



INTERIOR BOARD OF INDIAN APPEALS

Philip H. Tarbell, Kerney Cole, Randy Hart, Cecil Garrow, Glenn Hill, Sr.,
and Allen White v. Eastern Regional Director, Bureau of Indian Affairs

50 IBIA 219 (09/17/2009)



United States Department of the Interior

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

PHILIP H. TARBELL, KERNEY)	Order Affirming Decision
COLE, RANDY HART, CECIL)	
GARROW, GLENN HILL, SR.,)	
AND ALLEN WHITE,)	
Appellants,)	
)	
v.)	Docket No. IBIA 08-29-A
)	
EASTERN REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	September 17, 2009

Philip H. Tarbell, as Chief Executive Officer (CEO); Kerney Cole, as Vice-CEO; and Randy Hart, Cecil Garrow, Glenn Hill, Sr., and Allen White, as Legislators of the current Constitutional Government (Appellants¹), have appealed an October 31, 2007, “Determination of the Governmental Body of the St. Regis Mohawk Tribe with whom the Bureau of Indian Affairs Shall Conduct its Government-to-Government Relations” (Decision) issued by the Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA). In the Decision, the Regional Director recognized the Traditional Three Chief Government (Three Chiefs), rather than the Constitutional Government, as the governmental body of the St. Regis Mohawk Tribe (Tribe), with whom BIA would conduct government-to-government relations.

Appellants, who allegedly were the last elected governmental officials under the Constitutional Government,² challenge the Regional Director’s determination that the Tribe has chosen to be governed by the traditional form of government comprised of a council of

¹ Although listed as an appellant, Kerney Cole did not sign the notice of appeal; he did, however, sign Appellants’ opening brief, thus signifying that he had authorized the appeal to be filed on his behalf. *See* Notice of Docketing, Order Setting Briefing Schedule, and Order for Clarification, Jan. 11, 2008, at 1 n.1. We therefore include him as an Appellant.

² It is not entirely clear from the record when (or even if) Appellants were elected.

three chiefs and three sub-chiefs, rather than by the one established by the Constitution purportedly adopted in 1995. Appellants contend that the Constitution proposed in 1995 was validly adopted in a June 5, 1995, referendum, and that the subsequent referenda purportedly repudiating the approval of the Constitution were invalid because participation in the referenda did not satisfy the Constitution's requirement that 30 percent of eligible voters must vote in a referendum in order for the Constitution to be amended (or revised). Appellants also object to the fact that the Regional Director issued the Decision at all, asserting that he should have first required resolution of the internal tribal governmental dispute through appropriate tribal mechanisms or through arbitration.

While it is undeniably true that internal tribal governmental disputes should be resolved in the first instance through appropriate tribal judicial or non-judicial processes and that BIA should defer to a tribe's reasonable interpretation of its laws, it is equally true that BIA has the authority and the obligation to determine the governmental body with whom it will engage in government-to-government relations. In this case, two U.S. district courts have explicitly directed BIA to independently review the disputed tribal procedures surrounding the adoption of the Constitution and to grant official recognition to whichever governmental entity embodies the Tribe's choice of government. Moreover, Appellants had explicitly requested the Regional Director to issue such a decision. Thus, we find no error in the Regional Director's issuance of his decision at this time.

We also reject Appellants' challenge to the merits of the Regional Director's recognition decision. Contrary to Appellants' assertion, the Regional Director did not unequivocally find that the Constitution was validly adopted. And his conclusion that, whatever support the Constitution might have once enjoyed had all but evaporated by 1996 when, in a series of referenda, the tribal voters overwhelmingly denied the validity of the Constitution and expressed their desire to be governed by the Three Chiefs, not by the Constitution, is amply supported by the record. In light of the U.S. district courts' remand directives, the Regional Director was not free to ignore the expressed will of the Tribe's membership. We therefore affirm the Regional Director's decision recognizing the Three Chiefs as the Tribe's governmental body with whom BIA will conduct government-to-government relations.³

³ The Regional Director did not address the validity of the tribal court, which was one of the issues mentioned by the U.S. district courts. Because both Appellants and the Three Chiefs have stipulated to the validity of the tribal court and its past rulings, this stipulation obviates any need for us to delve into the legitimacy of that court. We therefore deny the motion to file an *amicus curiae* brief addressing that issue submitted by Harrah's Operating Company, which we took under advisement by order dated May 23, 2008.

Factual and Procedural Background

The Tribe, whose lands extend into both northern New York and southern Canada, historically has been governed under a Three Chiefs system, with three chiefs and three sub-chiefs elected for staggered 3-year terms and a tribal clerk chosen once every 3 years forming the tribal council. The Three Chiefs exercised combined legislative, executive, and judicial authority. Beginning in approximately 1972, members of the Tribe initiated efforts to adopt a written constitution to bring about leadership reform; however, various drafts of a written constitution proposed between 1972 and 1992 were consistently rejected by the tribal membership. After a June 1993 referendum revealed that the tribal members wanted a written constitution, a Constitution Committee established in 1992 began preparing another draft for a community referendum. A 1993 draft Constitution, which provided that it would become effective when adopted by a majority vote of the Tribe's qualified voters in a vote in which at least 30 percent of those entitled to vote participated, was voted down in early 1994. Undaunted, the Constitution Committee again revised the draft Constitution, and the Tribe conducted a referendum on this draft Constitution on June 3, 1995, in conjunction with the regular annual tribal election.

Article XIX of the 1995 draft Constitution provided for its own adoption “upon certification that fifty-one [percent] (51 percent) of those present and voting in the referendum called on June 03, 1995 have voted in favor of adopting the Constitution” Administrative Record (AR), Vol. 1, Tab 3. Of the 909 valid ballots cast in the June 3, 1995, referendum, 463 votes were in favor of adopting the Constitution while 446 votes were against its adoption. Thus 50.935093 percent of the valid ballots supported the adoption of the Constitution. *See* AR, Vol. 1, Tab 5. The closeness of the vote precipitated a June 5, 1995, tribal council meeting to determine whether the Constitution had, in fact, been adopted. Relying on both a statement in the tribal council resolution (TCR) announcing the referendum (TCR 95-115) that the Constitution would be adopted if a majority voted in favor of adoption and also a comment made on December 4, 1993, by Henry Flood, a non-Indian consultant working with the Tribe in developing the Constitution, that the intended meaning 51 percent was a simple majority,⁴ the tribal council concluded that, according to tribal tradition, 51 percent meant 50 percent plus 1 vote and thus that the Constitution had been adopted. *See* AR, Vol. 1, Tab 4. On June 6, 1995, the tribal clerk certified the election, recounting the official vote tally and stating:

⁴ Since the 1995 draft of the Constitution did not exist in December 1993, Flood's comment necessarily referred to the 1993 draft of the Constitution which, by its terms, only required approval by a majority vote at an election in which 30 percent of the eligible voters participated.

I further certify that a majority of those present and casting valid ballots voted in favor of adopting the tribal constitution. I further certify that 51 percent under our current election procedures and tribal voting tradition means 50 percent plus one. I further certify that the proposed tribal constitution is adopted by a majority of the Mohawk people.

AR, Vol. 1, Tabs 5, 49. The tribal council joined in the certification in TCR 95-116. *Id.*

The certification of the adoption of the Constitution and a tribal meeting held on June 10, 1995, during which the validity of the Constitution was discussed and opposing views were aired, did not end the debate on the validity of the Constitution. Therefore, on May 23, 1996, in response to a petition signed by at least 20 percent of the Tribe's eligible voters, the Legislative Council established by the Constitution⁵ added a referendum question to the June 1, 1996, election of tribal officers under the new Constitution. The question — “Is the Tribal Constitution of the Saint Regis Mohawk Tribe valid?” — received 651 “No” votes and 330 “Yes” votes. *See* AR, Vol. 1, Tab 11.

On June 5, 1996, tribal member Russell Lazore challenged the June 1, 1996, referendum in tribal court. *Lazore v. Saint Regis Mohawk Tribal Council*, Case No. 96CI0080. In a decision issued on June 7, 1996 (*Lazore I*), the chief judge of the tribal court, Christine Zachary Deom, held that the referendum was purely advisory and could not reasonably be construed as binding or as amending or repealing the Constitution and that, even if not advisory, it would nevertheless fail as a matter of law because 30 percent of the eligible voters — the percentage of participation required by Article XVI of the Constitution to amend or repeal the Constitution — did not vote in the election. *See* AR, Vol. 1, Tab 12. The tribal court decision notwithstanding, on June 10, 1996, in TCR 96-84, the tribal council accepted the results of the June 1, 1996, referendum and revoked TCR 95-116, thereby rescinding the certification of the adoption of the Constitution. AR, Vol. 1, Tab 11.

On June 10, 1996, the tribal council approved TCR 96-85, in which it both called for and agreed to be bound by a referendum to be conducted on June 15, 1996, known colloquially as the “clean slate” referendum, which posed the question, “Do you favor

⁵ Among other things, the 1995 Constitution divided the tribal government into three independent branches: the legislative, executive, and judicial departments. The judicial department had been foreshadowed in the 1994 Saint Regis Mohawk Tribal Judiciary Act of 1994 (TCA 94-F), which, at Section 5(d), expressly provided that it would be amended to conform to the provisions of any constitution adopted by the Tribe. AR, Vol. 1, Tab 1.

continuing with our present elected officials?” AR, Vol. 1, Tabs 13, 49. This referendum identified two options: if the Tribe voted to retain the current officials, those officials would remain as the Three Chiefs system tribal council; alternatively if the Tribe voted for a clean slate, a nominating caucus would be held on June 22 with elections to follow on June 29, 1996. The referendum, with 481 votes for new elections and 194 votes for retention of the existing officials, resulted in clean slate elections. AR, Vol. 1, Tab 15. Elections were subsequently held on June 29, 1996. AR, Vol. 1, Tab 11.

The tribal council’s rescission of the approval of the Constitution and the subsequent clean slate referendum induced Lazore to again invoke the jurisdiction of the tribal court. In a decision issued on July 12, 1996 (*Lazore II*), the chief tribal judge stated that the Constitution had been approved, albeit by a very slim margin,⁶ and thus came from the people, and that the tribal council’s certification of the adoption of the Constitution was a special confirming act of the will of the people that could not be rescinded like other legislative acts. AR, Vol. 1, Tab 29. She further opined that, once adopted, the Constitution could only be changed or repealed by a sufficient number of people (a majority of voters in an election in which 30 percent of the eligible voters participated) and only through the use of methods permitted by the Constitution itself, adding that the amendment requirements could not be understated or treated in a cavalier fashion, as the tribal council had done. She therefore held (1) that the tribal council illegally rescinded the certification; (2) that any acts taken by the tribal council subsequent to the June 10, 1996, purported rescission related to the June 15 referendum and the clean slate (recall) election were null and void; (3) that the officials elected as a result of the June 15, 1996, referendum were enjoined from exercising any official government authority, and that any acts undertaken as of July 1, 1996 (the date the officials elected on June 29, 1996, assumed control) were enjoined; (4) that the Constitution and all tribal laws enacted thereunder were the law until amended or repealed; and (5) that the officials elected on June 1, 1996, pursuant to the Constitution and the Mohawk Election and Voting Rights Act of 1996 were lawfully elected. *Id.*

As a consequence of the tribal court’s decision, there were two competing groups claiming to be the Tribe’s governing body: the Constitutional Government elected on

⁶ The judge did not address the question of whether 51 percent meant 50 percent plus 1 vote but apparently accepted without independent analysis the tribal council’s initial determination that the Constitution had been approved.

June 1, 1996; and the Three Chiefs elected on June 29, 1996.⁷ Each group contacted BIA several times, seeking recognition as the governing body of the Tribe. By decision dated July 26, 1996, the Regional Director,⁸ in furtherance of BIA's policies of non-interference in internal tribal matters and of support of tribal self-governance and self-sufficiency, accepted the tribal court's determinations and recognized the Constitutional Government elected on June 1, 1996, as the tribal leaders entitled to represent the Tribe in government-to-government relations with the United States. *See* AR, Vol. 1, Tab 34. The Three Chiefs appealed this decision to the Board, and we affirmed the Regional Director's decision, finding that the Three Chiefs had not exhausted their tribal remedies. *See Smoke v. Acting Eastern Area Director*, 30 IBIA 31, 34 (1996). The Board subsequently denied the Three Chiefs' petition for reconsideration — in which the Three Chiefs had argued that the tribal courts had been inactive since 1996 and therefore that no tribal forum existed for resolving the dispute — again determining that the dispute belonged in a tribal forum, whether that forum was judicial or nonjudicial. *Smoke v. Acting Eastern Area Director*, 30 IBIA 90, 91 (1996).

As a result of the Board's affirmance of the Regional Director's decision, the Three Chiefs, who continued to maintain that they were the Tribe's governing body, issued TCR 96-56 on November 21, 1996, calling for a binding referendum to be held on November 30, 1996, to vote on the question: "Did the Judiciary of the Saint Regis Mohawk Tribe act under valid authority?" AR, Vol. 1, Tab 43. That referendum, which essentially challenged the validity of the tribal court rulings underlying BIA's support for the Constitutional Government, yielded a vote of 17 supporting the tribal court's authority and 394 votes denying that the court had acted with legal authority. *See* AR, Vol. 1, Tab 46. Despite being apprised of the outcome of this referendum and provided with requested additional information attesting to the propriety of the referendum — the process which the Three Chiefs considered to be the ultimate tribal forum to resolve internal tribal disputes — BIA's New York Field Office (Field Office) reaffirmed its previous recognition of the Constitutional Government on February 7, 1997. *See* AR, Vol. 1, Tab 55. The Three

⁷ The elected officials of these two groups have varied throughout the course of this dispute, and some individuals have been associated with both group at different times. We will not attempt to identify the officers included in each group at the various times mentioned herein, but will simply use the group's name with the understanding that it represents the group's officials at the specified time.

⁸ Prior to September 1999, the Eastern Regional Director was known as the Eastern Area Director. We have used the term Regional Director throughout this decision to refer to both positions.

Chiefs appealed the Field Office decision, but on May 2, 1997, the Regional Director affirmed the Field Office decision, restating BIA's position that the Three Chiefs had to first raise any challenges to the Constitutional Government's authority in a tribal forum. *See* AR, Vol. 1, Tab 65.

The Three Chiefs appealed the Regional Director's decision to the Board. While the appeal was pending, the members of the Three Chiefs group ran for and won a majority of the seats on the Constitutional Government Legislative Council in the June 7, 1997, tribal elections. The Three Chiefs and the Constitutional Government — which included the Legislative Council, the CEO, and the Vice-CEO — also endorsed a joint resolution, TCR 97-A-1, which reaffirmed that public referenda had historically been the voice of the people and that the results of those referenda were final and legally binding. The Regional Director sought dismissal of the appeal as moot based on the June 7, 1997 elections; although the Three Chiefs initially opposed dismissal, they later advised the Board that the dispute concerning the November 30, 1996, referendum had been settled. The Board therefore dismissed the appeal as moot. *See Smoke v. Acting Area Director*, 31 IBIA 99 (1997). The Board subsequently denied the Three Chiefs' request to reinstate the appeal. *See Smoke v. Acting Area Director*, 31 IBIA 121 (1997). The dismissal of the appeal left intact BIA's recognition of the Constitutional Government as the governing body of the Tribe.

The Three Chiefs challenged BIA's continued recognition of the Constitutional Government in Federal court. The U.S. District Court for the District of Columbia issued its decision on September 30, 1999, finding that BIA had

acted arbitrarily, capriciously, and contrary to law in refusing to review for themselves the intensely disputed tribal procedures surrounding the adoption of a tribal constitution, in crediting unreasonable decisions of a seemingly invalid tribal court, and in refusing to grant official recognition to the clear will of the Tribe's people with regard to their government.

Ransom v. Babbitt, 69 F. Supp. 2d 141, 143 (D.D.C. 1999) (*Ransom I*). The court acknowledged that BIA was required to harmonize its recognition decisions with the principles of tribal self-determination, that the Tribe had the right to initially interpret its own governing documents, and that BIA was obligated to give deference to a tribe's reasonable interpretation of its own laws. The court noted, however, that BIA also had both the authority and the responsibility to interpret tribal law when necessary to carry out government-to-government relations with a tribe and that this authority and responsibility included the ability to review tribal political procedures and, at a minimum, the

responsibility to determine whether or not a tribe's interpretations of its own laws were reasonable. *Id.* at 150-52.

Turning to the key issue of the adoption of the Constitution, the court first pointed out that BIA was obligated to abide by the clear meaning of statutory language if such language was plainly stated. *Id.* at 151. The court then determined that the 51 percent requirement set out in the Constitution for its adoption was unambiguous and established a clear and plain electoral benchmark for measuring whether the Constitution had been approved, a benchmark that undisputedly had not been attained. The judge faulted the interpretation of 51 percent as meaning a simple majority or 50 percent plus 1 vote, citing the 1995 Constitution's abandonment of the "majority" (i.e., 50 percent plus 1 vote) standard found in earlier Constitutional drafts as well as the later version's adoption of the explicit numerical percentage benchmark. *Id.* at 151-52. In light of these findings, the court criticized the tribal court's disregard for the ambiguities surrounding the Constitution's adoption mechanisms and concluded that not only could BIA not "deem to be reasonable the Tribal Court's determination that the [T]ribe unequivocally adopted the Constitution," *id.* at 152, but also that, by failing to determine for itself whether or not the Constitution was valid, BIA was "derelict in [its] responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe and the principles of tribal sovereignty." *Id.* at 153. The court bolstered this conclusion by adding that BIA had also ignored the will of the people as expressed in the subsequent referenda overwhelmingly rejecting the validity of the Constitution; the court pointed out that a referendum traditionally has been an appropriate way for a tribe to reach decisions that have authority and legitimacy. *Id.* at 153-54.⁹ Accordingly, the court found BIA's actions to be arbitrary, capricious, and contrary to law. *Id.* at 155. The Department did not pursue an appeal of the court's decision.

In response to the district court's decision, the Field Office issued a decision on February 4, 2000, recognizing the Three Chiefs system of government as elected in the June 29, 1996, clean slate election. AR, Vol. 2, Tab 4. The Field Office also noted that, although the Tribe's regular annual election set for June 1999 had been postponed while awaiting the district court's decision, BIA expected the Tribe to hold elections no later than June 2000. The Constitutional Government appealed the Field Office decision to the Regional Director, who denied the appeal on April 24, 2000. AR, Vol. 2, Tab 9. Neither

⁹ The court also noted that the record suggested that BIA had an interest in the Tribe's embracing a constitutional form of government because BIA had funded the development of the Constitution. *Id.* at 154.

the Field Office nor the Regional Director independently reviewed the circumstances surrounding the adoption of the Constitution in deciding to recognize the Three Chiefs.

The Constitutional Government then appealed the Regional Director's decision to the Board. While not challenging BIA's recognition of the Three Chiefs Government, the members of the Constitutional Government alleged that they, not the current leadership of the Three Chiefs, were the last duly elected officials of that government. The Board initially stayed consideration of the appeal pending the June 2000 tribal elections; however, upon the defeat of the members of the Constitutional Government running for office and the election of individuals associated with the Three Chiefs in that election (AR, Vol. 2, Tab 13), the Board dismissed the appeal as moot on the ground that a valid tribal election held during the pendency of an appeal from a prior leadership dispute moots the earlier appeal. *Smoke v. Eastern Regional Director*, 35 IBIA 186 (2000). BIA recognized the individuals elected in June 2000 as the governing body of the Tribe on December 5, 2000. AR, Vol. 2, Tab 17.

On March 16, 2002, the district court issued an order in *Ransom (Ransom II)*, Civil Action No. 98-1422 (CKK) (D.D.C.), clarifying that its 1999 decision was not a final judgment since it neither expressly ordered BIA to recognize the Three Chiefs system of government nor, in the event of such recognition, identified which three chiefs should be recognized. Rather, the court explained that, although not explicitly stated, the 1999 decision clearly envisioned independent review by BIA or the Board of the procedures surrounding the adoption of the tribal Constitution. *See* AR, Vol. 2, Tab 20, at 17.

Relying on *Ransom II*, the Constitutional Government requested that the Assistant Secretary - Indian Affairs and the Associate Solicitor, Indian Affairs, re-examine and reconsider BIA's recognition decision. By letter dated June 5, 2002, the Assistant Secretary declined to reconsider the recognition decision, asserting that the mandated further agency proceedings had taken place, that the Constitutional Government had been given the opportunity to address the merits of its position on the validity of the Constitution during those proceedings, and that, rather than raise that issue, it had chosen to object to the election of the Three Chiefs solely on non-constitutional grounds. AR, Vol. 2, Tab 32.

The Constitutional Government filed an appeal in the U.S. District Court for the Northern District of New York, challenging (1) the Board's August 25, 2000, dismissal of its appeal; (2) the Assistant Secretary's June 5, 2002, refusal to reexamine or reconsider BIA's recognition of the Three Chiefs Government; and (3) two letters from the Associate Solicitor, Division of Indian Affairs, addressing the validity of the tribal court. The court issued its decision on February 11, 2004. *Tarbell v. Department of the Interior*,

307 F. Supp. 2d 409 (N.D.N.Y. 2004) (*Tarbell*).¹⁰ The court concluded that BIA had erroneously interpreted the *Ransom* court's decision as mandating recognition of the Three Chiefs rather than as directing BIA to conduct further searching analysis of the issues before making a recognition decision. The court held that, before accepting the Three Chiefs as the government of the Tribe, BIA "must allow the matter to be fully aired, and when a decision is made regarding what Tribal leadership is to be recognized, the agency should detail the reasoning employed to arrive at the determination." *Tarbell*, 307 F. Supp. 2d at 429; *see also id.* at 423. The court therefore vacated the challenged decisions and remanded the matter to the Department for further proceedings consistent with the opinion. *Id.* at 430.

Upon receipt of *Tarbell*, the Principal Deputy Assistant Secretary - Indian Affairs advised the Regional Director by letter dated February 13, 2004, that, since BIA needed to recognize some group as the Tribe's representative pending a decision on remand, the Department would continue to recognize the representatives of the Three Chiefs Government until such time as a full review of the matter had been conducted. *See* AR, Vol. 3, Tab 3. BIA implemented the court's remand order first by encouraging the parties to attempt to resolve the controversy through direct negotiations and available tribal mechanisms, including conducting a referendum to allow tribal members to express their preference as to the form of their government. *See* AR, Vol. 3, Tabs 3 and 4. Those negotiations eventually reached a stalemate, which prompted the Constitutional Government to seek BIA resolution of the issue of which government constituted the duly chosen government of the Tribe. *See, e.g.*, AR, Vol. 3, Tabs 6, 7, 8. When BIA failed to respond to the requests that it conduct the court-ordered meaningful review, the Constitutional Government contacted the *Tarbell* court, by letter dated April 24, 2007, to complain about the lack of response and to request that, rather than requiring it to bring a contempt motion, the court direct that a conference with the parties be held to get the matter back on track. *See* AR, Vol. 3, Tab 10.

Apparently abandoning his preference that the parties resolve the dispute between themselves, the Regional Director sent a letter, dated August 20, 2007, to the parties,

¹⁰ The two Associate Solicitor letters, which were dated June 26 and July 12, 2002, responded to the U.S. District Court for the Northern District of New York's inquiry in another matter about the authority of the tribal court; both letters concluded, albeit with differing rationales, that the tribal court lacked authority. *See Tarbell*, 307 F. Supp.2d at 417-18. Since Appellants and the Three Chiefs have now stipulated as to the validity of the tribal court and its past rulings, this issue is moot and will not be discussed further. *See* n.3, *supra*.

explaining the procedures he would follow in reviewing the facts surrounding the 1995 constitutional referendum, including, *inter alia*, whether the 51 percent benchmark had been achieved and what the will of the people was concerning the Constitution. He provided the parties with copies of the AR and set a briefing schedule for the parties to submit their written positions on the issues. Both the Constitutional Government and the Three Chiefs proffered their written positions; the Three Chiefs also presented additional information concerning an August 28, 2007, referendum, which posed the question “Do you approve of the Constitution document that was presented to the community in 1995?,” the results of which again signified the community’s disapproval of the Constitution by a vote of 214 “No” votes to 91 “Yes” votes. *See* AR, Vol. 4, Tab 13.

The Regional Director’s Decision

In his October 31, 2007, decision, the Regional Director first discussed whether the Constitution had secured 51 percent of the referendum vote needed for its adoption. He agreed with the *Ransom* court that only 50.94 percent of the votes had supported the Constitution’s adoption, but observed that the 51 percent requirement was included only in the Constitution itself, which had not yet become the law of the Tribe, while the TCR announcing the referendum had stated that approval by a simple majority would result in the adoption of the Constitution. He also noted that the tribal council had seriously considered this question and had determined that the Constitution had been adopted, a determination he characterized as seeming “utterly reasonable at the time,” and one which likely would have been ascribed to the particular customs and usages of the Tribe had the Constitutional Government retained the support of tribal membership. Decision at 6. But, as the Regional Director stated, “the will of the Tribal people began to assert itself in a different direction after the first Constitution referendum,” thus complicating his inquiry by requiring him to consider the subsequent referenda rejecting the purported adoption of the Constitution. *Id.*

In discussing the second referendum, which concluded that the Constitution had *not* been validly adopted, the Regional Director recognized that less than 30 percent of eligible voters had participated in that election, but pointed out that if the Constitution had not been adopted in the first place, that requirement, which was set out in Article XVI of the Constitution, would not have come into existence. He also noted that more voters cast ballots in that referendum than had voted in the first referendum on the 1995 Constitution. He further observed that the third and fourth referenda similarly revealed that those who voted did not want the Tribe to be governed by the Constitution. *Id.* at 6-7.

The Regional Director therefore stated:

I cannot conclude with any great confidence that the Constitution was not adopted by the Tribe. I can determine that it did not receive 51 percent of the vote. It is also clear that whatever support the Constitution once had, that support all but evaporated in a little over a year. Recent events underscore the will of the Tribe not to be governed under a Constitution. On August 18, 2007, a fifth referendum was conducted by the recognized Three Chief Government, placing before the Tribal membership once again the 1995 Constitution, and once again the Tribe voted against the Constitution by a margin in excess of two to one. In light of the questions casting doubt on the legality of the Constitution's adoption and the consistent lack of support the Constitution has received over the past eleven years, I must recognize the fact that the people of the St. Regis Mohawk Tribe have chosen not to be governed by the Constitution, and they have clearly expressed their desire to revert to the traditional form of governance by a Council of Three elected Chiefs and Sub-chiefs. It is with this governmental body of the Tribe and its elected leaders that the Bureau will conduct its government-to-government relations.

Id. at 7.

This appeal followed.

Legal Principles

“It is a well-established principle of Federal law that intra-tribal disputes should be resolved in tribal forums. This rule applies with particular force to intra-tribal disputes concerning the proper composition of a tribe’s governing body.” *Bucktooth v. Acting Eastern Area Director*, 29 IBIA 144, 149 (1996). “[T]he ultimate determination of tribal governance must be left to tribal procedures.” *Wasson v. Western Regional Director*, 42 IBIA 141, 158 (2006); see *George v. Eastern Regional Director*, 49 IBIA 164, 186 (2009). These principles derive from the doctrines of tribal sovereignty and self-determination pursuant to which a tribe has the right to initially interpret its own governing documents in resolving internal disputes and the Department must give deference to a tribe’s *reasonable* interpretation of its own laws. *United Keetowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA 75, 80 (1992). Nevertheless, the Department has both the authority and the responsibility to interpret tribal law when necessary to carry out government-to-government relations with a tribe. *Richards v. Acting Pacific Regional Director*, 45 IBIA 187, 191-92 (2007); *United Keetowah Band of Cherokee Indians in*

Oklahoma, 22 IBIA at 80. And when an internal tribal dispute exists between different factions claiming to be the lawful governing body of the tribe, BIA must look to the tribe's governing documents and interpret tribal law itself to determine who appears to represent the lawful tribal government. See *Richards*, 45 IBIA at 192; see *Ransom I*, 69 F. Supp. 2d at 150-51. In construing tribal law, BIA must adhere to the clear meaning of the statutory (or constitutional) language if such language is plainly stated. *Id.* at 151, citing *Perrin v. United States*, 444 U.S. 37, 42 (1979), and *Utah v. Babbitt*, 830 F. Supp. 586, 596 (D. Utah 1993), *aff'd*, 53 F.3d 1145 (10th Cir. 1995).

Appellants bear the burden of demonstrating that the Regional Director's decision was erroneous or not supported by substantial evidence. *George*, 49 IBIA at 185; *Washinawatok v. Midwest Regional Director*, 48 IBIA 214, 228 (2009). Appellants must substantiate any claim of error with evidence supporting the claimed error; bare allegations, without evidence, are insufficient to sustain Appellants' burden. *Poe v. Pacific Regional Director*, 43 IBIA 105, 114 (2006). The Board reviews legal issues and questions regarding the sufficiency of evidence de novo. *George*, 49 IBIA at 185-86; *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 18 (2008); *Parker v. Southern Plains Regional Director*, 45 IBIA 310, 318 (2007); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director*, 21 IBIA 24, 27 (1991).

With these principles for guidance, we turn to Appellants' arguments, none of which we find persuasive.

Discussion

Appellants characterize the Regional Director's decision as unambiguously endorsing the conclusion that the Constitution proposed in 1995 was validly adopted in the June 5, 1995, referendum, which necessarily signified his acceptance of the tribal council's interpretation of 51 percent as meaning a simple majority or 50 percent plus 1 vote. They agree with that conclusion, which they insist controls this matter and requires recognition of themselves, the Constitutional Government, as the duly elected tribal government. Because they consider this finding dispositive, they dispute the Regional Director's reliance on the subsequent referenda to countermand the approval of the Constitution, averring that none of those referenda was valid because 30 percent of the eligible voters did not participate in any of those referenda and thus the referenda did not meet the requirements set out in Article XVI of the Constitution for amending (or repealing) that document. Appellants also object to the fact that the Regional Director issued the Decision at all, asserting that he should have first required resolution of the internal tribal government dispute through appropriate tribal mechanisms or through arbitration. We find none of these arguments meritorious.

Addressing first the propriety of the Regional Director's issuance of his Decision, we reiterate that, while it is undeniably true that internal tribal governmental disputes should be resolved in the first instance through appropriate tribal judicial or non-judicial processes and that BIA should defer to a tribe's reasonable interpretation of its laws, it is equally true that BIA has the authority and the obligation to determine the governmental body with whom it will engage in government-to-government relations. And in this case, both the *Ransom* and the *Tarbell* courts explicitly directed BIA to independently review the disputed tribal procedures surrounding the adoption of the Constitution, including the subsequent referenda, and to issue a decision granting official recognition to whichever governmental entity represents the Tribe's choice of government. Furthermore, although Appellants expressed frustration at the apparent lack of progress in the parties' attempts to negotiate a process to settle the dispute internally, they did not invoke any other available internal tribal judicial or non-judicial mechanisms to resolve the dispute, but instead specifically requested the Regional Director to conduct the court-ordered independent review and to issue a recognition decision based on that review and complained when he did not do so. We therefore find that Appellants have not shown error in the Regional Director's issuance of his decision at this time.

Turning to the heart of Appellants' arguments, we reject Appellants' challenge to the substance of the Regional Director's recognition decision. Contrary to Appellants' assertion, the Regional Director did not unequivocally find that the 1995 Constitution was validly adopted. Rather, he stated that the tribal council's conclusion that the Constitution had been adopted — which depended on the validity of the tribal council's interpretation of 51 percent as meaning a simple majority or 50 percent plus one — “seemed reasonable at the time,” and that he could not “conclude with any great confidence that the Constitution was not adopted by the Tribe,” although he was able to determine that it did *not* receive 51 percent of the vote. Decision at 6, 7. These pronouncements fall far short of constituting a clear, unambiguous finding that the Constitution was in fact approved and adopted.¹¹

The Regional Director's reluctance to unambiguously conclude that the Constitution had been approved finds ample support in the circumstances surrounding the initial constitutional referendum. There is no dispute that approval of the Constitution did not garner 51 percent of the ballots case. Nor did the tribal clerk certify that 51 percent of the

¹¹ We note that, although the tribal court clearly accepted the certification of the adoption of the Constitution and the Constitution's validity, the court did so without independently analyzing whether the 51 percent benchmark set out in that document actually meant something less than 51 percent, i.e., a simple majority; rather the tribal court uncritically accepted the tribal clerk's certification that the Constitution had been adopted.

valid ballots cast had voted in favor of adopting the Constitution; rather, she certified that a “majority” of those ballots approved the Constitution and that the Constitution had been adopted by a “majority” of the Tribe, although she did add that, under the Tribe’s current election procedures and tribal voting tradition, 51 percent means 50 percent plus one.¹²

We have independently reviewed the legal question of whether the 51 percent benchmark set out in the Constitution means something less than 51 percent and conclude that it means what it says — 51 percent of the votes cast had to approve the Constitution for it to be adopted. As the *Ransom* court noted, 51 percent “is as clear and plain an electoral benchmark as the Tribe could create.” *Ransom*, 69 F. Supp. 2d at 152. Absent any ambiguity in the express language in the Constitution, BIA was obligated to adhere to the clear meaning of that plainly stated language. *Id.* at 151. The conclusion that 51 percent means something other than a simple majority is further bolstered by the fact that Article XIX of the 1995 draft of the Constitution revised the adoption provision contained in the rejected 1993 draft by substituting the 51 percent requirement for the “majority” approval provision in the earlier draft, as well as by removing the 30 percent of eligible voter participation requirement set out in the 1993 draft. We cannot assume that these revisions signified nothing, especially since it was eminently reasonable to require a higher percentage of those voting to approve the adoption of the Constitution once the participation requirement was eliminated than had been required when that requirement was in place. Given that rarely, if ever, has 30 percent of the eligible tribal voters participated in a tribal election (*see* AR, Vol. 1, Tab 53 (draft minutes of June 10, 1995, monthly tribal meeting)), the Constitution would be virtually unassailable once adopted, and this consideration also weighs in favor of the reasonableness of Article XIX’s requirement of a higher approval percentage for its adoption. Thus the underlying premise of Appellants’ substantive challenge to the Regional Director’s decision does not withstand scrutiny.

In any event, the record amply supports the Regional Director’s conclusion that, whatever support the Constitution might have once enjoyed had all but evaporated by 1996 when, in a series of referenda, the tribal voters overwhelmingly denied the validity of the

¹² The minutes of the tribal council’s June 5, 1995, meeting on the validity of the Constitution, however, seem to intimate that the Tribe had never before set 51 percent — as opposed to simply a majority — as the required percentage for any previous election and that none of the council members knew why that percentage was used in Article XIX of the Constitution. *See* AR, Vol. 1, Tab 4. Those minutes also suggest that the tribal council’s decision to equate 51 percent with a simple majority may have been partly animated by factors such as the desire to avoid embarrassment — the newspapers had already announced the approval of the Constitution — and to eliminate the Tribe’s reputation as lawless.

Constitution and expressed their desire to be governed by the Three Chiefs, not by the Constitution. As the *Ransom* and *Tarbell* courts' remand directives make clear, the Regional Director was not free to ignore this subsequently expressed will of the Tribe. Although Appellants (and the tribal court) considered the June 1, 1996, referendum to be an attempt to amend the Constitution, we construe that referendum as an effort to determine whether the Tribe believed that the Constitution had been validly adopted *in the first place* by less than 51 percent of the votes. The fact that a significant majority of the votes — more than those cast in favor of adopting the Constitution in the first referendum — determined that the Constitution had *not* been validly adopted effectively repudiated the tribal council's interpretation of 51 percent as equivalent to a simple majority. Since that time, the members of the Tribe have consistently shown that they do not want to be governed by the Constitution, both by failing to elect supporters of the Constitution to tribal office and by again explicitly rejecting the Constitution in an August 2007 referendum. Even Appellants appear to agree, at least when it supports their position, that referenda represent the ultimate expression of the will of the people and are binding.¹³ Appellants have not shown error in the Regional Director's reliance on those referenda as the basis for determining that the Tribe has rejected being governed by the Constitution and the Constitutional Government. We therefore affirm the Regional Director's decision recognizing the Three Chiefs as the Tribe's governmental body with whom BIA will conduct government-to-government relations.¹⁴

¹³ In two supplemental letters dated August 13 and September 24, 2008, Appellants report that a July 5, 2008, referendum overwhelmingly rejected the Three Chiefs Government, implying that this rejection requires BIA to recognize them as the Tribe's governing body. Even if relevant to the propriety of the Regional Director's previously issued October 2007 decision, those submissions do not support Appellants' entitlement to recognition because, as a July 12, 2008, press release, attached to the September 24, 2008, submission, makes abundantly clear, the proponents of that referendum also rejected being governed by the Constitution, a document they state was previously disavowed by the Tribe in the June 1, 1996, referendum.

¹⁴ Neither the Regional Director's recognition decision nor our affirmance of that decision precludes the tribal members from using internal tribal means to revisit their current form of tribal government and elected tribal leadership in order to decide whether they want to alter or replace their current government and/or tribal leadership, or from seeking BIA recognition of a different governing body that reflects the current will of the Tribe.

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 decision.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Lisa Hemmer
Administrative Judge*

*Interior Board of Land Appeals, sitting by designation.