United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY 12 2014

Ms. Amy Dutschke, Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, California 95828

Dear Ms. Dutschke:

This appeal arises from a dispute within the Timbisha-Shoshone Tribe (Tribe) concerning eligibility to participate in a Secretarial election. Earlier this year, you authorized a Secretarial election for the Timbisha Shoshone Tribe, which took place on March 29, 2014. On April 2, 2014, the following tribal members challenged the election results: Joe Kennedy, Grace Goad, Erick Mason, Pauline Esteves, Madeline Esteves, and unnamed members aged 16 and 17 years old (Challengers). Pursuant to discussions with you, Director Michael Black, and the Solicitor's Office, I have elected to issue a decision on the challenge, on behalf of the Secretary.

For the reasons discussed below, I find that none of the Challengers' arguments for vacating the election compel such an action. I approve the Tribe's ratification of a new Constitution. My decision is final for the Department of the Interior (Department).

I. Introduction

An important attribute of tribal sovereignty and self-governance is the right to determine citizenship and the eligibility of its citizens to vote. Indeed, determining the composition of its body politic is one of the most important decisions any government can make. Like the United States, tribal governments determine tribal citizenship through its political and constitutional processes. Tribal sovereignty and self-governance are directly linked to tribal political membership and engagement in political processes. The Federal Government should interfere in such key tribal issues only when the law clearly provides such authority and no other alternative exists.

It is important to remember that, in the exercise of sovereignty and self-governance, tribes have the right, like other governments, to make good decisions, bad decisions, and decisions with which others may not agree. Possessing sovereignty and self-governance means bearing the immense responsibility that comes with the exercise of governmental powers. In other words, like the Federal Government, tribal governments and their citizens may occasionally make mistakes, even about matters as important as enrollment. But such decisions are tribal decisions

to make. The genius of tribal self-governance is that it insures that tribes must live with the consequences of their own decisions, good or bad, rather than the consequences of Federal decisions. One of the most profound lessons of the success of tribal self-governance is that the Federal Government should defer, whenever possible, to decisions made by tribal governments.

In this case, the matter at issue is a Federal matter, a Secretarial election. But also at issue is a decision made by the Tribe, a collective decision made in an election. The substance of the matter goes to the heart of tribal self-governance; it is a dispute about tribal membership. Pending before the Department are assertions that the results of the Secretarial election are invalid. The essence of the Challengers' argument is that certain citizens of the Timbisha Shoshone Tribe should be disenrolled and that those citizens' votes should not be counted in a Secretarial election conducted under Federal law. When the Department is acting pursuant to Federal statutes, the Department will seek to comply with Federal law in the manner that is least intrusive to tribal self-governance.[1] For the reasons described below, I find it unnecessary to intrude on the Tribe's citizenship determinations.

II. Background and Facts Relating to Secretarial Election

On March 29, 2014, the Department conducted a Secretarial election on a proposed Constitution for the Tribe, pursuant to Federal statute (25 U.S.C. § 476) and implementing regulations (25 C.F.R. part 81). The Tribe initially submitted the request for a Secretarial election on October 29, 2013, but withdrew that request when the Federal Government shut-down made compliance with regulatory deadlines impossible. The Tribe submitted their request again pursuant to a Tribal Council Resolution dated December 5, 2013 (Ex. A). The Director, Pacific Regional Office, authorized the election on January 6, 2014, and directed the Superintendent, Central California Agency, to call and conduct the election.[2] (Ex. B). Pursuant to the regulations, a Secretarial Election Board (Election Board)[3] was formed, a list of tribal members was provided by the Tribe, and election information distributed to those members 18 years of age and older, including a form to register to vote in the Secretarial election. (Ex. C).

On March 7, 2014, the Election Board posted the Eligible Voters list, consisting of the names of those individuals who registered to vote in the Secretarial Election. (Ex. D.) As provided for in the regulations, some tribal members challenged the Eligible Voters list on March 14, 2014 (25 CFR. 81.13) (Ex. E). The challengers asserted that qualified tribal members had been

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[1] *Santa Clara Pueblo,* 436 U.S. at 60, 63 (referencing that "a proper respect" for tribal sovereignty "cautions" that we tread lightly; referencing other titles of ICRA "manifest a congressional purpose to protect tribal sovereignty from undue interference").

[2] On March 18, 2014, the Interior Board of Indian Appeals (IBIA; Board) received an appeal of the Regional Director's authorization of the election from the same tribal members whose challenge to the election results is being decided today. On March 31, 2014, the Board issued a Pre-Docketing Notice denying the appellants' request to stay the election and placing the Secretary's authorization into effect. The Board directed the Regional Director to file the administrative record of the decision to authorize the election, which was filed on May 1, 2014. On May 6, 2014, the Board issued a docketing Order setting out a briefing schedule for the appeal. It is my expectation that, in light of today's decision - a final agency decision approving the outcome of the Timbisha Shoshone Secretarial election – the Interior Board of Indian Appeals will find that there is no longer a dispute over which it has jurisdiction.

[3] Pursuant to 25 CFR 81.8, the Chairperson of the Election Board was an employee of the BIA and the other 3 members of Election Board were members of the Timbisha Shoshone Tribe.

wrongly denied inclusion on the list, and that persons ineligible to vote had been included on the list. On March 20, 2014, the Election Board dismissed the challenge. (Ex. F).

The Secretarial election was conducted entirely by absentee ballot. On March 29, 2014, the Election Board counted the ballots and posted the Certificate of Election Results (Certificate). According to the Chairman of the Election Board, the Certificate posted on March 29, 2014, contained an error. The Election Board corrected the error and re-posted the Certificate on March 31, 2014. (Ex. G). According to the Certificate, the proposed Constitution was adopted by a vote of 63 in favor, 22 opposed, and 1 spoiled ballot.

As provided for in the regulations (25 CFR 81.22), tribal members challenged election results within 3 days of the posting of the Certificate. The Challengers asserted that the election was invalid, and therefore the proposed Constitution had not been adopted by the Tribe (Ex. H).

III. Arguments of Challengers

The challengers assert that the election is invalid because it was not conducted in conformity with the Tribe's 1986 Constitution. Specifically, Challengers assert that:

1. The Election Board erred in rejecting the applications for registrations submitted by Tribal members between 16 and 18 years of age.

2. The Election Board erred because 40 people included on the Registered Voters List, and whose names appear on the membership roll supplied to the Election Board by the Tribe, do not satisfy the membership requirements set out in the Tribe's Constitution.

3. The Election Board erred in declaring that the Secretarial election would be valid if 30 percent of the eligible voters took part, versus the 50 percent voter participation requirement for an amendment as set out in the 1986 Constitution.

4. The Bureau of Indian Affairs (BIA) erred in using a "registered voters list" to identify the "eligible voters," instead of listing of all adult members of the Tribe.

5. The Election Board and BIA disseminated false information to tribal members. On March 7, 2014, the Election Board distributed information stating that the date of the election was August 29, 2014. On March 10, 2014, the Election Board distributed corrected information. The Challengers assert that the misinformation "may have misled eligible voters into not voting on time" and "some voters undoubtedly relied on the erroneous August 29, 2014, date."

In addition to the bases for invalidating the election set out above, the challengers requested the opportunity to inspect a ballot that was declared invalid by the Election Board for being "spoiled or mutilated." Challengers assert that a single vote could determine the outcome of the election. As shown below, the outcome of the election is not so close as to be determined by a single vote.

IV. Analysis

Secretarial elections are initiated by tribes or tribal citizens, but are Federal in nature. See generally Nell Jessup Newton, et al, eds., Felix Cohen's Handbook of Federal Indian Law (2012 Ed.) § 4.06[2][a], at 286-87. As a result, most of the applicable law is Federal law and regulations. As noted above, these laws should be interpreted in a manner that best serves tribal self-governance. We address each of the Challengers' arguments in turn.

A. Rejection of Voters Younger Than 18 Is Required by Federal Law

I begin my analysis with Challengers' assertion that 16 and 17 year olds should have been allowed to participate in the Secretarial election. This is the only claim by the Challengers that could increase the pool of eligible voters for this election and therefore its resolution is relevant to the analysis of the other claims. I find that this claim fails as a matter of law. The 18 year old requirement is set by federal law. Case law cited by the Challengers does not permit variance from the Federal requirement. The Challengers purport to distinguish *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085 (8th Cir. 1977) on the basis that *Cheyenne River* dealt with a voting age requirement of tribal law that violated the Federal Constitution. But the Circuit Court did not base its decision on constitutional considerations. In affirming BIA's permitting 18 year olds to vote, despite a tribal law requirement that voters must be 21, the court said, "The Congress, not the Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections, and the Congressional definition of 'adult Indians' in 25 U.S.C. § 479 leaves no doubt that it intended a uniform Federal age qualification for voters in Secretarial elections." 566 F.2d at 1088-89. The Election Board's rejection of tribal members under 18 years of age was required by Federal law and cannot support invalidation of the Secretarial election.

B. Inclusion of Alleged Unqualified Voters, if Error, was Harmless Error

At the heart of this challenge is a long-standing dispute as to the validity of the enrollment of 35 voters.[4] As a general matter, it is not appropriate for the Department to intervene in internal tribal disputes or procedural matters[5] because, absent a Federal statute or express authority in a tribal governing document, the Department has no authority over matters of tribal citizenship.[6] Even in matters in which the Department is acting pursuant to Federal statutes, the Department should exercise its authority in a way that avoids unnecessary intrusion in tribal self-governance.[7]

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[4] The enrollment dispute impacts about 74 people shown on the Tribe's membership roll.

[5] *Cheyenne River Sioux Tribe v. Aberdeen Area Director,* 24 IBIA 55 (1993).

[6] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."). See also Nell Newton, et al., eds, Felix Cohen's Handbook of Federal Indian Law, 3.03[3] at 175-76 (2012 ed).

[7] *Santa Clara Pueblo,* 436 U.S. at 60, 63 (referencing that "a proper respect" for tribal sovereignty "cautions" that we tread lightly; referencing other titles of ICRA "manifest a congressional purpose to protect tribal sovereignty from undue interference"); *Shakopee Mdewakanton Sioux Community v. Babbitt,* 107 F.3d 667, 670 (8th Cir. 1997) (the IRA does not give the Secretary "carte blanche to interfere with tribal elections," limiting Secretarial disapproval for substantive reasons only if the proposals are contrary to Federal law.).

In this matter, the Tribe provided its membership list to the Election Board. Consistent with Federal law, the Department recognizes and defers to the Tribe's fundamental and inherent right to define its own membership. When the Challengers disputed the eligibility of certain voters to participate in the election, the duly appointed Election Board ensured that the voter list matched the tribal roll.

In this case, even if the Challengers' claims regarding voter eligibility were accepted, the election results are sufficiently lopsided that a substantive assessment of the membership challenge is unnecessary.[8] Assuming that all 35 disputed voters voted in favor of the new Constitution, and subtracting 35 from the 63 'yes' votes tallied, the result is 28 to 22. Assuming further that the rejected ballot was a 'no' vote, the result would be 28 to 23 in favor of the proposed Constitution.

In sum, a majority of the eligible voters who are *acceptable to the Challengers* voted to adopt the new constitution.

C. CHALLENGERS CLAIM THAT THE ELECTION BOARD ERRED BECAUSE VOTER PARTICIPATION DID NOT SATISFY THE REQUIREMENTS OF THE 1986 CONSTITUTION IS REJECTED BECAUSE VOTER PARTICIPATION EXCEEDED THE 50 PERCENT DEMANDED BY CHALLENGERS

The Challengers assert that the Indian Reorganization Act's requirement that 30 percent of the eligible voters participate in the election does not apply because the Tribe's 1986 Constitution requires participation by at least 50 percent of eligible voters. Regardless of which requirement applies, as shown below it is clear that participation in the Secretarial election exceeded 50 percent. Accordingly, this claim is denied.

The Election Board received registration forms from 103 individuals whose names appeared on the membership list provided by the Tribe.[9] Ballots were received from 86 of the registered voters (Ex. I). Returns from 86 of the103 voters equals 83 percent voter participation – far above the 50 percent voter participation called for by the Challengers. Of those 86, the vote was 63 to 22 in favor of adopting the new Constitution. There was 1 spoiled ballot.

The Challengers assert that 40 of those individuals listed on the Registered Voters List were not qualified to be members of the Tribe. Of the 85 people from whom ballots were received, 35 were among the 40 people whose qualifications to vote were disputed by challengers. Therefore, even assuming that all the assertions made by the Challengers are correct, voter turnout was 80 percent. (Subtract 35 votes from the 86 cast, which equals 51. Subtract 40 eligible voters from the pool of 103 eligible voters, which equals 63. 51 votes divided by 63 eligible voters equals

[8] Given that Challengers' claim to increase the eligible voter pool is rejected as a matter of law, there is no dispute that at most there are 103 eligible voters and there is no dispute that 86 of those 103 voters participated in the election.

[9] Again, because Challengers' claim to increase the eligible voter pool to add 16 and 17 year olds is rejected as a matter of law, there is no dispute that at most there are 103 eligible voters and there is no dispute that 86 of those 103 voters participated in the election.

80%). Thus, even accepting Challengers' claims, participation far exceeded the 50% voter participation required by the Tribe's 1986 Constitution.

D. THE USE OF A REGISTERED VOTERS LIST IS LEGAL

As noted by Challengers, the IRA directs that any Indian tribe may adopt or revise organic documents, which become effective "when ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe" 25 U.S.C. § 476(a)(1). Since 1967, the regulations governing the conduct of Secretarial elections have required the creation of a registered voters list (25 CFR § 52.11), and the use of that list to determine those tribal members who are entitled to vote (25 CFR § 52.6), as well as calculating sufficiency of voter participation (25 CFR § 52.21) (29 F.R. 14359, Oct. 17, 1964)(25 CFR part 52 was redesignated as part 81 in 1982 (47 FR 13326)).

Courts have accepted the process outlined in the regulations:

> The Bureau of Indian Affairs sent out registration packets to the 3,659 voting-eligible LCO [Lac Courte Oreilles] members, advising them of the election and informing them about the need to register, which 1,130 LCO members did. After the registered voter list was posted on January 8, 1992, no objections were made to any persons on the list.

Thomas v. United States, 141 F. Supp. 2d 1185, 1189 (W.D. Wisc. 2001).

Litigation arising from a contested Secretarial election for the Jamul Village resulted in specific acceptance of the BIA's use of a Registered Voters List. In *Rosales v. United States*, the district court for the District of Columbia rejected arguments identical to those raised by the Timbisha Shoshone Challengers respecting the relationship between the Tribe's Constitution and the Part 81 regulations' definition of "qualified voters":

> Under section 81.6(d), when a tribe wants to hold a Secretarial election to amend its constitution, "only members who have duly registered shall be entitled to vote; . . ." The Bureau and the Board read section 81.6(d) to require registration for each particular Secretarial election, and further conclude that only registrants are qualified voters within the meaning of section 81.22.
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> . . .
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> [A]gencies are entitled to substantial deference when interpreting their own regulations, especially when those regulations are as detailed as those being relied upon in this case. Moreover, Plaintiffs have not demonstrated that the Board's interpretation of section 81.6(d) conflicts with any statute or regulation. *See Thomas Jefferson Univ.*, 512 U.S. at 512; *Stinson*, 508 U.S. at 45. Accordingly, the Board's interpretation must be upheld.

Rosales v. United States, 477 F. Supp. 2d 119, 128-29 (DDC 2007).

The Election Board's use of a Registered Voters List to identify all those people who are entitled to vote in the election because they registered rather than using a list of all adult members

regardless of registration is required by the Department's regulations, and cannot support the invalidation of the Timbisha Secretarial election.

E. LACK OF EVIDENCE THAT DISTRIBUTION OF ERRONEOUS DATE CAUSED HARM

The Challengers assert that erroneous information respecting the election date "may have" misled some eligible voters, and that some voters "undoubtedly" relied on the erroneous information. The Interior Board of Indian Appeals (IBIA) has affirmed the rejection of such speculative argument:

> 25 CFR § 81.22 requires that an election contest include substantiating evidence in support of the grounds for the contest. Appellant failed to support his allegation with any evidence that the error in the election notice adversely affected the voter turnout or tainted the election results in any way. Accordingly, the Board finds that appellant's challenge to the election was properly rejected, insofar as it was based on the error in the election notice. *Thurman v. Anadarko Area Director*, I.D. LEXIS 133, *17; 26 IBIA 69 (IBIA 1994).

The IBIA's rejection of speculative claims is wise, especially about a matter of such importance, and we adopt the same reasoning. The challengers provided no evidence of any kind to support their speculation that the erroneous date published by the Election Board affected any tribal member's decision or action with respect to this election. Following the IBIA's reasoning in *Thurman*, it would be improper to invalidate the Timbisha Shoshone Secretarial election based on the Challengers' unsubstantiated claims respecting the impact of the erroneous information.

V. Conclusion

Based on the review of the challenge to the Secretarial election conducted by the BIA for the Timbisha Shoshone Tribe, I find that the BIA properly executed the regulatory procedures for holding such elections, and therefore deny all challenges. The proposed Constitution was adopted by a majority of the eligible voters. I therefore approve the "Constitution of the Timbisha Shoshone Tribe," which will supersede the Constitution adopted by the Tribe in 1986.

Sincerely

Kevin K. Washburn
Assistant Secretary – Indian Affairs

Enclosures

cc: Ian Barker, Dentons US LLP
Chairperson George Gholson, Timbisha Shoshone Tribe
Mark A. Levitan, Attorney at Law