STEVEN D. SANDVEN
LAW OFFICE PC

PRINCIPAL
STEVEN D. SANDVEN

Admitted in South Dakota,
Minnesota & Washington D.C.

116 EAST MAIN STREET
BERESFORD, SOUTH DAKOTA 57004-1819
TELEPHONE (605) 763-2015
FACSIMILE (605) 763-2016
SSANDVENLAW@AOL.COM

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RE: Secretarial Elections

This memorandum is provided to apprize the Committee of the time lines imposed on the Bureau of Indian Affairs under 25 C.F. R. § 81 when calling elections for amending tribal constitutions. After the Committee has agreed upon the amendments, the Community Council will review the same and adopt a resolution requesting Secretarial review from the regional office. If the change is considered a revision, the BIA has 30 days to call an election to be set not less than 30 nor more than 60 days thereafter. However, if the change is considered an amendment, the Washington, D.C. office will review and call an election within 180 days. The federal regulations do not provide clear guidance as to what constitutes a revision as compared to an amendment, but the latter is defined in Section 81 as any modification, change, or total revision of a constitution.

Interior Review of Proposed Amendments

The Indian Reorganization Act authorizes the Secretary of the Interior to conduct referendum elections to amend tribal constitutions pursuant to "rules and regulations" determined by the Secretary. 25 U.S.C. §§ 476(a)(1). Those regulations are set forth in the Code of Federal Regulations. 25 C.F.R. pt. 81. The regulations are entirely procedural in nature and govern only the mechanism by which tribal constitutions may be amended. Once the Secretary receives a qualifying request to hold an election to ratify proposed amendments, the Secretary reviews the legality of the proposed amendments and calls an election within 90 days. 25 U.S.C. § 476(c)(1)(B); 25 C.F.R. § 81.5(d). The election results are not binding until the Secretary approves them, and any qualified voter may contest the results to the Secretary within three days of the election. 25 C.F.R. § 81.22. The Secretary has 45 days to resolve these election contests, conduct an independent review, and approve or disapprove the election. 25 U.S.C. § 476(d)(1).

Prior to 1986, the Secretary was not restrained by time frames when calling constitutional elections. In Coyote Valley Band of Pomo Indians v. United States, 639 F.Supp. 165 (E.D.Cal.1986), several tribes sued the Secretary of the Interior as part of their attempt to adopt constitutions and form tribal governments under §§ 476. Id. at 166. The tribes had drafted constitutions and fulfilled the petition and request for election requirements of the federal regulations. *See* 25 C.F.R. §§ 81.5 The Secretary notified the tribes that he objected to the substance of the amendments and planned to disapprove them if ratified and requested the tribes alter the objectionable provisions. When the tribes refused to modify their proposed constitutions, the Secretary refused to call the election. Id. at 166-67. The tribes responded by

filing suit. The district court ruled that the IRA required the Secretary to call an election upon receiving a request supported by a valid petition under the regulations. Id. at 173.

Congress reacted to Coyote Valley by amending §§ 476 in 1988, Act of November 1, 1988, Pub.L. No. 100-581, §§§§ 101-103, 102 Stat. 2938-2939 (codified as amended at 25 U.S.C. §§ 476 (1988)). The 1988 amendments had both procedural and substantive aspects to them. Procedurally, Congress adopted suggestions made by the Coyote Valley court that a timetable be established for the calling of a constitutional election and that the timetable include a process by which the BIA could "suggest possible modifications to objectionable constitutional provisions." [1] As to the substantive terms of the amendment, the new §§ 476 provides that the Secretary "shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws." 25 U.S.C. §§ 476(a) (1988). Congress further limited secretarial discretion by defining "applicable laws" for purposes of the new §§ 476: "Applicable laws" means any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts. Pub.L. No. 100-581, §§ 102, 102 Stat. 2939 (1988) (republished as commentary to 25 U.S.C. §§ 476 (1988)). Thus, the 1988 amendments set a substantive standard which limits the Secretary's discretion to disapprove constitutional amendments. [2]

Narrowing the Secretary's discretion in 1988 was a step in the right direction but Congress did not go far enough because it maintained federal oversight of tribal constitutional enactments. The secretarial oversight mechanism is an anomaly when compared to Congress' approach to Indian self-determination in general. In Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F.3d 667 (8th Cir. 1997), the Secretary conducted a constitutional election for amendments pertaining to Tribal membership qualifications. Three weeks before the election, the election board posted a registered voter list containing one hundred eleven names. In response to objections, the board determined that forty-four people were not eligible to vote, removed them from the list, and posted a revised list twelve days before the election. The amendments passed by a vote of thirty-five to twenty-seven, and the election board certified the results the same day as the election. Several Tribal members filed challenges to the eligibility determinations, alleging that eighteen qualified members were prevented from voting and that twenty-two unqualified individuals were allowed to vote. Forty-three days after the election, the Secretary issued a decision letter stating that he could not approve the election's results because the possible errors in the voter-eligibility determinations raised substantial doubt regarding the election's fundamental integrity and fairness. The Secretary deferred to the election board's decision with respect to a number of the challenges, but ordered an administrative law judge to resolve those

[1] Coyote Valley, 639 F.Supp. at 173. The 1988 amendments require the Secretary to call an election within ninety days of a request for a referendum to amend a tribal constitution. Pub.L. No. 100-581, §§ 101, 102 Stat. 2938-39. During that 90 day period, the Secretary must review the draft amendments "to determine if any provision therein is contrary to applicable laws." Id. If the Secretary finds that a proposed amendment is "contrary to applicable laws," he must notify the tribe in writing of the objection, but the Secretary must still conduct the election.

[2] Congress also provided that tribes may bring "actions to enforce the provisions of the section ... in the appropriate Federal district court." 25 U.S.C. §§ 476(d)(2) (1988). This provision grants tribes a means to seek review of the Secretary's approval decision.

that remained. In response, the Tribe sued the Secretary for alleged violations of both the IRA and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, seeking an order declaring the Secretary's actions unlawful and declaring the amendments effective. The Eighth Circuit concluded that the Secretary did not abuse its discretion, but emphasized that "[t]he Secretary may review amendments that have been ratified by a majority vote only to ensure that they comply with applicable federal law. If they do not, the Secretary may disapprove them within forty-five days of the election. If the Secretary neither disapproves nor approves them within that time, the amendments are deemed approved and become effective. The Secretary's interpretation of the limitations contained in 25 U.S.C. § 476 does not give him or her carte blanche to interfere with tribal elections; the Secretary may still disapprove elections for substantive reasons only if the proposals are contrary to federal law." Hence, the Secretary is limited to determining whether the proposed amendments are contrary to "applicable laws."

Please contact me if there are any questions.