CALIFORNIA VALLEY MIWOK TRIBE, Plaintiff, v. DIRK KEMPTHORNE; GEORGE SKIBINE, DALE RISLING; and TROY BURDICK, Defendants.

NO. CIV. S-08-3164 FCD/EFB

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

2008 U.S. Dist. Ct. Motions 107917; 2009 U.S. Dist. Ct. Motions LEXIS 40996

February 6, 2009

Motion for Injunction

COUNSEL: [*1] LAWRENCE G. BROWN, Acting United States Attorney, SYLVIA QUAST, Assistant United States Attorney, Sacramento, California, Attorneys for Defendants.

JUDGES: Hon. Frank C. Damrell, Jr.

TITLE: MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

TEXT: INTRODUCTION

Silvia Burley ("Burley"), purporting to be the leader of the California Valley Miwok Tribe ("Tribe"), brings this lawsuit against officials of the United States Department of the Interior ("DOI") and DOI's Bureau of Indian Affairs ("BIA"), challenging the BIA's December 14, 2007 decision to reject her application for funds for calendar year 2008 under the Indian Self-Determination and Education Assistance Act ("ISDA"). She now seeks a preliminary injunction "sequestering or ordering the release of the funds." Plaintiff's Memorandum of Law In Support of Temporary Restraining Order and Preliminary Injunction ("Memo") at 13. However, she fails to mention another recent federal court action in which she challenged (among other things) DOI's rejection of her as leader of the Tribe and lost. California Valley Miwok Tribe v. United States ("CVMT I"), 424 F. Supp. 2d 197 (D.D.C. 2006), **[*2]** aff'd, California Valley Miwok Tribe v. United States ("CVMT II"), 515 F.3d 1262, 1263-64 (D.C. Cir. 2008). This Court should likewise reject her attempt to equate herself with the Tribe and her challenge under the ISDA, which only creates jurisdiction over challenges by tribes and tribal organizations, not private individuals. Burley's challenge also fails because she opted to pursue administrative remedies rather than a district court action and then failed to exhaust those remedies. Moreover, BIA will likely prevail on the merits, since it can only enter into ISDA self-determination contracts with tribal organizations. Finally, the balance of harms tips in DOI's favor - it is much too late to seek preliminary relief for funding for last year's activities, and in any event, DOI has an obligation "to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." CVMT II, 515 F.3d at 1267.

STATUTORY AND REGULATORY BACKGROUND
I. Tribal "Recognition" and Tribal "Organization"

If an American Indian group **[*3]** wishes to obtain the protection, services, and benefits that the Federal government offers to Indian tribes in virtue of their status as tribes, it must be "acknowledged" or "recognized" by the Department of the Interior. 25 C.F.R. §83.2; CVMT II, 515 F.3d at 1263-64. Historically, the federal government recognized tribes through treaties, statutes, and executive orders, id., but acknowledgment now generally occurs through a standardized application process administered by BIA. 25 C.F.R. Part 83.

Although formal recognition by DOI may allow a tribe to claim certain federal benefits, other benefits are available only to tribes "organized" under the Indian Reorganization Act ("IRA"). CVMT II, 515 F.3d at 1264. There are two ways for tribes to organize under the Indian Reorganization Act ("IRA"). Section 476(a) sets out standards and procedures by which a federally-recognized tribe that wishes to organize "may adopt an appropriate constitution and bylaws" and secure the Secretary's approval of those documents. 25 U.S.C. §476(a). Section 476(h) recognizes that tribes may organize pursuant to their inherent **[*4]** sovereignty as well. 25 U.S.C. §476(h). The difference between the two provisions is that Section 476(a) acts as a "safe harbor" in that if a tribe follows its procedures the Secretary will necessarily recognize the constitution and resulting government. CVMT II, 515 F.3d at 1264. A tribe that organizes under Section 476(h) does not have the benefit of a safe harbor and has no guarantee that the Secretary will recognize its constitution and resulting government. A tribe that has not successfully organized under either section is an unorganized tribe and its government is not "recognized." The IRA does not require recognized tribes to organize, but organized tribes are vested with the power "[t]o employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments." 25 U.S.C. §476(e).

II. The Indian Self-Determination and Education Assistance Act ("ISDA")

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act **[*5]** ("ISDA"), a statute that was designed to foster Indian self-government by permitting the transfer of certain federal programs to Indian Tribes. See 25 U.S.C. §§ 450, 450a. "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. §450b(e). The ISDA directs the Secretary of DOI, upon the request of an Indian Tribe, to enter into "self-determination contract[s]" with "tribal organization[s]." See 25 U.S.C. §§ 450f(a)(1), 450b(I). A "self-determination contract" is a contract "entered into . . . between a tribal organization and the [Secretary of DOI] for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law." § 450b(j). "'[T]ribal organization' means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, **[*6]** 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 an organization and which includes the maximum participation of Indians in all phases of its activities. . . ." §450b(l).

Under the ISDA, if an Indian Tribe wishes to take over the planning, conduct, or administration of programs or services which are otherwise provided by DOI, it may authorize a tribal organization to "submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review." See 25 U.S.C. §450f(a)(2). The proposal must contain, inter alia, the amount of funding requested for the contract. See 25 C.F.R. §900.8(h). The Secretary thereafter has 90 days either to (1) approve the proposal and proposed funding levels and award the contract, or (2) issue a written notification declining all or part of the proposal for one of five justifications found in §450f(a)(2). See 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.16. If the Secretary does not **[*7]** take action on a contract proposal within 90 days, the proposal is deemed approved. See 25 C.F.R. § 900.18.

Each ISDA contract has three components: the contract itself, modifications or amendments to the contract, and, since 1995, annual funding agreements ("AFAs"). See 25 U.S.C. § 450*l* (providing for a model contract); id. § *450l(c)(e)(2)* (providing for written modifications to the contract); id. §§ *450l(c)(b)(4)*, (c)(f)(2) (providing for an AFA). The funding levels for an ISDA contract are generally described in the AFA.

Although many self-determination contracts remain in effect for more than one year, Tribal contractors must submit AFA proposals each year, which are then subject to individualized negotiations with the Secretary. See id. § 450j-1(a)(3)(B); 25 C.F.R. § 900.12. If the parties are unable to agree on the appropriate funding level, the Secretary can decline the proposal in part or in full under the declination procedures described above. See 25 C.F.R. § 900.32.

The Secretary may decline, in part or in full, a contract proposal **[*8]** on one of five statutory bases. See 25 U.S.C. § 450f(a)(2); see also 25 C.F.R. § 900.22 (reciting statutory bases). In issuing a partial or full contract "declination," the Secretary must "state any objections in writing[,]" "provide assistance to the tribal organization to overcome the stated objections," and provide the organization with an administrative appeals process. See § 450f(b); 25 C.F.R. § 900.31. This administrative appeals process is set forth in 25 C.F.R. §§ 900.150-900.176.

"In lieu of" pursuing an administrative appeal, an Indian Tribe or Tribal organization may also initiate a federal court action under 25 U.S.C. § 450m-1(a). See 25 U.S.C. § 450f(b). Section 450m-1(a) gives federal courts the power to review a Secretary's declination decision for its compliance with ISDA and, if the decision is in error, to enjoin the Secretary "to reverse the declination finding . . . or to compel the Secretary to award and fund an approved self-determination contract." 25 U.S.C. § 450m-1(a) **[*9]** . The conclusion of an action challenging a declination is an order affirming the decision of the Secretary or an order compelling the Secretary to enter into a contract.

STATEMENT OF FACTS

I. Tribal Leadership Disputes Within the California Valley Miwok Tribe

In 1916, the United States purchased a small parcel of land near Sheep Ranch, California, in Calaveras County, for the benefit of approximately 13 Miwok living in the area. CVMT I, 424 F. Supp. 2d 197 (D.D.C. 2006). The group dwindled to one, and in 1966, the Federal government transferred the land, known as the "Sheep Ranch Rancheria," to Mabel Hodge Dixie, as the only Indian still living on it. Id. at 198.

In 1979, the Sheep Ranch Rancheria of Me-Wuk Indians of California was still a federally recognized tribe. n1 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979); 60 Fed. Reg. 9250, 9253 (Feb. 16, 1995). Yakima Dixie ("Dixie"), a son of Mabel Hodge Dixie, claimed to be the hereditary chief of the Tribe. CVMT I, 424 F. Supp. 2d at 198. In 1996, Silvia Burley approached Dixie and requested tribal status for herself and her daughters Rashel **[*10]** Reznor and Anjelica Paulk, and her granddaughter, Tristan Wallace, id., and Dixie adopted them into the Tribe.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
n1 The Burley Government purported to re-name the Tribe the California Valley Miwok Tribe in June 2001.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

On September 24, 1998, BIA advised Dixie that he, his brother Melvin Dixie, Burley, and Burley's daughters and granddaughter "possess[] the right to participate in the initial organization of the Tribe" under the IRA. Id. This group established a tribal council with Dixie as chairman. Id. Shortly thereafter, Dixie allegedly resigned that position, and on May 8, 1999, the group held a "general election" at which Burley was elected Chairperson and Dixie was elected Vice Chairperson. Id. BIA recognized Burley as tribal chairperson on June 25, 1999. Id.

In late 1999, a leadership dispute developed within the Tribe between Dixie and Burley, which has spawned several lawsuits and administrative proceedings. Dixie complained about this dispute to BIA as well as internally, id. at 199, **[*11]** and eventually filed an action in this Court, Sheep Ranch Miwok v. Silvia Burley, No. 01-1389-LKK-DAD (E.D. Cal. 2002), in which he challenged Burley's claim to be Chairperson. On January 24, 2002, this Court dismissed his case because he failed to exhaust his administrative appeal of BIA's February 2000 decision rejecting his request to reverse BIA's recognition of Burley and the award of the self-determination contract to Burley's tribal government.

Later in 2002, Burley filed California Valley Miwok Tribe v. United States, No. 02-0912-FCD-GGH (E.D. Cal. 2002), in which she alleged the United States violated the California Rancheria Act and breached a fiduciary duty to the Tribe when it transferred title to the Rancheria to Mable Hodge Dixie in 1967. The apparent goal of the lawsuit was to use the land taken into trust to build and operate a casino. California Valley Miwok Tribe, No. 02-0912-FCD-GGH (E.D. Cal. July 1, 2004) (Document 80 at p.6). Burley's complaint asserted that, as of April 2002, the Tribe had a potential membership of 250 people. CVMT II, 515 F.2d at 1265. This court dismissed on sovereign immunity and statute of limitations grounds, **[*12]** and was affirmed by the Ninth Circuit in California Valley Miwok Tribe v. United States, 197 Fed. Appx. 678 (9th Cir. 2006).

In 2003, Dixie filed an administrative appeal challenging BIA's June 1999 recognition of Burley as tribal Chairperson and seeking to nullify his 1998 adoption of Burley, her daughters and granddaughter into the Tribe. On February 11, 2005, the Principal Deputy, Acting Assistant Secretary-Indian Affairs dismissed Dixie's appeal on procedural grounds. CVMT I, 424 F. Supp. 2d at 200. Among other things, he found that Dixie's challenge to BIA's recognition of Burley as tribal Chairperson was rendered moot by a BIA decision of March 26, 2004, rejecting the Tribe's proposed constitution. The decision explained that "BIA did not recognize Silvia Burley as Tribal Chairperson, but as a 'person of authority' within California Valley Miwok Tribe," and

"that BIA would not recognize anyone as the Tribal Chairperson until the Tribe had organized as described in the March 26, 2004 letter." CVMT I, 424 F. Supp. 2d at 200.

In March 2005, BIA convened a series of meetings in an attempt to resolve the leadership dispute and other **[*13]** issues besetting the Tribe. CVMT I, at 200-01. This attempt failed, and later that year, the Tribe purportedly "disenrolled" Dixie. Id.

II. DOI's Rejection of Burley's Attempts to Obtain Approval of a Constitution

Burley engaged in a series of attempts to obtain BIA approval of tribal constitutions developed by her and her supporters (i.e., her daughters) during her ongoing leadership dispute with Dixie. Her first attempt came in March 2000 when they adopted a constitution and requested that BIA conduct a Secretarial election to ratify it under the IRA. CVMT II, 515 F.3d at 1265; CVMT I, 424 F. Supp. 2d at 199; 25 U.S.C. § 476 (c), (d). The election did not happen and on June 7, 2001, she withdrew her request. CVMT II, 515 F.3d at 1265; CVMT I, 424 F. Supp. 2d at 199.

Her second attempt came a few months later in September 2001 when her group submitted an amended version of the tribal constitution to BIA for approval. CVMT II, 515 F.3d at 1265; CVMT I, 424 F. Supp. 2d at 199. On October 31, 2001, BIA returned the amended constitution **[*14]** without taking action on it, and advised that BIA would "continue to recognize the Tribe as an unorganized Tribe and its elected officials as an interim Tribal Council until the Tribe takes the necessary steps to complete the Secretarial election process," CVMT I, 424 F. Supp. 2d at 199-200 (emphasis deleted), and further offered agency staff to provide technical assistance. Burdick Declaration Exhibit 5.

Her third and final attempt came in February 2004. CVMT II, 515 F.3d at 1265; CVMT I, 424 F. Supp. 2d at 200. On March 26, 2004, BIA advised Burley that it still considered the Tribe to be unorganized and that she would at least need to attempt to involve the entire tribe in the organizational process before it could approve a constitution. CVMT II, 515 F.3d at 1265-66; CVMT I, 424 F. Supp. 2d at 200. Specifically, BIA explained that:

> Where a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence that such general involvement was attempted **[*15]** or has occurred with the purported organization of your tribe. For example, we have not been made aware of any efforts to reach out to the Indian communities in and around the Sheep Ranch Rancheria, or to persons who have maintained any cultural contact with Sheep Ranch. To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts were you and your two daughters.

Burdick Declaration Exhibit 4. It further reiterated the Agency's continued willingness to "facilitate the organization or reorganization of the tribal community" through Public Law 93-638 self-determination contracts and other forms of assistance. Burdick Declaration Exhibit 4.

III. Burley's Unsuccessful Attempt in the D.C. Circuit to Establish Her Leadership of the Tribe

Rather than file an administrative appeal of BIA's decisions, on April 12, 2005, Burley filed a complaint in the federal district court in the District of Columbia, challenging BIA's rejection of her government, its documents, and her claims to chair the Tribe. CVMT I, 424 F. Supp. 2d at 201; Complaint in CVMT I PP 57-59 (alleging "actions of the Defendant in declining to recognize **[*16]** Silvia Burley as tribal chairperson . . . not in accordance with law"). Among other things, she sought a declaration that the tribe was organized for purposes of the IRA and approval of a tribal constitution that conferred tribal membership exclusively upon her, her two daughters, and their descendants. CVMT II, 515 F.3d at 1266; CVMT I, 424 F. Supp. 2d at 201, 203 n.7; Complaint in CVMT I (Appendix A attached hereto), at p.13 (requesting declaratory relief that DOI February 11, 2005 letter stating that BIA did not recognize Burley as Tribal Chairperson was "invalid"). On March 31, 2006, the district court granted the government's motion to dismiss for lack of jurisdiction and failure to state a claim. CVMT I, at 203 n.8. It explained that Burley predicated her claims on the mistaken view that, under 25 U.S.C. § 476(h), the Secretary was required to recognize the Burley government and its government documents even though Burley was elected, and the governing documents were adopted, without the participation of the majority of the Tribe's potential membership. CVMT I, at 201-203.

Burley appealed, and the court of **[*17]** appeals affirmed the district court on February 15, 2008. CVMT II, 515 F. 3d 197. In so doing, the court explicitly rejected Burley's attempt to equate herself with the Tribe, CVMT II, 515 F.3d at 1263 n.1 & 1266 n.7, and noted that although the Tribe "has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting her proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary." CVMT II, 515 F.3d at 1267.

IV. The ISDA Contract at Issue

Shortly after the BIA's initial recognition of Burley as tribal chairperson in 1999 and before the tribal leadership squabbles began in earnest, BIA and the Tribe entered into an ISDA self-determination contract (also known as a Public Law 93-638 contract) pursuant to 25 U.S.C. § 450f. CVMT I, 424 F. Supp. 2d at 198. Under this contract, BIA provided funding to support and assist the Tribe in becoming organized through the development of a tribal constitution and organized government. Burdick Declaration P 7; CVMT I, 424 F. Supp. 2d at 198. In January **[*18]** 2004, the BIA determined that the self-determination contract was a "mature contract" under the ISDA. n2 Complaint at P 13. The amount of this funding varied each year, ranging from approximately $ 166,000 to almost $ 353,000. CVMT I, 424 F. Supp. 2d at 203, n.7; Burdick Declaration P 7. n3

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n2 A "mature contract" is one that has been continously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization. 25 U.S.C. § 450b(h). Burley's assertion that a mature contract may not be declined (Complaint P 21) is incorrect.

n3 At one point, the Tribe also received additional funding from the California Gambling Control Commission, a state agency that makes payments to non-gaming tribes from the California Revenue Sharing Trust Fund. These payments are made on a per-tribe basis, not on the number of tribe members, and amounted to over $ 1 million in 2005. CVMT I, at 203 n. 7.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[*19]**

In light of the February 11, 2005, decision by the Principal Deputy, Acting Assistant Secretary-Indian Affairs, discussed supra at p.7, which in part stated that BIA did not recognize Burley as tribal chairperson and that it "would not recognize anyone as the Tribal Chairperson until the Tribe had organized," BIA suspended the contract on June 19, 2005, but subsequently reinstated it. CVMT I, at 200.

On October 1, 2007, Burley submitted a proposal to renew the contract's annual funding agreement for 2008. Memo at 7. On December 14, 2007, BIA informed Burley that it was returning her application for funding under the ISDA (P.L. 93-638), citing the definition of "tribal organization" under the Act, and explaining that DOI did not recognize the California Valley Miwok Tribe as having a governing body, and that it would only consider applications submitted by federally recognized tribes with a recognized governing body. Burdick Declaration Exhibit 2. It further cited CVMT I in support of DOI's position. Id. BIA's letter informed Burley that she had thirty days from the date she received notice of BIA's decision to appeal, citing and enclosing the administrative appeal **[*20]** regulations in 25 C.F.R. Part 2, and informed her of the procedures for filing an administrative appeal. Id.

Burley received the letter on December 17, 2007, and thirty-one days later, on January 17, 2008, requested that the BIA commence an informal conference pursuant to 25 C.F.R. § 900.154. Memo at 7-8. Because Burley submitted her request late, BIA did not commence the informal conference. Id.; Burdick Declaration Ex. 1. On March 28, 2008, Burley filed an administrative appeal of the December 14 letter before the Interior Board of Indian Appeals, but the appeal was deemed untimely. Id.; Memo at 8. Rather than challenge that final agency action, Burley filed this lawsuit. Memo at 8. n4

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n4 Burley sought to renew ISDA funding for the current fiscal year as well. The BIA rejected this application on the same grounds that it rejected her fiscal year 2008 application. Burdick Declaration P 6. Although she refers to the October 16, 2008 BIA letter rejecting her request, Memo at 7 n. 1, she does not challenge that decision here.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[*21]**

ARGUMENT
I. Preliminary Injunction Standard

Burley misstates the standard for a preliminary injunction. Memo at 2-3. In Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 376-77 (Nov. 12, 2008), the Supreme Court rejected the "possibility of harm" standard as "too lenient." 129 S. Ct. at 376 . Reversing the Ninth Circuit, the Court held that a plaintiff must always show, inter alia, that he is *likely* to suffer irreparable harm in the absence of preliminary relief. 129 S. Ct. at 376. Moreover, the Court held in Munaf

v. Geren, 128 S. Ct. 2207 (Mar. 25, 2008), the Court held that an injunction may not properly issue based on "questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." Id. at 2219 (internal quotation omitted). Instead, "a party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'" 128 S. Ct. at 2219 (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428, 126 S. Ct. 1211 (2006)). **[*22]**

Even when a statute directs a court to issue an injunction, the court still is to follow traditional equitable principles in determining whether injunctive relief is appropriate. See Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587 (1944) (finding that court was to use discretion in determining whether injunction should issue under the Emergency Price Control Act, notwithstanding statutory language that injunction "shall be granted"); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 60-65, 95 S. Ct. 2069 (1975) (finding that injunction should not issue for violation of securities laws without demonstrating irreparable harm, even when violation of statute was conceded). "A preliminary injunction is an extraordinary remedy never awarded as of right." Winter, 129 S. Ct. at 376. To obtain an injunction, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter, 129 S. Ct. at 374. The court must "balance the competing **[*23]** claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." Winter, 129 S. Ct. at 377 (quoting Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542, 107 S. Ct. 1396 (1987)). The public interest may preclude an injunction even if the other requirements are satisfied. 129 S. Ct. at 381. See also Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 102 S. Ct. 1798 (1982); Lands Council v. McNair, 537 F.3d 981, 1003-04 (9th Cir. 2008) (en banc). Applying those standards, an injunction is not proper here.

II. This Court Lacks Jurisdiction Because Burley Is Neither A "Tribe" Or A "Tribal Organization" For Purposes Of The ISDA

Burley asserts that this Court has jurisdiction over this action based on the judicial review provisions in the ISDA. Complaint PP 3,4. The ISDA provides that when DOI declines to enter into a self-determination contract with a tribal organization, it shall provide the tribal organization with an administrative appeal "except that the tribe or tribal organization may, in lieu of filing such [an] appeal, exercise the option **[*24]** to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a) of [the ISDA]." 25 U.S.C. § 450f(b). Thus, only a tribe or tribal organization is allowed to sue under § 450f. Burley is neither, regardless of how she captions her complaint. Accordingly, this Court lacks jurisdiction over her complaint because the ISDA does not authorize private individual to bring an action.

The ISDA defines "Indian Tribe" to mean "any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 450b(e). Burley is obviously not a tribe herself, nor is she the recognized leader of the California Valley Miwok Tribe. The D.C. Circuit recently upheld BIA's determinations that the California Valley Miwok Tribe has no recognized governing body and that Burley is not the recognized Tribal chairperson, and rejected her attempt to equate herself with the Tribe. CVMT I, 424 F. Supp. 2d

at 200-203, aff'd CVMT II, 515 F.3d 1262. **[*25]** She is estopped from relitigating these issues here, as they are identical to the ones alleged in the D.C. Circuit litigation, were actually litigated by Burley, and their determination was a critical and necessary part of the judgment in that litigation. See Town of N. Bonneville v. Callaway, 10 F.3d 1505, 1508 (9th Cir. 1993) (discussing elements of collateral estoppel). See also Fireman's Fund Ins. Co. v. Int'l Mkt. Place, 773 F.2d 1068, 1069 (9th Cir. 1985) ("Federal law governs the collateral estoppel effect of a federal case decided by a federal court."). Accordingly, this Court should reject her attempt to pass herself off as the Tribe for purposes of this lawsuit.

Moreover, she does not qualify as a "tribal organization," which the ISDA defines to mean "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 [an] organization and which includes the maximum participation of Indians in all phases of its activities. . . ." § 450b(l). **[*26]** Again, the D.C. Circuit upheld BIA's determinations that the California Valley Miwok Tribe has no recognized governing body. CVMT I, 424 F. Supp. 2d at 200-203, aff'd CVMT II, 515 F.3d 1262. Nor does she qualify as a "legally established organization of Indians . . . 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" because she and her daughters were not democratically elected. CVMT II, 515 F.3d at 1267. She is thus also estopped from arguing that she represents a "tribal organization" since the California Valley Miwok Tribe has no recognized governing body, let alone a "democratically elected body." For these reasons, the Court should dismiss this action.

III. This Court Lacks Jurisdiction Because Burley Failed to Exhaust Her Administrative Appeals

Tribal organizations with whom DOI has declined to enter into self-determination contracts have two options under the jurisdictional provision in the ISDA: they can file an administrative appeal under rules and regulations **[*27]** promulgated by DOI, or "in lieu of filing such appeal," they may "exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-1(a)." 25 U.S.C. § 450f(b). Rather than choosing one or the other, however, Burley chose both. She first filed an administrative appeal from the December 14, 2007 letter, which she failed to exhaust, and then filed this action directly challenging BIA's decision. The ISDA does not permit this - it says "in lieu of filing" an administrative appeal, not "in addition to filing" such an appeal. Accordingly, this Court should dismiss Burley's action because she failed to exhaust her administrative remedies.

Burley acknowledges that she filed an administrative appeal of BIA's December 14, 2007, letter returning her ISDA annual funding application. Memo at 7-8. She began by requesting an informal conference pursuant to the ISDA rules and regulations at 25 C.F.R. § 900.154. n5 Id. However, she missed the 30-day deadline for filing her request, and BIA did not commence the conference. Id. She then filed an appeal to the Interior Board of Indian **[*28]** Appeals ("IBIA") on March 28, 2008, which the IBIA dismissed because she missed the 30-day cut-off for initiating her appeal. Id.; Memo at 8. Although she could have appealed the IBIA's decision to the district court under the Administrative Procedure Act, 5 U.S.C. § 704, she did not do so. Instead, she chose to start anew by filing an action in this Court. Memo at 8.

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n5 The December 14 letter stated that she could file an administrative appeal pursuant to 25 C.F.R. Part 2 within 30 days of receipt of the letter. Burdick Declaration Exhibit 2. Part 2 provides default administrative procedures for decisions where no other regulatory route of appeal is provided. Burley filed her appeal pursuant to 25 C.F.R. §§ 900.150 through 900.176, which provides the ISDA administrative appeal procedures, and also allows 30 days from the date or receipt to file an appeal. 25 C.F.R. §§ 900.154, 900.158.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*29]**

The ISDA does not countenance this, and the Court should not either. Exhaustion of remedies is a well-established doctrine of administrative law, which serves the purpose of giving the agency an opportunity to correct its own mistakes and also promotes efficiency, since "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." Woodford v. Ngo, 548 U.S. 81, 89 (2006). Moreover, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Id. at 90-91. Because Burley did not exhaust her administrative remedies, this Court should dismiss for lack of jurisdiction.

IV. Burley is Not Eligible For An ISDA Self-Determination Contract Because DOI Can Only Enter Into Such Contracts With Tribal Organizations

DOI may only enter into ISDA self-determination contracts with tribal organizations. See 25 U.S.C. §450b(j) (defining "self-determination contract" as a contract **[*30]** "entered into . . . between a tribal organization and the [Secretary of DOI] for the planning, conduct and administration of programs or services . . . ."); 25 U.S.C. § 450f(a)(1) ("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 to plan, conduct, and administer programs . . . ."); 25 U.S.C. § 450f(a)(2) ("If so authorized by an Indian tribe . . . a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review."). As previously noted, the ISDA defines "tribal organization" to mean "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 [an] organization and which includes the maximum participation of Indians in all phases of its activities. . . ." § 450b(l). Because the California Valley Miwok Tribe **[*31]** has no recognized governing body or other democratically elected organization, there is no "tribal organization" with which to contract under § 450f. Accordingly, BIA was correct to return Burley's application for an annual funding agreement under the ISDA. n6

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n6 There was no need for BIA to address the five statutory bases for declining an ISDA contract, 25 U.S.C. § 450f(a)(2), 25 C.F.R. § 900.22, because Burley could not satisfy an even more fundamental requirement in the statute - the requirement that DOI contract with a "tribal organization."
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Burley notes that BIA has been contracting with the Tribe for a number of years under the ISDA and alleges that the governing body of the Tribe has not changed over time. Complaint PP 11, 32. However, what is conspicuously absent from her filings is any mention of CVMT I, let alone CVMT II. BIA initially recognized Burley as tribal chairperson on June 25, 1999, and entered into a self-determination contract **[*32]** with the Tribe with her as Tribal Chairperson one month later. CVMT I, 424 F. Supp. 2d at 198. Under this contract, BIA provided funding to support and assist the Tribe in becoming organized through the development of a tribal constitution and organized government. Burdick Declaration P 7; see CVMT I, 424 F. Supp. 2d at 198. Over time and after repeated undemocratic attempts to limit membership in the Tribe to Burley's direct descendants, BIA began to reconsider its view of Burley and her claim to lead the Tribe and question her ability or willingness to properly organize it. This culminated in the CVMT I court's upholding BIA's determination not to recognize her as Tribal Chair or the Tribe as having a governing body, which BIA subsequently relied on to reject her application for yet more self-determination funding in 2007. n7 Ironically, it is in part because Burley's so-called "governing body" had not changed over time that BIA ultimately rejected her application.

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n7 Burley cites the possible loss of the Tribe's "privileged status" if "the BIA deems the Tribe's government to be unorganized and hence unworthy of 638 funding." Memo at 9. She does not appear to grasp that BIA has already deemed the Tribe to be unorganized and ineligible for 638 (i.e. ISDA) funding.
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V. The Traditional Equitable Considerations for Preliminary Injunctive Relief and the Public Interest Tip in BIA's Favor

For the foregoing reasons, Burley cannot establish that she is likely to succeed on the merits. This is sufficient grounds for denying her motion for a preliminary injunction. Winters, 129 S. Ct. at 374. Balancing the equities and the public interest would tip the balance in DOI's favor in any event. Id. BIA informed Burley on December 14, 2007, well over a year ago, that it would not accept her funding application for one year's worth of funding in 2008. If the failure to obtain that funding actually presented the likelihood of irreparable injury, the time to seek preliminary relief from this Court was in December of 2007, before the funding year started, not on January 15, 2008, two weeks after it ended. This Court should not reward such a gross example of laches.

Burley also cites the threat that the Tribe will be precluded from entering the tribal self-governance program if it does not get the 2008 funding. Memo at 2, 8; Complaint P 19. The Tribe has much more fundamental problems that prevent it from entering into the ISDA **[*34]** self-governance program. This program, which is established in section 450h(a) of the ISDA, provides, "The Secretary of the Interior is authorized, upon the request of an Indian tribe . . . to contract with or make a grant or grants to any tribal organization . . . ." 25 U.S.C. §450h(a). As has already been discussed, the Tribe fails to satisfy the definition of "tribal organization" in the ISDA. 25 U.S.C. § 450b(l). There is no "recognized governing body" and no "legally established organization of Indians . . . 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" because Burley and her daughters were not democratically elected. § 450b(1); see CVMT II, 515 F.3d at 1267. As a result, the Tribe is not eligible for ISDA self-governance contracts. n8

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n8 For the same reasons, an "annual audit" is not the only thing standing between the Tribe and self-governance status. See Memo at 2, 8.
- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*35]**

Finally, the public interest weighs strongly in favor of withholding relief. As the district court in CVMT I noted, the Secretary of the Interior has broad authority over "public business relating to . . . Indians." CVMT I, 424 F. Supp. 2d at 201, quoting 43 U.S.C. § 1457. "At the core of this authority is a responsibility to ensure that [the] Secretary deals only with a tribal government that actually represents the members of a tribe." CVMT I, 424 F. Supp. 2d at 201. Moreover, the Secretary has an obligation "to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." CVMT II, 515 F.3d at 1267. In light of these considerations and Burley's history of dealings with the Tribe, as evidenced by CVMT I and CVMT II, this Court should abstain from giving her any relief.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for a preliminary injunction and dismiss this case.

Dated: February 6, 2009

LAWRENCE G. BROWN
ACTING UNITED STATES **[*36]** ATTORNEY

By: /s/ Sylvia Quast
SYLVIA QUAST Assistant United States Attorney

DECLARATION OF TROY BURDICK IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, Troy Burdick, declare as follows:

1. I am the Central California Agency Superintendent of the Bureau of Indian Affairs ("BIA") in the United States Department of the Interior, and have been with BIA in this capacity since June 2005, and have been with the agency since October 1990. As the Superintendent, I am responsible for ensuring that programmatic activities are properly coordinated to deliver services to the Tribes within my jurisdiction. I have administrative jurisdiction over 54 federally-recognized tribes in Central California, one of which is the California Valley Miwok Tribe ("Tribe"). I make this declaration based on my personal knowledge and experience and, if called, would testify to the same facts at trial.

2. Attached hereto is Exhibit 1, which is a true and correct copy of the Interior Board of Indian Appeals June 10, 2008, decision rejecting Silvia Burley's appeal of my December 14, 2007 decision (a true and correct copy of which is attached hereto as Exhibit 2) **[*37]** to return her application for annual funding for 2008 under the Indian Self-Determination and Education Assistance Act ("ISDA"), P.L. 93-638.

3. Attached hereto is Exhibit 3, which is a true and correct copy of the Acting Assistant Secretary - Indian Affairs's letter rejecting Yakima Dixie's appeal filed October 30, 2003.

4. Attached hereto is Exhibit 4, which is a true and correct copy of a March 26, 2004 letter rejecting Burley's third proposed tribal constitution for the Tribe.

5. Attached hereto is Exhibit 5, which is a true and correct copy of a October 31, 2001 letter rejecting Burley's second proposed tribal constitution for the Tribe.

6. Silvia Burley submitted an application in the name of the California Valley Miwok tribe for ISDA funding for fiscal year 2009. On October 16, 2008, the BIA rejected this application on the same grounds that it rejected her fiscal year 2008 application.

7. BIA first entered into an ISDA contract with the Tribe in 1999. Under this contract, BIA provided funding to support and assist the Tribe in becoming organized through the development of a tribal constitution and organized government. Over the course of the years, the amount of the funding **[*38]** under the contract varied each year, ranging from $ 166,160 in one fiscal year to $ 352,821 in another.

8. Each Exhibit provided with my declaration is a true and correct copy of a document kept in the ordinary course of business and located in files in the BIA's offices in Sacramento, California.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed at Sacramento, California, this 5th day of February, 2009.

By: /s/ [Signature]
TROY BURDICK
Superintendent
Central California Agency
Bureau of Indian Affairs

[SEE APPENDIX A IN ORIGINAL]

[SEE EXHIBIT 1 IN ORIGINAL]

[SEE EXHIBIT 2 IN ORIGINAL]

[SEE EXHIBIT 3 IN ORIGINAL]

[SEE EXHIBIT 4 IN ORIGINAL]

[SEE EXHIBIT 5 IN ORIGINAL]