



INTERIOR BOARD OF INDIAN APPEALS

Jefferey Alan-Wilson, Sr. v. Sacramento Area Director, Bureau of Indian Affairs

30 IBIA 241 (04/01/1997)

Reconsideration denied:

31 IBIA 4

Related Board cases:

30 IBIA 263

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Reconsideration denied, 32 IBIA 92

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United States Department of the Interior

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

JEFFEREY ALAN-WILSON, SR.

v.

SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-112-A

Decided April 1, 1997

Appeal from a decision recognizing a tribal government for the Cloverdale Rancheria of Pomo Indians.

Vacated and remanded.

I. Appeals: Generally--Indians: Generally

Under 25 C.F.R. § 2.7(b), the failure of a Bureau of Indian Affairs deciding official to give written notice of a decision and to inform interested parties of the right to appeal from that decision, including the 30-day time limit for filing a notice of appeal, tolls the running of the time limit.

APPEARANCES: Pamela J. Stevens, Esq., San Francisco, California, Michael D. Harris, Esq., D. Martin Nethery, Esq., Robert W. Hargreaves, Esq., and Jeffrey S. Flashman, Esq., Rancho Mirage, California, for Jefferey Alan-Wilson, Sr.; William M. Wirtz, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Area Director; David J. Rapport, Esq., Ukiah, California, for John Santana; Adam A. Studnicki, Esq., Phoenix, Arizona, for Joseph A. Stra, Jr.; Thomas Fredericks, Esq., Boulder, Colorado, for Patricia Hermosillo.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Jefferey Alan-Wilson, Sr. (Wilson), seeks review of an April 4, 1995, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), withdrawing BIA recognition of a tribal council for the Cloverdale Rancheria of Pomo Indians of California (Cloverdale Rancheria) elected on November 21, 1991, and headed by Wilson, and recognizing an interim tribal council elected on March 28, 1994, and headed by John Santana (Santana). For the reasons discussed below, the Board of Indian Appeals (Board) vacates the Area Director's April 4, 1995, decision and the February 10, 1992, decision of the Superintendent, Central California Agency, BIA (Superintendent), recognizing the Wilson government, and remands this matter to BIA with instructions to attempt to facilitate resolution of this dispute among the parties.

Background

The parties dispute, and place considerably different emphasis on, many of the facts in this case. The Board concludes, however, that these differences do not prevent the issuance of this decision. The Board recites only

so much of the background information as it deem necessary to an understanding of this decision.

At the beginning of the twentieth century, most of the Indian population of California was scattered and homeless. In recognition of the plight of these Indians, Congress began appropriating funds to purchase land for them. As relevant to this case, the Federal government purchased 27.5 acres of land near Cloverdale, California, for the use of homeless Indians in that area. See Cloverdale Rancheria Legal Description attached to "A Plan for the Distribution of the Assets of the Cloverdale Rancheria, According to the Provisions of Public Law 85-671, Enacted by the 85th Congress, August 18, 1958" (Cloverdale Rancheria Distribution Plan). Although the Board did not find a copy of the original deed for this purchase in the administrative record, the record indicates that the land was purchased on March 11, 1921 (Id.), pursuant to section 3 of the Act of March 3, 1921, 41 Stat. 1225, 1234, which appropriated \$10,000 "[f]or the purchase of lands for the homeless Indians in California."

Wilson contends that this purchase was made for the Makahmo Pomo Indians, and presents an extensive history of this group. He alleges at pages 2-3 of his July 31, 1995, opening Brief (Wilson Opening Brief) that

[t]he Cloverdale Rancheria of Pomo Indians was among the original signatories to the [unratified] 'Barbour Treaties' of 1851-52 between the United States Indian Commissioners and eighteen tribes of California Indians. Originally referred to as the Makahmo Pomo (the tribe's aboriginal name), the historic location of the Makahmo Pomo Village is directly adjacent to the modern boundaries of the town of Cloverdale, California, with the tribelet boundary encompassing Cloverdale and much of the surrounding area; consequently, and during most of the tribe's association with the United States Government the tribe has been referred to interchangeably and indiscriminately as the Makahmo or Cloverdale Indians.

The record shows that the Cloverdale Rancheria was initially divided into 12 lots, which the Department assigned to various homeless Indians. The original assignees were William (Bill) Tooley, Omar Tooley, John Arnold, Fred Arnold, Bill Arnold, Lucy Arnold, Wallace Thompson, John Thompson, Kruse Holupa, Fred Jack, Agnes Santana, and Peter Mariano. It does not appear that tribal affiliation was a prerequisite for receiving an assignment at the Cloverdale Rancheria. A February 19, 1922, letter from the Superintendent 1/ to the Commissioner of Indian Affairs indicated that Bill Tooley was the first Indian to move onto the Cloverdale Rancheria. A February 16, 1935, letter from the Senior Clerk, Indian Field Service, Ukiah, California, to the Superintendent stated that "Bill Tooley * * * belonged to the Yokiah

1/ As relevant to this appeal, the agency designations of Departmental Indian field offices underwent several changes. For ease of reference, the Board will use only the term "Superintendent" without providing the agency designation.

Tribe and his wife was a Geyserville Indian." The record shows, however, that Bill Tooley was, for many years, recognized by the Department as the spokesperson for the Cloverdale Rancheria. See Apr. 22, 1933, letter from the Superintendent to Ernest Buck: "Mr. William Tooley was the first settler on the rancheria and for years has been considered by this office, and has considered himself, as the head of the Cloverdale Band." 2/

Wilson claims to be a descendant of original assignee Lucy Arnold Maysee, and/or Mary Arnold, who is identified as "mother-in-law" on the assignment to John Arnold. This claim does not appear to be disputed.

The record shows that the Department managed the Cloverdale Rancheria through, for example, revoking assignments to individuals who failed to use the assigned lot for a period of time (undated letter to Lucy Arnold Maysee from Area Director, responding to a Feb. 12, 1959, letter: "Our records are not definite as to whether or not you ever lived on the lot or used it. However, it appears that you did not occupy or use the lot for many years; consequently, you lost your rights to the assignment. We believe your reinstatement as a member of the Cloverdale group can only be acquired by a consent of the majority of the adult residents presently living on the rancheria"); reassigning lots to other individuals needing homes, with the approval of the adult residents (July 1, 1947, letter to Santana from the Superintendent assigning Santana Lots 7 and 8 on the Cloverdale Rancheria); and, in general, dealing with problems arising on the Rancheria (Mar. 29, 1922, letter from the Superintendent to Commissioner of Indian Affairs concerning fencing of the Cloverdale Rancheria; Jan. 20, 1926, letter to C.B. Shaw from the Superintendent; and Dec. 4, 1928, letter from the Superintendent to Bill Tooley, both concerning disturbances at the Cloverdale Rancheria; and Mar. 15, 1935, letter from the Senior Clerk to the Superintendent concerning road work at Cloverdale Rancheria).

The Cloverdale Rancheria voted on the question of whether to organize under the Indian Reorganization Act (IRA), 25 U.S.C. § 476 (1994). 2/ The record shows that the Department determined that only adult residents of the Cloverdale Rancheria at the time of the election would be allowed to vote in that election, a fact which suggests that the Department viewed the Rancheria as a group of "adult Indians residing on such reservation" within the meaning of 25 U.S.C. § 476. On June 11, 1934, 10 of the 20 residents of

2/ See also Jefferey Alan-Wilson, Sr., The History of the Lost Tribe, Part I, The Salmon Hole, Nov. 1, 1991, at 9:

"William Tooley, who was the Indian contact organizing the land allotment [at the Cloverdale Rancheria] was "Yokiah" (Mendocino County) rather than MAKAHMO Pomo. Fred, Bill, John, and Mary Arnold appear in 1880 Manuscript census data for Cloverdale and are probably MAKAHMO Pomo; Peter Mariano and Agnes nee Comatch Santana are identified as MAKAHMO in two documents * * *. The ethnic affiliations of the Thompsons, Kruse Holupa, and Fred Jack were not stated in the sources examined."

3/ All further citations to the United States Code are to the 1994 edition.

the Cloverdale Rancheria voted in favor of organizing under the IRA. However, there does not appear to be any dispute that the Cloverdale Rancheria never organized a tribal government. See, e.g., Feb. 19, 1995, Declaration of John Santana (Santana Feb. Declaration) at ¶ 5.

The Act of August 18, 1958, 72 Stat. 619, as amended by the Act of August 11, 1964, 78 Stat. 390 (Rancheria Act), provided for the termination of the trust relationship between the Federal government and the California rancherias. The Cloverdale Rancheria was named in the Rancheria Act as one of the rancherias to be terminated. As amended, section 2(a) of the Rancheria Act states:

When the Indians of a rancheria or reservation request a distribution of assets in accordance with the provisions of this Act, they, or the Secretary of the Interior after consultation with them, shall prepare a plan for distributing to individual Indians the assets of the reservation or rancheria, including the assigned and the unassigned lands, or for selling such assets and distributing the proceeds of sale, or for conveying such assets to a corporation or other legal entity organized or designated by the group, or for conveying such assets to the group as tenants in common Provided, That the provisions of this section with respect to a request for distribution of assets shall not apply to any case in which the requirement for such request is waived by section 1 of this Act, and in any such case the plan shall be prepared as though request therefor had been made. The Secretary shall provide such assistance to the Indians as is necessary to organize a corporation or other legal entity for the purposes of this Act.

Amended section 10 of the Rancheria Act sets out the consequences of distribution of rancheria assets:

(a) The plan for the distribution of the assets of a rancheria or reservation, when approved by the Secretary and by the Indians in a referendum vote as provided in subsection 2(b) of this Act, shall be final, and the distribution of assets pursuant to such plan shall not be the basis for any claim against the United States by an Indian who receives or is denied a part of the assets distributed.

(b) After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families who are not members of any other tribe or band of Indians, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all restrictions and tax exemptions applicable to trust or restricted land or interests therein owned by them are terminated, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the

same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States. The provisions of this subsection, as amended, shall apply in the case of a distribution of assets made either before or after the amendment of the subsection.

Regulations implementing the Rancheria Act were published at 24 Fed. Reg. 4653 (June 9, 1959), and listed the Cloverdale Rancheria as a rancheria whose assets were to be distributed.

The Cloverdale Rancheria was terminated under the Rancheria Act. The record shows that at the time a distribution plan was drawn up, there were five families residing on the Cloverdale Rancheria. The heads of those families, and the persons to whom the Rancheria's assets were distributed, were: Ernest Buck, Blanche Hermosillo, Lillian Jack, Agnes Santana, and Santana. ^{4/} Title to the Rancheria's water system and certain other real property, including a cemetery, was transferred to the Dusho Corporation, which was created to hold and administer this common property. Notice of the termination was published at 30 Fed. Reg. 16274 (Dec. 30, 1965). The termination notice listed a total of 20 individuals--5 distributees and 15 dependent members--whose status as Indians was terminated under the Rancheria Act. This list did not include Wilson, Lucy Arnold Maysee, or Mary Arnold, but did include Santana.

The Cloverdale Rancheria was 1 of 17 rancherias restored to Federal recognition under the stipulated judgment in Hardwick v. United States, Civil No. C-79-1710 SW (N.D. Calif. Dec. 22, 1983). Paragraphs 2 through 4 of that stipulated judgment state:

2. The Court shall certify a class consisting of all those persons who received any of the assets of the rancherias listed and described in paragraph 1 of the California Rancheria Act and any Indian heirs, legatees or successors in interest of such persons with respect to any real property they received as a result of the implementation of the California Rancheria Act.

3. The status of the named individual plaintiffs and other class members of the seventeen rancherias named and described in paragraph 1 as Indians under the laws of the United States shall be restored and confirmed. In restoring and confirming their status as Indians, said class members shall be relieved from the application of sections 2(d) and 10(b) of the California Rancheria Act and shall be deemed entitled to any of the benefits or services provided or

^{4/} According to the May 18, 1961, letters from the Area Director announcing the distribution of assets, Santana was the conservator for both Lillian Jack, his sister, and Agnes Santana, his mother.

performed by the United States for Indians because of their status as Indians, if otherwise qualified under applicable laws and regulations.

4. The Secretary of the Interior shall recognize the Indian Tribes, Bands, Communities or groups of the seventeen rancherias listed in paragraph 1 as Indian entities with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act, and said Tribes, Bands, Communities and groups shall be included on the [BIA's] Federal Register list of recognized tribal entities pursuant to 25 CFR, Section 83.6(b). Said Tribes, Bands, Communities or groups of Indians shall be relieved from the application of section 11 of the California Rancheria Act and shall be deemed entitled to any of the benefits or services provided or performed by the United States for Indian Tribes, Bands, Communities or groups because of their status as Indian Tribes, Bands, Communities or groups.

As a result of this stipulated judgment, the Cloverdale Rancheria was listed in the Federal Register as a tribal entity eligible to receive government services. 50 Fed. Reg. 6055 (Feb. 13, 1985). The Cloverdale Rancheria is still so listed. 61 Fed. Reg. 58211, 58212 (Nov. 13, 1996).

On June 7, 1984, BIA officials met with Santana, four other individuals who were apparently living on the former Cloverdale Rancheria lands, and one individual who was living in Santa Rosa, California, to discuss the effects of Hardwick. As relevant to this decision, the minutes of that meeting indicate that BIA personnel asked the attendees if they would be interested in forming a tribal government. An unidentified attendee asked: "Even though we are terminated?" BIA personnel responded that they were no longer terminated. However, the minutes show that the discussion then turned to services available because of the restoration of Federal recognition. It is not clear from these minutes whether the attendees actually understood the effect of restoration, and, in particular, if they understood that they could organize a tribal government and what advantages there might be in having an organized tribal government.

There is a gap in the information before the Board as to what happened at the Cloverdale Rancheria between 1984 and 1991, when Wilson approached the Agency Office, stating that he wanted to reorganize the Rancheria's government. However, the record indicates that as of May 27, 1987, the date of a general letter from the Superintendent requesting up-dated information on tribal representatives, BIA recognized Santana as the spokesperson for the Cloverdale Rancheria.

Wilson states that when he approached BIA about reorganizing the tribal government, he informed BIA that he was not a Cloverdale Rancheria distributee, dependent member, or lineal descendant, and was told only that he would have to contact Santana, and determine that he was not opposed to Wilson's reorganization efforts. See Wilson Opening Brief at 7-8; Wilson's

Dec. 5, 1995, Reply Brief (Wilson Reply Brief) at 6. In an October 22, 1991, letter to Santana, Wilson stated that he had made several unsuccessful attempts to contact Santana, and that when he ultimately contacted Santana, Santana stated he had no interest in reorganizing the tribal government. 5/

Wilson proceeded with his reorganization plans, drafting a tribal constitution and holding a tribal election on November 21, 1991. Thirteen people voted in this election, electing, unanimously in each case, Wilson as Executive Chief; Ginger (in some places, Georgina or Georgia) Allen-Maggi as Deputy Chief; Merney Wilson-Thomas as Secretary/Treasurer; and Clarence Luna, Sr., and Loretta Lincoln-Harjo as Council Members. 6/

By letters dated February 10, 1992, and addressed to each person elected on November 21, 1991, the Superintendent recognized the results of that election. Wilson states that the Superintendent told him that the delay in recognizing his government resulted from a decision to allow Santana additional time to protest the election. See Wilson Opening Brief at 15. The Board finds no evidence in the record corroborating Wilson's assertion, or any evidence that Santana or anyone other than the persons elected on November 21, 1991, were given written notice of BIA's recognition decision. None of the February 10, 1992, letters in the record contain appeal information.

Wilson began correspondence with BIA regarding funding and other BIA assistance in establishing the tribal government. BIA provided Wilson's government with substantial assistance over the next several years. This assistance included initial consideration of a fee-to-trust land acquisition which Wilson states received substantial opposition from local politicians. See Wilson's Sept. 19, 1996, Supplemental Brief (Wilson Supp. Brief) at 10.

On March 21, 1994, Santana wrote the Superintendent stating his intention to reorganize the Cloverdale Rancheria tribal government, and requesting that his lands be placed back into trust. Santana asserted that he, not Wilson, was the official representative of the Cloverdale Rancheria. On March 29, 1994, Santana submitted a proposed constitution for BIA review.

5/ Santana states that he received one letter from Wilson and talked with him once. Although acknowledging that Wilson asked if he wanted to join Wilson's tribal council, Santana contends that he did not understand that Wilson was talking about reorganizing the tribe. Santana Feb. Declaration at ¶ 8. At page 7 of his Oct. 2, 1995, Answer Brief (Santana Answer Brief), Santana states that he considered Wilson's group to be separate from the Cloverdale Rancheria.

6/ Santana contends that "[t]he election was conducted in San Jose, California, more than 200 miles from Cloverdale, exclusively among the members of [Wilson's] family. None of the five candidates elected to office were listed on the distribution plan or lineal descendants of Indians on that plan." See Santana Answer Brief at 10.

By letter dated August 19, 1994, the Superintendent withdrew his recognition of Wilson's government. The Superintendent acknowledged that BIA knew Wilson was not a lineal descendant of a distributee or dependent member, but stated that Wilson had been allowed to proceed with his reorganization efforts anyway, with the proviso that he contact Santana and ascertain whether Santana opposed those efforts. The letter noted that Santana had shown no interest in being involved in reorganizing the tribal government from 1984 until February 1994. However, the Superintendent stated that BIA "was administratively in error in allowing [Wilson's] group the right to organize the Cloverdale Rancheria." Aug. 19, 1994, Letter at 2. The Superintendent recognized as the governing body of the Cloverdale Rancheria an interim tribal council headed by Santana, which he stated was elected on March 28, 1994. The letter ended by stating that BIA based its decision on the facts that

- 1) The individuals participating in the reorganization of the Cloverdale Rancheria, specifically, the tribal election held on November 21, 1991, and subsequent tribal actions, do not have the right to formally organize under the applicable authorities, i.e., [the IRA] or the Tillie Hardwick judgment.
- 2) [BIA] recognizes the right of the distributees, dependent members, and lineal descendants to formally organize the Cloverdale Rancheria pursuant to the IRA and Tillie Hardwick judgment. It shall be the responsibility of the reorganized government to establish subsequent tribal membership criteria and rolls.

Id. at 3-4.

On September 13, 1994, Wilson appealed the Superintendent's August 19, 1994, decision to the Area Director.

By letter dated October 23, 1994, Joseph A. Stra, Jr. (Stra), notified the Area Director of the formation of a group calling itself the Cloverdale General Council Interim of Lineal Descendants. It does not appear that any of the materials submitted at that time identified the members of this group or its general council. However, one resolution submitted to the Area Director indicated that the group was unhappy with Wilson's leadership.

While his appeal to the Area Director was pending, on or about December 15, 1994, Wilson sought to obtain a temporary restraining order (TRO) from the United States District Court for the Northern District of California. Wilson filed his motion in the original Hardwick case. According to the court, Wilson sought to restrain BIA from "1) recognizing John Santana's Interim Tribal Council; 2) giving consultation or advice to the Interim Council; 3) giving 'false information to the media, private investors, and the general public', and 4) withholding previously approved grants from Wilson's tribal council." Hardwick, Civil No. 79-1710 SW, Slip op. at 5 (N.D. Cal. Dec. 21, 1994). The court denied the TRO, holding that Wilson had not shown likelihood of success on the merits because Hardwick was "not the proper vehicle for adjudicating Wilson's dispute" (Id. at 7); reopening Hardwick would jeopardize the rights of thousands of other California

Indians; and it appeared that Wilson had failed to exhaust his administrative remedies.

Stra filed a brief in Wilson's appeal to the Area Director. Stra stated that his group included Lillian Jack, a Cloverdale distributee; 7/ lineal descendants of Cloverdale distributees Lillian Jack and Blanche Hermosillo; and "other persons of Indian descent with documentable claim to Cloverdale Indian ancestry by reason of identification on official or unofficial established federal rolls." Stra's Jan. 4, 1995, Answer Brief at 1-2. Stra further stated that this group's members, which included at least 18 distributees and lineal descendants, were originally brought together by Wilson's organizational activities. However he asserted that, by Tribal Declaration #94-1118-0001, the group had removed Wilson and replaced him with Stra. 8/ The group contended that it had the right to continue the organizational efforts begun by Wilson, and that the Superintendent's August 19, 1994, decision constituted interference with the Cloverdale Rancheria's right of self-government. This group drafted a third constitution and established membership criteria for the Cloverdale Rancheria.

On January 31, 1995, Santana held a tribal election. Santana states that 12 of the 14 registered voters voted in this election, electing him Chairman; Patty Bird Vice-Chairperson; Leneitte (one of several variant spellings in the record) Laiwa Secretary/Treasurer; and Antoinette Miller and Michele Jojola Council Members. See Santana Feb. Declaration at ¶ 11; Report of Tribal Election of Jan. 31, 1995.

On April 4, 1995, the Area Director affirmed the Superintendent's August 19, 1994, decision. The Area Director's decision states at page 2:

We base our determination on the order issued in [Hardwick]. The court case restored the Cloverdale Rancheria to Federal status and stipulated that only distributees, dependent members, and their descendants would have the right to organize. In order to

7/ Although a Feb. 24, 1995, letter from Stra informed the Area Director that papers had been filed to end Santana's conservatorship over Jack, all copies of those documents in the record are unexecuted. A Mar. 1, 1995, press release which gives no indication that it was ever published, stated that Jack had suffered a series of strokes and was living in a nursing home, but did not indicate whether Jack was competent at that time. Santana contends that Jack is incompetent. Santana Answer Brief at 8.

8/ All copies of the referenced Declaration in the record are undated and unsigned. The Declaration sought to remove Wilson's entire tribal council and to replace it with a new tribal council consisting of Stra as Chairman; Patricia Hermosillo as Vice Chairperson; Vickey Macias as Secretary; Jovey Becerra as Treasurer; and Marcellena Becerra, Mary McCloud, Carmen Stra, and Silverio Espinoza as Council Members. Membership applications for these individuals show that only Patricia Hermosillo was a lineal descendant of a Cloverdale Rancheria distributee or dependent member.

determine those persons, the original distribution list for termination is relied on.

* * * * *

Unorganized Federally recognized tribes would look to historical records and rolls to determine recognized membership for organizational purposes. However, in the case of the Cloverdale Rancheria, although other records exist, the [Hardwick] case governs the initial establishment of a tribal government.

Consequently, the determination to officially organize and determine future membership or reorganize under a Federal Statute rests with termination plan distributees, dependent members and their direct lineal descendants. All such adults should be entitled to participate in organization without meeting further requirements, other than proving descendancy. Any other persons, even though they may be of Pomo (Makahmo) ancestry, would not have any standing with the Cloverdale Rancheria unless they are subsequently accepted and recognized under a tribal governing document or statute enacted after initial organization or reorganization. [9/]

On May 3, 1995, Wilson appealed to the Board. Briefs were filed by Wilson, Santana, and the Area Director. Although an attorney representing Stra entered an appearance, Stra did not file a brief.

Another election was held on August 18, 1995. Although there is little information in the record about this election, it was apparently held by Stra's group. In a July 30, 1996, Motion to Intervene in this appeal, discussed further below, Patricia Hermosillo (Hermosillo) states that she was elected Chairperson on August 18, 1995. The Board has found no other information in the record concerning the composition of this tribal council.

By order dated November 1, 1995, the Board placed the Area Director's April 4, 1995, decision into immediate effect and informed Wilson that, because of this decision, he could choose to proceed to Federal court. On March 20, 1996, Wilson did so. Cloverdale Rancheria of Pomo Indians of California v. United States, No. C-96-1037-CW (N.D. Cal.). By order dated March 25, 1996, the Board stayed further proceedings before it pending its receipt of instructions from the court. On June 6, 1996, the court granted Wilson a preliminary injunction which limited Wilson's authority, but required the Department to recognize Wilson's government as the governing

9/ Following recognition of his tribal government, Santana began requesting assistance and funding from BIA. Wilson filed three additional appeals concerning these matters. Those appeals, which were assigned Docket Nos. IBIA 95-119-A, 95-120-A, and 95-121-A, and which were stayed pending a decision in the present appeal, are addressed in a separate order issued today. 30 IBIA 263.

body of the Cloverdale Rancheria pending resolution of this appeal on the merits by the Board and of the appeal before the court. The court requested the Board to consider whether disputed factual issues existed in the case, and to appoint an administrative law judge to conduct an evidentiary hearing, if necessary.

In its June 6, 1996, order, the court noted that

[t]he day after the hearing on the instant motions took place, another tribal council election was held by the Cloverdale Rancheria Tribal Election Board, an organization that appears to be supported by the BIA and of which at least one member is a BIA official. The election involved members of the Santana and Hermosillo factions. A total of 127 individuals had voting privileges in the election. The five-member tribal council that was elected includes two members of the Santana faction, two members of the Hermosillo faction, and one member whom the BIA has characterized as unaligned, but who the parties agree has familial ties to the Hermosillo faction. This tribal council is referred to in this order as the "June 1 Council." Patricia Hermosillo was elected as Chair. It appears likely that in light of the election, absent an order of this Court to the contrary, the BIA will recognize the June 1 Council and derecognize the Santana Council.

Id. at 7-8.

By letter dated August 29, 1996, Hermosillo provided the Board with a copy of an enrollment resolution passed by her tribal council. This resolution identified the members of the tribal council elected on June 1, 1996, as Hermosillo, Chairperson; Matt Lemley, Vice Chairperson; Christina Hermosillo, Secretary; Elaine Willits, Treasurer; and Antoinette Miller, Member at Large. At page 7 of a September 19, 1996, Supplemental Brief filed in this appeal, Hermosillo stated that the June 1, 1996, election was held after "[t]he BIA and the [Santana council and the August 18, 1995, council] negotiated the parameters of" the election, and that, "[i]n a letter dated June 4, 1996, * * * [the] U.S. Attorney [handling the Cloverdale Rancheria case] stated that the adult community had conducted a valid tribal election." See also Hermosillo's July 30, 1996, Brief in Support of Motion to Intervene (Brief on Motion to Intervene) at unnumbered 3. Contrary to Hermosillo's statement, no copy of the U.S. Attorney's letter was attached to her Brief on Motion to Intervene. The Board did not find any copy of a June 4, 1996, letter from the U.S. Attorney in the record, although it did find a June 3, 1996, letter. See footnote 10.

By order dated June 27, 1996, the Board allowed the parties an opportunity to propose procedures to be followed on remand. Responses were filed by Wilson, Santana, the Area Director, and Hermosillo. Only Wilson argued that there were factual issues in dispute which required an evidentiary hearing. On August 8, 1996, the Board ruled that a hearing did not appear necessary, and gave the parties an opportunity to file briefs on the issues

Wilson contended required a hearing. Supplemental briefs were filed by Wilson, Santana, the Area Director, and Hermosillo.

Participation by Hermosillo

On July 30, 1996, the Hermosillo tribal council moved to intervene in this appeal on the grounds that it was the lawfully elected governing council of the Cloverdale Rancheria. ^{10/} By order dated August 8, 1996, the Board took this motion under advisement and informed the parties that they could address the motion in the supplemental briefs filed on remand. Only Wilson opposed intervention. See Wilson Supp. Brief at 3-10.

The Board has carefully considered Wilson's arguments against intervention and its regulations in 43 C.F.R. § 4.313(a) which provide that motions to intervene "shall be liberally construed." The Board finds that it cannot ignore the passage of time in regard to this matter. It is clear that the individuals claiming association with the Cloverdale Rancheria have continued to attempt to reorganize the Rancheria's tribal government in a way that would be acceptable to BIA. During this process, individuals who initially joined with Wilson have now disassociated themselves from him. Further, as discussed below, it is also clear that Santana does not represent all Cloverdale Rancheria distributees, dependent members, and lineal descendants. Under the unique circumstances of this case, discussed further below, and in the interest of ensuring as thorough representation as possible for all parties potentially affected by this decision, the Board grants amicus curiae status to Hermosillo.

Discussion and Conclusions

This is not an ordinary tribal government dispute, arising from an internal dispute in an already existing tribal entity. In such cases, BIA and this Board must exercise caution to avoid infringing upon tribal sovereignty. E.g., Wadena v. Acting Minneapolis Area Director, 30 IBIA 130 (1996). Rather, this case concerns, in essence, the creation of a tribal entity from a previously unorganized group. In such a case, BIA and this Board have a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so.

The Board first addresses Wilson's contention that Santana's challenge to his government was barred by laches. Under 25 C.F.R. § 2.7(a),

^{10/} Although BIA has not recognized Hermosillo's government, as noted above, Hermosillo states that the district court in Cloverdale Rancheria was advised that BIA considered the June 1, 1996, election valid. In his June 3, 1996, letter to the district court, the Assistant U.S. Attorney stated that 82 out of 127 eligible voters voted in the June 1, 1996, election. Nothing in the materials before the Board shows who were considered eligible voters for that election, although the Board counts 120 distributees, dependent members, and lineal descendants among the individuals shown on Hermosillo's Aug. 29, 1996, list of tribal members and individuals eligible for tribal membership.

which was in effect at all times relevant to this appeal, a BIA decisionmaker must give "all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail." Although Wilson contends at page 15 of his Opening Brief that BIA delayed recognizing the November 21, 1991, election in order to give Santana an opportunity to appeal, as noted in the Background section above there is no evidence in the record that Santana was given written notice of the Superintendent's decision recognizing Wilson's government or was informed of his right to appeal. In fact, at paragraph 3 of a September 29, 1995, Declaration submitted with his Answer Brief, Santana denies receiving any written notice of BIA's recognition of the results of Wilson's November 21, 1991, election.

Under 25 C.F.R. § 2.7:

(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

(c) All written decisions, except decisions which are final for the Department pursuant to § 2.6(c), shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

[1] The Superintendent's failure to give Santana written notice of the decision recognizing Wilson's government tolled the time period during which Santana could appeal that decision. Because there is no evidence in the record that Santana was ever given written notice of the decision and his right to appeal from it, his time for filing an appeal from that decision never began to run. Accordingly, Santana's appeal was timely under Departmental regulations. See, e.g., Central Council of Tlingit and Haida Indian Tribes of Alaska v. Acting Chief, Division of Social Services, 28 IBIA 206, 208 (1995); Johnson v. Acting Minneapolis Area Director, 28 IBIA 104, 106 (1995); Sac and Fox Nation v. Chief, Branch of Judicial Services, 26 IBIA 203, n.1 (1994). Cf. Albertson v. FCC, 182 F. 2d 3 97, 3 99 (D. C. Cir. 1950) ("[i]n the absence of any specific limitation, [a motion to reconsider an agency decision] may be filed within the period for taking an appeal. That is so, for within such period jurisdiction over the contested order remains with the [agency]").

The basic question presented in this appeal is: Who can reorganize the Cloverdale Rancheria's tribal government? 11/ The Area Director based

11/ The parties seeking to reorganize the Cloverdale Rancheria's tribal government differ in their views as to who should be allowed to be tribal members: Wilson and Hermosillo favor broadly inclusive membership, while Santana advocates very restrictive membership. Therefore, the decision as to who can reorganize the tribal government will also impact the tribe's

his answer to this question on the stipulated judgment in Hardwick, concluding that the Department has consistently interpreted that judgment as limiting the right to reorganize the tribal government of a rancheria restored under Hardwick to that rancheria's distributees, dependent members, and lineal descendants. At page 7 of his October 20, 1995, Answer Brief (Area Director Answer Brief), the Area Director argues: The "decision in Smith v. U.S. [, No. C 74 1016 WTS (N.D. Cal. Mar. 28, 1978)], determined that the distribution plans created vested interests in the Distributee. This case established the standard to be utilized in the organization of all the previously terminated rancherias as those parties with vested rights and this standard was confirmed in the stipulated judgment in the Tillie Hardwick case."

The Smith decision did not concern the reorganization of a tribal government; instead, it dealt with questions of whether the Hopland Rancheria was properly terminated and to whom the United States was liable for rancheria property lost or destroyed, or for the diminution in value of such property. The decision held that the Rancheria was not properly terminated and that liability ran to the distributee because the distributee had received a vested beneficial interest in the lands distributed to him. On its face, Smith does not address the question of who could reorganize the tribal government of the Hopland Rancheria or any other rancheria. The stipulated judgment in Hardwick does not cite Smith or repeat language contained in Smith.

The Board does not find it necessary to decide the significance of Smith in order to reach a decision here. It merely notes that Smith was first raised in the Area Director's Answer Brief.

Wilson attacks the Area Director's reliance on Hardwick, contending that the judgment does not address the manner in which restored tribes can reorganize. He argues that the class of individuals established under the stipulated judgment relates only to the restoration of individual rights and Indian status, not to the right to reorganize the tribal government. Wilson argues that restricting the right to reorganize the tribal government to actual distributees, dependent members, and lineal descendants merely continues the inequitable and arbitrary decisionmaking process that was evidenced in the manner in which the rancherias were terminated. See Wilson Opening Brief at 17-19; Wilson Reply Brief at 9.

Although paragraphs 2 and 3 of the Hardwick stipulated judgment relate to individuals and individual rights, paragraph 4 requires the restoration of the 17 rancherias "with the same status as they possessed prior to distribution of [their] assets." The Area Director reads Hardwick as restoring the rancherias as groups of adult Indians residing on reservations, *i.e.*, "the same status as they possessed prior to distribution of [their] assets."

fn. 11 (continued)

determination of who can be a tribal member. Because of this, the parties devote substantial portions of their discussions to matters relating to tribal membership.

If the Cloverdale Rancheria were restored to the status of a group of adult Indians residing on a reservation as of the time just prior to distribution, those adult Indians would be the distributees, dependent members, and, by extension, their adult lineal descendants. The Board concludes that the record amply demonstrates that the Department considered the status of the Cloverdale Rancheria prior to termination to be that of a group of adult Indians residing on a reservation, and therefore holds that the Area Director's interpretation of paragraph 4 of Hardwick is reasonable.

Wilson next contends that the Department's actual practice has not demonstrated the Area Director's alleged consistent interpretation of Hardwick. In support of this assertion, he submits a December 4, 1995, affidavit from Aileen Meyer. In her affidavit, Meyer states that she is familiar with the Hardwick case through employment in the law offices of the attorneys who brought the case on behalf of the rancherias (¶ 3), and through personal experience in assisting with the reorganization of the tribal government for the Rohnerville Rancheria, one of the rancherias restored under Hardwick. ¶¶ 5-7. Meyer states that, in her experience, BIA had no consistent position with respect to the "formation" of the rancherias (¶ 4), and that each rancheria "has been reorganized depending on the particular circumstances of that Tribe." ¶ 8. However, Meyer fails to give any examples to support her assertion that BIA has been inconsistent in determining who can reorganize a tribal government for a Hardwick rancheria. In fact, the only example she gives is Rohnerville, which she states was reorganized by a distributee and lineal descendants. ¶ 7.

As a second example of BIA's alleged inconsistency, Wilson cites an August 11, 1994, letter from the Assistant Secretary - Indian Affairs to the Chairman of the House Subcommittee on Native American Affairs. This letter, which was printed in H.R. Rep. No. 801, 103rd Cong., 2nd Sess. (1994), available in 1994 WL 562215, at *4 (Leg. Hist.), concerned legislation to restore the Paskenta Rancheria. Wilson argues that, in this letter, the Assistant Secretary "strongly advocated an inclusive membership process." Wilson Reply Brief at 18. The Assistant Secretary's letter states in relevant part:

The Paskenta Band has lived in the foothills of southwestern Tehama County, California, near the town of Paskenta, from historical times. In 1920, the Federal Government purchased 260 acres for the Indians of the Paskenta area and called it the Paskenta Rancheria (Rancheria). By 1940, however, only two families were still living on the land. The land comprising the Rancheria was sold and the assets distributed to the two individuals who held assignments on the Rancheria after 1940. With the publication of a notice in the FEDERAL REGISTER on April 11, 1961, the Federal trust relationship with the Indians of Paskenta Rancheria was officially terminated.

Although the current membership of the Paskenta Band includes a number of lineal descendants of these two distributees, it includes many more who descend from other Nomlaki

Indians clearly identified with the group at Paskenta as early as 1900.

The Paskenta Band has submitted a 1994 membership list containing 179 members; they protect [sic] that when complete, the membership will include from 170 to 185 persons who meet their membership requirements. Eligibility for membership is limited to Persons of Nomlaki Indian blood who resided on the rancheria prior to distribution of the Rancheria's assets or who were identified as Indians from Paskenta in any rolls prepared by [BIA] and their direct lineal descendants who have maintained tribal relations with the Band.

The Assistant Secretary's letter presents historical information in regard to the Paskenta Rancheria, which, while much more abbreviated, is similar in type to information Wilson presents in regard to the Cloverdale Rancheria. However, as to the present-day membership and criteria for membership, the Board reads the letter as merely stating information presented by the tribe. It does not read the letter as either supporting or opposing the tribe's determination of its membership.

Also, the Paskenta Rancheria was not restored under Hardwick, but rather by the Paskenta Band Restoration Act, 25 U.S.C. §§ 1300m--1300m-7. In section 1300m-4(b), Congress provided for broad membership for the purpose of reorganizing the Paskenta Rancheria's tribal government, but left the ultimate establishment of membership criteria to the tribe. Because the Paskenta Rancheria was restored by legislation, not under Hardwick, any argument based on what Congress did in regard to the Paskenta Rancheria is, at best, only an argument by analogy as to what should/could be done in regard to a rancheria restored under Hardwick.

Although not discussed in this context by Wilson, the Superintendent's initial decisions here to allow Wilson to reorganize the Cloverdale Rancheria's tribal government and to recognize the results of Wilson's election, also appear at odds with the Area Director's assertion that there was a consistent practice which restricted reorganization efforts for Hardwick rancherias to that rancheria's distributees, dependent members, and lineal descendants. The record contains a June 22, 1994, memorandum from the Superintendent to the Regional Solicitor requesting an opinion as to whether the right to reorganize the tribal government of a Hardwick rancheria was restricted to distributees and their lineal descendants. It appears that, at best, the Superintendent was ignorant of any consistent practice in this area. As a BIA official responsible for overseeing several Hardwick rancherias, ^{12/} the Superintendent should have been aware of any such practice.

The Area Director has not provided any evidence to support his assertion that the Department has had a consistent interpretation of Hardwick

^{12/} A Dec. 5, 1994, letter from the Superintendent to Wilson indicates that the Central California Agency has administrative jurisdiction over 11 of the 17 Hardwick rancherias.

in this area, or has had a consistent practice based on that interpretation. Such evidence could have included written documentation setting forth this interpretation in a context prior to this appeal, and information concerning the reorganization of the tribal governments for the other 16 rancherias which were restored by Hardwick. ^{13/} Santana agrees with the Area Director's assertion that the Department has had a consistent practice in this area, but also fails to present any collaborating evidence. See, e.g., Feb. 10, 1995, Special Appearance before the Area Director at 1-2.

The Board concludes that the Area Director has not shown that the Department has had a consistent practice in regard to who is entitled to reorganize the tribal government of a rancheria restored under Hardwick. It also concludes, however, that Wilson has not shown that the Department has not had a consistent practice.

Assuming for this part of the discussion that the Department had a consistent practice in this area, the Board questions whether that practice was actually followed here. According to the Area Director, the consistent interpretation of Hardwick has been that distributees, dependent members, and lineal descendants could reorganize the tribal government. It appears, however, that BIA based its decisions here solely on the status of the leader of the reorganization effort. In apparent summary of BIA's position, the Area Director contends that "Mr. Santana, not Mr. Wilson, should be recognized by [BIA] as a proper party to partake in the reorganization of the tribe. Simply stated, Mr. Wilson is not a part of the class recognized by the court in Hardwick and therefore lacks entitlement to develop the Cloverdale Tribe or its membership." Area Director Answer Brief at 10.

Wilson was initially allowed to reorganize the tribal government even though he admitted that he was not a lineal descendant of a Cloverdale Rancheria distributee or dependent member. Wilson and Hermosillo agree, however, that several of the individuals involved in Wilson's reorganization effort were lineal descendants of Cloverdale Rancheria distributees. Nothing in the record indicates that BIA at any time considered the identity and status of individuals supporting Wilson's reorganization effort and/or the possibility that lineal descendants of distributees might be affiliated with him. Nor is there any indication that, when Santana expressed his interest in reorganizing the tribal government, BIA informed him that lineal descendants were, or might be affiliated with Wilson, or informed Wilson or anyone involved in his reorganization effort of Santana's interest. Consequently, BIA did not give the Cloverdale Rancheria lineal descendants involved in Wilson's reorganization effort any opportunity to present their position or to continue their reorganization effort without the apparent taint of Wilson's involvement, whether together with, or independent of, Santana.

As noted in the Background section, Stra contended in his filings before the Area Director that the lineal descendants removed Wilson from

^{13/} Wilson states that the Cloverdale Rancheria is the last of the Hardwick rancherias to reorganize its tribal government. Wilson Reply Brief at 2.

office, and should have been allowed to continue their efforts to reorganize the government and to elect a new tribal council. Although it appears that Stra's group also included individuals who were not lineal descendants of distributees, including Stra himself, the Area Director's decision does not show any recognition of the basic argument that lineal descendants involved in Wilson's reorganization effort should have received some consideration.

The Board finds that BIA erred in this case by focusing its analysis solely upon the status of the leaders of the reorganization efforts, rather than also considering the involvement of other individuals whom BIA stated had the right to participate in the reorganization of the tribal government under its alleged consistent interpretation of Hardwick.

When he revoked BIA's recognition of Wilson's government, the Superintendent stated that he was recognizing Santana's interim tribal council, which he further stated was elected on March 28, 1994. The Board finds nothing in the record supporting a conclusion that Santana held an election on March 28, 1994. In fact, at page 1 of an August 29, 1994, letter to the Central California Agency, Santana stated that "[a] self-appointed interim tribal council, consisting of John Santana, Patty Bird, Lennette Laiwa, and Antoinette Miller commenced the organization of the Cloverdale Rancheria. All of the councilmembers are either distributees or descendants of distributees from the Cloverdale Rancheria." (Emphasis added.) See also, June 9, 1994, letter to the Superintendent from counsel for Santana at 4. The Board found no reference to March 28, 1994, as the date on which Santana's interim tribal council appointed itself, although there are references to a May 28, 1994, organizational meeting. Id. at 1; Santana Feb. Declaration at ¶ 10. Other than Santana's statement as to the composition of his interim tribal council, the Board finds no other evidence in the record showing who participated in Santana's 1994 reorganization effort. However, from the fact that Article III, section 1, of Santana's draft constitution would not permit anyone to be a member of the Cloverdale Rancheria except distributees, dependent members, and lineal descendants, it may be a safe assumption that no one other than such persons participated in his reorganization effort.

Although he issued his decision on April 4, 1995, more than two months after Santana's January 31, 1995, election, the Area Director did not mention that election in either his decision or in his filings on appeal to the Board. Instead, he affirmed the Superintendent's recognition of the interim tribal council "elected" on "March 28, 1994."

Based on Santana's statements and the fact that the record does not contain any references to, or documentation of, a March 28, 1994, election, the Board finds that the record does not support either the Superintendent's or the Area Director's recognition of an interim tribal council headed by Santana which was elected on March 28, 1994.

Although the correct identification of the interim tribal council being recognized might seem relatively insignificant, the Board finds it indicative of what appears to be BIA's failure either to ensure that the administrative record contained evidence in support of its decisions, or perhaps, more seriously, to make relevant inquiries before issuing those decisions.

The record indicates that members of Stra's and Hermosillo's groups objected that they were being excluded from Santana's reorganization effort. On January 27, 1995, the Superintendent wrote to Santana, indicating that 23 individuals, including Hermosillo, who claimed to be lineal descendants of Cloverdale distributees and dependent members, had contacted him about being excluded from Santana's reorganization effort and the January 31, 1995, election. In that letter, the Superintendent stated that 22 of those individuals had been verified to be Cloverdale Rancheria lineal descendants, and 1 individual could not be identified. The letter stated at page 2:

Although this Agency has not been provided documented evidence of a denial of membership and the right to participate in the tribal election process, we feel that the Interim Tribal Council of the Cloverdale Rancheria is required to investigate this matter prior to the January 31, 1995 tribal elections to avoid a violation of any individual's right to participate. We would very much appreciate a response to these issues.

In an undated letter to the Superintendent, Santana stated that no one who had wanted to fill out a membership application had been turned down. The Board finds this statement unresponsive to the concerns expressed in the Superintendent's letter. It also finds nothing in the record indicating that any further action was taken in regard to those concerns, despite several requests for further action from Hermosillo. See, e.g., letters of Feb. 24, 1995; Mar. 3, 1995; and Mar. 9, 1995.

The record contains a copy of a membership application used by Santana. The application provided:

1. I understand that membership in the Rancheria is limited to persons whose names appear on the Plan for the Distribution of the Assets of the Cloverdale Rancheria, approved by the Commissioner of Indian Affairs on August 13, 1959 ("Distribution Plan"), and their direct lineal descendants.

2. ☐ My name appears on the Distribution Plan.

☐ I am a direct lineal descendant of a person whose name appears on the Distribution Plan.

Name of person from whom I am descended: _____

[Attach family tree]

3. In submitting this application I understand that the [BIA] has established a government-to-government relationship with an organization calling itself the Makahmo Pomo Indian Nation. However, that organization is not composed of those Indian people with a legal right to reorganize the Cloverdale Rancheria. I oppose any constitution or other organizational document for the Cloverdale Rancheria that does not limit membership to persons whose names appear on the Distribution Plan and their direct lineal descendants.

4. I support a request by the interim tribal chairman, John Santana, and the interim tribal council, for a BIA conducted election under the Indian Reorganization Act, using a voter's list composed of persons named in the Distribution Plan and their direct lineal descendants.

I declare under penalty of perjury the foregoing is true and correct.

Although there is at least one statement in the record indicating a belief that this membership application was amended (see Jan. 30, 1995, letter to Area Director from counsel for Stra at 3), the Board found no copy of an amended application, and no indication of what amendments were made or when they were made, or whether all distributees, dependent members, and lineal descendants were notified before the January 31, 1995, election that the membership application had been amended and were given an opportunity to apply for membership using the revised application form. In fact, the January 30, 1995, letter specifically stated that no member of Stra's group received an amended membership application. Id. The Board considers it highly likely that the membership application quoted above was used in Santana's May 1994 "membership drive," and probable that it was the basis for determining eligible voters for the January 31, 1995, election. See Santana Feb. Declaration at ¶ 10.

The Board has serious concerns about this membership application. The application effectively limited the right to participate in Santana's reorganization effort to individuals who agreed with his position that only distributees, dependent members, and lineal descendants could be members of the Cloverdale Rancheria. Thus, other distributees, dependent members, and lineal descendants who favored a broader membership base were effectively cut out of the reorganization process.

There is a good likelihood that Santana's membership application had a chilling effect on the freedom of speech of individuals who did not agree with Santana's restrictive position on membership. See, e.g., Jan. 30, 1995, letter to the Area Director from counsel for Stra at 3. Freedom of speech is guaranteed under the Indian Civil Rights Act, 25 U.S.C. § 1302(1). The Board has held that in maintaining the government-to-government relationship with Indian tribes, BIA has the authority and the responsibility to decline to recognize a tribal action where it finds that the action is tainted by a violation of the Indian Civil Rights Act. Wadena, 130 IBIA at 148; John v. Acting Eastern Area Director, 29 IBIA 275 (1996); Naylor v. Sacramento Area Director, 23 IBIA 76 (1992); Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992).

The Area Director's April 4, 1995, decision did not mention Santana's January 31, 1995, election or the Superintendent's efforts to ensure that all persons eligible to participate in the reorganization of the Cloverdale Rancheria tribal government were included in that reorganization process. It did, however, state that "[a]ll such adults [termination plan distributees, dependent members, and their direct lineal descendants] should be

entitled to participate in organization [of the Cloverdale Rancheria] without meeting further requirements, other than proving descendancy." Even if there had not been earlier, by the time the Area Director issued his decision there were obvious questions concerning whether Santana was allowing full participation in his reorganization effort by all of the individuals whom the Area Director states the Department has consistently recognized as eligible to reorganize the tribal government of a Hardwick rancheria. It appears quite likely that, in both March 1994 and January 1995, Santana was allowing only those individuals who agreed with his restrictive membership position to participate in his reorganization effort. The Board has no opinion as to whether the membership of the Cloverdale Rancheria should be restrictive or inclusive. It finds, however, that a reorganization effort which limited participation to only those individuals who agreed with the position of the person leading that effort is not consistent with the Area Director's statement of the Department's interpretation of who is eligible to reorganize the tribal government of a Hardwick rancheria.

In summary, the Board finds no evidence in the record that the Department either did or did not have a consistent practice in regard to determining who would be allowed to reorganize the tribal governments of rancherias restored under Hardwick, and no evidence that all of the individuals the Department claims it recognized as entitled to reorganize such a tribal government were actually allowed to participate in Santana's reorganization effort. Because of these findings, the Board concludes that neither the Superintendent's February 10, 1992, decision recognizing Wilson's government, nor the Area Director's April 4, 1995, decision recognizing Santana's government is supported by the administrative record. Therefore, the Board vacates both of those decisions and remands this matter to BIA. 14/

The Board believes that this matter can and should be resolved among the parties. 15/ Therefore, on remand, the Area Director shall act as a facilitator for discussions intended to resolve this dispute. If the Area Director can demonstrate that a consistent interpretation of Hardwick has

14/ Under the district court's June 6, 1996, order in Cloverdale Rancheria, supra, the Department is required to recognize Wilson's government pending both a decision on the merits by this Board and resolution of the appeal still pending before the district court. In the absence of other instructions from the district court, the Department will continue to recognize Wilson as the Chief Executive in accordance with the court's order during this remand.

15/ The Board is aware that Stra previously attempted to resolve this dispute between his and Santana's groups. See Draft Agreement for Collaborative Resolution, Exh. A to Jan. 30, 1995, letter to the Area Director from counsel for Stra; Mar. 17, 1995, letter from counsel for Stra to counsel for Santana, advising of BIA's agreement to facilitate a meeting to resolve the dispute. It appears that Santana had little interest in a compromise resolution of the dispute at that time, probably because of BIA's recognition of his interim tribal council.

been followed concerning the reorganization of other Hardwick rancherias, all of the individuals recognized as eligible to reorganize the Cloverdale Rancheria's tribal government under that interpretation shall be allowed to participate in the discussions. If the Area Director is not able to demonstrate the alleged consistent interpretation, the discussions shall include all of the individuals who have the same status in regard to the Cloverdale Rancheria as persons who have been allowed to reorganize the tribal governments of any other Hardwick rancheria. This remand should not be construed to require unanimous agreement by the parties; rather, a decision reached by a majority of the participants, or other percentage agreed upon by them, should be accepted. 16/

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 February 10, 1992, decision of the Superintendent, Central California Agency, recognizing the Cloverdale Rancheria tribal government elected on November 21, 1991, and the April 4, 1995, decision of the Sacramento Area Director recognizing the tribal government elected on March 28, 1994, are vacated. This matter is remanded to the Area Director with instructions to attempt to facilitate resolution of this dispute. 17/

 //original signed
 Kathryn A. Lynn
 Chief Administrative Judge

I concur:

 //original signed
 Anita Vogt
 Administrative Judge

16/ Although the Board in no way requires such a resolution, it notes that the parties might, for example, agree to abide by the results of the June 1, 1996, election.

17/ Because of its disposition of this case, the Board does not reach other issues raised by the parties.