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7

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

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

16 Plaintiffs,

17 v.

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

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

) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF**  
) **PLAINTIFFS' REPLY TO DEFENDANTS'**  
) **OPPOSITION TO MOTION FOR**  
) **PRELIMINARY INJUNCTION**

) Courtroom: 4

) Judge: Hon. Lawrence O'Neill

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1 Plaintiffs TIMBISHA SHOSHONE TRIBE (“Tribe”), EDWARD BEAMAN, VIRGINIA  
2 BECK, and CLEVELAND LYLE CASEY (collectively “Plaintiffs”) hereby submit the following  
3 memorandum of points and authorities in support of their Reply to Defendants JOSEPH KENNEDY,  
4 MADELINE ESTEVES, PAULINE ESTEVES, ANGELA BOLAND, and ERICK MASON  
5 (collectively “Defendants”) Opposition to Plaintiffs’ Motion for Preliminary Injunction.

6 **I. INTRODUCTION**

7 Defendants’ opposition brief, rather than providing reasons why this Court should refuse to  
8 grant the preliminary injunctive relief requested by Plaintiffs, actually highlights the reasons why  
9 entry of interim injunctive relief is necessary to stabilize the present dispute to prevent further harm  
10 to the Tribe, its governing institutions, and most importantly, the tribal members. Indeed, a cursory  
11 review of the declarations submitted in support of Defendants’ opposition only bolsters Plaintiffs’  
12 position that irreparable harm is being suffered by the Tribe and its members. Defendants’ argument  
13 concerning Tribal sovereign immunity is inapplicable, since Defendants have acted beyond the scope  
14 of their authority by violating tribal law and refusing to abide by extent decisions issued by the  
15 United States Department of the Interior, Bureau of Indian Affairs (“BIA”). Most importantly,  
16 Defendants opposition simply misses the point, since Plaintiffs requested relief does not seek to have  
17 this Court decide the present intratribal dispute, instead all that is being requested is that injunctive  
18 relief be entered to prevent Defendants from continuing to engage in conduct which has the intended  
19 effect of destroying the jurisdiction of the BIA and this Court to decide which governmental body  
20 should be recognized for purposes of maintaining the government-to-government relationship with  
21 the Tribe. Without governmental stability, the whole point of making this intergovernmental  
22 determination is pointless, as there will never be a status quo from which a proper determination can  
23 be made.

24 Accordingly, as set forth below and in Plaintiffs’ moving papers, this Court should enter  
25 interim injunctive relief against Defendants to prevent further irreparable harm to the Tribe, its  
26 members, and its governing institutions pending the completion of administrative appeals before the  
27 BIA and any further remedies the parties may seek in federal court.

28 ///

1 **II. LEGAL ARGUMENT**

2 **A. The Winter Decision Does Not Completely Eliminate The Sliding Scale Test For**  
3 **Evaluating Whether Preliminary Injunctive Relief Should Be Entered.**

4 Plaintiffs will not reiterate the decisions cited in its moving papers which have held that this  
5 Court may analyze a request for preliminary injunctive relief under the sliding scale approach,  
6 provided that a likelihood of irreparable harm is demonstrated required by *Winter v. Nat'l. Resources*  
7 *Defense Council, Inc.*, 129 S.Ct. 365, 376 (2008). However, Plaintiffs do point out that the evidence  
8 and legal authorities submitted in support of their moving papers are sufficient to satisfy the  
9 requirements for obtaining preliminary injunctive relief under either standard.<sup>1</sup>

10 **B. Defendants Evidence Manifestly Demonstrates That The Tribe Has Suffered**  
11 **Irreparable Harm, and Will Continue to Suffer Irreparable Harm Absent This**  
12 **Court's Entry of Interim Injunctive Relief.**

13 Plaintiffs identified several specific harms that Plaintiffs, the Tribe, and tribal members have  
14 suffered as a result of the present intratribal dispute, and will continue to suffer as a result of  
15 Defendants refusal to abide by Tribal law and applicable BIA decisions. The evidence submitted in  
16 connection with Defendants' opposition papers, instead of refuting that irreparable harm has been  
17 suffered, confirms Plaintiffs' case. The specific harms identified in Plaintiffs' moving papers include  
18 the following: (1) denial of access to the Tribe's programs and services; (2) tribal members living in  
19 unsafe and unhealthy living conditions; (3) denial of civil rights through disenrollment without  
20 compliance with Tribal laws and procedures; (4) denial of civil rights to Plaintiffs by Defendants  
21 which have enforced an illegal removal from office; (5) removal and attempted removal of tribal  
22 members from their housing; (6) destruction of tribal members' livelihoods, including, financial,  
23 educational, and employment opportunities; (7) destruction of tribal heritage; (8) the Tribe's loss of  
24 goodwill in the business community, and with federal and state agencies; and (9) degradation of the  
25 Tribe's ability to participate in official proceedings before state and federal agencies.

26 The declarations submitted by Defendants confirm that these irreparable harms are being  
27 suffered, and will continue to be suffered, and include the following: (1) interruption of tribal

28 <sup>1</sup> With regard to Defendants' submitted evidence, Plaintiffs point out that the Declaration of Gene Harrison is not signed at all. Accordingly, this declaration should be disregarded in evaluating the instant motion. Plaintiffs also object to the late filing of Defendants' opposition papers and request that the Court strike the opposition on that ground.

1 funding and programs (Declaration of Barbara Durham, Ex. B at ¶ 35); (2) interruption of funding  
2 and payments owed to third parties (Declaration of Carmen Armitage, at ¶¶ 5, 7); (3) denial of  
3 housing to tribal members (Declaration of Charles Tyrone Sudway, at ¶¶ 1-6); and (4) interference  
4 with tribal environmental programs and confusion caused to state and federal agencies regarding the  
5 leadership of the Tribe (Declaration of Don Forhope, at ¶¶ 5, 11-18, 22-27; Declaration of Dr. Bonnie  
6 Eberhardt, at ¶¶ 11-12, 13), among other harms described in the various declarations submitted.

7 In sum, Plaintiffs and Defendants' evidence amply demonstrate that Plaintiffs, the Tribe, and  
8 its members will continue to suffer irreparable harm if interim injunctive relief is not entered.

9 **C. Defendants Are Not Entitled To Assert The Tribe's Sovereign Immunity.**

10 As an initial matter, because Defendants Pauline Esteves, Erick Mason and Angela Boland are  
11 not validly elected under Tribal, nor recognized as tribal officials by the BIA, they are not entitled to  
12 assert the Tribe's sovereign immunity to bar the present suit. With respect to Defendants Joseph  
13 Kennedy and Madeline Esteves, those individuals are not entitled to assert the Tribe's sovereign  
14 immunity because they only constitute a minority of the Tribal Council, the legitimate governing  
15 body of the tribe. Pursuant to the Tribe's Constitution, only the Tribal Council has the power to  
16 confer sovereign immunity on any Tribal official seeking to assert it, and Plaintiffs, whom constitute  
17 the governing majority of the Tribal Council have obviously not conferred such authority. By  
18 bringing the instant action against Defendants, Plaintiffs have waived any sovereign immunity  
19 Defendants would otherwise possess.

20 For example, in *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*, 170  
21 Cal.App.3d 489, the Tribal chairwoman purported to waive the Tribe's sovereign immunity by  
22 signing an agreement. In rejecting the argument that the Tribal chairwoman lacked the ability to  
23 waive the Tribe's sovereign immunity, the court held that she "could not waive the tribe's immunity,  
24 unless the Tribe had expressly delegated that duty to her," and further noted that "[n]othing in the  
25 Tribe's Constitution and bylaws gave her such authority." *Id.* at 496. The court concluded that even  
26 if the chairwoman intended to waive the Tribe's immunity, she could not do so because she was not  
27 permitted to under tribal law.  
28

1 Here, Plaintiffs are seeking to assert the Tribe's sovereign immunity, a power which they do  
2 not possess under the Tribe's Constitution without proper authorization from the Tribal Council. As  
3 Defendants only comprise two (2) of the members of the Tribal Council recognized by the BIA and  
4 pursuant to tribal law, and Plaintiffs seek to address violations of both those decisions and the tribal  
5 law, Defendants are not entitled to assert sovereign immunity to the present request for preliminary  
6 injunctive relief.<sup>2</sup>

7 In addition, because Defendants have failed to adhere to Tribal law and extant BIA decisions  
8 by forming an illegal government and preventing Plaintiffs' from participating as they are legally  
9 entitled to do, Defendants have acted beyond the scope of any official authority they possess and may  
10 be sued. Plaintiff have exhaustively discussed, as has the BIA in its decisions, the reasons why  
11 Defendants actions are beyond the scope of their official authority and do not reiterate it here. It  
12 suffices to say that a number of Courts, including federal, state and tribal, have concluded that where  
13 Tribal officials act beyond the scope of their lawfully delegated authority, their actions are not that of  
14 the sovereign entity and are not protected by sovereign immunity. *McCurdy v. Steele*, 353 F.Supp.  
15 629, 636 (D. Utah 1973), citing *Dugan v. Rank*, 372 U.S. 609 (1963); *Larson v. Domestic & Foreign*  
16 *Commerce Corp.*, 337 U.S. 682 (1949); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59  
17 (1978) (concluding that tribal governor was not immune from a suit seeking declaratory and  
18 injunctive relief against enforcement of tribal ordinance); *Puyallup Tribe v. Dept. of Game of the*  
19 *State of Wash.*, 433 U.S. 165, 171 (1977) ("whether or not the Tribe itself may be sued in a state court  
20 without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal  
21 members is permissible"); *Combrink v. Allen*, 3 Okla. Tribe 46, 1993 WL 831921 (Tonkawa Ct.  
22 Indian Appeals Mar 5, 1993); *Lynch v. Yomba Shoshone Tribe*, No. CVC-YT-003-96, et al., 1997  
23 WL 34704354 (Nev. Inter-Tribal Ct. App. July 16, 1997); *Honyaoma v. Nuvamsa*, No. 2007-AC-  
24 0005, 7 Am. Tribal Law 320 (Hopi Tribe App. Ct. Jan. 28, 2008).<sup>3</sup>

25  
26 <sup>2</sup> Plaintiffs also note that the issue of sovereign immunity is irrelevant to the determination of whether Plaintiffs should be  
27 recognized by the BIA as members of the Tribal Council for government-to-government purposes, and submit that the  
28 Court may disregard this argument in issuing an interim injunction preventing Defendants from attempting to destroy the  
BIA's and this Court's jurisdiction by their actions.

<sup>3</sup> In addition, the individual Defendants in this action have also been sued in their individual capacities, and "Tribal  
sovereign immunity does not protect an official against individual-capacity claims." *Fletcher v. United States*, 116 F.3d

1 Accordingly, Defendants' sovereign immunity defense should be rejected.

2 **D. Plaintiffs' Have Standing to Seek the Requested Preliminary Injunctive Relief**  
3 **Against Defendants.**

4 For example, in *Feezor v. Babbitt*, 953 F.Supp. 1 (D.D.C. 1996), the Court considered  
5 whether individual tribal members had constitutional standing to challenge a BIA decision. The court  
6 outlined the following requirements that must be met to demonstrate standing: (1) injury in fact that  
7 is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.  
8 *Id.* at 4. In this action, Plaintiffs meet this requirement, both as tribal members and tribal officials  
9 recognized by the BIA for the purposes of the Tribe's intergovernmental relationship with the Tribe.  
10 Plaintiffs have suffered injury-in-fact by being denied their right to participate in the Tribe's  
11 governance, which is traceable to Defendants' actions in forming an illegal tribal government, which  
12 will be redressed by the issuance of a preliminary injunction which requires the Defendants to abide  
13 by tribal law and extant BIA decisions pending the outcome of administrative proceedings and any  
14 subsequent appeal.<sup>4</sup> Defendants failure to abide by the decisions of the BIA governing recognition  
15 has also resulted in injury in fact to Plaintiffs which can be addressed by the granting of interim  
16 injunctive relief.

17 Accordingly, Defendants' standing defense should be rejected.

18 **E. Plaintiffs' Are Likely To Prevail On The Merits Of Their Causes Of Action.**

19 As noted by Defendants, Plaintiffs' complaint does allege that Defendants must abide by the  
20 BIA's decisions recognizing them as the lawful majority of the Tribal Council. Under similar  
21 circumstances, Courts have concluded that a Tribe and its officials are entitled to interim injunctive  
22 relief pending the BIA's determination of a leadership dispute. For example, in *Goodface v.*  
23 *Grassrope*, 708 F.2d 335 (8th Cir. 1983), the Court concluded that the district court had the power to

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24 1315, 1324 n. 12 (10th Cir. 1997), citing *Santa Clara Pueblo*, 436 U.S. at 59. In addition, because the claims against  
25 Defendants in this action are stated against them in their individual, as well as their official capacities, a suit for monetary  
26 damages is also not barred by Tribal sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 757 (1999) ("Even a suit for  
27 money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful  
28 conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the  
officer personally"); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 575 (10th Cir. 1984).

<sup>4</sup> Defendants contend that Plaintiffs are not tribal members, and therefore are not entitled to standing to bring the instant action. As with all actions taken by Defendants, the purported disenrollment of Plaintiffs is invalid precisely because it does not comply with tribal law, nor are those disenrollments entitled to recognition by the BIA.

1 issue interim injunctive relief recognizing status quo members of the Tribal Council pending  
2 completion of administrative proceedings with the BIA concerning who constituted the lawful  
3 leadership of the Tribe. In addition, the Northern District of California has issued a preliminary  
4 injunction requiring recognition of a tribal governing body "pending resolution of" administrative  
5 appeals and appeals to the district court. (See *Alan-Wilson, Sr. v. Sacramento Area Director*, 30 IBIA  
6 241, 251, 1997 WL 215308, citing *Cloverdale Rancheria of Pomo Indians of Cal. v. United States*,  
7 Case No. C-96-1037-CW (N.D. Cal. 1996).

8 Given the facts outlined in the present dispute, and the inability of the BIA to assure that  
9 Defendants observe the status quo pending completion of administrative proceedings, Defendants  
10 submit that they are likely to succeed on the merits of their claims, and are entitled to interim  
11 injunctive relief.<sup>5</sup>

### 12 III. CONCLUSION

13 For all of the foregoing reasons, and those outlined in Plaintiffs' moving papers, Plaintiffs  
14 respectfully requests that this Court enter the requested preliminary injunctive relief.

15  
16 Dated: October 13, 2009

Respectfully submitted,

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18  
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20  
21 By: /s/ A. Robert Rhoan

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28 <sup>5</sup> Defendants agree that the last undisputed election resulted in the election of Joseph Kennedy, Madeline Esteves, Cleveland Lyle Casey, Virginia Beck, and Edward Beaman to the Tribal Council. (See Defendants' Opp., at p. 6, lines 22-24.)