decisions issued February 29, 2008 and October 17, 2008, recognizing the General Council
 15 actions taken at the January 20, 2008 and September 20, 2008 meetings, respectively, were not final
 16 and effective under federal regulations governing administrative appeals, therefore he recognized the
 17 Tribal Council led by Joe Kennedy, and not the one led by Mr. Gholson, nor the 2006 Council. (*Id.*,
 18 at ¶ 22; PRJN, Ex. 7.) Thereafter, on November 21, 2008, Superintendent Burdick issued yet another
 19 letter, confusingly stating that since all pending appeals were not yet final, that he had to recognize
 20 the 2006 Council as the valid Tribal Council. (PRJN, Ex. 8.) Accordingly, Superintendent Burdick
 21 effectively rescinded the rescission of his initial October 17, 2008 letter and restored the status quo
 22 *ante* by restoring the recognition of the 2006 Council, while simultaneously rescinding his
 23 recognition of the Gholson and Kennedy Councils, all within the space of three letters. (*Id.*; PRJN,
 24 Exs. 6, 7, 8.) Mr. Kennedy appealed from the October 17, 20, and 21, 2008 letters, all of which
 25 recognized his removal from the Chairperson position. (Beaman Decl., at ¶ 23.)

26 On December 4, 2008, Regional Director Morris issued a decision finding “exigent
 27 circumstances” for placing Superintendent Burdick’s October 17, 2008 decision recognizing the
 28 Gholson Council into immediate effect. (PRJN, Ex. 9.) Accordingly, the BIA recognized the Tribal
 Council as George Gholson (Chairperson); Wallace Eddy (Vice-Chairperson); Madeline Esteves

1 (Secretary-Treasurer); Margaret Cortez (Executive Council Member); and Pauline Esteves (Executive
2 Council Member). (*Id.*, at ¶ 24; PRJN, Ex. 9.) Regional Director Morris cited as an “exigent
3 circumstance” that the Tribal leadership dispute effectively prevented the tribe from proceeding in
4 proceedings before the Nuclear Regulatory Commission (“NRC”) regarding the Yucca Mountain
5 project. (*Id.*; PRJN, Ex. 9.)

6 Thereafter, Defendants Kennedy and Esteves filed a complaint against the BIA and various
7 officials, including Regional Director Morris, in the United States District Court, Eastern District of
8 California seeking injunctive and declaratory relief, and requesting that the Court overturn the
9 December 4, 2008 BIA decision which the Regional Director had made final and effective. (Beaman
10 Decl., at ¶ 25; PRJN, Exs. 24-25.) This lawsuit was filed on December 17, 2008 in case styled as
11 *Timbisha Shoshone Tribe v. Kempthorne* (“*Kempthorne* Action”), Case No. 2:08-CV-03060-MCE-
12 DAD. (*Id.*; PRJN, Exs. 24-25.) After the filing of this action, on December 22, 2008, Regional
13 Director Morris issued another letter decision rescinding his decision of December 4, 2008 and
14 nullified the BIA’s recognition of the Gholson Council. (*Id.*, at ¶ 26; PRJN, Ex. 10.) Regional
15 Director Morris made this decision on the ground that Defendant Kennedy had filed a notice of
16 appeal from Superintendent Burdick’s October 17, 2008 letter and had not been provided an
17 opportunity to file a Statement of Reasons in support thereof. (*Id.*; PRJN, Ex. 10.) Regional
18 Director Morris permitted Defendant Kennedy to file a supporting Statement of Reasons by January
19 23, 2008. (*Id.*; PRJN, Ex. 10.) Thereafter, Defendants Kennedy and Esteves requested dismissal of
20 the *Kempthorne* action, which was granted on February 3, 2009. (*Id.*, at ¶ 27; PRJN, Ex. 25.)

21 On February 17, 2009, Regional Director Morris issued a letter decision reversing
22 Superintendent Burdick’s decision of February 29, 2008, concluding that the actions taken at the
23 August 25, 2007 Tribal Council meeting, and the January 20, 2008 General Council meeting, both of
24 which were conducted by Defendant Kennedy violated tribal law, and violated Ms. Beck and
25 Mr. Casey’s civil rights and would, therefore, would not be recognized by the BIA. (Beaman Decl.,
26 at ¶ 28; PRJN, Ex. 11.) The Regional Director also confirmed that the BIA would continue to
27 recognize the 2006 Council. (*Id.*; PRJN, Ex. 11.) This decision disposed of the appeal filed by
28 Plaintiffs with the BIA on March 27, 2008. (*Id.*) Defendants in this action appealed this decision to

1 the Interior Board of Indian Appeals (“IBIA”) on February 25, 2009, and the IBIA issued a pre-
2 docketing notice of the appeal on March 3, 2009. (Beaman Decl., at ¶ 29; PRJN, Ex. 12.)

3 On March 10, 2009, George T. Skibine, Deputy Assistant Secretary for Policy and Economic
4 Development in the Office of the Assistant Secretary-Indian Affairs, issued a letter, in which he
5 advised the IBIA that the Deputy Secretary of Interior had delegated to him all of the authority of the
6 Assistant Secretary-Indian Affairs and that he would be exercising jurisdiction over the Defendant’s
7 appeal of Regional Director Morris’ decision of February 17, 2009 which confirmed recognition of
8 the 2006 Council. (*Id.*, at ¶ 30; PRJN, Ex. 13.) On March 12, 2009, the IBIA issued a notice
9 confirming that Deputy Assistant Secretary Skibine’s assumption of jurisdiction over Defendant’s
10 pending IBIA appeal. (*Id.*, at ¶ 31; PRJN, Ex. 14.)

11 On March 24, 2009, Regional Director Morris issued a second letter decision which reversed
12 Superintendent Burdick’s letter decision of October 17, 2008, concluding that Defendant Kennedy’s
13 removal from the Chairperson position violated his civil rights. (*Id.*, at ¶ 32; PRJN, Ex. 15.)
14 Regional Director Morris again confirmed that the 2006 Council would continued to be recognized
15 by the BIA. (*Id.*; PRJN, Ex. 15.) This decision disposed of the appeal filed by Defendants Kennedy
16 and Esteves on November 13, 2008. (*Id.*; PRJN, Ex. 15.) George Gholson, Wallace Eddy and
17 Margart Cortez filed an appeal with the IBIA of this decision on April 27, 2009, and Deputy
18 Assistant Secretary Skibine then issued a letter dated May 8, 2009, also assuming jurisdiction over
19 this appeal. (*Id.*, at ¶¶ 33-34; PRJN, Exs. 16 & 17.) In this letter, Deputy Assistant Secretary Skibine
20 also advised that the appeals would be consolidated. (*Id.*)

21 **vii. Assistant Secretary-Indian Affairs, Larry Echohawk, Asserts**
22 **Jurisdiction to Decide Appeals From Prior Decisions Recognizing**
23 **Various Tribal Council.**

24 On June 22, 2009, Larry Echohawk, Assistant Secretary-Indian Affairs, issued a letter
25 wherein he consolidated the appeals from Regional Director Morris’ February 17 and March 24, 2009
26 decisions and set a briefing schedule with his office, and these appeals are still pending. (Beaman
27 Decl., at ¶¶ 35 & 36; PRJN, Exs. 18 (including the Administrative Record) & 19.)

28 **C. Defendant’s Conduct In Refusing To Abide By Applicable BIA Decisions**
And Tribal Law By Forming an Illegal Tribal Council.

1 Rather than adhering to Tribal law, as confirmed by the foregoing BIA decisions, Defendants
2 have undertaken a course of conduct which has resulted in irreparable injury to Plaintiffs, the Tribe
3 and its members, even though the last undisputed, and therefore status quo Tribal Council is that
4 composing the members of the 2006 Council. (Beaman Decl., at ¶¶ 1 & 37; Declaration of Virginia
5 Beck ("Beck Decl."), at ¶ 1; Declaration of Cleveland Lyle Casey ("Casey Decl."), at ¶ 1;
6 Declaration of George Gholson ("Gholson Decl."), at ¶ 1.) This conduct includes the formation of
7 various illegal Tribal Councils which have held themselves out to various governmental agencies and
8 private entities as the legitimate governing body of the Tribe. (Beaman Decl., at ¶ 38; Beck Decl., at
9 ¶¶ 2-3.) In addition, third-parties, such as various banks and governmental agencies such as the NRC
10 have relied on these misrepresentations and opened accounts in the name of the Tribe which have
11 later been closed when the bank was advised of BIA decisions which confirm Plaintiffs' rightful
12 status as the governing majority of the Tribal Council. (Beaman Decl., at ¶ 41.)

13 The BIA has been complicit in permitting Defendant to operate unilaterally, notwithstanding
14 their continued representations to Plaintiffs that they recognize the 2006 Council, and in spite of 2006
15 Council resolutions outlawing Defendants' actions. (Beaman Decl., at ¶ 39; PRJN, Exs. 34, 35 &
16 36.) In addition, it is notable that the BIA has stated that they will no longer communicate with
17 Plaintiffs regarding Tribal operations, notwithstanding the fact that they have indicated that they
18 recognize the 2006 Council, of which, Plaintiffs constitute the majority. (PRJN, Exs. 20 & 21;
19 Gholson Decl., at ¶ 6.) Specifically, the BIA has not responded to Plaintiffs' requests to change the
20 name of the Tribe's representative on the Central Contractor Registration from that of Defendant
21 Kennedy to those designated by the majority of the 2006 Council. (Beaman Decl., at ¶ 42; Gholson
22 Decl., at ¶ 6.) Instead, the BIA continues to accept Defendant Kennedy's misrepresentations that he
23 is the sole authority to decide how the Tribe's money is spent. (*Id.*) Because the BIA does not abide
24 by its decision to recognize the 2006 Council, other public entities such as the California Gambling
25 Control Commission, which has continued to forward RSTF funding to Defendant Kennedy, in spite
26 of the 2006 Council's request to direct all funding pursuant to its designation. (Beaman Decl., at
27 ¶ 43; Beck Del., at ¶ 7.) In addition, Mr. Casey attempted on numerous occasions to contact BIA
28 officials to address the irreparable harm being suffered by Plaintiffs and tribal members as a result of

1 Defendants' actions, only to be put-off and told that those concerns could not be addressed, while
2 being simultaneously advised that the 2006 Council is recognized by the BIA. (Declaration of
3 Cleveland Lyle Casey ("Casey Decl."), at ¶¶ 1-15; PRJN, Exs. 28 & 29.)

4 Defendants have taken advantage of this legal void and have conspired to purportedly
5 disenroll Plaintiffs, and other tribal members viewed as Plaintiffs' supporters from the Tribe, in an
6 effort to politically silence those who have challenged Defendants' authority to govern the Tribe.
7 (Beaman Decl., at ¶ 40; Beck Decl., at ¶¶ 3-4, Ex. A; Gholson Decl., at ¶¶ 5 & 16-18, Ex. A.) These
8 disenrollments, although illegal and illegitimate, were undertaken without according Plaintiffs due
9 process and without following Tribal law or respecting those tribal members' civil rights. (*Id.*) The
10 Tribe receives funding from various sources, including: (1) contracts with the BIA entered into
11 pursuant to the Indian Self-Determination and Educational Assistance Act ("638 funding"); (2)
12 income from the RSTF which is a fund established by the State of California pursuant to the terms of
13 Tribal-State Compacts entered into by the State with various gaming tribes in California; (3) 638
14 funding for Tribal welfare programs; (4) 638 funding for Tribal educational programs; and (5) 638
15 funding for Tribal housing programs. (Gholson Decl., at ¶ 3.) Defendants have interfered with these
16 programs by taking action to prevent Plaintiffs and other tribal members from accessing various tribal
17 programs and benefits they are entitled to. (See Beaman Decl., at ¶¶ 40-43; Casey Decl., at ¶ 16;
18 Beck Decl., at ¶ 4, 10-12; Gholson Decl., at ¶ 4; Declaration of Alan G. Beaman, at ¶¶ 2-8;
19 Declaration of Helen Beaman, at ¶¶ 2-8.) Unfortunately, many of the Tribes' members are on limited
20 incomes and the denial of this assistance has been devastating as explained below. (Gholson Decl., at
21 ¶ 7.)

22 In addition, Defendants have called Tribal health clinics in an effort to deny medical services
23 to tribal members that they have purportedly and illegally disenrolled. (Beck Decl., at ¶ 8.)
24 Defendants have also failed to pay taxes to the federal government owed by the Tribe resulting in the
25 IRS' levy of funds on deposit with a bank account in the Tribe's name. (Beck Decl., at ¶¶ 9-10;
26 PRJN, Ex. 30.) All of the conduct described above has resulted in a loss of goodwill with those
27 entities, both public and private, and with those individuals that conduct business with the Tribe.
28 (Gholson Decl., at ¶ 8.) This intratribal dispute has also spawned satellite litigation related to who

1 controls the Tribe and which faction is entitled to represent the Tribe in various proceedings.
 2 (Gholson Decl., at ¶ 8; PRJN, Exs. 22, 23, 24, 25, 26, 27 & 37.) All of the foregoing has resulted in,
 3 and continues to cause irreparable harm to Plaintiffs, the Tribe and its members.

4 III. LEGAL ARGUMENT

5 A. Statement of Jurisdiction

6 This Court has the inherent power to grant equitable relief pending the completion of
 7 administrative proceedings within the BIA and any appeal that may be filed with this Court, or any
 8 other court with competent jurisdiction, appealing any final decision rendered by that agency.² *Nken*
 9 *v. Holder*, 129 S.Ct. 1749, 1756 (2009) (“The ability to grant interim relief is . . . a means of ensuring
 10 that appellate courts can responsibly fulfill their role in the judicial process”); *Fed. Trade Comm’n. v.*
 11 *Dean Foods Co.*, 384 U.S. 597, 603 (1966) (“[D]ecisions of this court have recognized a limited
 12 judicial power to . . . maintain the status quo by injunction pending review of an agency’s action
 13 through the prescribed statutory channels.”); *Scripps-Howard Radio, Inc. v. Fed. Communications*
 14 *Comm’n.*, 316 U.S. 4, 10 (1942) (same).³

15 In the instant matter, Defendants have repeatedly refused to abide by several interim decisions
 16 of the BIA recognizing Plaintiffs and Defendants Joseph Kennedy and Madeline Esteves as the

17 ² Alternatively, Plaintiffs submit that the BIA decision to recognize an interim council composed of Plaintiffs and
 18 Defendants Joseph Kennedy and Madeline Esteves pending completion of administrative review are “guidance
 19 document[s] reflecting a settled agency position and have . . . legal consequences for those subject to regulation”
 20 permitting judicial review of this matter. *See Seminole Nation of Okla. v. Norton*, 223 F.Supp.2d 122, 142 (D.D.C. 2002).

21 ³ In addition, Plaintiffs submit that the court may properly enter preliminary injunctive relief to preserve the status quo
 22 pending the completion of administrative proceedings and any subsequent appeal proceedings in the federal courts
 23 pursuant to (1) 28 U.S.C. 2349(b); (2) the All Writs Statute, 28 U.S.C. 1651; and (3) 5 U.S.C. § 705. *See Superior*
 24 *Trucking Co. v. United States*, 614 F.2d 481, 483-484 (5th Cir. 1980) (holding that power to enter preliminary injunctive
 25 relief pending the completion of administrative appeals might emanate from any of these sources). In addition, such relief
 26 may be sought, even though the BIA officials which are presently deciding the appeals in the underlying administrative
 27 proceedings are not joined as defendants, since “the power lies in this Court, in view of its duty to protect its jurisdiction,
 28 to issue a restraining order which operates in its effect upon persons not actually parties to the main action. . .” *City of*
Fresno v. A.D. Edmonston, 131 F.Supp. 421, 427 (S.D. Cal. 1955) (issuing preliminary injunction against the State of
 California to prevent State’s participation in collateral administrative proceedings which sought to alter the status quo).
 Plaintiffs submit that Defendants are engaging in analogous behavior by purporting to act under color of Tribal authority
 and an illegal Tribal Council in disenrolling members perceived to oppose their governing authority, many of whom may
 support Plaintiff’s authority as the governing majority of the Tribal Council, as recognized by the BIA. Preliminary
 injunctive relief is appropriate where Defendants take actions to undermine the jurisdiction of a federal agency or a
 district court with potential jurisdiction over those proceedings. *West India Fruit & Steamship Co. v. Seatrain Lines, Inc.*,
 170 F.2d 775, 779 (2d Cir. 1948) (entering preliminary injunction against defendant at request of plaintiff to preserve
 status quo pending completion of administrative proceedings to which both plaintiff and defendant were also adverse
 parties); *Isbrandsten Co. v. United States*, 81 F.Supp. 544 (S.D.N.Y. 1948) (same).

1 lawful majority of the Tribal Council. In addition, the BIA has failed to enforce its own interim
 2 decisions to prevent Defendants from irreparably working to change the status quo to defeat this
 3 Court and the BIA's jurisdiction over the instant matter, while appeals are pending. Indeed, in
 4 pleadings filed with this Court, Defendants have boldly asserted that they have the authority to
 5 proceed however they please, in derogation of Plaintiff's authority as the governing majority of the
 6 Tribal Council, notwithstanding any decision by the BIA, or the existence of Tribal law proscribing
 7 such conduct. (See Docket Entry No. 17, Answer, at ¶¶ 1-3 [denying that BIA decisions can bind
 8 Defendants at all].) Plaintiffs bring the instant motion to preserve the status quo *ante* as confirmed by
 9 the BIA, and Tribal law, to prevent actions by Defendants which are calculated to undermine the
 10 jurisdiction of that federal agency and this Court's authority to review final agency action. *Board of*
 11 *Governors of Fed. Reserve Sys. v. Transamerica Corp.*, 184 F.2d 311, 316 (9th Cir. 1950) (issuing
 12 preliminary injunction to preserve status quo pending completion of administrative proceedings and
 13 any subsequent appeals to the federal courts); *Jackson v. Dist. of Columbia*, 254 F.3d 262, 268 (D.C.
 14 Cir. 2001) (noting courts "traditional equitable power to issue injunctions to prevent irreparable
 15 injury pending exhaustion of administrative remedies"); *Susquehanna Valley Alliance v. Three Mile*
 16 *Island Nuclear Reactor*, 619 F.2d 231, 237-238 (3d Cir. 1980) (entering interim injunction).⁴

17 B. Standard of Review

18 "A preliminary injunction is . . . a device for preserving the status quo and preventing the
 19 irreparable loss of rights before judgment." *Textile Unlimited, Inc. v. BMH and Company, Inc.*, 240

20
 21 ⁴ Plaintiffs submit that this Court will have jurisdiction over any final decision issued by the BIA concerning the instant
 22 intra-tribal leadership dispute to test whether such decision was arbitrary and capricious. *See Tarbell v. Dept. of the*
 23 *Interior*, 307 F.Supp.2d 409, 426 (N.D.N.Y. 2004) (reviewing and overturning tribal leadership decision made by the BIA
 24 as arbitrary and capricious under 5 U.S.C. § 551, *et seq.*); *Ransom v. Babbitt*, 69 F.Supp.2d 141 (D.D.C. 1999) (same).
 25 Plaintiffs also submit that venue in this Court is proper since the Tribe is situated within the jurisdictional boundaries of
 26 this Court, the complained of conduct occurred within this District, and much of the property which Defendants' have
 27 misappropriated is situated in this District. *See Winnebago Tribe of Nebraska v. Babbitt*, 915 F.Supp. 157, 166 (D.S.D.
 28 1996); 28 U.S.C. § 1391(b)(1) (venue is proper in "a judicial district in which a substantial part of the events or omissions
 giving rise to the claim occurred, or substantial part of property that is the subject of the action is situated"). Accordingly,
 the Court has the authority to enter the requested relief in aid of preserving that jurisdiction it will have to determine
 whether the BIA's decisions comply with the Administrative Procedure Act, which includes providing interim relief to
 prevent Defendants from taking action to alter the status quo and attempting to defeat this Court's potential jurisdiction.
ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 n. 19 (5th Cir. 1978) ("A federal court has the power under
 the All Writs Act to issue injunctive orders [to preserve the status quo] in a case even before the court's jurisdiction has
 been established. When potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its
 jurisdiction is shown to exist, the court will be in a position to exercise it").

1 F.3d 781, 786 (9th Cir. 2001) (citations omitted). “‘Status quo’ means *the last uncontested status* that
 2 preceded the pending controversy.” *GoTo.com., Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th
 3 Cir. 2000) (emphasis added); *accord Hershel Cal. Food Prods. Co. v. Hunt Foods*, 111 F.Supp. 732,
 4 734 (N.D. Cal. 1953) (same); *cf. George v. Eastern Regional Director*, 49 IBIA 164, 186 (2009)
 5 (“The policy of recognizing particular individuals when necessary for government-to-government
 6 relations is normally applied by recognizing *the last undisputed officials*”) (emphasis added).

7 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the
 8 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance
 9 of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural*
 10 *Resources Defense Council*, 129 S.Ct. 365, 374 (2008); *see also Munaf v. Green*, 553 U.S. ----, ----,
 11 128 S.Ct. 2207, 2218-2219 (2008); *Am. Trucking Assn’s., Inc. v. City of Los Angeles*, 559 F.3d 1046,
 12 1052 (9th Cir. 2009); *accord Nat’l Meat Ass’n v. Brown*, No. CV-F-08-1963 LJO DLB, 2009 WL
 13 426213, at *3 (E.D. Cal. Feb. 19, 2009). Alternatively, preliminary injunctive relief is appropriate
 14 where a plaintiff shows a likelihood of irreparable injury and “that serious questions going to the
 15 merits were raised and the balance of hardship tips sharply in [the plaintiff’s] favor.” *The Lands*
 16 *Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008); *Save Strawberry Canyon v. Dept. of Energy*,
 17 613 F.Supp.2d 1177, 1180 n. 2 (N.D. Cal. 2009); *Barney v. Burrow*, 558 F.Supp.2d 1066, 1076 (E.D.
 18 Cal. 2008) (acknowledging alter native test).⁵ Because plaintiffs meet each of these requirements to
 19 obtain injunctive relief in this matter, this Court should grant the instant motion.⁶

20 **C. Plaintiff’s Have and Will Continue to Suffer Irreparable Injury If**
 21 **Defendant’s Rogue Tribal Government Is Not Enjoined From Violating**
 22 **the Tribe’s Laws and Extant BIA Decisions.**

23 ⁵ The requirements for demonstrating entitlement to preliminary injunctive relief under this alternative test have not been
 24 altered by the decision in *Winter v. National Resources Defense Council*, 129 S.Ct. 365 (2008). *See, e.g., Save*
 25 *Strawberry Canyon*, 613 F.Supp.2d at 1180 n. 2 (“*Winter* does not foreclose injunctive relief in such situations”); *accord*
 26 *San Luis & Delta-Mendota Water Authority v. Salazar*, No. 1:09-CV-00407 OWW DLB, 2009 WL 1575169, at *9 (E.D.
 27 Cal. May 29, 2009) (same). The Ninth Circuit has also held that this alternative analysis “implicitly supports a likelihood
 28 of irreparable harm to Plaintiffs in the absence of injunctive relief,” where the requirements of the test are met. *See*
Johnson v. Couturier, 572 F.3d 1067, 1085 (9th Cir. 2009).

⁶ Plaintiffs only need to demonstrate that they meet the requirements for preliminary injunctive relief on one of their
 claims in order for this Court to enter relief. *See, e.g., Martinez v. Schwarzenegger*, No. C 09-02306 CW, 2009 WL
 1844989, at *5 (N.D. Cal. June 26, 2009) (concluding that because the “Court concludes that a preliminary injunction is
 warranted based on Plaintiffs’ likelihood of success on their procedural claim, the Court need not determine the likelihood
 of Plaintiffs’ success on their [substantive] claim”); *accord Gerling Global Reins. Corp. of Am. v. Quackenbush*, No. Civ.
 S-00—5-6WBSJFM, et al., 2000 WL 777978, at *5 (E.D. Cal. June 9, 2000).

1 “‘Irreparable harm’ for purposes of obtaining a preliminary injunction is harm that cannot be
2 redressed by legal or equitable remedy following trial.” *Pioneer Military Lending, Inc. v.*
3 *Dufauchard*, No. CIV.S-06-1445 LKK/PAN, 2006 WL 2053486, at *18 (E.D. Cal. July 21, 2006).
4 Plaintiff can meet its showing of irreparable harm by demonstrating that Defendant’s past conduct
5 leading to identified irreparable injury is likely to recur if not enjoined. *See Johnson v. Couturier*,
6 572 F.3d 1067, 1085 (9th Cir. 2009) (holding that Defendant’s “own prior conduct establishes a
7 likelihood that in the absence of [injunctive relief], Plaintiffs will not be able to recover improperly
8 diverted funds and will thus be irreparably harmed”); *Rubin v. Pringle*, 387 F.3d 1077, 1086 (9th Cir.
9 2004) (irreparable harm proven by past conduct”); *Conn. Gen. Life Ins. Co. v. New Images of Beverly*
10 *Hills*, 321 F.3d 878, 881 (9th Cir. 2003) (same); *FTC v. Affordable Media, LLC*, 179 F.3d 1228,
11 1236-37 (9th Cir. 1999).

12 The Ninth Circuit has recognized “that intangible injuries, such as damage to . . . goodwill,
13 qualify as irreparable harm.” *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944
14 F.2d 597, 603 (9th Cir. 1991). Where harm threatened by a defendant could undermine the goodwill
15 of an entity by creating the appearance or inference of instability and prevent that entity from
16 transacting business with third-parties in the marketplace, many courts have found that irreparable
17 harm exists. *Gerling Global*, 2000 WL 777978, at *13. This includes any reputational injury caused
18 to that entity due to the negative perceptions created in the marketplace. *United Serv. Auto. Ass’n. v.*
19 *Muir*, 792 F.2d 356, 362 (3d Cir. 1986); *see also Ross-Simons, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20
20 (1st Cir. 1996) (same).

21 In addition, the Ninth Circuit has also held that “constitutional violations cannot be
22 adequately remedied through damages and therefore generally constitute irreparable harm.” *Nelson*
23 *v. Nat’l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008). In addition loss of one’s
24 income “does not carry merely monetary consequences” but also causes “emotional damages and
25 stress, which cannot be compensated by mere back payment of wages.” *Id.*; *see also Cobell v.*
26 *Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) (holding that where Indian plaintiffs relied on income
27 from funds held by the federal government “for their financial well-being, the injury from delay
28 could cause irreparable harm” because “the interests at stake are not merely economic interests in [an

1 administrative scheme], but personal interests in life and health”). Harm is also considered
2 irreparable where “retrospective monetary damages are unavailable due to” sovereign immunity.
3 *Cal. Pharmacists Ass’n. v. Maxwell-Jolly*, 563 F.3d 847, 851-852 (9th Cir. 2009).⁷ Finally, cultural,
4 social and economic harms to a Tribe can constitute irreparable injury. *N. Cheyenne Tribe v. Hodel*,
5 851 F.2d 1152, 1158 (9th Cir. 1988); *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171
6 (10th Cir. 1998) (holding that Tribe demonstrated irreparable harm where tribe’s assets necessary to
7 run tribal government were seized and threatened Tribe’s ability to govern itself by partial shutdown
8 of tribal government).

9 Defendants’ conduct has already resulted in irreparable harm to Plaintiffs, the Tribe and its
10 members. The declarations submitted concurrently with the instant motion shows the tragic suffering
11 to the Tribe’s members that has been caused by Defendant’s actions in refusing to abide by BIA
12 decisions and Tribal law. Elder tribal members have suffered irreparable harm by being denied tribal
13 programs and services, which has forced many tribal members to live in unsafe and unhealthy living
14 conditions that would have been otherwise remedied had they not been denied access to housing
15 services by Defendants. (Gholson Decl., at ¶¶ 9-15.) In addition, in purportedly disenrolling various
16 tribal members, those tribal members have been denied their civil rights because they have been
17 given no opportunity to challenge those purported disenrollments. (Gholson Decl., at ¶ 11; *cf. Quair*
18 *v. Sisco*, 359 F.Supp.2d 948 (E.D. Cal. 2004); *Sweet v. Hinzman*, No. CO8-844LJR, 2009 WL
19 1175647, at *9 (W.D. Wash. April 30, 2009) (concluding that Tribe’s disenrollment and banishment
20 violated Plaintiffs’ due process rights under the Indian Civil Rights Act and issuing writ of habeas
21 corpus overturning Tribal decision). In addition, the BIA has determined that Plaintiffs Beck and
22 Casey have had their civil rights violated by Defendants’ actions in attempting to remove them from
23 office, as the decisions above explain.

24 Defendants have also sought to rescind housing which has already been granted to those tribal
25 members it has purportedly disenrolled, by either attempting to kick them out, or denying funding

26
27
28 ⁷ As the Tribe would likely possess sovereign immunity with regard to any monetary damages brought by Plaintiffs’ for recovery of the amounts the Defendants’ have withheld under color of Tribal authority, this weighs in favor of concluding that Defendants’ actions which have resulted in the loss of funding to Plaintiffs’ and the Tribe’s members have resulted in irreparable harm to Plaintiffs and the Tribe.

1 which has resulted in foreclosures and inability to pay rent. (Gholson Decl., at ¶¶ 11-15; Declaration
2 of Jesse D. Davis (“Davis Decl.”), at ¶¶ 4-7; Declaration of Edward Merchant (“Merchant Decl.”), at
3 ¶ 7; Declaration of Merel Dillard (“Dillard Decl.”), at ¶ 7; Declaration of Thomas Jackson, at ¶¶ 1-7;
4 Declaration of Marion Merchant, at ¶¶ 1-5; Declaration of Harold Bever, Sr., at ¶¶ 1-7.) As a result
5 of these disenrollments and subsequent denial of access to tribal programs, funding and services,
6 several tribal members cannot meet day-to-day expenses such as paying for car, health, and life
7 insurance, feeding and supporting their families, paying their bills, continuing theirs or their families’
8 employment and educational opportunities, or paying their taxes. (Davis Decl., at ¶¶ 5-6; Declaration
9 of Evelyn L. Casey (“E. Casey Decl.”), at ¶ 4; Declaration of Frank Shoshone (“Shoshone Decl.”), at
10 ¶¶ 2-7; Declaration of Shoshone Flores (“Flores Decl.”), at ¶¶ 1-5; Declaration of Richard Duane
11 Casey (“R.D. Casey Decl.”), at ¶¶ 1-7; Declaration of Robert W. Gholson, at ¶¶ 1-7; Declaration of
12 Jeanne L. Klinkhammer, at ¶¶ 1-8; Declaration of Jack Gholson, at ¶¶ 1-6; Merchant Decl., at ¶¶ 1-7;
13 Dillard Decl., at ¶¶ 1-7; Declaration of Douglas Gholson (“D. Gholson”), at ¶¶ 1-9; Declaration of
14 Eleanor Jackson, at ¶¶ 1-6; Declaration of Leroy Jackson, at ¶¶ 1-9; Declaration of Beverly Long, at
15 ¶¶ 1-5; Declaration of Patricia Nash, at ¶¶ 1-7; Declaration of William Merchant, at ¶¶ 1-7;
16 Declaration of Raquel West, at ¶¶ 1-7; Declaration of Evelyn Weigman, at ¶¶ 1-4.) More
17 fundamentally, several tribal members have seen their heritage degraded and disgraced as a result of
18 Defendants’ actions. (E. Casey Decl., at ¶¶ 3 & 6; Shoshone Decl., at ¶ 7; Flores Decl., at ¶ 6; R.D.
19 Casey Decl., at ¶¶ 8-9.) All of the foregoing has resulted in irreparable harm to many tribal
20 members’ physical and emotional health. (E. Casey Decl., at ¶ 5; Dillard Decl., at ¶ 7; D. Gholson, at
21 ¶¶ 7-9; Declaration of Shirley Summers, at ¶¶ 1-5; Nash Decl., at ¶ 4.)

22 The evidentiary record shows that Plaintiffs have been denied their rightful position as the
23 governing majority of the Tribe, Plaintiffs and other Tribal members have been denied their civil
24 rights as a result of disenrollment, the goodwill of the Tribe with commercial entities and other public
25 entities has been irreparably damaged, Tribal members have been denied income and other
26 governmental services from the Tribe to which they are rightfully entitled, Tribal members’ health
27 and welfare have been irreparably damaged, and the Tribe’s ability to participate in litigation and
28 other official proceedings has been seriously undermined by the lack of clarity as to the Tribe’s

1 governmental leadership. The history of Defendant's conduct shows that they are willing to flout
2 Tribal law and extant BIA decisions to maintain their illegal control of the Tribe, without a
3 preliminary determination as to the lawful governing majority of the Tribe, this conduct will
4 continue, and irreparable harm has been and will continued to be suffered if relief is denied.

5 **D. Plaintiffs Are Likely to Prevail On the Merits of Their Claim That They**
6 **Comprise The Lawful Governing Majority of the Tribe and That**
7 **Defendants Have Acted Illegally As Described In the Complaint.**

8 "Plaintiff need not show positively it will prevail on the merits. A reasonable probability of
9 success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief."
10 *Nat'l Meat Ass'n*, 2009 WL 426213, at *3, citing *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th
11 Cir. 1984). In other words, "[t]he moving party need not demonstrate a mathematical probability of
12 success, such as greater than 50 percent." *Yankton Sioux Tribe v. Kempthorne*, 442 F.Supp.2d 774,
13 782 (D.S.D. 2006). As discussed below, under Tribal law, as confirmed by the various BIA decisions
14 attached to the concurrently filed Request for Judicial Notice, Plaintiffs are likely to prevail on their
15 claims that they constitute the governing majority of the Tribe, and consequently, are also likely to
16 prevail on the causes of action asserted in the complaint. Administrative decisions by federal
17 agencies are indicative of plaintiff's likelihood of success of prevailing on a claim. *See, e.g., Harris*
18 *v. United States*, No. Civ.S03878 LKK/DAD, 2003 WL 23332985, at *7 (E.D. Cal. Aug. 5, 2003)
19 (holding that party had fair chance of litigating issue decided in its favor in an administrative
20 decision).

21 **1. The BIA Decisions Indicate That Plaintiffs Are Likely To**
22 **Prevail On Their Claim That They Constitute The Lawful**
23 **Governing Majority of the Tribal Council.**

24 As related above, the BIA currently recognizes the 2006 Council as the last duly elected and
25 undisputed Tribal Council and the legitimate government of the Timbisha Shoshone Tribe. Although
26 the BIA has at various points issued decisions recognizing other Tribal Councils, none of these
27 decisions have ever become final and effective under the BIA's regulations, and all such recognitions
28 have since been rescinded or reversed. Moreover, every BIA decision to address the issue has
assumed and taken as its baseline the fact that the 2006 Council was the last undisputed election. The

1 issues in dispute all concern events after the 2006 election – whether various council members
2 resigned or were voted out, removed, recalled, reelected, or disenrolled from the Tribe. Unless and
3 until these disputes are finally resolved in a manner that compels a different outcome, the status quo
4 that existed before the disputes arose must remain in place. Therefore the Tribal Council elected in
5 2006 remains the rightful Tribal Council, a fact the BIA has acknowledged and continues to promote.

6 The BIA’s decisions recognizing the 2006 Council demonstrate that Plaintiffs are likely to
7 prevail on the merits of their claim that they are the governing majority of the Tribal Council, and are
8 therefore entitled to protect tribal assets by asserting causes of action against those who seek to
9 control the Tribe’s property and violate their fiduciary duties to the Tribe, as alleged in the
10 Complaint. These decisions are in exercise of BIA powers to recognize Tribal leadership when
11 necessary to carry out a government-to-government relationship with an Indian tribe, and to interpret
12 Tribal law in doing so. *Reese v. Minneapolis Area Director* (1989) 17 IBIA 169, 173. This includes
13 the authority and responsibility to decline to recognize the results of a tribal election and leadership
14 when a violation of the tribal Constitution or Indian Civil Rights Act has tainted the election results,
15 or where the leadership of the Tribe is not supported by the majority of the Tribe’s members.
16 *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (“Payment of funds at the request of a
17 tribal council which, to the knowledge of the Government officers charged with administration of
18 Indian affairs . . . , was composed of representatives faithless to their own people and without integrity
19 would be a clear breach of the Government’s fiduciary obligation”); *Cal. Valley Miwok Tribe v.*
20 *United States*, 515 F.3d 1262, 1267-1268 (D.C. Cir. 2008) (“A cornerstone of [the trust] obligation is
21 to promote a tribe’s political integrity, which includes ensuring that the will of tribal members is not
22 thwarted by rogue leaders when it comes to decisions affecting federal benefits”); *Norton*, 223
23 F.Supp.2d at 140 (same) (emphasis added); *United Keetoowah Band of Cherokee Indians in*
24 *Oklahoma v. Muskogee Area Director* (1992) 22 IBIA 75, 83; *Reese, supra*, at p. 173. These
25 determinations, which recognize that the last undisputed Tribal Council was the 2006 Council, are
26 enough to demonstrate that Plaintiffs’ are likely to prevail on their allegations that Defendants’
27 actions are illegal, that they are operating under color of Tribal authority, and that they have violated
28 Tribal law and BIA decisions in persisting in the conduct outlined above.

1 For all of the foregoing, reasons, it is therefore appropriate for this Court to rely upon the
2 decisions made by the BIA recognizing the last duly elected Tribal Council to decide whether
3 Plaintiffs are likely to prevail on their claim that they constitute the governing majority of the Tribe,
4 and therefore, that Defendants' had no authority to control tribal property and tribal government as
5 alleged in the Complaint.

6 **2. Tribal Law Supports Plaintiff's Likelihood of Prevailing on**
7 **Their Claim That They Constitute The Lawful Governing**
8 **Majority of the Tribal Council.**

9 While the BIA's recognition of the 2006 Council is a sufficient basis for this Court to
10 conclude that Plaintiffs are likely to prevail on their claim that this Council is the Tribe's legitimate
11 government, an independent review of the undisputed facts compels the same conclusion. This
12 section therefore discusses the Tribal laws which Defendants have violated by their actions. With
13 respect to the August 25, 2007 attempted removals of Ms. Beck and Ms. Casey from office, the
14 Tribe's Constitution requires the presentation of the "allegations and proof against the accused
15 member of the Tribal Council." (PRJN, Ex. 31, Art. XI(1.2).) In addition, the Constitution provides
16 that "[t]he Tribal Council *member* who is the subject of the removal request shall not vote ... in the
17 removal proceedings." (*Id.*) As outlined in the factual section of these briefs, these requirements
18 were not met at the August 25, 2007 meeting, and no vote actually ever took place to remove
19 Mr. Beaman and Ms. Beck, another requirement of the Tribal Constitution. (PRJN, Ex. 31,
20 Art. XI(1.3).)

21 Defendants Kennedy and Esteves' purported Tribal Council election on November 13, 2007
22 also violated numerous provisions of the Tribe's Constitution. The election was held by Defendants
23 Kennedy and Esteves pursuant to the Tribe's Constitution, Article VI, Section 4(b). (PRJN, Ex. 31,
24 Art. VI(4)(b).) However, this election, as well as the election board charged with overseeing the
25 election, must be approved by a majority of the Tribal Council, and it is undisputed that Defendants
26 Kennedy and Esteves, as only two (2) votes on the Tribal Council never satisfied quorum
27 requirements to approve their rogue Tribal Council election. (PRJN, Ex. 31, Art. VI(1); Ex. 32,
28 Election Ordinance.) Such approval is required by Article III, Section 2(b) (requiring a quorum of

1 three Tribal Council members to conduct any Tribal Council business) and Article VI, Section 1
2 (requiring the Election Board, charged with administering the election, to be approved by the Tribal
3 Council). (PRJN, Ex. 31.) These irregularities rendered the election unconstitutional, and its results
4 illegitimate and void, as the BIA has recognized in its various decisions.

5 As discussed above, on January 20, 2008, Defendants Kennedy and Esteves sought to use the
6 General Council to ratify the results of the November 13, 2007 election. However, the General
7 Council has no authority to “ratify” by popular vote actions taken by the Tribal Council which violate
8 its Constitution. (PRJN, Ex. 31, Arts. IV(1) & V(1)(1) (outlining Tribe’s doctrine of separation of
9 powers)). The General Council arguably possesses authority to *amend* its Constitution in such a way
10 that the November 2007 election results would retroactively take effect, but no such amendment has
11 ever taken place. (PRJN, Ex. 31, Art. XVI.) The vote taken by the General Council to retroactively
12 interpret Mr. Beaman and Ms. Beck’s departure from the August 25, 2007 Tribal Council meeting as
13 resignations of their respective offices also suffers from the same defect, since removal can only be
14 voted on by the Tribal Council under the Constitution. (PRJN, Ex. 31, Art. VI.) The procedure
15 which permits the General Council to recall Tribal Council members is contained in separate
16 provisions of the Tribe’s Constitution, and it is undisputed that no such recall of Ms. Beck and
17 Mr. Beaman was ever attempted. (PRJN, Ex. 31, Art. XI(2).) In addition, the purported removal of
18 Mr. Beaman, Ms. Beck and Mr. Casey from the Tribal Council and from Tribal membership without
19 adhering to the procedural and substantive requirements of tribal law would infringe the three
20 individuals’ due process rights in violation of the Timbisha Constitution (Art. XIV, Sec. 5(h)) and the
21 ICRA, 25 U.S.C. § 1302(8), and the provision of the Constitution and Membership Ordinance which
22 require enrollment to be revoked by the Tribal Council. (PRJN, Ex. 31, Art. III(6); Ex. 33, Ordinance
23 No. 2, § X.) As discussed above, the BIA has also recognized that the actions taken at the
24 January 20, 2008 meeting were unlawful. In addition, no subsequent events have ever altered the
25 status quo of the leadership of the 2006 Council, and Defendants illegal and purported disenrollments
26 are yet another unconstitutional attempt to undermine Plaintiffs and the Tribe, even though they have
27 never had enough votes to ever constitute a quorum of the Tribal Council.

1 Federal courts considering similar intratribal leadership disputes have similarly concluded that
 2 where an illegally constituted Tribal government body attempts to remove Tribal officials without
 3 complying with the Tribe's Constitution and laws, those actions are deemed invalid. For example, in
 4 *Seminole Nation of Okla. v. Norton*, 223 F.Supp.2d 122 (D.D.C. 2002), the Tribe and other plaintiffs,
 5 who claimed to be members of the Tribe's General Council, argued that they had validly removed
 6 Defendant from his position as principal chief of the Tribe. The district court, however, rejected this
 7 argument on several grounds, all of which were premised on provisions contained in the Tribe's
 8 Constitution, including: (1) the General Council was not empowered to appoint a replacement
 9 principal chief, because they had not satisfied the constitutional condition that a death, resignation, or
 10 proper removal had taken place; (2) the resolution purportedly removing the principal chief only had
 11 sixteen (16) votes of the General Council in violation of the Constitution's requirement of nineteen
 12 (19); (3) the Constitution contained no provision which authorized the suspension of the principal
 13 chief; and (4) the General Council that purported to remove the principal chief was illegally
 14 constituted. *Id.* at 145-146. The Court concluded that the BIA had validly continued to recognized
 15 Defendant as the principal chief.⁸

16 The foregoing undisputed facts establish that under the Constitution and laws of the Timbisha
 17 Shoshone Indian Tribe, the 2006 Council is the last duly elected *status quo* Tribal Council, and is the
 18 current Tribal Council entitled to govern the Tribe, as recognized by the BIA.

19 **3. Plaintiffs Are Likely To Prevail On Their Causes of Action**
 20 **As They Constitute The Governing Majority of the Tribal**
 21 **Council Under BIA Decisions And Tribal Law.**

22 As Plaintiffs are likely to prevail on their claims that they are the governing majority of the
 23 Tribe, they are, therefore, also likely to prevail on each of the causes of action asserted in their
 24 Complaint, since the basis of each of those claims is that Defendants are acting without lawful

25 ⁸ The court also noted that refusing to recognize a vote by Tribal officials illegally elected to their position was supported
 26 by the fact that the "Secretary of the Interior is charged not only to protect the rights of the tribe, but also the rights of
 27 individual members. And the duty to protect these rights is the same whether the infringement is by non-members or
 28 members of the tribe." *Seminole Nation*, 223 F.Supp.2d at 146: Plaintiffs submit that the entry of the requested
 injunction is necessary and appropriate also because the BIA has demonstrated by its inaction that it is unwilling to fulfill
 this duty, and therefore this Court's intervention is necessary to restrain Defendants from taking actions that violation
 BIA decisions. *Id.* at 147 ("Where the [Tribe] will not protect the Constitutional rights of its minority members, the BIA
 has the responsibility and indeed, the duty, to intervene and attempt to protect those rights through appropriate
 remedies").

1 authority in spending the Tribe's money, representing that they can act on behalf of the Tribe, and
2 taking any action to govern the Tribe without the authority of the Tribal Council. Since Defendants
3 are not the lawful governing majority of the Tribe, they had no legal authorization for undertaking the
4 conduct described in the complaint, and should be required to abide by the status quo preceding the
5 present dispute. The status quo is the last undisputed Tribal Council composed of Joseph Kennedy,
6 Madeline Esteves, Edward Beaman, Virginia Beck, and Cleveland Lyle Casey.⁹

7 **E. Defendants Will Suffer No Harm By Being Required to Abide By Tribal**
8 **Law and Extant BIA Decisions.**¹⁰

9 Defendants will suffer no harm if they are required to comply with the status quo represented
10 by a Tribal Council composed of Joseph Kennedy, Madeline Esteves, Edward Beaman, Virginia
11 Beck, and Cleveland Lyle Casey, since they would still be permitted to participate in the governance
12 of the Tribe. *See Bank of America v. Lee*, No. CV 08-5546 CAS(JWJx), 2008 WL 4351348, at *7
13 (C.D. Cal. Sept. 22, 2008) (Defendants that were forced to "abide by the current state of the law" not
14 harmed where activity continues on a more limited basis). The only difference is that they would
15 have to abide by Tribal law and BIA decisions in governance of the Tribe. The granting of the
16 requested relief would not affect Joseph Kennedy and Madeline Esteves' status as duly elected
17 members of the Tribal Council. As to the other Defendants, they would still be entitled to participate
18 in the governance of the Tribe in proceedings of the General Council. Defendants cannot colorably
19 claim to be harmed under such circumstances.

20 **F. The Public Interest Favors Issuing a Preliminary Injunction As Both**
21 **Tribal Members and Third-Parties Will Have An Interim Decision They**
22 **Can Rely Upon In Determining Whether They Are Dealing With the**
23 **Lawful Tribal Government.**

24 "The public interest analysis for the issuance of a preliminary injunction requires [this Court]
25 to consider whether there exists some critical public interest that would be injured by the grant of
26 preliminary relief." *Indep. Living Centers of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th

27 ⁹ Plaintiffs submit that the foregoing evidence also demonstrates that there are serious questions as to the merits which
28 favor entering injunctive relief.

¹⁰ Plaintiffs submit that because Defendants will suffer no harm by entry of the proposed preliminary injunction, the
balance of the hardships tips decidedly in favor of Plaintiffs.

1 Cir. 2009). The public interest would be favored should this Court grant Plaintiff's request for a
2 preliminary injunction, since third-parties, including both governmental agencies and private entities,
3 would have a uniform determination of the governing body of the Tribe pending resolution of the
4 instant dispute by way of administrative appeals and any further litigation in the federal courts. This
5 would serve to minimize litigation that is currently pending in state courts, federal agencies, and now
6 this Court regarding who is the lawful governing body of the Tribe, and therefore entitled to control
7 funding contained in private bank accounts. In addition, the Tribe's ability to participate in public
8 proceedings, such as the Yucca Mountain proceedings, would be preserved as there would be a
9 uniform representation of the Tribe's interests in that and other forums. Finally, granting the
10 requested relief would permit the Tribe to once again provide the governmental services and benefits
11 to all of its members, while preventing Defendants' active retaliation against the Tribes' members in
12 this regard. *Oglala Sioux Tribe v. C & W Enterprises*, No. CIV. 07-5024-KES, 2009 WL 803625, at
13 *3 (D.S.D. March 25, 2009) (granting TRO, and holding that public interest favored where requested
14 relief would permit Tribe to provide utilities, essential government services, law enforcement,
15 medical services, and child protection, and other basic services to its members).

16 Conversely, without the entry of preliminary injunctive relief, third-parties would have to
17 expend unnecessary time, energy and resources in making their own determinations regarding who
18 constitutes the lawful governing majority of the Tribe. Indeed, as the Wells Fargo litigation, and the
19 Yucca Mountain proceedings demonstrate, significant resources have already been wasted by these
20 third-party entities in making such determinations. (PRJN, Exs. 22-30 & 37.) In addition, the public
21 interest is favored by the entry of a preliminary injunction since this would prevent Defendants from
22 cutting off members of the Tribe, many of whom have limited incomes, from tribal services and
23 income they need to support their families. *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir.
24 1983) ("It would be tragic, not only from the standpoint of the individuals involved but also from the
25 standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential
26 benefits for any period of time").

27 **G. Other Federal Courts Have Recognized That It Is Appropriate To Enter**
28 **Preliminary Injunctive Relief To Prevent Minority Members of a Tribal**
Council From Undermining the Governing Majority's Authority.

1 In *Dauids v. Coyhis*, 857 F.Supp. 641 (E.D. Wis. 1994), a dispute erupted among members of
2 a Tribal Council which constituted the Tribe's governing body. The dispute resulted in one member
3 of the Tribal Council forming "a voting majority which, pursuant to the Tribal Constitution, became
4 authorized to take Council action without the cooperation or approval of the remaining three Council
5 members." *Id.* at 643. The minority Tribal Council members, with support from other members of
6 the Tribe, purportedly conducted a special election and formed a new Tribal Council. *Id.* "Neither
7 the special election nor the new Tribal Council [was] recognized by the United States Department of
8 the Interior's Bureau of Indian Affairs." *Id.* The new and unrecognized Tribal Council then engaged
9 in the following conduct:

10 (1) prevented the recognized Tribal Council members from gaining access to tribal
11 headquarters; (2) prevented recognized Tribal Council members from gaining access
12 to the Casino; (3) interfered with the recognized Tribal Council's ability to govern the
13 Community or supervise the Casino (including but not limited to interfering with the
14 recognized Tribal Council's ability to change signature cards on the Norwest Bank
accounts and any other bank accounts opened by defendants with Casino proceeds);
and (4) removed fund and/or property from the Casino and tribal headquarters.
Id. at 644.

15 The recognized Tribal Council members requested preliminary injunctive relief against the
16 dissident Tribal Council members restraining them from engaging in the above conduct. *Id.* The
17 dissident Tribal Council members objected to the Court's jurisdiction on the ground that the action
18 involved a purely intratribal dispute. The Court rejected this assertion, and concluded that it had
19 "federal question jurisdiction" over the issues raised in the complaint because it involved theft from
20 the Tribe's Casino and was brought by the Tribe itself. *Id.* Moreover, the Court concluded that entry
21 of preliminary injunctive relief was appropriate, stating that:

22 The Tribe's Constitution vests in these elected individuals the authority to implement
23 policies and practices to maintain order and further the economic, social, and cultural
24 development of the Tribe. The Council's ability to function is dependent on the
25 Tribe's respect for its authority, which has clearly been diminished by defendants'
26 actions. The longer the Tribe's dissident members are permitted to operate in
deliberate disregard of the Will of the Council's majority, the more the governing
structure contemplated by the Tribe's Constitution is damaged. To deny injunctive
relief here would be to encourage a coup d'etat.

27 *Id.* at 647.
28

1 Other district courts have similarly concluded that injunctive relief is appropriately entered
2 against Tribal members or dissident Tribal Council members that have usurped governmental
3 authority in violation of the Tribe and its laws. *See, e.g., Maxam v. Lower Sioux Indian Community*
4 *of Minn.*, 829 F.Supp. 277, 285 (D. Minn. 1993); *United States v. Pawnee Business Council*, 382
5 F.Supp. 54, 59 (N.D. Okla. 1974), quoted with approval in *Seminole Nation of Okla. v. Norton*, 223
6 F.Supp.2d 122, 139 (D.D.C. 2002). Plaintiffs submit that this Court may appropriately order that
7 similar relief be provided in this action, as there is no question that Defendants are acting in violation
8 of Tribal law and the BIA's interim determinations regarding the proper members of the Tribal
9 Council.

10 **H. Plaintiffs Should Not Be Required to Post Any Security.**

11 Federal Rule of Civil Procedure 65(c) states that “[t]he court may issue a preliminary
12 injunction . . . only if the movant gives security in an amount that the court considers proper to pay
13 the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”
14 “Despite the seemingly mandatory language, Rule 65(c) invests the district court with discretion as to
15 the amount of security required, *if any.*” *Johnson*, 572 F.3d at 1086 (emphasis in original), citing
16 *Jorgenson v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003) (quotation omitted). As discussed above,
17 Defendants would suffer no harm by being required to follow extant BIA decisions and Tribal law,
18 accordingly, the Court should not require Plaintiffs to give security as condition of entering the
19 requested preliminary injunction. *Stidham*, 609 F.Supp.2d at 1227 (no bond required where there is
20 no proof of any resulting harm to Defendant).

21 **IV. CONCLUSION**

22 For all of the foregoing reasons, Plaintiffs respectfully request that this Court issue a
23 preliminary injunction to preserve the *status quo ante* pending exhaustion of administrative remedies
24 and subsequent appeals, the terms of which are outlined in the concurrently filed [Proposed] Order.

25 Dated: September 14, 2009

FREDERICKS PEEBLES & MORGAN LLP

26 By: /s/ A. Robert Rhoan

27 A. Robert Rhoan

Attorneys for Plaintiffs