



## INTERIOR BOARD OF INDIAN APPEALS

Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro v.  
Acting Western Regional Director, Bureau of Indian Affairs

52 IBIA 353 (12/17/2010)

Related Board cases:

38 IBIA 205

38 IBIA 255

39 IBIA 174

42 IBIA 141

50 IBIA 342



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
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SHARON WASSON, THOMAS	)	Order Vacating Decision
WASSON, WILLIAM BILLS, JUDY	)	and Remanding
ROJO, AND ELVERINE CASTRO,	)	
Appellants,	)	
	)	
v.	)	
	)	Docket No. IBIA 10-050
ACTING WESTERN REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	December 17, 2010

Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro, in their capacity as Members of the Winnemucca Indian Colony Council (Colony Council or Council) and as individuals (Appellants), appealed to the Board of Indian Appeals (Board) from a December 8, 2009, decision (Decision) by the Acting Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director’s decision was issued after the Board instructed the Regional Director to issue a decision in response to Appellants’ request for recognition as the Colony Council, the elected governing officials of the Winnemucca Indian Colony of Nevada (Tribe or Colony). Appellants’ request for recognition was made in connection with their allegation that Tribal lands were being occupied without the Tribe’s permission and that BIA had an obligation to respond to the trespass. *See Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo, and Elverine Castro v. Western Regional Director*, 50 IBIA 342, 352 (2009) (*Wasson V*).

The Regional Director’s decision, in response to the Board’s order, consists in substance of a single paragraph stating two unexplained conclusions.<sup>1</sup> First, the Regional Director stated that “based on the information currently available, I hereby affirmatively do not recognize or acknowledge or certify or approve these individuals, identified in [Appellants’] February 26, 2007 request as the duly elected officers of the Winnemucca Indian Colony.” Decision at 1. The Decision provides no reasoning for this conclusion and

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<sup>1</sup> The Decision consists of a one-paragraph introduction, one paragraph announcing the Regional Director’s conclusions, and three paragraphs providing appeal rights.

refers to no evidence or “currently available” information that was considered or evaluated in reaching this conclusion. Second, the Regional Director stated — also without explanation — that there was no source of authority under which BIA has an affirmative obligation to decide whether to recognize any individuals as the Tribe’s leaders and that such action by BIA could be seen as an intrusion into tribal sovereignty. *See id.* The Decision does not mention Appellants’ allegation of trespass on tribal lands.

We vacate the Decision and remand the matter for further proceedings because the Decision contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council. It is not even clear whether, by stating that he “affirmatively” did not recognize Appellants as the Colony Council, the Regional Director intended to determine that Appellants had not demonstrated that *they* were entitled to be so recognized, or whether the Regional Director intended to determine only that he was not required to decide whether to recognize *any individuals* as the Tribe’s leadership, and thus was “affirmatively” not recognizing Appellants in that context. What is clear is that the Regional Director did not comply with the Board’s order to address Appellants’ request for recognition in the context of their trespass allegation. The Board’s prior order required, and Appellants were entitled to, a substantive decision explaining why the Regional Director was declining to recognize them as the Tribe’s leaders or, in the alternative, explaining why a decision by BIA regarding tribal leadership was not required in order for BIA to respond to Appellants’ allegations of trespass on tribal lands.

### Background

The protracted history of the governance dispute within the Tribe, and BIA’s obligation, or lack of an obligation, to make a decision about which individuals to recognize as the Tribe’s leadership for government-to-government purposes, has been recounted in previous Board decisions and need not be repeated here. *See Wasson V*, 50 IBIA at 344-50; *Wasson v. Western Regional Director*, 42 IBIA 141, 141-152 (2006) (*Wasson IV*).<sup>2</sup> The Tribe has two competing factions, currently referred to as the “Wasson” faction, represented by Appellants, or possibly by their claimed successors in office, and the “Ayer” faction (formerly referred to as the “Bills group” and “Leyva group”). *See id.* at 142 n.3. For several years, BIA has not recognized either or any faction as constituting the Colony Council or as representing the Tribe for government-to-government purposes.

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<sup>2</sup> *See also Wasson v. Acting Western Regional Director*, 39 IBIA 174 (2003) (*Wasson III*); *Wasson v. Western Regional Director*, 38 IBIA 255 (2002) (*Wasson II*); and *Wasson v. Western Regional Director*, 38 IBIA 205 (2002) (*Wasson I*).

In *Wasson IV*, the Board affirmed a decision by the Regional Director not to recognize the Wasson faction as the Colony's Council. We did so because the appellants in that case failed to identify any federal purpose for which recognition of a Council was required. 42 IBIA at 154. In addition, the Board affirmed the Regional Director's conclusion in that case that the Wasson faction had not exhausted tribal remedies for determining the identity of the legitimate Council. *See id.* At the time *Wasson IV* was decided, the two factions were involved in several tribal processes for resolving the dispute over the Colony Council. In addition, both tribal factions had been joined in an interpleader action brought by the Bank of America, in which the court also recognized that several tribal processes on the issue were pending, including one in which the factions had stipulated to the appointment of a special appellate panel of tribal judges (the "Minnesota Panel") to issue a binding, non-appealable decision to resolve the dispute. *See id.* at 146, 154; *Bank of America, N.A. v. Bills (Bank of America I)*, No. 3:00-cv-00450-BES-VPC, 2008 WL 682399, at \*2 (D. Nev. Mar. 6, 2008).

In *Wasson V*, based on Appellants' allegation of trespass on tribal lands, the Board concluded that Appellants *had* (in contrast to *Wasson IV*) satisfied their burden to show that their request to be recognized was ripe for a decision by BIA on the merits. *Wasson V* was an appeal from inaction, *see* 25 C.F.R. § 2.8, and the Board specifically rejected the Regional Director's assertion that "he need not issue any decision because there is no need for Federal recognition of a tribal government for purposes of the government-to-government relationship." *Wasson V*, 50 IBIA at 352. In rejecting that assertion, the Board found that Appellants' allegation that tribal lands were being illegally occupied constituted a claim that was sufficient to refute the Regional Director's argument, in the context of a § 2.8 appeal, that he did not need to take any action or issue a decision addressing the merits of Appellants' request.

In *Wasson V*, the Board also noted developments in the *Bank of America* litigation, specifically the district court's decision. *See* 50 IBIA at 350. In its decision, the district court concluded that tribal remedies had been exhausted. Applying the rule that federal courts must recognize and enforce tribal court judgments under principles of comity, the court found that the decision of the Minnesota Panel was controlling. *Bank of America I*, 2008 WL 682399, at \*5-6. The Minnesota Panel had concluded in 2002 that the members of the Colony Council consisted of Sharon Wasson, Thomas Wasson, William Bills, and Elverine Castro, plus one vacancy, for which the Panel had ordered the Council to appoint a successor to fill the unexpired term. *See id.* at \*2; *Wasson IV*, 42 IBIA at 146. At the time *Wasson V* was issued, the Ayer (then "Bills") faction had appealed the district court's decision and the Regional Director argued that the court's decision was not determinative.

*See Wasson V*, 50 IBIA at 350. Because *Wasson V* was an appeal from inaction, which does not encompass the underlying merits, the Board only noted, but did not further discuss, the *Bank of America I* decision.<sup>3</sup>

As noted earlier, in response to the Board's directive to issue a decision on the merits addressing Appellants' request for recognition, the Regional Director issued, in substance, a single conclusory paragraph, stating that he did not recognize Appellants "based on the information currently available" and that he was not required to recognize any tribal leaders for the Colony. When Appellants filed this appeal, the Board ordered the Regional Director to show cause why the Board should not summarily vacate the Decision and remand the matter. Order For Regional Director to Show Cause (OSC), Mar. 18, 2010. In the OSC, the Board noted that the Decision did not "provide any fact-based analysis to support a decision not to recognize either Appellants[] or anyone else as constituting the political leadership of the Tribe, whether on an interim basis or otherwise, for government-to-government purposes." OSC at 3. The Board also noted that "it would seem that an allegation of trespass on tribal lands by a group claiming to be the Tribe's leadership might well require a decision by BIA whether or not it recognizes the group as the Tribe's leadership, for government-to-government, or trustee-to-beneficiary, purposes." *Id.* n.3.

Responding to the Board's OSC, and defending his one-paragraph decision against summary vacatur, the Regional Director filed a 20-page brief. In his response, the Regional Director seeks affirmance of his decision, arguing that (1) the Decision complied with the Board's instructions in *Wasson V* because the Board did not direct BIA how to decide the matter, but only ordered him to decide whether to accept or reject Appellants' claim that they constitute the Colony Council, and the Decision is supported by substantial evidence; (2) because Appellants do not identify the identity of the alleged trespassers or the location of the alleged trespass, BIA is unable to determine whether any acts of trespass or improper occupation of Colony lands is occurring; (3) BIA may not get involved in a tribal leadership dispute unless there is no tribal forum that can resolve the dispute; and (4) an evaluation of Appellants' trespass allegations might require BIA to decide who is or is not a member of the Colony, which would impermissibly intrude on internal tribal affairs.

None of the Regional Director's arguments convince us that his Decision should be sustained. We address each argument in turn.

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<sup>3</sup> Recently, the U.S. Court of Appeals for the Ninth Circuit affirmed *Bank of America I*. *See Bank of America N.A. v. Swanson*, No. 08-16146, 2010 WL 4025788 (9th Cir. Oct. 14, 2010) (*Bank of America II*).

First, while we agree that *Wasson V* did not direct BIA how to decide the issue of whether or not to recognize Appellants as the Colony Council, it does not follow that a Decision summarily rejecting Appellants' request, with no explanation, analysis, or discussion of the evidence, either complied with the Board's directive or can be sustained. The Regional Director fails to identify, either in his Decision or in his response to the OSC, the evidence or law upon which he purportedly relied in refusing to recognize Appellants, on an interim basis or otherwise, as the Colony Council, in light of the trespass allegations. Although there is evidence in the record to support a determination that Elverine Castro cannot be considered a member of the Colony Council — she died in 2007 — we are unable to determine what evidence the Regional Director relies upon as “substantial evidence” to support his decision with respect to the remaining Appellants. In some cases, evidence in the administrative record that is relevant to reasoning in a BIA decision may be identified on appeal; a decision need not exhaustively identify in detail all of the evidence relied upon. In the present case, however, the lack of reasoning in the Decision largely precludes us from determining what evidence might provide support for the Decision. Moreover, because the Regional Director issued the Decision without providing the parties with any opportunity to provide more current information, or supplemental arguments — despite the fact that Appellants' request for action dated back to 2007 — the Regional Director's assertion that his decision is based on information “currently available” is questionable.<sup>4</sup>

Second, we reject the Regional Director's argument that Appellants' failure to identify the alleged trespassers and the location of the alleged trespass provides us with a basis to uphold his Decision. As a threshold matter, we note that the Decision does not even address the trespass issue, and thus there is no evidence that the Regional Director actually considered a failure by Appellants to identify the alleged trespassers or to identify the location of the alleged trespass as relevant. If he did, he did not provide Appellants with an opportunity to submit additional information. Moreover, even on appeal, the Regional

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<sup>4</sup> The original administrative record submitted to the Board by the Regional Director, and certified by him as containing all documents utilized in the Decision, consisted of three documents: (1) a copy of the Board's January 28, 2010, pre-docketing notice; (2) a copy of the Regional Director's December 8, 2009, decision and cover sheet for faxing the decision to Appellants' counsel; and (3) a copy of Appellant's November 16, 2007, notice of appeal for their previous appeal to the Board. Only in response to the Board's OSC did the Regional Director submit documents from the record developed in the previous proceedings, as required by 43 C.F.R. § 4.335(a). Thus, it is far from clear whether the Regional Director even reviewed the previous record of proceedings before issuing the Decision.

Director has not explained why BIA's duty to investigate alleged trespass on Indian trust lands is dependent upon the complaining party providing the identity of the alleged trespassers.

Possession of Indian trust land may only occur pursuant to lawful authority. *See, e.g.*, 25 C.F.R. § 162.104 (When is a lease needed to authorize possession of Indian Land?). If a lease is required, and possession is taken without a lease by a party other than an Indian landowner, BIA "will treat the unauthorized use as a trespass." *Id.* § 162.106(a). Even if a lease is not required, there must be some other basis for finding lawful occupancy of Indian trust land. The Regional Director argues that Appellants' allegations of occupancy of tribal lands by "non-Indians" and "non-members" are overly vague and that Appellants failed to identify with specificity which lands they were referring to. That may have been grounds for the Regional Director to have demanded that Appellants provide additional information, but it does not, without more, provide us with a basis to affirm a decision that ignored the trespass allegation altogether — particularly in light of our directive in *Wasson V* and BIA's trusteeship of tribal trust lands.

Third, while the Regional Director devotes a substantial portion of his argument to a discussion of cases in which courts and the Board have counseled against BIA unnecessarily intruding in internal tribal government disputes, he fails to explain how those principles are applicable in the specific factual context presented by this case. We have no quarrel with the Regional Director's general statements, in the abstract, and we agree, as we held in *Wasson IV*, that recognition of tribal government officials is not required if it is not needed for government-to-government purposes. *See also George v. Eastern Regional Director*, 49 IBIA 164, 186-87 (2009), and cases cited therein. But the allegation of trespass on tribal lands in the present case would appear to require at least some inquiry and decision by BIA, which may or may not require a determination that the group making the allegation is the Tribe's Council. Moreover, with respect to principles of deference to tribal processes, the Regional Director fails to address the *Bank of America I* decision, which the Board noted in *Wasson V* as potentially relevant and which has now been affirmed by the court of appeals.

Fourth, the Regional Director attempts to defend his Decision by arguing that an investigation of Appellants' trespass allegation might entangle BIA in an internal membership dispute, and impermissibly require BIA to decide whether certain individuals are members of the Tribe. But the Regional Director cites no federal or tribal law that grants general authority, or specific permission, for individual members of the Tribe to take possession of the Tribe's lands. Thus, the Regional Director has not explained how a member-nonmember distinction is even legally relevant to Appellants' trespass allegation.

And even if it is relevant, it does not necessarily follow that BIA is automatically precluded, as the Regional Director suggests, from making a decision to address Appellants' trespass allegation.<sup>5</sup>

In summary, Appellants, purporting to constitute the Colony Council, alleged that trespass was occurring on tribal lands. Faced with that allegation, the Regional Director has not explained, either in his Decision or on appeal, why BIA was not required to decide, *and explain the basis for a decision*, (1) that Appellants do not constitute the Colony Council and do not represent the Tribe, and thus regardless of whether or how BIA acts upon the allegations, BIA owes no duty to Appellants;<sup>6</sup> (2) that Appellants do constitute the Colony Council and do represent the Tribe; (3) that, whether or not Appellants constitute the Colony Council and represent the Tribe, there is no trespass occurring because the individuals occupying the Tribe's lands are doing so under the authority of federal or tribal law unrelated to permissive use that is dependent upon deciding who constitutes the lawful Colony Council; or (4) that some other response by BIA to the trespass allegation is appropriate.

As noted above, it may be possible for the Regional Director to address Appellants' trespass allegation without having to decide whether Appellants' faction should be considered, on an interim basis or otherwise, as representing the Tribe as landowner.<sup>7</sup> But

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<sup>5</sup> If a trespass determination is dependent upon a finding of an individual's tribal membership status, and if that membership status is disputed, BIA may well have a certain degree of discretion in deciding whether to make a BIA determination of the individual's status for purposes of protecting trust property against trespass, or deciding whether to take enforcement action pending the Tribe's resolution of a membership issue.

<sup>6</sup> A determination of whether Appellants constitute the Colony Council could also be relevant, for example, if certain use or occupancy is dependent upon permission from the Colony Council.

<sup>7</sup> The caption of Appellants' Notice of Appeal identifies Appellants as "Sharon Wasson, Thomas Wasson, William Bills, Judy Rojo and Elverine Castro, in their capacity as Members of the Winnemucca Indian Colony Council and as individuals," but the appeal itself purports to request relief on behalf of the Tribe, *see* Notice of Appeal at 10, and it identifies a different composition of the Colony Council elsewhere in the Notice of Appeal, *see id.* at 9. Moreover, Appellants acknowledge that Elverine Castro was no longer living when they filed this appeal with the Board. Under the circumstances, we leave it for the

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if the Regional Director is required to make a recognition decision for purposes of the trustee-beneficiary relationship or for government-to-government purposes, he must address *Bank of America II* decision, as well as any recent elections purportedly held by the Tribe.<sup>8</sup> Considering the time that has elapsed since Appellants made their request for action to the Regional Director, it not sufficient for the Regional Director to summarily decide the matter, on remand, without affording Appellants and interested parties an opportunity to identify the current basis for their claims relating to the trespass allegation or to the tribal leadership issue.

### Conclusion

The Regional Director's Decision failed to comply with the Board's directive in *Wasson V*, and contains no reasoned analysis nor an identification or discussion of any evidence upon which the Regional Director relied or purported to rely in making his decision not to recognize Appellants as the Colony Council, in the context of Appellants' allegation that trespass was occurring on tribal lands. Therefore, we vacate the Decision and remand the matter. On remand, the Regional Director shall afford Appellants an

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<sup>7</sup>(...continued)

remand proceedings for Appellants, or their purported successors in office, to clarify in whose names and in what capacities they request action by BIA, and we leave it for the Regional Director to address such issues, as appropriate, in a decision.

<sup>8</sup> On December 10, 2010, the Board received a copy of a memorandum from the Western Nevada Agency Superintendent to the Regional Director, informing the Regional Director of the election held by Appellants' faction, and also noting that the pendency of Appellants' appeal to the Board precluded BIA from taking action to decide whether or not to recognize that election. In addition, on December 6, 2010, the Board received a brief from the Ayer faction. The Ayer faction's brief was submitted without leave from the Board and outside the time period allowed for any briefing. For that reason, the Board declines to consider the Ayer faction's brief, except for the limited purposes of noting that each faction apparently recently has held competing elections. The Ayer faction's brief does not address *Bank of America II*, which presumably is binding on both factions.

The present appeal is limited to reviewing the Regional Director's Decision that was made in the context of Appellants' trespass allegation. It is unclear whether there are separate matters that would now require BIA to make a tribal government recognition decision, either for trustee-beneficiary or government-to-government purposes, on an interim basis or otherwise. Although our order of vacatur and remand pertains to the Decision, the return of jurisdiction to BIA allows it to consider and decide other issues, as appropriate.

opportunity to submit supplemental briefing and evidence relevant to Appellants' trespass allegation, and shall afford the Ayer faction (and any other interested parties) an opportunity to respond.<sup>9</sup>

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 vacates the Regional Director's December 8, 2009, Decision and remands the matter for further proceedings consistent with this order.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge

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<sup>9</sup> In light of the passage of time since Appellants made the trespass allegation, it is unclear whether this issue may be moot. We leave that issue for BIA to determine in the first instance, on remand, after affording all interested parties an opportunity for briefing.