



## INTERIOR BOARD OF INDIAN APPEALS

Newtok Traditional Council v. Acting Alaska Regional Director, Bureau of Indian Affairs

61 IBIA 167 (08/06/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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NEWTOK TRADITIONAL COUNCIL,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 13-134
ACTING ALASKA REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	August 6, 2015

The Newtok Traditional Council (Appellant or “Old Council”)<sup>1</sup> appealed to the Board of Indian Appeals (Board) from a July 11, 2013, decision (Decision) of the Acting Alaska Regional Director (Regional Director), Bureau of Indian Affairs (BIA), declining to recognize it as the Traditional Council (Council) of Newtok Village (Tribe), in Alaska. The Regional Director decided instead to recognize a group of individuals (“New Council”), based on information submitted that the membership of the Tribe had accepted the New Council as their elected governing body. We affirm the Decision because Appellant has failed to demonstrate that the Regional Director’s decision is not supported by the record, or is otherwise arbitrary, capricious, or contrary to law.

## Background

The governing body of the Tribe is the Traditional Council, which consists of seven members, elected to either 2- or 3-year terms. Newtok Constitution (Constitution), art. IV, §§ 1, 2, 6.<sup>2</sup> Elections are held during public meetings of the Tribe, and are to be held in October. *Id.*, art. VIII, §§ 2, 3. In 2012, if not earlier, a dispute developed within

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<sup>1</sup> Appellant consists of Moses Carl (President), Walter Kassaiuli (Vice President), Louie Patrick (Treasurer), Andy Patrick (Secretary), Joseph John, Sr., Joseph Inakak, and George Tom.

<sup>2</sup> Both Appellant and the New Council rely on the same Constitution, and the validity of that document is not within the scope of this appeal. *See* Letter from Regional Director to Moses Carl and Paul Charles, Mar. 15, 2013, at 2 (stating that BIA does not know whether the document was properly ratified by the tribal membership).

the Tribe about whether the Old Council was holding elections as required by the Constitution. In October 2012, based on a petition circulated among the membership, a tribal election was held and the New Council was elected to replace entirely the Old Council, all of whose terms allegedly had expired. Early in November 2012, the Old Council, which did not participate in the October election, held a meeting that also included an election for some positions on the Council.

Both Councils submitted proposals or resolutions to BIA for action in connection with existing or proposed Indian Self-Determination and Education Assistance Act (ISDA) contracts. In response to the conflicting claims to represent the Tribe, the Regional Director sent a letter to both Councils, noting that BIA had a duty to determine which individuals were authorized representatives of the Tribe for ISDA contract-related actions, and setting out her understanding of the facts and evidence concerning the dispute. Letter from Regional Director to Moses Carl and Paul Charles, Mar. 15, 2013 (Administrative Record (AR) Decisions & Reference Docs. Tab 9). The Regional Director specifically noted that BIA's records designating authorized individuals to sign ISDA documents, e.g., payment requests, were dated 1997, and that the authority of those individuals (i.e., members of the Old Council) was being disputed. *Id.* at 1, 3. The Regional Director reported her understanding that both groups had held elections "ostensibly conducted in accordance with the Newtok Tribal Constitution in October 2012," and that "[p]rior to that, no elections had been held for more than seven years." *Id.* at 1. The Regional Director also identified various provisions in the Constitution that she suggested might be relevant to the matter. The Regional Director invited the parties to submit information or documentation to support their positions.

Appellant did not respond.

The New Council responded by presenting arguments and additional documentation to support a finding that the October 12, 2012, election should be recognized by BIA as valid. Letter from Paul Charles to Regional Director, Apr. 2, 2013 (AR Decisions & Ref. Docs. Tab 10). The New Council also argued that the Old Council's election held in November 2012 violated the Constitution. *Id.* at 3.

In June 2013, the New Council again wrote to the Regional Director requesting that she recognize it as the Tribe's governing body. In support of its renewed request, the New Council informed the Regional Director that a general membership meeting had taken place on June 14, 2013, to discuss the dispute. Letter from Walleri to Regional Director, June 24, 2013, at 1 (AR Decisions & Ref. Docs. Tab 12). At that meeting, which was attended by both the Old Council and the New Council, the Tribal Administrator employed by the Old Council (and a former President of the Council) made a motion to resolve the dispute by voting on the "new" council versus the "old" council. The result was

that a majority of those voting voted to confirm the October 2012 election of the New Council. The results of the vote were signed by Paul Charles of the New Council, and Walter Kassaiuli of the Old Council. *Id.* at 2 (unnumbered) and Exhibit (“June 14, 2013 Ballot”). Thus, according to the New Council, the general membership of the Tribe had undertaken a dispute resolution process and resolved it in favor of the New Council. *Id.* at 2 (unnumbered).

On July 11, 2013, the Regional Director issued her decision to recognize the New Council as the authorized governing body of the Tribe. Letter from Regional Director, July 11, 2013 (Decision). The Regional Director recounted the history of the dispute, her solicitation of the views of both parties, and their responses, or absence of a response in the case of Appellant. With respect to Appellant, the Regional Director found that the Old Council had “to date furnished no written submissions documenting the basis of its claim to continuing authority, or demonstrating why [BIA] should not recognize the New Council.” Decision at 7. The Regional Director noted the apparent resolution of the tribal dispute at the June 2013 meeting in favor of accepting the New Council. The Regional Director also found that the option of recognizing the Old Council “would not appear to be justifiable,” in light of multiple expressions of majority membership support for the New Council and the failure of the Old Council to provide support for its own continuing authority. *Id.* at 8.

Appellant appealed the Decision to the Board.<sup>3</sup> With its appeal, Appellant submits what it contends is proof that it held Council elections more recently than the 7-year hiatus stated in the Decision. *See* Notice of Appeal, Aug. 1, 2013; Letter from Appellant to Board, May 6, 2014. Appellant also argues that the New Council has violated the Constitution by acting without the approval of Appellant. As the Board understands Appellant’s argument, the October 2012 election in which the New Council was elected did not comply with the requirements of the Constitution. Appellant also argues that there was “no agenda for the new council on June 14, 2013, our joint meeting . . . about old and new council members.” Letter from Appellant to Board, Feb. 5, 2014.

## Discussion

### I. Standard and Scope of Review

The Board reviews decisions of BIA officials to determine whether they are in accordance with the law, are supported by the evidence in the record, and are not arbitrary or capricious. We review questions of law, and the sufficiency of evidence, *de novo*.

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<sup>3</sup> On May 27, 2014, upon motion of the New Council, the Board placed the Decision into effect. *See* Order Granting Motion to Lift Stay, May 27, 2014.

*Aloha Lumber Corp. v. Alaska Regional Director*, 41 IBIA 147, 157 (2005). When a BIA decision involves an exercise of discretion, we do not substitute our judgment for BIA's, but we do review the decision to determine whether it is reasonable, i.e., in accordance with the law, adequately explained, and adequately supported by the evidence. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). An appellant bears the burden to demonstrate error in the decision being appealed. *Tafoya v. Acting Southwest Regional Director*, 46 IBIA 197, 200 (2008).

The Board has consistently held that it is not required to, and generally will not, consider arguments raised or evidence presented for the first time on appeal, which could have been presented in the proceedings below. *Garcia v. Western Regional Director*, 61 IBIA 45, 50 (2015); *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 301, 305 (2004); *Nelson v. Acting Portland Area Director*, 26 IBIA 85, 86 (1994).

## II. Analysis

We affirm the Decision because the Regional Director reasonably concluded, on the record before her, that the New Council had provided evidence to support its claim of legitimacy, including several expressions of support from the Tribe's membership, and had provided evidence that a dispute resolution vote in favor of the New Council had been certified by an individual from each Council, and that in any event Appellant had failed to submit any evidence in support of its own claim of continuing authority. The record supports the Regional Director's decision, and includes various petitions for holding a new election and to support the results of the election of the New Council, as described in the Decision. *See* Decision at 2-8.

Appellant's arguments on appeal—that it had been holding elections and that the October 2012 election was invalid—are raised for the first time on appeal. We find no justification for considering them now when they could have been presented below. And although the Regional Director did not provide an additional opportunity for Appellant to respond to the New Council's submission regarding the June 2013 dispute resolution process, Appellant does not contest the Regional Director's finding that the process had been proposed by a tribal member aligned with Appellant and that the vote was certified by a member of each Council. As the Board has previously noted, “[i]nherent in the authority of a tribe to govern itself is its authority to determine the manner in which differences are resolved.”<sup>4</sup> *Patrick Stands Over Bull v. Billings Area Director*, 6 IBIA 98, 104 (1977).

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<sup>4</sup> The Tribe does not have a tribal court.

Appellant has not met its burden to demonstrate that the Regional Director's decision was arbitrary or capricious, or contrary to law, and thus we affirm.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's July 11, 2013, decision.<sup>5</sup>

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\_\_\_\_\_  
//original signed  
Thomas A. Blaser  
Administrative Judge

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<sup>5</sup> In our order granting the New Council's motion to make the Decision effective, we noted that the Decision contains three different descriptions of the composition of the New Council. As we understand the explanation from the New Council, there was some turnover on the Council following the October 2012 election. In any event, the composition of the New Council is not within the scope of this appeal, which is limited to the Old Council's challenge to the Regional Director's decision to recognize the New Council, instead of the Old Council, as the governing body of the Tribe. No party has contended that there is overlapping membership between the two Councils.