United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CALIFORNIA VALLEY MIWOK TRIBE, Appellant, v. CENTRAL CALIFORNIA AGENCY SUPERINTENDENT, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Order Concerning Jurisdiction and Granting Expedited Consideration Docket No. IBIA 19-088 October 21, 2020

The California Valley Miwok Tribe of California (Tribe or Appellant)[1] has appealed to the Board from a July 23, 2019, decision (Decision) of the Central California Agency Superintendent (Superintendent), Bureau of Indian Affairs (BIA), to return without action an Indian Self-Determination Act (ISDA) contract proposal submitted by Silvia Burley as the Tribal Representative, for Fiscal Year (FY) 2019, FY 2020, and FY 2021. The Superintendent stated that the Department of the Interior (Department) has not recognized a governing body for the Tribe since issuance of a December 30, 2015, decision (2015 Decision) by the Assistant Secretary – Indian Affairs (Assistant Secretary), and therefore Appellant's contract proposal failed to meet the threshold requirements for contracting by a recognized tribal government in accordance with ISDA, 25 U.S.C. § 5321 *et seq.*, and its implementing regulations at 25 C.F.R. Part 900. Appellant alleges that the Decision is arbitrary, capricious, and contrary to law. Merits briefing in this matter has been completed.

On September 29, 2020, Appellant filed an emergency motion to vacate a purported BIA decision and related public notice (Decision and Notice) concerning a virtual meeting organized by BIA "to assist the [Tribe] . . . with organization of a formal government

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[1] The appeal was filed in the name of the Tribe, and the Board has captioned the case accordingly. The Board's caption of this case and its reference to the "Tribe" as the appellant shall not be construed as a determination on the merits regarding the authority of Burley to serve as the Tribal Representative or that of the individuals said to be serving as the Tribe's General Council to bring an appeal in the name of the Tribe.

structure by individuals who are eligible to participate in such a process."[2] Appellant argued that the Decision and Notice and the instant appeal from the Superintendent's July 23, 2019, ISDA decision share the same subject matter, and contended that under Board precedent, the instant appeal divests BIA of jurisdiction to undertake any deliberation or actions concerning that subject matter while the appeal is pending. Motion to Vacate at 2. The Board made a preliminary determination that BIA lacked jurisdiction to undertake the challenged actions identified in the Public Notice due to the subject matter and pendency of Appellant's appeal from the Superintendent's Decision, stayed the challenged actions until the Board resolved Appellant's motion, and solicited a response from the Regional Director to Appellant's motion, with opportunity for Appellant to reply. Order Soliciting Response from Regional Director to Appellant's Motion to Vacate, Oct. 2, 2020 (October 2 Order). The Board also indicated that it was inclined to expedite its consideration of the instant appeal and allowed parties to address whether the Board should do so in their briefing. *Id.* at 3.

The Board received a response from BIA and a reply from Appellant. In its response, BIA states that the Superintendent issued the Public Notice and that it represents the "first formal step in the process of assisting the Tribe to organize." Appellee's Response to Order and Motion to Dismiss, Oct. 6, 2020, at 2 (Appellee's Response). BIA requests that the Board deny Appellant's motion for lack of standing and reiterates its position that Appellant also lacks standing to bring the instant appeal. *Id.* at 1, 4. BIA argues that Appellant lacks standing because the Superintendent's Decision correctly concluded that Appellant does not have authority to represent the Tribe for purposes of contracting (or any other purpose). *Id.* at 2, 4.

BIA further argues that both the Superintendent's Decision to return Appellant's contract proposal, and the Superintendent's actions related to the Public Notice, are "consistent with and governed by" the Assistant Secretary's 2015 Decision concerning tribal membership and governance of the California Valley Miwok Tribe. *Id.* at 1, 3. According to BIA, "jurisdiction concerning the Superintendent's actions was previously assumed by the [Assistant Secretary] and cannot now be re-delegated to the [Board] because the 2015 Decision was final for the Department." *Id.* at 2. BIA asserts that the Assistant Secretary's 2015 Decision established that Appellant does not have authority to represent

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[2] Appellant's Motion for Leave and Motion to Vacate Appellees' September 2020 Decision and Notice for Lack of Jurisdiction over the Subject Matter; And Alternatively, Notice of Appeal of the Appellees' September 2020 Decision and Notice, Sept. 29, 2020, at 1-2 (Motion to Vacate) (quoting from the document attached to Motion to Vacate as Exhibit A, Public Notice, California Valley Miwok Tribe, aka Sheep Ranch Rancheria Organization, undated (Public Notice)).

the Tribe and consequently the instant "appeal . . . has already been adjudicated and resolved," citing the doctrine of *res judicata*. *Id.* at 3. The Regional Director also argues that any appeal regarding the Public Notice is premature because it concerns a "preliminary meeting to disseminate information" and is not a final action subject to appeal under BIA's appeal regulations in 25 C.F.R. Part 2. *Id.* at 2.

Appellant replies that the issue of standing was pending before the Board when the Public Notice was published and that "the agency's position on the matter does not allow the agency to act as though the appeal is not happening."[3] Appellant's Reply to Appellee's Response to Order and Motion to Dismiss, Oct. 14, 2020, at 4 (Appellant's Reply). Appellant notes that BIA does not dispute that the Board has jurisdiction for the purpose of determining whether Appellant is a "tribal organization" under ISDA and its implementing regulations, and that the Notice and Decision concerns the same subject matter as the instant appeal. *Id.* at 5 (citing Appellee's Response at 2). Appellant asserts that BIA merely "reiterates the problems it sees with the appeal itself," and Appellant disputes that there was any assumption of jurisdiction by the Assistant Secretary over the instant appeal. *Id.* Appellant requests that the Board vacate the Decision and Notice and stay any further proceedings by BIA. *Id.* at 6. Appellant also requests that the Board expedite its consideration of the appeal and renews its request for a hearing on the record. *Id.* at 14-15.

There was no assumption of jurisdiction by the Assistant Secretary over this appeal. BIA confuses the alleged preclusive effect of the Assistant Secretary's 2015 Decision on Appellant's appeal with the authority of the Assistant Secretary to assume jurisdiction over certain appeals to the Board, which authority is not applicable here in any event. Pre-award contract disputes under ISDA are governed by 25 C.F.R. Part 900, and except when they are referred to an administrative law judge for a hearing on the record, they are docketed immediately upon receipt by the Board, without waiting for the 20-day period described in 43 C.F.R. § 4.336. *See* 25 C.F.R. § 900.160(b).

BIA also conflates the issue of whether the Assistant Secretary's 2015 Decision is dispositive for this appeal—the very issue at the heart of Appellant's ISDA challenge[4]—with the issue of whether BIA was divested of jurisdiction, upon the filing of the instant appeal, to take the actions opposed in Appellant's motion. It is well settled that, "when an appeal is filed with the Board from a decision of a BIA official, BIA loses jurisdiction over the matter, except to participate as a party to the appeal." *See, e.g.*, *Alturas Indian Rancheria*

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[3] Appellant advises that BIA held the meeting described in the Public Notice on October 8, 2020, despite the Board's October 2 Order.

[4] Appellant argues that the 2015 Decision is not dispositive, based at least in part on a subsequent May 2019 decision by the Office of Federal Acknowledgment.

v. Pacific Regional Director, 53 IBIA 100, 101-02 (2011). This rule "maintains order in the processing of appeals and decisions" and is intended to avoid "'the obvious confusion that would result if two offices of the Department [of the Interior] were to exercise jurisdiction over the same matter simultaneously.'" *Yakama Nation v. Northwest Regional Director*, 51 IBIA 187, 187 (2010) (quoting *Tonkawa Tribe of Oklahoma v. Acting Anadarko Area Director*, 18 IBIA 370, 371 (1990)). This rule is not imposed merely to force BIA to "jump through procedural hoops" or to "protect the Board's turf," and is simply "part of every orderly review system." *Raymond v. Acting Aberdeen Area Director*, 19 IBIA 41, 42 (1990).

BIA is not without options where, as here, an appeal to the Board has divested it of jurisdiction over the matter. For example, BIA can request that the Board expedite its consideration of the appeal. BIA can also request a grant of jurisdiction from the Board.[5] BIA did not do so prior to issuing the Public Notice. In its October 2 Order, the Board made a preliminary finding that BIA lacked jurisdiction to pursue the actions related to the Decision and Notice challenged by Appellant. BIA has not alleged error in the Board's finding or requested a limited grant of jurisdiction/lifting of the stay to hold the organizational meeting and related actions. Nor does the Board now do so on its own motion. BIA has not asserted, much less demonstrated, that time is of the essence to take the challenged actions. BIA essentially reiterates the arguments it made during the course of briefing on the merits that the Superintendent's Decision is consistent with and governed by the Assistant Secretary's 2015 Decision, and that Appellant lacks standing. These arguments will be considered by the Board when deciding the appeal.

With respect to Appellant's motion to "vacate" the Decision and Notice, it is denied. The Public Notice was issued by the Superintendent. To the extent (if any) the Decision and Notice constituted an appealable decision, it was not subject to appeal to the Board under 25 C.F.R. § 2.4(e). But to be clear, the issue discussed above of whether any BIA official had *jurisdiction to take* the challenged actions during the pendency of this appeal is separate and distinct from the issue of which official would have authority to review those actions, to the extent they are subject to appeal.

As noted above, Appellant also requests that the Board expedite its consideration of the Superintendent's July 23, 2019, ISDA decision, and renews its request for a hearing on the record. Appellant's Reply at 14-15. Prior to receipt of the administrative record and briefing, the Board denied Appellant's original request for a hearing. *See* Order Concerning Appellant's Request for a Hearing on the Record and Order for Administrative Record,

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[5] When appropriate, BIA can also ask that its decision be placed into effect pending appeal. *See* 43 C.F.R. § 4.314(a); 25 C.F.R. § 2.6(a).

Oct. 31, 2019, at 2-3. To the extent Appellant renews its request for a hearing based on the arguments contained in its briefs on appeal, the Board takes that request under advisement. The Board grants Appellant's request for expedited consideration of the instant appeal.

The parties are advised that the Board will not predict when a decision may issue. Although the Board is now taking this case under expedited consideration, this does not preclude the Board from simultaneously addressing or considering other pending appeals, as necessary and appropriate.

for Robert E. Hall
Administrative Judge

Distribution: See attached list.

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