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UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 N. Quincy St., Suite 300  
Arlington, Virginia 22203

NEWTOK TRADITIONAL COUNCIL,        )  
    Appellant,                        )  
  )  
    v.                                    )  
  )  
ALASKA REGIONAL DIRECTOR,        )  
    BUREAU OF INDIAN AFFAIRS,    )  
    Appellee                         )  
  )

Docket No. IBIA \_\_\_\_\_

APPELLEE’S SUBMISSION OF REQUESTED INFORMATION

On July 11, 2013, Appellee, Acting Alaska Regional Director of the Bureau of Indian Affairs, issued a Decision recognizing for federal purposes a list of tribal members, referred to as the “New Council,” as the holders of seats on the Newtok Traditional Council, and as such, as the authorized representatives of the tribe. The same Decision concluded that another set of tribal members, referred to as the “Old Council,” and apparently headed by Appellant Moses Carl, would not be recognized by the Bureau as the duly elected members of the Newtok Traditional Council. Moses Carl, claiming to act on behalf of the Old Council, appealed from that decision to the Interior Board of Indian Appeals (IBIA) (although he failed to comply with the service requirements applicable to the proper filing of a Notice of Appeal). Notably, none of

the other individuals identified as members of the Old Council has filed his or her own appeal.

After receiving the Notice of Appeal, and a copy of the Appellee's July 11, 2013 Decision, the Board on July 20, 2013, issued a Pre-Docketing Notice, Order for Appellant to Complete Service, and Order for Information from Regional Director. This filing responds to the portion of the August 20, 2013 IBIA Order directed at the Acting Regional Director. Specifically, the Board instructed the Appellee to submit information as to whether there was any matter pending before BIA at the time its July 11, 2013 Decision was issued, that required the BIA to take action. In fact, there was. Specifically, an Indian Self-Determination Act (ISDA) contract proposal for Calendar Year 2013 was submitted on behalf of the Old Council, an action which required that the BIA determine which governing body, if either, should be recognized, so that it could either recognize the Old Council as authorized to act on behalf of the tribe, and award the contract, or else determine that a proper contract proposal requiring award or declination had not been submitted. In addition, it has been necessary for the BIA to render a decision in order to determine and confirm which tribal officials are authorized to access federal funds already included in existing ISDA contracts.

#### Background facts

This recitation of background facts will not be as detailed and comprehensive as one which may be provided in a later Appellee's Answer Brief, to be submitted after compilation of the Administrative Record for the July 11, 2013 Decision, and in response to a possible Statement of Reasons which Appellant may submit, but will hopefully suffice to satisfy the Board as to the necessity of the BIA having involved itself in internal tribal governmental affairs, by issuance of its July 11, 2013 Decision.

Prior to the fall of 2012, the BIA Alaska Region and Newtok Village, represented by the *Newtok Traditional Council v. Alaska Regional Director, BIA*  
Appellee's Submission of Requested Information - Page 2

Newtok Traditional Council, have been party to a succession of ISDA Title I contracts, including several in effect during Calendar Year (CY) 2012. At the time the dispute over tribal leadership arose in the fall of 2012, the Newtok Traditional Council was administering multiple ISDA contracts, one covering normal appropriated BIA funds and programs, and several involving Indian Reservation Roads (IRR) funding. Prior to the fall of 2012, no question had been raised as to the identity and authority of the Newtok Traditional Council to act on behalf of the tribe, and the Bureau had not had occasion to question such authority. With each succeeding ISDA contract proposal a resolution certified as having been passed by the apparent tribal governing body was submitted, requesting the awarding or renewal of such contract(s). In accordance with that pattern, a contract proposal for CY 2013 was submitted, under cover of Newtok Traditional Council Resolution 12-29, certified as having been adopted on October 11, 2012 (Exhibit 1 hereto). However, before the Bureau received and took action on such facially sufficient governing body resolution, questions were raised as to whether or not the seven member Traditional Council which submitted the contracting proposal was in fact the properly constituted and authorized governing body of the tribe.

At the latest, the existence of an ongoing dispute over who should be regarded as the duly elected members of the Newtok Traditional Council was called to the attention of the BIA during the Annual Providers Conference held in Anchorage in the late fall of 2012. Members of two rival factions were in attendance at the November conference, and each met separately with BIA staff, advocating that the BIA recognize specific members of their group as the duly elected and seated tribal governing body. Thereafter, the so-called New Council submitted a letter dated January 28, 2013, describing a number of events that had reportedly occurred over the preceding several months. See letter dated January 28, 2013, with several attachments (Exhibit 2, with

attachments 2A through 2D). According to the New Council's submissions, a large percentage of tribal members felt that the Old Council had continued in office for a long period without submitting to membership elections to choose the Council members. A petition was circulated to the tribal membership, calling for an election to be held in October 2012. Attachment 4, Exhibit 2D. On its face, that Petition bore the signatures of 122 persons, although it has neither been independently verified or confirmed—nor disputed—that every single one of them is an adult tribal member and eligible voter. The New Council's January letter goes on to report that the Petition was not acted on by the Old (incumbent) Council, with the result that community members called a general membership meeting on October 12, 2012 at which an election was held to fill all seven seats on the Council, allegedly in accordance with the terms of the tribe's 1999 Constitution (Exhibit 2C).

The Old Council apparently did not participate in the October 12 meeting or election, but instead conducted some sort of election of its own on November 4, 2012<sup>1</sup>. It appears that some persons elected on October 12 did attend the November 4 meeting, and assert during that meeting that the Old Council should recognize the results of the October 12 vote. The Old Council chose instead to conduct an election at the November 4 meeting, for the purpose of filling only two seats or offices, rather than seating a full slate of seven new Council members. Following the November 4 meeting, there were two different sets of individuals who regarded themselves as duly elected Council members under tribal law. When the two Councils failed to

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<sup>1</sup> As of the time BIA issued its July 11, 2013 Decision, the Old Council had provided to the BIA little if any information about this November 4 meeting/election, although it did for the first time attach a report or minutes of that meeting to its Notice of Appeal. According to those minutes, an election was held to fill the offices of President and Treasurer. It appears that 41 total votes were cast for candidates for one office, and 38 for the other. See Exhibit 3 hereto, already filed with the Board by Appellant. As noted, this document was not timely made available and therefore was not considered by the Acting Regional Director in reaching her July 11 Decision.

settle their differences on their own, or during separate meetings with BIA personnel in Anchorage, the day-to-day administration of tribal affairs continued to rest, at least for a period of time, with the employees answering to the Old Council.

This uncertain state of affairs led to the New Council in effect petitioning the BIA to recognize it, rather than the Old Council, through the correspondence and documents submitted on January 28, 2013 (Exhibit 2, and attachments 2A-2D), as well as numerous other communications. In its January 28 letter, the New Council claimed that no elections had taken place in accordance with the Newtok Constitution for eight years, so that no one on the Old Council was legitimately holding office<sup>2</sup>. The January 28 letter unmistakably put the BIA on notice that there was a serious question as to the authority of the Old Council, which had submitted the ISDA contracting proposal, to take such action on behalf of the tribe. Before it could completely or partially award or decline the CY 2013 ISDA contract proposal, it was necessary for the BIA to satisfy itself as to whether it had been submitted by the governing body authorized to act on behalf of the tribe.

In the weeks before the January 28, 2013 letter was sent, another petition was apparently circulated among tribal members (Exhibit 2C). That petition, addressed to the BIA, asked the BIA to assist the “New Council” to regain oversight and control of the economic and financial resources of the Traditional Council. Most of the 104 signatures on this second petition were affixed on January 4, perhaps at a community meeting, but additional signatures were collected through January 26. As the cover sheet for the supporting documents notes, the village has

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<sup>2</sup> The New Council’s letter erroneously referenced the Indian Reorganization Act (IRA). In fact, Newtok Village is not organized under the Indian Reorganization Act, although there may have been an intent at some point to complete that process, leading to an erroneous belief that IRA reorganization has occurred. In any case, there does not seem to be a dispute over the existence or text of the 1999-adopted tribal constitution.

approximately 200 adult residents and member/voters, so that the number of petition signers (128 in August or September 2012 and 104 in January 2013) in each case is asserted to represent a majority of adult tribal members<sup>3</sup>. Along with the member petition, the attachments to the January 28 letter included a Resolution passed by the New Council, asserting among other things that the terms of all Council members who voted on Resolution 12-29, to submit a CY 2013 ISDA contract proposal, had expired. The BIA therefore concluded that some resolution of the dispute, as to whether the Old Council validly exercised tribal authority in requesting a CY 2013 ISDA contract, was required for federal purposes.

In order to more fully inform its determination, the BIA composed and sent out a March 15, 2013 letter, addressed to the Presidents of both the Old and New Councils (Exhibit 4). That letter described information already in the possession of the Bureau, invited submission of additional information and documentation, and requested further explanation or interpretation of events and tribal law. It also sought to deal with the problem of ongoing administration of current contracts, suggesting that necessary actions be concurred in by both Councils<sup>4</sup>. And in fact, both Councils in parallel proved willing to act to authorize a substantial disbursement to a subcontractor (the State of Alaska) under one of the tribe's existing transportation contracts. Finally, the BIA's March letter responded to the assistance requests from both Councils by

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<sup>3</sup> The BIA has had no means of determining whether every one of the persons who signed is in fact an adult tribal member, but it is noteworthy that the Appellant Moses Carl has never raised any question on that score.

<sup>4</sup> In addition to the question as to whether the CY 2013 ISDA contract proposal from the Old Council should be regarded as a tribally authorized submission, the BIA had to reassess what individuals were authorized to "draw down" or access remaining federal funds obligated in existing contracts. In a February 13, 2013 Resolution No. 01/03, the New Council specifically called upon the Bureau to "stop funding" the existing Bureau contracts (Exhibit 5). Subsequently, on April 18, 2013, the New Council adopted a resolution and transmitted a form to the BIA designating certain individuals as having signature authority to act on behalf of the tribe in relation to its ISDA contracts (Exhibit 6).

suggesting the possibility of resolving the leadership dispute by conducting a new tribal election in which all would participate.

Unfortunately, only the New Council responded promptly to the BIA request for more information, and the two Councils also failed to cooperatively resolve the governing body composition dispute through internal tribal processes. On June 10, 2013, the BIA sent an informational letter to the tribal membership, explaining its understanding of the then current status of BIA contracting pending the resolution of the tribal leadership dispute (Exhibit 7). The June 10 letter indicated that in the absence of ability to enter into a CY 2013 ISDA contract, BIA had the direct responsibility to carry out programs, functions, services, and activities (PFSAs) for which the tribe and its members were eligible, and intended to do so by contracting with the regional service provider, Association of Village Council Presidents (AVCP) for that purpose. As a matter of fact, such an arrangement was never finalized. However, contacts with AVCP by some village residents and the BIA did lead to AVCP's President making a trip to Newtok to participate in a community meeting.

AVCP President Myron Naneng, a well-known and respected regional leader, apparently agreed to attend a community-wide meeting to attempt to assist with resolving the leadership dispute. The BIA ultimately decided not to attend that meeting, partly for logistical reasons (in light of the community's remoteness), and partly because it was not confident that its attendance was welcomed by both competing factions. The meeting, which ended up being scheduled for June 14, was apparently organized and noticed primarily by the Old Council and/or its employees, but was also attended and willingly participated in by members of the New Council and its supporters. It was also attended by attorney Michael Walleri, who had been engaged by the New Council to assist with resolution of the leadership dispute. Subsequently, based upon

extensive June 24 submissions from attorney Walleri, the New Council asked for a BIA decision recognizing it as the authorized governing body. Although acceding to such a general request would ordinarily have been contrary to the letter and spirit of the case law cited in the Board's August 20, 2013 Order, the BIA felt it was obliged to make a determination at that time because of the need to finally determine whether the Old Council had the authority to submit the contract proposal that had been pending since fall of 2012. In addition, the implicit flip side of the New Council's request for recognition was the request for a determination that the Old Council lacked the authority to act on behalf of the tribe in entering into a new ISDA contract for CY 2013, or to continue to administer funds provided in prior existing contracts.

According to the cover letter and documentation relating to the June 14 meeting, submitted by attorney Walleri, an internal tribal dispute mechanism was actually utilized at that meeting, via the presentation to tribal members in attendance of an electoral choice to establish and confirm either the Old Council or the New Council as the duly elected tribal governing body. These materials, submitted on June 24, 2013 both electronically and by mail, are included herewith as Exhibits 8A through 8H. The two sign-in sheets, circulated by the two Councils, contain respectively approximately 78 and 38 signatures, with limited overlap, where in a few instances the same tribal member signed both lists (Exhibits 8G and 8H). It certainly appears that there were at various times well over 100 tribal members in attendance, although by the time a membership vote on which Council to recognize was taken, only 82 votes were cast (Exhibit 8C). Two sets of meeting minutes were also submitted, one apparently prepared by or for the Old Council, covering primarily a morning meeting of that Council, termed a "Joint Meeting" (Exhibit 8E), and one by or for the New Council, which appeared to be an afternoon public meeting of tribal members in attendance (Exhibit 8F). It appears from the minutes of the



public meeting that those in attendance, based on a motion by Tribal Administrator Stanley Tom, a longtime employee of the Old Council, chose to “resolve” the intra-tribal leadership dispute by a membership vote as to which Council would be invested with the power and status of the membership-selected governing body (Exhibit 8F at 4).

Following the report of the outcome of the June 14 joint council and tribal membership meetings, there was a brief period during which the BIA was under the impression that the dispute as to which Council was invested with authority to represent the tribe appeared to have been resolved. Unfortunately, after initial apparent acceptance of the outcome of the June 14 vote, the Old Council started giving indications that it would not acquiesce in that result, but instead would persist in asserting that it remains the authorized tribal governing body. The BIA’s July 11, 2013 Decision under review was therefore issued in the face of renewed indications that the dispute between the Old Council and the New Council remained unresolved. Moses Carl’s filing of his appeal obviously indicated his disagreement with the July 11, 2013 BIA decision to recognize the New Council, at least for BIA contracting purposes, and by so doing to reject consideration of the Old Council’s fall 2012 resolution and proposal to enter into a CY 2013 ISDA contract with the BIA. Most recently, the Old Council’s position has been illuminated by its August 28, 2013 letter, lately received, insisting that the internal tribal governance dispute remains unresolved, and proposing another joint meeting of the two Councils, along with “all agencies involved,” to resolve the question as to which Council is Newtok’s authorized governing body.

#### Discussion

The Board’s August 20 Order raises the question as to whether it was necessary for the BIA Acting Regional Director to issue her Decision of July 11, 2013, which obviously intrudes

to a significant degree into internal tribal political affairs. As the Board correctly observes, such a decision by the BIA should only be taken if necessary in connection with a required federal action. In this case, two such necessary BIA actions required the Bureau to make a determination. First, in the face of the clear existence of a serious dispute over what tribal members had authority to act as a governing body for purposes of submitting a CY 2013 ISDA contract proposal, the Bureau was obliged to make a determination as to whether it would treat the October 2012 contract request submitted by the Old Council as properly submitted on behalf of the tribe. And second, in regard to the release of funds under the already awarded 2012 and earlier ISDA contracts, the Bureau had to determine what individuals were authorized by the properly recognized tribal governing body to interact with the government financial system to gain control of such remaining funds.

Although the Board's concern regarding the necessity for issuance of the BIA Alaska Region decision, expressed at page 3 of its August 20 Order, is certainly understandable, especially in the face of the Board-cited "if any" phrasing from page 8 of the July 11 Decision, the BIA's decision was in fact required in order to determine, first, whether the CY 2013 ISDA contract proposal submitted by the Old Council was cognizable, as an act of the duly authorized tribal governing body, and secondly, which individuals, designated by the governing body properly exercising tribal authority, were to be recognized as vested with authority to access already obligated ISDA contract funds, through the federal financial system.

The Board's August 20 Order also requests documentation of the action taken by BIA in conjunction with issuance of its decision. In effect the actions taken (or not taken) by the Bureau in connection with its July 11 Decision have taken place both prior to and continuously since issuance of the decision. First, the Bureau has not acted on the Old Council's CY 2013

ISDA contract proposal, initially because of a serious question as to whether it was a request received under ISDA §102(a)(1), 25 U.S.C. § 450f(a) (1), from an authorized tribal governing body, and since July 11, in accordance with the determination that it was not.

Secondly, with respect to the question of disbursements under previously awarded contracts, the Bureau has not allowed any such release of funds to the tribe, since the leadership dispute arose, with the sole exception of the payment of \$226,345.92 through the tribe to one of its subcontractors, the State of Alaska Department of Transportation. As mentioned previously, this payment was made after BIA solicited the cooperation and explicit approval of both Councils, although it was actually carried out by Tribal Administrator Stanley Tom, an employee under the supervision of the Old Council, and authorized by that group as a signatory able to access ISDA contract funds through the federal financial system. See Exhibit 9, BIA Awarding Official's advice, based on an April exchange of emails between the Regional Solicitor's Office and an attorney loosely affiliated with the New Council, whereby the New Council approval of the specific disbursement to the State of Newtok ISDA contract funds was given and documented. The import of the BIA's July 11, 2013 Decision, if or when it becomes effective, will be to limit tribal "draw down" authority to those individuals authorized by the New Council. See Exhibit 6, whereby the New Council designated such individuals.

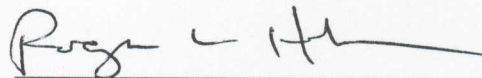
For the Board's further information, it is reported that the New Council has initiated contacts, and requested technical assistance in connection with preparation and submission of its own request on behalf of the tribe of an ISDA contract covering BIA administered PFSA's to which the village and its members are entitled. However, these contacts, having come *after* issuance of the July 11, 2013 Decision, are not relied upon by the Acting Alaska Director in this

Submission as a basis for her position that it was necessary for her to issue the Decision under review.

Additional Issue - Effective Date of July Decision

The Appellee Acting Alaska Regional Director respectfully requests in conjunction with this submission that the Board provide some clarification and guidance to the Bureau and the interested members of Newtok Village with regard to the effective date of the July 11 Decision, assuming that it is not vacated after the Board's consideration of this filing. Under 25 § 2.6(b), the appeal of Moses Carl prevented the July 11 Decision from taking effect on August 10. However, it is also noted that under 43 C.F.R. § 4.21(a)(2), the absence of the filing of a petition for stay by an appellant, as in this case, would seem to suggest that the BIA's decision is presently in effect. On the other hand, certain statements of the Board would appear to indicate a contrary view. For example, in *Committee to Organize the Cloverdale Rancheria Government v. Acting Pacific Regional Director*, 55 IBIA 220 (2012), one of the decisions cited in the Board's August 20 Order, it is stated that "... the effectiveness of a BIA decision is automatically stayed, unless made effective by the decision maker to whom an appeal may be filed." Clarification of the interaction of the cited regulations, and their implications with regard to the important question of decision effective date would no doubt be helpful to all concerned, and much appreciated.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of September, 2013.



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Counsel for Appellee Acting Alaska Regional  
Director, BIA

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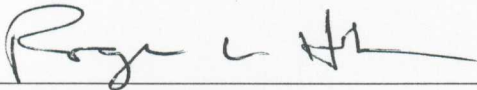
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Docket No. IBIA \_\_\_\_\_

**ENTRY OF APPEARANCE**

Comes now the undersigned attorney with the Office of the Regional Solicitor, Alaska Region, and hereby enters his appearance in this proceeding on behalf of the Acting Alaska Regional Director, Bureau of Indian Affairs, Appellee herein.



Roger Hudson, Attorney  
Office of the Solicitor - Alaska Region

9/6/13  
Date

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Docket No. IBIA \_\_\_\_\_

**CERTIFICATE OF SERVICE/MAILING**

I certify that I am an employee in the Office of the Regional Solicitor, Alaska Region, and I am a person of such age and discretion as to be competent to serve papers. I further certify that on September 9, 2013, I caused the foregoing original APPELLEE'S SUBMISSION OF REQUESTED INFORMATION and ENTRY OF APPEARANCE to be served by certified mail, return receipt requested, postage prepaid to the Interior Board of Indian Appeals, 801 N. Quincy, Suite 300, Arlington, Virginia, 22203, with a copy of the same, postage prepaid, to the following:

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