No. 09-15466

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA VALLEY MIWOK TRIBE

Plaintiff-Appellant,

v.

DICK KEMPTHORNE; GEORGE SKIBINE; DALE RISLING; and TROY BURDICK

Defendant-Appellees.

ANSWERING BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

Appellant's Opening Brief ("Brief") fails to identify a basis for the district court's subject matter jurisdiction in its jurisdictional statement, and the district court correctly held that it did not have jurisdiction because Appellant failed to exhaust its administrative remedies. Brief at 2. As will be discussed in greater detail below, Appellant also lacks standing to bring a claim under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), which is the basis for jurisdiction alleged in Appellant's complaint. ER 21. The district court dismissed the case without prejudice and entered final judgment on February 23, 2009, and Appellant filed a notice of appeal on March 9, 2009. Appellant's Excerpts of Record ("ER") 157, 161. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly dismissed Appellant's lawsuit for failure to exhaust its administrative remedies if Appellant admittedly "abandoned its administrative appeal" and then filed a direct challenge in district court to the Bureau of Indian Affairs's ("BIA's") decision to reject a proposed funding agreement under the ISDEAA.

2. Whether Silvia Burley ("Burley"), who brought this lawsuit in the name of the California Valley Miwok Tribe ("Tribe") but is not the recognized Tribal

Chairperson, has standing to bring an action under the ISDEAA if she is neither a "tribe" nor a "tribal organization" for purposes of 25 U.S.C. § 450f.

3. Whether the district court correctly held that Appellant was not likely to prevail on the merits because the Tribe does not have a recognized governing body, as determined in California Valley Miwok Tribe v. United States ("CVMT I"), 424 F. Supp.2d 197 (D.D.C. 2006), aff'd, 515 F.3d 1262 (D.C. Cir. 2008) ("CVMT II"), and thus cannot qualify as a "tribal organization" for purposes of the ISDEAA.

STATEMENT OF THE CASE

On December 29, 2008, Burley, who describes herself as the Chairperson of the Tribe, filed a complaint in the name of the Tribe alleging violations of the ISDEAA in connection with BIA's December 14, 2007 decision to reject her application for ISDEAA funds for calendar year 2008. ER 1-2, 20-29. The complaint named as defendants the Secretary of the Department of the Interior ("DOI") and DOI's Acting Assistant Secretary–Indian Affairs, as well as three BIA officials (collectively "Appellees"). ER 2 n.2. On January 15, 2009, Burley moved for a preliminary injunction that would have required Appellees to either sequester the funds or disburse them to her. ER 2. On February 6, Appellees opposed the motion, pointing out that the district court lacked jurisdiction because Burley did not have standing to bring suit under the ISDEAA and because she

failed to exhaust her administrative appeals. ER 74-94. In support of their opposition, they filed a declaration with accompanying exhibits, as well as the complaint in CVMT I, ER 95-134, and they requested that the district court dismiss the case for lack of jurisdiction. ER 89, 91, 94. Burley filed a reply to Appellees' opposition brief on February 13. ER 135.

The district court denied the motion for preliminary injunction and dismissed the action without prejudice on February 23. ER 3-4, 17-18. It held that it lacked jurisdiction over the action because Burley failed to exhaust administrative remedies, and accordingly, did not reach the issue of whether Burley had standing under the ISDEAA to bring suit. ER 3-4, 8-12, 17-18. In the alternative, it denied the motion on the merits, noting that "plaintiff has not shown it is likely to succeed on the merits of its claims because the government's basis for denying the [ISDEAA annual funding agreement] has been upheld by the courts", citing CVMT I and CVMT II. ER 17-18. See also ER 3-4, 14-17. Although the dismissal was without prejudice, Burley did not seek to amend her complaint, and instead filed this appeal.[1]

[1] She appears to challenge only the dismissal of her case, not the district court's denial of a preliminary injunction. Brief at 12.

STATUTORY AND REGULATORY BACKGROUND

The Indian Self-Determination and Education Assistance Act ("ISDEAA")

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDEAA") to foster Indian self-government by allowing the transfer of certain federal programs to Indian tribes. See 25 U.S.C. §§ 450, 450a. The ISDEAA defines "Indian tribe" as "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." § 450b(e). At the request of an Indian Tribe, the Secretary of DOI can enter into "self-determination contracts" with "tribal organizations" under the ISDEAA. See §§ 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). 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 an organization and which includes the maximum participation of Indians in all phases of its activities. . ." § 450b(l). If an Indian Tribe authorizes 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," the Secretary has ninety days from the date the tribal organization submits the proposal to either approve the proposal and proposed funding levels and award the contract, or 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.

Each ISDEAA contract has three components: the contract itself, modifications or amendments to the contract, and, since 1995, annual funding agreements ("AFAs") that specify the funding levels. See 25 U.S.C. § 450*l* (providing for a model contract); § 450*l*(c)(e)(2) (providing for written modifications to the contract); §§ 450*l*(c)(b)(4), (c)(f)(2) (providing for an 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 25 U.S.C.§ 450j-1(a)(3)(B); 25 C.F.R. § 900.12. Declination of a contract may be appealed administratively under rules and regulations promulgated by the Secretary. See 25 U.S.C. § 450f(b); 25 C.F.R. §§ 900.150-900.176. "In lieu of" pursuing an administrative appeal, an Indian Tribe or tribal organization may 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 compliance with the ISDEAA 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).

STATEMENT OF FACTS

Tribal Leadership Disputes Within the California Valley Miwok Tribe

The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California, is a federally recognized tribe. CVMT II, 515 F.3d at 1265; 60 Fed. Reg. 9250, 9253 (Feb. 16, 1995); 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979).[2] In 1996, Yakima Dixie ("Dixie"), who claimed to be the hereditary chief of the Tribe, was approached by Burley, who requested tribal status for herself, her two daughters, and her granddaughter. CVMT I, 424 F. Supp. at 198. Dixie adopted them into the Tribe.

On September 24, 1998, BIA advised Dixie that he and his brother and Burley and her daughters and granddaughter "possess the right to participate in the

[2] To obtain the protection, services, and benefits that the Federal government offers to Indian tribes in virtue of their status as tribes, an American Indian group 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.

initial organization of the Tribe" under the Indian Reorganization Act ("IRA").[3] 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, Dixie and Burley entered into a leadership dispute that spawned several lawsuits and administrative proceedings over the course of the next decade. See, e.g., ER 98-103, 125-132; CVMT I, 424 F. Supp. at 199-200 (describing DOI administrative proceedings). BIA convened meetings in March 2005 in an attempt to resolve the leadership dispute and other issues besetting the Tribe. CVMT I,

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[3] Some federal benefits are available only to tribes "organized" under the IRA. CVMT II, 515 F.3d at 1264. One option for organization under the IRA sets out standards and procedures for a federally-recognized tribe to "adopt an appropriate constitution and bylaws" and secure the Secretary of DOI's approval of those documents. 25 U.S.C. § 476(a). The other recognizes that tribes may organize pursuant to their inherent sovereignty as well. 25 U.S.C. § 476(h). The first option provides 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 the second option does not have this guarantee. The IRA does not require recognized tribes to organize, but organized tribes are vested with the power "to 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).

424 F. Supp.2d at 200-01. This attempt failed, and later that year, the Tribe purportedly "disenrolled" Dixie. Id.

Contemporaneous with this leadership dispute, Burley embarked on a series of attempts to obtain BIA approval of tribal constitutions under the IRA. She first requested BIA to conduct a Secretarial election to ratify a constitution under the IRA in March 2000. ER 133; CVMT II, 515 F.3d at 1265; CVMT I, 424 F. Supp.2d at 199. BIA did not conduct such an election and on June 7, 2001, she withdrew her request. ER 133; CVMT II, 515 F.3d at 1265; CVMT I, 424 F. Supp.2d at 199. Approximately four months later, she submitted an amended constitution to BIA for approval. ER 133; CVMT II, 515 F.3d at 1265; CVMT I, 424 F. Supp.2d at 199. On October 31, 2001, BIA informed her that her submission was defective (ER 133 and CVMT II, 515 F.3d at 1265,) and returned it, advising her 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." ER 134; CVMT I, 424 F. Supp.2d at 199-200 (emphasis deleted).

She presented BIA with a third version of a constitution in February 2004. ER128; 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 need to at least attempt to involve the entire tribe in the

organizational process before it could approve a constitution. ER 128-130; CVMT II, 515 F.3d at 1265-66; CVMT I, 424 F. Supp.2d at 200.[4] 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 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.

ER 128-129; CVMT II, 515 F.3d at 1265-66. BIA reminded her that it had attempted "to facilitate the organization or reorganization of the tribal community" through Public Law 93-638 (or ISDEAA) self-determination contracts and other forms of assistance, but that being an unorganized tribe could affect the Tribe's "continued eligibility for certain grants and services." ER 130, 128.

On February 11, 2005, the Principal Deputy, Acting Assistant Secretary–Indian Affairs for DOI further clarified 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

[4] Burley herself asserted that as of April 2002, the Tribe had a potential membership of 250 people. CVMT II, 515 F.3d at 1265.

Chairperson until the Tribe had organized as described in the March 26, 2004 letter." ER 125; CVMT I, 424 F. Supp.2d at 200.

Burley thereupon sued in the Tribe's name, challenging BIA's rejection of her government, its documents, and her claims to chair the Tribe. CVMT I, 424 F. Supp.2d at 201; ER 95-108. See, e.g., ER 106 at ¶ 57 (alleging "actions of the Defendant in declining to recognize Silvia Burley as tribal chairperson . . . not in accordance with law"). She sought a declaration that the Tribe was organized for purposes of the IRA and also sought approval of a tribal constitution that conferred tribal membership exclusively upon her, her two daughters, and their descendants. ER 107; CVMT II, 515 F.3d at 1266; CVMT I, 424 F. Supp.2d at 201, 203 n.7. She also requested declaratory relief that the February 11, 2005 letter stating that BIA did not recognize Burley as Tribal Chairperson was invalid. ER 107. 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, 424 F. Supp.2d 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, 424 F. Supp.2d at 201-203.

Burley appealed, and the court of appeals affirmed the district court on February 15, 2008. CVMT II, 515 F.3d at 1268. In so doing, the court rejected Burley's attempt to equate herself with the Tribe, CVMT II, 515 F.3d at 1263 n.1 and 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.

The ISDEAA Contract at Issue

Shortly after 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 ISDEAA self-determination contract pursuant to 25 U.S.C. § 450f. ER 110; 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. ER 110; CVMT I at 198. In January 2004, BIA determined that the self-determination contract was a "mature contract" under the ISDEAA. ER 23 at ¶ 13. The amount of funding

varied each year, ranging from approximately $166,000 to almost $353,000. ER 110; CVMT I, 424 F. Supp.2d at 203, n.7.[5]

In light of the February 11, 2005, decision by DOI's Principal Deputy, Acting Assistant Secretary–Indian Affairs, which 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, 424 F. Supp.2d at 200.

In October 2007, Burley submitted a proposal to renew the contract's annual funding agreement for 2008. Brief at 4. On December 14, 2007, BIA informed Burley that it was returning her application for funding under the ISDEAA, citing the definition of "tribal organization" under the Act, and explaining that DOI did not recognize the Tribe as having a governing body, and that it would only consider applications submitted by federally recognized tribes with a recognized governing body. ER 122. 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

[5] 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, 424 F. Supp.2d at 203 n. 7.

appeal 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 BIA commence an informal conference pursuant to 25 C.F.R. § 900.154.[6] ER 43-44. Burley submitted her request late, and BIA did not commence the informal conference. ER 43-44. 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. ER 112-119. Rather than challenge that final agency action, Burley filed this lawsuit. Brief at 4.

SUMMARY OF THE ARGUMENT

This court should affirm the district court's decision to dismiss Burley's case. The ISDEAA gives tribes and tribal organizations the option of either administratively appealing BIA's declination of a self-determination contract or, "in lieu of filing such an appeal," going directly to district court. Burley admits that she chose to file an administrative appeal but then "abandoned" that appeal

[6] BIA's December 14, 2007 letter cited the incorrect appeal procedures, but Burley filed her appeal pursuant to the correct provisions for the ISDEAA. The 30-day deadline for filing an appeal is the same for both and the district court determined that Burley suffered no prejudice. ER 7 at n.7. She does not challenge that determination on appeal.

and filed a direct action in district court. This violates the terms of the ISDEAA and the well-established doctrine of exhaustion of administrative remedies, and Burley's interpretation of the ISDEAA would encourage forum-shopping and duplicative proceedings. This Court should not countenance such an outcome.

Alternatively, the Court could uphold the district court's decision to dismiss the lawsuit on the ground that Burley does not have standing to bring suit under 25 U.S.C. § 450f(b) of the ISDEAA, which only allows an "Indian tribe" or a "tribal organization" to initiate an action in federal court. Burley purports to bring this action in the name of the Tribe, but she is not the recognized Chairperson of the Tribe. Moreover, as the district court properly determined, the Tribe has no recognized governing body and hence, cannot qualify as a "tribal organization." Burley previously challenged BIA's determinations that she was not the recognized Chairperson and that the Tribe lacked a recognized governing body, but was rebuffed by the federal courts in the District of Columbia. See CVMT I and CVMT II. This Court should reject her claims as well.

Finally, the district court was correct that Burley would likely not prevail on the merits. BIA properly declined the 2008 AFA because, as it had determined in 2005, the Tribe lacked a recognized governing body and hence did not qualify as a "tribal organization" with which BIA could contract. Burley challenged the 2005

determination that the Tribe lacked a recognized governing body in CVMT I, which upheld BIA's position in 2006 and which was affirmed in CVMT II in 2008.

STANDARD OF REVIEW

In reviewing a dismissal for failure to exhaust administrative remedies, this Court reviews the district court's underlying factual determinations for clear error, and its application of substantive law is reviewed de novo. Wilkins v. United States, 279 F.3d 782, 785 (9th Cir. 2003). Appellant asserts that the well-pleaded complaint rule is relevant here, but as the case it cites shows, this rule pertains to whether removal is appropriate. In re Miles, 430 F.3d 1083, 1088 (9th Cir. 2005). Nor do In re Miles or Hinduja v. Arco Prods., 102 F.3d 987, 990 (9th Cir. 1996), support the proposition that the Court must "take the allegations in the complaint as true" (Brief at 5), particularly when Appellees here factually attacked the existence of jurisdiction. See Ritza v. Int'l Longshoremen's and Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1988) (no presumptive truthfulness attaches to plaintiff's allegations in context of factual attack on jurisdiction).

ARGUMENT

I. DISMISSAL WAS PROPER BECAUSE BURLEY FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES.

The District Court dismissed this action, holding that it lacked jurisdiction over Appellant's claim because Appellant failed to exhaust its administrative

remedies when it abandoned its administrative appeal of BIA's December 14, 2007 letter rejecting Appellant's proposed AFA. ER 8-12, 17. Appellant admits that it "abandoned its administrative appeal," but argues that it has an "absolute right" to file an action in district court, notwithstanding the fact that it filed such an appeal. Brief at 1, 6. This Court should reject Appellant's argument because it ignores the ISDEAA's plain language and because it would encourage forum-shopping and duplicative proceedings, and would not promote judicial economy.

If BIA declines to enter into a self-determination contract, as was the case here, the ISDEAA specifies how to appeal that decision: a tribal organization can file an administrative appeal "under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, 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)(3) (emphasis added). The parties agree that this provision gave Burley a choice between appealing BIA's December 4, 2007 decision administratively and going directly to federal court to challenge it. What they do not agree on, and what is prohibited by § 450f(b)(3), is that Burley could choose both. In this case, she chose to pursue her administrative appeal through two levels of review, only to abandon it and start a new challenge in the district court.

Burley argues that she has an "absolute right" to switch course whenever she chooses, focusing on the words "may" and "option" in § 450(b)(3), but these words simply mean what no one disputes – that she has a right at the outset to choose. What she ignores is the words "in lieu of" in the same section, which mean "in place of" or "instead of," not "in addition to." They require that once she has chosen, she must abide by her choice. ER 9-10. Burley's interpretation would render "in lieu of" surplusage, violating a fundamental canon of statutory construction. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (court has a duty to give effect, if possible, to every clause and word in a statute); United States v. Wenner, 351 F.3d 969, 975 (9th Cir. 2003).

She also argues that the statute does not contain "mandatory language" that requires her to exhaust her administrative appeal before proceeding to district court. Brief at 6. However, even if one were to ignore the words "in lieu of," the statute does not need to have such language. As the district court explained (ER 8-9), 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, promotes efficiency, and protects judicial resources. Woodford v. Ngo, 548 U.S. 81, 88-89 (2006). See also White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988) (principles of administrative exhaustion "well known

in Indian law"). "Proper 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. See also Laing v. Ashcroft , 370 F.3d 994, 998 (9th Cir. 2004) ("a litigant's failure to seek timely administrative relief did not constitute exhaustion of administrative remedies.") The failure to appeal from an administrative agency's decision is the classic example of a failure to exhaust administrative remedies. Here, Burley could have appealed the Interior Board of Indian Appeal's decision to the district court under the Administrative Procedure Act, 5 U.S.C. § 706, but she did not. Accordingly, she did not exhaust administrative remedies, and the district court properly rejected her suit.

Finally, accepting Burley's reading of § 450f(b)(3) would encourage forum-shopping and duplicative proceedings. On her view, a tribal organization could take up administrative resources appealing through layers of administrative review, as Burley has done here, only to decide that it should have made different arguments and start all over again in district court. Nor is there any reason to think that, on her view, this would not apply in the opposite direction as well – that a tribal organization might well decide to pursue a preliminary injunction in district court upon rejection of a self-determination contract, only to abandon its lawsuit in

favor of an administrative appeal if the injunction were denied. This Court should not countenance such a wasteful result and should therefore affirm the District Court's dismissal for lack of jurisdiction.

II. BURLEY DOES NOT HAVE STANDING TO SUE UNDER THE ISDEAA BECAUSE SHE IS NOT A "TRIBE" OR A "TRIBAL ORGANIZATION."

Because the district court held that it lacked jurisdiction due to Burley's failure to exhaust administrative remedies, it did not reach Appellees' argument that it also lacked jurisdiction because Burley does not have standing to bring suit under the ISDEAA, the sole basis for jurisdiction asserted in her complaint. ER 21-22. However, "[a] dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning." Rubin v. City of Santa Monica, 308 F.3d 1008, 1013 (9th Cir. 2002). As discussed supra at 16, the ISDEAA provides that when DOI declines to enter into a self-determination contract, "the tribe or tribal organization 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) of [the ISDEAA]." 25 U.S.C. § 450f(b) (emphasis added). Thus, only a tribe or tribal organization has standing to sue under § 450f. Burley is neither.

The ISDEAA 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 an "Indian Tribe" herself, nor is she the recognized leader of the California Valley Miwok Tribe. BIA determined years ago that the Tribe has no recognized governing body and that Burley is not the recognized Tribal chairperson. She challenged these determinations in the District of Columbia, but the courts there upheld them. CVMT I, 424 F. Supp. 2d at 200-203, aff'd CVMT II, 515 F.3d 1262.[7] She has no authority to bring suit in the Tribe's name, as the D.C. Circuit implicitly recognized in CVMT II, 515 F.3d at 1266, n.7 ("Here, however, the Secretary's proposed interpretation does not run against any Indian tribe; it runs only against one of the contestants in a heated tribal leadership dispute . . . .") This Court

[7] Burley claims that "[n]o court has made any rulings on the legitimacy of the Tribe's government under the leadership of Silvia Burley, largely because they cannot do so," citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In fact, Burley herself put this at issue in her complaint in CVMT I, see ER 107 and 424 F. Supp. 2d at 201, and the D.C. district court rejected her challenge and was affirmed in CVMT II. Santa Clara Pueblo is irrelevant here – although the Supreme Court may have restrained the role of the courts in adjusting relations between and among tribes and their members, 436 U.S. at 72, it did not require the Executive Branch to recognize rogue tribal leaders, nor does it prevent the courts from upholding decisions not to do so. See CVMT II, 515 F.3d at 1267, citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

should follow the D.C. Circuit's example and similarly reject her attempt to portray herself as the Tribe for purposes of this lawsuit.

Moreover, Burley – or the Tribe, for that matter – does not qualify as a "tribal organization." The ISDEAA 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 organization and which includes the maximum participation of Indians in all phases of its activities. . . ." § 450b(l). Thus, a "tribal organization" must be one of the following:

> (1) a recognized governing body of an Indian tribe;
>
> (2) a legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body; or
>
> (3) 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.

Id. Burley does not attempt to argue that she qualifies as a "tribal organization" under (3), instead claiming that she qualifies under (1) and (2).[8] Brief at 9. However, as the district court explained (ER 16-17), she qualifies under neither because the courts of the D.C. Circuit upheld BIA's determination that the Tribe has no recognized governing body. CVMT I, 424 F. Supp. 2d at 200-203, aff'd CVMT II, 515 F.3d 1262.

Burley conflates being a "recognized governing body" with being "legally established" in an effort to avoid the fact that the Tribe has no recognized governing body, Brief at 9-10, but this again ignores the language of the statute, which makes clear that these are separate concepts. It is not enough to be merely a legally established organization of Indians to qualify as a "tribal organization" for purposes of the ISDEAA – such an organization must also be "controlled, sanctioned, or chartered by" a recognized governing body. 25 U.S.C. § 450b(l). As already noted, there is no such body here.

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[8] Any argument Burley might have regarding (3) is foreclosed by what the D.C. Circuit characterized as her "antimajoritarian gambit" in limiting adoption of the proposed tribal constitutions to her and her supporters (i.e. her daughters) when the Tribe had a potential membership of 250. CVMT II, 515 F.3d at 1267. Burley does assert that the district court held that there was no "tribal organization" for purposes of the ISDEAA "because the Tribe did not have full constituted membership," Brief at 8, but the district court nowhere discusses "full constituted membership," whatever that might mean.

Burley also argues that BIA's January 2004 determination that the self-determination contract was a "mature contract" means that the Tribe must be a tribal organization. Brief at 10-11. A "mature contract" is one that has been continuously 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). BIA's determination that the contract was "mature" only affects whether tribal organizations must comply with certain record-keeping requirements. 25 U.S.C. § 450c(a). It does not mean that BIA cannot re-evaluate the contractor and determine that it no longer qualifies for a contract under the ISDEAA.

Here, BIA initially recognized Burley as the Tribal Chairperson in June 1999 and entered into a self-determination contract with her shortly thereafter to assist the Tribe in becoming organized through the development of a tribal constitution and organized government, but cautioned her as early as October 2001 that it was recognizing the Tribal Council as "interim" only. ER 110, 134; CVMT I, 424 F. Supp. at 198. After further undemocratic attempts by Burley to limit membership in the Tribe to Burley's direct descendants, BIA eventually reconsidered its view of Burley and her claim to lead the Tribe and determined in February 2005 that it would no longer recognize her as the Tribal Chair and indeed

that it did not recognize any tribal government. ER 125-126. Burley challenged these determinations in CVMT I, but the D.C. district court upheld BIA's determination, and BIA explicitly relied on the court's holding in rejecting Burley's application for a 2008 AFA. ER 122-123. Nothing in the ISDEAA compels BIA to continue to recognize – and provide funding to – an interim tribal government or a rogue leader once it becomes clear that they are faithless to their own people, especially if there is a court decision to the contrary. CVMT I, 424 F. Supp. at 201-202.

As the district court properly determined, no "tribal organization" exists here for purposes of the ISDEAA. Moreover, Burley does not qualify as an "Indian tribe." Accordingly, she does not have standing to bring this suit under 25 U.S.C. §450f, and this Court may uphold the district court's decision to dismiss the lawsuit on this alternative ground.

III. BURLEY COULD NOT PREVAIL ON THE MERITS BECAUSE BIA PROPERLY DECLINED THE PROPOSED AFA.

As just discussed, BIA determined that the Tribe was not organized and that it lacked a recognized governing body. This determination was upheld by CVMT I and affirmed by CVMT II. ER16-17. Based on this, the district court properly ruled that "because the government's basis for denying the AFA has been upheld

by the courts", " the "Plaintiff has not shown it is likely to succeed on the merits of its claims." ER 18.

Burley does not dispute that the Secretary may only enter into ISDEAA self-determination contracts with tribal organizations. See 25 U.S.C. § 450b(j) (defining "self-determination contract" as a contract "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 explained in the previous section, because there was no recognized governing body or other democratically elected organization, there was no "tribal organization" with which to contract. Since Burley could not satisfy the fundamental requirement that the Secretary contract with a "tribal organization, there was no need for BIA to also address the five statutory bases for declining an ISDA contract. 25 U.S.C. § 450f(a)(2), 25 C.F.R. § 900.22. Accordingly, BIA was correct to return Burley's AFA application under

the ISDEAA, and the district court was correct to hold that she was not likely to prevail on the merits.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of Burley's action.

Dated: July 8, 2009

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STATEMENT OF RELATED CASES

Defendant-Appellee United States of America has no knowledge of any cases pending before this court related to the issues herein.

Dated: July 8, 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief does not exceed 30 pages, is proportionately spaced, has a type face of 14 points or more and contains 6,886 words (based on the Word Perfect word count tool).

Dated: July 8, 2009

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on July 8, 2009, she served a copy of:

ANSWERING BRIEF FOR APPELLEES

by placing said copy in an envelope addressed to the persons hereinafter named, at the places and addresses shown below, which are the last known addresses, and mailing said envelope and contents in the U.S. Mail in Sacramento, California.

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