



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Fallon Paiute-Shoshone Business Council v. Bureau of Indian Affairs

Docket No. HD/ISDA 2001-1 (09/17/2001)



United States Department of the Interior
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FALLON PAIUTE-SHOSHONE)	
BUSINESS COUNCIL,)	Docket No. HD/ISDA 2001-1
)	
Appellant)	Indian Self-Determination Act
)	25 U.S.C. §450 et seq
v.)	
)	Emergency Contract
BUREAU OF INDIAN AFFAIRS,)	Reassumption
)	
Respondent)	

RECOMMENDED DECISION

Syllabus

The BIA was justified in effecting an emergency reassumption, pursuant to 25 U.S.C. §450m, of the Indian Self-Determination Act law enforcement contract with the Fallon Paiute-Shoshone Tribes, due to the Tribal Police force's failure to provide fair and uniform law enforcement services on the reservation, and the resulting immediate threat of imminent harm to the safety of the police and Tribal members.

Background and Proceedings

On June 9, 2001, the Bureau of Indian Affairs (the "BIA" or "Respondent"), Western Nevada Agency, in Carson City, sent a letter to Marie Loper, Vice-Chairman of the Fallon Paiute-Shoshone Business Council (the "Fallon Tribe" or "Appellant"). The letter constituted written notice that the Secretary of the Interior had decided to effect an emergency reassumption of the Fallon Tribe's law enforcement program contracted under the Indian Self-Determination and Education Assistance Act ("ISDA"), Public Law 93-638, 25 U.S.C. §450 et seq., also known as "Public Law 638." The emergency reassumption was undertaken pursuant to the authority of the ISDA at 25 U.S.C. §450m and the ISDA regulations at 25 CFR §§900.252 and 900.253. The BIA's reassumption of the Tribe's law enforcement contract became effective at 12:00 noon on June 10, 2001.

The reassumption notice informed the Fallon Tribe of its right, pursuant to 25 CFR §900.253(b), to a hearing on the record within 10 days of the date of the notice, according to the procedures in 25 CFR §900.171. On June 15, 2001, the Deputy Director of the Department's Office of Hearings and Appeals appointed the undersigned Administrative Law Judge to hold a hearing in this matter. In prehearing correspondence and a telephone conference, the Tribe agreed to a later date for holding the hearing, as permitted by §900.171(a), and agreed to hold the hearing in Reno, Nevada. The hearing was then held in Reno on three days, July 10, 11, and 12, 2001.

Three parties participated in the hearing. The Bureau of Indian Affairs (the "BIA") was represented by William W. Quinn, Esq., of the Department of the Interior's Office of the Field Solicitor in Phoenix, Arizona. The BIA, the Respondent, of course supported its emergency reassumption of the Tribe's law enforcement contract.

The two other parties consisted of members of two opposing political factions within the Fallon Tribe. The Appellant, which was generally referred to as the "Tribe" during the hearing, consisted of the faction which controlled the Tribe's Business Council for most of the period at issue, including during the hearing itself. For clarity, in this decision, that faction will be referred to by the name of one of its political leaders, Marie Loper, as the "Loper party," or as the Appellant. The Loper party was represented at the hearing by Kevin Gover, Esq., Steptoe & Johnson, Washington, District of Columbia, as trial counsel. He was assisted at the hearing by Dennis Chappabitty, Esq., of Sacramento, California, and John O. Wright, a paralegal with the Tribe's retained law firm, Belanger & Plimpton, of Lovelock, Nevada. Todd A. Plimpton, Esq., of that firm, was unable to attend the hearing, but was on the Appellant's brief. The Loper party opposed the BIA's emergency reassumption of the Tribe's law enforcement contract.

The third party, which was generally referred to during the hearing as the "interested parties," consists of members of the Tribal faction which did not control the Tribe's Business Council during most of the relevant time, including during the hearing. Due to events that occurred just after the hearing (described below in the Findings of Fact), the "interested parties" faction does currently, at the time of this writing, control the Business

Council. For clarity in this decision, the "interested parties" will also be referred to by the name of one of its leaders, Donna Cossette, as the "Cossette party." The Cossette party was represented by Brian Morris, Esq., of Reno, Nevada. In a prehearing conference, the Cossette party was also represented by James Abourezk, Esq., of Sioux Falls, South Dakota. At the hearing, the Cossette party appeared to support the BIA's reassumption of the Tribe's law enforcement contract. In its post-hearing briefs, however, the Cossette party took the position that an emergency reassumption was not justified, but that the BIA's action should be viewed as a voluntary retrocession of the law enforcement contract at the request of the valid Tribal government.

A total of 24 witnesses testified at the hearing. The stenographic transcript of the hearing consists of 933 pages, and 31 exhibits were received into evidence. The parties filed post-hearing briefs and reply briefs. The record closed on August 16, 2001, upon the judge's receipt of the reply briefs.

FINDINGS OF FACT

The Fallon Paiute-Shoshone Tribe is riven by an internal political quarrel between two factions that has been ongoing for at least two years. Disputes between the Loper and Cossette parties over various tribal elections and actions to remove opposing Council members have resulted in a series of decisions by the BIA and appeals to the Interior Board of Indian Appeals (the "Board" or "IBIA") concerning the legitimacy and control of the Tribal government. The ongoing dispute has thus forced the BIA and the Board to issue a series of decisions effectively determining which party is, for the time being, in control of the Tribal government. As further described below, this underlying dispute remains unresolved as of the date of this Recommended Decision. (Exs. 11, 19, 21, 22¹).

The governing body of the Fallon Paiute-Shoshone Tribe is the Fallon Paiute-Shoshone Business Council (the "Tribal Council"), consisting of seven members: a chairperson, vice-chairperson, secretary, treasurer, and three members at large. For future reference in this Recommended Decision, the following table lists

¹ References to exhibits ("Ex.") and pages in the stenographic transcript of the hearing ("Tr.") are representative and not intended to be complete or exhaustive. After the close of the hearing, the IBIA issued several additional orders which are also included in the Findings of Fact.

members of the two factions or parties who occupied seats on the 7-member Business Council at various relevant times, and others who held (or would have held) positions in the tribal government who were loyal to one of the parties.

<u>Position</u>	<u>Loper Party</u>	<u>Cosette Party²</u>
Chairperson	Lenora Rogers	Donna Cosette
Vice-Chairperson	Marie Loper	
Secretary	Rosanna Marrujo	Eugene Jack
Treasurer	Valerie Henry	
Council Member	Barbara Culbertson	Alvin Moyle
Council Member	Judith Macias	Susan Willie
Council Member	Marcelle Rusk	
Tribal Judge	Kevin Pasquale	Peter Sferrazza
Tribal Attorney	Kyle Swanson	
Chief of Police	Ted Bolzle	Dennis Simmons ³

The following findings of fact will be presented generally, with some digressions, in the form of a chronological summary of significant events leading to the BIA's decision to reassume the Tribe's law enforcement contract. The events that took place on several key dates on which Tribal Council meetings were held -- particularly January 23 and May 7, 2001 -- are described in detail.

February 12, 1998. The Fallon Tribe enters into a "P.L. 638" Indian Self-Determination Act contract, (Contract No. CTH61T64524) to perform law enforcement services for the tribal population on the Fallon Reservation and nearby Fallon Indian Colony. The reservation and colony are both located about 5 miles east of the City of Fallon, in Churchill County, Nevada. The contract is in a model form that contains the standard provisions for the Tribe's performance, reporting, and funding of activities, that are commonly found in such contracts entered into by Indian tribes throughout the country. (Ex. 1).

² The BIA reported in its reply brief that the Cosette party has now removed the three holdover members of the Loper party from the Business Council, and installed Cosette supporters in those positions. However, the record does not reveal who the new members are; hence the blank spaces in the table.

³ As further described below, Dennis Simmons did not, on this record, ever take office as the Tribe's Chief of Police. He was, however, the Cosette party's choice to fill that position if and when that party would be granted the authority to resume the law enforcement contract on behalf of the Tribe.

The Fallon Tribal Police have law enforcement authority only on the reservation or other tribal lands. The Fallon Tribe operates under a cooperative law enforcement agreement with the Churchill County Sheriff's office and District Attorney. Emergency "911" calls from the reservation are dispatched through the County Sheriff's office. The Tribe also uses the Churchill County jail to detain its prisoners. (Tr. 58-59).

August 2000. The Loper party, with four members in control of the Fallon Business Council, votes to remove three members from the Cossette party: Alvin Moyle, who was then Chairperson; Donna Cossette, who was then Vice-Chairperson; and Susan Willie, Secretary. The removals are allegedly for neglect of duty and gross misconduct while in office, as provided under the Tribe's Constitution. The three removed Council members do not seek review of this action in Tribal Court. (Ex. 19).

October 14, 2000. The removed Council members organize and hold a recall election. The results of that election would have recalled the Loper party Council members from office. (Ex. 19).

October 23, 2000. The BIA issues a decision by Regional Director Wayne Nordwall declining to recognize the results of the recall election. That decision finds that the three Cosette members were "facially" properly removed from the Council under the Tribal Constitution, and thus had no authority to pass the resolution that led to the recall election. The BIA Decision also noted that the Inter-Tribal Court of Appeals of Nevada had reversed several Fallon Tribal Court Orders favorable to the Cossette party's position. The effect of those court decisions and the BIA decision is to maintain the Loper party in control of the Council. (Ex. 19).

November 22, 2000. The three Cossette party members appeal the October 23, 2000 BIA decision to the IBIA. That appeal is now apparently moot due to subsequent events, as recognized in the IBIA's Order for Statements as to Whether this Appeal is Moot, dated June 13, 2001. The October 23, 2000 decision effectively confirmed the BIA's recognition of the then-existing Tribal government. Hence, as also noted by the IBIA, any automatic stay that would apply to a BIA decision while under appeal would not have any practical effect with respect to the October 23, 2000 decision. (Exs. 18, 19, 21).

January 13, 2001. The Tribe holds a regularly scheduled election. In this election, Donna Cossette is elected Chairperson of the

Fallon Business Council, replacing Lenora Rogers. Alvin Moyle and Susan Willie are elected as council members, replacing Barbara Culbertson and Judith Macias. Under the Tribal Constitution, the newly elected members are scheduled to be sworn into office at the next regularly scheduled Council meeting. The election results are not challenged in Tribal Court by the Loper party. (Ex. 11).

January 23, 2001. The Tribal Council convenes in the gymnasium at Tribal headquarters for the next regularly scheduled meeting. The Loper members of the Council pass a resolution prohibiting the newly elected council members from being sworn in as new officers and members. The resolution is based on the past removal of those members for cause and pending charges against them. Following this action by the Council, the audience, consisting mostly of Cosette party supporters, protests and begins a chant of "Swear them in!" The Tribal police order the room cleared. The crowd, of about 50 persons, moves outside the front entrance to the headquarters building. (Ex. 13; Tr. 220-221, 802-805).

Believing that the crowd constituted a threat to safety of those inside or those trying to enter or leave the building, the police order the crowd outside to leave the premises. The officers outside begin to form a skirmish line to move the crowd away from the building. Officer Timothy Tooker, stationed just outside the door, is challenged by a young man by the door who refuses to leave. Officer Tooker attempts to restrain him, and when he still cannot control him, Officer Tooker deploys his pepper spray on the man and starts to arrest him. At this point, the crowd starts to close in behind him, and Officer Tooker points his pepper spray canister toward the crowd, and sprays twice over the crowd in general. Sergeant (now Lieutenant) Mark McGarry moves outside to help and retrieves the can of pepper spray, which had been knocked out of Officer Tooker's hand. Sergeant McGarry deploys his baton to clear a space around him, and repeatedly orders the crowd to leave. (Ex. 13; Tr. 220-240, 729-735, 805-812).

The crowd then disperses. About a dozen people who are affected by the pepper spray go to Churchill County Community Hospital in Fallon, where they were treated and released.

After these events, Donna Cossette asked Chief of Police Bolzle and other officers to swear her into office, as authorized by the Tribal Law and Order Code. Ultimately, they refused to do so. (Tr. 367-369; 464-466).

February 16, 2001. The Fallon Paiute-Shoshone Tribal Court holds a hearing and issues a decision validating the results of the election. The BIA sends officers, upon a request for assistance by the Fallon Tribal Police, to provide support in the event of a disturbance outside the court. However, no disturbance occurs. (IBIA Order of August 13, 2001; Tr. 488-490).

May 1, 2002. The Inter-Tribal Court of Appeals of Nevada issues an order affirming the Tribal Court's decision recognizing the results of the election of January 13, 2001, and ordering the swearing of Donna Cossette, Alvin Moyle, and Susan Willie onto the Fallon Business Council. (Ex. 21).

May 7, 2001. A special Business Council meeting is held. The agenda includes the swearing in of Donna Cossette, Alvin Moyle, and Susan Willie. Ms. Cossette is sworn in as chairperson by Marie Loper. However, after that, the meeting deteriorates into confusion as Ms. Cossette attempts to adjourn and take control, while the Loper party members continue with their meeting. The Loper members continue the meeting by passing a resolution to immediately remove Donna Cossette as chairman due to alleged misconduct or additional pending charges. (Ex. 20; Tr. 322).

Ms. Cossette, meanwhile, waits for the arrival of Susan Willie and Alvin Moyle. When they arrive about ten minutes later, she swears them in as Business Council members. The Cossette members then vote to remove Rosanna Marrujo as secretary of the Council, and immediately appoint Eugene Jack to that position. He is then sworn in. During this time, the Loper members continue with their meeting. They take action to remove Ms. Cossette after she was sworn in, so she would not have had authority to swear in the other members or appoint Eugene Jack to the Council. During these competing meetings, Donna Cossette, while standing at the Council table, is bumped by Marcelle Rusk, one of the Loper party members. (Ex. 20; Tr. 327-330; 343; 370-374).

Ms. Cossette had arranged with Dennis Simmons, then the Chief of Police for the Lovelock Paiute Tribe, to drive down from Lovelock (about 60 miles distant) with several of his deputies, on the evening of May 7, and stand by for her to telephone him. Ms. Cossette had made this contact through her cousin, Allen Ambler, who is a council member for the Lovelock Tribe and operates a business in Fallon called FMI. Ms. Cossette had planned to call the Lovelock officers to come on the Fallon Reservation, so she could cross-deputize them as temporary Fallon officers after she

was sworn in. Ms. Cossette had not informed the Tribal Police or anyone on the existing council about the plan involving Dennis Simmons and his men, who would essentially comprise a competing police force, loyal to the Cossette party. Ms. Cossette also plans to hire Mr. Simmons and his companions as the regular Tribal Police when she attains control of the Tribal Council. (Exs. 8, 23; 252-256; 340; 376; 402; 921-922).

Dennis Simmons arrives at the Fallon Tribal headquarters at about 8:00 PM on May 7, 2001, with several associates, including Dan Hudspeth, Oscar Hudspeth, and Ray East. At first they cannot gain entry to the gymnasium where the meeting was being held. The Fallon police then invite Dennis Simmons in to question him in the Tribal conference room. Mr. Simmons says he is an authorized BIA officer and that he was requested to come to the Fallon Reservation that evening by Donna Cossette. Chief Bolzle telephones the BIA office in Carson City and speaks to BIA Chief of Police Iola Swick, who denies that Mr. Simmons has any authority from BIA to be there that evening, although she was aware that Donna Cossette had requested his presence. The BIA does have an observer present, Criminal Investigator ("CI") Marla Hernandez, who was sent to Fallon that evening only to monitor the situation. (Exs. 5, 6, 20; Tr. 90-95; 394-397).

To the Fallon Police, it appears that Mr. Simmons and his companions are armed civilians with no valid authority to enforce the laws or to be present on the Fallon Reservation. Donna Cossette, however does confirm to Sergeant McGarry that she had requested Simmons and his men to come that evening. Chief Bolzle orders Mr. Simmons to leave the reservation. Mr. Simmons starts to leave the room, but says that he and his crew would remain in the area. Chief Bolzle then restrains Mr. Simmons, who is handcuffed and placed under arrest by the Fallon Police. He is taken to a vehicle behind the building, and his companions summoned. The Fallon police have their weapons out of their holsters in the ready position, pointed downward. As instructed, Mr. Simmons directs his men to leave the reservation, to prevent any further trouble. They comply. The Fallon police then transport Mr. Simmons to the Churchill County jail. He is charged with resisting arrest, disorderly conduct, and interfering with government process. Those charges are still pending. (Exs. 5, 25, 26, 31, 31-A; Tr. 397-399; 426-429).

May 10, 2001. Fallon Tribal Chief of Police Bolzle writes a letter to the BIA Regional Commander, Richard Armstrong, and Chief of

Police of the Western Nevada Agency Iola Swick, informing them of a threat of an armed overthrow of the current tribal government and requesting "any and all available assistance." Shortly after the Council meeting on May 7, and the arrest of Dennis Simmons, the Fallon Tribal Police had received information that it believed credible, that Dennis Simmons and his supporters were planning an armed takeover of the Fallon Tribal headquarters. (Ex. 27; Tr. 490-492).

May 11, 2001. Commander Armstrong replies in a letter that the Fallon Tribal Police is still considered the primary law enforcement agency on the reservation. He also states BIA's Office of Law Enforcement Services ("OLEs") would respond and assist with a contingency plan "once a serious incident occurs or there is supporting information that it is imminent." (Ex. 9).

Also on this date, Barry W. Welch, Acting Regional Director of the BIA's Western Regional Office in Phoenix, writes a letter to Marie Loper indicating that the BIA intended to recognize Donna Cossette as chairperson, Eugene Jack as secretary, and Alvin Moyle and Susan Willie as Business Council members. (Ex. 11).

May 14, 2001. The Cossette council, meeting at Donna Cossette's home, issues notices of suspension to Chief Bolzle and other members of the Tribal Police. Some of them are served on the officers by Jackie Allen. (Ex. 14; Tr. 256-258, 513).

May 15, 2001. Members of the Loper party, Tribal attorney Todd Plimpton, and Sergeant McGarry of the Tribal Police meet at the Western Nevada Regional Office with Commander Armstrong and other BIA officials. The threat of hostile takeover and the possibility of a BIA reassumption or retrocession of the law enforcement contract is discussed, but such action is not requested by the Loper party. (Ex. 7).

May 18, 2001. Acting Regional Director Barry W. Welch issues a decision confirming the decision to recognize the Cossette council members stated in his May 11 letter. The decision states that the Loper members had not apparently followed the proper procedure in their attempt to remove the newly elected Cossette members, and that the Cossette party had properly removed the secretary and appointed their own supporter, Eugene Jack, to that vacant position. (Ex. 11).

May 21, 2001. Tribal Court Judge Peter Sferrazza, on motions by

the Cossette party, issues restraining orders against Kyle Swanson, Tribal prosecutor; Kevin Pasquale, Tribal Court Judge; and the members of the Tribal Police force, prohibiting them from performing any duties on behalf of the Tribe or entering on the reservation. At this time, Kevin Pasquale was the Tribal Court Judge appointed by the Loper party. (Ex. 28; Tr. 559-566).

May 23, 2001. The Fallon Tribal Police hire Kevin E. Bussdieker as a part-time police officer. He is hired after a background investigation conducted by Lieutenant McGarry indicated that Mr. Bussdieker is on suspension from the Washoe County Sheriff's office due to an investigation for a firearms violation, but that he otherwise has a favorable military and work record. (Tr. 813-817).

May 30, 2001. The Cossette party members, including Donna Cossette, Susan Willie, Alvin Moyle, and Dennis Simmons, meet in Carson City with BIA OLES Commander Richard M. Armstrong. They describe the situation on the reservation in which the Loper party refuses to cede control of the Council or to allow the Cossette members access to the Tribal headquarters. The Loper council has issued temporary restraining orders against Donna Cossette and her supporters preventing them from engaging in various activities, and from using offices in the Tribal administration building. The meeting concludes with a 5-point plan for BIA to take administrative action to aid the Cossette party's effort to assume control of the Tribal government, in accord with the May 18 BIA decision. (Ex. 8).

Also on this day, Rosalie Allen begins video-taping several Fallon Police officers, who are armed with semi-automatic rifles, guarding the front of the Tribal administration building. Lieutenant McGarry orders her to move across the street where she would not impede traffic and be out of harm's way. The Police on that day are guarding against the possibility of an armed confrontation with the police force led by Dennis Simmons, who was recruited by Donna Cossette to be the Tribal Police chief. (Exs. 12, 23; Tr. 206-213).

Also on this day, the Cossette council passes resolutions terminating the positions of members of the Tribal Police force. (Ex. 15).

Later on this day, Donna Cossette and her brother begin driving her gravely ill dog from the reservation to the veterinarian in Fallon. The dog apparently dies in the back seat,

and they stop to call the veterinarian at a phone booth outside a convenience store between the reservation and town, known as Harmon Junction. At that time, three Fallon Tribal Police cars arrive, and one of the officers, Brian Downs, serves a civil summons and complaint on Ms. Cossette. Ms. Cossette and her brother are angered by the apparent show of force by the police, especially in their overwrought state due to the death of her dog. (Ex. 30; Tr. 305-321; 793-800).

Also on this day, the U.S. District Court for the District of Nevada issues an indictment of Kevin E. Bussdieker for unregistered possession of a machine gun and silencers. (Ex. 24).

June 5, 2001. Jackie Allen, while picking up commodities in the parking lot of Tribal headquarters, is also distributing newsletters prepared by the Cossette council, under the Tribal letterhead. Officer Biley approaches her car and Ms. Allen states that she doesn't recognize him as a police officer. Lieutenant McGarry then drives up and approaches and asks to speak with Ms. Allen. She ignores him and puts the car in gear, bumping into the leg of Lieutenant McGarry, who has moved in front of the car. He draws his gun and orders her to get out. She doesn't comply. He strikes her car window with his baton, but it doesn't shatter. She then gets out of the car. The officer then handcuffs and arrests Ms. Allen. She is charged with battery on a police officer, interfering with law enforcement procedures, disorderly conduct, and interference in governmental process. (Tr. 520-526; 827-830).

Lieutenant McGarry then transports Jackie Allen to the Churchill County jail. However, a court order issued by Judge Woodside Wright was issued there for Ms. Allen's release on her own recognizance. Judge Wright was not recognized as the Tribal Court judge by Lt. McGarry. The District Attorney for Churchill County, Arthur Mallory, due to the conflicting orders and confusion as to the legitimate authority on the Fallon Reservation, determines that Churchill County will no longer accept prisoners from the Fallon Reservation until the situation is clarified. Lt. McGarry then begins transporting Ms. Allen to the Washoe County jail in Reno. However, upon calling the BIA regional office, Commander Armstrong informed the lieutenant that Ms. Allen should be released pursuant to the order by Judge Wright. Lt. McGarry then transports Jackie Allen back to the Tribal headquarters and releases her. (Ex. 4; Tr. 527-530; 837-840).

Also on this date, Donna Cossette, as chairperson of the

Fallon Tribe, writes to Alan Anspach, then Superintendent of the Western Nevada BIA Field Office, to request retrocession, or the voluntary takeover of the law enforcement program on the reservation by the BIA Office of Law Enforcement Services. (Ex. 16).

June 6, 2001. The seven members of the Loper party who comprised the previous Fallon Business Council appeal the May 18, 2001, decision, which recognized the Cossette party in control of the Council, to the IBIA. (Ex. 22).

June 7, 2001. The IBIA issues a "Predocketing Order, Order Concerning Identification of Appellants, and Order Addressing Petition for Stay." This order notes that, under 43 CFR §4.314, the Regional Director's decision is stayed while the appeal is pending before the Board. However, the Board also notes that it has the authority to place the BIA decision into immediate effect pursuant to 25 CFR §2.6(a). The Board therefore allows the parties until July 6, 2001 to submit statements concerning their positions on whether the decision recognizing the Cossette party Council members should be placed into immediate effect. For the time being, due to the stay, the Loper party remains in control of the Fallon Tribal Business Council. (Ex. 22).

June 6-9, 2001. Upon receiving the Cossette party's request for retrocession of the law enforcement program, BIA officials in Nevada, Phoenix, Albuquerque, and Washington, D.C., begin conferring on the situation. The BIA begins making plans to undertake a retrocession, or a voluntary transfer of control of the law enforcement contract from the Tribe. Within the next few days, the BIA realizes that the Cossette party does not constitute the current Tribal government and is therefore not authorized to request a retrocession. The BIA then determines that its action will be an emergency reassumption of the Tribe's law enforcement program, although the operational details do not change. The BIA informs both parties of its plan. (Ex. 10; Tr. 40, 161, 201-201).

June 9, 2001. The BIA sends a letter to Marie Loper formally notifying the Tribe that the BIA had decided to effect an emergency reassumption of the Fallon Tribe's law enforcement program. The letter is signed by Ben Picotte, Awarding Official for the Western Nevada Agency, and Richard Armstrong, District III Commander. It was drafted with input from several other BIA officials and attorneys. The notice cites the following main provisions of the contract allegedly not fulfilled by the Fallon Tribe: (1) failure

to provide law enforcement services in a fair and uniform manner; (2) failure to investigate all citizen complaints; (3) failure to provide continual patrol and protective services; (4) and failure to properly complete a background investigation before hiring an officer with knowledge he was under indictment for a federal firearms violation. The letter also cites many of the events of the past several months described in these Findings of Fact. (Ex. 2).

June 10, 2001. The BIA OLES enters the Fallon reservation and reassumes law enforcement services for the Tribe. A large crowd of Cossette supporters is present at the headquarters to greet the BIA OLES officers. The BIA officers defuse a confrontation between Lieutenant McGarry and Eugene Jack. (Ex. 10; Tr. 162-164).

The BIA force consists of seven officers, reduced from 10 to 14 under the former police force. The BIA force is limited to enforcing the Code of Indian Offenses found in 25 CFR Part 11, rather than the Fallon Tribal Law and Order Code. At least initially, the BIA OLES also does not provide parole and probation counseling, and service of process duties previously performed by the Tribal police. The pre-existing Tribal police are placed on administrative leave status, with pay. (Ex. 2; Tr. 767-776; 778-792).

July 12, 2001. The IBIA issues an Order placing the May 18 decision of the BIA into immediate effect. This has the effect of transferring control of the Tribal government to the Cossette party from the Loper party. Shortly thereafter, the Cossette council terminates the positions of the former Tribal police. The Cossette council also removes the three remaining Loper party members from the Council and replaces them with Cossette supporters. (IBIA Order of July 12, 2001⁴).

August 13, 2001. The IBIA issues an order denying reconsideration of its July 12 order placing the May 18 BIA decision into immediate effect. (IBIA Order of August 13, 2001).

August 31, 2001. The IBIA issues an order requiring the parties to this dispute to state their positions on the use of a non-judicial

⁴ These events took place after the hearing ended, during the briefing period, or after the close of the record on August 16, 2001. The facts are corroborated by statements in the post-hearing briefs filed by all parties, and statements in the cited orders of the IBIA.

dispute resolution process in an attempt to resolve the intra-tribal government dispute. (IBIA Order of August 31, 2001).

DISCUSSION

The Indian Self-Determination Act, at 25 U.S.C. §450m, provides that the Secretary of the Interior may immediately rescind a contract and resume control of a program "if the Secretary finds that (i) there is an immediate threat of imminent harm to the safety of any person, . . . and (ii) such threat arises from the failure of the contractor to fulfill the requirements of the contract." This standard is echoed by the applicable regulations implementing the Act. 25 CFR §900.247(a) states: "A reassumption is considered an emergency reassumption if an Indian tribe or tribal organization fails to fulfill the requirements of the contract and this failure poses: (1) An immediate threat of imminent harm to the safety of any person." Thus, an emergency reassumption requires two elements: (1) failure of the Tribe to fulfill the contract, which causes (2), an immediate threat of imminent harm to the safety of any person.

The Act gives the contractor or tribal organization the right to a hearing on the record to contest such an emergency reassumption. The statute further provides: "In any hearing or appeal provided for under this section, the Secretary shall have the burden of proof to establish, by clearly demonstrating the validity of the grounds for rescinding, assuming, or reassuming the contract that is the subject of the hearing." 25 U.S.C. §450m.

To a considerable extent, it seems that events have overtaken the exigency of this appeal. At the time of the hearing, the Loper party was still in control of the Council, and the Tribal police were on administrative leave with pay. A decision finding the reassumption improper, if upheld on appeal, would mean the pre-existing Tribal police, led by Chief Bolzle, would be reinstated to their positions. Now, however, the Cossette party controls the Tribal government, at least temporarily, and the pre-existing police have been fired.⁵ Of course, the situation could

⁵ This demonstrates that the real issue the Fallon Tribe and the BIA must address is, of course, which party comprises the legitimate Tribal government. If the May 18, 2001 decision recognizing the Cossette party had been placed in effect earlier, before the reassumption on June 10, in all likelihood there would have been no appeal, as the party with standing to appeal would have been a different Tribal government, which supported BIA

change again through the appeals pending before the IBIA. However, regardless of the ultimate effect of this decision, all I can do is apply the legal standards to the facts as determined on the record of the hearing.

Tribal Police Fulfillment of Law Enforcement Contract

The Secretary must first clearly demonstrate that the Tribe failed to fulfill the requirements of the ISDA law enforcement contract. All parties agreed at the outset that the issues should be limited to those set forth in the June 9, 2001 letter formally notifying the Tribe of the BIA's decision to effect an emergency reassumption of the contract. (Ex. 2). The allegations in that letter will be dealt with below, but not necessarily in the same order as in the letter.

- Fair and Uniform Services

In summary, I find that the Fallon Tribal Police generally acted in a professional manner and did their best to fulfill the requirements of the contract. The BIA did establish, however, that the Fallon Tribe failed to provide "fair and uniform services" as required by Section C, Statement of Work, Sec. 1, ¶2 of the contract. (Ex. 1). This was essentially due to the persistent political conflict between the two Tribal parties, and not necessarily the fault of the police themselves, who were placed in an extremely difficult position.

The parties have not attempted to define the contractual meaning of this section of the contract. It simply reads as follows:

Fair and Uniform Services. The contractor agrees that any services or assistance provided to Indians under the contract shall be provided in a fair and uniform manner.

It may be helpful, in the absence of any specific legal or contractual definition, to refer to the plain English meaning of these terms. "Fair" in this context means "equitable, impartial, and unprejudiced." (Webster's Deluxe Unabridged Dictionary, Second

intervention. This appears to have been the situation in *Keen v. United States*, 981 F. Supp. 679 (D.D.C. 1997), where the Tribal Council in power waived a hearing on a similar BIA emergency reassumption of a law enforcement contract. (See 981 F. Supp. 685, fns. 9-11).

Edition, 1979, Simon & Schuster, p. 658. "Uniform" in the context of the contract means "always the same; not varying or changing in form, rate, degree, manner, etc." (*Id.*, p. 1998). An overall view of the Tribal Police interaction with the Tribal members from January to June of 2001, indicates that they did not always act in an impartial, equitable, and unvarying manner, particularly with regard to incidents with Donna Cossette and her party's supporters.

The perception that the Tribal Police were loyal only to the Loper party probably stems from the January 23 incident after the Council meeting in which Officer Tooker deployed his pepper spray on the crowd of Cossette party supporters. The Loper party's expert witness, Michael Johnson, testified quite convincingly that Officer Tooker, Sergeant McGarry, and the others present acted well within proper police procedures in the circumstances. The preponderance of the evidence also indicates that Officer Tooker did not target any individuals other than the one he was trying to arrest, when he deployed the pepper spray. (Tr. 617, 659-661, 734). The police were thrust into this position by the Loper Council's refusal to swear in the newly elected Cossette party members. This action understandably stirred emotion and anger in the audience, most of whom apparently supported the Cossette party.

Nevertheless, although the actual conduct of the police that evening may have been appropriate in the circumstances, the police never took any opportunity, slight though they may have been, in the ensuing weeks and months to demonstrate their impartiality in the Tribe's political dispute. Chief Bolzle refused to swear in Donna Cossette as chairperson when she requested him to do so, as authorized by the Tribal Law and Order Code after the Council refused to do so. The police force consistently only recognized the Loper party as the governing body of the Tribe, despite court orders and BIA decisions to the contrary. (Tr. 452-457). At each ensuing juncture, the Tribal Police acted decisively according to the directives of the Loper party, without attempting to make any overtures to help mollify the concerns of the Cossette party.

During the May 7 Council meeting evening, Chief Bolzle ignored Donna Cossette after she was, as he acknowledged, validly sworn in. (Tr. 336). Had he spoken with her before the confrontation with Dennis Simmons, he would have learned that she had invited Mr. Simmons to the meeting. (Tr. 442-443). This may have led to a more peaceful resolution than the Simmons arrest and the resulting escalation of bitter feelings. The use of three police units, with six officers present, merely to serve civil papers on Ms. Cossette

off the reservation on May 30, has no counterpart in any similar such service on any members of the Loper party. This type of action is representative of the Tribal Police's failure to provide fair and uniform services. The police simply did not treat the Cossette party members in the same manner as it did the Loper party and other Tribal members.

However, the Cossette party is not blameless in these events. In some of these incidents, to a considerable degree, their actions provoked the police. Jackie Allen repeatedly refused to acknowledge the Tribal Police as authorized officers, leading to her June 5 confrontation with Lieutenant McGarry. Donna Cossette took it upon herself to invite Dennis Simmons and his men to the reservation without notifying the Loper Council or Chief Bolzle. The police can therefore not be faulted for defusing the potential armed confrontation by arresting Mr. Simmons. Eugene Jack made threatening comments at the meeting with Richard Armstrong on May 30 in the Western Nevada office (Ex. 8). But the Cossette party is not the subject of the hearing. They felt they were unjustly prevented from taking Tribal office, and were entitled to protest lawfully.

The Tribal Police are only human and were placed in a position in which it might well have been impossible to provide truly fair and uniform services, due to the internal conflict on the reservation. The police were put on notice by the suspensions and restraining orders issued by the Cossette party on May 14 and 18, that they would likely not be retained in their positions if that party assumed control of the Council. (Exs. 14, 28). They had little discretion not to enforce the myriad temporary restraining orders issued by the Loper Council prohibiting activities by Cossette party members. The events at Council meetings regularly led to angry audience reactions. In this polarized environment, the police had to tread an extremely fine line.

Nevertheless, there were a few opportunities, alluded to above, where the police could have demonstrated a more equitable attitude, or at least a gentler manner, to the Cossette party. The record does not show any attempt to by the police to understand the Cossette party position, or to consider carrying out orders by the Cossette party, even after the BIA letter of May 18, 2001. Between May 18 and June 6, when the Loper party filed its appeal to the BIA, it was not clear, even to the Loper party's attorneys, that the BIA decision had been stayed and that the Loper party did technically remain in control of the Council. This is indicated in

the IBIA order of June 7, which refers to the appellants' petition for a stay of the decision. (Ex. 22). During this period, neither the Loper party nor the Tribal Police attempted to consider the position of the Cossette party. Rather, both parties hardened their positions, resulting in an increase in tensions as seen in the events described above of May 30 and June 5, 2001. Even if the Tribal police were legally justified in taking these actions, their course of action during this period did not demonstrate the delivery of law enforcement services in a fair, equitable and uniform manner.

The police essentially became the enforcement arm of one party in an internal Tribal dispute and acted accordingly. Regardless of the causes or justification, the Tribal Police, from January to June 2001, thus failed to fulfill the self-determination contract's requirement that it provide law enforcement services on the reservation in a fair and uniform manner.

- Other Alleged Contract Violations

The BIA did not clearly demonstrate that the Fallon Tribal Police failed to fulfill the several other requirements of the contract cited in the June 9 reassumption letter. There was no substantial evidence that the police failed to investigate all citizen complaints, as required by the contract's Plan of Operation, Sec. 2(vi). If this refers to the "bumping" of Donna Cossette by Marcelle Rusk at the May 7 Council meeting, the videotape shows this was probably not an actionable assault or battery. (Ex. 20). Also, the record shows that Ms. Cossette did not follow up by filing a complaint. (Tr. 831). Churchill County Sheriff William Lawry testified that he was not aware of any instance in which the Tribal Police failed to respond to a call from the reservation, all of which are dispatched through his office. (Tr. 80).

The BIA also did not clearly establish that the Tribal Police failed to provide continual law enforcement services, and adequate patrol services on the reservation, as required by the Plan of Operation, Sec. 2(i and vi). The testimony of Chief Bolzle and Lieutenant McGarry established that the police did schedule shifts to provide coverage on the reservation 24 hours per day, 7 days per week ("24-7"). They also showed that cars were on patrol the vast majority of the time, if not "24-7." (Tr. 779). The contract requires "24-7" law enforcement services, but does not require patrol cars to be on the road 24 hours per day, 7 days per week.

(Ex. 1, p. 13; Tr. 802).

The BIA also did not clearly establish that the Fallon Tribal Police failed to fulfill the self-determination act contract requirements in its hiring of Kevin Bussdieker. The June 9 letter cites Sec. 2(f)(ii)(3), which requires the contractor to conduct a full field background investigation of a prospective officer, including a full criminal history check.

The testimony of Lieutenant McGarry and Chief Bolzle established that such a full background check was conducted with respect to Mr. Bussdieker. He was hired on a part-time basis, with full knowledge that he was suspended from the Washoe County Sheriff's office due to a pending investigation for a firearms violation. He was not actually indicted until after he was hired. Even then, Mr. Bussdieker was not convicted of a felony or misdemeanor, which would render him ineligible under Sec. 2(f)(ii)(4) of the contract. Moreover, Lt. McGarry explained that there were positive aspects in Mr. Bussdieker's application, particularly his honorable military record, that he and Chief Bolzle believed rendered him qualified to serve as a commissioned Tribal police officer, despite the recent trouble. They also cleared this decision with the BIA. The police did not breach the contract by exercising their discretion to hire Kevin Bussdieker as a Tribal police officer.

The Fallon Tribal Police therefore did not fail to fulfill the contract with respect to the requirements to investigate all citizen complaints, provide adequate protection and patrol services, and to conduct a full background investigation of an applicant for employment. However, as found above, the Tribal Police did fail to provide fair and uniform services as required by the P.L. 638 law enforcement contract. Hence, the BIA has satisfied the first requirement in order to support its reassumption of the contract under 25 U.S.C. §450m.

Immediate Threat of Imminent Harm

In order to support an emergency reassumption of this Indian self-determination law enforcement contract, the BIA must also show that the Tribe's failure to fulfill the contract has led to an "immediate threat of imminent harm to the safety of any person." 25 U.S.C. §450m. The BIA has shown that the failure of the Tribe to provide fair and uniform police services did lead to such an immediate threat of harm to the safety of persons on the

reservation.

The chief incident demonstrating the risk of imminent harm to public safety was the confrontation on the evening of May 7, 2001, between the Tribal Police, and Dennis Simmons and his men. This did not quite amount to a contest between "competing law enforcement units" as characterized by Judge Reeh in the similar case of *Comanche Indian Tribe v. Bureau of Indian Affairs*, Docket No. HD/ISDA 98-1 (August 19, 1998, p. 4). The Loper party's expert witness, Michael Johnson, rather, characterized the confrontation as one between a "police force and hired mercenaries." (Tr. 680). The Fallon police took charge by arresting Mr. Simmons, and ordering his companions to leave. Both groups were armed, however, suggesting that the potential for escalation of violence was real. The statute only requires a threat to safety - not actual violence. This standard was met in the events of May 7.

In addition, the Fallon Tribal Police themselves believed that there was a continuing threat of imminent harm to their own safety in the form of a potential armed overthrow of the Loper government by Mr. Simmons' group, on behalf of the Cossette party, in the days following May 7. (Ex. 27). Mr. Simmons vehemently denied he ever planned such an armed encounter. The evidence on this issue centered on rumors and hearsay. (Tr. 490-492, 922-924). If Mr. Simmons ever did mention such a plan, it likely was in the heat of the moment, and either not serious or quickly abandoned. It is hard to believe that any reasonable person would contemplate such action. The testimony of David Standing Bear suggests that some type of action may have been mentioned at one time, but was abandoned because it could jeopardize Mr. Simmons' potential lawsuit against the Fallon Tribe for false arrest. (Tr. 916). This evidence is inconclusive and, as a whole, indicates that an armed takeover was never a real threat. However, the Tribal Police did perceive it as a credible threat at the time, to the extent of asking for BIA assistance. The police also responded by heavily arming themselves and guarding the Tribal headquarters building in late May. Even if, in hindsight, this was not a real threat, it certainly led to an increase in tensions on the reservation.

This increase in tension likely contributed to the incidents on May 30 between Lieutenant McGarry and Jackie Allen. This arrest did involve some actual violence. Lt. McGarry accused Ms. Allen of driving her vehicle into him. He then attempted to smash her car window and arrested her at gunpoint. Later, on the day of the reassumption, June 10, a physical confrontation occurred between

Lieutenant McGarry and Eugene Jack. (Tr. 163-164). Regardless of justification, these occurrences also indicate that tensions on the reservation between the Tribal police and the Cossette party were at a level rising to an immediate threat of imminent harm to the safety of Tribal members, as well as to the police themselves.

As in the *Comanche* case, the BIA was faced with a situation in which it could not determine which of two Tribal parties or factions was in legitimate control of the Tribal government. The BIA met with both factions separately and was fully aware of an apparently irreconcilable rift among the Tribal members. The existing police force was seen by the Cossette party as an armed extension of an illegitimate government. The putative police force recruited by the Cossette party was seen by the Loper police as a group of armed thugs. Significant violence had not yet erupted, but tensions were perilously high. The Tribal Police were actually guarding against a threat of armed takeover that they themselves believed to be credible. The Tribal Police, over the past months, by siding so heavy-handedly with one party, had not acted in a fair and uniform manner. In these circumstances, the BIA was amply justified in perceiving an immediate threat of imminent harm to the safety of Tribal members, and effecting an emergency reassumption of the self-determination law enforcement program.

CONCLUSION

The Bureau of Indian Affairs has clearly demonstrated that it had valid grounds to effect an emergency reassumption of the Indian Self-Determination contract between the BIA and the Fallon Paiute-Shoshone Tribes for law enforcement services. The evidence on the record of this hearing shows that the Fallon Tribal Police did not provide fair and uniform law enforcement services to the Tribal population during the relevant period, and that this failure to fulfill this requirement of the contract led to an immediate threat of imminent harm to the safety of Tribal members and to the police themselves. Therefore, the BIA's reassumption of the Fallon Tribe's law enforcement contract was appropriate and in accord with the applicable standards pursuant to 25 U.S.C. §450m.

NOTICE OF RIGHT TO APPEAL

Within 15 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.165(c). An appeal to the IBIA under 25 CFR 900.165(c) shall be filed at the

