Case No. 12-16539

United States Court of Appeals for the Ninth Circuit

Cloverdale Rancheria of Pomo Indians of California, et al.,
Plaintiffs and Appellants,

v.

Kenneth L. Salazar, et al.
Defendants and Appellees

Appeal from the U.S. District Court for the Northern District of California
Case No. 5:10-cv-01605-JF
Hon. Jeremy Fogel

APPELLANTS' REPLY BRIEF

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Introduction

Just a few years ago, the Department of the Interior ("Department") concluded that the Cloverdale Rancheria of Pomo Indians ("Tribe") had not organized itself following its 1983 return to federal recognition. In the Department's considered view, the 2003 expansion of tribal membership was invalid and ineffective, and the expanded membership could not take action on behalf of the Tribe. The Department rejected a proposed tribal constitution because it was adopted by individuals other than the *Hardwick* class, the only persons with authority to organize the Tribe. *See Hardwick v. United States*, No. C-79-1710 (N.D.Cal. Dec. 22, 1983). Nevertheless, because it was necessary to recognize somebody to act on the Tribe's behalf, the Department continued to deal with the successors of the 1996 Council, chosen by the Tribe in 1997 to serve as its interim government.

Now the *Hardwick* class members have voted to adopt a tribal constitution, elect a governing body, and dissolve the Tribe's interim government. But the Department refuses to consider whether, based on these facts, it should rethink which people it recognizes as the Tribe's government.

In the face of the Department's stubborn refusal to consider departing from the already dubious status quo, the Tribe is attempting to spur action

through this litigation. The Administrative Procedure Act ("APA") authorizes the district court to compel the Department to take legally required action. *See* 5 U.S.C. § 706(1). Two directives in particular require departmental action: First, the Department's policy, expressed in binding decisions of the Interior Board of Indian Appeals ("IBIA"), requires that when it recognizes the formal organization of the Cloverdale Rancheria and the election of its tribal government (as required by the *Hardwick* stipulated judgment), the Department must assure itself that these organizational actions were taken only by the tribal distributees, their dependents, and their lineal descendants. *See Alan-Wilson v. Sacramento Area Director*, 30 IBIA 241 (1997) ("*Alan-Wilson I*"); *Alan-Wilson v. Acting Sacramento Area Director*, 33 IBIA 55 (1998) ("*Alan-Wilson II*"). Second, the Indian Self-Determination and Education Assistance Act ("ISDA") requires that when the Department declines a contract proposal submitted by a tribal organization and authorized by an Indian tribe, the Department must identify specific facts or legal authority clearly demonstrating the proposal is deficient in any of five ways. *See* 25 U.S.C. § 450f(a)(2). The district court reached incorrect conclusions in determining that it lacked jurisdiction to hear the Tribe's APA claims and that the Tribe lacked statutory standing to bring a claim under the ISDA.

In this Reply Brief, the Tribe will address certain points arising out of the Department's Answering Brief. First, the Tribe is not asking the Department to insinuate itself into an internal tribal dispute, as the Department suggests. Rather, the Tribe is seeking Departmental recognition of the Tribe's own internal resolution of the issue. Second, the Department's discussion of its duties toward the Tribe omits both the agency's responsibility to ensure the lawful organization of the Tribe's government, recognized in the IBIA's *Alan-Wilson* decisions, and the Department's duty to the Tribe as an ISDA contract applicant. Third, the Department has a flawed understanding of standing under the ISDA and of the facts alleged by the Tribe, and extensively supported by documentation, that establish the Tribe's right to assert an ISDA claim.

I. The Department Must Respect the Results of the Tribe's Democratic Elections.

The Department characterizes the Tribe's claims as an effort to have the Department resolve a dispute between tribal factions. Intra-tribal disputes must be resolved in tribal forums, the Department argues, and therefore the Department cannot be compelled to act. *See* Answer Brief at 6, 21, 27, 39.

This is not a case in which a faction of tribal members asks the federal government to intercede and make a decision to externally resolve an

internal dispute. Here, the Tribe itself has conducted two democratic elections to resolve the issues dividing the tribal membership. The members of the Tribe – the people identified in the Department's *Alan-Wilson* decisions and the Department's 2008 list of members eligible to vote – have resolved the dispute internally, and the Tribe now asks the Department to recognize the results of its internal resolution. "Once the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself." *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010).

The government-to-government relationship between the Tribe and the United States requires the Department to engage with the Tribe itself, through the representatives authorized by Tribe's membership. It is for the Tribe to determine the form in which it organizes its government and who serves as its governing body. The Cloverdale Rancheria made these determinations in its 2008 and 2009 tribal elections, and ideally that would have ended the matter. It is an unfortunate fact, however, that the Tribe's internal resolution means little while it goes unrecognized by the Department. The Tribe's most significant external relationship is with the Federal government, on which it relies for the funds to operate and serve

tribal members. Other relationships too depend on the Department's approbation of the 2009 Council, including the Tribe's relationships with businesses that may be reluctant to partner with the Tribe while the legitimacy of its government appears unclear.

Because the Department cannot be expected simply to accept as a fact when a group claims to be the newly elected Tribal government, particularly when the Department is aware of an ongoing internal dispute, the Tribe and the 2009 Council in this case supplied the Department with an extensive record of the relevant facts to establish legitimacy. There are several points of contention, two of which are particularly important: the effect of the election of the 1996 Council, and the legitimacy of the purported expansion of the tribal membership in 2003. As alleged in the Complaint and to the Department officials, the Tribal Council chosen in 1996 was an interim government with limited authority, and the membership criteria were modified in 2003 without the required participation or approval of the existing members. If these allegations are correct, then the Tribe first organized its government in 2008, then chose the 2009 Council as its governing body and dissolved the 1996 Council. There are some in the Tribe who see the facts differently and support the 1996 Council. The Department will need to contend with these questions to determine whether

the Tribal members have in fact resolved the dispute internally.[1] What the Department cannot do is simply ignore the issues and maintain its recognition of the 1996 Council in complete disregard of the will of the Tribe's members.

The cases on which the Department relies are inapposite. In *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130 (1996) (*see* Answer Brief at 6, 39) BIA officials issued decisions concerning the removal of certain tribal officers, and in reaching these decisions interpreted the White Earth Band's constitution, in direct contravention of a tribal law providing a procedure for the Band itself to interpret its constitution. *Id*. at 142-43. The IBIA held this was "an unwarranted intrusion into tribal sovereignty and self-government." *Id.* at 143. The IBIA emphasized that when there is a dispute concerning a tribe's governing body, the tribe must always have an "opportunity to resolve the dispute." *Id.* at 145. Nevertheless, "when the situation deteriorate[s] to the point that recognition of some government [is] essential for Federal purposes, such as maintaining the government-to-government relationship with the tribe or operating P.L. 93-638 grants or contracts," then the BIA may "step[] in and issue[] a decision." *Id*.

[1] The IBIA has previously noted the necessity of analyzing these issues before deciding how best to implement the demonstrated will of Tribe. Ex.R. at 342-43.

In the case at bar, it is not a question of the Department intruding into the Tribe's sovereignty. The Tribe has exercised its sovereignty by conducting fair and democratic elections, and the Department is now asked to respect the Tribe's sovereignty by accepting the results of the elections. And the Department owes the Tribe the responsibility of ensuring its lawful organization, which requires the Department to analyze the factual history to determine whether these elections warrant departmental approval. Moreover, the situation has "deteriorated" to the point that it is essential the Department identify the correct government, in accordance with the will of the Tribe. The Department is well aware of the infirmities in the 1996 Council's claim of authority, and in the composition of the expanded tribal membership, yet it carries on as if ignorant. For the simple reason that the Department should maintain its government-to-government relationship and ISDA contracts with the actual Tribe and its government, as organized and chosen by the tribal members themselves, the Department has the duty and authority to genuinely assess the identity of the Tribe's government.

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) are cited by the Department for the proposition that the federal courts lack jurisdiction over internal tribal disputes. *See* Answer Brief at 21. Both are tribal membership cases. In

Santa Clara Pueblo, the plaintiff sought to have the tribe's membership policy declared unlawful under federal law. *Santa Clara Pueblo* at 51-52. In *Lewis*, the plaintiffs asked the court to order the Department to order the tribe to admit plaintiffs into the tribe's membership. *Lewis* at 960-61. Neither is equivalent to the instant case, in which the plaintiffs do not seek to turn over to an outside arbiter the power to decide the outcome of an internal matter, such as tribal membership, usurping the Tribe's sovereignty. Here, the members of the Tribe voted to enact a constitution, elect a governing body, and reject the unauthorized actions of the outgoing interim government. These acts are done, accomplished by the Tribe exercising its sovereignty. The Tribe now wants to move on to the matter of conducting its business, which requires the Federal government, when it acts with respect to the Tribe, to acknowledge the results of the tribal elections. And while this acknowledgement will require the Department to depart from the comfortable status quo, it is within the Department's power to do so when required to fulfill its obligation to respect the will of the people of each Indian tribe, and its particular responsibility to ensure the Cloverdale Rancheria's ultimate lawful reorganization. It is within the federal courts' jurisdiction to compel the Department to issue a reasoned decision as required by law. *See Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir.

1983) (recognizing district court's jurisdiction to review under APA the BIA's tribal government recognition decision); *Winnemucca Indian Colony v. U.S. ex rel. Dept. of the Interior*, No. 3:11-cv-00622, 2012 WL 78198, *4, *6 (D.Nev. Jan. 10, 2012) (holding that "the choice of which tribal leadership to recognize lies with the BIA in the first instance," and that the court has jurisdiction under APA to "identify, and hold the BIA to respect, tribal rulings on internal matters.")

II. The Department Owes to the Tribe the Discrete, Non-Discretionary Duty to Issue a Reasoned Decision Identifying the Tribe's Governing Body.

Contrary to the Department's assertions, the duty owed to the Tribe is not based only on "broad statutory mandates." *See*, *e.g.*, Answer Brief at 23. Several sources of law unite to create a discrete, non-discretionary obligation: not only Federal Indian common law and the *Hardwick* stipulated judgment, which the Department's brief addresses, but also the binding decisions of the IBIA and the mandatory directives of the ISDA, both of which the Department's brief ignores as a basis for the required action. The Department is required by law to restore the Tribe to its pre-termination status by substantively evaluating, in accordance with the criteria set forth in the IBIA's *Alan-Wilson* decisions, the Tribe's request to recognize its election results and the Tribe's ISDA contract proposals. The

district court has jurisdiction under the APA to order the Department to undertake the required actions.

This case is not like *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (*see* Answer Brief at 23), in which Indian Tribes sought "to impose a duty, not found in any treaty or statute, to manage non-tribal property for the benefit of the tribes." *Id.* at 811. There the Court held the government's common law trust obligation toward Indian tribes does not alone, absent a specific duty imposed by the law, provide a cause of action. *Id.* at 809-10. Nor does an alleged breach of trust, even if it is tied to "broad statutory mandates," give courts authority to compel specific action under the APA. *Id.* at 814. In the instant case, however, the Tribe does not present the Court with two generalized legal duties and ask it to compel specific action. Here, the Department owes a particular duty to the Tribe, mandated by *Hardwick*, to return the Tribe to its pre-termination status, and a particular duty to the Tribe, mandated by the *Alan-Wilson* cases, to ensure the Tribe's restoration is accomplished according to the established criteria. The Department owes the further duty, particular to Tribes and tribal organizations that have submitted ISDA proposals to the Secretary, to address the Tribe's proposal according to the statutory criteria. The backdrop to all of these duties is the Federal government's power and

responsibility to determine "whether a tribe has properly organized itself." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). As the Department notes in its brief, "the Department ha[s] a duty to conduct business only with lawfully-constituted governing bodies who represent the tribal membership." *California Valley Miwok Tribe v. United States*, 424 F.Supp.2d 197, 201 (D.D.C. 2006) (*see* Answer Brief at 6.) "Payment of funds at the request of a tribal council which, to the knowledge of [Department officials], was composed of representatives faithless to their own people . . . would be a clear breach of the Government's fiduciary obligation." *Id.* at 202, quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). There exist strong legal obligations that require the Department to respect the internal democratic decisions of every Indian tribe. In this case, these general obligations inform the particular duties owed to the Cloverdale Rancheria pursuant to *Hardwick*, *Alan-Wilson*, and the ISDA. It is these specific legal duties – to restore the Tribe and to evaluate its contract proposals, both according to the mandatory criteria – the district court has jurisdiction to enforce by compelling the Department to act.

Alvarado v. Table Mountain Rancheria, 509 F.3d 1008 (9th Cir. 2007) (*see* Answer Brief at 26), does not rebut the Tribe's arguments. In *Alvarado*,

plaintiffs brought a claim under the APA for review of the Secretary of the Interior's failure to act upon a petition to admit plaintiffs as members of the Table Mountain Rancheria. *Id.* at 1015. The Court affirmed the dismissal of the "failure to act" claim. *Id.* at 1019-20. The plaintiffs' focus in *Alvarado* was a settlement agreement, similar to the *Hardwick* judgment, that restored the Indian status of a class of individuals and the federal recognition of the Table Mountain Rancheria. *Id.* at 1013. The Court held the requested agency action was not required by law because the issue of tribal membership was entirely unconnected to the settlement agreement; the restoration of the individuals to Indian status was not equivalent to requiring that they be members of any particular tribe. *Id*. at 1018, 1020. The "settlement did not establish membership in the [Table Mountain Rancheria] either expressly or by implication." *Id*. at 1018.

The Department asserts that as in *Alvarado*, the agency action the Tribe desires in this case is equally unconnected to the *Hardwick* judgment. *See* Answer Brief at 27. But the Department mischaracterizes what the Tribe seeks, which is not "for the Bureau to intervene in . . . intra-tribal leadership disputes." *Id*. at 27. The Department is also incorrect to state that its legal obligations are subject to "considerable discretion," and that this

precludes an order compelling action. *Id.* And the Department is wrong to assert that its obligation under *Hardwick* was "fulfilled." *Id.* at 28.

As discussed above, the Tribe does not ask for the Department's intervention in, or external resolution of, an internal tribal leadership dispute. The Tribe seeks recognition of the Tribe's own internal resolution of its leadership issues, by the one external entity with the practical ability to give the Tribe a meaningful imprimatur. And while the *Hardwick* judgment itself does not enumerate this act – the recognition of the Tribe's ultimate organization – as a discrete duty, the Department bound itself to undertake this responsibility. In *Alan-Wilson I*, the IBIA stated:

> This is not an ordinary tribal government dispute, arising from an internal dispute in an already existing tribal entity. . . . Rather, this case concerns, in essence, the creation of a tribal entity from a previously unorganized group. In such a case, *BIA and this Board have a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so*.

Alan-Wilson I, 30 IBIA at 252 (emphasis added). The Tribe, now organized, asked the Department to confirm that its organization was accomplished by individuals who have the right to do so, in accordance with what the Department determined in 1997 is part of its duty to the Tribe.[2] The duty *to*

[2] The Tribe asked for this confirmation in two ways, both valid: the March 2009 recognition request, and the two 2010 ISDA contract proposals. The

make a decision as to whether the Tribe is lawfully organized is not a discretionary one. It is the Department's mandatory duty to make that decision. Agency discretion may play a part in the outcome, though even there, the Department's discretion is constrained by its holding in *Alan-Wilson II* that the individuals authorized to organize the Tribe are "only those individuals who were distributees, dependent members, or lineal descendants thereof." *Alan-Wilson II*, 33 IBIA at 57. The Department's responsibility did not end with the 1997 vote electing the 1996 Council. As alleged in the Complaint, the 1996 Council was chosen to serve as an "interim" government with limited authority, for the primary purpose of effectuating the Tribe's initial organization. *See* SAC ¶ 42 (Ex.R. at 38); *see also Alan-Wilson II* at 55 (describing the 1997 resolution supporting the 1996 Council as the Tribe's "interim governing body"). Its election did not itself organize the Tribe. The Department's responsibility to the Tribe is not fulfilled until it has ensured the Tribe's lawful organization.

Moreover, the Department is bound by the specific statutory mandate requiring it to accept or decline the Tribe's ISDA contract proposals. The Tribe's standing under the ISDA is addressed below. If the ISDA's requirements apply to the Tribe's contract proposals, as the Tribe argues

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Department would meet its responsibility to ensure the lawful organization of the Tribe by providing a substantive response to either of these.

they do, then this too is a basis for compelling the agency to make the required decision, either pursuant to the APA or the grant of jurisdiction in the ISDA itself.

III. The Department Is Required to Issue a Reasoned Decision Whether the ISDA Proposals Were Authorized by the Tribe.

The Department argues, in line with the district court, that the Tribe's ISDA claim is "not an appropriate means" for compelling the Department to evaluate the Tribe's organization and leadership. The Department does not offer a persuasive reason, instead advancing the circular logic that says the Department recognizes one Tribal Council, and therefore it cannot be asked to decide whether it ought to recognize a different Council.

The Department insists that to qualify for substantive consideration, a contract proposal must be submitted with "a valid resolution from the tribe enacted in accordance with the tribe's governing documents." Answer Brief at 29. This is exactly how the Tribe submitted its proposals. *See* SAC Exh. 11 & 13 (Ex.R. 351, 362). But the Department did not accept that the Tribe's government and governing documents had changed, and refused to look any further. The Department cites *San Pasqual Band of Mission Indians v. Salazar*, No. 09-1716 (RMC) (D.D.C. Mar. 10, 2010), to support its argument that this refusal was correct. *See* Answer Brief at 29,

Supp.Ex.R. 01-03. However, *San Pasqual* actually supports the Tribe's arguments in this case. The facts in *San Pasqual*, as described in the district court's order, are similar to the facts in this case concerning the Tribe's contract proposals. *See* Supp.Ex.R. 01-03. There, the Department returned an ISDA contract proposal "based on its determination that the resolution supporting the contract proposal was not from a recognized governing body of the Band." Supp.Ex.R. 02.[3] There is an important distinction, however: in *San Pasqual*, the "BIA's determination as to the tribal organization's legal status [was] currently on appeal before the Department of Interior's Assistant Secretary—Indian Affairs." Supp.Ex.R. 01. The *San Pasqual* court recognized that the outcome of the case "*depend[ed] on whether BIA was correct* in concluding that the resolution supporting the contract proposal was not submitted by a recognized tribal organization," and therefore denied the Department's summary judgment motion. Supp.Ex.R. 03 (emphasis added). In *San Pasqual*, someone within the Department was actually going to make a considered decision as to whether the organization submitting the contract proposal was authorized to do so. The court was not

[3] In *San Pasqual*, the district court appeared to accept the erroneous reading of the ISDA advanced by the Department in this case, that a contract proposal must be submitted by a "recognized" tribal organization, and that a tribal organization must be the "recognized governing body of any Indian tribe." SER 02, 03. This issue is discussed below.

willing to simply accept the Department's conclusion that because the submitter was not previously recognized, recognition now would be impossible. But in the instant case, the district court did simply accept the Department's conclusion. The Tribe asks instead for the Department to make a reasoned decision in light of the facts and applicable law, as in *San Pasqual*.

The Department suggests that the Department should only examine the merits of a submitter's claim of Tribal authorization "when there is no recognized governing council at all," or when the Tribe's ability to engage in government-to-government dealings has otherwise been "impaired." *See* Answer Brief at 31-32 (citing *Coyote Valley Band of Pomo Indians v. Acting Pacific Regional Director*, 54 IBIA 320 (2012), and *Alturas Indian Rancheria v. Salazar*, No. S-10-1997, 2010 WL 4069455 (E.D.Cal. Oct. 18, 2010).[4]

[4] In connection with this point the Department also cites *Lenares v. Salazar*, No. 12-cv-00186, 2012 WL 4490840 (E.D.Cal. Sept. 28, 2012) and 25 C.F.R. § 83.3. *See* Answer Brief at 32. This case and regulation concern the procedures for federal acknowledgement of Indian tribes, which is entirely unrelated to the Department's recognition of the results of a Tribal election. *See also* Answer Brief at 6-7 (citing *United States v. Holliday*, 70 U.S. 407 (1865), and *Miami Nation of Indians of Ind. v. U.S. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001), both of which concern acknowledgement of the existence of the Indian tribe itself, rather than recognition of one or another tribal government, and 25 C.F.R. § 83.3, an irrelevant acknowledgement regulation).

The IBIA's *Coyote Valley* decision does not support this notion. In *Coyote Valley*, the IBIA vacated the BIA's decision to recognize a tribal government, stating, "The Regional Director has simply failed to identify any required Federal action that prompted BIA's decisions." *Coyote Valley*, 54 IBIA at 326. "Whether [the BIA's] intrusion [in the tribe's internal affairs] is justified depends on whether some Federal action is required that necessitates a decision by BIA recognizing one or more of the tribe's representatives." *Id.* The IBIA identified a single circumstance that could justify a BIA decision: "ISDA may require BIA to act on a request for approval of an ISDA document from a tribe." *Id.* at 327. The Coyote Valley Band's ISDA request was submitted after the BIA made its decisions, so the IBIA did not accept the request as justification for the BIA to have made the decisions. *Id.* But the IBIA's disposition "return[ed] jurisdiction to BIA to take action on [the ISDA] request," with the instruction that BIA's decision thereon "must be based upon the underlying ISDA resolutions and must fully consider Appellants' contention that a tribal election conducted in December 2011 . . . renders the present dispute moot." *Id.* at 327 & n.15.

Coyote Valley does not state, or even imply, that the Department can act on an ISDA contract proposal only in the complete absence of a tribal government recognized by the Department. To the contrary, the IBIA

ordered BIA officials to decide on the ISDA request even if a tribal election had been conducted, resulting in the election of a governing body. Moreover, it is telling that the IBIA directed BIA officials to base its decision on the relevant factual circumstances before it, rather than merely adhering to the unexamined conclusion that the governing body currently recognized is the correct one, as in the instant case. And furthermore, even if the Department's view of *Coyote Valley* is accurate, after the IBIA's 2012 decision the Cloverdale Rancheria itself has no governing body recognized by the Department. *Committee to Organize the Cloverdale Rancheria Government v. Acting Pacific Regional Director*, 55 IBIA 220, 226 (2012) (vacating decision that stated BIA "'continues' to recognize" 1996 Council, stating it is "unnecessary to make a current determination regarding the Council.")

The Department attempts to distinguish this case from *Alturas Indian Rancheria, supra*, on the basis that here, unlike in *Alturas*, "the ability of the Tribe to engage in government-to-government dealings has not been impaired because the Bureau has signed self-determination contracts with the June 1996 Council." Answer Brief at 32. However, if the Tribe's allegations of fact are accepted, then the Tribe's government-to-government

relationship *is* impaired, because the Federal government is dealing with a body that does not represent the Tribe.

The Department's argument regarding the Tribe's statutory standing to assert any rights under the ISDA is flawed in several respects. The Department mistakenly equates the term "recognized governing body" with "tribal organization." A tribal organization may submit a contract proposal. 25 U.S.C. § 450f(a)(2). The statutory definition of "tribal organization" includes the "recognized governing body of any Indian tribe," as the Department repeatedly emphasizes, but it also includes "any legally established organization of Indians . . . which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities." 25 U.S.C. § 450b(*l*).[5] It should be clear that a tribal organization does not need to be the Tribe's recognized governing body.

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[5] The "tribal organization" definition in the ISDA is nearly identical to the definition of the same term in the Tribally Controlled Schools Act ("TCSA"), 25 U.S.C. §§ 2501-2511, except that in the TSCA it is formatted in a manner that enhances comprehension:

> The term "tribal organization" means—
>
> (i) the recognized governing body of any Indian tribe, or
>
> (ii) any legally established organization of Indians which—
>
> (I) is controlled, sanctioned, or chartered by such governing body or is democratically elected by the

In this case, while the 2009 Council alleges it is the Tribe's lawful, duly elected governing body, there is no doubt the Department does not recognize it as such. However, the 2009 Council was democratically elected by the adult members of the Indian community it is to serve (i.e., by the voting members of the Tribe), and it includes the maximum participation of Indians in all phases of its activities (i.e., each member of the 2009 Council is an Indian). The 2009 Council is a tribal organization, even though it is not the governing body recognized by the Department.[6]

The Department blends its incomplete definition of "tribal organization" with the separate requirement that the tribal organization's contract proposal must be "authorized by an Indian tribe." 25 U.S.C. § 450f(a)(2). The term "Indian tribe" is defined in the ISDA. It means "any

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> adult members of the Indian community to be served by such organization, and
>
> (II) includes the maximum participation of Indians in all phases of its activities.

25 U.S.C. § 2511(3)(A). Given the nearly identical wording, there is every indication that Congress intended the ISDA's definition to be parsed the same way.

[6] The fact that the Department has recognized the 1996 Council in no way diminishes the Tribe's authority to choose its own government. "Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions . . . and the BIA's recognition of a member or faction is not binding on a tribe." *Attorney's Process and Investigation Services, Inc.*, 609 F.3d at 943. Being recognized by the Department is not the same as being the lawful governing body.

Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(e). There is no dispute that the Cloverdale Rancheria is an Indian tribe within this definition. *See* Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47868 (Aug. 10, 2012) (listing the Cloverdale Rancheria of Pomo Indians of California). Any dispute as to the current lawful membership or government of the Tribe does not alter this fact. The Tribe's contract proposals, it is alleged, were authorized by the Tribe, and this authorization was provided to the Department in the form of a tribal resolution, as required by statute and regulation. *See* 25 U.S.C. § 450f(a)(1), 25 C.F.R. § 900.8(d).

Was this resolution authorizing the contract proposals enacted by a body with the power to act on behalf of the Tribe? The plaintiffs assert that the answer is yes, and their Complaint contains detailed allegations and documentary support for this fact.[7] The Department does not dispute any of these allegations, but claims it did not need to answer this question. Instead,

[7] The complaint's allegations are not "merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). These are material allegations the court must accept as true and construe in the light most favorable to the plaintiff. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

it asked a different question: Were the contract proposals authorized by the governing body which the Department *previously* recognized as having power to act on the Tribe's behalf? In answering this question, it was unnecessary to evaluate the current facts; it was only necessary to check the names on the last approved contract proposal. This expedient approach may be appropriate in many instances, but it is decidedly inadequate when it results in the Department intentionally ignoring the will of the Tribe as expressed through a democratic election conducted in accordance with tribal law.

The Federal administration's explanation of the requirement that a proposal be "authorized by an Indian tribe," recorded in the Federal Register and cited by the Department, weighs against the Department's argument. *See* Indian Self-Determination and Education Assistance Act Amendments, 61 Fed. Reg. 32482, 32486 (Jun. 24, 1996); Answer Brief at 34-35. There, it is simply averred that the regulations require every submission to include certain documentation, including an authorizing tribal resolution. *See* 25 C.F.R. § 900.8. In the absence of a required document, the Department must notify the applicant of the missing information. *See* 25 C.F.R. § 900.15(b). If the proposal remains incomplete, then it cannot be approved. 61 Fed. Reg. at 32486. As explained above, the Tribe's proposals were submitted

with a tribal resolution. The Tribe was never notified that any information was missing. *See* SAC ¶¶ 90-97 (Ex.R. 51-52). Nothing in the ISDA authorizes the Department, in the face of a facially valid authorizing tribal resolution, simply to reject it in reliance on its unsupported, discredited, prior recognition of a different tribal government. The Department should be required to do more than make an arbitrary, capricious decision that does not "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This is what the ISDA means when it requires the Department to decline a proposal only with "notification to the applicant that contains a specific finding that clearly demonstrates [any of the five inadequacies listed in the statute], or that is supported by a controlling legal authority that [any of the five inadequacies exist]." 25 U.S.C. § 450f(a)(2).

The IBIA decision *Navajo Nation v. Office of Indian Education Programs*, 40 IBIA 2 (2004), does not assist the Department. *See* Answer Brief at 35-36. In *Navajo Nation*, the Department determined the entity submitting a contract proposal was not an authorized tribal organization, but only after analyzing the applicable facts under Navajo tribal law. *See id*. at 5-8 (describing extensive correspondence and meetings between tribal and

agency officials and basis for Department's ultimate determination). Accordingly, the decision refers to the applicant's need to "*show* that it constitutes a 'tribal organization' for purposes of that proposal," and the consequences when applicants "have not *demonstrated* that they are a tribe or tribal organization." *Id.* at 15-16 (emphasis added). In this case, the Tribe was never allowed an opportunity to demonstrate anything to the Department, and the Department did not examine the facts before it or seek to learn the facts. Rather than basing its decision of the Tribe's eligibility to submit a contract proposal on tribal law, as in *Navajo Nation*, the Department's decision was a matter of fiat.[8]

[8] It should also be noted that *Navajo Nation*'s acceptance of a "threshold assessment" is contrary to the ISDA statute and regulations. *See* 25 C.F.R. § 900.3(a)(7) ("Congress has declared that there not be any threshold issues which would avoid the declination, contract review, approval, and appeal process.") Also, even the *Navajo Nation* opinion states that when the Secretary returns a proposal based on a "threshold" determination that the proposal is not authorized by an Indian tribe, the ISDA requires the Secretary "to notify the applicant of any missing information, including lack of a statutorily-required tribal resolution, and to give the applicant an opportunity to submit the missing information." *Navajo Nation* at 15, fn. 12; *see* 25 C.F.R. § 900.15(b). No such notice and opportunity were provided in this case. *See* SAC ¶¶ 90-97 (Ex.R. 51-52). Moreover, the statutory section requiring this notice of deficiencies is the same section that authorizes an applicant to proceed directly to court. *See* 25 U.S.C. § 450f(b). It is entirely inconsistent to assert that the notification aspect applies to "threshold" declinations, while the judicial review aspect does not. Furthermore, the facts of *Navajo Nation* are very different from those in this case. There, the claimed "tribal organization" was undisputedly a tribal organization for certain purposes, but its authorization to enter into the

Nor does *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935 (D.C. Cir. 2012), support the Department's position. *See* Answer Brief at 38. In the *Timbisha* case, the Department acted to help the Timbisha Shoshone Tribe end years of internal leadership disputes by recognizing one of two factions "for a limited time and for the limited purpose of conducting government-to-government relations necessary for holding a special election to determine who constituted the Tribal Council." *Timbisha Shoshone Tribe* at 937 (internal quotation marks omitted). The Department made the necessary preliminary findings under tribal law to identify the temporary governing body and qualified voters. *See Kennedy v. Pacific Regional Director* (Dep't of Interior March 1, 2011) (order of Assistant Secretary – Indian Affairs). Following the special tribal election, the Department recognized the elected Tribal Council, stating:

> The April 29 election . . . constituted the resolution of an internal tribal dispute in a valid tribal forum. The Timbisha Shoshone people embraced a tribal government by means of an election compliant with their Constitution. The Federal

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contract at issue was in question. Under Navajo law, it was required to be authorized by the Navajo government with respect to the contract at issue in order to qualify in that instance as a "tribal organization." *Navajo Nation* at 2-8. That is not the case always, as evident in the term's statutory definition, and it is not the case with the Tribe. As explained above, the 2009 Council does not require the sanction of the tribal government recognized by the Department to qualify as a "tribal organization" – it needs to have been democratically elected by the members of the Tribe, which it was.

> Government may not ignore or reject the results of a tribal election that clearly states the will of a sovereign Indian nation.

Timbisha Shoshone Tribe at 937-38 (quoting the July 29, 2001 letter of Assistant Secretary for Indian Affairs Larry Echo Hawk). The court observed that "[t]he Echo Hawk letter acknowledge[d] that the Timbisha Shoshone resolved their *own* leadership dispute through a valid *internal* tribal process." *Id.* at 938. Therefore the court held that "[i]n these circumstances, we owe deference to the judgment of the Executive Branch as to who represents a tribe." *Id.* Deferring to the Department's recognition of the electoral winners, the court ruled the other faction had no standing to bring an action on the Tribe's behalf. *Id.* at 939.

In the instant case, no such deference is warranted. Unlike in *Timbisha*, in the years since the Department was informed of the disagreement within the Tribe, the Department has not assessed the disputed facts in light of tribal law or any other applicable laws, has not determined that the Tribe conducted an election in accordance with its Constitution, has not acknowledged the results of such an election, and has not in any other way enunciated a rational basis for declaring that it recognizes one group as the tribal government, and not another. To the contrary, the Department has explained its reasons for refusing to accept the elections conducted by the 1996 Council and its enlarged version of the tribal membership. *See* SAC

Exh. 1-J (Ex.R. at 237) (Department's Regional Solicitor stating in 2008, "It does not appear the resolution to expand the tribal membership was adopted in conformance with a Tribal organizing document, or by a vote of the Hardwick class.") *See also* SAC Exh. 4-L (Ex.R. at 317) (BIA Superintendent stating in 2007 that the BIA has never recognized a reorganization of the Tribe since the 1983 Hardwick judgment). And yet when faced with the issue, the Department refuses to consider the possibility that the members of the Tribe have elected the 2009 Council and rejected the 1996 Council. Nothing in the law permits the courts to defer to the Department's decision to maintain a blind eye to the will of the Tribe.

Conclusion

For the foregoing reasons, the Tribe requests the Court to reverse the district court's orders granting the Department's motions to dismiss and the judgment dismissing the action.

February 22, 2013

Respectfully submitted,

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Steven J. Bloxham
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By: /s/ Steven J. Bloxham

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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/s/ Tim Hennessy
Attorney for Appellants

Dated: February 22, 2013

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS
(Ninth Circuit Rule 28-2.7)

Except for the following, all applicable statutes, etc., are contained in the Addendum to the Appellants' Opening Brief.

United States Code Annotated
Title 25. Indians
Chapter 27. Tribally Controlled School Grants (Refs & Annos)

25 U.S.C.A. § 2511

§ 2511. Definitions

Effective: January 8, 2002
Currentness

In this part:

(1) Bureau

The term “Bureau” means the Bureau of Indian Affairs of the Department of the Interior.

(2) Eligible Indian student

The term ‘eligible Indian student’ has the meaning given such term in section 2007(f) of this title.

(3) Indian

The term “Indian” means a member of an Indian tribe, and includes individuals who are eligible for membership in a tribe, and the child or grandchild of such an individual.

(4) Indian tribe

The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including an Alaska Native Village Corporation or Regional Corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(5) Local educational agency

The term “local educational agency” means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State or such combination of school districts or counties as are recognized in a State as an administrative agency for the State's public elementary schools or secondary schools. Such term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(6) Secretary

The term “Secretary” means the Secretary of the Interior.

(7) Tribal governing body

The term “tribal governing body” means, with respect to any school that receives assistance under this Act, the recognized governing body of the Indian tribe involved.

(8) Tribal organization

(A) In general

The term “tribal organization” means--

(i) the recognized governing body of any Indian tribe; or

(ii) any legally established organization of Indians that--

(I) is controlled, sanctioned, or chartered by such governing body or is democratically elected by the adult members of the Indian community to be served by such organization; and

(II) includes the maximum participation of Indians in all phases of the organization's activities.

(B) Authorization

In any case in which a grant is provided under this chapter to an organization to provide services through a tribally controlled school benefiting more than one Indian tribe, the approval of the governing bodies of Indian tribes representing 80 percent of the students attending the tribally controlled school shall be considered a sufficient tribal authorization for such grant.

(9) Tribally controlled school

The term “tribally controlled school” means a school that--

(A) is operated by an Indian tribe or a tribal organization, enrolling students in kindergarten through grade 12, including a preschool;

(B) is not a local educational agency; and

(C) is not directly administered by the Bureau of Indian Affairs.

Credits

(Pub.L. 100-297, Title V, § 5212, as added Pub.L. 107-110, Title X, § 1043, 115 Stat. 2078.)

25 U.S.C.A. § 2511, 25 USCA § 2511
Current through P.L. 112-207 approved 12-7-12

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter F. Tribal Government
Part 83. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe (Refs & Annos)

25 C.F.R. § 83.3

§ 83.3 Scope.

Currentness

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in § 83.7 (a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which

a determination is not final and effective. Such petitioners may request a suspension of consideration under § 83.10(g) of not more than 180 days in order to provide additional information or argument.

SOURCE: 59 FR 9293, Feb. 25, 1994, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2 and 9; 43 U.S.C. 1457; and 209 Departmental Manual 8.

Notes of Decisions (136)

Current through February 14, 2013; 78 FR 11088

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter V. Bureau of Indian Affairs, Department of the Interior, and Indian Health Service, Department of Health and Human Services (Refs & Annos)
Part 900. Contracts Under the Indian Self–Determination and Education Assistance Act (Refs & Annos)
Subpart C. Contract Proposal Contents

25 C.F.R. § 900.8

§ 900.8 What must an initial contract proposal contain?

Currentness

An initial contract proposal must contain the following information:

(a) The full name, address and telephone number of the Indian tribe or tribal organization proposing the contract.

(b) If the tribal organization is not an Indian tribe, the proposal must also include:

(1) A copy of the tribal organization's organizational documents (e.g., charter, articles of incorporation, bylaws, etc.).

(2) The full name(s) of the Indian tribe(s) with which the tribal organization is affiliated.

(c) The full name(s) of the Indian tribe(s) proposed to be served.

(d) A copy of the authorizing resolution from the Indian tribe(s) to be served.

(1) If an Indian tribe or tribal organization proposes to serve a specified geographic area, it must provide authorizing resolution(s) from all Indian tribes located within the specific area it proposes to serve. However, no resolution is required from an Indian tribe located outside the area proposed to be served whose members reside within the proposed service area.

(2) If a currently effective authorizing resolution covering the scope of an initial contract proposal has already been provided to the agency receiving the proposal, a reference to that resolution.

(e) The name, title, and signature of the authorized representative of the Indian tribe or tribal organization submitting the contract proposal.

(f) The date of submission of the proposal.

(g) A brief statement of the programs, functions, services, or activities that the tribal organization proposes to perform, including:

(1) A description of the geographical service area, if applicable, to be served.

(2) The estimated number of Indian people who will receive the benefits or services under the proposed contract.

(3) An identification of any local, Area, regional, or national level departmental programs, functions, services, or activities to be contracted, including administrative functions.

(4) A description of the proposed program standards;

(5) An identification of the program reports, data and financial reports that the Indian tribe or tribal organization will provide, including their frequency.

(6) A description of any proposed redesign of the programs, services, functions, or activities to be contracted,

(7) Minimum staff qualifications proposed by the Indian tribe and tribal organization, if any; and

(8) A statement that the Indian tribe or tribal organization will meet the minimum procurement, property and financial management standards set forth in subpart F, subject to any waiver that may have been granted under subpart K.

(h) The amount of funds requested, including:

(1) An identification of the funds requested by programs, functions, services, or activities, under section 106(a)(1) of the Act, including the Indian tribe or tribal organization's share of funds related to such programs, functions, services, or activities, if any, from any Departmental local, area, regional, or national level.

(2) An identification of the amount of direct contract support costs, including one-time start-up or preaward costs under section 106(a)(2) and related provisions of the Act, presented by major categories such as:

(i) Personnel (differentiating between salary and fringe benefits);

(ii) Equipment;

(iii) Materials and supplies;

(iv) Travel;

(v) Subcontracts; and

(vi) Other appropriate items of cost.

(3) An identification of funds the Indian tribe or tribal organization requests to recover for indirect contract support costs. This funding request must include either:

(i) A copy of the most recent negotiated indirect cost rate agreement; or

(ii) An estimated amount requested for indirect costs, pending timely establishment of a rate or negotiation of administrative overhead costs.

(4) To the extent not stated elsewhere in the budget or previously reported to the Secretary, any preaward costs, including the amount and time period covered or to be covered; and

(5) At the option of the Indian tribe or tribal organization, an identification of programs, functions, services, or activities specified in the contract proposal which will be funded from sources other than the Secretary.

(i) The proposed starting date and term of the contract.

(j) In the case of a cooperative agreement, the nature and degree of Federal programmatic involvement anticipated during the term of the agreement.

(k) The extent of any planned use of Federal personnel and Federal resources.

(l) Any proposed waiver(s) of the regulations in this part; and

(m) A statement that the Indian tribe or tribal organization will implement procedures appropriate to the programs, functions, services or activities proposed to be contracted, assuring the confidentiality of medical records and of information relating to the financial affairs of individual Indians obtained under the proposal contract, or as otherwise required by law.

SOURCE: 61 FR 32501, June 24, 1996, unless otherwise noted.

AUTHORITY: 25 U.S.C. 450f et seq.

Notes of Decisions (5)

Current through February 14, 2013; 78 FR 11088

End of Document

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAR 01 2011

JOE KENNEDY, PAULINE ESTEVES, MADELINE ESTEVES, ANGIE BOLAND, AND ERICK MASON, PLAINTIFFS/APPELLANTS

v.

PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, DEFENDANT/APPELLEE.

ORDER

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

I. Background

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

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

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

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

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

II. Procedural timeline

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

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

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

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

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

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

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

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

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

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

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

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

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

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

April 16, 2010: Beaman filed a Response Brief.

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

III. Applicable law

A. Relevant Federal law

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

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

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

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

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

B. Applicable Tribal Law

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

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

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

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

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

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

7. **Timbisha-Shoshone Constitution Article X section 1:** "The Tribal Council shall declare a Tribal Council position vacant for any of the following reasons:
   . . .
   b. When a Tribal Council member resigns;
   . . .
   d. When a Tribal Council member is removed from office;
   e. When a Tribal Council member is recalled from office"

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

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

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

IV. Background

A. The August 25, 2007, Tribal Council meeting

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

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

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

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, 2007[3].

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

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

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

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

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

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

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

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

C. The January 20, 2008, General Council meeting

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

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

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

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

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

V. History of appeals

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

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

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

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

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

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

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

VI. Summary assessment of the Regional Director's findings

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

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

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 0 1 2011

Larry Echo Hawk
Assistant Secretary – Indian Affairs

CERTIFICATE OF SERVICE

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

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Ninth Circuit Case Number: 12-16539

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on **February 22, 2013**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Sally Eredia