INTERIOR BOARD OF INDIAN APPEALS

California Valley Miwok Tribe v. Central California Agency Superintendent,
Bureau of Indian Affairs

68 IBIA 6 (07/13/2021)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CALIFORNIA VALLEY MIWOK TRIBE, Appellant,	)	Order Dismissing Appeal
v.	)	Docket No. IBIA 19-088
CENTRAL CALIFORNIA AGENCY SUPERINTENDENT, BUREAU OF INDIAN AFFAIRS, Appellee.	)	July 13, 2021

The California Valley Miwok Tribe (Appellant, CVMT, or Tribe), through Silvia Burley (Burley), appealed to the Board of Indian Appeals (Board) from a July 23, 2019, decision (Decision) of the Central California Agency Superintendent (Superintendent), Bureau of Indian Affairs (BIA).[1] The Superintendent returned, without action, an Indian Self-Determination and Education Assistance Act (ISDA) contract proposal submitted by Burley on behalf of the Tribe for Fiscal Years (FY) 2019, 2020, and 2021. The Superintendent refused to accept the proposal on the ground that the Department does not recognize a governing body for the Tribe, in effect concluding that Burley was not authorized to submit the proposal. The Superintendent's decision was based on a determination issued by Assistant Secretary – Indian Affairs (Assistant Secretary) Kevin Washburn on December 30, 2015 (2015 Decision), which was upheld by Federal courts against Burley's challenges, that the Department "does not recognize leadership for the CVMT government" and that "Ms. Burley and her family do not represent the CVMT." 2015 Decision at 5.

We dismiss the appeal. The Superintendent's decision applied the 2015 Decision in determining the threshold issue of whether the ISDA contract proposal submitted by Burley was authorized by the Tribe. The Superintendent's decision was compelled by and did not go beyond the Assistant Secretary's 2015 Decision, and with exceptions not

[1] The Board's caption of the appeal reflects the entity in whose name the appeal was filed. As discussed *infra*, the Department of the Interior (Department) does not currently recognize a governing body for the Federally recognized California Valley Miwok Tribe and does not recognize Burley as a tribal representative.

applicable here the Board lacks jurisdiction to review an Assistant Secretary's decision. Considering the overlap between the Superintendent's decision and the 2015 Decision, the Board dismisses this case for lack of jurisdiction.

Dismissal would also be appropriate on the basis that Burley's challenge to the Superintendent's decision and, by extension, the 2015 Decision is precluded. Burley's Federal court challenges to the 2015 Decision were rejected for lack of merit. Her central argument in this appeal is one that she unsuccessfully raised in Federal court: BIA cannot create or perpetuate a hiatus in the Department's recognition of a governing body for the Tribe and must recognize the General Council led by Burley as the "last undisputed" tribal government. Because the Superintendent's decision only implements the 2015 Decision, the Superintendent's decision does not afford Burley another bite at the apple to litigate whether the Department should recognize a governing body for the Tribe and recognize Burley as a tribal representative.

Burley argues that the 2015 Decision was withdrawn or diminished by subsequent events, and thus the 2015 Decision is not relevant to the Board's review of the Superintendent's decision. She contends here, as she did without success in Federal court, that the head of a rival faction of the Tribe, Yakima Dixie (Dixie), died in 2017; there is no longer a tribal leadership dispute; and the 2015 Decision was premised on that dispute. She also contends that the 2015 Decision was displaced or undermined by a decision of BIA's Pacific Regional Director (Regional Director) invalidating a 2019 Secretarial election on a constitution for the Tribe. The 2015 Decision determined the groups of individual Indians of Miwok ancestry who are eligible to organize the Tribe under a constitution. The Regional Director found that certain individuals who participated in the election did not satisfy the criteria for eligibility in view of additional research regarding their common ancestor. The Regional Director's decision did not disturb the 2015 Decision and, to the contrary, upon BIA's receipt of the proposed ISDA contract, the Regional Director advised the Superintendent that the Department still does not recognize any leadership for the Tribe. To the extent that Appellant is not precluded by prior judicial decisions from disputing the efficacy of the 2015 Decision, we find no merit in Appellant's position that circumstances changed such that the 2015 Decision no longer compelled the Superintendent to conclude that Burley lacked authority to submit the proposed ISDA contract on behalf of the Tribe.

Background

There is no dispute that the Tribe is Federally recognized as a tribal political entity. *See* 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021) (Federally recognized tribes list).[2] But questions of tribal membership and leadership have been disputed since the late 1990s. Because those questions have been thoroughly described in decisions of the Board, Federal courts, and state courts,[3] and because the 2015 Decision is dispositive for this appeal, our discussion of the factual and procedural background begins with the circumstances surrounding the issuance of that decision.

The 2015 Decision was issued on remand from the decision by the District Court in *CVMT III*. The District Court concluded that an August 31, 2011, decision (2011 Decision) by Assistant Secretary Larry Echo Hawk to recognize a General Council composed of the Burley family and Dixie was remiss in assuming that (1) the Tribe's membership was limited to five individuals,[4] and (2) the General Council led by Burley was a duly constituted government pursuant to a November 1998 Resolution signed only by Dixie and Burley. *CVMT III*, 5 F. Supp. 3d at 96. Assistant Secretary Echo Hawk acknowledged that his decision "mark[ed] a 180-degree change of course from positions defended by [BIA] in administrative and judicial proceedings over the [preceding] seven years."[5] *Id.* The District Court concluded that "when the federal government engages in

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[2] The Tribe is formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California.

[3] *See, e.g.*, *Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197 (D.D.C. 2006) (*CVMT I*); *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) (*CVMT II*); *Cal. Valley Miwok Tribe v. Jewell*, 5 F. Supp. 3d 86 (D.D.C. 2013) (*CVMT III*); *California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103 (2010).

[4] I.e., Dixie and the Burley family, consisting of Burley, her daughters Rashel Reznor and Anjelica Paulk, and Burley's granddaughter Tristian Wallace.

[5] Based on the 2011 Decision, the Board vacated and remanded a 2008 decision of the Superintendent to return, without approval, an ISDA contract proposal submitted by Burley on behalf of the Tribe for FY 2009 on the ground that the Department did not recognize a governing body for the Tribe. *California Valley Miwok Tribe v. Central California Agency Superintendent*, 53 IBIA 51 (2011). The Board previously dismissed, as untimely, an appeal from a 2007 decision of the Superintendent to return an ISDA contract proposal submitted by Burley on behalf of the Tribe for FY 2008 on the ground that the Tribe did not have a recognized governing body. *California Valley Miwok Tribe v. Central California Agency Superintendent*, 47 IBIA 91 (2008). Burley's attempt to challenge, in court, BIA's 2007 decision was unsuccessful. *Cal. Valley Miwok Tribe v. Kempthorne*,

(continued…)

government-to-government relations with a tribe, it must ensure that it is dealing with a duly constituted government that represents the tribe as a whole." *Id.* at 97. The District Court found that the 2011 decision was unreasonable in light of evidence in the administrative record, including a prior representation by Burley, that the Tribe's membership potentially consisted of 250 individuals, and that the decision "ignor[ed] multiple administrative and court decisions that express concern about the nature of the Tribe's governance." *Id.* at 88, 98-100.

In the 2015 Decision, Assistant Secretary Washburn held that the Tribe's membership was not limited to Dixie and the Burley family. 2015 Decision at 3-4 (Administrative Record (AR) 7). He instead concluded that there are three "Eligible Groups" of Mewuk Indians for whom the Rancheria was acquired and their descendants who must be given an opportunity to take part in reorganization of the Tribe. *Id.* at 4. The Eligible Groups are: (1) the individuals listed on a 1915 census by Special Agent John Terrell (1915 Terrell Census) and their descendants; (2) the descendants of Jeff Davis, who was a resident of the Rancheria and the only person on the 1935 Indian Reorganization Act (IRA) voters list for the Rancheria; and (3) the heirs of Mabel Dixie, who was the sole Indian resident of the Rancheria eligible to vote on its termination in 1967, and their descendants. *Id.* The Assistant Secretary left for the individuals who make up the Eligible Groups to decide, as an internal tribal decision, whether the descendants of Miwoks identified in a 1929 BIA census of the Indians of Calaveras County shall also be included in the organization of the Tribe. *Id.* at 5. While the Assistant Secretary found that Dixie was part of the Eligible Groups, *id.* at 4 n.20, he expressly declined to decide whether Burley or her daughters or granddaughter qualify for inclusion in the Eligible Groups, *id.* at 5.[6]

Assistant Secretary Washburn also held that "[t]he United States does not recognize leadership for the CVMT government." *Id.* Echoing the District Court's decision in *CVMT III*, he stated that "[f]or purposes of administering the Department's statutory responsibilities to Indians and Indian tribes, I must ensure that CVMT leadership consists of valid representatives of the Tribe as a whole." *Id.* His 2015 Decision stated that he did

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No. Civ. S-08-3164 FCD/EFB, 2009 U.S. Dist. LEXIS 13465 (E.D. Cal. Feb. 23, 2009). Beginning in 1999 and continuing through FY 2007, BIA executed an ISDA contract with the Tribe, through Burley, for improving tribal government. BIA initially referred to Burley as the Tribe's Chairperson or sometimes "Interim Chairperson," and later referred to her as a "person of authority," while also stating that BIA did not yet view the Tribe to be an organized Indian tribe. *See California Valley Miwok Tribe*, 51 IBIA at 110-11.

[6] The Board expresses no opinion on the Burley family's eligibility to participate in organization of the Tribe.

not recognize either the Burley faction's General Council or the Dixie faction's Tribal Council as the governing body of the Tribe. *Id.* at 5-6. With respect to Burley, the 2015 Decision found that the 1998 Resolution on which she based her claim of leadership was approved by Dixie, Burley, and possibly her daughter Rashel Reznor, and that this was not a "majority of those eligible to take part" in tribal organization. *Id.* at 5. He specifically held that "Ms. Burley and her family do not represent the CVMT." *Id.*

As for Dixie, the 2015 Decision found that the record as constituted did not support a conclusion that either a 2006 Constitution or a 2013 Constitution that Dixie and others purported to ratify was validly ratified through a process that afforded sufficient notice to persons eligible to take part in tribal organization. *Id.* at 6. Assistant Secretary Washburn authorized BIA to receive additional submissions from Dixie for the purpose of establishing whether the 2013 Constitution was validly ratified through a process that provided adequate notice. *Id.* And, "[a]s an alternative," the Assistant Secretary encouraged the Tribe to petition for a Secretarial election under 25 C.F.R. Part 81. *Id.* He instructed BIA to "work with the Eligible Groups to help the Tribe attain its manifest goal of reorganizing." *Id.*

The Burley faction challenged the 2015 Decision as arbitrary and capricious under the Administrative Procedure Act, and the decision was upheld by the Eastern District of California and the Ninth Circuit. *Cal. Valley Miwok Tribe v. Zinke*, No. CV 2:16-01345 WBS CKD, 2017 U.S. Dist. LEXIS 84282 (E.D. Cal. June 1, 2017), *aff'd*, 745 Fed. Appx. 46 (9th Cir. 2018), *reh'g denied*, 2019 U.S. App. LEXIS 3468 (Feb. 4, 2019). With respect to the tribal governance issue, the Eastern District found that only Dixie and Burley approved the 1998 Resolution that established the General Council, that the Burley faction therefore had not shown that a majority of adult members of the Tribe approved the General Council, and that "the Assistant Secretary must ensure that the United States is conducting government-to-government relations with 'valid representatives of the [Tribe] as a whole.'" 2017 U.S. Dist. LEXIS 84272, at * 17 (quoting *Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002)). The Eastern District rejected the Burley faction's arguments, *inter alia*, that because "the BIA once recognized the General Council, the BIA must now recognize the General Council as the valid tribal government." *Id.* at *20. The Eastern District concluded that "the Assistant Secretary was not arbitrary and capricious in finding that the 1998 Resolution and General Council did not sufficiently reflect the will of the Tribe in order to warrant acknowledgment of the federal government." *Id.* at *21.

After the Eastern District's decision, Dixie died in December 2017. The Burley faction argued in their appeal to the Ninth Circuit that the 2015 Decision was "entirely predicated" on claims by Dixie challenging the validity of the 1998 Resolution creating the General Council. Appellants' Reply Brief (Br.) at 1, *Cal. Valley Miwok Tribe*, 2019 U.S.

App. LEXIS 3468 (No. 17-16321) (excerpt added to appeal record).[7] According to the Burley faction, due to Dixie's death, there was no longer a tribal leadership dispute and Dixie's claims were "moot and extinguished." *Id.* at 1, 3. The Federal defendants responded that Dixie's death did not render the appeal to the Ninth Circuit moot, his death was not relevant to the issues on appeal, and it did not extinguish or undermine the 2015 Decision. Federal Defendants' Response to Second Motion for Judicial Notice at 2-4, *Cal. Valley Miwok Tribe*, 2019 U.S. App. LEXIS 3468 (No. 17-1632) ("With or without Dixie, the Burley family is not a 'majority of those eligible to take part' in tribal organization." (quoting 2015 Decision at 5)) (copy added to appeal record).

In upholding the 2015 Decision against the Burley faction's challenge, a panel of the Ninth Circuit found that Assistant Secretary Washburn "independently examined the facts and the law, before determining that the Tribe was not reorganized, that its membership is not limited to five individuals, and that the United States does not recognize leadership of the tribal government." *Cal. Valley Miwok Tribe*, 745 Fed. Appx. at 47. The panel found that the 2015 Decision comported with the Department's "responsibility to ensure that organized tribes are representative of potential membership." *Id.*

The Burley faction sought rehearing "to correct a panel decision that leaves the leadership dispute between the two competing factions (the Burley Faction and the Dixie Faction) unresolved—and unresolved in perpetuity." Appellants' Petition for Panel Rehearing and Rehearing En Banc at 1, *Cal. Valley Miwok Tribe*, 2019 U.S. App. LEXIS 3468 (No. 17-1632) (emphasis omitted) (excerpts added to appeal record). The Burley faction contended that the panel took judicial notice of Dixie's death, but "overlooked . . . how that has frozen the Tribe's existence." *Id.* The Burley faction argued that it must be recognized as the governing body of the Tribe, alleging:

> The panel failed to recognize that the 2015 Washburn Decision violated the rule of *Goodface v. Grassrope* (8th Cir. 1983) 708 F.2d 335, which requires the BIA to recognize one of two competing factions pending resolution of a tribal leadership dispute, so as not to create a "hiatus in tribal government" and "jeopardize[] the continuation of necessary day-to-day services on the reservation." 708 F.2d at 338-339. *Dixie's death now requires the Burley Faction be recognized*, as it had been before Dixie challenged Burley's leadership and alleged the establishment of the 1998 General Council was invalid at the outset.

[7] The Board takes official notice of pleadings filed in the proceedings before the Ninth Circuit. *See* 43 C.F.R. § 4.24(b).

Id. at 2 (emphasis added); *see id.* at 8 ("Because the Tribe's operations have come to a 'stand-still,' the 2015 Washburn Decision should be remanded to the AS-IA for reconsideration."). On February 4, 2019, the Ninth Circuit denied the petition for panel rehearing and rehearing en banc. *Cal. Valley Miwok Tribe*, 2019 U.S. App. LEXIS 3468.[8]

Meanwhile, the Dixie faction unsuccessfully sought approval from BIA of the 2013 Constitution. And, in 2018, BIA received and validated a petition for a Secretarial election under 25 C.F.R. Part 81 regarding a proposed constitution for the Tribe.[9] The election was held on April 15, 2019. On May 30, 2019, the Regional Director issued a decision finding that the election was invalid because "most of the participating individuals did not meet the requirements to be considered eligible to participate." Regional Director's Decision, May 30, 2019, at 2 (unnumbered) (AR 6). The Regional Director reasoned that "[m]ost of the people who petitioned for, and took part in, the Secretarial [e]lection are descendants of John Jeff," who is listed on the 1929 BIA census. *Id.* at 1. Prior to the Regional Director's decision, BIA had considered John Jeff to be "the son of base roll member Jeff Davis" who is listed on the 1915 Terrell Census. *Id.* "As a result" of that association, the petitioners for whom John Jeff was an ancestor were initially determined to be eligible to participate in the election pursuant to the 2015 Decision. *Id.* However, "[s]purred in part by [a congressperson's] inquiry . . . as well as two lawsuits challenging the election,"[10] BIA conducted a review of the eligibility of the individuals who participated

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[8] Afterward, the Burley faction maintained in other Federal and state court litigation, without success, that Dixie's death resolved the tribal leadership dispute, rendered the 2015 Decision moot, and established that the General Council led by Burley is now the valid governing body of the Tribe. *See In re $323,647.60 in Funds*, No. 18-CV-01194 JAP/KBM, 2019 U.S. Dist. LEXIS 25723 (D.N.M. Feb. 19, 2019); *Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n*, No. D074339, 2020 Cal. App. Unpub. LEXIS 642 (Cal. Ct. App. 4th Dist. Jan. 29, 2020). In both cases, the courts found that the Department does not recognize a governing body for the Tribe.

[9] The Registered Voters List published by BIA was challenged by individuals who claimed that the list included people who are not members of the Tribe, specifically, the Burley faction. *Aranda v. Sweeney*, No. 2:19-cv-00613-JAM-KLN, 2019 U.S. Dist. LEXIS 64432 (E.D. Cal. Apr. 15, 2019). The Eastern District denied an ex parte motion for temporary restraining order in deference to a "2017 finding [by the Regional Director] that the members of the Burley family were members of an eligible group," based on descent from "Jeff Davis," and allowed the election to proceed. *Id.* at *9-11.

[10] The Burley faction challenged BIA's decision to validate the petition within the Department, *Burley v. Central California Agency Superintendent*, 66 IBIA 136 (2019); *Burley v. Acting Pacific Regional Director*, 66 IBIA 270 (2019), and in Federal court, *Cal.*

(continued…)

in the Secretarial election. *Id.* at 2. This review included an examination by the Office of Federal Acknowledgment (OFA) and preparation of a memorandum determining whether John Jeff is the son of the Jeff Davis who is listed in the 1915 Terrell Census. *See id.*; Memorandum from Director, OFA, to Regional Director, May 30, 2019 (OFA Memorandum) (AR 6). OFA reviewed, *inter alia*, the records considered by BIA when it assessed whether the individuals who voted in the election concerning the 2013 Constitution submitted by Dixie were eligible to do so. *See* OFA Memorandum at 11. OFA disagreed with BIA's 2016 conclusion that John Jeff is the son of Jeff Davis, finding instead that John Jeff is the son of one "Indian Jeff" who was apparently shot and killed while trying to protect John Jeff from another man.[11] *Id.* at 8, 11 (referring to a July 25, 2016, BIA Report). The Regional Director's decision to invalidate the Secretarial election in reliance on OFA's finding was not appealed and thus became final for the Department.

Approximately 1 month later, Burley, identifying herself as "Tribal Representative authorized to conduct the government-to-government relationship with the United States and duly elected Chairperson of the General Council," submitted to BIA a proposed ISDA contract for Aid to Tribal Government, Contract No. CTJ51T62802, Mature Status, for FY 2019, FY 2020, and FY 2021. Letter from Burley to Regional Director, June 27, 2019 (AR 5). The proposal included a budget, budget justification, position descriptions, and three resolutions. The first resolution, No. R-1-05-11-2017, stated that pursuant to the 1998 Resolution, a Special General Council meeting was held on May 11, 2017, and Burley was elected chairperson and her daughter Rashel Reznor was elected secretary/treasurer. AR 5. This resolution described both the Tribe and the General Council as consisting of five adult members. *Id.* The second resolution, No. R-1-06-24-2019, stated that the General Council approved the request for a multi-activity, 3-year contract for FY 2019 through FY 2021, and that Burley was authorized to contract for and administer the proposed contract on behalf of the Tribe. AR 5. The third resolution, No. R-2-06-24-

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Valley Miwok Tribe v. Dep't of the Interior, No. 1:19-cv-00917-RCL (D.D.C.). The faction withdrew its Federal court complaint upon issuance of the Regional Director's decision.

[11] OFA also discussed a "draft" family tree that was contained in BIA's records. The document indicates that Indian Jeff and Jeff Davis were brothers and Limpy Davis, who is on the 1915 Terrell Census, was their mother. *See* OFA Memorandum at 11. OFA noted that, if correct, this would support the conclusion that the descendants of John Jeff are eligible to participate in organization of the Tribe; however, "BIA's 2016 determination was premised on descent from Jeff Davis, not from Limpy." *Id.* OFA also stated that the document "lacks any indication of when or by whom it was created, and does not cite any source material," and therefore the suggestion that Limpy Davis was John Jeff's grandmother was "not supported." *Id.*

2019, stated that the General Council approved the FY 2019 budget for the proposed contract and that Burley was authorized to approve subsequent changes to the annual budget and ensure that the funds would be properly managed. AR 5. Each of these three resolutions "was adopted by a vote of 3 in favor, 0 opposed, and 0 abstaining," and was signed by Burley as chairperson, Reznor as secretary/treasurer, and Burley's other daughter, Anjelica Paulk, as vice-chairperson. AR 5.

On July 1, 2019, an attorney for the Burley faction emailed a copy of the contract proposal to the Department. Email from Peter Lepsch to John Tahsuda, July 1, 2019 (AR 4). The email stated that the contract was submitted "in light of most recent invalidation of the April 15, 2019 Secretarial Election." *Id.* at 1. The email also stated that, "[a]s you know, a former citizen and leader of CVMT, Yakima Dixie[,] died in 2017. Therefore[,] there exists no leadership or member/citizenship dispute." *Id.* According to the email, the Tribe was composed of 12 members. *Id.* The email asserted that Burley "is the last recognized Tribal Representative," "[t]he case law on this matter is rather clear and straight forward," and the United States should "end this hiatus." *Id.* at 2.

On July 5, 2019, the Regional Director advised the Central California Agency that "[a]s of this date there is no one who has been deemed officially the Tribal Government so the issue is to make sure we get the application declined timely." Email from Regional Director to Central California Agency, July 5, 2019 (AR 3). On July 8, 2019, the Regional Director acknowledged receipt of the contract proposal. Letter from Regional Director to Burley (AR 2). On July 23, 2019, the Superintendent issued the Decision from which Appellant appeals. Decision (AR 1). The Superintendent's decision states:

> The . . . Central California Agency[] is returning the June 27, 2019, Contract Proposal . . . without action.
>
> Since issuance of the attached decision dated December 30, 2015, by the Assistant Secretary-Indian Affairs, the Department of the Interior has not recognized a governing body for the . . . Tribe, including for purposes of contracting pursuant to 25 U.S.C. § 5321(a), which provides, in relevant part:
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> > "The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization…"
>
> Your proposal does not meet the threshold requirement for contracting by a recognized tribal government, in accordance with Public Law 93-638

(88 Stat. 2203), as amended, and codified at 25 U.S.C. § 5321, and as implemented by regulations at 25 CFR Part 900.

Id. at 1. The Superintendent did not provide appeal instructions.

Appellant, through Burley, appealed to the Board.[12] Notice of Appeal, Aug. 16, 2019. Upon receipt of the appeal, by order dated August 28, 2019, the Board made a preliminary determination that it had jurisdiction over the appeal under 25 C.F.R. Part 900, Subpart L (ISDA Appeals), at least to the extent necessary to decide the Board's own jurisdiction. The Board explained that only a "tribe or tribal organization" has a right of appeal to the Board, *see* 25 C.F.R. §§ 900.150, 900.158–.160, and that it was disputed whether the General Council led by Burley was a tribal organization. Under ISDA, unless certain declination criteria are present, the Secretary is required to contract "upon the request of [an] Indian tribe by tribal resolution." 25 U.S.C. § 5321(a)(1). A contract proposal may be submitted by a "tribal organization" only "[i]f so authorized by an Indian tribe." *Id.* § 5321(a)(2). A "tribal organization" is defined as

> the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities . . . .

Id. § 5304(*l*); 25 C.F.R. § 900.6 (same).

The Board's order also explained that whether a contract proposal is at the request of an Indian tribe by tribal resolution is a threshold determination that precedes application of the declination criteria, and refusal to accept a proposal on that ground is not a "declination" of the proposal within the meaning of ISDA. *See Navajo Nation v. Office of Indian Education Programs*, 40 IBIA 2, 14, 16 n.14 (2004). The Board noted that it has treated BIA decisions refusing to act on ISDA proposals, on the threshold ground that the submitting party has not shown that the proposal is authorized by the tribe, as an "other appealable pre-award decision" under the ISDA regulations, 25 C.F.R. § 900.150(i). *See, e.g.*, *Alturas Indian Rancheria v. Northern California Agency Superintendent*, 52 IBIA 7, 8 nn.2-3 (2010); *Trenton Indian Service Area v. Turtle Mountain Agency Superintendent*, 47 IBIA 60, 60 (2008).

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[12] Appellant, through Burley, subsequently filed a lawsuit in Federal court and voluntarily dismissed it. *Cal. Valley Miwok Tribe v. Bernhardt*, No. 1:19-cv-02739-RC (D.D.C.).

The Board received briefs on the merits from Appellant (i.e., Burley as a purported representative of the Tribe) and the Superintendent.[13] After briefing concluded, Appellant informed the Board and filed a notice of appeal with the Regional Director concerning a public notice issued by the Superintendent in September 2020 that BIA was planning to "assist [the Tribe] with organization of a formal government structure by individuals who are eligible to participate in such a process."[14] Appellant argued to the Board that the notice violated the automatic stay that attaches to BIA decisions, *see* 25 C.F.R. § 2.6, and was issued after BIA no longer had jurisdiction over the matter, and requested an order directing BIA to take no further action on the matter while the appeal was pending. The Superintendent subsequently confirmed that BIA suspended all activity concerning organization of the Tribe. By order dated October 21, 2020, the Board advised the parties that it would take the instant appeal from the Superintendent's July 23, 2019, decision under expedited consideration but that it could not predict when a decision would issue. BIA then requested that the Board dismiss this appeal for lack of standing or on the ground that the Superintendent's decision to return the proposed contract is subject to appeal to the Regional Director under 25 C.F.R. Part 2 rather than directly to the Board under 25 C.F.R. Part 900, Subpart L, and thus Appellant must first exhaust administrative remedies within BIA. Appellant filed an opposition to dismissal. Finally, the Board received an answer brief in opposition to Appellant's appeal from several individuals[15] as "Interested Parties," a response in opposition from Appellant, and a request to submit an answer brief by Chad Everone as a former "Deputy" of Dixie and "Interested Party." In light of the Board's decision reached after consideration of the submissions by Appellant

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[13] Appellant's Response to Order for Statement and Order to Show Cause, Sept. 26, 2019; Superintendent's Answer to Appellant's Response to Order, Oct. 11, 2019; Appellant's Reply to [Superintendent's] Answer, Oct. 21, 2019; Appellant's Opening Br., Dec. 30, 2019; Superintendent's Answer Br., Jan. 27, 2020; Appellant's Reply Br., Feb. 12, 2020; Superintendent's Response to Reply, Mar. 5, 2020; Appellant's Surreply, Mar. 20, 2020.

[14] Appellant's Motion for Leave and Motion to Vacate Appellee['s] September 2020 Decision and Notice for Lack of Jurisdiction Over the Subject Matter; and Alternatively, Notice of Appeal of the Appellee['s] September 2020 Decision and Notice, Sept. 29, 2020, at Exhibits A (Public Notice) & B (Notice of Appeal to Regional Director, Sept. 29, 2020). Appellant stated that it did not know which official issued the public notice and, if the public notice was issued by the Regional Director, it wished to appeal to the Board pursuant to 25 C.F.R. § 2.4(e). *See id.* at 6. Because the public notice was issued by the Superintendent, the Board did not construe Appellant's submission as a notice of appeal to the Board.

[15] Marie Aranda, Joshua Fontanilla, Yolanda Fontanilla, Bronson Mendibles, Jasmine Mendibles, Leon Mendibles, Christopher Russell, and Rosalie Russell.

and BIA, the Board finds no reason to consider arguments by any of the "Interested Parties" and denies Mr. Everone's request to submit an answer brief.

Discussion[16]

I. Arguments on Appeal

Appellant's central argument on appeal is that, by returning the proposed ISDA contract without action, BIA continues to withhold recognition of a governing body for the Tribe, or a "tribal organization" for ISDA purposes, and that this is contrary to *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), and its progeny. Opening Br. at 10, 13; Reply Br. at 1, 7. In *Goodface*, the Eighth Circuit concluded that BIA's decision to recognize two tribal councils only on a de facto basis amounted to recognition of neither and "effectively creat[ed] a hiatus in tribal government which jeopardized the continuation of necessary day-to-day services on the reservation." 708 F.2d at 338-39. The Court determined that BIA was obligated to recognize and deal with one of the councils on an interim basis in that case. *Id.* at 339. Appellant argues that the Superintendent's decision, and by extension the 2015 Decision, creates or perpetuates a hiatus in tribal government contrary to *Goodface*. According to Appellant, as a Federally recognized political entity, the Tribe is entitled to contract pursuant to ISDA; the Department must recognize a governing body for ISDA contracting purposes on an interim basis or otherwise; and the Board should order BIA to recognize the General Council led by Burley as the "last undisputed" tribal government.

Appellant further argues that the Superintendent's decision to return the proposed ISDA contract without approval was unnecessary under the 2015 Decision and "went beyond" Assistant Secretary Washburn's determinations. Reply Br. at 1, 4. According to Appellant, the 2015 Decision applies only to recognition of a tribal government for purposes of reorganization pursuant to the IRA and does not purport to cover ISDA contract proposals. Opening Br. at 15-16. Appellant also maintains that the 2015 Decision was premised on a leadership dispute between Burley and Dixie, there is no longer a

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[16] As a threshold issue, the Board denies BIA's request to dismiss the appeal on the ground that the Decision is subject to review by the Regional Director under 25 C.F.R. § 2.4(a), whose decision would then be subject to review by the Board under § 2.4(e). Appellant contends that the appeal is properly before the Board, and BIA does not persuade us that we should revisit the Board's August 28, 2019, order making a preliminary determination that the appeal fell under 25 C.F.R. § 900.150(i), that Appellant was not entitled to a hearing on the record, and that the appeal should proceed under the Board's regulations in 43 C.F.R. Part 4, Subpart D. *See* 25 C.F.R. § 900.160(b); *Alturas Indian Rancheria*, 52 IBIA at 8 n.2.

leadership dispute following Dixie's death, and thus the 2015 Decision is inapplicable to this matter. *See* Appellant's Response to Order for Statement and to Show Cause at 4; Opening Br. at 13. In addition, Appellant argues that the Regional Director's May 30, 2019, decision invalidating the results of the 2019 Secretarial election displaced or undermined the 2015 Decision, and the Superintendent cannot rely on the 2015 Decision and the Ninth Circuit's decision upholding it. Opening Br. at 15-16; Reply Br. at 11-12. Thus, Appellant believes that the Superintendent's decision was not compelled by the 2015 Decision and is contrary to *Goodface*, and the General Council led by Burley must be recognized as the tribal government.

The Superintendent argues that *Goodface* is inapposite because it involved an election dispute within an organized tribe, Federal courts have confirmed that the greater tribal community must be identified for purposes of government-to-government relations with the Tribe, and the 2015 Decision declined to recognize Burley on an interim basis as BIA had previously done when it recognized her as an "Interim Chairperson" or "person of authority." *See supra* note 5; Answer Br. at 9-10. The Superintendent argues that his decision to return the proposed ISDA contract was governed by and consistent with the 2015 Decision and the Federal court decisions upholding it. Answer Br. at 9-10. The Superintendent characterizes this appeal as part and parcel of the Burley faction's opposition to Departmental efforts to facilitate organization of the Tribe by the larger community of individuals who are eligible to participate in tribal organization. *Id.* at 10. The Superintendent requests that the Board dismiss the appeal for lack of jurisdiction to review the 2015 Decision, for lack of standing, or based on collateral estoppel or res judicata.[17] In the alternative, the Superintendent requests that the Board affirm the Decision as consistent with the 2015 Decision and the Federal court decisions upholding it.

II. Analysis

The Board concludes that the Superintendent's decision to return the proposed contract was compelled by the 2015 Decision and did not go beyond it. Because, with

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[17] Under the doctrine of collateral estoppel, a party and those in privity with the party generally may not relitigate an issue of fact or law actually litigated and necessarily decided against the party in a valid and final judgment. *See Citizen Potawatomi Nation v. Director, Office of Self-Governance*, 42 IBIA 160, 167-68 (2006); Black's Law Dictionary 318 (10th ed. 2014) (definition of "Collateral Estoppel"). The doctrine of res judicata generally bars parties and those in privity with them from relitigating the same cause of action, including claims that were raised or could have been raised, after a final decision has been issued on the merits. *See Castillo v. Pacific Regional Director*, 46 IBIA 209, 212-13 (2008); Black's Law Dictionary 1504 (10th ed.) (definition of "Res Judicata").

exceptions not applicable here, the Board lacks jurisdiction to review a decision of the Assistant Secretary, we dismiss the appeal.[18] *See Cherokee Nation v. Acting Eastern Oklahoma Regional Director*, 58 IBIA 153, 161 (2014); *California Valley Miwok Tribe*, 51 IBIA at 118, 120-21; *Haney v. Acting Assistant Secretary – Indian Affairs*, 39 IBIA 25, 25 (2003); 25 C.F.R. § 2.6(c) (decisions of the Assistant Secretary are final for the Department unless the decision states otherwise); 43 C.F.R. § 4.331(b) ("Any interested party affected by a final administrative action or decision of an official of [BIA] . . . may appeal to the Board . . . except . . . [w]here the decision has been approved in writing by the Secretary or Assistant Secretary – Indian Affairs prior to promulgation.").[19]

In *Cherokee Nation*, we explained that

> where a [BIA official's] decision is connected to a decision of the Assistant Secretary, the Board's jurisdiction depends on a careful examination of the relationship between the Assistant Secretary's decision and the [BIA official's] decision. To the extent that a [BIA official's] decision 'goes beyond what was decided or confirmed by the Assistant Secretary,' our review is not necessarily precluded by the Assistant Secretary's action. *California Valley Miwok Tribe*, 51 IBIA at 105. The Board may consider a challenge to a [BIA official's] implementation of a decision by the Assistant Secretary if in doing so the Board's review does not implicate the Assistant Secretary's decision.

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[18] To the extent BIA argues that the appeal should be dismissed for lack of standing (i.e., because the appeal was not brought by an Indian tribe or tribal organization as defined in the ISDA regulations), that issue is inextricably intertwined with the issue of whether the Superintendent's decision was compelled by the 2015 Decision and thus whether the Board lacks jurisdiction over the appeal. While we dismiss the appeal for lack of authority to review the 2015 Decision, we agree that the appeal is subject to dismissal for lack of standing because Burley is, at most, an individual tribal member. *Cf. Chambers v. Acting Eastern Oklahoma Regional Director*, 39 IBIA 44, 46 (2003) ("Nothing in the ISDA regulations authorizes a tribal member to appeal an ISDA decision.").

[19] Appellant also initially contended that "[o]n or about August 16, 2019," it submitted a request pursuant to 25 C.F.R. § 2.8 (appeal from inaction of official) to the Secretary of the Interior to take action "to recognize the duly elected tribal government and the Tribe's designated Tribal Representative." Appellant's Response to Order for Statement and Order to Show Cause at 5. Appellant contended that the Secretary failed to respond. *Id.* The Board lacks jurisdiction to review alleged inaction of the Secretary and, in any event, an appeal from inaction does not encompass the underlying merits of a request for action. *Mease v. Secretary of the Interior*, 52 IBIA 237, 238 & n.3 (2010).

58 IBIA at 161.

For example, in the cited *California Valley Miwok Tribe* case, an underlying 2005 Assistant Secretary decision made final Departmental determinations that (1) the Department did not recognize the Tribe as being organized or having any tribal government that represented the Tribe; (2) the Department did not recognize the Tribe as necessarily limited to Dixie, his brother Melvin, Burley, and her daughters and granddaughter, for purposes of who is entitled to organize the Tribe and determine the membership criteria; and (3) the Department had an obligation to ensure that a "greater tribal community" be allowed to participate in organizing the Tribe. 51 IBIA at 120. The Board concluded that these determinations were not subject to further review by the Board in that appeal and dismissed Burley's claims that BIA erred in deciding that the Tribe was unorganized and in refusing to recognize her as the Tribe's Chairperson.[20] *Id.* at 120-21, 123.

In this case, we see no daylight between the Superintendent's decision and Assistant Secretary Washburn's 2015 Decision. Under the heading "The United States does not recognize leadership for the CVMT government," the Assistant Secretary stated: "*For purposes of administering the Department's statutory responsibilities to Indians and Indian tribes*, I must ensure that CVMT leadership consists of valid representatives of the Tribe as a whole." 2015 Decision at 5 (emphasis added). The 2015 Decision allowed no exception for a proposed ISDA contract authorized by the General Council and submitted by Burley. In fact, the 2015 Decision left open the possibility that the 2013 Constitution submitted by Dixie might be ratified instead of organizing the Tribe through another election.[21] *Id.* at 6. As relevant to this appeal, the 2015 Decision determined finally for the Department that (1) the Department does not "recognize the actions to establish a tribal governing structure

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[20] On the other hand, the Board found that the Regional Director's decision arguably went beyond the Assistant Secretary's by "determining who would constitute the 'greater tribal community,' or class of 'putative members,' and in deciding that they could participate as part of a 'general council' meeting of the Tribe, to decide membership and organizational issues." 51 IBIA at 121. Though the Regional Director's decision arguably broke new ground, the Board concluded that Burley's claim was essentially an enrollment dispute and dismissed the claim for lack of subject matter jurisdiction to adjudicate tribal enrollment disputes. *Id.* at 122; *see* 43 C.F.R. § 4.330(b)(1).

[21] Appellant argues that the 2015 Decision contained a sunset provision, based on a statement by the Assistant Secretary "encourag[ing] the Tribe to petition for a Secretarial election under 25 C.F.R. Part 81 within 90 days" of the decision. 2015 Decision at 6; *see* Reply Br. at 10-11. That argument is nonsensical, especially in light of the Ninth Circuit's decision upholding the decision approximately 4 years later in 2019.

taken pursuant to the 1998 Resolution," and (2) "Ms. Burley and her family do not represent the CVMT." *Id.* at 5. The three resolutions that Burley submitted to BIA in support of the proposed ISDA contract are based on the 1998 Resolution and signed only by Burley and her two daughters. Because the 2015 Decision holds that the 1998 General Council and Burley do not represent the Tribe, the current General Council and Burley necessarily lacked authority to propose an ISDA contract as a "tribal organization" under 25 U.S.C. § 5304(*l*) and 25 C.F.R. § 900.6. The Superintendent was therefore compelled by the 2015 Decision to return the contract without approval.

To the extent Appellant explicitly argues that the Superintendent's decision—and at least implicitly the 2015 Decision—is contrary to *Goodface*, the Board lacks jurisdiction to consider that argument on the merits for the reason discussed above. Moreover, Burley unsuccessfully argued in her petition for rehearing of the Ninth Circuit decision upholding the 2015 Decision that it "violated the rule of *Goodface*" and that the Burley faction must be recognized as the "last undisputed" tribal government. *Supra* at 11; *see Cal. Valley Miwok Trib*e, 745 Fed. Appx. at 47 ("[T]he Department of the Interior . . . has the responsibility to ensure that organized tribes are representative of potential [tribal] membership. The [2015] Decision comported with that responsibility." (citation omitted)), *reh'g denied*, 2019 U.S. App. LEXIS 3468. Because the Superintendent's decision only implements the 2015 Decision, it does not afford Burley another opportunity to litigate whether the Department should recognize a governing body for the Tribe and recognize Burley as a tribal representative.

Burley also unsuccessfully raised, in her Ninth Circuit challenge to the 2015 Decision and subsequently in other courts, the argument that the 2015 Decision was premised on a leadership dispute between the Dixie faction and the Burley faction, and that Dixie's death in 2017 extinguished or undermined the 2015 Decision. *See supra* at 10-11. Even if Appellant was not precluded from raising that argument here, we would reject it for the reasons articulated by the Federal defendants in that litigation. *See supra* at 11.

Nor is there any merit to Appellant's argument that the Regional Director's May 30, 2019, decision displaced or undermined the 2015 Decision as relevant to this matter. First, the Regional Director is subordinate to the Assistant Secretary and thus could not withdraw or countermand the 2015 Decision absent a delegation of authority to do so, which Appellant has not identified. Second, the May 30, 2019, decision did not purport to disturb the 2015 Decision's determination that the 1998 Resolution and the General Council failed to sufficiently reflect the will of the Tribe in order to warrant acknowledgment by the Department. The Regional Director's decision found that the efforts to organize the Tribe through a Secretarial election conducted on April 15, 2019, were invalid in light of information from OFA that certain participants were not eligible to take part in tribal organization. AR 6 at 2. While the 2015 Decision identified the Eligible

Groups who are entitled to participate in organization of the Tribe, the Regional Director's decision concerned the identification of the specific individuals who constitute that broader tribal community and may elect a governing body for the Tribe.[22] Appellant contends that the Superintendent's decision was based on an assumption that there were over 200 individuals potentially eligible to participate in organization of the Tribe, and that this is not possible following the Regional Director's decision. *See* Reply Br. at 12. But the Superintendent's decision was based on Assistant Secretary Washburn's conclusions that "the Tribe's membership is more than five people," "that the 1998 General Council does not consist of valid representatives of the Tribe," and that "the individuals who make up the Eligible Groups must be given opportunity to take part in the reorganization of CVMT," however many there may be. 2015 Decision at 6; *see* Answer Br. at 6-7; Response to Reply Br. at 2, 6. Third, upon receipt of the proposed ISDA contract, the Regional Director instructed the Superintendent, consistent with the 2015 Decision, that the Department still does not recognize any governing body for the Tribe. *See supra* at 14.

Appellant has not shown that, based on the Regional Director's May 30, 2019, decision or any other event, there was a change in circumstances such that the Superintendent was not bound by the 2015 Decision to return the proposed ISDA contract submitted by Burley on behalf of the Tribe. The Board lacks jurisdiction to review the 2015 Decision. Accordingly, we dismiss the appeal.

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 dismisses this appeal of the Superintendent's July 23, 2019, decision.

I concur:

// original signed	//original signed
Thomas A. Blaser	Kenneth A. Dalton
Chief Administrative Judge	Administrative Judge

[22] As we explained as background, in 2020, the Superintendent published a notice that BIA planned to take action to assist the Tribe in organizing and subsequently confirmed that it would cease such action while this appeal remained pending. *See supra* at 16; *see also California Valley Miwok Tribe*, 51 IBIA at 116 n.10, 121 n.16. To the extent that this appeal divested BIA of jurisdiction over the matter, the Board's dismissal of the appeal returns jurisdiction to BIA.