

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

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

II. Procedural timeline

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

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

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

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

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

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

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

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

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

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

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

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

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

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

April 16, 2010: Beaman filed a Response Brief.

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

III. Applicable law

A. Relevant Federal law

1. The Department of the Interior (Department) has both the authority and the responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the Tribe. *Greendeer v. Minn. Area Director*, 22 IBIA 91, 95 (1992), citing *Reese v. Minneapolis Area Director*, 17 IBIA 169, 173 (1989).
2. "BIA has the authority and the responsibility to decline to recognize the results of tribal actions when those results are tainted by a violation of ICRA." *Greendeer v. Minn. Area Director*, 22 IBIA 91, 97 (1992).
3. "The Secretary of the Interior is charged not only with the duty to protect the rights of the tribe, but also the rights of individual members. And the duty to protect these rights is the same whether the infringement is by non-members or by members of the tribe." *Milam v. Dept. of the Interior*, No. 82-3099; 10 ILR 3013, 3017 (D.D.C. 1982); quoted at *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 137 (D.D.C. 2002).
4. The Federal Government has a duty to recognize, if at all possible, a tribal government with which it can carry on government-to-government relations. *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983).
5. The Secretary of the Interior has a duty to ensure that trust resources belonging to a tribe, or Federal resources allocated to a tribe, are transmitted to an entity that legitimately represents the tribe. *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Milam v. U.S.*, supra.

B. Applicable Tribal Law

1. **Timbisha-Shoshone Constitution Article IV (1):** The Tribe’s Constitution identifies the three parts of the Tribal government – General Council, Tribal Council, and Judiciary – and provides that none of these branches "shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document."
2. **Timbisha-Shoshone Constitution Article IV section 3:** "The Tribal Council shall exercise, concurrently with the General Council, all the powers delegated to it by the General Council in Article V of this document and otherwise vested in the Tribal Council by this document."
3. **Timbisha-Shoshone Constitution Article VI section 4:** Tribal officers shall hold office for two years.
4. **Timbisha-Shoshone Constitution Article VI section 4(b):** "General elections to vote for tribal council members shall be held annually on the second Tuesday of the month of November. Notice of the general elections shall be posted by the Secretary of the Tribal Council at least 20 days before such election at the Tribe's business office, the voting place, and at three or more additional public places."
5. **Timbisha-Shoshone Constitution Article VIII section 3(b):** “Special meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meeting shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.”
6. **Timbisha-Shoshone Constitution Article VIII section 2(b):** "A majority of the members of the Tribal Council shall constitute a quorum at all Council meetings. No business shall be conducted in the absence of a quorum."
7. **Timbisha-Shoshone Constitution Article X section 1:** “The Tribal Council shall declare a Tribal Council position vacant for any of the following reasons:
...
b. When a Tribal Council member resigns;
...
d. When a Tribal Council member is removed from office;
e. When a Tribal Council member is recalled from office”
8. **Timbisha-Shoshone Constitution Article XI:** This section addresses Removal and Recall of Tribal Council members. Section 1 sets out the procedural requirements for removal of the member by the Tribal Council itself; section 2 sets out the procedural requirements for recall of the TC member by the General Council. Both sections require a public hearing where charges must be articulated and the member permitted to present a defense against those charges (Article XI section 1(d)(2); section 2(c)).

9. **Timbisha-Shoshone Constitution Article XI section 1(d)(3):** "After hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is the subject of the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings."
10. **Timbisha-Shoshone Constitution Article XIV section (5)(h):** "(The Tribe may not deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

IV. Background

A. The August 25, 2007, Tribal Council meeting

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

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

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

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

B. The November 2007 elections

Both factions purported to hold elections in November of 2007. According to Kennedy, there were four seats to fill: the terms in office had expired for himself and Casey; Beaman's term in office did not expire for another year, but he had been removed from office; and Beck had been removed from office and her term had expired. Thus the only carry-over officer was Madeline Esteves. According to the report on the Kennedy election, prepared by Indian Dispute Resolution Services, out of 262 eligible tribal voters, 117 ballots were cast in the Kennedy election of Nov. 13, 2007. The top four vote-getters were placed on the TC: Kennedy (79); M. Cortez (74); M. Armitage (69); P. Esteves (65).² Casey was included on the Kennedy faction's ballot, receiving seven votes. Beaman and Beck appealed the Kennedy election to the Election Board established by the Beaman faction via their resolution 2007-28, adopted at a meeting of the Beaman faction on September 22, 2007³.

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

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

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

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

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

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

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

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

C. The January 20, 2008, General Council meeting

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

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

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

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

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

V. History of appeals

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

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

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

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

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

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

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

VI. Summary assessment of the Regional Director's findings

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

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

VII. Analysis

My office has reviewed the extensive administrative record and the filings of the parties in this matter. While it is a very important principle of Indian law that the Federal government should defer to decisions of a tribal government when attempting to resolve internal disputes, such a presumption of deference can never permit the Federal government to accept actions by a tribal entity that are plainly contrary to the Tribe's own laws. In the matter at hand, the Tribe's Constitution permits the TC to "declare" a vacancy on the TC when a member "resigns." The word "resign" is a plain English word, with straightforward dictionary definitions:

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

Webster's 9th New Collegiate Dictionary © 1985

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

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

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

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

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

VIII. Recognition of Gholson government for limited purpose

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

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

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

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

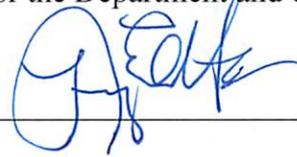
IX. Conclusion

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

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

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

Dated: MAR 01 2011



Larry Echo Hawk
Assistant Secretary – Indian Affairs

CERTIFICATE OF SERVICE

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

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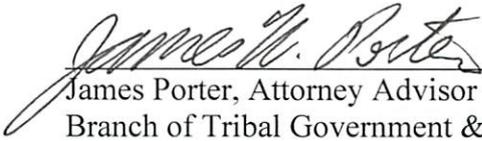
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