APPELLATE COURT OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

Kevin CHAMBERLAIN, et al. v. Philip PETERS, Sr., et al.

No. 99-CI-771 (Jan. 5, 2000)

Summary

The Saginaw Chippewa Tribal Appellate Court finds: (1) the Assistant Secretary—Indian Affairs violated both tribal and federal law in his August 10, 1999 recognition of the "Interim Peters Council" and therefore the Peters Council was not lawfully holding office; (2) the Chamberlain Council violated the Saginaw Chippewa Indian Tribal Constitution in its holdover actions and therefore is not entitled to relief; (3) the tribal council officials sworn into office on December 6, 1999 as a result of the November 2, 1999 general election properly and lawfully hold office in accordance with the laws and Constitution of the Saginaw Chippewa Indian Tribe of Michigan.

Full Text

Before VICENTI, Chief Justice; FAIRBANKS and POMMERSHEIM, Associate Justices

PER CURIAM

Opinion and Order

This matter comes before this Court upon a petition submitted by Kevin Chamberlain and other members of his Council[1]

[1]Shelly Foster, Benedict Hinmon, Alvin Chamberlain, William Snowden and Valerie Sprague.

(the Chamberlain Council) seeking extraordinary relief against Chief Philip Peters, Sr. and the members of his Council (the Peters Council) in this Court's original jurisdiction[2] pursuant to the jurisdictional provisions of Resolution 99-024, Section 1.513.2(b). By an order entered September 25, 1999, this Court accepted jurisdiction over the subject matter and the parties to the case. Oral argument was heard on October 16, 1999. Briefs in this matter were submitted on October 1, 1999, and November 2, 1999. In short, this case asks whether the Secretary of the Interior of the United States of America, through the Assistant Secretary for Indian Affairs Kevin B. Gover, possesses the authority under federal or tribal law to determine the proper and valid elected leadership of this Tribe. This Court hereby holds in favor of the petitioners as to their essential claim, but denies any extraordinary relief as unwarranted due to the petitioners' own illegal actions and the constitutional stability and repose that now exists on the Isabella Reservation. The Court is ever mindful of the far reaching implications of this case and therefore proceeds with due respect and caution.

I. Factual Summary

The facts of this case[3] reflect the typical convoluted saga experienced by many of the Indian tribes that were overrun by American expansion in the 18th and 19th centuries. In order to recover from the presence of an invading force, this Tribe was coerced to yield its lands, urged to reorganize governmentally, required to reassess its tribal identity through determining its foundation membership, and, then compelled to revise its organic laws to accord with a transcendent vision of future tribal governance and society. Such things do not, and did not, in this case, proceed without conflict and confrontation.

A. Historical Background

The Saginaw Chippewa Indian Tribe originated as a collection of affiliated bands of Saginaw, Swan Creek and Black River Chippewa all of whom occupied the region around Mt. Pleasant, Michigan, the current seat of tribal government. Through successive treaties entered between the Tribe and the United States in the years 1805, 1807 and 1817, the Tribe ceded large parcels of land in Michigan and Ohio to the United States government for its use and disposal.

In 1937, the Saginaw Bands reorganized pursuant to the provisions of the Indian Reorganization Act of 1934 as the "Saginaw Chippewa Indian Tribe of Michigan" through a newly adopted Constitution. The newly organized Council then promptly passed Ordinance 1 on October 3, 1938. This ordinance set the base membership of the Tribe and otherwise created procedures for the enrollment and adoption of persons into membership of the Tribe. Soon thereafter, Superintendent Peru Farber of the Michigan Agency of the Bureau of Indian Affairs (BIA) prepared a roll of names that contained the additional names of other persons who were not included in the initial roll of membership (the Farber roll), but who qualified, in his estimation, by the terms of the law for membership in the Tribe. This roll was not adopted by the Tribe at the time, but it did not receive an in-depth review for decades.

From 1973 to 1979 the Tribe litigated its claims to the ceded lands described above before the Indian Claims Commission (and, later, the Court of Claims) until a judgment for monetary compensation was entered, thus requiring the federal government to pay $4.3 million to the Tribe. On the heels of this judgment, the Council repealed Ordinance 1, then issued a series of resolutions beginning on February 1, 1982 (TM-01-82, TM-02-82 and TM-03-82, hereinafter the TM Resolutions) that purportedly expanded the original roll set in Ordinance 1. Some of these new names appeared on the previously mentioned Farber roll. Others were eligible by virtue of the terms of Article III of the 1937 Constitution. This process was completed on December 10, 1982, a date that figures prominently in this case.

On a parallel course, the U.S. Congress, after a failed attempt, finally worked out a bill to compensate the Saginaw Chippewa Tribe for the lands it lost. Public Law 99-346, 100 Stat. 674 (1986), authorized the release of the monies previously adjudged by the Court of Claims to be owed to the Tribe. A portion of that law required the Tribe to make changes to its Constitution as a condition precedent to the distribution of the money to the Tribe's membership. Sec. 3(b)(3). As requested, the Tribe obliged with the adoption of a new Constitution on November 4, 1986. Most notable in that Constitution was the language of Article III, Section 1(a) which provides that membership extends to "[a]ll persons whose names appeared on any of the following rolls: (1) November 10, 1883; (2) November 13, 1885; (3) November 7, 1891; or (4) *December 10, 1982.*" (Emphasis added.)

In November of 1995 Kevin Chamberlain and nine others (the Chamberlain Council), some of whom are signatory to the present petition, were elected to represent District 1 by the base voter rolls represented in the 1986 Constitution which included those persons also named in the TM Resolutions. Part of the platform of this Council included a promise to reform membership problems and a commitment to effectuate constitutional reforms. During these years, though, scant progress was made toward these intended reforms. Instead, the Council proved itself more successful in constructing the expanded Soaring Eagle Casino, the economic cornerstone of the Tribe. After two years had passed, it was time for new elections to take place, as required by the Saginaw Chippewa Tribal Constitution.

B. The Elections

On October 16, 1997, a primary election was held for District 1. The field of candidates was reduced to twenty as the law required. The following month, on November 4, the General Election was held. Only four of the sitting members of the Chamberlain Council were re-elected. The election results were challenged, and, as was the procedure of the time, the Council examined the results. The Council ruled the election was invalid. This declaration led next to a curative General Election. This election, held on January 27, 1998, had virtually the same results. The Chamberlain Council, again, declared the election to be invalid. This occurred as their terms of office expired and their mandate of reform came to an end.

From this point, and precisely beginning on February 18, 1998, a series of tribal court challenges advanced toward what appeared to be a cure to the problem of membership and the proper legal succession to office. In fulfillment of the court's directions to complete both its membership examination and the election process, the Chamberlain Council tried unsuccessfully to secure the services of genealogist Betty Bell. It then successfully secured the services of James Mills. Mr. Mills produced his recommendations citing what he perceived to be shortcomings in various categories of documents that should be produced in order to bring finality to questions of membership in the Tribe. Acting upon these recommendations, the Chamberlain Council issued notices in October of 1998 to more than 140

[2]When the appellate court is called upon to take "original jurisdiction" in an action, the Court is thereby required to conduct a fact-finding mission in addition to its customary role of hearing legal argument. There are no rules regarding this fact-finding mission when it is to be done by the appellate court. Peculiar to this case as well has been the need to proceed as expeditiously as possible in order to bring this matter to finality and repose.

[3]For ease of understanding much of the text that follows, extensive factual information has been culled from a "Chronology of Events" that this Court required the parties to submit into the record.

persons who previously had been considered members of the Tribe telling them that they had been "temporarily suspended" from membership unless they could produce documentation which would satisfy Mr. Mills and the Enrollment Advisory Board (EAB). The subsequent cascade of documentation, involving some 500 files, led Mr. Mills and the EAB to conclude that only six individuals truly appeared to have been questionably enrolled. After notification, two of these voluntarily relinquished membership in the Tribe. This, arguably, set the stage for a valid election.[4]

On November 24, 1998, a second primary election was held for District 1. Surprisingly, the persons who had been temporarily suspended from membership were disallowed from either voting or running for office in this election. The election took place leading to the selection of 20 finalists. Of these 20, only one person was a member of the Chamberlain Council. The suspended members, all except for the questionable remaining four, were then inexplicably restored to membership. Before a general election could be held, acting upon protests submitted by several members of the Tribe, the Chamberlain Council acted on December 15, 1998 to again nullify the election process. But, also in that month the Council enacted law that established an appellate court to hear appeals from the Community Court.[5] It is this resolution that created this Court and the original jurisdiction contemplated in this case.

The day following the Council's nullification, the Community Court issued notices that a hearing would be convened to determine whether the Chamberlain Council should be held in contempt of court for its apparent failure to hold a curative election. On December 29, 1998, Judge Bruce Havens convened the Community Court. After a disruptive proceeding the Chief Judge prepared his ruling. He determined that "the Tribal Council Defendants have shown a consistent pattern of disregard for the Constitutional and Ordinance mandates [of the Tribe] and thus are acting outside of the scope of employment with the Tribe thereby subjecting themselves to individual liability for their conduct." Members of the Chamberlain Council found themselves under prosecution for criminal contempt before Associate Judge Ronald Douglas, after Judge Havens summarily recused himself, and subsequently resigned.

The second year of the Chamberlain Council's "holdover" term began with a dismissal of the contempt charges. The Tribe proceeded to its third round of elections. The third primary election was held on January 19, 1999. This time the Chamberlain Council again invalidated the election in a ruling entered on February 25, 1999, stating that the TM Resolutions unconstitutionally increased the membership rolls. These two events are the most significant developments relevant to this case: first, it is from the January 19, 1999 primary election that the Peters Council comes; and second, it is the unconstitutionality of the TM Resolutions that the Chamberlain Council relies upon for its continued maintenance of control beyond the end of its term of office.

Obviously incensed by this last turn of events, a group of members of the Tribe began to organize an alternative election outside of any existing governmental backing and purportedly authorized by Ordinance 4. They announced their intentions. The Chamberlain Council countered this initiative by enacting a law of sedition making the "simulation of governmental processes" a crime and punishable by imprisonment. On March 9, 1999, the alternative election proceeded, nonetheless, and resulted in a voter participation of approximately 37% of the voters in District 1. Several persons were then issued criminal citations, subsequently dismissed, pursuant to the sedition law.

It is important to note that the elections and court cases were not the only tracks of activity. From late in 1998 until the March 1999 alternative election both the supporters of the alternative election—which included the current Peters Council—and the Chamberlain Council were actively engaged in the pursuit of the political backing of the Assistant Secretary of the Interior Kevin B. Gover. As part of this strategy, while Assistant Secretary Gover postponed official action in this controversy, the Chamberlain Council initiated an alleged media critique of Gover's B.I.A. Administration.

On March 11, 1999, the Chamberlain Council passed a law redistricting District 1, the Isabella District, such that the District expanded beyond the boundaries of the reservation to include lands which had previously encompassed Saginaw lands as they appeared before those lands were ceded to the federal government.

On March 16, 1999, the victors in the March 9 alternative election took the oath of office but there was no officially recognized transfer of governmental power. In the Community Court, on the same day, Judge Bruce S. Hinmon dismissed challenges to the Chamberlain Council's rulings that invalidated the November 1998 Primary and the December 1999 General Elections. Judge Hinmon based his decision on the sovereign immunity and political question doctrines.

Meanwhile, Assistant Secretary Gover finally weighed in on the controversy. By a letter dated June 9, 1999, he urged the Chamberlain Council to hold an election within the next 45 days. The letter implied that his office considered the January 19, 1999 primary election to have been valid—in spite of the Chamberlain Council's and the Court's rulings to the contrary. He further challenged that his Administration would be forced, in the absence of such election, to "deal with the representatives of the two off-reservation districts and the ten persons from the Isabella District who received the highest number of votes in January 1999 as representatives of the Tribe."

The Chamberlain Council, aware of Gover's threatened course, nonetheless, scheduled a fourth round of elections beginning with a primary set for some time in September 1999, outside of the 45-day window established by Assistant Secretary Gover in his letter of June 9, 1999. As a result, on August 10, 1999, Assistant Secretary Gover adhered to his word and issued a letter stating:

> I am instructing the Area Director to proceed with the instructions I gave him on June 9. He is to deal with the representatives of the two off-reservation districts and the eleven persons from the Isabella District who received the highest votes in January 1999 as representatives of the Tribe on an interim basis.

Assistant Secretary Gover, letter of August 10, 1999.[6]

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[4]There can be no doubt that the summary "temporary suspension" from tribal membership of more than 140 individuals (approximately 10% of the electorate) without advance notice and an opportunity to be heard clearly violated notions of tribal fairness and due process under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8). This is especially troubling since it prevented such individuals from voting and running for office, which are surely core elements of tribal citizenship and membership. All of this was exacerbated by the fact that the tribal enrollment of the suspended individuals was determined in accordance with Article III, Sec. 1 of the Saginaw Chippewa Indian Tribal Constitution.

If tribal membership requirements as set out in the Tribal Constitution are somehow defective or flawed, they may only be changed with due tribal deliberation and constitutional reform in accordance with the Tribal Constitution itself. While such constitutional reform (whether good or bad) may have been contemplated by the Chamberlain Council, it was never effectuated during its time in office.

[5]Resolution 99-024 (enacted on December 24, 1998). Chief Justice Vicenti was sworn into office later in the month on December 30, 1998. Justices Fairbanks and Pommersheim were sworn in early in 1999 on March 20, 1999.

[6]A copy of this letter appears in its entirety as an appendix to this opinion and order.

It is not entirely clear what had happened at this juncture. Copies of the Assistant Secretary's letter were provided to tribal and BIA law enforcement, as well as the Federal Bureau of Investigation and the United States Marshall Service. Many of the tribal law enforcement personnel were employed directly by the BIA and also held supervisory positions. There is some suggestion in the record that Attorney Michael Phelan, who served in the capacity of legal counsel to the Tribe during the Chamberlain Administration had advised the police that they should give effect to the Secretary's letter. The Peters Council was sworn into office by a notary public. Conflict and confrontation ensued in the following month. It is from these series of events that this petition emerged.

The Peters Council then went directly to produce its version of curative elections. In order to accomplish this, the Peters Council enacted laws that restored the electorate—the body of eligible voters—to the *status quo* as it existed before the Chamberlain Council took office. In addition, it set up an election challenge process which involved neither the Council nor the Courts. Primary elections were held on October 2, 1999, by which 24 finalist candidates were selected. Immediately following this election, a petition was submitted to this Court in an attempt to receive a ruling of invalidation.[7] This Court denied the request. A general election took place on November 2, 1999, in which twelve persons were selected to take office. Five minutes before the close of business on December 6, 1999, another petition was submitted, this time by Kevin Chamberlain and Benedict Hinmon,[8] asking this Court to issue a temporary restraining order calling for a halt to the administration of the oaths of office on December 7, 1999, to the prevailing candidates in the November election. This Court has stayed its hand pending its ruling in this case, fully aware that the two are inextricably intertwined.[9]

A final note to this factual summary is in order regarding the participation of the federal government, or lack thereof, in these proceedings. This Court convened two sessions, the first, as a pre-trial conference, and the second, as oral argument regarding the issues presented here. In anticipation of these hearings, and, at least, in the latter hearing, at the urging of both parties, we *sua sponte* invited the participation of the federal government in these proceedings and have received a mere letter of declination.[10]

II. Issues Presented

Through the two proceedings conducted by this Court in its original jurisdiction we have gathered the foregoing facts, limited, however, by the nature of proceedings of this sort. Although there are a myriad of subsidiary issues raised by the parties, we find the following to be most salient and ripe for consideration:

A. Whether the Chamberlain Council possessed an unfettered right to continue to hold over in office despite the expiration of its constitutionally defined term of office?

B. Whether the Assistant Secretary of the Interior for Indian Affairs possessed the lawful authority to replace the Chamberlain Council?

C. Whether the Peters Council possessed lawful authority to sit as the Interim Council for the Tribe?

D. Whether the answers to these questions affect the legality of the Council recently elected? and

E. Whether the findings of this Court require the granting of extraordinary relief?

III. Discussion

A. Validity of the Actions of the "Holdover"[11] Chamberlain Council

We begin our discussion on the question of whether the Chamberlain Council possessed an unfettered right to continue to hold over in office despite the expiration of its constitutionally defined term of office? The answer to that question lies in its constituent elements. What authority did the Chamberlain Council have to continue in office beyond the end of its term? Did the Constitution mention the prospects of a holdover? If not, is there something within the theory and structure of the Constitution that provides for such a "holdover"? What, therefore, were the limits of its authority, if any? And if there were, how do we treat such unconstitutional actions?

It takes only a minimal review to recognize that the Constitution, adopted in 1986, and the laws of the Tribe,[12] have not a single provision regarding the transition of power from one Council to the next. It does not follow that the Council in office at the time that a transition should occur is, therefore, left with open authority to reshape the government of the Tribe. Various other provisions of the Constitution provide either direct or implied limitations against Tribal Council action, irrespective of whether it is legally or illegally constituted. The most notable of such provisions, in this case, concern Article III, regarding membership,[13] Article VI, Section 1(m),[14] and Article VII.[15] In addition, the Tribe is presumptively bound by the mandates of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8), in particular, its references to "due process of law" and "equal protection of the laws."

We recognize that at the heart of the Chamberlain Council's justification for its continued validity beyond the end of the term of office is its assertion that the membership mandate had to be fulfilled *before* any valid elections could take place. In its estimation, it was, thus, essential to change the membership of the Tribe. This was effectuated by the dual initiatives to investigate the validity of membership claims, and, to amend the Constitution to reflect its vision of an ideal profile for membership. Both are problematic on legal and theoretical grounds.

Read together Article III,—which sets a base membership roll based upon the particular rolls taken on November 10, 1883, November 13, 1885, November 7, 1891, and December 10, 1982,[16]—and Article VI, Section 1(m)—which denies the Coun-

[7] *Helen Black, et al. v. Philip Peters, Sr., et al.*, Case No. App. Ct. 1005 (filed November 2, 1999).

[8] *Kevin Chamberlain and Ben A. Hinmon v. Chief Judge, Tribal Community Court*, Docket Number unassigned.

[9] A final motion was submitted in this case on December 14, 1999, as we were in the midst of penning this opinion. Attorney Dwight P. Carpenter renewed, in this petition, his request for an award of attorney's fees. Because this request requires additional facts, we reserve ruling on this matter to a later date.

[10] We received indirect notification from the BIA that it was prohibited by 28 C.F.R. § 0.20(c) from participating in a tribal court proceedings in an *amicus curiae* capacity without the approval of the Solicitor General.

[11] This term was used first by Assistant Secretary Gover in his letter of August 10, 1999, in paragraph 4.

[12] Even if such laws existed, such laws would be subject to scrutiny to determine whether they would comport with specific portions of the Constitution through a judicial process.

[13] This Article sets the parameters for membership in the Tribe.

[14] This Article allows the Council to pass laws "not inconsistent with Article III."

[15] This Article provides a process for amendment of the Constitution to accommodate such laws that might be contrary to other terms within the Constitution.

[16] Constitution of the Saginaw Chippewa Indian Tribe of Michigan, Article III, 1(a)(1-4).

cil any authority to pass laws affecting membership—signal a clear barrier to such Council actions that would affect the status of membership. Even the attempt to force individuals by law *ex post facto*[17] to produce proof of membership, therefore, is highly suspect. *See* footnote 4, *supra.* From a practical perspective, however, we concede that some laws that touch upon the issue of membership are allowable, though, tempered by the "due process" and "equal protection" clauses of the ICRA. Due process and notions of fundamental fairness suggest that the status of membership cannot be assailed without ample procedures, and especially so after a person has been admitted to membership in the Tribe.

The status of nominal membership is not the sole concern raised by the Chamberlain Council's actions. Membership consists of a bundle of rights and privileges, including, but not limited to, the right to be secure in one's identity as a member, the right to receive tribal benefits on an equal footing with other members, and the right to participate in the political process. The fact that over 140 persons were denied that right strips the Chamberlain Council of any cover of innocence and righteousness.

The theory and structure of the Constitution also serve to erode the Chamberlain Council's dual initiatives and its continued occupancy of office. Article IV, Section 8 provides that the Council "*shall* be elected every two years." (Emphasis added.) This modest statement forms the foundation for the government of the Tribe. It is mandatory and not discretionary. The election *must* take place. The performance of the election is a duty incumbent upon the Council, and the failure to hold an election can be deemed a neglect of that duty thus serving as a basis for removal from office. *See* Article IV, Section 14(a).

The "two year" limitation, moreover, places a very finite limitation upon the elected Council. A candidate knows before running for office that his or her term may last only two years and not beyond. And, in order to gain the public trust, a candidate voices certain public concerns that either do or do not succeed in gaining the public validation through the voting process. *See generally* Article IV. In this case, the Chamberlain Council ran on a particular platform that did indeed gain the public trust. But there is a clear constitutional implication that such platform must be fulfilled or completed within the given two years.

The holdover actions of the Chamberlain Council were clearly in violation of the Saginaw Chippewa Indian Tribal Constitution. The Tribal Constitution makes no provision for a holdover tribal council and implicitly rejects such a possibility. Article IV, Section 8 of the Constitution states: "The Tribal Council shall be elected every two years in the month of November." This constitutional provision clearly does not envision any holdover possibility.[18] In fact, it constitutionally guarantees members the right to elect a tribal council every two years.

The Chamberlain Council argument that its holdover actions were constitutionally authorized rests more directly, as counsel conceded at the hearing on October 16, 1999, on language in Election Ordinance No. 4 (at that time) that stated:

> Any voter may protest an election for the district in which he/she voted. The written notice of protest must be made to the Tribal Council within seven (7) days after the election. The notice must set out the grounds of the protest. The Tribal Council shall schedule a hearing on the protest within ten days. The Tribal Council decision will be *final.* (Emphasis added.)

While this election ordinance did grant substantial authority to the Tribal Council to decide election protests, it cannot be said that it granted authority in excess of constitutional limits. To do so would render the constitutional requirement of tribal elections every two years in November as guaranteed in Art. IV, Sec. 8, a mere nullity. To state the obvious, no tribal ordinance may render constitutional provisions inoperative.

The "logic" of the Chamberlain Council argument is fatally flawed at its core. It presumes an ongoing right to set aside tribal elections without reference to the tribal constitution or potential review by a tribal court. This is profoundly undemocratic and contrary to any notion of the balance of governmental powers. The mandate for reform that originally carried the Chamberlain Council to elected office eventually became a justification for what looked more and more like despotism. Lofty motives do not excuse unconstitutional and illegal actions.

The jurisprudential implications of such matters have been noted by other tribal courts. For example, the Confederated Salish and Kootenai Tribal Court of Appeals observed:

> Interpretation and application of the law to determine the legality of a particular act is the "heart of the judicial function." [Citing *Menominee Indian Tribe ex rel. The Menominee Indian Tribal Legislature v. Menominee Indian Tribal Court*, 20 Indian L. Rep. 6066, 6068 (Men. Tr. S. Ct. 1993)]. Among the most important functions of courts are constitutional interpretation and the closely connected power of determining whether law and acts of the legislature comport with the provisions of the Constitution. Courts were created to serve these purposes.

Moran v. Council of the Confederated Salish and Kootenai Tribes, 22 Indian L. Rep. 6149, 6155 (C.S. & K.T. Ct. App. 1995). *See also* the classic federal precedent of *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803).

The Chamberlain Council had two years to complete its pledge of resolving membership, election and constitutional issues before its term of office expired in November 1997. *See* Saginaw Chippewa Indian Tribe of Michigan Constitution and Bylaws, as amended, Article IV, Sec. 8. During its tenure, it should be noted that its primary focus was on economic development and it did achieve major success in establishing a sound economic base for the Tribe. However, the alleged necessary governmental reforms were not extensively dealt with until late in its term or until its official term of office had expired. At the end of those first two years the Chamberlain Council could only be considered a "holdover" Council.

Arguably, the political mandate that elected it to office had to be accounted for *at that time* to the voting public, leaving the question to the existing membership whether membership and constitutional reforms should be continued under the same government. The Chamberlain Council's political platform *at that time* could have been the very same assertions made before Assistant Secretary Gover and before this Court throughout these proceedings, that it had identified issues of membership which required a curative constitutional amendment, and, that it would be its electoral platform to so amend the Constitution.

Nonetheless, continuing its quest to fulfill its expired political mandate, this "holdover" Council finally began to act on the political reforms it had promised, which involved a series of meetings with the federal government. Nearly one year after its term expired, on December 23, 1998, Chief Chamberlain and several representatives of the Tribe met with the BIA requesting Assistant Secretary Gover's assistance in expediting an election on a proposed Constitution that would address the Tribe's enrollment and membership problems.

As a "holdover" body, the Chamberlain Council did have a duty at the expiration of its term to ensure a constitutionally

[17]Consider that every person who was subject to produce proof of their membership had been confirmed to be a member of the Tribe and should have been able to feel a sense of security in that status. This expectation was shattered by the Chamberlain Council's actions.

[18]While a holdover possibility might potentially exist in some unforeseen, extraordinary circumstances the constitution certainly does not envision a tribal council maintaining itself in office by setting aside election results.

elected government and a proper and orderly transition of that body. This "holdover" Chamberlain Council failed in its efforts to conduct a valid election and consequently has not been able, since, to effectuate an orderly transfer of government within the internal mechanisms of the Tribe's government. Both the Chamberlain Council and the Peters Council thereafter sought to rely on a political resolution of the Chamberlain-created problem from the BIA's Assistant Secretary of Interior, Kevin Gover. Both of these requests to the Assistant Secretary totally ignored the internal tribal law and institutions of the Saginaw Chippewa Indian Tribe. In sum, both the "holdover" and "interim" councils were in error. *See* discussion *infra* at pp. 19-33. Moreover, this appeal to the United States government exemplifies both the negative impact that historical federal policy has had upon Indian tribes, and, the all-too-often tribal populist reliance on the well-established paternalistic posture of the BIA.[19] This reliance on the federal government rather than upon the basic right and responsibility of self-government is counter to the established principles of tribal sovereignty and, as we shall see below, yielded a major intrusion into the internal governmental functions of this Tribe.

The previous discussion brings into question, though, the validity of the actions of the Chamberlain Council taken from the end of its two-year term to the installation of the Peters Council—the "holdover" period. As stated above, the Tribal Constitution does not have any provision for an interim governing body or a "holdover" Council. Thus, the Chamberlain Council after its term expired apparently acted outside the scope of tribal constitutional authority. Such actions outside the scope of constitutional authority place the overall tribal government in a very tenuous position. There are a myriad of potential circumstances where a Council may be legally required to hold over. If, for instance, a major snowstorm had caused power shortages, road closures and a resultant failure of the election process, a Council may be required to hold over to ensure that such elections eventually take place. Such events may require the expenditure of funds and, perhaps, an adjustment of the internal laws. But, it is clear that such "holdover" authority converts the mandate of such leadership away from initial platform concerns toward the primary duty to hold such elections. One cannot, in retrospect, say that any holdover or interim actions during such an emergency are manifestly illegal—*that* would require a case-by-case analysis. And under such analysis, the most suspect of actions must be those which accrue to the benefit of those holding office, or, are contrary to the Constitution, the laws of the Tribe and applicable federal law.

Clearly, to provide the necessary continued stability and regularity in government, the actions of the "holdover" council must be deemed presumptively valid unless it can be established by clear and convincing evidence[20] that those actions were contrary to the Tribal Constitution or applicable federal law, or, provided an undue benefit to those persons holding such "holdover" office. The most relevant areas that have surfaced as issues of concern include the adoption of an amended election code. *See* Saginaw Chippewa Indian Tribe of Michigan, Tribal Council Resolutions # 99-101 & # 99-104.

Even though the Chamberlain Council, in good faith, began these broad constitutional reforms, the timing for these actions was constitutionally erroneous. Its term had expired. In addition, to begin constitutional reforms during the "holdover" period is questionable as it is well-settled law that tribal officials are limited to the authority conferred upon them by their tribal constitutions or statutes. Thus the timing of the Chamberlain Council's actions is not only contestable, but the adoption of such ordinances containing provisions relating to a currently contested election is questionable.

Finally, according to the Constitution, the Tribal Council is vested with the authority to make provisions for all elections, "by *proper* ordinance." *See* SCITM Constitution, Article IV, Section 7. (Emphasis added.) Where a "holdover" or "interim" government attempts to change the constitutional democratic processes from those that existed at the time of its own election, we can only conclude that such changes are *improper* and violative of Article IV, Section 7. These changes occurred on July 15 and 16, 1999. *See* SCITM Tribal Council Resolutions # 99-101 & 104.

The timing of these actions brings to question the intent of the Chamberlain Council to cure any defect in the election process and conduct a legitimate tribal election. Once its terms had expired it was foreclosed from changing the laws of the Tribe that pertain to political succession. The Chamberlain Council was bound by the laws that installed it into office. Its primary duty was to ensure compliance with the pre-existing tribal law and to effect an orderly transition of government. To initiate any laws outside their constitutional authority, exceeded their legal and political mandate.

B. Validity of the Recognition of the "Peters Council" by Assistant Secretary Gover

1. Introduction and Background

Although the essential facts are set out above, *supra* at pp. 2-10, these additional facts are particularly relevant in this section dealing with Assistant Gover's recognition of the "Peters Council." In the aftermath of the several failed elections discussed in Part I of this opinion, during the period from December 1998 through August 1999, there were extensive contacts by both the Chamberlain Council and the Peters Council with Mr. Gover. During this period, representatives of the Chamberlain Council met with Mr. Gover at least four times and with high level assistants of Mr. Gover on at least two other occasions. The Peters Council met with Mr. Gover at least twice. Despite its obvious importance, Mr. Gover never effectuated a face-to-face meeting of the Chamberlain Council, the Peters Council and himself. Even more startling, no administrative appeal[21] in this matter was ever filed, much less pursued, by the Peters Council.

All of these meetings—not surprisingly—dealt with the mutually agreed upon necessity to conduct a tribal council election that was legitimate and without flaw. The critical items of disagreement appeared to be over the timing of the election, which would include both a primary and general election, and whether this was possible without a prior election involving constitutional reform relating to membership, redistricting, and changing the size of the tribal council. Although agreement between the parties and Assistant Secretary Gover appeared imminent at times, it never materialized.

During this period, Assistant Secretary Gover wrote at least four letters to the Chamberlain Council. In a June 9, 1999 letter, Mr. Gover wrote, "I strongly urge you to conduct an election within the next forty-five days to select ten individuals to serve as Tribal Council members for the Isabella District from among

[19] *See Felix S. Cohen's Handbook of Federal Indian Law* (1982) at 42. This treatise provides a detailed history of federal Indian policy and its impact on tribal governments.

[20] We have chosen this particular standard after recognizing that the relationship of a member to his or her tribe is significantly similar to the relationship of a person to his or her family. The rules of a family leader must be accorded considerable weight under the presumption that such rules are to the ultimate benefit of the family, and, likewise for political leadership.

[21] *See, e.g.*, 25 C.F.R. Part 2 (1999) setting forth the administrative procedure for challenging actions (or, as in this case, alleged inactions) of the Bureau of Indian Affairs.

the twenty persons from the Isabella District who were the successful candidates at the latest primary election in January 1999." Mr. Gover further indicated that if this did not happen, he "would direct the local B.I.A. Superintendent and Area Director to deal with the representatives for the two off-reservation districts and the ten persons from the Isabella District who received the highest number of votes in [the] January 1999 [primary] as representatives of the Tribe."

Pursuant to a subsequent letter from the Chamberlain Council, Mr. Gover wrote again on July 6, 1999 indicating his perception of a "prolonged and (sic) undeterminable limbo thereby frustrating the clear will of the people" yet he also indicated a willingness "to consider any other reasonable alternatives to resolving the current frustration of the voters." Three days later Mr. Chamberlain met personally with Mr. Gover. In a written communication, Assistant Secretary Gover subsequently extended the election deadline until August 6, 1999. A final round of separate meetings of members of the Chamberlain Council and the Peters Council with Mr. Gover ensued. Following these meetings, Mr. Gover's legal representative requested the submission of any final arguments and/or documents by the Chamberlain Council and the Peters Council to be made by August 6, 1999.

On August 10, 1999, Mr. Gover made his decision in a letter directed to both the parties. As noted above, *supra* at p. 9, and in the appendix, he recognized the *eleven* top vote-getters in the January 1999 primary as the representatives of the Isabella District. Since two vote-getters tied for the tenth highest spot, he directed that those two individuals "share the vote for that seat on the Council." Assistant Secretary Gover further indicated that this recognition was on an "interim basis" and he looked "forward to a time when *normal* government-to-government relations with the tribe can be re-established."[22] (Emphasis added.)

As will become more clear in the discussion of relevant statutory and case law, *infra* at pp. 22-33, Mr. Gover's letter is remarkable in at least three respects. First, it provides absolutely *no* legal authority for Mr. Gover's decision. No part of the United States or Saginaw Chippewa Tribe's constitution, no federal or tribal statute, no federal or tribal regulation, and no case law—federal or tribal—are cited, much less discussed. It necessarily follows, of course, that there is no reference to the procedural posture of the case as being an administrative appeal or otherwise authorized by law. Second, Mr. Gover's decision clearly *violates* the Constitution of the Saginaw Chippewa Tribe of Michigan in recognizing eleven instead of ten representatives from the Isabella District.[23] Third, it breaks entirely new (and tribally unconstitutional) ground in recognizing individuals who have not won any general election but only are top vote-getters in a primary election.[24]

2. Federal Substantive and Procedural Law

a. Substantive Law

Given the remarkable sweep of the Assistant Secretary's (alleged) power to "recognize" one set of elected tribal officials over another, one would expect express congressional authorization and delegation of such authority to the Bureau of Indian Affairs. Yet this is not so. As attorneys for the Peters Council—the clear beneficiaries of Assistant Secretary Gover's actions—admitted "there is no statute or regulation which states in so many words that the Secretary must decide which persons to recognize as the lawfully elected leadership of the Tribe." (Respondent's Supplemental Brief at 3.) This candid statement bears further scrutiny.

It is—in this Court's opinion—a necessary and unavoidable conclusion as well. While it is true that United States Constitution recognizes Congress' power to regulate "commerce with Indian tribes" (Art. I. Sec. 8 cl. 3), *see, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 [7 Indian L. Rep. 1055] (1980) and while Congress has delegated much of that authority to the executive branch at 25 U.S.C. § 9[25] with corresponding subdelegations to the Secretary of Interior and to the Commissioner of Indian Affairs at 25 U.S.C. §§ 1, 1a,[26] & 2a, such delegations are properly contingent on "carrying into effect the various provisions of any *act* relating to Indian Affairs." 25 U.S.C. § 9 (1994) (emphasis added). Of course, there is no act of Congress that purports to confer authority on the Secretary of Interior to decide tribal elections.[27] Therefore such an argument quickly runs out of steam and comes up empty.

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[22]Mr. Gover's letter also contains a somewhat bizarre disclaimer that "the holdover [i.e. Chamberlain] Council's public relations activities [concerning an 'unflattering newspaper article about me'] have not caused me to feel any bias against them. I have decided this matter strictly on the merits." *See* full text at Appendix.

[23]*See* Art. IV, Sec. 2(1), Saginaw Chippewa Tribe of Michigan Constitution. In addition, the Tribal Constitution makes no provision to "share the vote for that seat on the Council."

[24]*See* Art. IV, Sec. 1, Saginaw Chippewa Tribe of Michigan Constitution.

[25]25 U.S.C. § 9 provides:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

[26]25 U.S.C. § 1a provides:

> For the purpose of facilitating and simplifying the administration of the laws governing Indian affairs, the Secretary of the Interior is authorized to delegate, from time to time, and to the extent and under such regulations as he deems proper, his powers and duties under said laws to the Commissioner of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior pursuant to law. Subject to the supervision and direction of the Secretary, the Commissioner is authorized to delegate, in like manner, any powers and duties so delegated to him by the Secretary, or vested in him by law, to the assistant commissioners, or the officer in charge of any branch, division, office, or agency of the Bureau of Indian Affairs, insofar as such powers and duties relate to action in individual cases arising under general regulations promulgated by the Secretary of the Interior or the Commissioner of Indian Affairs pursuant to law. Such delegated powers shall be exercised subject to appeal to the Secretary, under regulations to be prescribed by him, or, as from time to time determined by him, to the Under Secretary or to an Assistant Secretary of the Department of the Interior, or to the Commissioner of Indian Affairs. The Secretary or the Commissioner, as the case may be, may at any time revoke the whole or any part of a delegation made pursuant to this section, but no such revocation shall be given retroactive effect. Nothing in this section shall be deemed to abrogate or curtail any authority to make delegations conferred by any other provision of law, nor shall anything in this section be deemed to convey authority to delegate any power to issue regulations.

[27]If such an act of Congress existed, it would arguably extend beyond any reasonable definition of "Indian commerce" and could only be "justified" by the plenary power doctrine articulated in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). While this doctrine and the few ensuing limitations set out in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 [4 Indian L. Rep. A-7] (1977) and *United States v. Sioux Nation of Indians*, 448 U.S. 371 [7 Indian L. Rep. 1044] (1980) are well established in federal Indian law, this Court regards the plenary power doctrine as essentially extra-constitutional and illegitimate especially when it is used as a sword against tribal sovereignty instead of as a shield to protect tribes from state encroachment. *See, e.g.*, Frank Pommersheim, BRAID OF FEATHERS 46-50 (1995); Philip Frickey, "*Marshalling Past and Present: Colonialism, Constitutional*

In conventional administrative law parlance, it appears that the Assistant Secretary's actions are clearly *ultra vires* and therefore of no force and effect. For example, federal executive officials are limited to the authority conferred on them by the Constitution or statute. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). This may even be more true in Indian law. *See, e.g., Morton v. Ruiz*, 415 U.S. 199 [1 Indian L. Rep. No. 3, p. 6] (1974).

The Assistant Secretary's actions in this matter are further remarkable in their complete failure to heed the essential precepts of the pivotal cases of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 [12 Indian L. Rep. 1035] (1985) and *Iowa Mutual Ins. v. LaPlante*, 480 U.S. 9 [14 Indian L. Rep. 1015] (1987) to exhaust tribal court remedies—including tribal appellate remedies—before invoking federal court jurisdiction to challenge tribal authority. Perhaps the Assistant Secretary considered his unilateral actions as *sui generis* and beyond such precedential constraint. In fact, this failure of the Assistant Secretary, in part, was the basis for the Chamberlain Council's action brought against the Assistant Secretary in the federal courts. *See* further discussion *infra* at pp. 30-33.

b. Procedural Law

Despite the existence of a well recognized administrative process set out at 25 C.F.R. Part 2 (1999) to bring claims against the Bureau of Indian Affairs for what it did or failed to do,[28] the process was not used by the Peters Council in this matter. Instead, it, as well as the Chamberlain Council, engaged the Assistant Secretary Gover directly and repeatedly in this matter. Counsel for both parties could not provide any legal authority for this process. Certainly, this was not a legal or administrative law proceeding in any sense of that term in that it never involved a face to face meeting of the parties, resulted in no record or findings of fact and conclusions of law, and it was completely without the existence of administrative due process and regularity. To be blunt, it was basically a bold political attempt by both sides to have the Assistant Secretary weigh-in in their favor in this not unimportant election dispute. Each side seemed to think that the Assistant Secretary, regardless of the law, held the necessary political power in his hands. And, curiously enough this was not a completely unfounded assumption for at least two reasons. First, there exists both the unique element of the trust relationship in Indian law and second, there was plenty of case law of various stripes involving BIA. "resolution" of tribal election disputes. However, as the following analysis demonstrates neither of these two possibilities permits the naked use of secretarial power as it was used in this case.

3. Trust Relationship between the Federal Government and Indian Tribes

While the absence of positive law on point is usually dispositive in most areas of law, it is not necessarily so in Indian law. One reason is the existence of the trust relationship. The trust relationship, which is rooted in the early, seminal cases of *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 6 (1832), articulates a special affirmative duty of the federal government "trustee" to act in such a way as to protect and advance the status of the tribal "beneficiary." This is most often seen in matters of land and natural resources, but also exists in matters of the delivery of governmental services. For example, this is the entire undergirding for the provision of such essential governmental services as police and social services by the BIA on many reservations. In addition, it is the basis for encouraging many tribes to provide these services *directly* though the popular "638 contracts" authorized by the Indian Self-Determination and Education Act of 1975, 25 U.S.C. §§ 450a-450n (1998).

Many (federal) courts have routinely—but without any compelling or persuasive analysis—assumed that one of the elements or duties of the trust relationship includes umpiring tribal election disputes. *See, e.g., Milam v. United States Dep't of Interior*, 10 Indian L. Rep. 3013 (D.D.C. 1982); *Goodface v. Grassrope*, 708 F.2d 335 [10 Indian L. Rep. 2119] (8th Cir. 1983), *Ransom v. Babbitt*, 69 F. Supp. 3d 141 [27 Indian L. Rep. 3001] (D.D.C. 1999). Yet these cases and others fail adequately to distinguish between (1) the federal trustee's responsibility to itself as a disburser of federal money to tribes (and others) and (2) its responsibility (if any) to guarantee to the beneficiary tribe the "right" of any particular group of elected tribal officials to take office or remain in office.

The former situation was the one most often alluded to by attorneys for the Peters Council in their citation to such statutes as the Indian Self-Determination and Education Act of 1975 and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1998) which make reference to the Secretary's responsibility to deal with "the recognized governing body of any Indian tribe."[29] Yet these seem rather unremarkable provisions subject to the common sense interpretation that the federal government should not disburse public money to any government—such as a tribal government—that is *not* the proper or legitimate governing body from some appropriate federal perspective. This is to protect the public fisc. Within the limits of notice and basic fairness, surely the federal government—with applicable regulations—can make such funding decisions (as it already does) concerning money that goes to states, counties, and municipalities across this land. You either meet the requirements to qualify for federal funding or you don't. Yet it is much more difficult to extend this obvious federal governmental responsibility to the right and duty (again without any statutory or regulatory authorization) to legally decide who is the "recognized" governing body of the Tribe. That responsibility, it seems, belongs to the Tribe alone as a quintessential element of tribal sovereignty and the right of self-government. To let the federal government decide can only be viewed as a remarkable intrusion into tribal sovereignty.[30]

ism, and Interpretation of Federal Indian Law," 107 HARV. L. REV. 381, 395 (1993).

[28]*See, e.g.*, the case law discussion *infra* at pp. 30-33 in which *all* the tribal (election) cases mentioned are rooted in proper administrative appeals in accordance with 25 C.F.R. Part 2. The Assistant Secretary engaged in a course of conduct without a single precedent supporting his (procedural) actions and dozens of cases to the contrary. This is quite astounding.

[29]This contention by the Peters Council appears to be belied by the fact that the Assistant Secretary's letter of "recognition" was presented to the local BIA police for its presumed enforcement which seems to go beyond matters of funding into matters of power. It is further true that there is not a single reported case in which a tribe was successful in resisting the decision of the BIA in an election dispute without recourse to a federal appeal. BIA decisions resolving tribal election disputes—at least in the federal arena—are not merely advisory opinions about federal funding but enforceable decisions likely backed by invocation of the Supremacy Clause. This, of course, is not necessarily the view subscribed to by this Court. *See* further discussion *infra* at pp. 30-33.

[30]Yet this Court is not unmindful of those instances—duly reported in the cases—in which tribal institutions for whatever reasons sometimes prove incapable of resolving election disputes and political turmoil and even violence ensue. Such cases—but not the case at bar—do need the prophylactic availability of BIA administrative forums to resolve such disputes in the context of interpreting (tribal) law. However, naked pleas (whatever their intentions) to the Assistant Secretary do not invoke the rule of law but rather rely on power politics and an all too available dangerous residue of colonialism within the BIA.

The second view of the trust relationship contends that it includes an affirmative responsibility on the part of the federal government to protect the right of tribal members to select a government of their choice. *See, e.g., Ransom v. Babbitt*, discussed *infra* at pp. 31-33. Yet this is equally problematic in that such an assertion, as noted above, invades the province of tribal sovereignty and the heart of self-government. While such a view of the trust relationship situates itself on high ground as the democratic "enforcer" of the tribal right to elect its own government, it is only legitimate upon the exhaustion of tribal remedies that have proved to be futile, non-functioning, or non-existent and it is only plausible within an administrative process governed by appropriate regulations rather than invoking the raw power politics of the Assistant Secretary's office. A trust relationship that is grounded in dependence and subservience is inherently at odds with any notion of sovereignty and meaningful self-government. That is why the safeguards mentioned above are not extravagances or mere window dressing but are absolutely necessary to safeguard tribal self-determination.

In essence, if the trust relationship is to be of any mutual benefit to both the federal government and the contending tribal parties, it must be in the context of supporting tribal institutions—particularly tribal courts—as the primary arbiters of election disputes with the BIA as a forum of last, not first, resort. Such a supportive, respectful attitude on the part of the Assistant Secretary's office was not much in evidence in the case at hand. The Assistant Secretary's office appeared to assume from beginning to end (without the benefit of any inquiry, hearings or findings) that the Saginaw Chippewa Indian Tribal Appellate Court was somehow incapable of resolving the election dispute.[31]

The record before this Court reveals the uncontroverted fact that—despite the adverse ruling of the tribal trial court against the Peters Council—*no* appeal was ever filed with the Tribal Appellate Court. As counsel for the Peters Council admitted, he was aware that a newly established Tribal Appellate Court had been formed but when several of his telephone inquires to the then appellate clerk about the necessary procedures to be followed were not returned, he abandoned the idea of filing any appeal as essentially fruitless. While counsel's candor is refreshing, it is not persuasive. And while his frustration at the time is quite understandable, it does not excuse his failure to appeal. The newly formed Tribal Appellate Court was created pursuant to a tribal ordinance that outlined its basic procedures.[32] Obviously, the failure, however rude, of a court clerk to return a party's telephone inquiries cannot excuse the party's failure to comply with tribal law.

In addition, even after the initial failure to timely appeal, subsequent inquiry to the new clerk would have confirmed that indeed the Appellate Court was up and running and was already considering its first case. *See, e.g., Saginaw Chippewa Tribe of Michigan v. Cunningham*, No. 98-CI-220 [27 Indian L. Rep. 6052]. Such a set of circumstances should have set the stage for the Peters Council to file for a extraordinary writ invoking the original jurisdiction of this Court. At oral argument in this case, John Jacobson, counsel for the Peters' Council, wistfully admitted as much when he observed that had he been better informed his client would be the petitioner instead of the respondent in the case at bar and perhaps, just perhaps, there would have been no need to call on the Office of the Assistant Secretary.

For want of such effort, the integrity of Saginaw Chippewa tribal institutions—particularly its Tribal Appellate Court—were severely and needlessly impugned. The Assistant Secretary made no inquiry—formally or informally—of the Court. His office sought no declaratory or extraordinary relief in any official proceeding nor did it seek the simplest verification about whether any action had been or could be brought to adjudicate the election dispute. He simply assumed the worst and proceeded accordingly. This is the trustee not as helpful partner, but as arrogant superior. Nor does this Court intend to cast the Chamberlain Council as innocent and without fault. As Part III(A) of this opinion fully indicates, *supra* pp. 11-19, the Chamberlain Council did act illegally and outside the scope of the Tribal Constitution in its several holdover actions, but it did, nevertheless, create a Tribal Appellate Court fully empowered in either a direct appeal or in an original action seeking an extraordinary writ to resolve the election dispute that is finally before us.[33]

In sum, while the trust relationship remains an important component of the government-to-government relationship between the federal government and Indian tribes, it does not authorize the Assistant Secretary to act with unbridled discretion in resolving tribal election disputes. At best—upon exhaustion of tribal remedies—the BIA must provide adequate opportunity for administrative hearings and appeals in which the dispositive law will always be tribal—not federal—law.

4. Case Law

All the relevant case law[34] in the area of BIA and federal court resolution of tribal court election disputes affirms two broad propositions. First is the necessity of exhausting and deferring to tribal remedies and second, that the governing law for resolving such disputes is tribal—not federal—law. For example, the Tenth Circuit has held that, where an independent tribal forum has exercised jurisdiction, the Secretary is without authority to rule on an election dispute. *Wheeler v. United States Department of Interior*, 811 F.2d 549 [14 Indian L. Rep. 2058] (10th Cir. 1987). *See also Wheeler v. Swimmer*, 835 F.2d 259, 262 [15 Indian L. Rep. 2004] (10th Cir. 1987) (The right to conduct an election without federal interference is essential to the exercise of the right of self-government).

Respondents rely most heavily on two cases to support the actions of the Assistant Secretary in this matter. They are *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983) and the very recently decided case of *Ransom v. Babbitt*, 69 F. Supp. 3d 141, 1999 WL 825126 (D.D.C. 1999). In *Goodface*, the Eighth Circuit held that the Secretary of Interior could not decide to not decide which elected faction to recognize in a dispute on the Lower Brule Sioux Reservation in South Dakota. Yet the case expressly stated that such action by the BIA is "interim" only and "should continue only so long as the dispute remains unresolved by a Tribal Court." In the case at bar, the actions of the

[31] *Durfee v. Chamberlain*, though decided by Judge Hinmon to be nonjusticiable on grounds of sovereign immunity and political question doctrines, could have been appealed to this Court.

[32] *See, e.g.*, Tribal Council Resolution 99-024 (1998), Saginaw Chippewa Indian Tribe of Michigan.

[33] It is worth noting in this regard that although the respondent Peters Council explicitly waived its sovereign immunity in this matter (*see* respondents' opening brief at pp. 1-2), this Court does not concede that it had any sovereign immunity to waive. It would seem, for example, that the explicit authorization of the extraordinary relief made possible in cases such as this through the Tribal Council's express lawmaking in Resolution 99-024, necessarily contemplates a waiver of tribal sovereign immunity for purposes of awarding any non-monetary, remedial relief. Given the "waiver" in this case, specific consideration of the extent of the Tribal Council's sovereign immunity in such matters is left for another day.

[34] In addition to the cases discussed in the text, *see, e.g., Displaced Elem. Lineage Emancipated Members Alliance v. Sacramento Area Director*, 34 IBIA 74, (3/10/99); *Duncan v. Portland Area Director*, 33 IBIA 220 (4/1/99); *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130 [24 Indian L. Rep. 7069] (12/11/96).

Assistant Secretary foreclosed—or attempted to foreclose—use of tribal court appellate or original jurisdictional authority to resolve the matter at hand. Yes, the Secretary must do something when his authority is invoked in an election dispute but only when tribal remedies have been exhausted and have proved ineffective. In this case, tribal court remedies, regardless of what the Assistant Secretary thought, had not been exhausted and of course could not have been deemed ineffective.[35]

The Eighth Circuit found it was an abuse of discretion to recognize "both Tribal councils only on a *de facto* basis." Specifically:

> We recognize that the district court faced a practical problem. The BIA's action effectively recognized a two-headed administration with no real power to govern. Although it was necessary to remedy the situation by ordering the BIA to recognize one governing body, the district court overstepped the boundaries of its jurisdiction in interpreting the tribal constitution and bylaws and addressing the merits of the election dispute.

Goodface at 338. In addition, the situation on the Lower Brule Reservation involved "interim recognition" of a group of individuals who appeared to have won a *general* election as opposed to merely surviving a primary election.[36] This case is therefore not at all similar to *Goodface*.

The respondents also rely heavily on the recent case of *Ransom v. Babbitt*, 69 F. Supp. 3d 141 (D.D.C. 1999). In *Ransom*, a federal district court held that a determination of the BIA to recognize the new "Constitutional Government" of the St. Regis Mohawk Tribe in New York State as opposed to the old "Three Chief System" of government was "arbitrary, capricious, and contrary to law." The basis of this decision was the Court's view that the BIA acted erroneously in deferring to a tribal (trial) court decision's in the matter and ignoring a subsequent tribal referendum that rejected the tribal court's decision concerning the very close tribal election to adopt the new form of constitutional government in the first instance.

The court found that it was necessary for the BIA to insure that tribal court decisions were "reasonable" (*Ransom* at 7) and that it had failed to do so in this instance by ignoring information that the tribal court had become "non-functional," and by refusing to accept a tribal referendum that expressly rejected the tribal court's difficult and controversial decision about the results of the original constitutional election.

While *Ransom* is indeed a difficult case involving an extremely close, hotly contested election that changed the *structure* of tribal government and about which reasonable people might differ, it seems to us that the federal district court in adopting a "reasonableness" standard of review clearly went beyond the "arbitrary, capricious and abuse of discretion" standard set out in the Administrative Procedures Act (APA).[37] In addition, the reasonableness standard does not seem to us to provide adequate recognition of tribal sovereignty and self-determination.

In any event, *Ransom* is not analogous to the case at bar. *Ransom* proceeds from an extensive set of administrative appeals (hence the necessity of applying the APA "arbitrary, capricious and abuse of discretion" standard) which included on the record evidence about the then "non-functioning" tribal court, the results of a specific referendum about the validity of the tribal court decision,[38] and clear evidence of a BIA tilt in favor of the constitution reform government.[39] The precedential value of *Ransom* is further qualified by the fact that it did not exist at the time Assistant Secretary Gover made his decision and may well be subject to appeal itself. Yet *Ransom* is instructive in a positive way—not as legal precedent—but as a model of the benefit of extensive administrative proceedings in developing a meaningful record to bring before a federal court. Needless to say, no such administrative proceeding occurred in this case.

In sum, the relevant case law identifies three essential steps that must be taken to resolve any tribal election dispute. They are:

1. The necessity of exhausting tribal court remedies, including tribal appellate remedies;
2. Then (and only then), if necessary, taking appropriate BIA administrative appeals in accordance with 25 C.F.R. Part 2 in which the dispositive law is tribal—not federal—law; and
3. Finally, subsequent federal judicial review, if any, of the BIA administrative determination shall be based on the APA "arbitrary, capricious and abuse of discretion" standard.

None of these ingredients are present in the case at bar and therefore the Assistant Secretary's action is "arbitrary, capricious, and an abuse of discretion," and wholly contrary to law.

5. Government-to-Government Relationship

In a larger, more public policy and diplomatic focus, the actions of the Assistant Secretary did nothing to advance the government-to-government relationship between the federal government and the Saginaw Chippewa Tribe of Michigan. In fact the Assistant Secretary's actions were directly contrary to the current federal policy of supporting tribal sovereignty and advancing tribal self-government. This government-to-government policy has been endorsed by all recent Presidents of the United States including Mr. Gover's current boss, President William Jefferson Clinton. The Assistant Secretary's extreme course of conduct in this matter ripped and tore at the fabric of tribal sovereignty. Examples are manifest. He showed no respect for the integrity of tribal institutions, particularly this Tribal Appellate Court. Neither he nor any of his staff made any inquiry—official or unofficial—directly to this Court about its operational status or likely jurisdictional purview in this matter.

This initial unwillingness to inquire has mutated into a current unwillingness to participate as *amicus curiae* in the present proceeding.[40] This Court in its subsequent order of October 18,

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[35]*See, e.g., National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. v. LaPlante*, 480 U.S. 9 (1987).

[36]Respondents also elide the crucial fact that the posture of *Goodface* is that of an administrative appeal of a BIA decision rather than any *sua sponte* decision of the Assistant Secretary.

[37]*See, e.g.*, federal Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1998). Federal courts are empowered to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." *United States v. Garno*, 974 F. Supp. 628, 633 (1997).

[38]While the district court found this quite probative, this Court is much more cautious about endorsing precedent that appears to subject the validity of specific tribal court decisions to review in the "court of popular opinion." This is not something that we routinely see in the federal and state context. Why is it somehow appropriate in the tribal court context?

[39]*See Ransom* at 9.

[40]On September 23, 1999, this Court issued an order that *inter alia* invited the federal government acting through the Secretary of Interior and the Assistant Secretary to submit an *amicus curiae* friend of the court brief in this matter. This offer was declined by Assistant Solicitor Scott Keep on the grounds that it was "currently engaged in related litigation in the United States District Court for the Eastern District of Michigan." This seems somewhat of a *non sequitur* since

1999 again requested an *amicus curiae* brief from the Assistant Secretary's office. This time there was no direct response to this Court by the Secretary except through a footnote in its supplemental brief submitted in the federal proceeding. The footnote stated that authority to submit an *amicus curiae* brief requires approval of the Solicitor General of the United States, 28 C.F.R. 0.20(c),[41] but as a "practical matter" it had no problem with either of the tribal parties providing this Court with a copy of its brief. Mr. John Jacobson, counsel for the Peters Council, kindly provided a copy of the federal government's supplemental memorandum to this Court. It is only six pages in length and is remarkably unilluminating and is much less thoroughly researched than the brief submitted to the Court by the Peters Council. It is hard to fathom how these evasive, if not actually disrespectful, actions are in line with the government-to-government relationship. As noted elsewhere in this opinion, *supra* pp. 11-19, this does not mean that the Chamberlain holdover Council was without fault. Indeed it was guilty of wrongdoing, but its wrongdoing cannot excuse the wrongdoing of the Assistant Secretary. In law, as in life, two wrongs do not make a right.

In addition, the actions of the Assistant Secretary have resulted in extensive negative publicity for the tribe,[42] have resulted in tribal attorneys' fees in the excess of one hundred thousand dollars[43] and have potentially created a very bad precedent relative to condoning extensive secretarial discretion in deciding internal tribal matters. All of this for want of simple inquiry to this Court about its operational existence and reasonable reliance on its integrity to make a thoughtful, expeditious, and reliable decision.[44]

C. Validity of the Actions of the "Interim"[45] Peters Council

As demonstrated above, *supra* pages 19-33, the Assistant Secretary acted illegally in recognizing the Peters Council as the "interim" government of the Saginaw Chippewa Indian Tribe of Michigan. Therefore it is necessary to analyze the validity and status of the actions taken by the Peters Council during its interim phase. Concern for stability and government regularity creates a necessary presumption in favor of the legality of interim governmental actions. Such a presumption is nevertheless rebuttable in a given circumstance by clear and convincing evidence that such actions violated tribal or federal law.[46]

The problem in this case is not the fact that the Peters Council was "interim" in nature,[47] but rather that its recognition by the Assistant Secretary as such was erroneous and illegal as a matter of both tribal and federal law. This in no way, however, makes, the holdover actions of the Chamberlain Council legal. *See* discussion *supra* at pp. 17-19. Unfortunately, these actions—taken together—have created the stressful and anomalous situation of pitting an illegal "holdover" Tribal Council against an illegal "interim" Tribal Council.

While it is not the duty of the Court to scrutinize every action taken by the Peters Council during its interim phase, there are two necessary areas of inquiry and they are the areas of membership reform and changes in the electoral process. These are legitimate questions for investigation as they—in one form or another—constitute the core elements of the differences between the Chamberlain and Peters Councils.

As to membership, the Peters Council enacted no new legislation, took no action to remove anyone currently enrolled, and otherwise proceeded in accordance with the "base enrollees" list as adopted in the Saginaw Chippewa Indian Tribal Constitution of 1986. Therefore, the eligible pool of candidates and voters has remained identical under the Peters interim regime as existed prior to its recognition.

In regards to the tribal election procedure, the interim Peters Council was active. In fact, it substantially amended Ordinance No. 4, the Tribal Election Ordinance. Specifically, it amended Sections 7, 22 and 27 of Ordinance 4 relative to voting requirements, election protest, and violation of election laws. Most significantly, the new Section 20 repealed this Court's original jurisdiction to hear election challenges and established the new position of Election Appeals Judge. In addition, the decision of the Election Appeals Judge was deemed "final" without "consent to the jurisdiction of the tribal court over decisions of the Election Appeals Judge." This enactment gives the Court significant pause. While it may be entirely legitimate to repeal this Court's original jurisdiction in election challenges, it is significantly less likely that repeal of all judicial appeals in election matters comports with essential notions of tribal fairness and due process under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8). This issue is not currently before the Court and therefore is properly left for another day.

In sum, the Peters Council committed major legal error by its failure to exhaust tribal (appellate) remedies, and then, if necessary, to file a BIA administrative appeal in accordance with 25

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the Secretary was already "defending" its actions in the federal case, it would take no extra effort to provide those same explanations to this Court. Assistant Solicitor's Keep's letter to this Court of September 30, 1999, goes on to note "[A]s to the merits of the Assistant Secretary's August 10 decision, I believe that decision is adequately explained in the Assistant Secretary's letter of that date and his earlier one of June 9." Of course, this cannot be so since neither of those letters contain any legal authority or justification whatsoever.

The U.S. Supreme Court recognizes the ability of tribal courts as a general matter to decide questions of federal law. Specifically, "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think questions of federal preemption are any different." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 119 S. Ct. 1430, 1438, n.7 [26 Indian L. Rep. 1027] (1999).

[41]Of course, we are troubled by the fact that the U.S. Supreme Court has urged parties to exhaust tribal remedies through the use of the tribal courts, *see* discussion *infra* at pp. 40-41, yet the executive branch of the U.S. government has chosen to support a different policy through this cumbersome regulation which, to this Court's knowledge, finds no basis in statute.

[42]*See, e.g.*, the following articles in *Indian Country Today*: David Melmer, "Membership Problems Void Four Elections" at C1 (June 28, 1999); "Saginaw Chippewa in Turmoil," at A1 (August 23, 1999); "Saginaw Offices Seized," at A1 (September 27, 1999); *see also* Elizabeth Amon, "What's U.S. Tribal Role? Feds Replace Tribal Council with Rival But Face Court Challenge," *National Law Journal*, at A1 (November 8, 1999). Similar articles appeared in newspapers around the country ranging from the *Grand Rapids Press* to the *Washington Post*.

[43]*See, e.g.*, billing submitted by the law firm of Jacobson, Buffalo, Schoeseler, and Magnuson, Ltd. to the Saginaw Chippewa Tribe.

[44]In this regard, it is fair to note (again) that the Peters Council itself is not without fault. It has never explained adequately to this Court why it failed to initiate any administrative appeal challenging the conduct of the Chamberlain Council and the necessity for BIA corrective action, but instead called on the Assistant Secretary for direct assistance.

[45]Again, we rely upon the term used by Assistant Secretary Gover in his letter of August 10, 1999, p. 2.

[46]*See* discussion *supra* at pp. 17-19. We consider this equally applicable both to the Peters and Chamberlain Councils.

[47]Any number of tribal election cases correctly note the authority of the BIA *under proper circumstances* (which are not present here) to recognize one tribal group over another in contested elections. *See* discussion *supra* at pp. 30-33. *See also* such cases as *Goodface v. Grassrope*, 708 F.2d 338 (8th Cir. 1983); *Ransom v. Babbitt*, 1999 WL 825126 (D.D.C. 1999).

C.F.R. Part 2. This failure did not cause the tribal election crisis, which was sparked by the Chamberlain Council's illegal holdover actions, but it did exacerbate the resulting problems. As this opinion amply demonstrates elsewhere, it didn't have to be this way. And hopefully, it will not be so in the future.

This case demonstrates the potential for genuine crisis when there is a failure of confidence in and respect for tribal law and tribal institutions. In this instance it generated the painful paradox of an illegal "holdover" government in contention with an illegal "interim" government aided and abetted by the illegal actions of the Assistant Secretary's Office. This is not to say that any side intended to create harm or crisis but only that it did happen. No one welcomes painful experience but it can provide the benefit of learning, perhaps even wisdom, if it is carefully examined. If it is merely ignored or trivialized, it invites tragedy. This Court has taken the road of close examination in an attempt to render justice with compassion and without recrimination; an examination that might lead to a new beginning of cultural conciliation and democratic respect.

IV. A New Beginning

Implicit throughout this opinion is the Court's perception that there needs to be a new beginning between the contending tribal parties as well as between the Saginaw Chippewa Indian Tribe of Michigan and the federal government. Hopefully, this process has begun and will continue. Let us examine what has already happened and what might yet happen. With regard to the relationship between the Peters and Chamberlain Councils, several very positive steps appear to have already taken place. They include the respect each party accorded each other and this Court throughout these proceedings. The Court commends both sides in this regard. This very advance was made all the more likely by the judicial and cultural atmosphere created by the Court. Specifically, for example, the Court invited both parties to come forward and shake the hands of the members of the Court of Appeals as a gesture of respect and good will. In addition, the Court invited each side—through a designated representative—to offer a prayer or blessing at the beginning of the hearing (Chamberlain Council) and at the close of the hearing (Peters Council). These events appeared to create an atmosphere of high purpose and dignity. Each party noted its gratitude for the existence of the Tribal Appellate Court and its commitment to accept and to abide by the Court's decision in this matter.

Each member of the Court also spoke briefly on the record to the parties. These comments served to provide a thumbnail sketch of the Justices' background for the parties, but more importantly each Justice spoke earnestly of the honor to serve on the first ever Saginaw Chippewa Tribal Appellate Court.[48] In addition, each Justice emphasized the historical, cultural, and legal importance of the case before it and his or her sincerest hope that its resolution would be the beginning of a new tribal jurisprudence of respect, cultural sensitivity, and legal integrity.[49] Without tempering the cogency or force of their arguments, the demeanor of the parties and their counsel indicated a willingness to acknowledge and to accept the responsibilities of such a momentous occasion. Nor did such willingness apparently end with the hearing. Since the hearing on October 16, 1999, the Tribe has concluded a primary and general election without major incident or protest.[50] These developments are indeed remarkable and hopefully presage a new era of intra-tribal cooperation in strengthening democratic processes and institutions of the Saginaw Chippewa Indian Tribe.

Unfortunately, the relationship of the federal government to the Saginaw Chippewa Indian Tribe of Michigan appears to be on less settled, less harmonious ground. There continues to be vigorous—if not hostile—litigation involving all three parties in federal court. As described above, *supra* at pp. 33-35, the federal government has been less than cooperative in assisting this Court. Perhaps the federal government, acting through the BIA, simply moves more slowly, more deliberately before it can change its posture so that it can reconfigure the balance in the trust relationship away from a vertical neo-colonialist paradigm to a more horizontal, collaborative model. Of course, there can be no doubt about the necessity of such approach to give genuine substance to the meaning of government-to-government relationship in the modern era. And while there is some evidence of this progressive movement in other efforts of the BIA, it is not present in current federal interaction with the Saginaw Chippewa Indian Tribe. This needs to change and this Court is committed to playing any positive role available to it in this area of concern.

This case is a test case on many different levels. The 1986 Constitution makes no provisions for the circumstance where there is a breakdown in the transitional process between successive Councils within the representative democracy prescribed by the current constitutional order. There are no prior documented and applicable cases that may guide the current Appellate Court either within the past cases of this Tribe or of any other Court. The situation described here finds its most apt analogy in events that occur in newly independent third world countries and therefore there is a resulting necessity to forge a new and appropriate jurisprudence—a point of "jurisgenesis."[51]

We have determined in the course of examining the facts and law applicable to this case that the Chamberlain Council wrongly held over, pursuing a course of action that was ineluctably contrary to the Constitution of the Tribe. Nonetheless, the Council wisely created an appellate process, and, when time came to query the validity of the Assistant Secretary's actions, properly invoked the Court's original jurisdiction. We can commend the Assistant Secretary for finding in principle, at least, that the Chamberlain Council was motivated by an erroneous perception of the tribal membership laws. But we conclude here that the Assistant Secretary then violated both tribal and federal law in recognizing the Peters Council—a reckless misuse of the power and authority of that office that created anomalous and trying circumstances for all involved that may never be corrected even in a Court's most brilliant and creative moments. We cannot overlook the Assistant Secretary's failure to turn to the tribal judiciary, to give vivid endorsement to the policy of

[48]None of the three justices are members of the Saginaw Chippewa Indian Tribe. Two of the Court's members are tribal members elsewhere and all three are longtime scholars, teachers, and/or practitioners of Indian law.

[49]*See, e.g.*, the Hearing Transcript October 16, 1999, at 9, Chief Justice Vicenti; "We don't want to make any illusions about it, ... that we endorse Native belief and Native tradition, at the outset ... we want to foster what we consider to be the central principles of respect, generosity, of co-operation, and of self sacrifice for the good of the whole. And we recognize that that has its ... correlatives in the four directions of the wind, the four colors you have on your flag in front of you [the Tribal flag], ... and [the] four sacred substances of sage, cedar, sweetgrass and tobacco"; Justice Fairbanks, at 120-121 "And so I see us as helping restore ... this Tribe and ... bringing some unity to this Tribe."; and Justice Pommersheim, at 119 "We hope, as people have said, that people will pull together, because the future and the importance of future generations is what is the key. And that will help—hopefully guide our own deliberations in this matter."

[50]*See also* discussion *supra* at p. 37 as to whether this fact obviates the necessity of granting the "extraordinary writ" sought in this action.

[51]Robert Cover, *"Forward: Nomos and Narrative,"* 97 HARV. L. REV. 4, 11 (1983) ("That the creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium.").

deference to tribal institutions as set forth in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,[52] *Iowa Mutual Insurance Co. v. LaPlante*,[53] and Executive Order 13084 (May 14, 1998) notwithstanding the existence of 28 C.F.R. 0.20(c).[54] Our examination of the facts herein also allow us to commend the Peters Council for the solid adherence to an interest in ensuring the proper and lawful transition of government. But, it too, compromised the integrity of the Tribe's sovereignty by seeking the approval of the Assistant Secretary to accede to its leadership, as if his approval meant anything under the circumstances and existing tribal law.

In the American system of jurisprudence, litigation is conducted on an adversarial basis: there are clear winners and clear losers. Traditional notions of Native American jurisprudence are concerned with healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again—no winners or losers—rather, there are survivors who must be nourished back to health. Although the petitioners do prevail in their claims regarding the Assistant Secretary's authority, we cannot conclude that they should be restored to leadership as a continuation of an unlawful holdover Council—to do so would not be mindful of the tribal members' need for healing and transcendence. Neither can we uniformly endorse the enactments of the Peters Council except to the extent that they restored the political processes that elected the Chamberlain Council and this current Council to office. We must, accordingly, deny the relief requested in the Chamberlain petitions.[55]

In part, our closing comments here are an admission, as is more often the case, that the parties are each at fault and each to be acclaimed. We would only urge that each accept responsibility for the errors each has committed and each accept the responsibility to work cooperatively in the future. Traditions of generosity, respect, integrity and cooperation compel each party to do what good grace and a proper way of life would dictate, well beyond what a Court may order. The rest remains to a higher source.

V. Conclusion

In sum, for all the reasons discussed above, the Court finds that Assistant Secretary Gover did violate both tribal and federal law in his August 10, 1999 "recognition" of the "interim" Peters Council. Therefore, the "interim" Peters Council was not lawfully holding office. However, this Court also finds that the Chamberlain Council violated the Saginaw Chippewa Indian Tribal Constitution in its "holdover" actions by setting aside the results of at least three elections after the expiration of its constitutional term of office and therefore it is not entitled to any relief in this matter. The actions of both the "holdover" Chamberlain Council and the "interim" Peters Council—except as to matters relative to perpetuating their occupancy of office—are nevertheless presumptively valid unless a party with proper standing can demonstrate by clear and convincing evidence that such action violated tribal or federal law, or, conferred an undue benefit of those persons then seated in office.

The Court also concludes that at this time the Tribal Council officials who were sworn in on December 6, 1999, pursuant to their victory in the November 2, 1999 general election properly and lawfully hold office in accordance with the laws and Constitution of the Saginaw Chippewa Indian Tribe of Michigan.

Finally, the Court, again, commends both parties to this action for the dignity and respect with which they approached this Court and we urge that its judgment be received with the same dignity and respect.

It Is So Ordered.

[52]471 U.S. 845 (1985).

[53]480 U.S. 9 (1987).

[54]As we have repeatedly noted above, the Appellate Court was fully constituted and functional very early in 1999. The Assistant Secretary did not make inquiry into its existence, but had he done so, and, had he conformed his priorities to the deference noted here, he would have had ample time to consult the Department of Justice and, with its approval, petitioned this Court to issue a declaratory judgment, well before he was faced with the need to consider the issuance of the fateful August 10 letter.

[55]This holding is applicable to both the present case, and the request for a temporary restraining order as filed December 5, 1999, in *Chamberlain and Hinmon v. Chief Judge, Tribal Community Court*, Ct. App. Docket Number unassigned. Their request for the temporary restraining order is also denied.

Appendix

[*DOI Logo & Letterhead Omitted.*]

Aug 10, 1999

Honorable Kevin Chamberlain
The Saginaw Chippewa Indian Tribe
7070 East Broadway
Mt. Pleasant, Michigan 48858

Dear Chief Chamberlain:

On June 9, I wrote you and expressed my concern over the Tribe's failure to complete the constitutionally mandated election of representatives for the Isabella District. I urged you and your Council to call and conduct an election within the next 45 days to select 10 individuals to serve as Tribal Council members for the Isabella District from among the twenty persons from the Isabella District who were the successful candidates at the latest primary election in January 1999. I indicated further that if the Tribe failed to resolve this matter through an election of Tribal Council members for the Isabella District, I had instructed the Area Director and Superintendent to deal with the representatives for the two off-reservation districts and the ten persons from the Isabella District who received the highest number of votes in January 1999 as representatives of the Tribe.

Based on our meetings and documents you submitted, I extended my original 45-day deadline to permit you a further opportunity to persuade me that the Tribal Council had taken or was taking the steps necessary to restore constitutionally elected government to the Tribe. I have reviewed the actions of the Tribal Council in adopting a new election code and an amended enrollment ordinance. I have considered the comments of those opposed to the Tribal Council's actions, and I have considered the Tribal Council's response to those comments.

I appreciate the efforts of the Tribal Council to explore broad, governmental reforms. However, the reforms the Tribal Council has initiated through the election code and amended enrollment ordinance contain provisions which amount to substantive changes in the Tribal Constitution, changes which can only be legally effected through amendments to the Constitution. They are fundamental changes which are beyond the Council's authority to accomplish by ordinance. They can not resolve the current disputes without a constitutional amendment to put them in place by the majority vote of the tribal members.

Thus, the critical fact is that the holdover Council, scheduled to leave office after the November 1997 election, has failed in four efforts to conduct elections and effect a lawful transition of power. I note that most of the holdover Council members have not been successful candidates in these four elections.

The Area Director is still reviewing the petitions requesting an election to consider the adoption of a new constitution. An

amendment of the Tribal Constitution, whether it is the amendment currently before the Area Director or another one or several other smaller amendments, may be one way for the tribal members to resolve the current disputes. However, any resolution based on an amendment of the Tribal Constitution is necessarily some time off.

In the meantime, I believe that the Federal government needs certainty in dealing with representatives of the Tribe for purposes of carrying on the day-to-day, government-to-government relationship of the Federal government with the Tribe. Accordingly, I am instructing the Area Director to proceed with the instructions I gave him on June 9. He is to the [sic] deal with the representatives for the two off-reservation districts and the eleven persons from the Isabella District who received the highest number of votes in January 1999 as representatives of the Tribe on an interim basis. While this interim council is an incomplete reflection of the democratic will of the people, it is the clearest and most recent expression of the sentiments of the tribal membership.

I realize that the Isabella District is entitled to only 10 representatives under the Tribal Constitution and that two individuals were tied for the tenth highest number of votes in the January 1999 primary. I see no reason why the two individuals can not share the vote for that seat on the Council. If they agree, they can cast one vote for the agreed upon position. If they disagree on a matter, their votes will simply cancel each other out.

Finally, I note for the record that I am aware of information suggesting that the holdover Council, or its agents, caused or contributed to the publication of an unflattering newspaper article about me. I have conferred with the Ethics Office for the Department and been advised that, notwithstanding my knowledge of this information, I may properly be the deciding official on this matter. The holdover Council's public relations activities have not caused me to feel any bias against them. I have decided this matter strictly on the merits.

I continue to look forward to a time when normal, government-to-government relations with the Tribe can be reestablished.

Sincerely,
[s/s]
KevinGover
Assistant Secretary – Indian Affairs

[cc: *Omitted*]

Counsel for petitioners: Dwight R. Carpenter

Counsel for respondents: John E. Jacobson, Henry M. Buffalo, Jr.