United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CHARLES O. TILLMAN, DUDLEY WHITEHORN, JOANNA BARBARA, R.E. YARBROUGH, JOHN JOHNSON, JOE HALL, AND CODY TUCKER, Appellants,	)	Order Affirming Decision
v.	)	Docket No. IBIA 12-101
ACTING EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS Appellee.	)	March 23, 2015

Appellants Charles O. Tillman, Dudley Whitehorn, Joanna Barbara, R.E. Yarbrough, John Johnson, Joe Hall, and Cody Tucker[1] appealed to the Board of Indian Appeals (Board) from a March 12, 2012, decision (Decision) of the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), regarding the governance of the Osage Tribe's mineral estate. Appellants own what are known as "headright" interests in the mineral estate, which entitle them to a share of the income generated by the mineral estate. In 2006, the Osage Tribe adopted a new Constitution after Congress "reaffirm[ed] the inherent sovereign right of the Osage Tribe to determine its own form of government." Pub. L. No. 108-431, 118 Stat. 2609 (2004) ("Reaffirmation Act"). The Constitution declares the mineral estate to be reserved to the Osage Nation (Nation)[2] and creates an Osage Minerals Council (Minerals Council) to administer the mineral estate. The Minerals Council is elected solely by headright owners, but is lodged within the Nation's government and subject to certain provisions in the Constitution.

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[1] During the pendency of this appeal the Board was notified that Cora Jean Jech, who was initially named as an appellant, had died, and that the case would be pursued by the remaining appellants. *See* Appellants' Notice of Death, Dec. 7, 2012.

[2] When the Osage Tribe adopted a new Constitution in 2006, it renamed itself the Osage Nation.

Appellants believe that the Constitution violates Federal law and their rights as headright owners by impermissibly asserting ownership and control over the mineral estate. Appellants contend that a form of government that Congress prescribed for the Osage Tribe in 1906 continues to apply to the mineral estate, unaffected by the Reaffirmation Act.[3] Appellant Tillman objected to the Constitution and asked BIA to hold an election to resurrect the 1906 Act Council, which had dissolved itself after embracing the Constitution. In 2008, in response to a complaint on the same issue by another headright owner, the Assistant Secretary – Indian Affairs (Assistant Secretary) declared that the Constitution "upholds the intent and direction of the Congress" and that "BIA will take no further actions [on] this issue since it is an internal tribal matter that is best addressed [in] the proper tribal forum." Letter from Assistant Secretary to Miller, Jan. 28, 2008 (Administrative Record (AR) Tab 168).

Appellants subsequently renewed their demand for BIA to conduct an election pursuant to 25 C.F.R. Part 90, the regulations governing elections for the 1906 Act Council. In the Decision, the Regional Director rejected Appellants' demand, concluding, among other things, that Appellants lacked standing to complain to BIA about the Constitution adopted by the Osage Nation, and that the Part 90 regulations were effectively superseded and rendered irrelevant by the Reaffirmation Act and the Osage Tribe's adoption of a Constitution.

We affirm the Regional Director's decision to reject Appellants' request that BIA conduct an election to resurrect the 1906 Act Council because for BIA to conduct such an election would squarely conflict with the directive of the Assistant Secretary. The Assistant Secretary's directive left no room for BIA to consider Appellants' request, nor does the Board have jurisdicition to review the Assistant Secretary's determination.

Even were we to assume—contrary to Appellants' own apparent understanding of the Assistant Secretary's action—that the Assistant Secretary did not intend his letter as a merits determination on the issue, we would affirm the Regional Director's decision not to conduct an election under the 1906 Act and 25 C.F.R. Part 90. BIA has no authority under Part 90 to unilaterally conduct an Osage tribal election. A Part 90 election is initiated by the Osage Tribe and BIA's authority under Part 90 is limited to performing certain duties to assist the Tribe in the conduct of the election. The 1906 Act provides no

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[3] The 1906 Act, Pub. L. No. 59-321, 34 Stat. 539, imposed on the Osage Nation a specific form of government (1906 Act Council) and limited the "legal membership" of the Tribe to a final roll approved by the Secretary of the Interior (Secretary). It appears that Appellants became owners of headright interests through inheritance or devise; none claims to be on the final roll of the legal membership of the Tribe, as defined by the 1906 Act.

separate basis for relief because it only directed that elections under the Act be conducted in a manner prescribed by the Secretary, which the Secretary determined through the Part 90 regulations. Thus, the relief sought by Appellants from BIA is not available under the law upon which they rely.

In addition, the Regional Director correctly concluded that the Reaffirmation Act allowed the Osage Tribe to depart from the form of government prescribed by the 1906 Act, and did not exclude "governance" of the mineral estate from the authority restored to the Tribe. To the extent Appellants contend that the Osage Constitution (which BIA did not approve, nor was it required to) conflicts with their rights as headright owners, their claims lie outside the scope of this appeal from the Regional Director's decision.

Background

I. History of the Osage Nation

The history of the Osage Nation, not unlike that of other tribes, is one of displacement and Federal interference with the tribal government. At one time, the Osage Tribe resided in what is today southwestern Missouri, with hunting ranges extending into present-day southeastern Kansas, northeastern Oklahoma, and northwestern Arkansas. *Osage Tribe v. United States*, 68 Fed. Cl. 322, 323 (2005). Under pressure from white settlement, the Tribe ceded its lands, except for a reservation in Kansas, and then agreed to sell that reservation and settle on lands in present-day Oklahoma purchased from the Cherokees. *Id.*; Alex Skibine, *The Cautionary Tale of the Osage Indian Nation Attempt to Survive its Wealth*, 9 Kan. J.L. & Pub. Pol'y 815, 816 (2000). The Nation first adopted a written constitution in 1881. *Fletcher v. United States*, 116 F.3d 1315, 1319 (10th Cir. 1997) (citing H.R. Rep. No. 92-963, at 7 (1972)). The late-nineteenth century was the period of Federal policies designed to dissolve tribal land ownership in favor of individual ownership in the form of "allotments." The Tribe initially refused to agree to have its reservation allotted. *Osage Tribe*, 68 Fed. Cl. at 323. That eventually changed after the discovery of oil on the reservation in 1897, and the Department's "dissolution" of the Osage constitutional government in 1900, followed by its creation of an Osage Business Committee. *Id.*[4]

On June 28, 1906, with the support of the Osage Business Committee, Congress passed the Osage Allotment Act (1906 Act) "[f]or the division of the lands and funds of the

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[4] Although the Department purported to abolish the Tribe's constitutional government in 1900, one division, composed of the Principal Chief, Assistant Principal Chief, and a 15-member Tribal Council, apparently refused to dissolve. *Fletcher*, 116 F.3d at 1319.

Osage Indians in Oklahoma Territory." Pub. L. No. 59-321, 34 Stat. 539 (1906); Skibine, *supra* at 819. The Osage Business Committee apparently supported allotment as a means to avoid the risk of further displacement and removal by the United States, and also sought to have the Tribe's membership roll closed to prevent "people of dubious Osage heritage" from sharing in the Tribe's newfound mineral wealth from the reservation's oil reserves. Skibine, *supra* at 815, 819. The 1906 Act directed the preparation of a final roll of the "legal membership" of the Osage Tribe, to serve as a basis for the distribution of tribal income and property to enrolled members. 34 Stat. at 539-540. The roll included only the Osage members shown on the U.S. government records as of January 1, 1906, and Osage children born before July 1, 1907. *Id.* Upon approval of the final roll by the Secretary, membership in the Tribe was closed. *Id.* at 540. The Act thus limited "legal membership" in the Osage Tribe to the 2,229 individuals appearing on the final roll. *See Fletcher v. United States*, 2011 U.S. Dist. LEXIS 35992 at *12 (N.D. Okla., Mar. 31, 2011).

Although the surface of the Tribe's reservation was allotted to individual members, the subsurface interest in oil, gas, coal, and other minerals beneath the reservation was reserved to the Tribe. 34 Stat. 540, 543. The 1906 Act directed that royalties derived from leases of the mineral estate be held in trust by the United States "to the credit of the members of the Osage tribe."[5] *Id.* at 544. The 1906 Act required that periodic distributions from the revenue of the mineral estate be made "according to the roll provided for herein," *id.*, and the right to a distribution was known as a "headright" interest. *Fletcher*, 116 F.3d at 1319. Each Osage whose name appeared on the final roll received one headright interest in the mineral estate. *Id.* The headright interest could be inherited, and heirs could thus acquire the right to distribution of income.[6] *See id.*

Section 9 of the 1906 Act prescribed the form of government for the Osage Tribe by requiring the biennial election of a Principal Chief, Assistant Principal Chief, and an eight-member Tribal Council. 34 Stat. at 545. The 1906 Act provided that the election be held "in the manner to be prescribed by the Commissioner of Indian Affairs." *Id.* In 1946, BIA adopted regulations requiring cooperation between BIA and the tribal government in the administration and oversight of elections. *See* 25 C.F.R. Part 18 (1946); *see also* 25 C.F.R. Part 90 (2014) (current regulations); Decision at 2. The regulations delegate most of the

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[5] The 1906 Act also provided for the mineral estate itself to be held in trust for a period of 25 years. Subsequent amendments to the Act extended the trust period, and most recently in 1978, Congress reserved the mineral estate to the Tribe "in perpetuity." Pub. L. No. 95-496, 92 Stat. 1660 (1978).

[6] The 1906 Act also authorized certain amounts of the mineral estate royalties to be set aside for Osage Agency purposes, an emergency fund, and the support of Osage schools. 34 Stat. at 544.

responsibility for conducting elections to an election board appointed by the Principal Chief, and consisting of a Supervisor, Assistant Supervisor, and a set of judges and clerks. 25 C.F.R. § 90.32. The regulations also provide for BIA involvement in the preparation of a voter list and election ballots. *Id.* §§ 90.35, 90.40.

Over the years, the right to vote or run for office was expanded beyond the legal membership of the Osage Tribe, as defined by the 1906 Act, to include Osage individuals who acquired headright ownership by devise or descent. *See* 25 C.F.R. § 18.4 (1946); *Fletcher v. United States*, 160 Fed. Appx. 792, 793 (10th Cir. 2005).[7] In order to avoid fractionation, headright interests were often passed down or sold undivided, leaving many Osage descendants of the "legal membership" of the Tribe without a headright interest. The right to vote or run for office was not extended to Osages who did not own a headright interest. By restricting voter eligibility to members of the Osage Tribe who owned headright interests, the regulations had the effect of disenfranchising a large number of Osages that BIA recognized as members of the Tribe for other purposes.[8] *Fletcher*, 116 F.3d at 1319; *see also* Reaffirmation Act § 1(a).

In 2004, Congress passed the Reaffirmation Act in an attempt to resolve this political discrepancy. The Reaffirmation Act clarified that "legal membership" under the 1906 Act was limited to the "persons eligible for allotments . . . and a pro rata share of the [mineral estate]," i.e., the original 2,229 individuals on the final roll, and that "legal membership" did not mean "membership in the Osage Tribe for all purposes." 118 Stat. at 2609. Congress reaffirmed "the inherent sovereign right of the Osage Tribe to determine its own membership, provided that the rights of any person to Osage mineral estate shares are not diminished thereby." *Id.* The Reaffirmation Act also declared that "[n]otwithstanding section 9 of the [1906 Act], Congress hereby reaffirms the inherent sovereign right of the Osage Tribe to determine its own form of government." *Id.* The only role prescribed for the Department under the Act is that, "[a]t the request of the Osage

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[7] In 1958, the regulations were changed from a system in which each headright owner's vote was weighed equally to one in which each vote was weighed in proportion to the voter's headright interest. *Compare* 25 C.F.R. § 18.4 (1946), *with* 25 C.F.R. § 73.21 (1958); *see Fletcher*, 160 Fed. Appx. at 793.

[8] The regulations governing elections for the 1906 Act Council require voters to be "members" of the Tribe, in addition to owning headright interests, but do not define the term "member." It appears that the term has come to be used to refer to persons of Osage ancestry on BIA's records. *See* Cohen's Handbook of Federal Indian Law 791 n.195 (1982 Ed.). In regulations promulgated for the government of Osage Indian Villages, the term "Tribal Member" is defined to mean "any person of Osage Indian blood of whatever degree, allotted or unallotted." 25 C.F.R. § 91.2(d).

Tribe, the Secretary of the Interior shall assist the Osage Tribe with conducting elections and referenda to implement" the Act. *Id.*

Following Congress's enactment of the Reaffirmation Act, the Osage Tribal Council created an Osage Government Reform Commission to "establish a government that reflects the will of the Osage People." Resolution No. 31-1032, Feb. 25, 2005, at AR-18, AR-23 (AR Tab 52). The Commission was made up of the Principal Chief, Assistant Principal Chief, and 10 members of the Tribe appointed by the 1906 Act Council. *Id.* at AR 38. The Commission undertook to draft a new constitution and hold elections for a reformed government by the close of April 2006. *Id.* at AR-24-25.

By referendum on November 19, 2005, the tribal franchise was expanded to "all adult tribal members," regardless of headright ownership, for future elections, including the pending referendum on the proposed Osage Constitution.[9] Tony Thornton, *Osage Nation Decides All Adult Members Can Vote*, The Oklahoman, Nov. 30, 2005 (AR Tab 53). The Commission ultimately concluded its work ahead of schedule, and scheduled a referendum on the proposed constitution for March 11, 2006. A group identifying itself as the Osage Shareholders Association Ad Hoc Committee wrote to BIA expressing concern that the proposed constitution was "poorly drafted and replete with inconsistencies," and also expressed procedural concerns about the referendum, asking that BIA monitor the election. Letter from Trumbly to Regional Director, Mar. 7, 2006, at 1 (AR Tab 55); *see also* Letter from Trumbly to Osage Government Reform Commission, Mar. 6, 2006 (asking Commission to postpone the vote and raising concerns about the proposed constitution) (AR Tab 56).

The 2006 Osage Constitution was approved by 66.64% of the 2,182 Osages who voted, which included those who owned headright interests as well as those who did not. Osage Nation Constitutional Referendum Election Results, Mar. 12, 2006 (AR Tab 57). The Osage Tribal Council, organized under the 1906 Act, certified the adoption of the Constitution and declared it to be "the fundamental law of the newly named Osage Nation." Resolution No. 31-1531, Mar. 15, 2006 (AR Tab 58). The Council declared itself to be "the last governing body of the Osage Tribe of Indians elected pursuant to the 1906 Act." *Id.*; *see also* Letter from Principal Chief to Superintendent, Mar. 15, 2006 (forwarding referendum results to the Superinendent) (AR Tab 58).

The Constitution adopted a system of government consisting of an Executive Branch (Principal Chief and Assistant Principal Chief), Legislature (Osage Nation Congress), and

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[9] The record is unclear as to who was eligible to participate in the November 19, 2005, referendum.

Judiciary. Opening Brief (Br.), June 26, 2012, Exhibit 7 (Osage Constitution) arts. V-VII. The general membership of the Tribe is defined to include "[a]ll lineal descendants of those Osages listed on the 1906 Roll." *Id.* art. III, § 2. Voting rights are extended to all "qualified voters" who are "enrolled members of the Osage Nation who shall have attained the age of . . . 18 years and are registered to vote," regardless of whether they owned headright interests in the mineral estate. *Id.* art. XIII, § 1.

The Constitution states that the Tribe "shall hereafter be referred to as The Osage Nation, formerly known as the Osage Tribe of Indians of Oklahoma." *Id.* art. I. The Constitution declares that the mineral estate is reserved to the Nation pursuant to the 1906 Act. *Id.* art. XV, §§ 2, 4. The Constitution also provides that "[t]he right to income from mineral royalties shall be respected and protected by the Osage Nation through the Osage Minerals Council formerly known as the Osage Tribal Council and composed of eight members elected by the mineral royalty interest owners." *Id.* art. XV, § 3. Administration and control over the mineral estate is delegated to an Osage Minerals Council, an eight-member, independent agency established by the Constitution and made up of, and elected solely by, headright owners "for the . . . purpose of continuing [the Osage Tribal Council's] previous duties . . . in accordance with the [1906 Act]." *Id.* § 4; *see also* Election Regulations, June 5, 2006, at 1, 3 (AR Tab 83). The Minerals Council is authorized to approve leases, promulgate rules and regulations, and is responsible for protecting the shareholders' "right to income from mineral royalties." Osage Constitution, art. XV, §§ 3-4. Any dispute arising through the process governing administration of the mineral estate may be heard before the Supreme Court of the Osage Nation Judiciary. *Id.* art. XV § 4. In a section titled "Declaration of Rights," the Constitution provides that "[t]he Osage Nation Government shall not create any law or ordinance pertaining to the mineral royalties from the Osage Mineral Estate that acts in conflict with Federal law and regulations." *Id.* art. IV, § 5.

On June 5, 2006, the Osage Nation conducted its first Minerals Council election. Minerals Council Election Results at 1 (unnumbered) (AR Tab 85). A total of 9,433 votes were cast, representing the participation of approximately 1,180 headright owners in the election.[10] *Id.* In 2009, the Minerals Council requested that the 2010 Osage Minerals

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[10] Because the Minerals Council is made up of eight members, each headright owner was entitled to cast eight votes. *See* Election Regulations at 4 (AR Tab 83). Assuming that each headright owner cast a complete ballot, the number of headright owners who participated in the election was derived by dividing the total number of votes by eight.

Council Elections be held separately from other tribal elections. Letter from Mashunkashey to Principal Chief, Mar. 18, 2009 (AR Tab 171).[11]

II. Appellants' Request for BIA to Conduct an Election for the 1906 Act Council

On December 21, 2006, Appellant Tillman, a former Principal Chief of the Osage Tribe, sent a letter to the Superintendent objecting to the June 2006 elections and requesting that BIA take "immediate steps to rectify the unlawful situation currently existing." Letter from Tillman to Superintendent, Dec. 21, 2006, at 1, 3 (AR Tab 90). Tillman argued that the Osage tribal elections had violated the Federal regulations, 25 C.F.R. Part 90, by allowing non-headright owners to vote.[12] *Id.* at 1. Tillman objected to the Constitution, which he construed as impermissibly granting the Principal Chief "veto authority" over management of the mineral estate, and which he argued was "contrary to the letter and intent of the 1906 Act." *Id.* at 2.[13]

Tillman argued that the Reaffirmation Act had no effect on the form of tribal government required by the 1906 Act for the "Osage Tribe," as defined by the "legal membership" of the Tribe to which headright interests in the mineral estate were distributed. *Id.* at 1-2. Tillman equated headright ownership with "legal membership" in

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[11] The Minerals Council also passed a resolution asking BIA to conduct its election pursuant to 25 C.F.R. Part 90. Resolution No. 1-230, Apr. 9, 2009 (AR Tab 174); *see also* Letter from Mashunkashey to Principal Chief, Aug. 4, 2009, at 1 (unnumbered) (AR Tab 173) (explaining that the Osage Minerals Council, as an independent agency, feels that "it is in the best interest of the Osage Minerals Headright Holders to have an independent election"). BIA declined, noting that it "has not applied the Part 90 regulation(s) since the enactment of the [Reaffirmation Act]" because the Act "resulted in a change in the structure of the Osage Nation when the Act affirmed the Nation's ability to develop its current constitution." Request for Elections, Apr. 28, 2011, Exhibit G (AR Tab 177). BIA explained that its position was that the Reaffirmation Act eliminates BIA's authority under the Part 90 regulations. *Id.* It does not appear that the Minerals Council pursued the matter further.

[12] Tillman did not contend that non-headright owners were allowed to vote for the members of the Minerals Council, but apparently objected to non-headright owners being allowed to vote for the Principal Chief and Assistant Principal Chief if those officers had any authority regarding the Tribe's mineral estate.

[13] The language of the Consitution does not state that the Principal Chief has "veto authority" over management of the mineral estate, but Tillman and Appellants construe language in the Constitution to have that effect, or at least possibly to have that effect.

the Tribe "created" by the 1906 Act. *Id.*; *see* Appellants' Opening Brief at 3 ("the Osage Tribe was created by the 1906 Act"). Tillman noted that in affirming the inherent sovereign right of the Osage Tribe to determine its membership, Congress had added the proviso "that the rights of any person to Osage mineral estate shares are not diminished thereby." *Id.* at 2 (citing Reaffirmation Act § 1(b)(1)). In Tillman's view, the new Constitution diminished his shares in the mineral estate by impermissibly diluting the headright owners' control of the mineral estate. *Id.* Tillman closed by demanding that the Superintendent uphold her duty to protect the rights of the Osage Tribe and the headright owners in matters concerning the mineral estate, including elections. *Id.* at 3.

The Superintendent responded, stating that pursuant to the Reaffirmation Act, BIA, "at the request of the governing body at that time, provided technical assistance and advice to the duly elected Tribal leadership on conducting an election to implement the Act," and that "[u]pon passage of the Act, any reference in the Code of Federal Regulations . . . became moot and were non-applicable." Letter from Superintendent to Tillman, Feb. 21, 2007, at 1 (AR Tab 112). The Superintendent further stated that "[i]t is the position of [BIA] that the Constitution, which was enacted by the vote of the Osage people as determined by the (former) duly elected Tribal Leadership and Council, upheld the intent and direction of the Congress in this regard." *Id.* As such, the Superintendent concluded that "there is no action to be taken by the Bureau at this time for the concerns outlined in the letter." *Id.* Finally, the Superintendent noted that BIA's policy was to refrain from involvement in internal tribal disputes absent evidence of electoral misconduct. *Id.* at 2.

Following the Superintendent's response, Appellants and other headright owners embarked on a campaign of letter-writing to BIA, congressional representatives, and administration officials, urging them to take action to protect the rights of the headright owners that were allegedly infringed upon by the adoption of the Osage Constitution. *See* Letters from Shareholders, Oct. 17 to Dec. 2, 2007 (AR Tabs 115 to 165). On January 28, 2008, the Assistant Secretary, responding to one of the letters, reiterated the conclusions of the Superintendent, stating that "[a]t the request of the Osage Nation, the BIA . . . provided technical assistance and advice pursuant to Section 1(b)(3) of the [Reaffirmation Act] to the elected Tribal leadership regarding conduct of an election to implement the Act." Letter from Assistant Secretary to Miller (AR Tab 168). The Assistant Secretary concluded that the Osage Constitution "upholds the intent and direction of the Congress," and stated that "*BIA will take no further actions* in this issue since it is an internal tribal matter that is best addressed [in] the proper tribal forum." *Id.* (emphasis added). The Assistant Secretary closed by asserting that BIA has "fulfilled [its] obligations established by the Act." *Id.*

Following the 2010 tribal election, including elections for the Osage Minerals Council, Appellants sent a letter to BIA's Director, again objecting to the Osage Constitution as applied to the mineral estate, and requesting that BIA conduct elections "for the independent governing body of the Osage Mineral Estate . . . which shall include an eight member Tribal Council, Principal Chief and Assistant Principal Chief as prescribed by the 1906 Act in accordance with 25 C.F.R. Part 90." Request for Elections, Apr. 28, 2011, at 1 (AR Tab 177). Appellants contended that the Osage Constitution diminished their property interests, and sought BIA's resurrection of the 1906 Act Council. Appellants acknowledged that BIA had been "steadfast" in its position not to do so, as confirmed in the Assistant Secretary's January 28, 2008, letter stating that BIA would "take no futher actions" on the issue. *Id.* at 6.

III. The Regional Director's Decision and Appellants' Appeal to the Board

The BIA Director forwarded Appellants' correspondence to the Regional Director for response,[14] and on March 12, 2012, the Regional Director rejected Appellants' request for a BIA-conducted election pursuant to Part 90. Decision, Mar. 12, 2012 (AR Tab 179). The Regional Director concluded that the Reaffirmation Act "removed the 1906 Act's requisite governmental form and granted the Osage Tribe the right to structure its government as it saw fit." *Id.* at 2. The Regional Director recounted the Tribe's adoption of the 2006 Constitution, and noted that the Nation had conducted elections for the Minerals Council in 2006 and 2010. *Id.* at 3. The Regional Director construed Appellants' demands as, in effect, a challenge to the decision of the Osage Nation to adopt the 2006 Constitution, and concluded that Appellants lacked standing to complain to BIA about the Osage Nation's governmental structure. *Id.* Additionally, the Regional Director concluded that any BIA decision to conduct an election and resurrect the 1906 Act Council "would inevitably run squarely into the Minerals Council's claim [of] authority to administer the Osage mineral estate." *Id.* at 6.

Appellants appealed to the Board. On appeal, Appellants argue that (1) BIA erred in determining that the Reaffirmation Act abolished the form of government prescribed by the 1906 Act, and superseded the regulations in Part 90; and (2) BIA failed to protect the mineral estate from confiscation by the Osage Nation by failing to conduct a Part 90 election and recognize a resurrected 1906 Act Council as governing the mineral estate.

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[14] Appellants construed the BIA Director's referral of the matter to the Regional Director as "inaction," and appealed to the Board pursuant to 25 C.F.R. § 2.8 (Appeal from inaction of official). Following the Regional Director's issuance of the Decision, the Board dismissed Appellants' appeal from BIA inaction as moot. *Tillman v. Director*, 54 IBIA 288 (2012).

Appellants apparently contend that in enacting the Reaffirmation Act, Congress intended only to authorize the Osage Tribe to establish a tribal government for matters not involving the mineral estate, and intended to preserve the form of government for the mineral estate prescribed by § 9 of the 1906 Act. Appellants contend that the "sole issue" in this appeal is whether BIA is required by the 1906 Act to administer an election for the 1906 Act form of Osage government. Opening Br. at 22. Appellants seek an order from the Board requiring BIA to conduct elections pursuant to Part 90 and enjoining BIA from recognizing any claim to an interest in or control over the mineral estate by the Osage Nation. *Id.* at 28.

The Regional Director filed an answer brief, and Appellants filed a reply brief. Neither the Nation nor the Minerals Council entered an appearance.

Standard of Review and Jurisdiction

The Board reviews questions of law *de novo*. *Black Weasel v. Rocky Mountain Regional Director*, 59 IBIA 258, 261 (2014). A determination by the Assistant Secretary is binding on BIA officials. *See Cherokee Nation v. Acting Eastern Oklahoma Regional Director*, 58 IBIA 153, 164 (2014) (Assistant Secretary's decision precluded BIA regional director from independently considering the issue). And with exceptions not relevant here, the Board lacks jurisidiction to review a determination by the Assistant Secretary. *Id.* at 161.

Discussion

We affirm the Decision because the Regional Director was bound by the Assistant Secretary's determination that BIA would take no further action on the demand by dissatisfied headright owners that BIA conduct a Part 90 election and resurrect the 1906 Act Council. Even if the Assistant Secretary's determination was not dispositive in precluding the Regional Director from granting Appellants' request for a Part 90 election, we would affirm the Decision. First, as the Regional Director correctly found, the Part 90 regulations, which codified the "manner . . . prescribed" by the Department for 1906 Act elections, *see* 34 Stat. at 545, do not authorize BIA to unilaterally conduct an election for the 1906 Act Council. Thus, the relief sought by Appellants is not available through the legal authority upon which they rely. Second, we agree with the Regional Director that the Reaffirmation Act removed the form of government prescribed for the Osage Tribe by the 1906 Act and restored the Tribe's inherent right to determine its form of government. Congress did not exclude the mineral estate from the authority restored to the Tribe to determine its own form of government. If Appellants believe that the Nation or BIA has taken action that infringes on their rights as headright owners, their recourse is not through BIA's resurrection of the 1906 Act governance structure, as they seek to do through this appeal.

I. The Assistant Secretary's Decision Precluded BIA from Granting Appellants' Request for a Part 90 Election

In demanding that BIA take action and conduct an election under Part 90, Appellants specifically acknowledged that the Assistant Secretary had spoken to the precise issue: "The Assistant Secretary stated that it was his opinion that the BIA had fulfilled its obligations under the 1906 Act and '*will take no further actions in this issue*.'" Request for Elections at 6 (AR Tab 177) (quoting Letter from Assistant Secretary to Miller) (emphasis added). As noted earlier, the Assistant Secretary stated that pursuant to its obligations under the Reaffirmation Act, and at the request of the Osage Tribe, BIA had provided assistance regarding the conduct of the election to implement the Act. Letter from Assistant Secretary (AR Tab 168). In response to Appellants' objections to the Osage Constitution, the Assistant Secretary asserted that the Constitution "upholds the intent and direction of the Congress." *Id.* The Assistant Secretary concluded that "BIA will take no further actions in this issue since it is an internal tribal matter that is best addressed [in] the proper tribal forum," and that BIA has "fulfilled [its] obligations established by the [Reaffirmation] Act." *Id.*

As interpreted—quite reasonably—by Appellants, the Assistant Secretary decided that BIA would take no further action in the conduct of Osage elections, based on an interpretation of the Reaffirmation Act as displacing BIA's authority under Part 90. Request for Elections at 7 (AR Tab 177). Inexplicably, the Regional Director's decision does not mention the Assistant Secretary's letter. But a determination by the Assistant Secretary is binding on BIA. *Cherokee Nation*, 58 IBIA at 164. Thus, the Regional Director was precluded by the Assistant Secretary's determination from conducting an election, whether the Regional Director acknowledged it or not. On this ground alone we may affirm the Regional Director's rejection of Appellants' request that BIA conduct a Part 90 election.

The Board similarly lacks jurisdiction to review a decision of the Assistant Secretary. *Cherokee Nation,* 58 IBIA at 161. Thus, to the extent Appellants' appeal may be construed as seeking Board review of the Assistant Secretary's determination, we would dismiss the appeal, leaving the Decision in place.

II. BIA Has No Authority to Unilaterally Conduct an Election under Part 90

Even if the Assistant Secretary's determination was not dispositive, we would affirm the Decision. Under Part 90, an election is initiated by the Principal Chief or Assistant Principal Chief of the Tribe. *See* 25 C.F.R. § 90.32. The Principal Chief and, in his

absence, the Assistant Principal Chief, is tasked with issuing the election notice that triggers the affirmative duties that BIA has under Part 90. *Id.*; *see also* § 90.35 (BIA "shall compile a list of the voters"); § 90.40 (BIA "shall have ballots printed"). Other BIA involvement is conditional upon completed acts of the Principal Chief, Assistant Principal Chief, or members of the election board appointed by the Principal Chief. *See id.* § 90.32 (designation of clerks upon recommendation of election board); § 90.37 (approval of election notice); § 90.42 (Superintendent (or designee) to accompany election board members in delivering locked box of absentee ballots); § 90.46 (BIA to notify candidates of their election to tribal office). But § 90.32 explicitly delegates primary responsibility for conducting elections to the election board: "The Principal Chief . . . or the Assisant Principal Chief shall . . . appoint an election board . . . whose duties shall be *to conduct the election* as provided in the regulations in this part." 25 C.F.R. § 90.32 (emphasis added). Nowhere does Part 90 grant BIA authority to unilaterally "conduct" an Osage tribal election.

In addition, to the extent Appellants suggest that the 1906 Act directly imposes on BIA a duty to conduct such an election, without involvement of the Tribe, Appellants are mistaken.[15] The 1906 Act prescribed the form of government for the Tribe and required the Tribe to hold elections "in the manner to be prescribed" by the Department. 34 Stat. at 545. If any duty for the Department arises under the 1906 Act regarding Osage tribal

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[15] It is far from clear that Appellants have standing to bring a claim under the 1906 Act concerning tribal elections. The right to vote in tribal elections that was extended to headright owners who are not on the final roll appears to be purely a creature of regulation. *See supra* at 147 and note 8. And Part 90 does not permit individual voters to initiate an election or otherwise take action that would trigger the duties that BIA had under Part 90.

In addition, Appellants' claims of injury appear to be premised on their own adverse interpretation of the Constitution—e.g., that the Principal Chief has "veto authority" over the Minerals Council—and their speculation that the value of their headright shares is or may become diminished in some way. Yet, to avoid running afoul of the doctrine requiring exhaustion of tribal remedies, Appellants appear to assert that the 1906 Act continues in full force and effect with respect to the mineral estate, regardless of the Constitution adopted by the Osage Tribe in 2006. But even if that were the case, the crux of Appellants' complaint would appear to be against the tribal officials who might decline to hold an election under the 1906 Act, a complaint which itself would appear to require exhaustion of tribal remedies, and would not involve BIA.

elections, it is to prescribe the manner for those elections, which the Department did in Part 90, and which, as we have explained, does not authorize BIA to unilaterally conduct Osage tribal elections.

III. The Regional Director Correctly Interpreted the Reaffirmation Act as Superseding the 1906 Act's Prescribed Form of Government for the Osage Tribe

The Reaffirmation Act provides that "[n]otwithstanding section 9 of the [1906] Act . . . Congress hereby reaffirms the inherent sovereign right of the Osage Tribe to determine its own form of government." Reaffirmation Act § 1(b)(2). Appellants contend that the Reaffirmation Act stands for the proposition that the "Osage Nation and the [1906 Act] Tribal Council should be separate and distinct" governments, with the 1906 Act Tribal Council governing issues related to the mineral estate, and the Osage Nation governing all other tribal matters. Opening Br. at 10.[16] We are not convinced that Congress intended, in the Reaffirmation Act, to preserve the form of government imposed by the 1906 Act on the Osage Tribe, for any purposes.

To the contrary, Congress plainly reaffirmed the inherent right of the Osage Tribe to determine its own form of government "*[n]otwithstanding* section 9 of the [1906] Act," Reaffirmation Act § 1(b)(2), and not—as Appellants would have it—"*subject to*" § 9 of the 1906 Act. In so doing, Congress authorized the Osage Nation to supersede and supplant the form of government imposed by the 1906 Act, including governance of the mineral estate, and also reaffirmed the Tribe's right to determine its own membership, subject only to the proviso that "the rights of any person to Osage mineral estate shares are not diminished thereby." Reaffirmation Act § 1(b)(1).

Whether or not any provisions in the Osage Constitution might be construed by the Tribe's court in a manner that would impermissibly infringe on the rights of headright owners is a matter that is outside the scope of this appeal, as is the issue of whether either BIA or the Nation have taken or may take any actions that might impermissibly infringe on rights of headright owners preserved by the Reaffirmation Act. Appellants contend that the "sole issue" in this appeal is whether BIA has an obligation to conduct an election to resurrect the 1906 Act form of Osage tribal government, and the Regional Director correctly concluded that BIA does not.

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[16] Appellants assert that the Osage Nation and the 1906 Act government would not be "two separate tribes," but "part of the same tribe," Opening Br. at 10, although Appellants refer to the two as the "Osage Nation" and the "Osage Tribe," *id.*

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Decision.

I concur:

Steven K. Linscheid
Chief Administrative Judge

Thomas A. Blaser
Administrative Judge

Charles O. Tillman, Dudley Whitehorn, Joanna Barbara, R.E. Yarbrough, John Johnson, Joe Hall, and Cody Tucker v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs
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60 IBIA 143

Cori D. Powell, Esq.
William R. Grimm, Esq.
for Appellants, Charles O. Tillman, et al.
Barrow & Grimm, P.C.
110 W. Seventh St, Suite 900
Tulsa, OK 74119-1044
BY CERTIFIED MAIL

Principal Chief
Osage Nation
P.O. Box 779
Pawhuska, OK 74056

Osage Minerals Council
P.O. Box 779
Pawhuska, OK 74056

Osage Superintendent
Bureau of Indian Affairs
U.S. Department of the Interior
P.O. Box 1539
Pawhuska, OK 74056

Eastern Oklahoma Regional Director
Bureau of Indian Affairs
P.O. Box 8002
Muskogee, OK 74402-8002

Alan R. Woodcock, Esq.
Office of the Solicitor
U.S. Department of the Interior
7906 East 33rd Street, Suite 100
Tulsa, OK 74145