

Exhibit 4

(Document 2007-06-25)

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 06-5203

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**CALIFORNIA VALLEY MIWOK TRIBE,
formerly the Sheep Ranch Rancheria of Me-Wuk Indians,**

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees,

YAKIMA K. DIXIE, *Amicus Curiae.*

On appeal from the United States District Court for District of Columbia
No. 05-CV-739 (Honorable James Robertson, Jr., Judge)

BRIEF OF AMICUS CURIAE YAKIMA K. DIXIE

IN SUPPORT OF THE UNITED STATES

SEEKING AFFIRMANCE OF THE JUDGMENT BELOW

Tim Vollmann
3301-R Coors Rd. NW #302
Albuquerque, NM 87120
Telephone: 505-792-9168

Elizabeth T. Walker
Walker Associates
127 S. Fairfax St. # 126
Alexandria, VA 22314

Attorney for Amicus Curiae

Of Counsel

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and amici -- Amicus concurs in Appellant's statement of parties and amici, except that it is amicus Yakima Dixie's position that the persons responsible for filing this lawsuit and appeal in the name of the California Valley Miwok Tribe are not authorized to speak for or sue in the Tribe's name.

B. Rulings under Review -- Amicus concurs in Appellant's statement of the rulings under review, except that the District Court's Memorandum Opinion of March 30, 2006, appears at 424 F.Supp.2d 197 (D.D.C. 2006).

C. Related Cases -- There are no related cases, as defined by FRAP Rule 28(a)(1)(C). However, there are administrative appeals pending at the Department of the Interior which involve issues closely related to this case.

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* Authorities upon which we chiefly relied are marked with asterisks.

GLOSSARY

| | |
|------|----------------------------------|
| BIA | Bureau of Indian Affairs |
| CVMT | California Valley Miwok Tribe |
| IBIA | Interior Board of Indian Appeals |
| ICRA | Indian Civil Rights Act |
| IRA | Indian Reorganization Act |

INTEREST OF AMICUS CURIAE

Amicus Yakima K. Dixie is the hereditary chief of the Sheep Ranch Rancheria of Miwok Indians, now known as the California Valley Miwok Tribe. He was formerly recognized by the Bureau of Indian Affairs (BIA) as the chairman of the Tribe, and thereafter challenged the claim of authority of self-styled chairperson Silvia Burley, who has pursued this litigation and appeal in the name of the Tribe.¹ One such challenge by Mr. Dixie ultimately gave birth to this case: his administrative appeal which was rejected by defendant-appellee Michael D. Olsen, Deputy Assistant Secretary of the Interior for Indian Affairs, on February 11, 2005. A33. However, it was Silvia Burley, not Mr. Dixie, who sought judicial review of that agency decision in the U.S. District Court for the District of Columbia.

During the District Court proceedings Mr. Dixie's interest in this case was heightened when Silvia Burley and her two daughters (the Rancheria's self-appointed "Tribal Council") purported to disenroll him from the Tribe. Slip op., Supp.App. at 39; U.S.D.C. Dkt. #23-1, pp. 8-9. A "Tribal Council Resolution", dated September 5, 2005, effecting the "disenrollment" was

¹ Because Mr. Dixie does not regard Ms. Burley as speaking for the Tribe, or as authorized to pursue this litigation or appeal in the name of the Tribe, Appellant shall be referred to as Silvia Burley or Ms. Burley. Appellee shall be referred to as the government, the Department of the Interior, or the United States.

offered by Ms. Burley (Dkt. # 23-7) in opposition to Mr. Dixie's September 2, 2005, motion to intervene (Dkt. #19), arguing that he lacked a protectable interest in the proceedings since he was no longer a tribal member.² This bogus disenrollment, though not the subject of this case, amplifies the interest of Mr. Dixie in its outcome. *See* Motion for Leave, filed Sept. 18, 2006, at 7. It also serves to demonstrate why the Secretary of the Interior must retain the authority to address questions regarding claims of tribal leadership. This Court granted Mr. Dixie's Motion for Leave to file this amicus brief on December 18, 2006.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the enactment of section 104 of the Native American Technical Corrections Act of 2004, 25 U.S.C. § 476(h), stripped the Secretary of the Interior of his authority under 25 U.S.C. § 2 to determine whether or not the purported leadership of an Indian tribe in fact exercises governmental authority on behalf of that tribe.

STATEMENT OF THE CASE

The District Court granted the United States' Motion to Dismiss for failure to state a claim, a ruling which was not dependent on any fact-finding, since the court simply treated the allegations in the Complaint as

² The Motion to Intervene was denied as moot. Slip op., Supp.App. at 33.

true. Nevertheless, there are major factual disputes as between Silvia Burley and Yakima Dixie, though this court need not address any of them for purposes of determining whether to affirm the District Court's dismissal of Ms. Burley's case. Amicus believes it was misleading for the Opening Brief to suggest (at page 3) that "[T]he critical facts in this case are fairly undisputed and essentially accepted by the District Court."

It is Mr. Dixie's position that Silvia Burley has unlawfully usurped the communal benefits and rewards of an unorganized Indian tribe for the exclusive use of her immediate family.³ In 1998 he conferred tribal status on her and her two daughters so that they might receive government services, including educational and medical benefits. A13; slip op., Supp.App. 33, n. 2. Later Ms. Burley and her daughters purported to take control of the Tribe. She induced a few government officials to address her as chairperson, and secured BIA contracts for tribal government activities. A12-A15; slip op.; Supp.App. 34. However, she held tribal membership at only five members, and persistently thwarted BIA efforts to facilitate the

³ See U.S.D.C. Dkt. #19-1. Mr. Dixie disputes certain portions of Judge Robertson's recitation of the factual background (based as it is on the allegations of the Complaint), including the statement that he voluntarily resigned as chairman of the Tribe, and that he participated in the election of Ms. Burley as chairperson. These allegations have been denied.

organization of the Tribe among the descendants of the original Miwok residents of Sheep Ranch. A28-A30.

In the meantime, Silvia Burley unveiled her own “constitution” purporting to provide an organizational framework for the Tribe (one likely to guarantee her family’s perpetual control of the Tribe and its assets), and demanded that the BIA accept this document as the organic charter of a sovereign Indian tribal entity. BIA declined on the ground that she had failed to involve the greater tribal community. She has invoked 25 U.S.C. §476(h) for the proposition that the Secretary of the Interior has no discretion not to accept her constitution as the governing tribal document.⁴

It is not necessary for this Court to accept Mr. Dixie’s version of his dispute with Ms. Burley over Miwok tribal authority. But, as discussed below, neither should it accept Silvia Burley’s portrait of herself as the personification of the Tribe, possessing all the attributes of tribal sovereignty. That disguise is a bootstrap for the legal argument advanced on her behalf, and it hides the underlying truth of this controversy.

⁴ During the pendency of this appeal BIA has continued its efforts to assist in the organization of the Tribe by notifying lineal descendants of the original Sheep Ranch Miwoks. Mr. Dixie has cooperated in these efforts. Ms. Burley has filed further administrative appeals to prevent these efforts. Based on the results of recent research, Mr. Dixie now doubts whether Ms. Burley is herself a lineal descendant of the Sheep Ranch Miwoks, rendering her claim of tribal leadership highly suspect.

SUMMARY OF ARGUMENT

The Secretary of the Interior retains reasonable and necessary authority under 25 U.S.C. § 2 to determine who speaks—or does not speak—for an Indian tribe insofar as the intergovernmental relationship between the tribe and the federal government is concerned. This threshold authority provides an essential tool to insure the proper expenditure of federally appropriated funds, to prevent the improvident alienation of tribal assets held in trust by the United States, and to compel compliance with the requirements of federal law. There is nothing in the language of the 2004 amendment to Section 16 of the Indian Reorganization Act, 25 U.S.C. §476(h), in the Native American Technical Corrections Act, which deprives the executive of that primal authority.

ARGUMENT

THE SECRETARY OF THE INTERIOR (ACTING THROUGH THE BIA) HAS PRIMAL AUTHORITY TO DETERMINE WHO SPEAKS ON BEHALF OF AN INDIAN TRIBE.

The pervasive, underlying premise of Silvia Burley’s argument that the Secretary of the Interior is required by 25 U.S.C. § 476(h) to accept her constitution as the “valid governing document for the [California Valley Miwok] Tribe” (Complaint, Prayer ¶ 2, A20) is that she, and her two

daughters—the three now allegedly comprising the “Tribal Council”—constitute the governing body of a sovereign political entity, an Indian tribe.

This begs two elementary questions:

- (i) Who is the Tribe? and (ii) Who speaks for the Tribe?

(i) The Department of the Interior has dealt with the people of Sheep Ranch Rancheria as a tribal group since 1915; funds were appropriated by Congress for the Tribe’s benefit, and land was also held in trust for them until the termination initiative in the 1960s.⁵ The Tribe has been listed in the *Federal Register* as a tribal entity eligible for services from the federal government pursuant to the Act of November 2, 1994. P.L. 103-454. It is the BIA’s position that the Tribe is unorganized, *i.e.*, without an organic document or established membership criteria.

Ms. Burley, however, has purported to “govern” a Tribe of five people (give or take one, depending upon whether you count her minor granddaughter, or discount Yakima Dixie who was “disenrolled” in 2005.) For this the BIA has regrettably plied her with government contracts, as the representative of a tribal organization. Even so, BIA has sought to persuade her to assist in organizing the Tribe by involving the greater tribal community, namely the descendants of the original Sheep Ranch Miwoks,

⁵ As Judge Robertson’s Order of May 2, 2006, stated, whether the Tribe was actually terminated is not an issue in this case. A 212.

whom Ms. Burley herself has conceded may number 250 people. Govt. Response Brief at 11. Thus, one may seriously question whether this tiny group of people constitutes the “California Valley Miwok Tribe” or, at best, a handful of members thereof.

(ii) Ms. Burley claims to be the tribal chairperson, the leader of the tribal government. Mr. Dixie denies this. The United States now appears to view her as the leader of “a mere subset or faction” of the Tribe. Govt. Response Brief at 22.

Ms. Burley maintains her claim to tribal leadership based (1) on her “election” (she and her two daughters constituted a majority of her 5-member CVMT prior to Mr. Dixie’s “disenrollment”), and (2) on the past actions of BIA officials to treat her as chairperson. Even if one disregards Mr. Dixie’s allegations of fraud with respect to Ms. Burley’s takeover of the “tribal government”, and the fundamental questions surrounding Ms. Burley’s claim of Sheep Ranch heritage, it is highly questionable whether Ms. Burley’s claim of leadership status is based on any kind of consensus process among the Miwok people.

Accordingly, the filing of this lawsuit precipitates threshold questions about the identity and representation of the CVMT. The Complaint was

filed in the name of the Tribe, invoking (among other statutes) 28 U.S.C. §1362 (A10, ¶ 1), which confers jurisdiction on a U.S. District Court to hear

all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

May anyone with a federal claim invoke Section 1362 by claiming to be an Indian tribe? Obviously not. Since the BIA no longer recognizes Ms. Burley and her daughters as the tribal council, the invocation of jurisdiction under this statute is doubtful; but the question of subject matter jurisdiction is not critical here because plaintiff also invoked 28 U.S.C. § 1331 (federal question.) Nevertheless, the substantive merit of the suit appears to hang on these threshold questions of tribal identity and representation. Ultimately, Judge Robertson did not see it necessary to conduct a factual inquiry into the identity of the plaintiff, as he dismissed the suit for failure to state a claim—in effect determining that, even if the plaintiff were the California Valley Miwok Tribe, the claimed basis for relief does not exist.

Amicus agrees with the decision of the District Court that, even if Silvia Burley has the authority to sue in the name of the Tribe, she cannot state a claim under 25 U.S.C. § 476(h). The court's opinion and the United States' brief on appeal both provide persuasive reasons why that statute should not be interpreted as requiring the Secretary of the Interior to

recognize any “constitution” as the valid governing document of a tribe, if it does not reflect the will of the tribal people.

* * *

Apart from the issue of statutory interpretation, the dismissal of Ms. Burley’s claim is also supported by the primal authority of the Secretary to ascertain who speaks for a tribe, for purposes of a tribe’s external relations, namely the government-to-government relationship which Indian tribes have with the federal government. Questions of tribal leadership are not unique, and are certainly not new. Early encounters between Indian tribes and Federal agents necessarily involved the question of “Who’s in charge?” When the agents determined who a tribal leader was, they might have asked him to sign a treaty with the United States. Those agreements were not later subject to collateral attack on the ground that an unauthorized Indian signed the treaty. The courts have treated that as a political question, a matter left exclusively to “the executive and other political departments of government.” United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866); *see also* Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1856).

In 1832 Congress placed that authority in the Commissioner of Indian Affairs, Act of July 9, 1832, § 1, 4 Stat. 564. When the Department of the Interior was created in 1849, the Commissioner was moved there from the

War Department, and placed under the supervision of the Secretary of the Interior. R.S. § 463. The pertinent statute was later moved to the U.S. Code, where it is found today:

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.⁶

25 U.S.C. § 2 [hereinafter “Section 2”.] *See also* 43 U.S.C. § 1457(10), cited by Judge Robertson. Slip op., Supp.App. at 41. Section 2 has “served as the source of Interior’s plenary administrative authority in discharging the federal government’s trust obligations to Indians.” United States v. Eberhardt, 789 F.2d 1354, 1359 (9th Cir. 1986).

Burley’s Opening Brief ignores this threshold question of her ostensible authority, arguing in effect that the “inherent power” of a tribe, identified in 25 U.S.C. § 476(h), is simply vested in her. Her wooden reading of the statute would prevent the Secretary from looking behind any submission of a new tribal constitution to determine whether, in the words of Judge Robertson, “governing documents reflect the will of a majority of the tribe’s members.” Slip op., Supp.App. 42. Burley’s claim to be the embodiment of the Tribe would end further inquiry. Nothing in the text of

⁶ An executive reorganization in 2003 left that responsibility in the Assistant Secretary for Indian Affairs.

the 2004 amendment to the IRA suggests that the Secretary's primal statutory authority to ascertain who speaks for an Indian tribe has been repealed.⁷

That the Secretary retains such authority is as important today as it was in the days of treaty-making. Modern federal statutes authorize a wide variety of federal contracts and grant agreements between Indian tribal governments and federal agencies. Many millions of dollars in federal money are disbursed to representatives of tribes. Someone must be able to verify the authority of tribal representatives before they are entrusted with these federal funds. Congress has given the Secretary of the Interior that authority in Section 2 and 43 U.S.C. § 1457(10). Also, such authority is implicit in 25 U.S.C. § 450b(*l*), respecting Indian Self-Determination Act contracts, which defines "tribal organization" as the "recognized governing body" of a tribe. "Recognized" by whom? It must be the Secretary; if that adjective pertained simply to tribal recognition, it would be redundant, having no meaning independent of the word "governing".

⁷ The text of the amendment is worth repeating here:

Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

Similarly, tribal leaders have the power to enter into contracts and to lease tribal lands to third parties, usually subject to the approval of the Secretary (or the BIA with delegated authority.) It is essential that the Secretary satisfy himself that those tribal decision-makers act with the full authority of the tribe. *See e.g., Seminole Nation v. United States*, 316 U.S. 286 (1942), where the federal government was liable for entrusting tribal funds to tribal officials who misappropriated the money.

Today, many tribes have sophisticated governmental institutions, where each succession of leadership is unquestioned; but there are also many small tribes where numerous questions of ostensible authority may arise, due to a lack of a quorum at a legislative meeting, a disputed election or recall initiative, or a failure of tribal officials to observe due process in the exercise of executive, legislative, or judicial power. The Indian Civil Rights Act, 25 U.S.C. § 1302 (ICRA), imposes on tribal governments many of the restrictions of the Bill of Rights in the U.S. Constitution, including an obligation to give persons within tribal jurisdiction due process of law, 25 U.S.C. § 1302(8). However, except for the writ of *habeas corpus*, there is no private right of action to enforce those basic protections in federal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Thus, often it is only

the Secretary of the Interior who is in a position to require compliance with this and other federal laws governing the conduct of tribal leaders.⁸

For example, the Council of the United Keetoowah Band of Cherokee Indians in Oklahoma once passed a disenrollment ordinance immediately prior to a tribal election with the effect of disqualifying a number of candidates vying against the incumbents. The BIA Area Director determined that the ordinance violated the ICRA, and declined to recognize the results of the election. This action was upheld by the Interior Board of Indian Appeals. United Keetoowah Band v. Muskogee Area Director, 22 IBIA 75 (1992). Addendum, Tab 1.

Even a tribal government organized under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 461, *et seq.*, is not immune from the exercise of the Secretary's power when the will of the tribal majority is violated. In 2002, saddled with tribal leaders who failed to respond to legitimate recall petitions circulated among tribal members, the people of the Kickapoo

⁸ Ms. Burley's brief suggests (at page 20) that the decision in Santa Clara Pueblo v. Martinez constrains the Secretary from involving his Department in internal tribal matters. However, a footnote in that decision observes that under certain circumstances tribal violations of members' rights may be remedied at the Department of the Interior. 436 U.S. at 66, n. 22. Further, the 1994 amendments to the Indian Self-Determination Act require tribal governments to comply with the ICRA, 25 U.S.C. § 450l(c), Sec. 1(a)(13) of the model agreement; the Secretary may also reassume contracts for a violation of personal rights. 25 U.S.C. § 450m.

Traditional Tribe of Texas held a Vote of Conscience to oust their leaders. The Assistant Secretary for Indian Affairs accepted the extra-constitutional results of that vote, recognizing the new leaders on an interim basis until the Tribe was able to conduct a new election under the existing IRA Constitution. *See* Addendum, Tab 2. The Assistant Secretary decided to recognize the interim authority of the dissident tribal members who conducted the Vote, because the old Council members had simply failed to exercise their governmental authority.

A small tribe lacking an organization may be particularly vulnerable to manipulation, and offers a special challenge to the Department. Thus, the Secretary must be vigilant to ensure that the tribal government that is created represents the will of the people. Once that tribe has organized and has established institutions for dispute resolution, the Secretary must stand back to provide the tribe with an opportunity to address matters of internal governance. *See* Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983). Even then, however, the Secretary retains the necessary authority to remedy violations of federal or tribal law. That was the message of Seminole Tribe v. Norton, 223 F.Supp.2d 122 (D.D.C. 2002). There the Department refused to recognize the purported removal of the Tribe's Principal Chief, because it violated tribal law. The election to recall the Chief was considered invalid

because a class of voters was excluded from the polls. Relying on this Court's decision in Morris v. Watt, 640 F.2d 404 (D.C.Cir. 1981), the District Court commented:

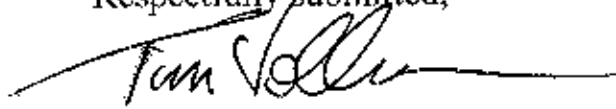
The Court acknowledges and appreciates the importance of the Nation's right, as a sovereign body, to self-determination and self-government. However, as a sovereign, the Nation has the duty and the responsibility to respect the rights of all of its members, including the rights of its minority members, as guaranteed by the Nation's Constitution.

223 F.Supp.2d at 146. Similarly, here the Interior Department is properly protecting the will of the majority of the putative members of the CVMT.

CONCLUSION

For the foregoing reasons, the judgment of the District Court, dismissing the Complaint for failure to state a claim, should be affirmed.

Respectfully submitted,



Tim Vollmann
Counsel for Amicus Yakima K. Dixie
3301-R Coors Rd. NW, #302
Albuquerque, NM 87120
505-792-9168

Of Counsel:

Elizabeth T. Walker, Esq.
Walker Associates
127 S. Fairfax St. # 126
Alexandria, VA 22314

CERTIFICATE OF SERVICE

I hereby certify that on or before June 25, 2007, copies of this Amicus Brief was served by United States Mail upon counsel of record at the addresses listed below:

Phillip Eugene Thompson
Thompson Consulting Associates
9450 Pennsylvania Ave, Suite 1
Upper Marlboro, MD 20772

Johnine Clark
Law Office of Johnine Clark, P.A.
6500 Central Avenue
Capitol Heights, MD 20743

Sonya Anjanette Smith-Valentine
Valentine Legal Group, LLC
7319 Hanover Parkway, Suite C
Greenbelt, MD 20770

Mark R. Haag
Katherine J. Barton
James M. Upton
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20020

Jane M. Smith
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240



Tim Vollmann

ADDENDUM



NEWS

U.S. Department of the Interior

Office of the Assistant Secretary - Indian Affairs

FOR IMMEDIATE RELEASE

November 25, 2002

Contact: Dan DuBray

202-208-7163

McCaleb Recognizes Traditional Council as Provisional Government of Kickapoo Traditional Tribe of Texas

BIA head calls for prompt special election in accord with tribal constitution

WASHINGTON - Interior Assistant Secretary - Indian Affairs Neal A. McCaleb today announced the Bureau of Indian Affairs (BIA) recognizes the leadership of the Kickapoo Traditional Tribe of Texas (KTTT), selected by tribal members on October 28, 2002, as the tribe's provisional governing body. The recognition accepts the Traditional Council members selected through last month's 'Vote of Conscience' for the purpose of maintaining the tribe's government-to-government relationship with the United States.

"I have examined numerous documents relating to October's 'Vote of Conscience' and believe the Traditional Council has the necessary foundation to be recognized as a provisional tribal government," McCaleb said today. "It is vitally important for this provisional government to promptly call for special elections in accord with the tribe's constitution. The tribe's members expect to have a fair opportunity to elect candidates to fill the unexpired terms of the officers who were removed last month."

In announcing BIA's provisional recognition of the KTTT leadership, McCaleb said he was persuaded to accept the substitute leadership in light of the prior tribal council's apparent abandonment of the tribe's constitution, leaving dissenting members no choice but to resolve questions by traditional means. McCaleb, however, urged the provisional government to promptly hold the special election to resolve the controversy.

McCaleb, as the Assistant Secretary for Indian Affairs, has the responsibility for fulfilling the Department of the Interior's trust responsibilities and promoting self-determination on behalf of tribal governments, American Indians, and Alaska Natives. The Assistant Secretary, who oversees the Bureau of Indian Affairs, is also responsible for providing services to approximately 1.4 million American Indians and Alaska Natives who are members of the 562 federally recognized tribes.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

NOV 25 2002

Honorable Jesus Anico
Chairman, Traditional Council
Kickapoo Traditional Tribe of Texas
H C 1, Box 9700
Eagle Pass, Texas 78852

Dear Chairman Anico:

Secretary Norton has asked me to respond to your November 18, 2002 letter that requests the Secretary to recognize the Traditional Council elected on October 28, 2002 ("Vote of Conscience") as the governing body of the Tribe. In response to the request, I am recognizing the Traditional Council elected by the Vote of Conscience, as the provisional governing body of the Tribe for purposes of maintaining the government-to-government relationship between the United States and the Tribe.

We have received and reviewed a number of documents relating to the Vote of Conscience, the history and tradition of the Tribe and the reorganization of the Tribe under its current constitution in 1989. The decision to recognize the Traditional Council elected at the Vote of Conscience is based on our review of the Tribe's important traditions and customs that are not fully incorporated into its constitution, and the prior Council's apparent abandonment of the Constitution. Both the Vote of Conscience and the petition dated November 16, 2002 are strong evidence of the overwhelming support for the Traditional Council.

It is essential for the long-term rule of law that the Traditional Council recognized by this letter conform their actions to the Tribe's governing document. I expect the new Traditional Council to act promptly to call for special elections in accordance with Article V of the Tribe's constitution to fill the unexpired terms of the officers removed at the Vote of Conscience. These elections are necessary to bring the new Council into conformity with the Tribe's constitution.

This decision is final for the Department. We are willing to provide assistance that would facilitate the upcoming special elections.

Sincerely,

Assistant Secretary - Indian Affairs



INTERIOR BOARD OF INDIAN APPEALS

United Keetoowah Band of Cherokee Indians in Oklahoma; Joe Grayson, Jr.;
and Pam Thurman Jumper v. Muskogee Area Director, Bureau of Indian Affairs

22 IBIA 75 (06/04/1992)

Reconsideration denied:
22 IBIA 172

Related Board case:
20 IBIA 1
Reconsideration denied, 20 IBIA 67



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

and

JOE GRAYSON, JR., and PAM THURMAN JUMPER

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS 1/

IBIA 91-60-A, 91-94-A

Decided June 4, 1992

Appeal from a decision declining to recognize the results of a tribal election for the positions of Chief, Assistant Chief, and Treasurer, but finding that the tribe might still be able to conduct business with the Bureau of Indian Affairs.

Affirmed.

1. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--
Indians: Tribal Powers: Tribal Sovereignty

In furthering the doctrines of tribal sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes, and, in administering the government-to-government relationship with a tribe, has given deference to that tribe's reasonable interpretation of its own laws.

2. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--
Indians: Tribal Powers: Tribal Sovereignty

When neither tribal sovereignty nor tribal historical values are at issue, review of a tribal ordinance by

1/ Docket No. IBIA 91-94-A was originally docketed as Chadwick Smith, Nelson Smith, Joe Grayson, Jr., and Pam Thurman Jumper v. Muskogee Area Director. As discussed in footnote 2, Chadwick Smith is found to lack standing to bring an appeal in this matter. The Board has also been informed that Nelson Smith died during the pendency of this appeal. Accordingly, the case has been renamed.

Docket Nos. IBIA 91-60-A and 91-94-A were consolidated by Board order of June 7, 1991.

the Bureau of Indian Affairs and the Board of Indian Appeals in order to discharge the government-to-government relationship does not substantially interfere with the tribe's ability to maintain itself as a culturally and politically distinct entity.

3. Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Government: Elections

In discharging its government-to-government relationship with an Indian tribe, the Bureau of Indian Affairs has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), has tainted the election results.

4. Indians: Civil Rights: Indian Civil Rights Act of 1968--Indians: Enrollment/Tribal Membership--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

Because of the possibility of abuse of power by a group of individuals temporarily in office, tribal legislation disenrolling certain tribal members must meet the standards established by the tribe's constitution or other governing documents. Since the passage of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988), these standards have included the matters covered by that Act.

APPEARANCES: G. William Rice, Esq., Cushing, Oklahoma, for the Band; Chadwick Smith, Esq., Tulsa, Oklahoma, for Joe Grayson, Jr., and Pam Thurman Jumper; Keith S. Francis, Esq., Office of the Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Two appeals have been filed from a February 11, 1991, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to recognize the results of a November 5, 1990, tribal election as it related to the offices of Chief, Assistant Chief, and Treasurer of the United Keetoowah Band of Cherokee Indians in Oklahoma (Band). The Band seeks review of the Area Director's decision not to recognize the results of the election for those offices. Joe Grayson, Jr., and Pam Thurman Jumper seek review of the Area Director's determination that the Band might still be able to conduct business with BIA. ^{2/} For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

^{2/} Chadwick Smith, a tribal member, also sought to be an appellant in this appeal. The Board held in Smith v. Muskogee Area Director, 20 IBIA 1, on reconsideration, 20 IBIA 67 (1991), that Smith had not established that

Background

By the Act of August 10, 1946, 60 Stat. 976, Congress recognized the Band for the purposes of organizing under the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988). ^{3/} In 1950, the Band organized under a Constitution and Bylaws approved by the Secretary of the Interior.

In large part, the members of the Band are also members of the Cherokee Nation of Oklahoma (Nation). Following enactment of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, 25 U.S.C. §§ 450-450n, Federal funds became available to Indian tribes through a contracting and/or grant process. Both the Nation and the Band sought contracts to perform services for their members. However, because the membership in the two groups overlapped, BIA was concerned that there would be a duplication of funding for the same client population if contracts were entered into with both the Nation and the Band. This problem has not been satisfactorily resolved.

On September 16, 1990, following an executive session of the Band's Council, ^{4/} a special meeting of the Council was called. Resolution 90 UKB

fn. 2 (continued)

he had standing to bring an appeal under prior Board decisions discussing standing of tribal members. In Frease v. Sacramento Area Director, 17 IBIA 250, 256 (1989), the Board stated that "[t]he Department [of the Interior] has never recognized * * * any right of an individual member of a tribe to bring an action for the tribe based on a personal assessment of what is or is not in the tribe's best interest." This position is based upon the Department's responsibility to refrain from interfering in intra-tribal disputes. However, in Sundberg v. Acting Sacramento Area Director, 18 IBIA 207, 210 (1990), the Board found standing when the appellant's tribal position was directly at issue. See also LeBeau v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 84 (1986).

Because the same considerations existed in this appeal as to Smith, by order dated June 7, 1991, Smith was given an opportunity to show that he had standing. After reviewing Smith's response, on July 11, 1991, the Board held that he had not established standing, and dismissed him as an appellant. Smith sought reconsideration of that decision. In order to expedite resolution of the underlying appeal, on Aug. 5, 1991, the Board took Smith's petition for reconsideration of his dismissal under advisement and stated that his standing would be addressed in the decision in the consolidated appeals.

The Board finds no reason to reverse its decision that Chadwick Smith lacks standing. Therefore, Smith's petition to reconsider the June 7, 1991, order is denied.

^{3/} All further references to the United States Code are to the 1988 edition.

^{4/} Article V, section 2, of the Band's Constitution provides that the Council consists of the Chief, Assistant Chief, Secretary, Treasurer, and nine elected district representatives. Article V, section 1, provides that "[t]he supreme governing body of the Band shall be the Council of the United Keetoowah Band of Cherokee Indians in Oklahoma."

9-4, dealing with tribal membership, was enacted at the special meeting. Among other things, the resolution provides in section 16:

No Enrolled Member of the [Band] shall be allowed to be a member of any other Tribe or Band, if such membership entails inclusion of the individual's name on an authorized and open census roll. * * *

Furthermore, section 19.A provides:

All persons whose names are on the rolls of the Band as of September 15, 1990 who are also enrolled with any other Indian Tribe, Band, or Nation shall be deemed to have relinquished their enrollment in the Band as of October 15, 1990 unless they shall have filed with the Band their written notarized relinquishment of their enrollment with any other Indian Tribe(s), Band(s), or Nation(s) with which they are enrolled on or before October 15, 1990.

A tribal election was scheduled for November 5, 1990. Candidates for office were required to file by September 16, 1990, the day on which Resolution 90 UKB 9-4 was enacted. Nelson Smith, Grayson, and Jumper timely filed as candidates for the offices of Chief, Assistant Chief, and Treasurer, respectively. Based upon Resolution 90 UKB 9-4's prohibition of dual tribal enrollment, Smith, Grayson, and Jumper were each found ineligible to run for office, and their names were not included on the ballot.

In letters and at a meeting with Band officials, the Area Director expressed concern about the constitutionality of Resolution 90 UKB 9-4. The Band took no action in response to the Area Director's concerns.

By letter dated November 26, 1990, the Chairman of the Election Committee notified the Area Director of the results of the election. In addition to the Chief, Assistant Chief, and Treasurer, a Secretary and nine district representatives were elected. No vote tallies were given to the Area Director.

Because of his continued concerns about the constitutionality of the resolution, and the impact it might have had on the election, the Area Director conducted an investigation into the election and requested a legal analysis from the Department's Regional Solicitor in Tulsa, Oklahoma. Based upon his review of the information obtained, the Area Director issued the February 11, 1991, decision under appeal. That decision stated:

As you know, * * * I specifically voiced my concern with the manner and timing of the disenrollment provisions in your Membership ordinance 90 UKB 9-4, * * *. I felt that the rights of tribal members were impaired by the short period of time allowed to comply with Section 19 * * *.

I also felt and still am of the opinion that the short time period did not allow for members to be properly informed

or educated on the effects that this ordinance would have on their individual rights and privileges to properly choose the tribe with which they want to be affiliated.

It has been [BIA] policy that stricter tribal membership requirements which have the effect of striking persons from tribal rolls, like the provisions in the 1990 [Band] ordinance may only be enacted through a tribal constitutional amendment, or at least through a tribal referendum which gives all tribal members an opportunity to speak on the issue of the stricter requirements.

There is a sound legal basis for the [BIA's] policy in this regard. The Indian Civil Rights Act, 25 U.S.C. § 1302, et seq., provides that

No Indian tribe in exercising powers of self-government shall. . .

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . [25 U.S.C. § 1302(8)]. [Citation in original.]

* * * I conclude that Sections 16 and 19 of the ordinance, insofar as they are applied to current members of the Band, do violate those members' due process rights.

* * * * *

* * * Our review also indicated that the candidates for the office of [Chief,] Assistant Chief and Treasurer were also not certified because of their failure to relinquish their membership with the Cherokee Nation. Although the September 16, 1990, Membership ordinance was adopted by the governing body of the [Band], it was not totally enforced. No formal action has been taken to remove any member from the Band rolls. Our review of the election information further revealed that one-hundred seventy-four (174) individuals voted at the election held November 3, 1990. Ninety-two (92) of these individuals were enrolled with both the [Band] and the [Nation]. One-hundred seventy-nine (179) members voted at the run-off election; one-hundred six (106) of these individuals were enrolled with both the [Band] and the [Nation]. No member[s] appearing at the polls were denied the right to vote, regardless of whether or not they were dually enrolled with another tribe. It seems that two standards were used; i.e., if you were a candidate and dually enrolled with another tribe, Section 19 of the Membership Ordinance was strictly enforced; however, Section 19 was not enforced for purposes of voting. * * * Two of these same individuals (who were informed they were not members of the Band for purposes of running for office] were recognized as members of the tribe and allowed to vote at the November 5, 1990, tribal election.

Thus, the [Band] electorate were not allowed to vote for all eligible candidates filing for the offices of Chief, Assistant Chief, and Treasurer by reason that their names did not appear on the ballot. Because of the above-stated reasons, I do not recognize the results of the * * * tribal election held November 5, 1990, for the positions of Chief, Assistant Chief, and Treasurer.

I do, however, feel that the election, with the exception of these three positions, is valid and it is my opinion that the [Band] can still conduct business under several options authorized by its constitution * * *.

The Board received a notice of appeal from the Band on March 7, 1991. Grayson and Jumper's notice of appeal was received on June 4, 1991. Grayson and Jumper technically appealed from a May 2, 1991, letter from the Area Director informing them that he had intended his February 11, 1991, letter to respond to concerns about the election they had raised to him. ^{5/} Briefs have been filed by the Band, the Area Director, and Grayson and Jumper.

Discussion and Conclusions

[1] In approaching this case the Board is guided by its prior holdings that, under the doctrines of tribal sovereignty and self-determination, a tribe has the right initially to interpret its own governing documents in resolving internal disputes, and the Department must give deference to a tribe's reasonable interpretation of its own laws. However, the Department has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe. See, e.g., Reese v. Minneapolis Area Director, 17 IBIA 169, 173 (1989), and cases cited therein.

Because Resolution 90 UKB 9-4 concerns tribal enrollment, the Board approaches this matter with great care. The power to control membership has consistently been held to be a fundamental aspect of tribal sovereignty. The determination of tribal membership may also raise issues of historical values particular to a tribe. Both of these contexts counsel any Federal forum to exercise caution. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). ^{6/}

^{5/} The Board dismissed an earlier appeal from Chadwick and Nelson Smith, Grayson, and Jumper, on the grounds that it had not been timely filed. Smith v. Muskogee Area Director, 20 IBIA 1, on reconsideration, 20 IBIA 67 (1991). In its orders, the Board granted intervenor status in Docket No. IBIA 91-60-A to Nelson Smith, Grayson, and Jumper. Grayson and Jumper subsequently filed the separate appeal docketed as Docket No. IBIA 91-94-A.

^{6/} In its reply brief, the Band cites four cases in which state restrictions on the rights of individuals to seek elective office had been upheld. The Band states that the statutes upheld were "similar to the Tribal ordinance at issue here" (Reply brief at 3). The cases cited do not involve

The Band explains that Resolution 90 UKB 9-4 was enacted because of its belief that it was required to take some action prohibiting dual enrollment in order for BIA to consider contracting with it under P.L. 93-638. Although BIA contends that it imposed no such requirement, resolution of this dispute is not necessary to a decision in this appeal.

[2] The Board finds that, by the Band's admission, the decision to pass Resolution 90 UKB 9-4 was not motivated by either an exercise of tribal sovereignty over, or the Band's historical values concerning, its membership, but rather was a response to what the Band perceived to be BIA's requirements for contracting under P.L. 93-638. Under these circumstances, the Board does not believe that its review of the resolution, to the extent necessary to decide this appeal, will "substantially interfere with [the Band's] ability to maintain itself as a culturally and politically distinct entity." Santa Clara Pueblo, 436 U.S. at 72.

The Band contends that the resolution is constitutional because Article IV, section 2, and Article V of its Constitution give the Council the authority to prescribe membership rules. 7/ The Band cites Paragraph 3 of its Corporate Charter as further support for its authority in this matter. 8/

Both the Area Director and Grayson and Jumper argue that the resolution is not constitutional because Article IV, section 2, of the Constitution gives the Council authority only to prescribe rules for future members of the Band. They contend that the resolution cannot be applied against present members of the Band to disenroll those members retroactively, and that a constitutional amendment would be needed to disenroll present members.

fn. 6 (continued)

legislation similar to Resolution 90 UKB 9-4. The Band's resolution concerns tribal membership, not candidacy for tribal office. It is only as an effect of loss of tribal membership that a person would be found ineligible to run for tribal office. The cases cited are not relevant to the decision in this matter.

7/ Article IV, section 2, states: "The governing body of the Band shall have the power to prescribe rules and regulations governing future membership." As noted in footnote 4, the Council is the Band's governing body.

8/ Paragraph 3 of the Corporate Charter provides:

"The United Keetoowah Band of Cherokee Indians in Oklahoma shall have the following corporate powers * * * (q) To impose penalties on members of the United Keetoowah Band of Cherokee Indians in Oklahoma for violation of the corporate bylaws or ordinances, not exceeding in any case \$100 for any one offense, or in the alternative, expulsion from the Band or suspension of voting rights therein."

This authority is limited to situations where a member has violated the "corporate bylaws or ordinances." Implicit in this authority, and explicit in ICRA, is the premise that members will be found to be in violation of a tribal ordinance only after they have been afforded due process of law and only when the ordinance itself is constitutional.

Article IV, section 1, of the Constitution provides that the membership of the Band shall consist of:

All persons whose names appear on the list of members identified by a resolution dated April 19, 1949, and certified by the Superintendent of the Five Civilized Tribes Agency on November 16, 1949; Provided, that within five (5) years after the approval of this Constitution and Bylaws, such roll may be corrected by the Council of the United Keetoowah Band of Cherokees, subject to the approval of the Secretary of the Interior.

Section 2 provides that the Council has power to prescribe rules governing future membership.

These provisions create two classes of tribal members. Certain persons are made members by the Constitution. The membership rights of any individual who does not fall within Article IV, section 1, are subject to the rules prescribed by the Council. Under this power, the Council enacted at least two membership ordinances prior to Resolution 90 UKB 9-4.

Those individuals who are made members of the Band by the Constitution cannot be disenrolled or otherwise deprived of Band membership except through a process comparable to the process by which they were made members, *i.e.*, a constitutional amendment. This conclusion flows from the fact that constitutional rights cannot be limited or abrogated by legislation. *See, e.g., Almedia-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution"). Because Resolution 90 UKB 9-4 purports to apply to members who are covered by Article IV, section 1, it is unconstitutional as applied to those members.

The question as to those individuals who are members of the Band by virtue of meeting enrollment requirements established by the Council pursuant to its authority under Article IV, section 2, is whether the Council may apply against present members a requirement that was not applicable when they became members. The Band first prohibited dual enrollment on September 16, 1990. Therefore, as to those individuals who became members of the Band prior to September 16, 1990, under rules prescribed by the Council, the resolution establishes a retroactive membership requirement.

The Area Director noted that it had been BIA policy that new membership requirements which had the effect of disenrolling present members must be enacted through a constitutional amendment, or at least through a tribal referendum. While BIA policy, *per se*, would be inadequate to support the Area Director's decision here, the Area Director also observed that the policy had a legal basis in the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, which provides that "[n]o Indian tribe in exercising powers of self-government shall-- * * * (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property

without due process of law.” The Area Director cited ICRA in support of the BIA policy.

[3] Although the Supreme Court has held that the Federal courts have no authority to enforce ICRA except through the habeas corpus procedure set forth in 25 U.S.C. § 1303, it has also suggested that, under at least one circumstance, *i.e.*, in approving tribal ordinances, BIA would have authority to ensure that ICRA is enforced. Santa Clara Pueblo, 436 U.S. at 66 n.22. The approval of tribal ordinances is one aspect of the government-to-government relationship. The Board holds that, in discharging its government-to-government relationship with an Indian tribe, BIA has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of ICRA has tainted the election results. ^{9/} The Board thus concludes that it has authority, for purposes of deciding this appeal, to review Resolution 90 UKB 9-4, in order to determine whether it violates ICRA.

The legislative history of ICRA noted that safeguards guaranteed to citizens of the United States in their dealings with Federal and state governments were not guaranteed to Indians in their dealings with tribal governments. The Senate report stated that, because of this situation, “tribes have been permitted to impose a tax without complying with due process requirements, tribal membership rights can be revoked at the will of tribal governing officials, and Indians have been deprived of the right to be represented by counsel.” S. Rep. No. 721, 90th Cong., 1st Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 1863, 1864; emphasis added.

Tribal membership is comparable to United States citizenship. As the Solicitor of the Department stated in an opinion published as M-36793, 76 I.D. 353, 355, II Op. Sol. Indian Affairs 2004, 2005 (1969):

Tribal membership is as fundamental to Indians as American citizenship is to Americans generally. To an Indian, membership in an Indian tribe corresponds to that citizenship rather than to membership in an organization, fraternity, class, or group. In early dealings with Indian tribes, members were, indeed, referred to as citizens of those tribes. Such designation is more closely correlated with the designation of tribes as “domestic dependent nations.” [Footnotes omitted.]

Statutes providing for the expatriation of United States citizens have been successfully attacked on due process grounds. See, e.g., Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Kennedy v. Mendoza-

^{9/} For this reason, the Board rejects the Band’s contention that BIA can decline to recognize the results of a tribal election only when there are two competing factions, each claiming to be the properly constituted governing body.

Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958). In view of this judicial precedent and the specific language in the legislative history of ICRA, it appears that Congress almost certainly intended the revocation of tribal membership to be covered by ICRA's due process guarantee.

In Afroyim, the Supreme Court struck down a section of the Nationality Act of 1940 after determining that the right to expatriate a citizen was not granted to Congress by the Constitution. Justice Black, writing for the majority, stated:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. * * * The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.

(387 U.S. at 267-68). In a dissenting opinion filed on behalf of four Justices, Justice Harlan wrote:

But nothing in the history, purposes, or language of the [Fourteenth Amendment] suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen. To the contrary, it was expected, and should now be understood, to leave Congress at liberty to expatriate a citizen if the expatriation is an appropriate exercise of a power otherwise given to Congress by the Constitution, and if the methods and terms of expatriation adopted by Congress are consistent with the Constitution's other relevant commands.

(387 U.S. at 292).

Because Afroyim was decided less than a year before enactment of ICRA, Congress was presumably aware of the Court's holding that United States citizenship could not be terminated involuntarily by the sovereign. It is possible that, in extending due process requirements to tribal governments, Congress expected that deprivation of tribal membership would be found subject to the same restrictions as expatriation of a United States citizen. The Board cannot, however, hold that Afroyim prohibits the Band's Council from enacting legislation disenrolling Article IV, section 2, members, because that section of the Band's Constitution specifically grants the Council authority to legislate on questions of future membership. This fact distinguishes the Band's Constitution from the Federal Constitution.

[4] Afroyim does, however, counsel special caution concerning the manner in which involuntary expatriation can be accomplished, and sets forth the reasons for this concern. Because tribal membership is not a light trifle, and there is a possibility of abuse of power by a group of individuals temporarily in office, legislation disenrolling certain tribal members must meet the standards established by the tribe's constitution

and/or other governing documents. Since the passage of ICRA, these standards have included ICRA's requirement of due process.

Based upon all of these considerations, the Board concludes that Article IV, section 2, of the Band's Constitution gives the Council the authority to enact legislation specifying membership requirements for "future members" of the tribe, *i.e.*, any person who was not made a member by virtue of Article IV, section 1. However, any legislation that would have the effect of disenrolling a person who became a member of the Band under prior enrollment ordinances must be enacted and applied in accordance with the due process requirements of ICRA. Resolution 90 UKB 9-4 was enacted in virtual secrecy, provided no opportunity for input from or consideration by tribal members, was applied arbitrarily, and denied members affected by it of their right to tribal membership without due process. Accordingly, the Board holds that the Area Director properly concluded that the Band's election as to the offices of Chief, Assistant Chief, and Treasurer, which were the only offices for which timely filed candidates were not included on the ballot because of dual enrollment, was tainted by substantial violations of ICRA and properly refused to recognize the election as it related to those offices as an exercise of the government-to-government relationship with the Band. ^{10/}

Grayson and Jumper seek a reversal of the Area Director's statement that despite the fact that the election was tainted as to three offices, the Band might still be able to conduct business with BIA. In making this statement, the Area Director was clearly attempting to limit the adverse impact of his decision on tribal sovereignty, by attempting to find some mechanism through which the government-to-government relations between the Band and BIA could continue, even though BIA could not recognize certain top tribal officials.

Grayson and Jumper contend that because of extensive publicity after the passage of Resolution 90 UKB 9-4, many persons who did not wish to relinquish their membership in the Nation simply did not attempt to vote in the November 1990 election. Because of this fact, they argue, the resolution affected the results of the entire election, despite the Area Director's factual finding that the majority of people who voted in the election were enrolled with both the Nation and the Band:

The [Area Director's] decision is ineffective; there is nothing about it that prevents the three illegally elected officials from holding office so long as the [Band] chooses not to do business through them with the Federal government.

^{10/} The Band argued in its reply brief that the Board should recognize the election at least as it related to the office of Chief because Nelson Smith, the only other person who had timely declared for that position, died during the pendency of this appeal. The fact that Smith is now deceased does not remove the problems with the election at the time it occurred. The Board will not recognize the election as to the position of Chief.

In fact, the [Area Director's] decision appears to condone and even encourage a situation in which the [Band] operates with respect to all the world, except the [BIA], through its illegal officials, and deals with the [BIA] through some jury-rigged executive arrangement with the tribal council. The invidious consequences for the [Band] from such an arrangement appear to be inescapable.

(Grayson and Jumper's opening Brief at 17).

The Area Director's decision cites three provisions under which the Band might be able to conduct business with BIA. These provisions are Article V, section 5; and Article VI of the Constitution; and Article I, section 3, of the Bylaws. Article V, section 5, states:

The Council shall have power to appoint subordinate personnel, committees and representatives, to transact business, and otherwise speak or act on behalf of the Band in all matters on which the Band is empowered to act now or may be empowered to act upon in the future. The Council shall also have the power to delegate such powers to individuals or subordinate groups consistent with law, and under such rules and regulations as may be prescribed by the Council.

Article VI provides:

The officers of the Band shall be a chief, assistant chief, a secretary and a treasurer. The officers shall serve for a period of four (4) years, or until their successors are duly elected and qualified. * * *

Article I, section 3, of the Bylaws sets forth the duties of the secretary, including that "in the absence of the chief and assistant chief [the secretary] shall call meetings to order until a chairman pro tem is elected."

The Area Director did not state that the Band must select one of these options for conducting business with BIA. Neither did he prohibit the use of any other constitutional provision that might resolve this situation. For example, Article VII, section 4, of the Constitution provides that "[t]he Council shall have the power to call and conduct special elections whenever necessary." Considering the fact that the November 1990 election has been found unconstitutional and violative of ICRA as it related to the offices of Chief, Assistant Chief, and Treasurer, it would appear that the Council would have the authority to call a special election for the purpose of filling those offices.

The Area Director carefully considered his decision in order to ensure that the government-to-government relationship between the Band and the Federal government was not compromised by officials who were not constitutionally elected, while at the same time refraining from interfering in the intra-tribal question of how the Band should deal with the problems resulting from BIA's refusal to recognize the results of the

