



INTERIOR BOARD OF INDIAN APPEALS

Samuel George, William Jacobs, Chester Isaac, Bernadette Hill, and Inez Jimerson v.
Eastern Regional Director, Bureau of Indian Affairs

49 IBIA 164 (05/04/2009)

Related Board case:

42 IBIA 240

58 IBIA 171



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

SAMUEL GEORGE, WILLIAM)	Order Affirming Decision
JACOBS, CHESTER ISAAC,)	
BERNADETTE HILL, and INEZ)	
JIMERSON,)	
)	
Appellants,)	Docket No. IBIA 06-74-A
)	
v.)	
)	
EASTERN REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
)	
Appellee.)	May 4, 2009

Samuel George, William Jacobs, Chester Isaac, Bernadette Hill, and Inez Jimerson (Appellants) are members of the Cayuga Nation (Nation) and appeal from a May 31, 2006, decision (Decision) of Eastern Regional Director Franklin Keel (Regional Director), Bureau of Indian Affairs (BIA).¹ The Regional Director declined to withdraw BIA's recognition of Clint Halftown as the representative of the Nation to BIA for purposes of the relationship between the Federal government and the Nation, which for BIA was relevant to the Nation's Public Law 93-638 contract (638 contract).² The Regional Director continued this recognition based on a unanimous 2003 designation of Halftown

¹ Appellants George, Jacobs, and Isaac identify themselves as members of the Nation's Council of Chiefs and Representatives, and Appellants Hill and Jimerson identify themselves as Clan Mothers.

² The Nation receives funding through a contract issued by BIA under Public Law No. 93-638, the Indian Self-Determination Act, 25 U.S.C. § 450-450n. When a tribe applies for such a contract, it must identify a representative within the tribe with which the Federal government may communicate for purposes of contract matters, as well as the tribal authorization permitting it to enter into the contract. 25 C.F.R. §§ 900.8, 900.12.

by the Cayuga Nation Council (Council), but emphasized that the authority that Halftown may possess and exercise is defined and controlled by the Nation, and not by BIA. Appellants sought to have the Regional Director accept a January 2006 action to remove Halftown as the Nation's representative, arguing that a resolution rendered by a five-to-one "super majority" of a six-person Council, removed Halftown.

Appellants contend that the Regional Director's decision is in error: they argue that (1) the Regional Director had previously issued an express finding that "consensus," which Appellants agree governs Council decision making, does not require unanimity under the Nation's oral law and tradition and, therefore, that he erred and acted arbitrarily in refusing to agree that a five-to-one vote of the Council constitutes a "consensus" vote that was effective in removing Halftown as the Nation's representative; (2) the Regional Director erred in refusing to remove Halftown as the Nation's representative because BIA's trust responsibility requires BIA to withdraw its recognition of a tribal official who misuses Federal grant or tribal funds; and (3) the Regional Director erred because (a) the Council's 2003 designation of Halftown as Nation representative was only temporary and is ineffective support for BIA's continued recognition of him; and (b) the Regional Director's decision is inconsistent with action taken by the U.S. Environmental Protection Agency (EPA), which refused to allow Halftown to rely on the same 2003 designation to revoke a previous tribal consensus position.

Halftown, joined by two undisputed members of the Nation's Council, defends the Regional Director's decision. These parties contend that Appellants are a dissident faction which assembled an *ad hoc* group in order to oust Halftown by a vote that neither constitutes a "consensus" decision of a Council with six members, nor even remains a position endorsed by all members of the *ad hoc* group. They contend that, under Cayuga law and tradition, "consensus" requires unanimity and "is achieved only when *all* of the members of the Nation's Council are 'of one mind.'" Brief of Interested Parties at 6-7. They contend that improprieties regarding the handling of Federal grant or tribal funds alleged by Appellants are without merit and provide no basis for BIA to withdraw recognition of Halftown as a tribal representative. They support the Regional Director's continued recognition of Halftown as the last official identified as a representative by the "original four Council members" in 2003. *Id.* at 7.

We affirm the Regional Director's conclusion declining to withdraw BIA's recognition of Halftown. First, Appellants have failed to provide a single factual example from the history or oral tradition of the Nation in which the Council acted by majority vote and over the objections of one of its members. Second, BIA investigated Appellants' allegations that Halftown misused Federal grant and tribal funds and was satisfied that corrective action had been taken by the Nation. More importantly, the Regional Director

properly concluded that allegations of impropriety are addressed through tribal or Federal laws applicable to individual conduct. Such remedies do not include authority given to BIA to “remove” a tribal official from tribal office or position.

Third, we find no basis for reversing the Regional Director’s conclusion that, to the extent the Nation wishes to continue a 638 contract with BIA, which necessarily requires an authorized representative, Halftown is the last identified representative designated by an undisputed Council. The 2003 designation in the record presented unanimous signatures of the four members of the Council as it was comprised in 2003, and BIA accepted this designation for over a year without objection from the Council. We find no error in the Regional Director’s conclusion that BIA may continue to recognize Halftown as the Nation’s representative to BIA for the limited purpose addressed therein. Moreover, Appellants’ post-briefing submission of evidence regarding the EPA does not demonstrate inconsistency with the Regional Director’s decision. Instead, it merely confirms that the EPA faced the same difficulties with the same factions as this Department, and followed a similar course of action.

Accordingly, we affirm the Regional Director’s decision. Our decision to affirm stems from the failure of Appellants to prove his decision was in error. We do not define for the Nation what constitutes “consensus” and conclude only that Appellants have failed to establish, on this record, that giving effect to a majority vote reflects the Nation’s law and tradition. Our decision is not an independent determination of the composition of the Council or its proper organization, which remains a matter for the Tribe to decide.

Background

This case represents another in a series of disputes among members of the Cayuga Nation over the proper direction of the Nation’s business. The dispute apparently arises out of, *inter alia*, matters relating to litigation and potential settlement of tribal land claims against the State of New York.³ The dilemma facing the Regional Director in this case is that the Nation has not proffered a tribal process by which the dispute over the Nation’s representation in the government-to-government relationship with the Department realistically may be resolved without BIA’s, and now this Board’s, involvement.

³ The Nation filed a lawsuit (tribal land claim litigation) in 1980, seeking recovery of land lost to the State through 17th and 18th century treaties and alleged violations thereof. *Cayuga Indian Nation of New York, et al. v. Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001), *rev’d*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).

The Cayuga Nation; Evidence Concerning Its Composition and Processes. The Nation is one of six Nation members of the Haudenosaunee (Iroquois) Confederation.⁴ It represents itself in letters as the “Cayuga Nation Chiefs, Representatives, Clan Mothers and Peoples,” sometimes without the clause “and Peoples.” The governing body is the Council. Affidavit of Vernon Isaac, Cayuga Nation Chief (Chief Isaac), *Cayuga Indian Nation of New York, et al. v. Cuomo*, Civil Nos. 80-CV-930, 80-CV-960, June 8, 1998 (1998 Chief Isaac Affidavit), at ¶¶ 2-4. The Nation follows an oral legal tradition known as “The Great Law of Peace, Gayanashagowa.” *Id.* at ¶ 3. It has no written law, court, or body other than the Council itself for resolving disputes that arise within the Council.

The Nation is comprised of five clans (Heron, Bear, Snipe, Wolf, and Turtle). Clan Mothers of each clan designate two full-blooded chiefs, who are then approved through a “condolence” ceremony before a Grand Council of chiefs from the Six Nations of the Haudenosaunee. *See Poody v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 (2nd Cir. 1996) (Haudenosaunee consensus decision making and Clan Mother designation of chiefs). The ten Nation chiefs, two from each clan, would comprise the Nation’s Council; presumably, the Council’s composition would change automatically as the Clan Mothers designate full-blood chiefs who are condoled by the Grand Council. This situation has become hypothetical. The Snipe and Wolf clans have no qualified candidates for the chief position, and there is a question as to the ability of any clan to fill vacant chief positions with qualified candidates. In the absence of condoled chiefs, it is not disputed that the Council employs “seatwarmers,” or representatives, to hold vacancies on the Council. The record does not verify how many seatwarmers are called to serve or clarify how changes in the composition of the Council, when vacancies are filled by seatwarmers rather than full-blood chiefs, are effectuated. Beyond the notion that consensus is required for Council decisions, the parties present no unified position regarding either how or whether consensus can be reached when Council members disagree, or whether a change in Council membership requires consensus among Council members.

The last undisputed fully condoled chiefs were Chiefs Isaac, Franklin Patterson, and James Leaffe. 1998 Chief Isaac Affidavit at ¶ 5. By 1998, only Chief Isaac remained alive. *Id.* at ¶ 6; *see also* sworn testimony of Clint Halftown, as Nation Representative, for purposes of the tribal land claim litigation, Sept. 16, 1998, Transcript (Tr.) at 25-34. In a letter to BIA dated May 5, 2003, Chief Isaac described the internal decision making process of the Council. As of that date, the Council contained five members; it “presently consists of Bear Clan Chief Vernon Isaac, Heron Clan Representative Clint Halftown, Heron Clan Representative William Jacobs, Turtle Clan Representative Timothy Twoguns, and Turtle

⁴ The other members are the Mohawk, Oneida, Onondaga, Seneca, and Tuscarora Nations.

Clan Representative Gary Wheeler.”⁵ Letter from Chief Isaac to Regional Director, May 5, 2003, at 1.⁶ The “Council authorizes and delegates authority to the Cayuga Nation Council Representative [to BIA] to act on behalf of the Cayuga Nation, but only for that one issue.” *Id.* at 2.⁷ Isaac asserted that his explanation of the oral tradition was “not a complete description of our internal decision making processes, which is subject to interpretation” by the Council. *Id.* at 2.

The parties agree that the “Great Law of Peace” oral tradition achieves consensus. The record contains some examples of how decision making occurs, disputes are resolved, and members are determined by the Council. During the 1990s, a faction led by Wolf Clan Representative Frank Bonhamie attempted to override the wishes of the Council on which Chief Isaac was the only condolee chief. Bonhamie apparently organized a competing Council, seeking its recognition on behalf of the Nation. 1998 Chief Isaac Affidavit at ¶¶ 6-8. Chief Isaac explained that Bonhamie was not a condolee chief, *id.* at ¶ 5, and that Bonhamie’s effort to establish an alternative Council was contrary to consensus, where the Council thoroughly airs issues from which process a “unified position emerges,” *id.* at ¶¶ 2-4. Chief Isaac’s position was that consensus requires unity or unanimity.

BIA refused to recognize the Bonhamie faction. In a letter to BIA, Halftown, as Heron Clan Representative on behalf of the Council, expressed agreement with BIA’s action but rejected a suggestion made by BIA that a “majority of the tribal membership” was relevant to rule by the Council, denying that such “Anglo” notions could be imputed to the Nation. “[P]roper respect for the right of the Cayuga Nation to govern itself requires [BIA] to defer to the Nation’s own law and procedure for selecting leaders. That process is based on the Great Law of Peace and implementing custom and practice. . . . [A]ccountability is enforced according to traditional Cayuga law and the clan system”

⁵ Isaac thus represented that he was the sole member of the Council from the Bear Clan.

⁶ Isaac explained that, with the death of the former Secretary, Sharon LeRoy was appointed as Secretary by the Council in July 1995. *Id.* LeRoy, who is Halftown’s mother, “is charged with distributing information for Cayuga Nation Council meetings, recording council minutes and decisions and signing Cayuga Nation Council Resolutions.” *Id.*

⁷ The parties imbue the term “representative” with at least two distinct meanings: a representative may be the “seatwarmer” on the governing Council, and may also be the point person to whom the BIA may look for communication about 638 contracts. Appellants also use the term to refer generically to the various clan “representatives” — Chiefs, seatwarmers and Clan Mothers. Appellants’ Opening Brief at 1, 8.

Letter from Halftown to Regional Director, Sept. 26, 1997, at 1-2. Halftown objected to any inference that majority rule governs Council business, arguing that it would create an incentive for divisiveness and undermine the Council's government. *Id.* at 2.

In his 1998 testimony for the tribal land claim litigation, Halftown described the Council's consensus process. He testified that the Council authorized him to "take certain positions . . . on behalf of the tribal government." Tr. at 76. He explained that the Council "reaches unanimous agreement" and that "[n]othing is decided upon unless Chief Isaac approves of it." *Id.* at 74-75. If the Council disagrees, the "issue is just tabled until everybody finds out more information or more facts until, you know, the [C]ouncil can come to one mind and agree . . . to accept or agree not -- to not accept it." *Id.* at 32.⁸

Council's Resolution to Designate Halftown as Nation Representative. Chief Isaac died in 2003, leaving the Council with the four living members identified by Chief Isaac in his May 5, 2003, letter — Halftown, Jacobs, Twoguns, and Wheeler (two seatwarmers from each of the Heron and Turtle Clans). All four Council members signed a letter dated August 11, 2003, sent to BIA, designating Halftown as follows:

With the death of Chief Vernon Isaac, the Cayuga Nation Council recognizes Clint C. Halftown as the Representative of the Cayuga Nation in its government-to-government relationship with the United States of America. Timothy Twoguns is an alternate signatory, should Clint C. Halftown be unavailable. . . . Halftown has the authority to negotiate and execute contracts and other agreements with all U.S. departments and agencies.

Letter from Nation to Regional Director, Aug. 11, 2003 (2003 Designation Letter).

BIA thereafter accepted Halftown as the Nation's representative for government-to-government purposes, and Halftown acted in this capacity apparently without quarrel for over a year. By the fall of 2004, discussions over the land claims litigation culminated in a resolution dated November 14, 2004, signed by LeRoy, authorizing Halftown or Twoguns to "negotiate, execute and deliver" settlement. Halftown and Governor Pataki signed a settlement agreement on November 17, 2004. The settlement catalyzed this dispute.

Emergence of Three Factions. The settlement resulted in a three-way schism among the four original Council members. First, in a December 13, 2004, letter to Halftown on

⁸ The reasons for his testimony are not explained here, as the record contains only pages 25-34 of his direct examination and 74-76 of his cross-examination.

Cayuga Nation stationary, six people (including the five Appellants) claimed to be “members of the traditional and lawful government of the Cayuga Indian Nation.” Letter from Jimerson, *et al.*, to Halftown, Dec. 13, 2004, at 1. They identified themselves as Bear Clan Mother Inez Jimerson; Heron Clan Mother Bernadette Hill; Chester Isaac, as “Bear Clan Condoleed Chief (Small Condolence)”; Samuel George, Bear Clan Seatwarmer; and William Jacobs and Daniel C. Hill, as Heron Clan Seatwarmers. This group denied that Halftown had any authority to act on behalf of the Nation; advised him that he was no longer a member of the Council; asserted that he had been removed by Clan Mother Hill in July 2004; and denied his authority to settle the tribal land claim litigation. *Id.* Jacobs was the only previously-identified Council member to sign this letter. Second, Halftown immediately withdrew the Nation’s agreement to the settlement with New York but on other stated grounds. Third, Council members Twoguns and Wheeler then wrote directly to Governor Pataki, claiming to represent the Nation; contending that the settlement had been authorized by the November 14, 2004, Resolution granting settlement power to Halftown; asserting that the Nation had not withdrawn from the settlement; and identifying Halftown as authorized to engage in government-to-government relations but denying his authority to revoke the settlement.

Three Factions Vie for BIA Approval. Thereafter, by letter dated January 28, 2005, the six signers of the December letter to Halftown — the five Appellants plus Daniel Hill — wrote to the Regional Director. They asserted that (a) they were six of the “nine members of the governing council”; (b) Halftown had been removed as Heron Clan Representative by its Clan Mother on July 3, 2004, due to poor health, and was replaced by Daniel Hill; and (c) Halftown was no longer a recognized spokesperson for the Nation.⁹ The six signers of this letter acknowledged that the nine-person “Governing Council” identified therein had three additional members, thus apparently conceding that Twoguns and Wheeler remained on it. Subsequent communication revealed the ninth individual to be Turtle Clan Mother Lena Pierce.

By letter to BIA dated February 3, 2005, Halftown opposed the January 28, 2005, letter, as authored by a faction opposed to the tribal land claim litigation settlement rather

⁹ In this letter, the five Appellants plus Hill represented to BIA that the Clan Mothers were and could be members of the “Governing Council.” Appellants have consistently asserted that Clan Mothers are a part of the governing structure of the Nation, a position reinforced by the explanation of their role in determining clan chiefs by Chief Isaac. Appellants’ current position regarding whether they believe Clan Mothers are a part of the actual Council is ambiguous. Appellants’ Opening Brief at 8.

than a duly constituted Council. He claimed to be the “recognized Representative of the Nation on land claim issues and matters involving economic development.”

The Twoguns/Wheeler faction claimed that the Council remained the original four members identified in 2003 by Chief Isaac. A document faxed to BIA on February 10, 2005, and signed by Wheeler, alleged that this Council had met on February 7 and resolved to revoke all authority previously given to Halftown as Federal representative in the 2003 Designation Letter, and also to remove Secretary LeRoy from her office. This resolution gave Twoguns and Wheeler the authority to sign financial instruments and secure the Nation’s offices. It asserted that Halftown had received notice but had failed to attend.

By early 2005, the stances of the four members of the 2003 Council had coalesced as follows: Jacobs asserted that Halftown was no longer the Nation’s authorized Federal representative or a member of the Council. He claimed that a nine-person Council included five “seatwarmers” (himself, George, Hill, Twoguns, and Wheeler), a “Bear Clan Condolored Chief (Small Condolence)” (Chester Isaac), and three Clan Mothers. Halftown claimed to be the only authorized Representative for purposes of government-to-government relations by virtue of the August 2003 Designation Letter and denied any change in the Council’s 2003 composition. Twoguns and Wheeler claimed that the four-person 2003 Council remained in place, but that it had cancelled Halftown’s designation as representative to BIA.

Each faction purported to represent the Nation to BIA, hiring lawyers as spokespersons. The George/Jacobs faction hired Joseph J. Heath, Esq.; Halftown hired Daniel J. French, Esq.; and Twoguns and Wheeler retained Martin R. Gold, Esq. The lawyers barraged each other and BIA with letters denying that others had authority to speak for the Nation. Unidentified Nation members, with the assistance of a landlord, changed the locks on the Nation’s offices, barring entry to Halftown and LeRoy.

The Regional Director Responds to Communications from the Three Factions. On February 10, 2005, the Regional Director sent a letter to all lawyers explaining that BIA continued to consider Halftown as the Nation’s representative for purposes of government-to-government relations by virtue of the August 2003 Designation Letter. By letter dated February 11, 2005, he set up a meeting on February 17 for the various factions to present their positions. He presented questions regarding the composition of the Nation, the identity of Nation representatives for the Bear, Wolf, and Snipe Clans, the procedure for installing and removing representatives, and the procedure for making decisions.

By separate filings dated February 17-18, 2005, counsel for the various factions documented the February 17 meeting with BIA. The Appellants’ faction again represented that the Council was made up of nine members — five seatwarmers including Daniel Hill

(replacing Halftown), a condoled (“small condolence”) Chief Chester Isaac, and three Clan Mothers.¹⁰ Halftown’s letter explained that his July 2004 removal from the Council by Clan Mother Hill had been temporary, for purposes of illness; he claimed to remain on the Council as evidenced by the November 14, 2004, authorization to settle the tribal land claim litigation. He claimed that he remained the duly authorized representative of the Nation for purposes of government-to-government relations.¹¹ Twoguns and Wheeler sent a letter dated February 25, taking the position that, while Halftown’s August 2003 designation as representative remained valid, it had only been for the limited purpose of acting as the government-to-government representative, and expressing their concern that Halftown had exceeded his authority. *Id.* at 2. They directly challenged the Appellants’ faction’s assertions that Clan Mothers participate in the Council. *Id.* at 3. While agreeing that Clan Mothers choose representatives for the clan, *id.* at 3, they denied that either George or Isaac was “presently recognized as [a] representative[] of the Bear Clan.” *Id.* As for removal of seatwarmers, they explained that the “Nation has never been faced with removal of a representative,” but presumed that it would occur in the same manner as removal of a chief. They explained that Clan Mothers could “commence” removal of a chief, but the Council must “confront[] him three times and afford him the opportunity to mend his ways.” *Id.*

March 15, 2005, Letters of the Regional Director. On March 15, 2005, the Regional Director issued two letters, one to Appellants’ (George/Jacobs) faction and one to the Twoguns/Wheeler faction, in response to the material they presented at the February 17 meeting and subsequent correspondence. The letters were similar in their descriptions of consensus and also in the fact that they did not provide appeal rights. Each letter purported to identify a different council composition for purposes of deciding the specific issue presented — whether Halftown had been removed as the Nation’s representative.

¹⁰ On February 11, 2005, Twoguns and Wheeler sued Halftown, LeRoy, and Anita Thompson, former office administrator, in Federal Court, seeking a ruling that Halftown “is not an authorized representative of the Nation” and an injunction requiring defendants to surrender the Nation’s books and records. Complaint, *Cayuga Nation of New York v. Clint Halftown, Sharon LeRoy, and Anita Thompson*, Civil No. 05-CV-0195 (N.D.N.Y.). On May 24, 2005, the Court granted plaintiffs’ motion for voluntary dismissal.

¹¹ During this time frame, accounting firm R.A. Mercer & Company audited the Nation’s 638 contract for 2004. The firm discovered questions involving approximately \$8,000 charged to credit cards used by LeRoy and Halftown and, in February 2005, sent letters to LeRoy demanding assurance that the money had been credited to the Nation’s accounts.

In his letter to the Twoguns/Wheeler faction, the Regional Director refused to consider the February 7 resolution purportedly among Jacobs, Wheeler, and Twoguns to constitute a removal of Halftown because it was only signed by Wheeler and did not even represent a “majority” of the Council, which their faction contended comprised four persons. BIA Letter to Gold, counsel for Twoguns/Wheeler, Mar. 15, 2005. The Regional Director noted that Jacobs had not attended the February 17 meeting to indicate his support for the February 7 resolution. *Id.*

In his letter to Appellants’ counsel, the Regional Director explained that “there is general disagreement among the Nation leaders concerning Nation custom and law” as to whether Halftown’s removal followed applicable standards. Letter from Regional Director to Heath, Mar. 15, 2005, at 1-2. Noting that the Appellants’ faction had represented to him that the Council consisted of nine people, he identified those nine people as including three Clan Mothers, and “Representatives” Isaac, George, Jacobs, Twoguns, Wheeler, but also *Halftown*. *Id.* at 2. Appellants had asserted that Halftown had been removed from the Council by his Clan Mother and replaced by Daniel C. Hill. It is not clear to us from the record or the Regional Director’s discussion whether the Appellants had changed this position orally. The Regional Director included representatives and Clan Mothers as members of the Council, but he also stated that he understood “that while clanmothers make recommendations, they do not have a voice in the decision making process for matters before the Council.”¹² *Id.* Accordingly, in this letter he identified the decision making Council as one containing six voting members, two from each active clan, with Chester Isaac and George thus added as representatives of the Bear Clan. *Id.* Explaining his understanding that each of the six representatives had an equal voice, the Regional Director noted that the January 28 letter was signed by only three (Isaac, Jacobs, and George) of six representatives on the Council, not by Halftown, Twoguns, or Wheeler. He thus found that the letter did not represent a “majority” of that decision making Council, so composed.

The Regional Director thus considered two different possible Council compositions in the two letters for purposes of rejecting that either Council so comprised had evidenced consensus. This suggests that he did not directly intend to define the Nation’s Council membership. His letters reveal his intent to address only the issue of the Nation’s representative to BIA, and not the “seatwarmers” or possible “chiefs” on the Council. Nonetheless, his letter to Heath identified a Council of six individuals who had never before been identified together as a Council, at least in the record before the Board: Isaac, George, Jacobs, Twoguns, Wheeler, and Halftown. These letters were served on all counsel.

¹² As noted above, this was the position asserted by at least Twoguns and Wheeler in their presentation to the Regional Director.

Finally, the Regional Director identified the matter of consensus in almost the exact same way to both factions in each letter. He stated:

I also understand that a consensus can be reached with some opposition from Council members to the final decision. I do not know at what point opposition to a matter is sufficient to prevent it from being passed by the Council, but it stands to reason that a favorable action would not take place unless *at least a majority of the Council either supports it or does not object to it.*

Letters to Heath, Mar. 15, 2005, at 2 (emphasis added), and to Gold, at 2 (similar).

By letter dated March 17, 2005, to attorneys for factions trying to oust Halftown, the Regional Director clarified his intent to address the Nation's representative to BIA.

[W]e continue to recognize Mr. Halftown as the Nation's representative in its government-to-government relationship with the Bureau.

The scope of the Bureau's recognition of Mr. Halftown as the Cayuga Nation's representative does not extend to the Nation's dealings with any state or local government, other sovereign entities, corporations and other entities, or individuals [and] should not be interpreted to affect the Cayuga Nation's land claim settlement with the State of New York.

Twoguns and Wheeler Appeal to the Board. Twoguns and Wheeler appealed their March 15, 2005, decision (to Gold) to this Board. See *Timothy W. Twoguns and Gary Wheeler v. Eastern Regional Director*, 42 IBIA 240 (2006). The appeal was dated March 16, and thus likely crossed in the mail with the Regional Director's March 17, 2005, letter.

The Factions Disagree With the Regional Director's Identification of Council Members. We do not have all material generated among the parties during the pendency of that appeal. It is clear, however, that the parties were dissatisfied with the Regional Director's identification of six Council members, pressed the Regional Director for recognition of a different council composition, and continued to trade accusations of malfeasance against each other and the various attorneys.

On May 25, 2005, at least George and Jacobs met with the Regional Director. In a subsequent letter dated June 1, 2005, George and Jacobs claimed that they had been condoleed as Nation chiefs at a ceremony on April 16, 2005, and sought to be recognized by BIA as the only condoleed chiefs of the Nation. Whether they represented that Halftown was no longer a member of the Council, or that Clan Mothers were, is unclear because we

only know of the letter by virtue of references to it in other documents. Similarly, we know that on May 17, 2005, Twoguns and Wheeler sent a letter asking (apparently with a Wheeler relative, Michael Wheeler) to be recognized as a new Council of three.

On July 18, 2005, the Regional Director again sent companion letters to the two factions with different holdings, denying both requests. In a letter to the Wheeler/Twoguns faction, the Regional Director stated, without qualification or explanation, that BIA recognized the Council as consisting of Halftown, Jacobs, Twoguns, Gary Wheeler, George, and Isaac — none of whom BIA recognized as chiefs. He denied the apparent request of Twoguns, Wheeler, and Michael Wheeler to be recognized as a new three-person Council, on the express ground that the Council consisted of the six representatives identified in the March 15, 2005, letter to the Appellants' faction. He did not explain in this letter how he had determined this Council membership or why he would not consider their proof (which we do not have in this record) as a persuasive alternative. He simply cited the Council he had identified in March as reason to deny further evidence of a different Council composition. In his July 18 letter to the Appellants' faction,¹³ the Regional Director stated that he could not grant their request to recognize Jacobs or George as condoled chiefs, because Halftown, Twoguns, Wheeler, LeRoy, and Thompson had denied that proper condolence ceremonies had been conducted. He offered to consider further information that the condolences were ratified by the Heron and Bear Clans and by the Grand Council of the Haudenosaunee.

To summarize the situation by July 18, 2005, the Regional Director had recognized a Council of six members in letters to the Appellants' faction and the Twoguns/Wheeler faction that were copied to the Halftown faction. None of these letters provided appeal rights. The six-person Council the Regional Director identified had not been postulated by any Nation member, at least in writing in this record. In this appeal, however, no party directly challenges the six-person composition of the Council, or the structure of the Council as containing two seatwarmers per active clan.¹⁴

¹³ We know of the May 25 meeting and June 1 letter from this BIA letter.

¹⁴ Appellants do not pursue any argument that Daniel C. Hill had replaced Halftown as a Heron Clan seatwarmer. Instead, at least for purposes of arguing that Halftown was removed by a five-to-one vote, Appellants accept Halftown as a Council member. *See* Opening Brief at 14-15. Appellants do, however, pursue their assertion that Jacobs and George are condoled chiefs. *Id.* at 8 n.5. Halftown, Twoguns, and Wheeler deny this. Brief of Interested Parties at 3 n.1. In this appeal, the Interested Parties do not directly

(continued...)

The Appellants' Faction and the Twoguns/Wheeler Faction Align for a Brief Period. In January of 2006, the Appellants' faction and the Twoguns/Wheeler faction then united briefly to oust Halftown from his position as Nation Representative. At a meeting on January 16, 2006, Jacobs, George, Isaac, Twoguns, and Wheeler all signed a Council Resolution removing Halftown from his position as Representative of the Nation in its government-to-government relationship with the Federal government. See Jan. 3, 2006, Resolution.¹⁵ This January 2006 Resolution became the basis for Appellants' arguments to BIA, and now to us, that the Council identified by the Regional Director reached consensus regarding the removal of Halftown as tribal representative.

By letter dated January 17, 2006, Heath telefaxed this January 2006 Resolution to the Regional Director, describing it as a "super majority" of "the six members of the Council, as identified in your March 15, 2005, letter" Letter from Heath to Regional Director, Jan. 17, 2006. Thus, in response to the Regional Director's July 18, 2005, letters to both factions rejecting their efforts to change his recognition of the proper Council, the factions instead pursued votes from as many representatives of the Council he identified as possible. Heath explained that the five representatives had convened in response to the Regional Director's decisions and averred that it was a "remarkable degree of unity for the Council," and the "only Council member identified in your March 15, 2005, letter who would not sign the Resolution was Mr. Halftown himself." *Id.*

In a January 27, 2006, letter to the Regional Director, Heath asserted that "Halftown has been sending unauthorized checks to selected nation citizens" without Council approval. Heath accused Halftown of "a blatant effort to bribe citizens of [t]he Nation" to support his effort to seek approval of his "defiance of requests by the Nation's Council for a full accounting" of how the Nation's funds and Federal monies were being used. Letter from Heath to Regional Director, Jan. 27, 2006. Attached to this letter was a copy of a letter sent to all "Cayuga Nation Member[s]" distributing \$1,000 checks to the Nation's members from revenues generated by the Nation's two "gas station/convenience stores" purchased in 2003. Letter from Halftown to Cayuga Nation Members, Jan. 24, 2006. This letter described a "setback" in efforts to open gaming facilities resulting from complaints from Seneca and Cayuga Counties for failure to pay property taxes. But, it

¹⁴(...continued)

challenge the identity of the six members of the Council identified by the Regional Director, but they claim presumably that the six are all seatwarmers.

¹⁵ The January 3 resolution predates the January 16 meeting due to the fact that it was mailed earlier to one of the participants.

explained, the success of “our businesses has enabled us to pay off our debt, and we are now at the point where we can make a distribution to our members” *Id.*

Motion for Remand. Based upon the January 2006 Resolution, the Regional Director moved for a remand of the appeal filed by Twoguns and Wheeler from the March 15, 2005, letter, as clarified by the March 17, 2005 letter. The Board allowed the other parties to respond to the Motion for Remand. Jacobs, George, and Isaac submitted a Statement of Support of Appellee’s Motion for Remand.¹⁶ Counsel for Halftown consented to the remand, but preserved his position that George and Jacobs were not chiefs.¹⁷

Remand and 2006 Audit. On March 10, 2006, the Board granted the Motion for Remand, vacating the March 15, 2006, Regional Director decision issued to and appealed by Twoguns and Wheeler and remanding for “further consideration and a new decision.” *Twoguns*, 42 IBIA at 241. Thereafter, BIA and a private accounting firm conducted an audit of the Nation’s 2005 finances on March 14-16, 2006.

After the remand, counsel for the Appellants’ faction (Heath) sent a lengthy letter dated March 22, 2006, to the Regional Director, on behalf of “the other five Council members” (Jacobs, George, Chester Isaac, Twoguns, and Wheeler), urging him to repudiate Halftown’s representation of the Nation. Heath also set forth a series of alleged financial improprieties that he asked BIA to investigate. He claimed that the audit revealed \$11,000 in Federal grant funds unaccounted for, which “illegalities are merely the tip of the iceberg.” Letter from Heath to Regional Director, Mar. 22, 2006, at 2. He reiterated accusations regarding the Mercer audit’s discovery of LeRoy’s use of tribal credit cards. *Id.* at 3-4. Recognizing that LeRoy had covered charges with a personal check, Heath asserted that the “date of that personal check is an important fact” and complained of improper use of tax-exemptions. *Id.* at 5. Citing a “financial crisis since January 16, 2006,” Heath contended that Halftown’s continued representation of the Nation since that date was depleting Tribal funds. *Id.* at 6-7. Heath accused Halftown of bribing the Nation’s members by

¹⁶ This Statement accused Halftown of “spending hundreds of thousands of the Nation’s money” and failing to give “full accounting and disclosure of all federal monies.” *Id.* at 3.

¹⁷ Citing BIA’s statement that “it appears that the Nation’s Chiefs have come to a consensus,” Halftown responded: “the record is clear that the [BIA] has denied [BIA] recognition of Samuel George and Chuck Jacobs as condoled chiefs. Respectfully, there are no BIA-recognized chiefs. Further, our understanding of the Nation’s laws, customs and traditions is that consensus can only be achieved when the members of the Council are of ‘one mind’.” Halftown Response to Motion, IBIA 05-60-A, at 2.

distributing the \$1,000 revenue checks. *Id.* Finally, Heath complained that Halftown had, without authorization, paid \$178,313.01 in property taxes to Seneca and Cayuga counties. “The primary issue in this payment is not whether it was correct or necessary, but the fact that Mr. Halftown has unfettered control of all of the Nation’s financial assets and bank accounts” *Id.* at 8. Heath alleged that BIA would be in violation of its fiduciary duty to protect the Nation if it did not issue a cease and desist order to Halftown. *Id.* at 7.

By letter dated April 3, 2006, to the “Members of the Cayuga Nation Council,” the Regional Director asked for written comments relative to issues raised by Heath to be filed by April 17, 2006. He provided a rebuttal opportunity on or before May 1.

Twoguns and Wheeler Realign With Halftown. On April 17, 2006, French, as counsel for Halftown, submitted “an affirmation dated April 11, 2006, whereby Timothy Twoguns and Gary Wheeler have withdrawn their agreement or consent” to the January 2006 Resolution. Letter from French to Regional Director, Apr. 14, 2006. The signed “affirmation” states: “We, the undersigned Turtle Clan Representatives of the Cayuga Nation Council hereby affirm that we have withdrawn our agreement or consent to the attached purported January 3, 2006, resolution.” Twoguns/Wheeler Resolution, Apr. 11, 2006. French forwarded a similar resolution signed on April 11 by the two which repudiated a prior resolution, dated February 27, 2006, which they had signed with Jacobs, George, and Isaac, repudiating French as the Nation’s attorney. Since this date, the two factions in this appeal have been aligned as follows: (1) Halftown, Twoguns, Wheeler; and (2) Appellants — Jacobs, George, Isaac, and the Clan Mothers Hill and Jimerson.

The Two Factions Seek Recognition By BIA. On April 17, 2006, Heath responded to the Regional Director; failing to identify his clients, he seemed unaware of Twoguns’ and Wheeler’s repudiation of their prior joinder with the Appellants’ faction. He pressed for a decision removing Halftown as tribal representative and repeated charges against Halftown’s handling of funds. He attached a letter he sent on that same date to BIA in response to the March 14-16 audit, on behalf of Clan Mothers Hill and Jimerson, “condoled Chiefs Samuel George and William Jacobs,” and Council member Isaac.¹⁸

¹⁸ Heath’s letter indicates that BIA’s Cherokee Agency had communicated with Clan Mother Hill, explaining that, in response to one or more audits, Halftown was managing the Nation’s business with a Corrective Action Plan which included procedures to safeguard proper use of the Nation’s credit cards. In the letter to the BIA, the Appellants’ faction denied Halftown’s claims to BIA that he was locked out of the Nation’s office by the landlord, asserting that if Halftown had assented to their demands, they would have made

(continued...)

On April 28, 2006, Heath sent another letter to the Regional Director, claiming that Halftown had misappropriated “*well over \$1 million of the Nation’s funds.*” Letter from Heath to Regional Director, Apr. 28, 2006, at 1. Heath stated that BIA’s fiduciary responsibility required the Regional Director to withdraw recognition of Halftown as representative, citing six alleged improprieties: (1) improper use of Nation credit cards for personal purchases; (2) failure to account for \$11,000 in Federal grant money; (3) issuance of \$1,000 checks to “selected Nation citizens”; (4) payment of \$100,000 salary to Secretary LeRoy; (5) unauthorized payment of property taxes of \$178,313.01 to Seneca and Cayuga Counties; and (6) expenditure of over \$1 million in violation of the Council’s January 2006 Resolution. Heath accused Halftown, Twoguns, and Wheeler of a “surreptitious seizure of the Nation’s records” which had been “under lock and key . . . since February 2005.” *Id.* at 4. Heath denied that the April 11 revocation by Twoguns and Wheeler of their prior signatures on the January 2006 Resolution was valid, and averred that it was “bought and paid for by Mr. Halftown – once again using Nation funds without authorization.” *Id.* at 5.

On April 28, 2006, French submitted a rebuttal on behalf of Halftown, Twoguns, and Wheeler. French explained that, given Twoguns’ and Wheeler’s support for Halftown, and their April 11, 2006, repudiation of their prior alignment with the Appellants’ faction against him, three of the four original 2003 Council members now supported Halftown’s recognition by BIA, and only Jacobs opposed it. Letter from French to Regional Director, Apr. 28, 2006, at 1. French argued that the January 2006 Resolution was moot. He contended that the Appellants’ faction was seeking an improper intercession by BIA in tribal processes. *Id.* He averred that they had created over a year of strife with an internal power struggle, while his clients had cooperatively managed the Nation.¹⁹ Denying Heath’s accusations of bribery, French explained that Twoguns and Wheeler had learned from the press that they had been induced by misrepresentation to sign the January 2006 Resolution. French explained that audits had revealed no serious problems and that all minor problems

¹⁸(...continued)

arrangements for access; claimed shock at salaries paid to LeRoy and Thompson, totaling \$160,000; and objected to matters related to the Nation’s funding, including payments of \$1 million for operation of the Nation’s business without apprising the Appellants’ faction.

¹⁹ French cited the following as examples of “successes” resulting from the resumption of relations among Halftown, Twoguns, and Wheeler: they had (a) submitted applications to have tribal lands taken into trust, after paying property taxes; (b) negotiated with municipalities; (c) filed a petition for a writ of certiorari in the tribal land claim litigation; (d) distributed monies from the Nation’s economic development to its members; (e) resolved office lock-down problems; and (f) resumed regular Council meetings.

had been explained, resolved, and prevented for the future by the establishment and implementation, with the auditors, of a Corrective Action Plan. French pointed out that despite Appellants' complaints regarding the \$1,000 checks distributed to Nation members, Appellants had cashed theirs. French described Heath's complaints as "demonstrably false allegations of 'mismanagement'" and baseless threats of BIA liability, and contended that the Regional Director should allow his clients to move forward with the Nation's business without interference.

Heath responded, filing a second letter on April 28, 2006. French responded again on May 1, 2006. These letters added nothing that was not repetitive of prior debate.

The Regional Director's May 31, 2006, Decision. The Regional Director issued the decision on appeal on May 31, 2006, holding that BIA would not withdraw recognition of Halftown as the Nation's representative for government-to-government purposes. He repeated his prior statements that "it is represented to the BIA that there is a total of six seatwarmers—two seatwarmers from each of the active clans (Heron, Bear and Turtle clans)," Decision at 2; he stated that he was required to consider two issues: (a) whether the January 2006 Resolution was, is, or remains a consensus decision of the Council; and (b) whether the Appellants' faction presented sufficient reason for BIA to withdraw recognition of Halftown based on allegations of "improprieties with federal program funds and Nation funds." Decision at 7.

The Regional Director refused to reach any conclusion regarding validity of the Council's January 2006 Resolution because he could not find a definition of consensus:

It is generally agreed by all parties that for a Nation decision to have validity a decision must be reached by a consensus of the Council members. . . . [I]n this circumstance the Nation has not been able to inform the BIA as to specifically what constitutes a consensus for Nation governmental purposes. There has been the suggestion that the Council needs to reach a position of having "one mind" before a decision can be affected. But it has also been stated that consensus can still be reached if one member of the Council remains a dissenter.

. . . .

Before considering whether the January 3, 2006 resolution constitutes a consensus decision of the Council and the bearing, if any, of the withdrawal of support by Messrs. Twoguns and Wheeler, the BIA first must decide whether it must make *any* determination of the validity of the Council action.

. . . .

Given other circumstances, the BIA would be averse to intervening into a situation whereby tribal leadership was unable, for whatever reason, to reach a decision and the BIA would be called upon to interpret tribal law. In this instance, not only is there a lack of tribal law to interpret, but the circumstances would require the BIA to make two decisions: if the January 3 resolution was an official action of the Council and, if so, what ramifications the reversals of two members of the Council have on that action.

Given the complexity of this situation, BIA is not inclined to render a decision which calls for the application of established guidelines where none are in evidence to apply. The BIA does not consider it appropriate to attempt to discern tribal law in this matter. Therefore, the BIA shall remain silent on the validity of the January 3, 2006 resolution and the subsequent disavowal of the resolution by Messrs. Twoguns and Wheeler. Inasmuch as the BIA has received no clear indication of tribal law in this matter, it has no basis upon which it could withdraw recognition of Mr. Halftown as the Nation's representative in its government-to-government relations with the BIA.

Id. at 6-7. Refusing to decide that the January 2006 Resolution was either a valid action of the Council or a consensus decision, the Regional Director concluded that he had received insufficient evidence in support of Appellants' faction's claim that BIA must revoke its recognition of Halftown. Such recognition is "limited to the government-to-government role" defined in the August 2003 Designation Letter. But his "powers as the Nation's designated representative are defined and controlled by the Nation, not by BIA." *Id.* at 8.

With respect to the second question, the Regional Director explained BIA's various efforts to investigate the accusations put forth by the Tribal leaders:

The BIA has been aware for some time of these allegations and is aware that the proper authorities have been notified of the allegations with regard to federal program funds. BIA Eastern Regional Office staff conducted an on-site P.L. 93-638 contract review of the Nation's Aid to Tribal Government contract on March 14-16, 2006. The BIA staff conducted a careful review of the Nation's programmatic expenditures for the 2005 program year, and have identified material weaknesses in the Nation's financial accounting system. The BIA has also received a recent financial audit of the nation's finances conducted by an independent accounting firm and is aware of the findings of that audit. The Nation staff, to its credit, has been very cooperative in these reviews and has taken the initiative in providing corrective action plans to address the problems identified by the program review and the financial audit.

There has been no evidence unearthed in the program review or the audit or in Mr. Heath's letters which would support consideration of discontinuing our recognition of Mr. Halftown on the basis of upholding our trust responsibility to the Nation.

With respect to Mr. Heath's argument that the BIA has a trust responsibility to withdraw recognition of Mr. Halftown because he is mismanaging Nation monies, it is noted that the Nation funds in question are not trust funds and therefore, there is no trust responsibility involved.

Please be informed that allegations of theft of Nation funds or property may be brought to the attention of the Federal Bureau of Investigation (FBI) . . . as the FBI has jurisdiction to investigate these charges under the federal criminal code.

Id. at 8. He concluded the Decision by urging mediation of the Nation's disputes.

Appeal and Arguments of the Appellants

This appeal followed, brought by Appellants Jacobs, George, Isaac, and Clan Mothers Hill and Jimerson. The case is briefed and argued in the following pleadings:

- June 22, 2006, Appellants' Notice of Appeal and Statement of Reasons;
- July 21, 2006, Answer of "Interested Parties" (Halftown, Twoguns, and Wheeler);
- Sept. 11, 2006, Appellants' Opening Brief;
- Oct. 10, 2006, Brief of Interested Parties;
- Oct. 13, 2006, Answer of the Appellee;
- Oct. 25, 2006, Appellants' Reply Brief;
- Jan. 5, 2007, Letter from Appellants attaching Dec. 19, 2006, decision of U.S. EPA Regional Administrator (EPA Decision);
- Jan. 10, 2007, Letter from Interested Parties Opposing Submittal of EPA Decision;
- Jan. 25, 2007, Appellee's Response to Submittal of EPA Decision;
- Jan. 25, 2007, Letter from Interested Parties responding to EPA Decision;
- Mar. 9, 2007, Letter from Appellants attaching Feb. 20, 2007, Letter from Cayuga Nation to Appellants; and
- Mar. 19, 2007, Letter from Interested Parties in response to Appellants' Letter forwarding Feb. 20, 2007, letter to Appellants.

We attempt briefly to summarize the parties' arguments in these pleadings.

Appellants do not challenge the six-member Council identified by the Regional Director, but contend that he defined “consensus” in the March 15, 2005, letter sent to their attorney to mean that consensus “can be reached [with] some opposition.” Appellants’ Opening Brief at 2. On these premises, Appellants argue that the issue before this Board is quite simple; because “five of the six members of the Nation’s Council agreed to remove Mr. Halftown as the Nation’s representative, and signed a formal Resolution to that effect,” they assert that the Regional Director has already found that such a five-to-one majority of the Nation’s governing body is sufficient to constitute “consensus.”

Thus, their first argument is that the Regional Director erred in refusing to honor the January 2006 Resolution, which they claim to be a consensus decision of the Council. *Id.* at 2. Appellants argue that “consensus” as unanimity is “contrary to Cayuga practice as recognized by BIA” and contrary to “BIA’s longstanding recognition” of the Nation’s “consensus-based system” in the March 15, 2005, letter from the Regional Director to Heath. *Id.* at 15-16. They cite the May 31, 2006, decision on appeal as “newfound confusion” over consensus, *id.* at 18, and assert that defining consensus as “unanimous” would give Halftown a permanent veto over his own removal. *Id.* Moreover, they claim that Twoguns and Wheeler could not undo the January 2006 Resolution with the April 11, 2006, revocation of their prior signatures on it, because a consensus decision can only be vacated by another consensus decision. *Id.* at 3. Appellants contend that the Council’s January 2006 Resolution “remains in full force and effect, and . . . is entitled to be honored and respected by BIA.” *Id.* at 22. They argue that the Regional Director’s failure to repudiate Twoguns’ and Wheeler’s April 11 “post-hoc reversals” “permanently hobble[s]” the Nation. *Id.* at 20.

Second, Appellants argue that the Regional Director breached BIA’s trust responsibility to the Nation because, in their view, they presented “clear evidence that Mr. Halftown has abused his position for personal and political gain,” refused them access to the Nation’s records, and maintained unilateral control of the Nation’s bank accounts and financial decisions. *Id.* at 4-5. Repeating the six examples of Halftown’s misuse of Nation funds cited in their April 2006 letters, Appellants argue that BIA’s trust responsibility requires BIA to withdraw recognition of Halftown as the Nation’s representative, when faced with the magnitude of evidence, in their view, of his malfeasance. *Id.* at 23-25.

Finally, Appellants concede that the August 2003 Designation Letter exists, was signed by the Nation’s Council, and designated Halftown as “Representative of the Cayuga Nation,” Opening Brief at 9, but question its continued validity based on assertions about the Council’s operations. They contend that, under the Nation’s system of governance, “there is no role of ‘Nation Representative’.” *Id.* They state that the “sole authority for the temporary role of ‘Nation representative’ came from the late condoled Chief [Isaac] who,

due to his illness, needed the assistance of the younger seatwarmer to convey messages and information.” *Id.* They state that “Chief Isaac designated Mr. Halftown to act as his ‘eyes and ears’.” *Id.* They conclude that the role designated for Halftown has never carried with it the authority to make unilateral decisions. *Id.* They contend that George and Jacobs “are fully condoled Chiefs by virtue of having been raised to their positions in a Six Nations’ condolence ceremony in April 2005.” *Id.* at 8 n.5. As we understand their point, they contend that, upon the condolence of Jacobs and George as chiefs, Halftown’s temporary position as “representative” to BIA dissolved and they, as chiefs, are superior to Halftown (or any other seatwarmer) and are now the only ones authorized to represent the Nation for government-to-government purposes.

In post-briefing January 2007 letters, Appellants argue that the 2003 designation vested no actual authority in Halftown. They attach a decision letter issued by the EPA in which it refused to permit Halftown, Twoguns, and Wheeler to repudiate the Nation’s 2001 consensus decision to participate in a grant program as part of the Haudenosaunee Environmental Task Force (HETF). The EPA Decision, issued December 19, 2006, to both the Halftown/Twoguns/Wheeler faction and the Appellants’ faction, refused to recognize the August 2003 Designation Letter as allowing Halftown or his faction to repudiate a prior July 31, 2001, consensus decision transmitted by LeRoy to the EPA requesting a General Assistance Program grant through the HETF. Appellants argue that this Board must now join the EPA in rejecting the continued effectiveness of the 2003 Designation Letter.

The Interested Parties (Twoguns, Wheeler, and Halftown) and BIA support the decision of the Regional Director. The Interested Parties contend that Appellants “are a dissident faction of the Cayuga Nation who . . . adamantly refuse[] to participate in the Nation’s traditional form of government.” Brief of Interested Parties at 3. They claim that the Appellants’ entire position rests on “distorted facts,” misrepresentation, and mischaracterization, and assert that the Appellants’ discussion of the role of “federal representative is both historically and legally inaccurate.” *Id.* at 2-4. They deny that George and Jacobs are condoled Chiefs of the Nation, and note that the Regional Director considered and rejected claims that George and Jacobs are chiefs condoled through the formal tribal process. *Id.* at 3 n.1, citing July 18, 2005, Regional Director’s letter to Appellants’ faction. Pointing out that Appellants did not appeal that letter, the Interested Parties assert that this Board must disregard such a “fact.”²⁰ While accepting for purposes

²⁰ The letter did not provide appeal rights as required by 25 C.F.R. § 2.7(c), in which case the time to file the notice of appeal did not begin to run when it was issued. *Id.* at § 2.7(b); (continued...)

of their argument that the Council has the “six members acknowledged by Director Keel,” they nonetheless assert that the January 2006 Resolution was not actually an action of the Council because it was devised by an “*ad hoc* group” assembled for a “sole purpose” of attempting “the removal of Mr. Halftown as part of their plan to take over the Nation.” Brief of Interested Parties at 5 n.2, and 15 n.4. As support for this notion, they point out that the alleged Council has never designated a new Federal representative and also that Jacobs, George, and Isaac repeatedly have refused to attend publicized Council meetings. *Id.* at 15, 17.

BIA contends that the question before the Regional Director related to whether the January 2006 Resolution was accompanied by proper procedures, such as whether it was officially sealed, contained proper endorsement of the Nation’s Clerk, and whether procedural rights were afforded Halftown. Answer at 7. BIA contends that the Regional Director made no decision at all. BIA “simply does not know, and has not been reasonably informed, of the controlling law [of the Cayuga Nation]. Thus, were the Bureau to reach some legal conclusions on these matters, it would be applying Bureau-made law to the controversy, not Cayuga-made law. This, the Bureau may not do.” *Id.* Denying that the Regional Director made a decision, BIA claims that it “would be extraordinarily improper for the Bureau to step into this matter, determine Nation law on the subject, [or] essentially adjudicate the status of Clint Halftown as an official of the Cayuga Nation.” *Id.* at 8. BIA contends that “[a]ll [that BIA] has done is to determine that [BIA] has not been provided with a reasonable basis for discontinuing its relationship with Mr. Halftown.” *Id.*

Analysis

Appellants bear the burden of demonstrating that the Regional Director’s decision was erroneous or not supported by substantial evidence. *Washinawatok v. Midwest Regional Director*, 48 IBIA 214, 228 (2009). The Board reviews legal issues de novo. *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 18 (2008); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director*, 21 IBIA 24, 27 (1991). In addition, we review

²⁰(...continued)

California Valley Miwok Tribe v. Central California Agency Superintendent, 47 IBIA 91, 93 (2008). “Appellants can still appeal [an order] until BIA gives Appellants proper notice of that decision, and the time for filing an appeal has expired.” *Alonzo S. Gallegos et al. v. Southwest Regional Director*, 41 IBIA 286, 291 (2005). The Regional Director’s May 31, 2006, Decision, however, superseded and subsumed the July 18, 2005, letters and it did provide appeal rights. Therefore, to the extent any party wished to challenge the Regional Director’s conclusions in the July 18 letters, they could have done so in this appeal.

questions regarding the sufficiency of evidence de novo. *Parker v. Southern Plains Regional Director*, 45 IBIA 310, 318 (2007).

I. Legal Background

“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).

But, “when an intra-tribal dispute has not been resolved and the Department must deal with the tribe for government-to-government purposes, the Department may need to recognize certain individuals as tribal officials on an interim basis, pending final resolution by the tribe.” *LaRocque v. Aberdeen Area Director*, 29 IBIA 201, 203 (1996). BIA’s decision is secondary to a final decision of the tribal forum. *Wanatee v. Acting Minneapolis Area Director*, 31 IBIA 93, 95 (1997). The policy of recognizing particular individuals when necessary for government-to-government relations is normally applied “by recognizing the last undisputed officials.” *Poe v. Pacific Regional Director*, 43 IBIA 105, 112 (2006), citing *Rosales v. Sacramento Area Director*, 32 IBIA 158, 167 (1998).

Recognition is not required in the abstract. BIA “is not required to make *any* recognition decision during a tribal leadership dispute, if interim recognition is not needed for government-to-government purposes.” *Poe*, 43 IBIA at 112 n.10, citing *Wasson*, 42 IBIA at 158. In addition, BIA may implement appropriate measures for conducting business with a tribe during a tribal leadership dispute. See *United Keetoowah Band of Cherokee Indians v. Muskogee Area Director*, 22 IBIA 75, 87 (1992) (affirming Area Director’s recitation of other possible courses for conducting relations with tribe). The Eighth Circuit Court of Appeals has held, however, that BIA must choose a tribal governing body with which to deal, where necessary to avoid a hiatus in necessary government-to-government relations — e.g., to provide day-to-day, smooth operation of tribal affairs. In *Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983), the Court reversed as arbitrary and capricious a BIA decision to recognize two competing tribal councils in an intra-tribal dispute — in effect, recognizing neither — where the result was to “effectively creat[e] a hiatus in tribal government which jeopardized the continuation of

necessary day-to-day services on the reservation.” In *Goodface*, the Court ordered BIA to recognize one council, at least on an interim basis.²¹

The Board has recognized in addressing tribal government disputes that there may be times when BIA and the Department will be required to interpret tribal law to make a decision on which tribal officials to recognize, *even if no cognizable interpretation of tribal law has been presented*. See *Candelaria v. Sacramento Area Director*, 27 IBIA 137, 141 (1995). In some cases, principles of tribal sovereignty and self-determination will require BIA to refrain from interpreting tribal law, and to recognize a tribal official on an interim basis, pending resolution of a dispute in an appropriate tribal forum. See *Poe*, 43 IBIA at 112; *Wasson*, 42 IBIA at 158; *Wanatee*, 31 IBIA at 93. In cases where no such forum exists, however, an interpretation of tribal law may be required for purposes of identifying the Nation’s designated representative for government-to-government relations.

II. Application of Law to This Appeal

It follows here that, if BIA needs to identify a tribal representative for purposes of executing a 638 contract or otherwise conducting government-to-government business, BIA must decide whom to recognize as that tribal representative. No party disputes this point or contends that no recognition of a representative is necessary. And no party has identified a viable tribal forum for resolution of the dispute, such that BIA could avoid doing so itself. We thus conclude that this is a case in which an interpretation of tribal law was justified for purposes of deciding whether Halftown would continue to be considered as the Nation’s designated representative to BIA.

The upshot of our ruling is that we find no basis upon which to reverse the Regional Director’s decision to retain the status quo, where Halftown is the last Federal representative for purposes of the government-to-government relationship duly recognized by the Department. That said, because Halftown is acting as an agent for the Nation, the Regional Director has discretion to decide whether and, if so, what form of verification may be appropriate to show Council approval of Halftown’s actions.

As noted above, the proper composition of a tribal governing body is established by the tribe, *Wasson*, 42 IBIA at 158, and it is not BIA’s role to pick among tribal members to

²¹ *Goodface* did not involve the question presented in this appeal, of whether an individual was authorized to be the government-to-government representative to BIA for purposes of 638 contracts, as required by regulation. See 25 C.F.R. §§ 900.8(e), 900.12 (tribe must have authorized agent to execute a 638 contract).

construct a tribal body. Through a series of letters the Regional Director ultimately identified and recognized a particular composition of the Council and advised the parties of his conclusion, but the basis for his conclusion is not evidenced in the record before the Board. Because no party directly challenges the Regional Director's conclusion regarding the composition of the Council, we do not consider the matter further. We merely note that deciding the Council's composition is not critical to examining the evidence regarding tribal consensus, or Halftown's status. Therefore our decision should not be read as an independent determination of the composition of the Council or its proper organization among the clans, which remains a matter for the Nation to decide.

A. We Affirm the Regional Director's Conclusion That the Evidence Regarding the Nature of Cayuga Nation Consensus Does Not Confirm Appellants' Position.

Appellants argue that the Regional Director was compelled to find that consensus was achieved by a vote of five members of a six-person Council, and to recognize the January 2006 Resolution as showing that the Nation no longer recognizes Halftown as the tribal representative for purposes of government-to-government relations. They argue that the Nation's practice of consensus decision making is made by majority rule, and requiring unanimity is contrary to Cayuga practice as recognized by BIA and contrary to "BIA's longstanding recognition" of the Nation's "consensus-based" system. Opening Brief at 16. They have not supported either proposition.

The best evidence of the meaning of "consensus" in the Nation's decision making process appears from record documents that pre-date this dispute, and which were articulated by the last undisputed Chief (Vernon) Isaac. As noted above, Chief Isaac plainly contended that the Nation's Great Law of Peace required consensus, which meant that a "unified position emerges." 1998 Chief Isaac Declaration at ¶¶ 2-4. Prior to the dispute here, Halftown testified and contended, on behalf of the Nation, that consensus meant unanimity, that disputes were tabled until agreement occurs, that the Nation decides matters when the Council is of "one mind," and that majority rule is not consensus and could interfere with tribal governance. Tr. at 74-76; Halftown's Letter to Regional Director, Sept. 26, 1997, at 2.

Appellants do not argue that Chief Isaac erred, or that Halftown was wrong when he made these representations to a Federal Court and to this Department in 1998 on behalf of the Nation. They present no single piece of factual evidence in support of their position, from the history of tribal action, that the Council has acted by less than a unanimous position. They fail to establish with evidence that majority rule, or super majority rule, is the proper meaning of tribal consensus. The only evidence presented is not tribal action,

but what they construe to be “BIA’s longstanding position,” referring to the Regional Director’s March 15, 2005, letters sent to counsel Heath and Gold.

The Regional Director’s letters are not evidence of the *Nation’s* construction of its own Great Law of Peace. The notion that BIA’s letters to lawyers presenting a tribal dispute constitute evidence of tribal action is unconvincing at best, and we agree with the Interested Parties that this argument seeks to bootstrap *BIA* intervention in tribal self-government into something with precedential weight in tribal law. But even if those letters setting forth BIA’s beliefs could constitute evidence of tribal law interpreting the Great Law of Peace, we note that they do not constitute a “longstanding position” on the meaning of consensus. First, the letter to the Twoguns/Wheeler faction was vacated by this Board. *Twoguns*, 42 IBIA at 241. Second, as noted above, the March 2005 letters cannot be construed as final action of the Department. Third, when seeking a remand in 2006, the Regional Director made clear that he sought to *reconsider* all evidence for purposes of reaching a new decision. Fourth, this Board made clear when vacating the only letter before us that we expected the Regional Director to issue a “new decision,” and the Regional Director’s decision to “reaffirm” his conclusion regarding Halftown’s status in the March 2005 letters is the very subject of this appeal. Any construction of the March 15, 2005, letters to the parties’ lawyers as a longstanding opinion by BIA is unwarranted.

Accordingly, we affirm the Regional Director’s finding that no evidence in the record supports Appellants’ position that consensus can be achieved in the Nation’s Council by majority, or even super majority, rule, and we affirm his decision to refuse to accept the January 2006 Resolution as a Council consensus decision to remove Halftown from his role as government-to-government representative. In rendering this conclusion, we recognize that the Regional Director denied making any decision as to the meaning of consensus. We agree with Appellants as to the illogic of this comment; his decision had the de facto effect of declining to accept the effectiveness of the January 2006 Resolution. In the absence of any viable tribal forum for deciding whether the alleged majority’s action itself constituted “consensus” within the meaning of tribal law, it was necessary for the Regional Director to interpret tribal law based on the evidence before him.²² Whatever characterization he chose to give his action, we find that his decision *did* have the effect of interpreting tribal law, even while he sought to avoid doing so. We affirm his rejection of Appellants’ position that a majority opinion has been shown to be a consensus opinion under the Nation’s law.

²² The lack of clarity in tribal law (i.e., the disputed meaning of “consensus”) did not, by itself, constitute a sufficient ground for BIA to refuse to decide the validity of the January 2006 Resolution. *See Candalaria*, 27 IBIA at 141.

B. *We Affirm The Regional Director's Conclusion That Appellants' Allegations Regarding Misuse of Federal Grant and Tribal Funds Did Not Warrant a BIA Decision Regarding Halftown's Tribal Position.*

We turn to Appellants' claim that the Regional Director violated the Department's trust obligation by failing to remove Halftown as the Nation's representative on the basis of his alleged improper use of funds. Appellants seize on six enumerated facts to sustain charges of financial impropriety. The six arguments supporting Appellants' claims of improper use of funds were presented to the Regional Director, and BIA properly investigated the accusations and responded to them. BIA investigated; a private accounting firm conducted an audit; the firm provided results of the audit; and the Regional Director concluded that a Corrective Action Plan was in place.²³ Appellants repeat here the averments proffered to the Regional Director, failing entirely to acknowledge his responses or demonstrate that conclusions based on the private audits were wrong.

But, more importantly, we find that the Regional Director was correct to identify the proper remedies for such allegations, even if he were to assume on the merits that they were true. A tribal officer is appointed by the tribe, not by BIA, and BIA's recourse when presented with allegations regarding improprieties with respect to grant or tribal funds does not include a takeover of the tribe's designation of its officers.

²³ The record reflects the following with respect to the merits: (1) *Alleged improper use of Nation credit cards.* The Nation was reimbursed with the monies and corrective action was taken to assure proper use of Nation credit cards. (2) *Alleged failure to account for \$11,000 in Federal grant money.* This money was accounted for during the March 2006 audit investigation. (3) *Distribution of \$1,000 checks to "selected Nation citizens."* The only distribution letter in the record is one to all "Cayuga Nation Member[s]" with revenues from Nation businesses. Appellants do not support allegations of selective distribution, nor do they deny cashing their checks. (4) *Payment of improper salaries to LeRoy.* Recitation of LeRoy's salary is not probative of a violation. (5) *Payment of property taxes of \$178,313 to Seneca and Cayuga Counties, without authorization.* The Nation seeks to have the Department acquire lands in trust pursuant to section 5 of the Indian Reorganization Act, 25 U.S.C. § 465; doing so requires payment of back taxes in association with an application to BIA under that statute. 25 C.F.R. § 151.13 (liens and encumbrances); (6) *Expenditures in violation of the Council's January 3, 2006, Resolution.* This argument is derivative of Appellants' claim that the Resolution ousted Halftown from recognition as Nation representative, and therefore is derivative of the outcome of this appeal.

The Regional Director correctly noted that the 638 contract grant funds over which BIA must communicate with the Nation, in a government-to-government relationship, are not funds held in trust for the Nation. BIA is correct that the appropriate remedy for misuse of 638 contract funds may be reassumption of the contract program by BIA. BIA's Answer at 8, citing 25 C.F.R. Part 900. The Regional Director also correctly noted that, if Appellants have evidence of malfeasance by Halftown that they believe rises to the level of criminal action, they should present this information to Federal or tribal authorities for appropriate investigation under laws applicable to individual action. Appellants cite no authority for the proposition that Federal intervention in tribal self-governance and choice of tribal officers or representatives is the appropriate response to their allegations. Accordingly, we affirm the Regional Director's decision on this point as well.

C. The Regional Director Did Not Err in Failing to Recognize Jacobs and George as Condoled Chiefs.

Appellants contend that Jacobs and George are condoled chiefs with superior status on the Nation's Council to Halftown or any seatwarmer. To the extent they claim that the Regional Director erred in failing to recognize them as chiefs whose status now supplants that of Halftown (and perhaps Wheeler and Twoguns as well), they fail to demonstrate that this is so. In his July 18, 2005, letter to the Appellants' faction, the Regional Director found the evidence insufficient to recognize the two as condoled chiefs, but invited them to submit additional evidence. Appellants did not do so. They have not shown on this record that the Regional Director erred, that they submitted additional evidence regarding the purported condolences of Jacobs or George, or that such evidence exists.

D. The Regional Director Correctly Concluded that the Last Consensus Decision of the Nation Regarding the Nation's Representative to BIA Recognized Halftown, and We Affirm His Decision to Refuse to Remove Halftown from that Role at this Time.

We affirm the Regional Director's decision to continue to recognize the last consensus decision of the Nation presented to BIA establishing a representative for government-to-government relations. As noted above, to the extent BIA is obligated to engage in communications with the Nation for purposes of addressing the 638 contract, BIA is required to recognize a tribal representative. *See* 25 C.F.R. §§ 900.8(e), 900.12. The Regional Director did not act unreasonably in advising Appellants that they had not provided a sufficient basis for him to alter his continued recognition of Halftown. We affirm the Regional Director on this point as well.

We reject Appellants' efforts to discredit the 2003 Designation Letter. They claim that Halftown was never more than a temporary seatwarmer authorized by the departed

Chief Isaac to be his “eyes and ears,” Opening Brief at 9, and assert that as a representative (presumably on the Council) Halftown had “no role.” Nothing in the August 2003 Designation Letter suggests that Halftown’s appointment was only temporary or interim.

Finally, we do not find the EPA’s decision to constitute support for Appellants’ assertion that we must reverse the Regional Director’s May 31, 2006, Decision. The difference between the EPA and BIA decisions is that, in this case, the Regional Director has decided that the August 2003 Designation Letter designating Halftown is the last position of a consensus Council as to the Nation’s representative. EPA did not accept that document, however, as vesting in Halftown the substantive authority to unilaterally override a prior consensus decision issued to EPA in 2001, authorizing the Nation to participate with the six Haudenosaunee Nations in applying for HETF grants. EPA’s approach is fully consistent with the Regional Director’s repeated assertions that Halftown’s designation as the Nation’s “representative,” for government-to-government purposes, is distinct from any decision as to the substantive authority vested in Halftown, which the Regional Director stated is defined and controlled by the Nation, not by BIA.

The similarities are more important. The EPA’s decision reflects its difficulty in assessing how to communicate with two different factions of the Nation demanding recognition as authorized to represent the Nation. That agency plainly acknowledged that the Nation is in internal dispute:

EPA is confronted with an unusual situation in which one half of the current [BIA]-recognized Cayuga Nation Council strongly believes that HETF is no longer authorized to receive financial assistance on behalf of the Cayuga Nation, while the other half of the Council strongly favors the continuation of such assistance.

EPA is very respectful of the Cayuga Nation’s sovereignty and right to govern its own affairs and thus would greatly prefer not to become involved in this internal matter. Nevertheless, the Agency is faced with deciding at this time whether the Cayuga Nation may continue to receive EPA GAP funding through the HETF for purposes of environmental capacity building.

Dec. 19, 2006, EPA decision at 1. The EPA Regional Administrator was advised by the Appellants’ faction that, with only four signatures, the 2003 Designation Letter was not a consensus position of a *six-person* Council — a Council configuration that no party argues before us even existed in 2003 — and found that it was not sufficient to overcome the prior consensus position in 2001. Unable to choose between the two groups, the EPA

“continue[d] to treat the 2001 decision as being in force.” Dec. 19, 2006, EPA decision at 2. This is entirely consistent with the Regional Director’s conclusion in this appeal.

To be clear, however, our decision resolves only the question of whether we would reverse the Regional Director for refusing to remove Halftown as tribal representative to the Federal government. That role is defined in the 2003 Designation Letter, but this appeal does not raise, nor do we decide, the precise contours of the authority defined in that letter. Nor do we take any position on Halftown’s authority beyond the scope of that letter. We take no position on any issue proffered by the Halftown/TwoGuns/Wheeler faction on matters unrelated to the government-to-government relationship, and the Regional Director is free to question whether any matter presented to him represents a consensus position of the Nation.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm the Decision.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.