



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Eastern Oklahoma Region

Eastern Oklahoma Regional Office

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August 26, 2024

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Robert Burkybile III
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Miami, Oklahoma 74354

This is the decision of the Regional Director, Eastern Oklahoma Region (Region), Bureau of Indian Affairs (Bureau), regarding the *Notice of Appeal* (Appeal) and *Statement of Reasons* filed by Wm. Blake Follis as attorney for the Modoc Nation (Nation), for and on behalf of Robert Burkybile, *et. al.*, as the purported leadership of the Modoc Nation (hereinafter referred to as “Appellant” or “Follis Faction”).¹ See Administrative Record, Tabs 53, 56. The Follis Faction’s Appeal challenges the May 21, 2024, decision of the Superintendent, Miami Agency (Agency), recognizing Robert Burkybile III as Chief of the Nation on an interim basis for the federal purpose of accepting Modoc Nation Resolution No. 24-04, validated by his signature as Chief, requesting a Secretarial Election to amend the Constitution of the Modoc Nation (Superintendent’s Decision). See Administrative Record, Tab 51.

Factual Background

The Superintendent’s Decision to recognize Robert Burkybile as the Chief of the Nation on an “interim” basis stems from the fact that there were two elections held in 2022, for the purpose of transferring leadership from the then, duly elected and undisputed leadership, headed by Chief William Follis, to new leadership, which resulted in the “election” of two different leadership groups. The original date of the Nation’s election was scheduled on May 7, 2022, which appears to be consistent with the Nation’s Constitution.² The Administrative Record reveals that from there, the two separate “election” paths emerged. The facts of which are as follows:

¹ The Follis Faction is the Appellant in this Appeal. Based on the *Notice of Appeal*, *Statement of Reasons*, and letter dated August 6, 2024, setting out the Follis Faction’s Objection to Consideration of Petition Filed in Court of Indian Offenses, the Follis Faction’s Elected Council consists of Chief Robert Burkybile, Second Chief Gina McGaughey, Secretary/Treasurer Roman Rosiere, Council Member Jessica Mullin, and Council Member Braxton Graham.

² The Nation’s Constitution, Article IX, Section 2 provides, “[e]lections of the Modoc Elected Council shall take place during the annual meeting of the Modoc Tribal Council.” See Administrative Record, Tab 47. The Nation’s

On April 26, 2022, the Agency was notified by Troy Littleaxe, the Nation's Assistant Tribal Administrator / Tribal Attorney, that the Nation had "discovered a major discrepancy regarding over 200 recent Tribal membership applications." *See* Administrative Record, Tab 2. The April 26, 2022, email stated that the Nation's Chief, Bill Follis, and Elected Council had decided to push back the Nation's annual meeting and election "in order to allow a third party to audit all enrolment records to ensure that only those Modoc that are truly eligible for enrollment are on the [Nation's membership] roll." *Id.* The email further stated, "there are some individuals that want the election to proceed without verification and may approach the agency to intercede." *Id.* The Administrative Record includes a Tribal Resolution, dated April 21, 2022, signed by the then Chief, Bill Follis, and Tribal Administrator, Troy Littleaxe. The Resolution indicates the reasoning for the postponement to be "to protect the health and safety of the Nation and to preserve the integrity of the tribal election ... subject to the issuance of the Final enrollment audit report." *See* Administrative Record, Tab 1.

The Administrative Record reveals that on various dates thereafter, beginning April 29, 2022, to May 5, 2022, the Agency received several emails from tribal member Ben Karnes lodging complaints about the Nation's postponement of its annual meeting and election and notifying the Agency that a faction of the Nation's members was planning to hold the annual meeting and conduct an election on the original date, May 7, 2022, notwithstanding the postponement issued by Chief Bill Follis and his council. *See* Administrative Record, Tabs 3-7.

On June 13, 2022, the Agency received a letter, with attachments, from an attorney, Joe Keene claiming to represent the Nation and indicating that the Nation held its annual meeting and election on May 7, 2022, in accord with the Nation's Constitution. The letter stated that the Nation elected new leaders to its Elected Council, consisting of: Chief Kirk Miller; 2nd Chief Ben Karnes; Council Member Danny Burkybile; Council Member Edd Miller; and, Secretary/Treasurer Anita Williams, referred to collectively as the "Miller Council" within the letter (but hereinafter referred to as the "Miller Faction" for purposes of this Appeal). Further, the letter stated that the prior leadership of the Nation, consisting of Chief Bill Follis, 2nd Chief Robert Burkybile, Secretary/Treasurer Ramona Rosiere, Council Member Mona Craven, and Council Member Tyle Scifers (hereinafter referred to the "Former Follis Faction"), refused to leave office and indicated that it was engaged in carrying out a mass disenrollment of Modoc Nation citizens. The letter went on to claim that the "Modoc Nation Tribal Court" granted a temporary restraining order on June 7, 2022, against the Former Follis Faction enjoining it from holding out its council as the lawful Elected Council of the Nation. Notably, the letter expressly requested that the Bureau recognize the Miller Faction as the lawful governing body of the Nation on an interim basis until the ongoing litigation pending in the said "Modoc Nation Tribal Court" was completed; it also requested the Agency allow the Miller Faction access to the Nation's property and accounts/files. *See* Administrative Record, Tab 9.

Constitution, Article X, Section 1 provides, "[t]he annual Modoc Tribal Council meeting shall be held the first Saturday of May." *Id.*

Also on June 13, 2022, the Agency received a separate email, with attachments, containing Chief Bill Follis and the Follis Faction’s audit of the Nation’s membership roll wherein the membership eligibility of several individuals who appear to have been previously “enrolled” or were applicants as members of the Nation was being questioned. *See* Administrative Record, Tabs 10-11.

On June 14, 2022, the Agency received an email from Wm. Blake Follis, as purported attorney for the Nation, transmitting a letter dated June 14, 2022, and its attachments, signed by Bill Follis, as the Chief of the Nation. Chief Follis’ asserted the rightful elected leadership of the Nation to still be: Chief Bill Follis; Second Chief Rob Burkybile; Secretary / Treasurer Ramona Rosier; Councilwoman Mona Crave; and Councilman Tyler Scifers. It further described the actions of the Miller Faction as a “*coup d’etat*” being orchestrated via an unlawful election of the Nation’s elected council held on May 7, 2022, and an “unlawful” election of tribal judge, Jason Clark. In summary, Chief Follis’ letter explained that: the Follis Faction’s membership audit was based on “discrepancies and genealogical gaps” in the Nation’s membership roll; the Follis Faction’s delay of the General Election to a date later than that provided for in the Nation’s Constitution was due to its investigation and audit of the Nation’s membership roll; and the Miller Faction’s meeting and election held on May 7, 2022, was unlawful. It also described the existence of the two tribal courts instituted by each of the Miller and Follis Factions and the proceedings and temporary restraining orders issued by the respective tribal courts and judges.³ Those dueling proceedings appear to seek to enjoin each respective faction’s elected leadership from holding themselves out as the Nation’s elected leadership. Notably, it too, requested that the Bureau recognize the then Follis Faction’s council as the Nation’s leadership. *See* Administrative Record, Tab 12.

Confronted with what the Superintendent factually characterized as the existence of a tribal leadership dispute, the Superintendent took the following course of action: On June 24, 2022, the Agency sent separate written decisions in response to the Miller Faction’s June 13, 2022, letter to the Agency (*see* Administrative Record, Tab 9) and the Follis Faction’s June 14, 2022, letter (*see* Administrative Record, Tab 12) addressing each factions request that the Bureau recognize their respective faction as the legitimate leadership of the Nation. *See* Administrative Record, Tab 15, 16. The Superintendent’s June 24, 2022, letter to each faction provided the same substantive response and copied the other faction respectively. In pertinent part, both letters stated:

Accordingly, the BIA must refrain from generally recognizing any particular individual or group of individuals as the duly elected leadership of the Nation and allow it to resolve the dispute without BIA intervention. The BIA only has authority to make recognition decisions regarding tribal leadership ‘when it is truly necessary as an incident to satisfying some separate *Federal* obligation.’ Cayuga Indian Nation of New York v. Eastern Regional Director, BIA, 58 IBIA 171, (2014) (emphasis added). There currently exists no separate Federal obligation for which

³ The Bureau has previously stated concerns with the factions’ respective competing tribal courts and the legitimacy of those competing courts. *See* Administrative Record, Tab 15, 16. The Bureau has not made any determinations as to the legitimacy of either faction’s court. With this concern in mind, the Bureau provided written information to both factions as to the existence of the Bureau’s operation of Court of Indian Offenses and directed each faction to 25 C.F.R. § 11.100 *et seq.*; 25 C.F.R. § 11.104; and 25 C.F.R. § 11.118, for their consideration in resolving the Nation’s dispute as to the factions’ respective elections and the lawful leader of the Nation. *Id.*

the BIA must make any interim recognition decision, and therefore, cannot do so at this juncture with respect to the Nation.

Id.

Both of the Superintendent's June 24, 2022, decision letters provided the factions the right to appeal the decisions. The Follis Faction appealed the Superintendent's June 24, 2022, decision to the Regional Director.

On August 11, 2022, the Superintendent received "official notification" of the Follis Faction's delayed election results. The Follis Faction sent the Superintendent a letter dated August 10, 2022, setting out that the Follis Faction election occurred on August 6, 2022, and elected the following: Chief Robert Burkybile III; Second Chief Gina McGaughey; Secretary / Treasurer Ramona Rosiere; Council Member Jessica Mullin; Council Member Braxton Graham; and Tribal Judge Jack Shadwick. The letter was signed by "Chief Robert L. Burkybile III" and contained a Modoc Nation seal. *See* Administrative Record, Tab 25.

On December 6, 2022, the Regional Director affirmed the Superintendent's June 24, 2022, decision declining to recognize either the Miller or Follis Faction as the Nation's leadership. *See* Administrative Record, Tab 61. The Regional Director found that "the existence of an intra-tribal dispute as of June 24 [2022] was an undisputed fact based on circumstantial evidence submitted by both factions of competing tribal courts, purported prior and upcoming contested elections held by each faction, and an ongoing tribal membership audit." *Id.* Neither faction appealed the Regional Director's decision affirming the Superintendent's decision to decline to recognize either the Follis or Miller Faction as the Nation's elected council and leadership.

The Administrative Record reflects that since June 28, 2022, to present, the Agency has continued to receive additional letters and emails from both the Follis and Miller Factions each asserting claims that the elections held by the opposite faction were unlawful and not to be recognized by the Bureau. Each faction continues to communicate to the Agency: that their respective faction's election was lawful, resulting in their own proclaimed rightful Modoc Nation leadership; their respective complaints and assertions regarding the tribal membership determinations; and reports of ongoing tribal court litigation against each faction by the respective faction's tribal court. *See* Administrative Record, Tabs 13 – 35; 41; 45-46.

Indeed, the most recent document received at the Agency is a notice of a Petition filed on July 16, 2024, In the Court of Indian Offenses for the Miami Agency filed by Plaintiffs *Ben Karnes, Individually and Ex Rel. The Modoc Nation, a federally recognized Indian Tribe vs. Robert Burkybile, Gina McGaughey, Ramona Rosier, Jessica Mullin, Braxton Graham, and Jack Shadwick*, Case No. CIV-24-M09 (C.F.R. Court Filing). The C.F.R. Court received notice of the Filing via electronic mail on July 16, 2024. The C.F.R. Court Filing sets out Ben Karnes and the Nation as Plaintiffs with Defendants being listed as the Elected Council of the Follis Faction and seeks declaratory relief of the Miller Faction's Elected Council being judicially declared as the Nation's leadership.

On April 18, 2024, the Agency received a request from the Follis Faction for a Secretarial Election for the purpose of amending the Nation's Constitution. *See* Administrative Record, Tabs 44, 48. The Nation's Resolution No. 24-04, authorizing and requesting the Secretarial Election was signed by Robert Burkybile III as Chief of the Nation. *Id.*

On May 21, 2024, the Superintendent acknowledged receipt of the request for a Secretarial Election and issued a decision to recognize Robert Burkybile III on an interim basis as Chief and as having signature authority for the federal purpose of accepting Modoc Nation RESOLUTION NO. 24-04: 2024 Constitutional Amendment – Amend Article XVII – AMENDMENTS. *See* Administrative Record, Tab 51. We note that although the Superintendent's decision does recognize Robert Burkybile III on an interim basis as Chief based upon his successor status to the former Chief Follis, the Superintendent's decision does not recognize the "Follis Faction" or Appellant as having been duly elected.

This Appeal followed, filed by the Follis Faction on May 30, 2024.⁴

For the sake of clarity, the following table lists the purported elected council members of the Follis Faction and Miller Faction:

Elected Position	Follis Faction⁵	Miller Faction⁶
Chief	Robert Burkybile	Kirk Miller
Second Chief	Gina McGaughey	Ben Karnes
Secretary / Treasurer	Ramona Rosier	Anita Williams
Council Member	Jessica Mullin	Danny Burkybile
Council Member	Braxton Graham	Edd Miller

In determining the facts regarding this appeal and rendering this decision, the Regional Director considered all documents in the Administrative Record Tabs 1-81; the Supplement to the Administrative Record Tabs 1-9; the recent C.F.R. Court Filing for the limited purpose outlined below; as well as the Appellant's *Notice of Appeal, Statement of Reasons* and supporting documents, and its objection to the consideration of the C.F.R. Court Filing.

Procedural History

The Agency received the Follis Faction's request for a Secretarial Election on April 18, 2024. *See* Administrative Record, Tab 44. The Agency issued a letter acknowledging receipt of the Nation's request for a Secretarial Election as well as conveying the Agency's decision to recognize Robert Burkybile III on an interim basis for the federal purpose of accepting the Nation's Tribal Resolution, requesting a Secretarial Election, dated May 21, 2024 (i.e., Agency Decision). *See* Administrative Record, Tab 51. Interested parties set out in the Agency Decision were as follows:

⁴ The Procedural History is more fully set out within the Procedural History section of this decision.

⁵ Table provides for elected council for Follis Faction as described by Appellant's *Statement of Reasons*. This is the Appellant faction in this appeal proceeding.

⁶ Table provides for elected council for Miller Faction as described by June 13, 2022, letter, with attachments, from attorney Joe Keene representing Miller Faction, *see* Administrative Record, Tab 9, and C.F.R. Court Filing. This is the faction having recently filed tribal litigation via the C.F.R. Court Filing referenced herein.

Kirk Miller (Chief of Miller Faction); William Blake Follis (Follis Faction attorney); Joe Keene (Miller Faction attorney); Eddie Streeter (Regional Director); Charles Babst (Senior Attorney for the Department of Interior, Office of the Solicitor); and, N. Roxane Mock (Attorney for the Department of Interior, Office of the Solicitor).

A *Notice of Appeal* is deemed filed when postmarked. 25 C.F.R. § 2.214. Appellant received the Agency's letter recognizing Robert Burkybile III on an interim basis on May 28, 2024, and timely postmarked its *Notice of Appeal* (Appeal) on May 30, 2024. Accordingly, the Regional Director finds that this Appeal was timely filed 25 C.F.R. § 2.704.

A *Statement of Reasons* setting out an appellant's arguments in support of their appeal must be filed no later than 10 days after filing a *Notice of Appeal*. 25 C.F.R. §§ 2.705-2.706. Appellant provided a *Statement of Reasons* postmarked June 7, 2024. The Regional Director also finds that Appellant's *Statement of Reasons* was timely filed per 25 C.F.R. § 2.706.

Any interested party as well as the local bureau office (i.e., the Agency in this instance) may file a response to the *Statement of Reasons*, thereby becoming a participant. 25 C.F.R. § 2.706. Notably, no response to the *Statement of Reasons* from any interested party, including the Miller Faction who has received notice of all filings herein, has been received by the Regional Director for this appeal proceeding.

However, as stated in the Factual Background section, the Agency was provided notice of the C.F.R. Court Filing by the C.F.R. Court on July 16, 2024, via electronic mail. Accordingly, the Agency provided notice of the same to the Regional Director on July 16, 2024, due to the pendency of this appeal.

The appeal regulations provide the Regional Director may consider documentation that was not included in the administrative record by following the procedure set out in 25 C.F.R. § 2.504(b). Pursuant thereto, by correspondence dated July 26, 2024, the Regional Director provided a notice of additional documentation under consideration for incorporation into the administrative record for this appeal proceeding to the Appellant and interested parties. The Regional Director provided all parties ten (10) days from receipt to review and submit comments to the Regional Director regarding the additional documentation of the C.F.R. Court Filing being considered and added to the record for this appeal.

Additionally, the Regional Director's July 26, 2024, letter provided notice to all parties of an extension of the Regional Director's decision deadline for good cause. Per 25 C.F.R. § 2.711, a reviewing official may, for good cause and with notice to the interested parties and local bureau office, extend the deadline for the reviewing official's decision one time, for no more than an additional thirty (30) days. The Regional Director provided notice of the one-time extension of the decision deadline from July 25, 2024, to August 26, 2024, on the basis of good cause to facilitate a comment period for all parties as to the additional documentation of the C.F.R. Court Filing being considered by the Regional Director in this appeal.

Appellant received the Regional Director's July 26, 2024, letter and notice of the additional documentation of the C.F.R. Court Filing on August 5, 2024. Appellant provided its comment and

objection to the additional documentation of the C.F.R. Court Filing being considered to the Regional Director via letter dated August 6, 2024, and postmarked on July 29, 2024. The Regional Director finds the Appellant's comment and objection to the C.F.R. Court Filing timely filed.⁷

Standard of Review

The Appellant bears the burden of proving error in the Agency's decision. *McCann Resources, Inc. v. Eastern Oklahoma Regional Director, BIA*, 46 IBIA 226, 269 (2008); *Tallgrass Petroleum Corp. v. Acting Eastern Oklahoma Regional Director, BIA*, 39 IBIA 9 (2003). Bare disagreements with, or unsupported assertions concerning the Superintendent's factual determination are not sufficient to carry this burden of proof. *King v. Eastern Oklahoma Regional Director, BIA*, 46 IBIA 149, 153 (2007).

While the Regional Director reviews legal determinations *de novo*, *Estes v. Acting Great Plains Regional Director, BIA*, 50 IBIA 110, 115 (2009), he may not substitute his judgment for that of the Superintendent when reviewing decisions that are committed to the Superintendent's discretion. *Clear Water Resources, L.L.C. v. Eastern Oklahoma Regional Director, BIA*, 46 IBIA 112, 115 (2007). Instead, the proper role for the Regional Director is to determine whether the Superintendent followed or considered all legal prerequisites in the exercise of the discretionary authority and whether the Superintendent's decision is supported by the Administrative Record and adequately explained. *Kent v. Acting Northwest Regional Director, BIA*, 45 IBIA 168, 174 (2007).

Summary of Appellant Arguments

Appellant's challenge to the Superintendent's Decision essentially rests upon four propositions put forth for the Regional Director's consideration:

First, in its *Notice of Appeal*, Appellant essentially argues the Superintendent's Decision to recognize Chief Robert Burkybile on an interim basis is "arbitrary, capricious, and contrary to the law because there is no intra-tribal leadership [dispute] [that exists] as the majority of the purported Miller Faction have disclaimed their [own] purported election and the current Elected [Follis] Council's status as the representative leadership of the Nation is not in dispute." Second, Appellant asserts that "members of the Miller Faction members [sic] do not meet the statutory or tribal criteria for membership or enrollment with the Modoc Nation;" and, therefore, it is "legally impossible for Kirk Miller, and his council, to be enrolled with the Nation, let alone be elected leaders." Based on these membership arguments and the Miller Faction's alleged disclaimer of their dispute provided to the Follis Faction via submitted declarations from the Appellant, the *Statement of Reasons* argues that "there is no genuine dispute, or a live case or controversy, the issue is resolved or otherwise moot."

⁷ Based on the Appellant's August 6, 2024, letter submitted for purposes of stating an objection and response to the C.F.R. Court Filing being considered and added to the record for this appeal, it does not appear that Appellant served all interested parties with a copy of the Appellant's August 6, 2024, letter and attachments. The August 6, 2024, letter does not contain a certificate of mailing, carbon copy list, or any other indicator of the Appellant having served the interested parties with a copy as required by 25 C.F.R. § 2.214.

Third, Appellant's *Statement of Reasons* argues that the Nation is in an "identity crisis created by the Bureau" itself, essentially claiming that the issues within the Nation's membership roll were created due to the Bureau's own misinterpretation of the Act of May 15, 1978, P.L. 95-287, 92 Stat. 246, formerly codified at 25 U.S.C. § 861, (hereinafter referred to as "Reinstatement Act") which reinstated the Modoc Nation, among others, as a federally recognized Indian tribe. Appellant claims that "the Bureau has routinely misinterpreted the Reinstatement Act and the inaction of review or investigation of enrollment decisions made by the Nation has created the basis of this appeal." The *Statement of Reasons* sets forth additional, lengthy legal argument in support of this proposition, relating to the Bureau's alleged role in determining an individual's Indian status and requirements as to membership determinations for the Nation specifically. The *Statement of Reasons* also argues that the Bureau has an alleged responsibility to make tribal membership determinations and tribal voter eligibility determinations when conducting a Secretarial Election.

Fourth, Appellant's sought relief set forth in the *Notice of Appeal* and *Statement of Reasons* would have the Regional Director reverse the Superintendent's Decision of recognition on an "interim" basis and, instead, to recognize the "current Elected Council for all governmental purposes . . ." as the Nation's lawful leadership on what amounts to a permanent basis.

Discussion and Findings

The Regional Director has reviewed the Superintendent's Decision, the Administrative Record, the Supplement to the Administrative Record, as well as Appellant's *Notice of Appeal*, *Statement of Reasons* and supporting documents, and its objection to consideration of the C.F.R. Court Filing and relevant legal authorities. Based on said review, the Regional Director offers the following discussion and findings relating to Appellant's propositions or arguments:

Appellant Proposition 1: There is no ongoing intratribal dispute as to the Nation's lawful leadership because the Miller Faction has disclaimed its dispute, are not eligible for membership, and based on the Follis Faction's tribal court processes.

In support of this proposition Appellant claims that the individuals that make up the Miller Faction have executed "Declarations" executed August 31, 2024, and September 1, 2024, respectively disclaiming their dispute against the Follis Faction. According to the *Statement of Reasons*, these "Declarations" were executed shortly after the Follis Faction's postponed Nation annual meeting held on August 6, 2022. The Superintendent first received a copy of the Declarations on March 4, 2024. *See* Administrative Record, Tabs 41-42. However, the Regional Director finds that the Bureau cannot make any determination as to the purpose or validity of those declarations, inasmuch as the Regional Director was not involved in the context under which the declarations were executed or even whether their execution was in fact made by the members of the Miller Faction, inasmuch as the declarations are not notarized. Moreover, as explained in the Regional Director's prior June 2022 decision, the Regional Director noted that both Factions' tribal courts were instituted after the dispute over the leadership erupted and therefore, lays in question, the validity of the proceedings and any orders issued therefrom.

Notwithstanding, the existence of those "declarations," there have been continued correspondence evidencing the existence of an ongoing dispute. As set out in the Factual Background section,

from the time period of April 2022 to present, the Administrative Record and Supplement to the Administrative Record is replete with communications from the respective Follis and Miller Factions requesting recognition as the lawfully elected leadership of the Nation and allegations as to the opposite faction's illegitimacy. The Follis Faction continues to maintain its arguments as to the illegitimacy of the Miller Faction's election, tribal council, and tribal court judge as evidenced by the *Notice of Appeal* and *Statement of Reasons*. Meanwhile, the Miller Faction's C.F.R. Court Filing sets out its arguments as to the illegitimacy of the Follis Faction's election, tribal council, and tribal court judge. The C.F.R. Court Filing on its face as well as the Appellant's *Notice of Appeal* and *Statement of Reasons* provides *prima facia* evidence of an ongoing intratribal dispute. Accordingly, the Regional Director concludes and hereby finds, that an ongoing intratribal dispute continues to exist as to the Nation's lawful leadership.

Additionally, the recently filed and pending July 2024 C.F.R. Court Filing disputing the validity of the Follis leadership serves as additional evidence of an ongoing dispute. While the Follis Faction's August 6, 2024, objection to the Regional Director's consideration of the C.F.R. Court Filing has been reviewed and considered in deciding this appeal, the Regional Director finds that it is appropriate to consider the C.F.R. Court Filing in deciding this appeal, but only for the limited purpose of it serving as additional evidence of the fact that the Miller Faction presently continues to dispute the validity of the Follis Faction as the Nation's lawful leadership. Accordingly, the Regional Director hereby incorporates the C.F.R. Court Filing into the Administrative Record for this decision and appeal proceeding.

To be clear, the Regional Director is not interpreting or deciding the merits of any of the allegations set forth in the C.F.R. Court Filing. We further note, the Miller Faction C.F.R. Court Filing includes an exhibit containing a tribal resolution granting jurisdiction to the C.F.R. court to adjudicate the ongoing election dispute between the Miller and Follis factions. The tribal resolution is further evidence of the Miller Faction's ongoing attempt to exercise governance as the valid leadership of the Nation. The C.F.R. Court has yet to rule upon the merits of the C.F.R. Court Filing and the validity of the tribal resolution. Accordingly, the Regional Director, must and will refrain from making any independent finding regarding same⁸. *See generally Elem. Indian Colony of Pomo Indians v. Acting Pacific Regional Director*, 66 IBIA 248 (2019).

Appellant Proposition 2: Members of the Miller Faction do not meet the statutory or tribal criteria for membership or enrollment with the Modoc Nation and as such cannot maintain a dispute as to the Nation's leadership.

⁸ The Board has made clear, “[t]ribal ordinances and resolutions are not subject to BIA review as a matter of course. . . because BIA review of tribal enactments, [], is an intrusion into tribal self-government. . .” *Wells v. Acting Aberdeen Area Director*, 24 IBIA 142, 145 (1993)(citing *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director*, 21 IBIA 24, 28 (1991); *Wheeler v. U.S. Dep’t of the Interior*, 811 F.2d 549, 553 (10th Cir. 1987)).

The Follis Faction argues that the Miller Faction consists of non-Indians, non-Modoc Indians, and a Modoc defector; and thus, effectively no legitimate dispute as to the Nation's leadership can be maintained by the Miller Faction. The Regional Director must refrain from making any determinations regarding the Nation's membership criteria, its procedures for enrollment and the purported disenrollment criteria and procedures of certain individuals of the Miller faction or other similarly situated individuals.

The law is clear that the Bureau cannot decide or otherwise resolve disputes related to tribal membership. Disputes over tribal membership are a matter of internal tribal concern for tribal governments to decide. *Hendrix v. Coffey*, 2008 U.S. Dist. LEXIS 52587, *7 (W.D. Okla.) (*citing Williams v. Lee*, 358 U.S. 217, 220 (1958), *aff'd*, 305 F. App'x 495 (10th Cir. 2008)). The great weight of authority holds that tribes have exclusive authority to determine membership issues. *Id.* at *8 (*citing Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996)). A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination. *Id.*; *Passons v. Osage Nation Government*, 2015 U.S. Dist. LEXIS 172279, *9 (N.D. Okla. 2015) (*citing Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004)). The Regional Director finds that the clear weight of authority provides that membership determinations are inherent to tribal sovereignty and must be made by the tribe and not by the Federal government.

Nevertheless, our review of the Administrative Record reveals an important fact to be noted: the Follis Faction's April 18, 2024, request for a Secretarial Election contained an Eligible Voters List of tribal members, as required by the governing federal regulations, 25 C.F.R. § 81.1 *et seq.* The Eligible Voters List is compiled and certified by the tribe's governing body (or the Bureau, if the Bureau maintains the current membership roll for the tribe). 25 C.F.R. § 81.4.⁹ The Eligible Voters List contains a list of tribal members that are eligible to vote in the requested Secretarial Election. *Id.*

The Eligible Voters List submitted to the Agency with the Follis Faction's April 18, 2024, request for a Secretarial Election contains what it deems to be the Nation's list of all tribal members eligible to vote as determined by the Follis Faction itself. *See* Administrative Record, Tab 47. Notably, the submitted Eligible Voters List includes at least three (3) of the elected Miller Faction members as valid, current members of the Nation.¹⁰ Accordingly, the Regional Director hereby finds that at least as to those three members of the Miller Faction, there still exists a legitimate leadership dispute by those three currently enrolled tribal members. Moreover, the Regional Director finds

⁹ The Bureau does not maintain the Nation's membership roll.

¹⁰ The following Miller Faction elected council members are included in the Follis Faction's Eligible Voters List: Benjamin James Karns (named Plaintiff in C.F.R. Court Filing and Miller Faction elected Second Chief); Anita Jo Williams (Miller Faction elected Secretary Treasurer); and, Daniel Lee Burkybile (Miller Faction elected Council Member). The following Miller Faction elected council members are not included in the Follis Faction's Eligible Voters List: Kirk Miller (Miller Faction elected Chief); Edd Miller (Miller Faction elected Council Member); and, Jason Clark (Miller Faction elected Tribal Judge). The Regional Director further notes review and consideration of the Administrative Record's inclusion of the Follis Faction's submission of documents providing for the following: amended death certificate of Louie Andrew Miller; membership disqualification determination of Kirk Miller as found by the Nation's Tribal Registrar, Enrollment Committee, and Tribal Council; and, Tribal Registrar communications with Jason Clark as to his membership application being insufficient as of June 29, 2022.

that those three council members elected to the Miller Faction are sufficient to establish the fact that the dispute is ongoing.

Appellant Proposition 3: Appellant's arguments as to the Bureau's inaction of review or investigation of enrollment decisions and Bureau's alleged responsibility to make tribal membership determinations while conducting the requested Secretarial Election.

The *Statement of Reasons* argues that the Nation is in an “identity crisis created by the Bureau,” based on the Appellant’s argument that the alleged issues within the Nation’s membership roll were created due to the Bureau’s misinterpretation of the Reinstatement Act. The *Statement of Reasons* provides additional, lengthy legal argument as to determining an individual’s Indian status and requirements as to membership determinations for the Modoc Nation specifically. The *Statement of Reasons* further argues the Bureau has an alleged responsibility to make tribal membership determinations while conducting a Secretarial Election.

These arguments present facts and allegations with respect to the 1978 Reinstatement Act that were never brought to the attention of the Superintendent. The Administrative Record does not contain any request for the Superintendent to intervene and assist the Modoc Nation with its membership dispute or otherwise request the Bureau to give a legal opinion regarding same. Indeed, Appellant has never made any prior suggestion that the Reinstatement Act may provide some special authority for the Secretary to resolve or consider membership determinations specifically for the Modoc Nation. Accordingly, the Regional Directors finds these factual and legal allegations to not be properly before the Regional Director for consideration, inasmuch as they were not before the Superintendent and were not addressed as part of the Superintendent’s Decision.

As discussed previously, the law is clear that tribal membership is purely a tribal matter and the Bureau cannot make determinations or otherwise get involved in matters of tribal membership. The Regional Director finds no legal authority to suggest that the Reinstatement Act creates any exception or authority for it to do so. Additionally, regarding Appellant’s claim that the Bureau has some authority to make membership determination in conducting a Secretarial Election, we note that a Secretarial Election has not yet been initiated and that this argument also was not subject of the Superintendent’s Decision. Thus, the Regional Director finds that these arguments and the issues raised within are not properly before the Regional Director and declines to make any findings regarding same.

Appellant Proposition 4: Appellant's sought relief to have the Superintendent's Decision reversed and the Follis Faction be permanently recognized as the Nation's leadership for all governmental purposes.

Appellant’s relief sought, which is for the Regional Director to recognize the Follis Faction as the valid leadership on what amounts to be a permanent basis, rather than on an interim basis, would require the Superintendent and/or the Regional Director to examine and interpret the competing positions of the factions regarding the Nation’s Constitution and laws. In particular, it would require the Regional Director to examine and interpret the Nation’s elections procedures, membership requirements, and its enrollment and disenrollment processes and to make determinations as to whether one or the other or both Factions properly followed or otherwise

failed to follow those procedures in accordance with all applicable tribal law. The Regional Director finds the Bureau cannot and will not do so.

The Superintendent's Decision cites authority governing intratribal disputes which makes clear that it is the tribe's responsibility to ultimately resolve intratribal disputes once and for all. *Goodface v. Grassrope*. 708 F.2d 335 (8th Cir. 1983); *Cayuga Indian Nation of New York v. Eastern Regional Director, BIA*, 58 IBIA 171 (2014).. The Bureau's authority is limited to identifying a tribal representative(s) through which the Bureau can fulfill its statutory and trust responsibilities to the tribe pending resolution of the tribe's internal dispute through tribal mechanisms. Decision of the Bureau of Indian Affairs Director, *In Re: Appeals of Decision of Reg'l Director, Western Reg'l Office, Bureau of Indian Affairs, Dated October 17, 2023, Concerning Recognition of a Representative of the Te-Moak Tribe of Western Shoshone Indians of Nevada*, 17 .

Legal precedence makes clear that when a tribal governance dispute has not been resolved and the Bureau is required to interact with the tribe for government-to-government purposes, the Bureau may need to determine with whom to recognize on an interim basis. *Id.* at 14 (citing *LaRocque v. Aberdeen Area Dir.*, 29 IBIA 201, 203 (1996)). The leading case on this point is *Goodface v. Grassrope*. 708 F.2d 335 (8th Cir. 1983). "The BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body in the *interim* before resolution of the election dispute (emphasis added)." *Id.* at 338-39. Interim recognitions are generally less intrusive on a tribe's sovereignty whereas broad and general recognitions are more intrusive and should generally be rare. *Id.* A Bureau interim recognition decision is intended to determine with whom the Bureau will interact for government-to-government purposes until the dispute is resolved or until developments within the tribe warrant a new Bureau recognition decision, interim or otherwise. *Picayune Rancheria of the Chukchansi Indians v. Pac. Reg'l Dir.*, 62 IBIA 103, 115 (2016). Tribal requests for Secretarial Elections cause a government-to-government interaction. 25 C.F.R. § 81.1; *Goodface*, 708 F.2d at 339.

Indian tribes retain their inherent power to determine tribal membership and to regulate domestic relations among members. Decision of the Bureau of Indian Affairs Director, *In Re: Appeals of Decision of Reg'l Director, Western Reg'l Office, Bureau of Indian Affairs, Dated October 17, 2023, Concerning Recognition of a Representative of the Te-Moak Tribe of Western Shoshone Indians of Nevada*, 14 (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)). This inherent tribal sovereignty establishes the presumption that intratribal disputes (whether concerning leadership or membership) are beyond the jurisdiction of federal review. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1986)). **These principles further inform the general federal policy that tribal government disputes must be resolved by tribal procedures, not by the Department.** *Id.* (citing *id.* at 65; *Fisher v. District Court*, 424 U.S. 382, 386-89 (1976); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *Wheeler v. Dep't of Interior*, 811 F.2d 549 (10th Cir. 1987); *Cahto Tribe of the Laytonville Rancheria v. Pac. Reg'l Dir.*, 38 IBIA 244, 249 (2002); *Carrigan v. Acting E. Okla. Area Dir.*, 36 IBIA 87, 88 (2001); *John v. Acting E. Area Dir.*, 29 IBIA 275, 277-278 (1996)) (emphasis added).

Tribal election disputes, like tribal elections, are key facets of internal tribal governance governed by tribal constitutions, statutes, or regulations. "It is a well-established principle of Federal law

that intra-tribal disputes should be resolved in tribal forums. This rule applies with particular force to intra-tribal disputes concerning the proper composition of a tribe's governing body." *Bucktooth v. Acting Eastern Area Director*, 29 IBIA 144, 149 (1996). "The determination of tribal leadership is quintessentially an intra-tribal matter raising issues of tribal sovereignty, and therefore the Department should defer to tribal resolution of the matter through an appropriate tribal forum, including the normal electoral process." *Hamilton v. Acting Sacramento Area Directory*, 29 IBIA 122, 123 (1996).

In relevant part, the Nation's Constitution provides for the following with respect to the Nation's tribal elections:

All tribal elections shall be conducted in accordance with an election ordinance enacted by the Nation's Elected Council within six (6) months of adoption of this constitution and which is consistent with this constitution. Such ordinance shall provide for secret balloting, majority election, tie votes, and procedures for handling protests, resolving election disputes, and registration of voters. Provisions shall also be made for the conduct of recall, referendum and initiative elections and uniform procedures for submitting and validating petitions.

See Administrative Record, Tab 47 (Constitution, Article IX – Elections, Section 3).

The Follis Faction argues that the Miller Faction's election was unlawful based on Chief Bill Follis' alleged lawful postponement of the Constitutionally set time for the Nation's elections. Chief Follis' postponement of the election was established for the stated purposes of public safety from COVID-19 virus and to maintain tribal election integrity via completing the ongoing membership audit being conducted. The Follis Faction further argues that the Miller Faction is ineligible for tribal membership based on the results of the membership audit directed by Chief Follis' administration. Additionally, the Follis Faction argues that the Miller Faction tribal court judge is unlawful based on the Nation's Constitution requiring tribal judges be an enrolled tribal member and the Miller Faction's elected judge's alleged ineligibility for tribal membership.

Meanwhile, the Miller Faction complains that the Follis Faction did not have authority to postpone the date of the election for the Nation's tribal council since the date is explicitly set by the Nation's Constitution on a sum certain date without provision for delay or postponement. The Miller Faction argues its election was lawful based on, *inter alia*, its election being in compliance with the Nation's Constitutional requirements. Additionally, like the Follis Faction, the Miller Faction argues the Follis Faction's tribal court judge is unlawful based on the Nation's Constitution requiring tribal judges be an enrolled tribal member and the Follis Faction's elected judge's alleged ineligibility for tribal membership.

Regarding the Superintendent's Decision that is subject of this Appeal, the Regional Director finds that the Superintendent properly determined that a government-to-government purpose was created via the April 18, 2024, request for a Secretarial Election. Given the Regional Director's above finding that an ongoing intratribal dispute exists, the Regional Director further finds that the

government-to-government purpose created by the Follis Faction's request for a Secretarial Election required an interim recognition decision to be issued by the Superintendent. Based on this finding and the finding that an ongoing intratribal dispute exists, the Regional Director finds that the Superintendent's Decision appropriately ascertained the underlying facts as evidenced by the Administrative Record and Supplement to the Administrative Record. Further, the Regional Director finds that the Superintendent's Decision applied the appropriate, relevant law in making an interim recognition decision and provided appropriate explanation as to the reasoning for the Superintendent's Decision.

Pursuant to the legal authorities explained herein, tribal election disputes must be resolved by internal tribal mechanisms. Based on these foregoing legal authorities, the Regional Director finds that the Superintendent's explanation in her decision recognizing the Follis Faction on an interim basis is legally sound. The Superintendent's Decision reasoned that Chief Bill Follis was the last undisputed leader of the Nation; that Chief Follis passed away on October 14, 2022; and "[i]n accordance with Article VI, Section 2 of the Constitution of the Modoc Nation, upon the death of the Chief the Second Chief shall assume all duties and responsibilities of the Chief. Accordingly, I [Superintendent] will recognize the constitutional transfer of chief executive power to Second Chief Burkybile because it is the only government-to-government leadership recognition mechanism that does not require me to choose between competing Faction elections." See Administrative Record, Tab 51.

Given that an ongoing intratribal dispute exists in large part due to the Follis and Miller Factions disputing each other's tribal council elections in competing tribal courts and more recently, in the C.F.R. Court, the reasoning provided by the Superintendent's Decision is directly in line with the leading IBIA cases and federal case law directing the Bureau's navigation of tribal election disputes, intratribal disputes, and interim recognition decisions. The reasoning set forth in the Superintendent's Decision follows the legal authorities cited herein requiring that election disputes be resolved by tribal processes, not by the federal government.

Decision

Based upon the review of the Superintendent's Decision, *Notice of Appeal*, *Statement of Reasons* and supporting documents, Administrative Record, and Supplement to the Administrative Record, the Regional Director finds that the Superintendent's Decision is supported by the Administrative Record and Supplement to the Administrative Record. Moreover, the Follis Faction's appeal and the C.F.R. Court Filing viewed together further substantiate the Superintendent's determination that an ongoing intratribal dispute exists. The Regional Director further finds that the Superintendent correctly applied the facts to the relevant law and fully explained her reasoning in issuing an interim recognition decision within the Superintendent's Decision.

The Regional Director further finds that the Appellant's *Notice of Appeal* and *Statement of Reasons* do not meet the burden of proving error in the Superintendent's Decision. The Administrative Record, Supplement, and C.F.R. Court Filing provide clear evidence of an ongoing intratribal dispute of the Nation's leadership. Moreover, the Appellant's arguments as to membership determinations in general and Secretarial Elections do not address the merits of this appeal

proceeding. The Appellant fails to identify any contradictory IBIA authority, or any other legal authority, allowing for or directing anything but an interim recognition decision.

Based on the foregoing findings, the Regional Director finds that that the Superintendent's Decision follows the requisite IBIA precedent and applicable law concerning intratribal political disputes and that the Appellant has not met the burden of showing error in the Superintendent's Decision. Accordingly, the Superintendent's Decision is hereby AFFIRMED.

Appeal Rights

This Decision may be appealed to the Interior Board of Indian Appeals (IBIA), U. S. Department of the Interior 801 N. Quincy St., Suite 300, Arlington, Virginia, 22203, or pursue judicial review in Federal court. An appeal to the IBIA must be in accordance with the regulations in 43 C.F.R. §§ 4.310-4.340. The regulations are available online free of charge at <https://ecfr.federalregister.gov/current/title-43 subtitle-A/part-4>. You must sign your notice of appeal to the IBIA and mail the notice within 30 days from the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to the IBIA. Your notice should clearly identify the decision being appealed.

If possible, attach a copy of the decision to the notice of appeal. Copies of the notice of appeal must be sent to (1) the Assistant Secretary – Indian Affairs, MS-3071-MIB, U.S. Department of the Interior, 1849 C Street, N.W. Washington, D.C. 20240; (2) each interested party known to you; (3) Eastern Oklahoma Regional Office, Bureau of Indian Affairs, P.O. Box 8002, Muskogee, OK 74402; and (4) U.S. Department of the Interior, Tulsa Field Solicitor's Office, P.O. Box 470330 Tulsa, OK 74147. The notice of appeal sent to the IBIA must certify that copies have been sent to these parties. If a notice of appeal is filed, the IBIA will advise you regarding further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the 30-day appeal period. No extension of time may be granted for filing a notice of appeal.

Respectfully,

TRACIE

WILLIAMSON

Digitally signed by
TRACIE WILLIAMSON
Date: 2024.08.26
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Acting Regional Director

CC: Via Certified Mail – Return Receipt Requested