UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE ASSISTANT SECRETARY – INDIAN AFFAIRS

TIFFANY L. (HAYES) AGUAYO, et al.,
Appellants

v.

ACTING PACIFIC REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

Decision

GINA HOWARD, et al.,
Appellants

v.

ACTING PACIFIC REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee

Introduction

This proceeding arises from a dispute within the Pala Band of Mission Indians (Band) concerning eligibility for tribal membership. Pending before the Assistant Secretary – Indian Affairs (Assistant Secretary) are appeals from letters of the Regional Director in response to appeals authorized by tribal law. Appellants argue that the Regional Director's letters applied the wrong tribal law or were incomplete.

An important attribute of tribal sovereignty and self-governance is the right to determine citizenship. Indeed, composition of its body politic is one of the most important decisions any government can make. Like the United States, tribal governments define and determine tribal citizenship through their political processes. The links between sovereignty and self-government and political membership are strong. The Federal Government should engage in such key tribal issues only when the law clearly provides such authority.

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. They also have the power and ability to make mistakes. Possessing sovereignty and self-governance means bearing the immense responsibility that comes with the exercise of this governmental power. Tribal governments, just like the United States, states, counties and cities, must address their own mistakes and, if one is made, live with it or correct it. If the Band has made a mistake in disenrolling a number of its members, then it must bear the responsibility of that mistake, determine whether to correct it and live with the scrutiny that follows.

In the present case, applicable tribal law established a limited role for the Regional Director to make recommendations on tribal action on enrollment appeals, but the law reserves ultimate decision-making authority with the Band. Because the Regional Director acted properly, we affirm the Regional Director's letters.

Background and Procedures

On June 1, 2011, the Executive Committee (EC) of the Band issued a decision disenrolling 8 members based on its evaluation of the Indian blood degree of an ancestor of the members. This ancestor, Margarita Britten (or Brittain), appeared on the 1962 reconstructed Base Roll of the Band as full blood. The EC determined in 2011 that she should be considered only ½ degree Indian blood. The EC's decision letter recognized the members' right to appeal the disenrollment decision to the Regional Director, Bureau of Indian Affairs (BIA), under the Band's enrollment ordinance.[1] These members appealed on June 28, 2011.[2] On February 3, 2012, the EC disenrolled an additional 150 of Britten's descendants and similarly advised them that they could appeal under the Band's enrollment ordinance to the Regional Director.[3] Of this second group of disenrollees, 63 appealed to the Regional Director on February 21, 2012,[4] and 53 appealed on February 27, 2012.[5]

By letters dated February 24, 2012,[6] and June 7, 2012,[7] the Regional Director responded to the appeals. The Regional Director's letters relied on the authority provided under the Band's 1997 Constitution and 2009 enrollment ordinance. Pursuant to those tribal laws, each letter made a "recommendation" to the EC that the Band continue to recognize the membership status of these individuals as there was no evidence provided to support their disenrollment. The Band did not follow this recommendation.

In the first week of July 2012, two different groups of disenrollees, represented by separate counsel, filed appeals with the Interior Board of Indian Appeals (IBIA or the Board).[8] On July 18, 2012, the IBIA docketed and dismissed the appeals for "lack of

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[1] AR 6. The Administrative Record (AR) from the Regional Director encompasses Tabs 1-28.

[2] AR 5. Seven other appeals similar to that filed by Gina Howard, also dated June 28, 2011, were received by the Assistant Secretary at that time. Their attorney moved to add these documents to the AR as before the Regional Director at the time of her decision; the Regional Director did not object, and they are part of the AR, hereafter referred to as Supplemental AR.

[3] AR 8; AR 9 as an example.

[4] AR 25.

[5] AR 12. The appeals are in the Supplemental AR. A letter from the Regional Director to the Band refers to 141 "requests for review" from the February 2, 2012 decisions to disenroll 150 individuals. Its attached list was not included in the record. AR 2.

[6] One letter was addressed to attorney Dennis Chappabitty on behalf of 8 appellants, AR 3.

[7] One letter was addressed to attorney Thor Emblem on behalf of 63 appellants (AR 2), a virtually identical letter was addressed to Mr. Chappabitty on behalf of 53 appellants (AR 12), and a third letter of the same date was addressed to the Band (also AR 2).

[8] By notice of appeal dated July 2, 2012, Aguayo and 43 others filed before the IBIA. *Aguayo v. Acting Pacific Regional Director*, Docket No. 12-127. This notice sought review by either the IBIA or the

jurisdiction because the Board does not have authority to adjudicate tribal enrollment disputes such as these, nor does it have jurisdiction to decide appeals from BIA officials' inaction on such disputes."[9] The Board referred one group of appeals to the Office of the Assistant Secretary – Indian Affairs for any action it deemed appropriate, noting that the other group of appellants had filed originally both with the Board and with the Assistant Secretary making it unnecessary to refer this second group of appeals.[10]

On March 25, 2013, an Aguayo group filed a motion for Temporary Restraining Order (TRO).[11] By Memorandum dated March 28, 2013, the Federal Defendants agreed to respond to the appeal referred to in *Aguayo, et al. v. Acting Pacific Regional Director,* 55 IBIA 192, on a date certain, 60 days from March 29, 2013 [May 28, 2013], and the Plaintiffs agreed to withdraw their Complaint and motion for a TRO without prejudice.

The Office of the Assistant Secretary issued a "Notice of Procedures, Request for Administrative Record, and Scheduling Order" on April 26, 2013.[12] That notice consolidated the *Howard* and *Aguayo* appeals of the letters of the Regional Director dated February 24, 2012 and June 7, 2012, requested the administrative record from the Regional Director, and permitted briefs to be filed by May 10, 2013.[13] The Notice provided that briefs need not repeat arguments submitted to the Regional Director or IBIA as those briefs would be reviewed.

An index of the record prepared by the Regional Director was served on the parties on May 10, 2013, and parties were given the opportunity to file any documents that were before the Regional Director and omitted from the record within 7 calendar days of service of the index. The Regional Director was permitted to respond to any supplemental filing within 7 calendar days of service of the motion. The nature and extent of the authority, if any, of the Assistant Secretary or the Regional Director to act on these appeals is a threshold matter that must be resolved first, before proceeding to the merits of the membership dispute.

Assistant Secretary. It was filed pursuant to 25 C.F.R. § 2.9 (general regulations governing notices of appeal) and 25 C.F.R. § 2.8 (appeal from inaction of official) and was provided to both the IBIA and Assistant Secretary. By notice of appeal dated July 7, 2012, Howard and 35 others filed before the IBIA, *Howard v. Acting Pacific Regional Director*, Docket No. 12-128, (total 80 appeals).

[9] *Aguayo and Howard v. Acting Pacific Regional Director*, 55 IBIA 192, 193-4, *citing* 43 C.F.R. § 4.330(b)(1).

[10] On August 12, 2012, IBIA denied reconsideration in *Howard.* 55 IBIA 240 (2012).

[11] *Aguayo v. Salazar,* 3:13-cv-705-WQH-KSC (S.D. CA.). This lawsuit was the second lawsuit filed by Aguayo plaintiffs. The first was *Aguayo, et al. v. Salazar*, 3:12-cv-00551-WQH-KSC, filed March 5, 2012, AR 24.

[12] AR 1.

[13] *See* 25 C.F.R. § 2.18.

Overview of Band's Governing Documents and Enrollment Ordinances

Absent a Federal statute or express authority in a tribal governing document, the Department has no authority over matters of tribal citizenship.[14] Tribes may assign to the Department certain responsibilities in this area, however, as the Band did here.

The Band's first governing document was the Articles of Association adopted in 1960.[15] The certificate of adoption certifies that they were adopted by a vote of 21 "For" and 0 "Against" at a duly called general tribal meeting on August 15, 1959. The Articles were approved by the Commissioner of Indian Affairs on March 7, 1960.

In accordance with those Articles, the Band adopted its original enrollment ordinance No. 1 in 1961.[16] This ordinance provides that the EC would review each application for enrollment and submit all applications, whether approved or disapproved, to the Area Director [now Regional Director], BIA. Section 4 provided that the Area Director "shall determine the applicants who are eligible for enrollment." If qualified, the Area Director "shall notify" the EC and such "notice will constitute authority for the Committee to enter this applicant's name on the membership roll." Under Section 5, any applicant who is rejected could appeal, and the Area Director "shall forward" the appeal to the Commissioner of Indian Affairs, including his recommendation and data, and the EC's report and recommendation on the application. An ineligible person could further appeal to the Secretary. If, on appeal, the person was found eligible, the EC "shall enter the applicant's name on the membership roll." The decision of the Secretary on appeal "shall be final and conclusive." In accord with Section 6, any "additions, deletions, or corrections" to the membership roll by the EC "must be submitted to the Area Director for approval."

On November 22, 1994, "at the Tribal elections for the Pala Band of Mission Indians, it was voted to accept a new Constitution."[17] In November 1997, the Band "adopt[ed] the Pala Tribal Constitution to supersede the Articles of Association."[18] The Constitution provides in Section 5 of Article II, "Membership," that the EC "may from time to time amend and/or replace its existing Enrollment Ordinance with an Ordinance governing adoption, loss of membership, disenrollment, and future membership, provided that such ordinances are in compliance with the Constitution."[19] Article IX, Section 1 provides that the Constitution "shall become effective immediately after its approval by a majority vote of the voters voting in a duly-called elections [sic] at which this Constitution is approved by the Bureau of Indian Affairs." Although the BIA received the Band's

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[14] *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."); Cohen's Handbook of Federal Indian Law, 3.03[3] at 176 (2005 ed).

[15] AR 25 Exh. 3.

[16] AR 25 Exh. 4.

[17] AR 25, Exh. 5.

[18] AR 25, Exh. 8.

[19] AR 27.

Resolution forwarding the Constitution to the Regional Director on December 8, 1997,[20] it was not until July 26, 2000, that the Acting Regional Director approved the Constitution "retroactive to the date of adoption on November 12, 1997."[21] This notification was sent to the Band on October 4, 2000.[22]

On July 22, 2009, the EC adopted Revised Enrollment Ordinance No. 1. It includes a "resolved" clause providing that the EC "does not intend to alter or change the membership status of individuals whose membership has already been approved and who are currently listed on the membership roll."[23] Section 3 of the ordinance provides that "Every person who is an enrolled member of the Pala Band on the date of adoption of this revised Ordinance shall remain an enrolled member unless he/she voluntarily relinquishes his/her membership in writing or is removed from the membership roll as provided in Section 6, below." Section 6, "Reevaluation of Membership Applications" provides that should the EC find that an applicant or the person "filing the application on his/her behalf misrepresented or omitted facts that might have made him/her ineligibile [sic] for enrollment, his/her application shall be reevaluated in accordance with the procedure for processing an original application." The section further provides that if the EC decides "that the member's name should be removed from the roll" that decision is subject to the member appealing the decision. Section 8, "Appeals of Eligibility Decisions" permits appeals to the Regional Director within 30 days. Upon review, if the Director is satisfied that the appellant meets the eligibility requirements, he shall so state and "recommend" that the EC enter the applicant's name on the membership roll. *Id.* The EC "shall meet and consider that recommendation and make a final decision on the appeal of decision. The decision of the Executive Committee shall be final." *Id.* Section 9 provides that the EC is charged with maintaining the membership roll, and a copy of any action by the EC on "additions, deletion or corrections . . . shall be submitted" to the Regional Director.

Summary of 1989 Resolution of Membership Appeals, Determination of Blood Quantum of Margarita Britten, Band's 2011 Determination

Both the Band's filings of August 17, 2011[24] and March 23, 2011,[25] with the Regional Director discuss the circumstances surrounding the May 17, 1989 blood degree decision of the Assistant Secretary that the ancestor Margarita Britten (or Brittain) (abt. 1856 - 1925) was a full blood Indian. The Band notes that on the reconstructed 1913 Pala Allotment Roll, its Base Roll, blood degrees were added in the 1960s by BIA officials, using BIA records. The Band notes that Margarita Britten's blood quantum as full-blood Cupa dated to February 27, 1962.[26]

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[20] AR 25, Exh. 8.
[21] AR 27.
[22] AR 25, Exh. 9.
[23] AR 27.
[24] AR 4.
[25] AR 21 brief; AR 22 documents from Band on Margarita Britten's blood quantum.
[26] AR 4 at 3 n.4; AR 5 Exh. 6.

As provided in the Assistant Secretary's May 17, 1989 decision, there were handwritten changes, without further notation, to the blood degree on the Base Roll.[27] Relying on these handwritten changes, the Band denied persons enrollment who then appealed to the BIA in 1985.[28] In resolving these membership appeals that were based on the lowered handwritten blood quantum, and relying on the 1961 enrollment ordinance, the Assistant Secretary on May 17, 1989, determined that Margarita Britten was full blood.[29] Following objection by the Band, the Assistant Secretary, by letter dated September 11, 1989, reviewed the circumstances and the BIA's authority in the matter pursuant to the Band's enrollment ordinance and affirmed the May 17, 1989, decision.[30]

The Band in its 2011 filings acknowledges that it accepted the 1989 determination that Britten was full-blood Cupa without doing its own independent investigation. The Band posits that in 2011, in response to three enrollment applications, it reviewed the documentation and agreed with a 1985 Superintendent's decision [not the subsequent Assistant Secretary's decision in 1989 that resolved the appeal] that "due to the unreliability of Bureau records, which served as the basis for DIB [degree of Indian blood] computations listed on the Base Roll, as well as lack of documentation regarding the identity of Margarita Britten's father, there was insufficient evidence to support a finding that Margarita Britten was a full-blood Cupa Indian." Having made this decision that the ancestor possessed only ½ degree Indian blood for purposes of the three enrollment applications, the EC then applied this finding to current members and determined that many of the ancestor's descendants no longer had sufficient Indian blood to qualify for membership in the Band and they were disenrolled.[31] Following their appeals, the Regional Director reviewed the matter and advised the Band that he recommended that it adhere to the 1989 4/4 Indian blood finding of the Assistant Secretary.

Arguments of Aguayo, Howard, Band and Regional Director

There is no specific Federal statute to apply in this appeal of the Band's citizenship determination. The Department's involvement in this membership dispute arises only because the Band's Constitution and enrollment ordinance confer upon the Regional Director a limited role in the Band's enrollment decisions. The extent of that role depends on whether the 1960 Articles of Association and enrollment ordinance adopted under it are in effect, or whether the 1997 Constitution and 2009 enrollment ordinance control.

Appellants argue that the 1960s-era documents are in effect and that the Regional Director erred in resolving the appeals using the more recent tribal documents. They argue that they qualify for membership based on the 1989 determination that Margarita

[27] Supplemental AR 4.B.
[28] AR 5 Exhs 4, 5, and 9.
[29] AR 5 Exh.2.
[30] AR 5 Exh. 3.
[31] Appellants cite to letters from the Band indicating that it was updating its rolls. Supplemental AR 6.A.

Britten was full blood Indian. The Band argues that the 1997 Constitution and 2009 enrollment ordinance apply and it could reevaluate Britten's blood degree. The Regional Director's letters in response to the appeals relied on the 1997 Constitution and 2009 enrollment ordinance. The primary arguments presented in the briefs filed in response to the Notice of Procedures are summarized below. Arguments of the parties before the Regional Director and IBIA are included in the footnotes.

Arguments of Aguayo Appellants

The Aguayo appellants' brief dated May 9, 2013, requests that the Assistant Secretary vacate the Regional Director's letter of June 7, 2012, and make three findings: (1) that the 1960s-era enrollment ordinance is applicable to the dispute because the Band's 1997 Constitution was not ratified by the Band as a whole in a duly called election as required by its terms and therefore any enrollment ordinances enacted by the EC pursuant to that Constitution are void; (2) that the 1989 decision as to Margarita Britten's blood quantum must be respected as final under government-to-government relations; (3) that the Regional Director acted arbitrarily in applying the 2009 ordinance to appellants who were approved enrolled members, when the ordinance provides that the EC "does not intend to alter or change the membership status" of persons currently on its membership roll. They "are challenging a void enrollment ordinance recognized" by the Regional Director, and argue that the original 1961 enrollment ordinance provides the Assistant Secretary "with final, conclusive authority as to membership."[32]

Arguments of Howard Appellants

The Howard appellants' brief dated May 9, 2013, argues that the Band's Constitution "is invalid for lack of any proof in the administrative record that a properly called election"

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[32] In the appeal to the Regional Director, the Aguayo appellants argued that the 1960s-era documents are the Band's governing documents because the 1997 Constitution was not ratified by a referendum election or by a majority of tribal members. They posited that the 1960s-era documents delegate enrollment decisions to the Secretary of the Interior and require that the Secretary's decision be final and conclusive. They argued that the EC's letter was outside its authority under these documents; the letter does not state the factual or legal basis for terminating the appellants' membership and benefits, and violates their due process rights under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302. They argued that the EC's action to suspend their per capita gaming payments and other tribal membership benefits violates the ICRA and the Band's gaming revenue allocation plan, and that ICRA is binding on the Department in its Federal supervisory actions. Appellants separately requested that the prior status quo be restored. They posited that they qualified for membership through Margarita Britten and that the Assistant Secretary's 1989 finding, which was not appealed by the Band, is binding on it. Appellants argued that for purposes of carrying out the government-to-government relationship with the Band, the BIA must interpret tribal laws and procedures in order to carry out its duty to recognize a tribal government and must take an "active role" and rescind its approval of the Constitution. AR 25, AR 13.

Before the IBIA, Aguayo appellants argued that the Regional Director's June 7, 2012 letter was arbitrary and capricious in relying on "the unratified Constitution and revised enrollment ordinance." They challenged "action and inaction" in addressing the issues of whether the 1961 or 2009 enrollment ordinance determines their enrollment and alleged a violation of their Fifth Amendment due process rights. They argued that the 1960s-era ordinance controlled, that the 2009 ordinance did not apply to enrolled members, and requested review of the file of Margarita Britten on file with the agency. AR IBIA.

was held in accordance with Federal and tribal law. They argue that their argument needed to be addressed in the Regional Director's "recommendations" of February 24, 2012 and June 7, 2012, to the Band. They argue that *res judicata* and collateral estoppel require enforcement of the May 17 and September 11, 1989 decisions regarding Margarita Britten, which the Band never appealed.

The Howard appellants argue further that the Articles of Association control, not the 1997 Constitution or later enrollment ordinance. They argue, thus, that the EC acted beyond the scope of its constitutional authority and contrary to its own ordinance when it ruled that Margarita Britten was not a full blood Indian. The Howard appellants posit that Part 62[33] does not apply to these proceedings as Britten's blood quantum was not appealed by the Band. In the alternative, they argue that the savings clause in the 1997 Constitution protects the 1989 decisions, and the Assistant Secretary is duty bound to enforce them and the Band's Constitution as "'laws' of a federal nature and character," including on the EC. Appellants argue that the issue is whether tribal membership ordinances can be applied to violate final Federal administrative decisions reached years before, that the Assistant Secretary "must intercede in this violation of Human Rights," and that *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), is not relevant to this issue.[34]

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[33] Part 62, "Enrollment Appeals," provides procedures for filing and processing appeals from adverse enrollment actions by Bureau officials, or from tribal committees if the tribal roll is subject to Secretarial approval or an appeal to the Secretary is provided for in the tribal governing document. 25 C.F.R. § 62.2.

[34] *Santa Clara Pueblo* held that the ICRA provides only for a remedy of writ of habeas corpus against the Tribe; ICRA does not provide for a private cause of action for injunctive and declaratory relief in Federal courts. It is frequently cited for the proposition that a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence. 436 U.S. at 72 n.32.

Before the Regional Director, the 8 Howard appellants who appealed the letter dated June 1, 2011, from the Band argued that the Band must honor the 1989 decisions regarding Margarita Britten, as final and solid precedent, or as *res judicata* because the Band did not file a Federal civil action against the 1989 final decision. AR 5. They argued that the Band determined its membership under the "Articles of Association and subsequent Constitution" and that *Santa Clara Pueblo* applies to them as tribal members. In addition, these appellants argue that the there was nothing new to sustain a re-evaluation under the 2009 enrollment ordinance, that the EC did not follow the procedures required, and that the EC does not have the power to disenroll existing members. *See also* Supplemental AR 1.D, 1.E. In an addendum, these appellants argued that the Band ignored its 10-year moratorium on membership requirements, adopted in 2002, and therefore the 1960-era ordinance would have remained unchanged to this date. Other Howard appellants who filed in February 2012, incorporated by reference arguments and evidence submitted by the first 8 Howard appellants. They argued that the Band acted while "updating" its role and without new information. Supplemental AR 2.A. They argued that because the Assistant Secretary approved the Constitution, he had a fiduciary duty to insure that the Band complies with it. They argue that the disenrollments are an internal governance dispute and that the BIA must take sides. They also challenge that a majority of the General Council did not vote on the 1997 Constitution. They raise the ICRA and the Savings Clause of the Constitution as the "hook," or legal authority, for the Department to put them back on the tribal rolls, as the EC did not have authority to overturn decisions made by the General Council in 1984 as to Britten's blood quantum. They argued that even if the 2009 ordinance allowed the EC to revisit enrollment, it was still bound by the 1984 "enactment and finding of fact" supporting Britten's full blood status. They argued that any enrollment ordinance needed to be "adopted" by the General Council before the EC could "enact" it. They argue also that enrolled members can be disenrolled only if there was intentional misrepresentation or omitted information, and even then, the EC must follow the procedures for reviewing original applications – a process not followed.

Arguments of the Pala Band

The Band argues in its brief dated May 10, 2013, that the Assistant Secretary is without jurisdiction to issue a decision regarding the appellants' submissions because membership determinations are inherently and exclusively within its province, citing *Santa Clara Pueblo.* It argues that as a matter of the Band's law, the role of the United States in membership issues is limited to review of enrollment-related appeals and issuance of a recommendation by the Regional Director regarding the appeal. The Band argues that appellants do not have standing to challenge the BIA's approval of the Band's Constitution. In the alternative, the Band argues that if appellants had standing, the timeframe for such an appeal has expired and they failed to exhaust administrative remedies. It argues that the Assistant Secretary has no authority to revisit at this late date the approval of the Constitution in 2000. The Band rejects the cases appellants rely upon for the proposition that adoption of the Band's Constitution required a vote of a majority of the Band's membership. They argue that the standards for adopting the Constitution are a matter of each tribe's law, thereby distinguishing the Assistant Secretary's decision in *San Pasqual*, referenced by appellants, under *that* Tribe's law.[35]

The Band argues that collateral estoppel is not applicable to it, as the Assistant Secretary was not acting in a judicial capacity when he acted in 1989, and the doctrine cannot bar the Band from exercising its inherent authority, nor from correcting errors. Moreover, it argues that it was not a "party" to the 1989 decision and was not in privity with the Assistant Secretary. It argues that there is no present specific or required Federal action justifying a decision by the United States to stop recognizing the current EC and that matters of tribal governance are best left to tribes. Finally, it argues that any trust responsibility to tribal members does not extend to tribal gaming revenue, citing *Smith v. Babbitt,* 875 F. Supp. 1353 (D. Minn. 1995).

The Band rejects the application of 25 C.F.R. Part 62 to appeals from adverse enrollment actions by tribal committees, arguing instead that Part 62 applies only to enrollment actions by BIA officials. The Band posits that under tribal law the Regional Director was limited to making a "recommendation" on the enrollment appeals, and therefore the

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Before IBIA, 36 of the 61 persons represented by Dennis Chappabitty before the Regional Director filed a notice of appeal. They argued that the Regional Director's letters were "mischaracterized as 'recommendations'" and did not provide for a right to appeal under 25 C.F.R. § 2.7 or 43 C.F.R. § 4.331. They argued they had standing before the IBIA as the Regional Director's letters failed to address the law controlling their disenrollments as being the Articles of Association, not the 1997 Constitution or 2009 enrollment ordinance. They argued that "when their appeal is docketed . . . they can show injury" caused by the Regional Director's actions in issuing letters as "recommendations" and not "final actions" appealable under the regulations and that the Regional Director did not address violations of the ICRA. By letter dated October 1, 2012, they requested the Acting Assistant Secretary to conclude that their dispute falls within the scope of Part 62.

[35] *San Pasqual Enrollment Committee, et al. v. Pacific Regional Director,* decision dated January 28, 2011. Tribal law of the San Pasqual Band provides that disenrollments are "subject to the approval of the Secretary." In *San Pasqual,* the Assistant Secretary approved the Band's proposal to disenroll the Marcus Alto descendants. An APA challenge to that decision is pending in Federal court, *Alto v. Jewell.*

Assistant Secretary is without jurisdiction to review the recommendation of the Regional Director.[36]

Argument of the Regional Director

The Regional Director in her brief, received on May 9, 2013, noted that one group of Howard appellants appealed the Band's disenrollment on June 28, 2011, and that another group of Howard appellants and the Aguayo appellants appealed the EC's subsequent letter dated February 3, 2012. The Regional Director posits that she appropriately exercised her limited authority under the Band's Constitution and applicable 2009 enrollment ordinance in issuing a recommendation to the EC that would then make the final decision. She argues that because the Band's enrollment ordinance does not invoke any provision of Federal law that provides the BIA with the authority to decide enrollment appeals, "there is no required federal action to take with regard to these requests, and we cannot render any decision regarding the Executive Committee's

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[36] In its August 17, 2011 filing before the Regional Director in response to the Howard appeal, the Band argued that under *Santa Clara Pueblo*, its powers of self-government over internal affairs were not subject to external review except as it authorized. AR 4. It argued that the EC acted within its authority to make and enforce tribal laws governing enrollment, including the 2009 enrollment ordinance, which provided the BIA with only limited authority to review appeals of enrollment determinations and left final determinations regarding membership with the Band. The Band argued that the BIA must give deference to a tribe's interpretation and implementation of tribal law. It argued that it operated under the Articles of Association until it received the 2000 Bureau approval of the 1997 Constitution, and thus its resolution regarding gaming appropriately referred to the Articles of Association and not the Constitution. Regardless of the authority originally delegated to the BIA in the 1960's, the Band argues that it was limited in the 1997 Constitution and 2009 ordinance. The Band argues that *ex post facto* arguments under ICRA apply only in the criminal context. As to the moratorium, the Band argued it concerned membership *criteria*, not enrollment and disenrollment. It argues that due process is provided through notice, the right to appeal to the Regional Director, the ability to provide evidence, and to have the EC consider the Regional Director's recommendation.

In its March 23, 2012 brief, the Band again argued that its powers of self-government over its internal affairs are subject to external review only to the extent it authorizes review. Noting that at one time the BIA possessed authority to make and enforce enrollment determinations for it, this authority "clearly has been withdrawn and retained" by the Band, leaving the BIA only limited authority. Citing *Welbourne v. Anadarko Area Director,* 26 IBIA 69 (1994), the Band argued that appellants lack standing to challenge the BIA's approval of the tribal Constitution. In the alternative, it argued that if appellants had standing, then the 25 C.F.R. Part 2 procedures applied and they did not initiate and exhaust their administrative remedies within the regulatory time period in 2000. The Band argued also that the 6-year statute of limitations applied. It argued that it has the authority to interpret its laws and that it determined that adoption of the Constitution required a majority vote of the voters voting and did not require a referendum election. It argued that the EC acted in accord with its authority under tribal law and complied with the ICRA. It posits further that the ICRA does not grant the BIA independent authority to overrule or overturn tribal actions. It argued that collateral estoppel does not prevent it from making determinations on tribal membership and is not applicable to the Band in regards to the 1989 decision. The Band argues it was not a party and was not in privity with the Assistant Secretary, and that administrative collateral estoppel did not apply and would not preclude correction of errors. It argued that government-to-government relations with the EC should continue, that its Plan for the Allocation of Gaming Revenues (RAP) was twice approved, and appellants must follow the appeal procedure in the RAP, and that the BIA's supervisory responsibilities did not extend to gaming revenue.

actions." The Regional Director then proceeded under the Band's ordinance to make recommendations in support of the continued enrollment of appellants in the Band.

The Regional Director argues that her 2012 letters appropriately relied upon the Band's most recent Constitution and that she was not required to render a decision concerning its validity. She argues that the Constitution was never previously challenged and was not the subject of the appeals before her, as the appeals were of disenrollment actions taken by the EC. "There was no statement that any decision by the BIA concerning the validity of the Pala Constitution was being appealed to the Regional Director." Moreover, such claims under the Administrative Procedure Act (APA) are subject to a 6-year statute of limitations, which commenced to run when appellants had actual notice. The Regional Director argues that the Constitution was adopted in 1997, approved in 2000, and amended three times since then. In 2003, the Band passed a motion that members are to be provided a copy of the Constitution upon turning age 18. The Regional Director argues that the Constitution was not kept secret from the members, that appellants had knowledge or should have had knowledge of the Constitution, and, therefore, that appellants should have asserted their claim within six years, before the expiration of the limitations period.

Legal Analysis: Nature and Extent of the Department's Authority

As stated above, the Department's involvement in this membership dispute arises because the Band's Constitution and enrollment ordinance confer upon the Regional Director certain obligations and authority over the Band's enrollment decisions.[37] The extent of the Department's authority depends on whether the 1960 Articles of Association and enrollment ordinance adopted under it are in effect, or whether the 1997 Constitution and 2009 enrollment ordinance control.

The Regional Director's letters relied upon the 1997 Constitution and 2009 enrollment ordinance and made recommendations that the appellants not be disenrolled by the Band. Appellants disagree with the fact that the Regional Director's letters provided only a recommendation and did not rely on the Articles of Association and the original enrollment ordinance. For purposes of deciding this appeal, it is necessary to determine which documents control.

Although the approval of the Constitution in 2000 was not specifically appealed to the Regional Director, the validity of that Constitution and subsequent 2009 enrollment ordinance determines the scope of the authority and obligations of the Department in responding to the enrollment appeals authorized by the Band.

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[37] General references concerning the role or authority of "the Department" are intended to encompass both the role of the BIA Regional Director, as well as that of the IBIA or the Assistant Secretary-Indian Affairs, exercising their delegated authority on behalf of the Secretary in reviewing the Regional Director's action.

Discussion of 1997 Constitution

We conclude that the 1997 Constitution, approved by the Regional Director in 2000, is the governing document of the Band. There are several reasons for this conclusion. First, a self-governing entity must be able to amend its governing documents from time to time in accordance with law to meet the needs of the community. At some point, if those changes are not lawfully challenged, they deserve finality. Here, the statute of limitations precludes a challenge to the approval of the document by the Regional Director and therefore precludes a challenge to the Constitution's effectiveness and applicability. Second, the Band's interpretation of its Constitution is entitled deference.

There may have been a right under Federal law to challenge the Department's approval. The statute of limitations applicable to APA challenges requires an action to be "filed within six years after the right of action first accrues."[38] A cause of action accrues when plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong. A person wishing to challenge agency action either on the basis of a procedural violation or a "policy-based facial challenge" must bring such a challenge within 6 years of the decision. *Wind River Mining Corp. v. United States*, 946 F. 2d 710, 715-16 (9th Cir. 1991).

Appellants raise a procedural violation in the adoption of the Constitution, arguing that the Band did not adopt it through a required "election" or referendum, but voted on it in a "meeting." Therefore, they argue that the Regional Director should not have approved it in 2000 and it never became effective. Such a procedural challenge, although directed primarily at actions of the Band, fits within the analysis of *Wind River*. An interested citizen can assess the wisdom of the governmental decision or discover procedural errors in the adoption of a policy within the 6-year period to bring the action. 946 F. 2d at 715. In sum, such a procedural challenge must be brought within 6 years and, as a challenge to the Regional Director's approval, it is now time-barred as the statute of limitations started to run in 2000.

In the alternative, if appellants' claims are not procedural or facial, the question is when did the 2000 approval "apply" to appellants. The facts suggest that the 1997 Constitution became effective at that time, both binding the Band's members and defining the respective powers of the General Council and the EC.[39] Thereafter various ordinances were adopted by the EC rather than by the membership, and in 2003, the Band amended the Constitution and passed a motion that members be provided a copy of the Constitution upon turning age 18. The appellant's did not appeal in 2000. The statute of limitations has run, and appellants' challenges are time barred.

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[38] *Shiny Rock Mining Corp. v. United States,* 906 F.2d 1362, 1364 (9th Cir. 1990); 28 U.S.C. § 2401(a).

[39] *Potts v. Bruce,* 533 F.2d 527, 529 (10th Cir., 1976) ("No member had a vested right in any particular law or the Tribal Constitution . . . [T]he consequences alleged in the complaint were those felt by the Tribe, and originated in the Tribe. All members were treated equally because they were members.").

In addition, as a general matter, it is not appropriate for the Department to intervene in internal tribal disputes or procedural matters.[40] Such restraint is particularly appropriate when the Department is simply exercising its limited review or approval authority pursuant to tribal law. 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.[41]

The arguments about the 1997 Constitution have two parts - whether it was adopted and whether it became effective, both procedural challenges that should have been brought within 6 years of 2000. The first issue is impacted by how the Articles of Association can be amended, the latter issue by the terms of the Constitution. Appellants' arguments focus on a differentiation between "meeting" and "election," terms used in both governing documents. The Band argues that meetings were sufficient for purposes of both adopting the Constitution and its effective date.

Under the Articles of Association, general "meetings" of the General Council required a quorum of 25 voters. Special meetings of the General Council could be called by the EC. The Articles were adopted at a "general tribal meeting" by a vote of 21 for and 0 against.[42]

The Articles of Association provide for "elections" in the context of officers, which are by secret ballot, and all "nominations, and election, whether for officers or by way of a referendum, shall be conducted in accordance with an ordinance or ordinances adopted by the governing body." Such ordinances "shall" provide for polling places, election committees, and absentee balloting.

The amendment provision of the Articles provide that they may be "amended by a majority vote of the General Council and such amendment shall be in effect upon the approval of the Commissioner of Indian Affairs." This provision does not specify whether the vote occur at a meeting or at an election. In practice, however, the Articles of Association were amended at both meetings and at elections, as long as a quorum of 25 was present.[43] Since the Constitution "amends" the Articles, as a substitute document,

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

[41] *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.).

[42] AR 25, Exh. 3.

[43] The Articles of Association were amended a number of times at general council meetings. Amendment 1 was certified by vote of 27 to 0; one document references that amendment 2 was furnished to each voter at a "referendum election" and vote tallies indicate that voters numbered about 120, and the approval of the Commissioner refers to approval at "a general council meeting." The December 17, 1973 vote at a general council meeting on amendments was 26 to 0. Amendment 3 in 1976 was "ratified by the General Council by a vote of 59 for and 26 against in accordance with Section 10, at a duly called Referendum Election." These certifications do not make the distinctions now advocated by appellants between elections and

the prior practice of the Band does not support appellants' argument that an election was required to adopt the Constitution.

In addition, the record includes Resolution 97-36, transmitting the Constitution to the Regional Director, received by the BIA on December 8, 1997.[44] The second "Whereas" clause in the Resolution specifically references a "General Election" of the Tribe as occurring in the context of revising the Articles into the Constitution. It provides:

> WHEREAS, on November 22, 1994 the Pala General Council in the *General Election* of the Tribe voted to revise the Pala Tribal Articles of Association into the Pala Tribal Constitution. (emphasis added).

Thus, even if an election were required to adopt the Constitution, an election occurred in 1994.

The Resolution provided "that effective the twelfth day of November 1997 the Pala Band of Mission Indians, exercising our inherent rights as a sovereign . . . do hereby adopt the Pala Tribal Constitution to supersede the Articles of Association." The certification provides that the resolution was taken up at a duly called meeting of the Band on November 19, 1997, and passed with a quorum present by a vote of 27 in favor, 0 opposed.[45] The Superintendent forwarded the Constitution to the Area Director "for your approval,"[46] raising no questions on how the Band voted on its adoption.

This resolution, referencing both an "election" in 1994 and a "meeting" in 1997, undermines the significance of the distinction that appellants make between election and meeting. The Band used these terms interchangeably as well in its certifications on amendments to the Articles of Association.

The 1997 Constitution, Article IX, provides that it is effective "after its approval by a majority vote of the voters voting in a duly-called elections [sic] at which this Constitution is approved by the Bureau of Indian Affairs." Appellants argue that an election must occur for the Constitution to be effective. The Band argues that a meeting was sufficient.

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meetings. Since the Articles of Association could be amended by a vote at a meeting attended by 25 members, the Band's prior practice provides no support for interpreting "election" in the new Constitution as requiring more than what the Band did in 1994 and 1997. AR 24, Exh. 3.

[44] AR 25, Exh 8; AR 25, Exh 6 referencing a "ballot vote," Howard Supplement AR 1.C.

[45] Thus, there were two votes on the adoption of the Constitution. There were also two votes in adopting the Articles of Association, where the Band adopted the Articles on August 15, 1959, and then ratified the Commissioner's conditional approval at a "general meeting." AR 5 Exh. 11, AR 25 Exh. 3. *See also* AR 25, Exh. 4 (two votes on 1961 ordinance).

[46] AR 13, Exh. A.

In considering appellants' arguments, we adhere to the principle of giving deference to a tribe's interpretation of its own laws.[47] Applying this standard, we defer to the Band's interpretation of its Constitution.

The Constitution uses both the term "meeting" and "election." "Meeting" is used in Article III, titled "General Council," in the context of General Council regular and special meetings. In contrast, the term "election" appears in Article V, titled "Executive Committee," in the context of elections of Executive Committee members. Article V also provides for establishment of an election ordinance, including polling places, an election committee and its duties, and absentee ballots.

Article IX provides that the Constitution shall be effective after "its approval by a majority vote of the voters voting in a duly-called elections [sic] at which this Constitution is approved by" the BIA. Appellants' argument is that the reference in Article V to an election ordinance as including ballots and polling places is applicable to Article IX. But, Article IX's discussion of the effective date of the Constitution does not refer to such an ordinance and no such ordinance was provided to demonstrate its applicability to a vote on a Constitution.

Appellants argue also that a majority of members must vote to adopt the Constitution, or at least vote in such an election. No such requirement exists in Article IX, Section 1, which refers only to majority of the persons voting. In addition, Article IX, Section 2, provides for the adoption of future amendments to the Constitution. Unlike Section 1 concerning effective date, Section 2 includes language requiring that "not less than half of the eligible members of the Pala Band cast their ballots." The omission of this language in Section 1 must be given significance and indicates that unlike in Section 2, there was no such requirement in Section 1 that this number of members vote.

Finally, the only established practice of the Band documented in the record is the prior practice of the Band under its Articles of Association. The Band's Articles did not include the distinctions that appellants draw. The amendment provision of the Articles provided that they "may be amended by a majority vote of the General Council." The Band did not require that a majority of the Band vote for such amendments. The Band applied a similar practice and interpretation to the Constitution as it did to the Articles.

It is also well established that the Department does not exercise jurisdiction over tribal disputes regarding the merits of a particular law passed by a tribe.[48]Appellants' remaining arguments are essentially an intra-tribal dispute over the merits of the Constitution and the authority granted to the EC in it. Appellants disagree with the Band's enactment of it, not the Regional Director's approval of it under tribal law. Absent an allegation that a

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[47] *Brady v. Acting Phoenix Area Director, BIA*, 30 IBIA 294, 299 (1997); *United Keetoowah Band v. Muskogee Area Director, BIA*, 22 IBIA 75, 80 (1992).

[48] *See Welbourne v. Anadarko Area Director,* 26 IBIA 69, 78 (1994); *Little Six, Inc. v. Minneapolis Area Director, BIA*, 24 IBIA 50 (1993).

provision in the Constitution is contrary to Federal law, the Department declines to review the merits of the Band's Constitution.[49]

Finally, appellants read Article VII of the Constitution, "Savings Clause," as precluding their disenrollment. This article provides that "all enactments" of the Band continue in effect to the extent that they are consistent with this Constitution. Nothing in the arguments presented indicates that Margarita Britten's blood quantum or their own membership was an "enactment" within the meaning of this article, or, if it were, that it could not be changed as done here.

We defer to the Band's interpretation of its Constitution. It is consistent with the Band's actions taken in 1997 and questions over that interpretation were not raised within the applicable statute of limitations period. We conclude that the 1997 Constitution is effective.

Discussion of the Enrollment Ordinance

The appellants argue that the 2009 enrollment ordinance is invalid because the 1997 Constitution is invalid. This argument fails because of the conclusion that the Constitution is valid. The 2009 enrollment ordinance applies.

Appellants also argue that even if the 2009 enrollment ordinance applies, the Band nevertheless did not intend it to apply to existing enrolled members. The Band, on the other hand, interprets its enrollment ordinance as allowing the EC to reevaluate existing members' applications if actions based on the new applications raise questions.

The Regional Director's letter dated March 23, 2012, to Aguayo appellants, specifically references Section 6, "Reevaluation of Membership Applications," as conferring authority upon the EC to reevaluate membership applications.[50] A "resolved" clause preceding Section 1 provides that the EC does not intend to alter membership status of enrolled persons. Nevertheless, Section 6 of the ordinance expressly permits a reevaluation of applications of existing members. The express language in the operative provision of the ordinance controls over an introductory "resolved" clause.[51]

Appellants argue also that a moratorium on membership requirements adopted by the Band precludes their disenrollment.[52] The Band responds that the moratorium concerns

[49] In *Feezor v. Babbitt*, the Federal court presumed that BIA review of a tribal ordinance under tribal law requires consideration of whether the ordinance was properly enacted. 953 F. Supp. 1, 7 (D.D.C. 1996). The foregoing review of "meeting" and "election" is consistent with *Feezor*.

[50] AR 20.

[51] *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163, 129 S. Ct. 1436, 1444 (2009), noting that a preamble or "whereas" clauses are not part of the act and cannot enlarge or confer powers, nor control the words of the act, and a court "has no license to make it do what it was not designed to do." (Citations omitted).

[52] AR 5 includes the minutes of the meeting regarding the moratorium. Agenda item #9 provides, "Membership Requirements to Remain as is for next ten (10) years." It then cited the membership requirements of the 1997 Constitution.

membership *criteria*, not enrollment or disenrollment of individuals, and thus does not preclude the disenrollments. We defer to the Band's interpretation of this moratorium.

Based on the foregoing analysis, it was appropriate for the Regional Director to limit her letters to a "recommendation" to the Band, because the enrollment ordinance provides that the final decision on enrollment rests with the EC. Because the Regional Director's role was limited to providing a recommendation and was not a final action on enrollment, the Regional Director's letters were not adverse enrollment actions and rights to appeal through the appeals process established for Federal action did not arise.

The Department's present consideration was for purposes of determining which tribal law applied in order to determine the *Federal* responsibilities and scope of *Federal* authority of the Assistant Secretary and Regional Director under tribal law. We conclude that the Band has not provided the Assistant Secretary a decision-making role under the 2009 enrollment ordinance.

In this context, briefs of the parties question whether 25 C.F.R. Part 62, "Enrollment Appeals," applies to these proceedings. Prior to 1987, some actions impacting enrollment could be appealed under the Bureau's general appeal regulations under 25 C.F.R. Part 2 to the IBIA. Other actions were classified strictly as enrollment actions, were expressly beyond IBIA's jurisdiction, and could be appealed directly to the Assistant Secretary under Part 62. 52 *Fed. Reg.* 30,159 (August 13, 1987). In 1987, the BIA revised its regulatory appeal procedures under Part 62. *Id.* The revisions to Part 62 were not intended to create any new rights to a Secretarial appeal but only to provide uniform procedures where a right to a Secretarial appeal already existed.[53]

For the reasons expressed earlier, we conclude that the 2009 ordinance applies and the Regional Director correctly limited her letters to recommendations. Therefore, there is no adverse action within the meaning of Part 62 that would give rise to a right to appeal the Regional Director's letters to the Assistant Secretary.

Discussion of Remaining Arguments

Appellants raise arguments that under Federal law the Department must act in this matter. Having concluded that applicable tribal law does not provide the Regional Director or Department a role other than to recommend on enrollment issues, appellants' remaining arguments are addressed to determine if any Federal law duties exist in this enrollment dispute.

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[53] At nearly the same time that the Bureau published its revised Part 62, the Department published proposed regulations revising Part 2, making it expressly clear that IBIA had no jurisdiction under 43 C.F.R. § 4.330(b)(1) over enrollment appeals. 52 *Fed. Reg.* 43,006, 43011 (November 6, 1987). This limitation on IBIA's jurisdiction was retained in the final regulations. 54 *Fed. Reg.* 6,478, 6,487 (February 10, 1989).

Res judicata and collateral estoppel

Appellants argue that *res judicata* and collateral estoppel prevent a modification of the blood degree of Margarita Britten that was issued under the procedures in the Band's 1960s-era ordinance. As the Regional Director adhered to the 1989 decision, the application of *res judicata* and collateral estoppel to the Regional Director is moot. To the extent the argument is that the Band is bound by the 1989 decision, it must be directed to the Band.

Department Enforcement

Appellants also seek to have the Department enforce its 1989 decision against the Band and argue that the Department, having approved the Band's Constitution, must ensure that the Band does not violate its terms. Some appellants argue that the Assistant Secretary has a fiduciary duty to insure compliance with the Band's federally approved Constitution.

Federal approval of the Band's Constitution does not empower the Department to enforce its terms. To the extent that the decisions of the IBIA may have suggested at one time that there was such authority, the IBIA subsequently expressly disapproved that decision as an "impermissible policy pronouncement."[54]

The cases cited by the appellants to support their fiduciary duty argument involve election leadership disputes. It does not follow, however, that the obligation to identify the lawfully selected leaders extends to determining the membership of a tribe because the determination of membership does not necessarily determine who the lawfully selected leaders and representatives of the tribe are. That fact is particularly true in a case such as this one where the membership determination depends on a judgment as to the sufficiency of evidence of blood degree of a deceased ancestor. The impact on membership eligibility is the straight forward arithmetic result of the calculations that affect all members who descend from her.

Indian Civil Rights Act, Indian Gaming Regulatory Act

Appellants further contend that the Department has an obligation to enforce its 1989 decision concerning Margarita Britten under the Indian Civil Rights Act (ICRA). Appellants assert also that because gaming revenue distribution is governed by Federal law, the Department must act on the disenrollment of qualified members.

If, as suggested by appellants, membership disputes necessarily implicate the ICRA, the Department would always be thrust into membership determinations whenever a dispute arises in connection with enactment of a tribal ordinance. While the Supreme Court in *Santa Clara Pueblo* suggested that persons aggrieved by tribal law may be able to seek relief from the Department as it reviews ordinances under tribal law, the Court did not

[54] *Burnette v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 10 IBIA 464, 465 n.1 (1982).

suggest that the ICRA *required* the Department to engage in a far-reaching inquiry into internal tribal matters whenever ICRA allegations were raised. Indeed, the Court also mentioned that "Congress rejected a substitute . . . that would have authorized the Department to adjudicate civil complaints concerning tribal actions, with review in the district courts available from final decisions of the agency." 436 U.S. at 68. There is no role for the Department under the ICRA in these circumstances.[55]

As to the gaming proceeds issue, the court in *Smith v. Babbitt* rejected similar contentions that the Indian Gaming Regulatory Act created a fiduciary obligation for the Department to determine tribal membership eligibility and ensure that gaming revenue per capita payments are made to qualified members only.[56]

The remainder of appellants' arguments has been considered. Many are subsumed in the analysis above although not specifically referenced. Following full consideration, we conclude that none of the arguments would result in a change to the above analysis or conclusions.

Summary of Procedural Issues Presented

Appellants and Procedures

At the time we issued the Notice of Procedures, there were pending before the Assistant Secretary 80 appeals, comprised of 44 Aguayo appellants who filed with IBIA and the Assistant Secretary and 36 Howard appellants referred by IBIA to the Assistant Secretary. Their names are listed in footnotes 1 and 2 of the IBIA decision, 5 IBIA 192.

The Notice of Procedures provided that certain correspondence would be considered. Included was a letter dated March 28, 2013, from the attorney for the Aguayo appellants naming 18 individuals who "were inadvertently omitted from" the July 2, 2012 appeal of the Regional Director's letter of June 7, 2012, due to a "MS Word box format" issue. These individuals appear on the typed list of persons who appealed to the Regional Director.[57] The May 2013 briefs submitted to the Assistant Secretary did not object to or comment on this letter. Seeing no prejudice to the existing parties and as further explained below, these 18 individuals are added to the present proceeding as represented by counsel.

The May 2013 brief filed by the attorney for the Howard group includes 8 persons named as appellants who had appealed to the Regional Director but who did not appeal to IBIA. These individuals thus were not referred to the Assistant Secretary by the IBIA. The brief provides no argument for their inclusion in this proceeding.

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[55] *Welmas, et al. v. Sacramento Area Director, BIA*, 24 IBIA 264, 271-272 (1993) (declining to review sanctions imposed by Tribe, concluding under *Santa Clara Pueblo,* ICRA does not authorize the Department to scrutinize tribal actions not otherwise properly within its jurisdiction).
[56] 875 F. Supp. 1353, 1369 (D. Minn. 1995), *aff'd*, 100 F.3d 556 (8th Cir. 1996).
[57] AR 2.

The fact that certain Howard appellants were referred by IBIA to the Assistant Secretary and others came directly to the Assistant Secretary in the May 2013 filing makes no meaningful distinction between the two sets of Howard appellants as a referral from IBIA cannot extend what otherwise is the Assistant Secretary's jurisdiction. All the appellants, Aguayo and Howard, raised the Regional Director's lack of action on their arguments concerning the applicable governing document, whether they complied with the procedural requirements of 25 C.F.R. § 2.8 or not. The IBIA correctly viewed these appeals as enrollment matters and referred them to the Assistant Secretary.

All of the Howard appellants, as well as the prior referenced 18 Aguayo appellants, assert the same claims as other appellants, which are based on the same letters of the Regional Director. Their claims are within the scope of the matters being reviewed and their inclusion does not prejudice the parties. These individuals were before the Regional Director. Further, since the Regional Director's letters did not provide for appeal rights, and such rights were not required as the letters were not actions that adversely affected them within the meaning of 25 C.F.R. Part 62, the Department cannot hold the timing of their filing against them. They are, therefore, included in this proceeding.[58]

The Band argues in its brief filed with the Assistant Secretary on May 10, 2013, that of the 8 persons affected by the June 1, 2011 determination, only Ms. Howard filed a timely appeal to the Regional Director. It posits that "the remaining individuals were included only on supplemental arguments submitted by Mr. Chappabitty thirty-eight days after expiration of the appeal period." It made this argument before the Regional Director as well in its letter of August 17, 2011.[59]

The Assistant Secretary received appeals from all 8 of these individuals, under cover letter dated June 29, 2011, and the certificate of service referenced service on the Band and the Regional Director. In addition, documents filed to supplement the record indicate such service and the Regional Director agreed that these appeals belonged in the Regional Director's record. These individuals are included as appellants in the briefs and, as discussed above, are considered part of these proceedings.

The May 2013 brief filed by the Aguayo appellants moves to include 2 additional minors as appellants. There is no evidence submitted that these 2 minors appealed to the Regional Director. They were not listed in the Regional Director's letters of either June 7, 2012 or February 24, 2012.[60] Since the Assistant Secretary is addressing appeals from the Regional Director's letters, and these 2 individuals did not demonstrate that they

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[58] In their original notice of appeal to IBIA, appellants said they would amend list of appellants "at a later date who…decide to become parties of interest in this matter." They attempted to add these individuals before IBIA in their request for reconsideration of the dismissal, but IBIA denied this motion as moot. 55 IBIA 240 n.1.

[59] AR 4.

[60] AR 25, AR 2, AR 3.

were before the Regional Director, they are not within the scope of the issues pending before the Assistant Secretary and are not added as named parties here.

In their brief submitted in response to the Notice of Procedures, the Aguayo appellants object that the list of documents to be considered in the Notice did not include documents that they submitted to the Assistant Secretary shortly before the Notice issued. This objection is without merit as nothing in the Notice precluded the parties from submitting in their briefs arguments and evidence not referenced in the Notice, and Aguayo appellants did so.[61]

In their brief, these appellants also objected to filing the brief without seeing the administrative record that was before the Regional Director, and seek the ability to comment on any new evidence and submit supplemental briefing on receipt of other parties' briefs. The evidence in the record submitted by the Regional Director was all before the Regional Director in 2012 and available to appellants at any point thereafter. This request, thus, did not justify a modification of the briefing schedule. Further, the request for delayed and supplemental briefing could not be accommodated within the 60-day period in which the Assistant Secretary committed to act, a time period negotiated with, and agreed upon by, the Aguayo appellants. Although an additional 15 days was added to the schedule to accommodate the Assistant Secretary's review of the extensive supplements to the record and finalize the decision, and were agreed to by Aguayo appellants, appellants' request in its brief provided no schedule accommodating the original time period nor offered to extend it. Therefore, the schedule was not revised to provide for additional briefing. Finally, since no new evidence was submitted to the Assistant Secretary, the request to address any new evidence submitted is moot.

On May 28, 2013, Aguayo appellants filed another unsolicited brief, moving that the Assistant Secretary waive or make exceptions to the Part 62 regulations, seeking a ruling on "the issues raised in their appeal under 25 C.F.R. § 1.2." This filing prompted an e-mail response from the Band, served on the parties, seeking permission to file a response to this and another filing, "should the Assistant Secretary . . . decide to consider newly-raised arguments in these two motions." By "Notice Regarding Filings" dated May 29, 2013, the parties were informed that if there were a change in the Notice of Procedures, the parties would be informed. Given the extensive briefing before the Regional Director, IBIA, and Assistant Secretary, and the foregoing extensive analysis, there is no justification to permit additional briefing beyond what was provided for in the Notice of Procedures.

[61] On April 29, 2013, Aguayo appellants served a separate "Request to AS-IA to Consider Supplemental Evidence" seeking to add to the items referenced in the Notice that would be considered. The Notice of Procedures expressly provided that other than the brief to be filed on or before May 10, 2013, "No other briefs will be accepted." The April 29, 2013 submission is not accepted.

Motions to Supplement the Record

Aguayo appellants moved to supplement the administrative record submitted by the Regional Director with five attachments. Attachment 1 consists of the exhibits to their notice of appeal to the Regional Director, and as the Regional Director responds, that attachment is already in the record as Tab 25.

Attachment 2 is a letter dated May 25, 2012, with Exhibits A through D. The Regional Director objects to the addition of this letter, citing 25 C.F.R. § 2.13(a), because the letter was served on the U.S. Attorney, with a request to forward it to the Regional Director, as the matter was in litigation, rather than serve it directly with the Regional Director or the Regional Solicitor's Office. This filing occurred during the pendency of *Aguayo v. Salazar* and was served on the U.S. Attorney's Office, which should be sufficient under 25 C.F.R. § 2.12(e).[62] This question need not be resolved, however, as the letter, without its exhibits, is part of the IBIA record, and the exhibits themselves already appear in the record. Attachment 2, thus, was considered in arriving at this decision.

Attachment 3, Notice to Take Action, July 2, 2012, post-dates the Regional Director's letters that are the subject of the appeal and thus, as provided by the Regional Director, does not belong in the Regional Director's record. Similarly, Attachment 4, the Band's June 9, 2012, response to a Notice of Appeal 2.8 and Notice of Appeal 2.9 post-dates the Regional Director's decision and does not belong in that record. Both attachments were accepted for the record *before the Assistant Secretary* in his consideration of the appeals.

Attachment 5 is a letter from counsel for Aguayo appellants dated May 5, 2012, to the Assistant U.S. Attorney requesting that he advise, and make inquiry of, the Regional Director on various matters. There is no record that the U.S. attorney did so. The Regional Director objects to the inclusion of this document in the record. This attachment is of a different character than Attachment 1 that dealt with forwarding an enclosure. This Attachment 5 is not accepted as part of the record before the Assistant Secretary.

On May 20, 2013, counsel for Aguayo appellants filed a brief in response to the Regional Director's response to his motion to supplement the record and a "Motion to Consider Supplemental Argument and Evidence (25 C.F.R. § 62.11)." These briefs fall outside the briefing permitted under the Notice of Procedures and were not considered.

On May 16, 2013, Howard appellants moved to supplement the record and the Regional Director responded on May 21, 2013. As provided by the Regional Director, Attachment 1A and 1B are already in the record as Tab 5. The Regional Director did not object to the supplementation of the record with Attachments 1C - 1F, 2A, 2B, 3A-3D, 4A, 4B, 5A, 5B, 6A, 6B, and 7. These documents are now part of the Regional

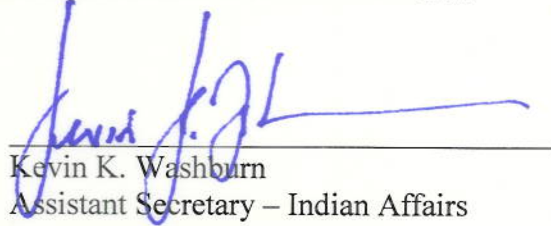
[62] It was appropriate for the attorney to be cautious in following professional rules in not communicating directly with the agency that was represented by counsel in litigation over the administrative appeal.

Director's record and were considered in this decision and cited with the prefix Supplemental AR.

Conclusion

Based on the foregoing analysis, we conclude that the Regional Director acted based on a proper interpretation of authority under tribal law to review the enrollment appeals. Tribal law limited the Regional Director to making a "recommendation," rather than actually deciding the enrollment appeals. We further conclude that the Department has no authority under Federal or tribal law to decide enrollment issues for the Band.

Dated: JUN 12 2013



Kevin K. Washburn
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