INTERIOR BOARD OF INDIAN APPEALS

Sharon Wasson, Thomas Wasson, Andrea Davidson, and Elverine Castro v.
Western Regional Director, Bureau of Indian Affairs

42 IBIA 141 (01/24/2006)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

SHARON WASSON, THOMAS WASSON, ANDREA DAVIDSON, and ELVERINE CASTRO, Appellants,	:	Order Affirming Decisions
v.	:	Docket Nos. IBIA 04-81-A IBIA 05-93-A
WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	January 24, 2006

Sharon Wasson, Thomas Wasson, Andrea Davidson, and Elverine Castro (Appellants) seek review of a March 9, 2004 decision of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), rejecting an application from Appellants to contract Bureau programs under the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. 93-638, 25 U.S.C. § 450 et seq., in part because BIA does not recognize Appellants as the tribal governing council (Council) of the Winnemucca Indian Colony (Colony). In a separate appeal, Appellants seek review of a July 26, 2005 decision of the Acting Western Regional Director (Regional Director) declining to recognize Appellants as the Colony's Council. 1/ Because the two appeals share a common issue — whether BIA wrongly declined to recognize Appellants as the Colony's Council — they are consolidated for the purposes of decision. For the reasons discussed below, the Board affirms the Regional Director's decisions.

Background

The United States created the Colony by Executive Order on June 18, 1917. Between 1917 and 1928, it set aside a total of 340 acres near the town of Winnemucca, Nevada, for homeless Indians living in the area. In 1970, the Indians living on this land —

1/ The second appeal is captioned Sharon Wasson, Thomas Wasson, Andrea Davidson, and Elverine Castro v. Acting Western Regional Director, IBIA 05-93-A.

generally Paiutes and Shoshones — adopted a representative form of government, the powers and responsibilities of which were described in a written Constitution & By-laws that were approved by the Assistant Secretary – Indian Affairs in 1971. Today the Colony is a federally recognized tribe.

The events underlying the current dispute date from February 2000. At that time, the Colony's Council consisted of Chair Glenn Wasson, Vice-Chair William Bills, and members-at-large Thomas Wasson, Elverine Castro, and Lucy (Wasson) Lowery. On February 22, 2000, the chair of the Council, Glenn Wasson, was murdered. The following day, in accordance with the Colony's Constitution, the vice-chair, William Bills, became the Council's acting chair. On March 3, 2000, the Superintendent of the Western Nevada Agency, BIA (Superintendent) recognized Bills as the Council's chair.

The Council members thereafter split into two factions. One faction, hereinafter referred to as the Wasson group, included Thomas Wasson, Elverine Castro, and Lucy Lowery. 2/ The Appellants in these appeals represent the Wasson group. The other faction, hereinafter referred to as the Bills group, included only William Bills on the Council but had the backing of other individuals in or who claim to be associated with the Colony. 3/

2/ Other individuals who have participated in litigation on behalf of the Wasson group include Sharon Wasson, Thomas Magiera, Andrea Davidson, and Merlene Magiera. As discussed below, Sharon Wasson — brother of Glenn Wasson and father of Thomas Wasson — was named by the Wasson group to take Glenn Wasson's seat and replace Bills as chair. Thomas Magiera was appointed to replace Lucy Lowery on the Council after her death. Andrea Davidson was initially appointed to the Council by other members of the Wasson group to replace Bills after he left the Colony and later to replace Thomas Magiera after his death. Marlene Magiera was purportedly elected to the Council in a disputed October 2000 election.

3/ In the first of these two appeals, IBIA 04-81-A, the interested parties are identified as the "Leyva group," after Vivian Leyva, the chair of the Bills group council at the time that appeal was filed. In the second appeal, IBIA 05-93-A, the interested parties are identified as the "Ayer group," after Linda Ayer, the chair of that group at the time the appeal was filed. Because this group claims to derive its authority from William Bills, the Board for simplicity's sake will refer to it as the "Bills group." Individuals supporting the Bills faction also include Allen Ambler, Lovelle Brown, Charlene Dressler, Clorinda (Toni) George, and Jim Ayer.

On March 24 and April 11, 2000, the members of the Council constituting the Wasson group met and voted to appoint Sharon Wasson as chair to replace Bills. On April 13, 2000, the Superintendent recognized Sharon Wasson as chair.

In April 2000, Bills brought legal action in the Winnemucca Tribal Court challenging the legitimacy of Sharon Wasson as the new chair. 4/ On April 17, 2000, the tribal court, Judge Kyle Swanson presiding, issued a temporary restraining order preventing the removal of Bills as chair, prohibiting Sharon Wasson from assuming the position of chair, and barring the members of the Wasson group from entering Colony lands. On May 2, 2000, in response to the tribal court ruling, the Superintendent recognized Bills as acting chair. The Superintendent also recognized Elverine Castro, Lucy Lowery, and Thomas Wasson as the other tribal council members.

On May 2, 2000, the Wasson group purported to remove Judge Swanson from his position on the tribal court and replaced him with Judge Chuck Hartman.

On June 6, 2000, the Superintendent apparently issued a decision declaring the Colony dysfunctional and imposing sanctions to force the Colony to resolve the dispute. The Superintendent's decision was appealed to the Regional Director by Sharon Wasson.

On August 9, 2000, Judge Hartman issued an order recognizing Sharon Wasson as chair, removing Bills from all tribal business, and ordering release of all tribal bank account funds to the Wasson council. Judge Hartman later also issued an order barring Bills from entering the Colony.

Also in August 2000, a new line of litigation began when the Bank of America filed an interpleader suit in the U.S. District Court of the District of Nevada to determine which group was entitled to control the Colony's money and finances. See Bank of America, N.A. v. Bills, CV-N-00-0450-HDM (VPC) (filed Aug. 28, 2000).

4/ In 1978, the Colony established the Winnemucca Tribal Court to adjudicate cases within the Colony's reservation boundaries. See Law and Order Code of Winnemucca Colony, Title I. The Code provides that judges are appointed by the Colony Council and may be removed for good cause by a two-thirds vote of the Council. The Code also provides for the establishment of a Tribal Court of Appeals. In 1992, when the Inter-Tribal Court of Appeals of Nevada was created by BIA, the Colony began relying on the Inter-Tribal Court as the appellate court for the colony. See Colony Resolution 04-201-01 (2001). The Inter-Tribal Court was purportedly formally recognized as the Colony's appellate court in a resolution adopted by the Wasson group on April 7, 2001. Id.

On October 28, 2000, members of the Wasson group held a disputed election in which they purportedly were elected as the Council.

On December 20, 2000, the Regional Director decided the appeal by Sharon Wasson from the June 6, 2000 letter by the Superintendent. The Regional Director overturned the Superintendent's decision, determining that the issues addressed by the Superintendent were internal tribal issues that, in the absence of a compelling federal interest, BIA lacked authority to attempt to resolve. This decision was not appealed to the Board. On January 18, 2001, the Superintendent withdrew his letter of May 2, 2000, regarding Council recognition.

Also on January 18, 2001, Judge Swanson issued an order for permanent injunctive relief in the suit that Bills had filed in tribal court in April 2000. Judge Swanson found that William Bills was the acting tribal chair and was to remain seated until a list of eligible voters was approved and certified and a valid election held. Judge Swanson found that Sharon Wasson was not a Council member and ordered the Wasson group to refrain from interference with or participation in the daily operations of the Colony's smoke shop.

Following Judge Swanson's order, Bills formed an interim Council, filling the vacant seats of Glenn Wasson and Lucy Lowery (who had died), and replacing Elverine Castro, who was alleged to have falsified her enrollment application. Bills retained Thomas Wasson on the interim Council. The interim Council purportedly held an election on April 28, 2001, at which the Bills council was elected.

In the meantime, Judge Swanson's order was appealed to the Inter-Tribal Court of Appeals of Nevada. 5/ The Inter-Tribal Court is funded by BIA to provide service for appellate review for Nevada tribes. On June 29, 2001, the Inter-Tribal Court issued an order holding that the matter was not ripe for appeal because there were undetermined issues of fact pertinent to the appeal. The Court remanded the case for a trial on those issues before a pro tem tribal trial court judge mutually selected by the parties. The issues remanded for determination by the trial judge were: (1) the names of the members of the

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5/ The parties stipulated that the Inter-Tribal Court had jurisdiction over the appeal. See Wasson v. Bills (In re: Kyle Swanson), Order on Stipulation (Inter-Tribal Court Apr. 27, 2001).

Colony eligible for enrollment; 6/ (2) the identity of the members of the legitimate Colony Council; and (3) the identity of the tribal judge, other than the pro tem judge, legally authorized to hold office for the Colony at that time. Wasson v. Bills (In re: Kyle Swanson), No. AP 1.01 (Inter-Tribal Court June 29, 2001). The parties selected Judge Steven Haberfeld to preside over the trial court proceedings.

On May 9, 2002, Judge Haberfeld issued an order determining that there was no properly seated Council. Bills v. Wasson, No. CV1003 (Winnemucca Tribal Court May 9, 2002). Judge Haberfeld directed that an election be held no later than October 30, 2002 and set forth procedures for preparing for and conducting the election. Given the breakdown in tribal governance, Judge Haberfeld determined that the tribal court could and should resolve the membership issue itself. From a total of 106 individuals potentially eligible for enrollment, Judge Haberfeld declared 49 as meeting enrollment requirements and ruled that all of those 21 years or older on that list were eligible to vote in the October 2002 election. He also determined that Judge Swanson was illegally removed from office. Finally, he declared that the court would maintain jurisdiction over the Colony until a proper election had been held.

In the meantime, in the fall of 2001, some members of the Wasson group had filed suit in the U.S. District Court for the District of Nevada seeking a temporary restraining order and preliminary injunction against the Secretary of the Interior and William Bills. Specifically, plaintiffs sought to have the court appoint a trustee to manage the Colony's smoke shop and other alleged trust assets and revenues. On October 12, 2001, the court denied the motion in part because it determined that the plaintiffs were not likely to win on the merits in that the smoke shop revenues were not trust property. Magiera v. Norton, CV-N-01-0467-DHW(VPC) (D. Nev. Oct. 12, 2001). The court confirmed this decision on reconsideration on December 6, 2001.

Plaintiffs appealed the denial of preliminary relief in Magiera to the U.S. Court of Appeals for the Ninth Circuit. While the matter was at the court of appeals, both parties also sought to appeal Judge Haberfeld's May 9, 2002 decision, but operation of the Inter-

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6/ The Colony Constitution requires that members appear or be descended from people who appeared on a 1916 base census roll, and that they be at least 1/4 Shoshone and/or Paiute. According to the order issued by Judge Haberfeld, discussed below, this left out some individuals who resided on the Colony but could not trace their families to the 1916 census roll. Judge Haberfeld also found that several individuals qualified for but had been denied membership by those in control of the tribal government. According to Judge Haberfeld, disputes between the Shoshone and Paiute people have contributed to the Colony's governance problems.

Tribal Court — which the Colony apparently had used for the prior decade as its appellate court — was in hiatus due to lack of funding by BIA. As a result of a mediation effort conducted under the auspices of the Ninth Circuit, the parties agreed to an alternate mechanism for appealing Judge Haberfeld's order. The parties agreed to the formation and hiring of an appellate panel composed of three tribal court judges from Minnesota agreed to by the parties. 7/

On August 16, 2002, the stipulated Minnesota panel reversed and vacated Judge Haberfeld's decision. The panel ruled that, following Glenn Wasson's death, the Council's appointment of Sharon Wasson as chair in March 2000, and the replacement of Lucy Lowery (after her death) with Thomas Magiera (who died before the issuance of the panel's decision), were legal. It therefore determined that the legal members of the Council were Sharon Wasson, Thomas Wasson, Elverine Castro, and William Bills, plus one vacancy. The stipulated Minnesota panel ruled that this Council should serve until its successors were duly elected. It ordered that the October 2002 election occur within six months of October 2002. See Wasson v. Bills, No. CV1003 (Lower Court No.) (Ct. App. Winnemucca Indian Colony Aug. 16, 2002).

As to membership enrollment, the Minnesota panel determined that it was the role of the Council, not the courts, to determine the Colony's membership. The panel found that an existing list of 77 members from 1998 was still valid. It also found that new memberships approved by the Enrollment Committee since that time were valid as well. The panel ordered procedures for revising the enrollment list, including requiring an effort to ensure that there were equal numbers of Paiute and Shoshone Indians on the enrollment committee. The stipulated Minnesota panel agreed with Judge Haberfeld that the removal of Judge Swanson from the tribal trial court was illegal. 8/ Id.

By the time the stipulated Minnesota panel issued its decision, William Bills had left the Colony to places unknown. Thus, as a practical matter, the panel's decision had the effect of leaving the members of the Wasson group in control of the Council described by the Minnesota panel. As of November 25, 2002, after purporting to fill the vacant seats of the late Thomas Magiera and the absent William Bills, the Wasson group deemed the

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7/ Apparently as a result of this agreement, the appeal to the Ninth Circuit of the order denying preliminary relief in Magiera was dismissed on August 20, 2002, pursuant to the stipulation of the parties.

8/ On August 26, 2002, Judge Swanson notified the Council that, despite decision of the lawsuit in his favor, he no longer wished to serve as the Colony's judge and was resigning his position.

Council to consist of Sharon Wasson, Thomas Wasson, Elverine Castro, Andrea Davidson, and Merlene Magiera.

The Bills group filed a petition for rehearing with the stipulated Minnesota panel but received no response.

On October 3, 2002, after the stipulated Minnesota panel's decision was issued, the Wasson group filed the first of several appeals to this Board challenging BIA's failure to recognize the Wasson group as the Colony's proper Council. 9/ On November 6, 2002, the Board dismissed the appeal because the appellants had failed to submit to the Board any decision issued by the Regional Director or to show that they had followed regulatory procedures for appealing from an agency failure to act. Wasson v. Western Regional Director, 38 IBIA 205 (2002).

On November 7, 2002, the District Court dismissed the Magiera case without prejudice for failure to exhaust agency procedures. Magiera v. Norton, No. CV-N-01-0467-LRH(VPC) (D. Nev. Nov. 7, 2002). Plaintiffs appealed this order to the U.S. Court of Appeals for the Ninth Circuit.

On December 2, 2002, the Wasson group again filed a notice of appeal to the Board, this time attaching an October 28, 2002 decision by the Western Regional Director not to recognize the Wasson group as the Colony's Council. The Board dismissed the action without prejudice on December 24, 2002. Wasson v. Western Regional Director, 38 IBIA 255 (2002). The Board determined that the appeal arose out of the same intra-tribal dispute that gave rise to Magiera — a power struggle between the two competing factions — and concluded that if it assumed jurisdiction over the case it would need to stay proceedings pending resolution of the federal court case. Instead, the Board determined to dismiss the action without prejudice, which would allow the parties to proceed on the basis of whatever situation existed after the conclusion of Magiera. 10/

9/ In this and the subsequent appeals filed by the Wasson group, the appellants consisted of the same individuals that are Appellants in the consolidated appeals at issue here.

10/ The Magiera case was concluded on September 2, 2004, when the Ninth Circuit affirmed the District Court's dismissal. Magiera v. Norton, 108 Fed. Appx. 542 (9th Cir. 2004). If the federal courts had reached the merits in Magiera, the courts likely would have needed to address the question of who are the members of the legitimate Colony Council. Because the Magiera case was dismissed for lack of jurisdiction, this question was not addressed in that case.

On March 13, 2003, the District Court issued an order in the Bank of America interpleader case adopting recommendations made by a magistrate judge on February 13, 2003. 11/ The District Court dismissed all cross-claims and counterclaims between the Bills and Wasson groups for lack of subject matter jurisdiction. On the question of what was the proper governing group, the District Court held that the question was a matter of tribal law and that tribal remedies had not been exhausted. The District Court identified two potential pending proceedings: (1) the petition for rehearing filed with the Minnesota panel; and (2) potential proceedings before the Inter-Tribal Court, which had been reconstituted after funding was restored and was considering whether to assume jurisdiction over the matter.

The District Court denied the Wasson group's motion for summary judgment without prejudice and stayed the action "pending exhaustion of tribal remedies or until further order of the court." Bank of America v. Bills, No. CV-N-00-450-HDM (VPC) (D. Nev. Mar. 13, 2003). On August 29, 2003, the District Court issued an order noting that the matter was "currently pending before the Inter-Tribal Court of Appeals" and administratively closing the case "subject to being reopened upon disposition of the matter before the Inter-Tribal Court or application of the parties." Bank of America v. Bills, No. CV-N-00-450-HDM (VPC) (D. Nev. Aug. 29, 2003).

In the meantime, on August 19, 2003, the Wasson group filed an appeal with the Board seeking review of a July 11, 2003 decision of the Acting Western Regional Director declining to contract with the Wasson group to carry out programs for the Colony under ISDA. On October 27, 2003, the Board dismissed for failure to file a timely appeal. Wasson v. Acting Western Regional Director, 39 IBIA 174 (2003).

In December 2003, the Wasson group submitted to BIA an application for a self-determination contract in the amount of $419,616 to carry out BIA functions to strengthen tribal government services, enrollment services, and resource planning. The application, dated December 18, 2003, was forwarded from the Western Nevada Agency of BIA to the Regional Director, who received it on March 3, 2004. 12/

11/ Plaintiff Bank of America was dismissed from the case on June 7, 2001, after depositing the contested funds with the court.

12/ The Bills group, by letter of April 17, 2003, also asked BIA to recognize it as the Colony Council for the purposes of obtaining self-determination contracts, which the Regional Director denied by letter of May 29, 2003. The Bills group again asked for recognition by letter of September 8, 2003, which the Regional Director denied by letter of November 12, 2003. The Bills group did not appeal these denials to the Board.

On March 9, 2004, the Regional Director denied the Wasson group's application. This is the first decision challenged in these consolidated appeals. The Regional Director noted that 25 U.S.C. § 450f directs the Secretary under certain circumstances to enter into requested self-determination contracts but found that Appellants had not demonstrated that they are the legitimate governing body of the Colony or a "tribal organization" within the scope of 25 U.S.C. §§ 450b(l) and 450f. The Regional Director found that the Wasson group's failure to demonstrate that it was the governing body not only failed to meet the explicit requirements of the statute, but meant that BIA could not be assured that the programs would be properly completed or maintained as required by statute.

In addition, the Regional Director recounted the history of litigation over the proper governing body of the Colony, relying heavily on the magistrate's February 13, 2003 report and recommendations in the Bank of America case. The Regional Director determined that the overarching issue presented by Appellants' contract proposal was the same as that in Bank of America: which group is the legal Colony Council. The Regional Director concluded (as did the judge in the Bank of America case) that this issue should be determined by tribal processes which were ongoing at that time. The Regional Director found that there were no emergency conditions requiring the making of a self-determination contract without waiting for the tribal processes to conclude.

The Regional Director also rejected the application on the ground that it did not meet the minimum statutory requirements of 25 U.S.C. § 450 and did not contain information required by the implementing regulations at 25 C.F.R. § 900.8.

Appellants filed a timely appeal from the Regional Director's March 9, 2004 decision. Appellants, the Regional Director, and the Bills group filed briefs in this appeal.

The remaining events are pertinent to the second appeal at issue in this case.

On March 19, 2004, the Inter-Tribal Court issued an order determining that the Minnesota panel had jurisdiction to decide the merits of the dispute, but that the parties had not precluded reconsideration of the Minnesota panel's decision in their stipulated agreement. The Inter-Tribal Court further concluded that, because it was reconvened, it had jurisdiction to consider the Bills group's petition for rehearing that had been submitted to the Minnesota panel. The Inter-Tribal Court then ordered briefing on the appeal.

On September 16, 2004, the Inter-Tribal Court issued its decision on reconsideration of the ruling of the stipulated Minnesota panel. The Inter-Tribal Court determined that none of the elections purportedly held since February 2000 were valid and reinstated the Council in place at that time. The remaining living members of the February

2000 Council were Thomas Wasson, Elverine Castro, and William Bills (who had left the Colony). The Inter-Tribal Court ordered an election for a new Council and determined that the Court would facilitate construction of the enrollment list and oversee the conduct of a fair election. It ordered the Council in existence in February 2000 to submit an enrollment list to the Inter-Tribal Court within 30 days, recognizing that two separate lists were likely to be submitted. The Inter-Tribal Court would then take necessary steps to finalize the membership list and oversee the holding of an election. Wasson v. Bills (In re: Kyle Swanson), No. ITCN/AC AP 1.01 (Inter-Tribal Court Sept. 16, 2004). 13/

On October 15, 2004, the Wasson group filed suit in the U.S. District Court for the District of Nevada against the Inter-Tribal Court and the three judges who participated in the September 16, 2004 decision. Wasson v. Inter-Tribal Court of Appeals of Nevada, No. CV-N-04-573-HDM (VPC). They argued that the Inter-Tribal Court had exceeded its jurisdiction and that implementation of its order for determining tribal membership and governance would violate the Indian Civil Rights Act and their constitutional rights to due process. They sought an injunction precluding the Inter-Tribal Court from implementing its order and determining the Colony's membership. The Bills group was not a party to this case.

On December 10, 2004, the District Court held a hearing in Wasson v. Inter-Tribal Court. That same day, the District Court issued an order stating that the parties agreed to enter into a written stipulation to settle the case. The written stipulation was signed by counsel for the Wasson group and by the Chief Judge of the Inter-Tribal Court and was filed on December 20, 2004.

The stipulation provided that the Council would be reinstated according to the finding of the stipulated Minnesota panel and would serve as long as the members are able or until another Council is elected pursuant to a membership chosen by that Council at a valid tribal election. It provided procedures for accepting membership applications and determination by the Council. It also provided that, after the Council issued a written decision on membership, applicants denied membership could file an appeal to the Inter-Tribal Court of Appeals. (This provision was modified by a court order of March 9, 2005 to provide that objections to the Council's membership decisions would proceed pursuant to the Colony's Constitution & By-laws, including consideration by the tribal court before possible appeal to the Inter-Tribal Court.)

13/ The Bills group filed with the Inter-Tribal Court a proposed membership list dated October 20, 2004. The record does not show that the Wasson group filed a list with the Inter-Tribal Court, and the Bills group asserts that they did not.

The terms of this agreement differed from the order issued by the Inter-Tribal Court by recognizing two additional members of the Council (Sharon Wasson and Andrea Davidson), by assigning to the Council rather than the Inter-Tribal Court the task of determining members, and by not requiring an election that would be overseen by the Inter-Tribal Court. Based on the entry of this stipulation, the District Court dismissed the case without prejudice on March 11, 2005.

In the meantime, on December 21, 2004, the Wasson group — based on the stipulation entered by the District Court in Wasson v. Inter-Tribal Court — moved for summary judgment in the Bank of America interpleader case. On April 1, 2005, the District Court in Bank of America denied the Wasson group's motion for summary judgment and ordered each party to certify a list of enrolled members to the stipulated Minnesota panel within 60 days. The Bills group filed a motion for relief of this order.

On December 22, 2004, Appellants sent the Superintendent a copy of the transcript of the December 10, 2004 hearing in Wasson v. Inter-Tribal Court as well as the December 20, 2004 stipulation and requested BIA to recognize the Council as identified in the stipulation and to re-establish government-to-government relations. 14/ On March 28, 2005, Appellants' attorney wrote the Superintendent noting that Appellants had not received a response to their request and asking him to make a decision. In a letter dated April 5, 2005, the Superintendent responded that he was waiting for a final order from the Inter-Tribal Court and would abide by the decision of that Court. By letter dated April 13, 2005, Appellants filed a timely appeal of that decision with the Regional Director.

The Regional Director decided the appeal by letter dated May 5, 2005. The Regional Director recounted the events since the Inter-Tribal Court's decision of September 16, 2004, and stated that it was not clear that the tribal courts — including the Inter-Tribal Court of Appeals — had determined that the Wasson group was the Colony Council or that persons added to the Council after February 2000 were legitimate members of the Council. The Regional Director thus determined that all tribal remedies had not been exhausted in the Colony's intra-tribal governance dispute, and affirmed the Superintendent's determination to decline to decide whether Appellants are the proper members of the Colony Council. The Regional Director also noted that there is no statute

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14/ The December 22, 2004 request for recognition is not included in the administrative record prepared by BIA and was not submitted to the Board with any of the parties' briefs. It is not clear whether the request was written or oral. The decisions of both the Superintendent and the Regional Director refer only to the March 28, 2005 letter making the request. Accordingly, the Board will treat the March 28, 2005 letter as constituting the request upon which the Superintendent, and subsequently the Regional Director, acted.

or regulation requiring BIA to decide whether Appellants are the legitimate Colony Council.

The Regional Director's May 5, 2005 letter rejecting Appellants' appeal was incorrectly mailed to Appellants. After inquiries from Appellants, the Acting Regional Director, in a letter dated July 26, 2005, adopted the decision in the May 5, 2005 letter in its entirety and served this letter on Appellants.

In the meantime, on May 26, 2005, the Bills group filed with the Inter-Tribal Court a motion for default in Wasson v. Bills (In re: Kyle Swanson) based on the Wasson group's failure to comply with the court's order of September 16, 2004 requiring the parties to submit proposed membership rolls. The motion sought an order recognizing the Bills group as the Colony's Council and declaring the enrollment list as determined by Judge Haberfeld (and submitted to the Inter-Tribal Court by the Bills group on October 20, 2004) as the official membership list of the Winnemucca Indian Colony.

Also on May 26, 2005, the Bills group sought relief from the District Court's April 1, 2005 order in Bank of America v. Bills.

On May 28, 2005, the Council as identified in the stipulated order in Wasson v. Inter-Tribal Court approved a revised membership list, which it subsequently submitted to the attorney who had served as the chief judge of the stipulated Minnesota panel, apparently pursuant to the District Court order in the Bank of America case.

On July 5, 2005, the District Court denied the Bills group's motion for relief from the order to submit a proposed membership list to the stipulated Minnesota panel. Bank of America v. Bills, No. CV-01-0045-HDM-VPC (D. Nev. July 5, 2005). 15/ The record does not show that the stipulated Minnesota panel has taken any action since the issuance of its order of August 16, 2002, including any action on any proposed membership lists.

On August 10, 2005, Appellants filed a timely appeal to the Board of the Regional Director's July 26, 2005 decision. Briefs have been submitted by Appellants, the Regional Director, and the Bills group.

15/ By letter of August 5, 2005, the Bills group submitted its proposed membership list to the attorney who had served as the chief judge of the stipulated Minnesota panel but argued that the panel no longer existed and had no authority to act. The Bills group asked the stipulated Minnesota panel not to act for 60 days.

Discussion

As an initial matter, the appeal of the Regional Director's decision of March 9, 2004, may be easily disposed of. There was no material change in circumstances between the time of the Board's dismissal of the Wasson group's December 6, 2002 appeal and the Regional Director's decision of March 9, 2004. The Board dismissed the 2002 appeal to await the conclusion of proceedings in Magiera v. Norton, which was on appeal to the Ninth Circuit. See Wasson, 38 IBIA at 256. The appeal in Magiera was still pending on March 9, 2004, when the Regional Director decided that it was premature to determine whether to recognize the Wasson group as the Colony's Council. The Magiera appeal was not resolved until September 2, 2004, when the Ninth Circuit affirmed the District Court's dismissal of the case. Thus, the ruling in the Board's December 24, 2002 order applies equally here, and on that basis, the Board rejects the Wasson group's appeal of the Regional Director's March 9, 2004 decision. 16/

In addition, the Regional Director declined to act on the application because the Regional Director determined that the application was incomplete and not filed in accordance with regulations. Appellants do not contest this determination and thus fail to satisfy their burden to prove error in the Regional Director's decision. This failure provides a separate and independent basis for the Board to affirm the March 9, 2004 decision of the Regional Director.

The second appeal may also be easily disposed of. Unlike the first appeal, the second appeal is not determined by the Board's December 24, 2002 order because, prior to the Regional Director's July 26, 2005 decision, the Magiera case was litigated to its conclusion. However, Appellant's March 28, 2005 request for recognition as the Colony Council is fatally flawed because it does not to seek recognition for the purpose of the conduct of any specified BIA function or program. Absent the identification of any particular right to or

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16/ While the Board disposed of the Wasson group's prior appeal by dismissing it without prejudice, we determine instead to affirm the Regional Director's decision here. The result is essentially the same because the Regional Director's decision does not address the merits of whether Appellants may in fact constitute the valid Colony Council, and it does not decline to make a determination for all time. Rather, the Regional Director determined only not to decide the question of the legitimate Council at this time, given that tribal processes for determining the question are still ongoing. We affirm the Regional Director's decision not to determine the identity of the Council based on the circumstances that existed at the time of that decision. This affirmance does not preclude Appellants from requesting a decision of the Regional Director again as circumstances change; nor does it constitute any determination on the merits as to the identity of the proper Colony Council.

need for the establishment of a government-to-government relationship with a tribal council, BIA has no duty to act on such a request. Indeed, the Regional Director, by letter of October 28, 2002, declined to consider a prior request by Appellants' to establish a government-to-government relationship "in a vacuum," where Appellants identified no federal action that was dependent on such recognition, and the Regional Director could have done so here as well. In fact, the Regional Director's July 26, 2005 decision did note that recognition was not required under any federal statute or regulation, although it is not clear that he considered this to be an independent ground for his decision. The Board concludes that Appellants' failure to identify any federal purpose for which recognition of a Council is required does provide a basis for denial of Appellants' request, and we affirm the Regional Director's decision on this ground. 17/

In addition, the Board finds that the Regional Director's conclusions, in both his March 9, 2004 and July 26, 2005 decisions, that Appellants had not exhausted tribal remedies for determining the identity of the legitimate Council are supported by the record, and Appellants have not met their burden to show otherwise. See Wanatee v. Acting Minneapolis Area Director, 31 IBIA 93, 95 (1997) (burden is on Appellant to demonstrate that tribal remedies have been exhausted).

With respect to the Regional Director's March 9, 2004 decision, Appellants' contention that tribal processes had been exhausted is clearly wrong. At the time of that decision, Appellants' tribal remedies clearly had not been exhausted because the Inter-Tribal Court had agreed to review the decision of the stipulated Minnesota panel. It is not just the Regional Director and the Board who deem that tribal processes were still active at that time. At the time of the March 9, 2004 decision, District Court proceedings in Bank of America were administratively closed to allow the question of the legitimate Colony Council to be determined by the Inter-Tribal Court of Appeals. The Regional Director, citing to Bank of America, took the same approach and properly declined to address the question of the proper Colony Council while tribal processes on the question were pending.

17/ Appellants argue for the first time on appeal that federal recognition of a Colony governing body is needed because the Colony relies on BIA for police and law enforcement services, and that BIA's refusal to recognize Appellants as the Council has resulted in BIA's failure to undertake law enforcement actions against the allegedly illegitimate Bills group and thus left them in control of the Colony and the Colony's trust assets. Whether or not this allegation would be sufficient to require federal recognition, Appellants did not make this argument — which was fully known and available to them at the time — to the Regional Director, and the Board thus declines to consider it here. See Schuyler Van Gordon v. Acting Midwest Regional Director, 41 IBIA 195, 203 (2005).

The question of exhaustion with respect to the Regional Director's July 26, 2005 decision is somewhat more complex. Appellants contend that the December 20, 2004 stipulation between the Wasson group and the Inter-Tribal Court exhausted tribal remedies and determined them to be the legitimate members of the Colony's Council. Thus, they argue that tribal processes were concluded at the time they sought recognition in their March 28, 2005 letter, and that the Regional Director was required to recognize them as the proper members of the Council.

We disagree. While the current state of the litigation situation is somewhat complex and confusing, the litigation pertaining to the Colony's membership and governance is clearly still pending.

Currently there are three different procedures, all arguably tribally based, for determining the membership and holding elections to determine the Colony's Council.

First, there is the procedure set forth in the December 20, 2004 stipulation entered by the District Court in Wasson v. Inter-Tribal Court, by which a Council controlled by Appellants are to determine the Colony's membership, a determination that is subject to appeal under tribal procedures. Given our ruling that there are other tribal remedies that have not been exhausted, we need not decide whether this stipulation, taken in isolation, is properly viewed to establish the identity of the governing Council for all purposes or, as the Regional Director argues, merely is authorized to undertake the steps necessary to determine membership enrollment and hold an election that will finally resolve the identity of the Council. Nor do we need to address the Bills group's contention that the stipulation, to which that group is not a party, is ineffective.

Second, there is the procedure set forth in the September 16, 2004 order issued by the Inter-Tribal Court in Wasson v. Bills (In re: Kyle Swanson), by which the two factions represented on the February 2000 Council are to submit proposed membership lists to the Inter-Tribal Court for its determination of membership and subsequent oversight of an election. Appellants argue that the stipulation entered by the District Court in Wasson v. Inter-Tribal Court renders this order ineffective. The record, however, does not show that the Inter-Tribal Court has dismissed Wasson v. Bills or taken action to vacate, reverse, or modify the September 16, 2004 order. In addition, the Bills group's May 26, 2005 motion for default is pending before the Inter-Tribal Court, awaiting its action. Because the Inter-Tribal Court has taken no action in Wasson v. Bills to terminate the case, and has a relatively recent motion before it, the Board views the Inter-Tribal Court's order as still effective.

Appellants argue that the Inter-Tribal Court litigation is concluded. As evidence for this proposition, they cite in their opening brief to a facsimile from Shannon Rambeau, who is not identified in the facsimile by title or organization, to Treva Hearne, Appellants' attorney, on the subject of the "Winnemucca Case." The facsimile states in its entirety: "Treva, This office has been left out of the loop for several months now. As far as I know there is nothing pending." With their brief replying to the Bills group's answer brief, Appellants additionally provide a declaration by their counsel stating that William Kockenmeister, one of the judges for the Inter-Tribal Court, told Appellants' counsel that nothing was pending before the Inter-Tribal Court regarding the Winnemucca Indian Colony.

The Board has consistently held that it need not consider evidence submitted for the first time on appeal. See Estate of Harvey (Harry) Miana, 38 IBIA 206, 209 (2002). Nor will it consider matters raised for the first time in a reply brief. See Aloha Lumber Corp. v. Alaska Area Director, 41 IBIA 147, 161 (2005). Thus, we need not consider this purported evidence of the termination of Inter-Tribal Court proceedings in Wasson v. Bills. In any event, the Board does not find this purported evidence to be authoritative. No order of dismissal has been entered in Wasson v. Bills, and pending in the case are an order that provides for a continuing process to resolve the dispute and a motion by the Bills group. Perhaps, if the Inter-Tribal Court appears to leave Wasson v. Bills indefinitely in limbo, BIA at some point may need to deem tribal processes to be concluded even in the absence of a formal dismissal or other termination of the case, but we do not deem such a point to have been reached. Moreover, as discussed below, another tribal process appears to be underway in the Bank of America case, so that even if the Inter-Tribal Court case were deemed terminated, the Board would find that tribal processes have not been exhausted.

The third procedure for resolving the dispute over the Colony's governance is the one set forth in the July 5, 2005 order issued by the District Court in Bank of America v. Bills, by which the parties are to submit proposed membership lists to the stipulated Minnesota panel. The relationship between this order and the procedure set forth in the stipulation entered by the District Court in Wasson v. Inter-Tribal Court is unclear, as is the basis on which the District Court invoked the participation of the stipulated Minnesota panel, which was created by the parties only for the limited purpose of hearing the appeals from the May 9, 2002 tribal court order by Judge Haberfeld. Nevertheless, the order stands, and the Bank of America case is active and in process. Thus, the Bank of America case appears to have established an alternate tribally based process for determining the identity of the legitimate Colony Council.

We therefore conclude that tribal processes have not been exhausted and have not determined the identity of the legitimate Colony Council.

While Appellants' primary argument is that tribal processes have been exhausted, they also argue that BIA's refusal to recognize them is illegal under federal law. Specifically, they argue that BIA is in violation of ISDA, the Indian Non-Intercourse Act, 25 U.S.C. § 177, and the federal government's trust responsibility to the Colony. They also argue that BIA should take responsibility for resolving the dispute because BIA has previously interceded in Colony internal governance affairs and helped cause the dispute to arise.

As an initial matter, it is well established that tribal governance disputes are to be resolved by tribal procedures, not by the federal government. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978); Fisher v. District Court, 424 U.S. 382, 386-89 (1976); Smith v. Babbitt; 100 F.3d 556, 559 (8th Cir. 1996); Wheeler v. US. Dept. of the Interior, Bureau of Indian Affairs, 811 F.2d 549 (10th Cir. 1987). Federal interference in internal tribal affairs would interfere with powers of self-governance conferred on tribes by the federal government, would subject disputes arising on reservations among reservation Indians to a forum other than the one they established for themselves, and would risk conflicting adjudications and diminish the tribal courts' authority. See Fisher, 424 U.S. at 387-88. Thus, the Board has ruled that neither BIA nor the Board should generally decide disputes that are intra-tribal in nature. See, e.g., Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director, 38 IBIA 244, 249 (2002); Carrigan v. Acting Eastern Oklahoma Area Director, 36 IBIA 87, 88 (2001); John v. Acting Eastern Area Director, 29 IBIA 275, 277-78 (1996).

Appellants argue that BIA is required to determine whether or not they are the legitimate Council under Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256 (9th Cir. 2000) Hein, however, is not applicable here. In Hein, a subgroup of members of a federally recognized tribe petitioned BIA to request that the members of that group be given their share of proceeds of the tribe's gaming revenues. BIA denied the petition, asserting that it had no trust responsibility over gaming revenue allocations, and the subgroup appealed that decision to the Secretary of the Interior (Secretary). While the Secretary's decision was pending, the subgroup sued the Secretary in federal court claiming, among other things, a violation of the Administrative Procedure Act (APA). The District Court dismissed the APA claim on the ground that there was no final agency action to review because the Secretary had not yet decided plaintiffs' appeal. The Ninth Circuit reversed and directed the District Court to treat plaintiffs' APA claim as an action to compel the Secretary to decide their appeal.

The holding of Hein is limited and procedural. The Court merely ruled that, under the facts of that case, plaintiffs could sue the Secretary for failing to act on their request for a decision. The Court did not rule that the Secretary was required to rule in a particular fashion, and expressly acknowledged that the Secretary could simply determine that the

Interior Department lacked jurisdiction over the question. Hein, 102 F.3d at 1259 & n.3. Hein does not apply here because the Regional Director did act on Appellants' request for a decision by declining to recognize them as the legitimate Council at this time, while tribal processes are being exhausted. That decision will become final upon the issuance of this order of affirmance by the Board and may be the subject of an APA claim in District Court if Appellants see fit. Hein says nothing about what the content of an agency decision must be, and it certainly does not require BIA to decide to recognize Appellants as the Colony Council.

While it is well-established that the ultimate determination of tribal governance must be left to tribal procedures, BIA may in certain circumstances be required, as an interim measure while tribal processes are underway, to temporarily recognize some tribal entity with which it will establish a government-to-government relationship. See Goodface v. Grassrope, 708 F.2d 355 (8th Cir. 1983). In Goodface, the court concluded that BIA was obligated to recognize and deal with some tribal governing body as an interim measure where its failure to provide recognition "jeopardized the continuation of necessary day-to-day services on the reservation." Id. at 338-39.

Thus, the Board has held that "[t]he issuance of an interim determination of tribal leadership should be considered an unusual action to be undertaken only in emergency situations." Cliv Dore v. Eastern Regional Director, 31 IBIA 173, 174 (1997); see also Wadena v. Acting Minneapolis Area Director, 30 IBIA 130, 145 (1996) (noting that BIA has issued such an interim decision "only when the situation deteriorated to the point that recognition of some government was essential for Federal purposes"). As we have already concluded, however, Appellants' March 28 and April 13, 2005 requests for recognition provided no reason for BIA to address the question of the Colony's proper governing body. Appellants thus did not identify any federal responsibility to the tribe that would require the establishment of an interim government-to-government relationship. 18/

18/ Appellants argue that BIA's determination not to recognize them for the purposes of contracting under ISDA was arbitrary and capricious in the absence of any BIA policy regarding how to determine such recognition. This argument fails because Appellants did not submit an application for a self-determination contract with their March 28, 2005 request for recognition as the legitimate Council.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decisions of March 9, 2004 and July 26, 2005.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge