

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

CALIFORNIA VALLEY MIWOK TRIBE,

Petitioner,

Case No. D061811

v.

**SUPERIOR COURT OF CALIFORNIA FOR
THE COUNTY OF SAN DIEGO,**

Respondent.

**CALIFORNIA GAMBLING CONTROL
COMMISSION**

Real Party in Interest,

**“CALIFORNIA VALLEY MIWOK TRIBE,
CALIFORNIA”; YAKIMA K. DIXIE;
VELMA WHITEBEAR; ANTONIA LOPEZ;
ANTONE AZEVEDO; MICHAEL
MENDIBLES; and EVELYN WILSON,**

Real Party in Interest.

San Diego County Superior Court, Case No. 37-2008-00075326-CU-CO-CTL
Ronald L. Styn, Judge

**CALIFORNIA GAMBLING CONTROL COMMISSION’S
RETURN TO PETITION FOR WRIT OF MANDATE;
SUPPORTING MEMORANDUM**

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

Case Name: **CALIFORNIA VALLEY MIWOK TRIBE v. SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO** Court of Appeal No.: **D061811**

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

(Check One) **INITIAL CERTIFICATE**

☐

SUPPLEMENTAL CERTIFICATE

☒

Please check the applicable box:

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There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d).

☐

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Full Name of Interested Entity or Party	Party Check One	Non-Party	Nature of Interest (Explain)
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	<input type="checkbox"/>	<input type="checkbox"/>	

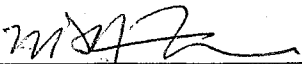
The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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JUNE 15, 2012
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INTRODUCTION

For approximately seven years, the California Gambling Control Commission (Commission) has withheld and set aside quarterly Revenue Sharing Trust Fund (RSTF) payments for the benefit of the California Valley Miwok Tribe (Tribe) as a consequence of an ongoing intra-tribal organizational and leadership dispute that has caused the Bureau of Indian Affairs (BIA) to deem the Tribe unorganized and lacking a tribal government. The Commission's only interest with respect to the RSTF payments is to take reasonable steps to ensure that they are disbursed to an individual or governing body authorized to receive and administer them on behalf of the entire Tribe.

By this Petition, the Burley Faction seeks two alternative forms of extraordinary relief in an effort to avoid the potential consequences of an adverse outcome in *California Valley Miwok Tribe v. Salazar*, which is currently pending at the dispositive motion stage in the United States District Court for the District of Columbia. (Case No. 1:10-cv-160, filed Jan. 24, 2010.) *California Valley Miwok Tribe v. Salazar* originally consisted, in part, of a direct challenge to Assistant Secretary for Indian Affairs Larry Echo Hawk's¹ December 22, 2010 letter decision that overturned a series of prior BIA agency actions that had found the Tribe

¹ Mr. Echo Hawk is referred to in the Petition as the "ASI." To avoid possible confusion, we will use that abbreviation in this brief as well.

unorganized and lacking a tribal chairperson or government.² The ASI's letter then recognized the Burley Faction as the legitimate governing body of the Tribe.

The filing of *California Valley Miwok Tribe v. Salazar* caused the ASI to withdraw his December 22, 2010 decision for reconsideration. The ASI reissued his decision on August 31, 2011, but expressly stayed its effect pending the outcome of the federal case.

By this Petition, the Burley Faction seeks an order vacating the stay on dispositive motions so that it may bring a dispositive motion seeking disbursement of the RSTF payments on a ground that is ambiguously described in the petition, but appears to be that the Commission has a duty to disburse the RSTF payments to the Burley Faction irrespective of the outcome of *California Valley Miwok Tribe v. Salazar*—in other words, irrespective of whatever determination the BIA may ultimately make, on the basis of the outcome of the federal case, as to the organization and leadership of the Tribe. This relief should be denied because the issues being litigated in the federal case are inextricably intertwined with the basis of the Commission's decision to withhold RSTF payments from the Burley Faction, and, moreover, because if the ASI's decision is upheld in

² The First Amended Complaint in *California Valley Miwok Tribe v. Salazar*, filed October 17, 2011, now challenges the ASI's modified, but similar, August 31, 2011 decision.

California Valley Miwok Tribe v. Salazar, that outcome would likely be dispositive of this case and would spare the parties and the court the burdens of, further dispositive motion practice in this case. For these reasons, the trial court's stay on dispositive motions is a reasonable act of case management that acknowledges that the outcome of *California Valley Miwok Tribe v. Salazar* will necessarily bear upon the outcome of this case, and that conserves the resources of the trial court and the parties.

Second, the Burley Faction seeks an order directing the trial court to enter judgment in its favor on the basis of the ASI's August 31, 2011 decision, irrespective of the fact that the operation of that decision has, by its own terms, been stayed pending the outcome of *California Valley Miwok Tribe v. Salazar*, and irrespective of the fact that the outcome of that case may vacate the ASI's decision and reinstate the prior BIA agency actions as the position of the BIA, thus eliminating the basis for the judgment the Burley Faction now seeks to persuade this Court to compel.

The Commission respectfully requests that the Court deny the petition in its entirety.

ANSWER TO PETITION FOR WRIT OF MANDATE

Real party in interest California Gambling Control Commission, in answer to petitioner's Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief, admits, denies, and alleges as follows:

1. Real party in interest admits the allegation in paragraph 1 based on information provided by petitioner.

2. Real party in interest admits the allegations in paragraph 2.

3. Real party in interest admits the allegations in paragraph 3.

4. Real party in interest denies that the challenged ruling occurred on March 7, 2012. The stay that is at issue in this petition was imposed by the trial court on April 6, 2011. (Ex. to Pet. for Writ of Mandate, Bates 0383.³) Real party in interest denies that this petition was filed “well within the historically acceptable 60 day time frame.” This petition was filed approximately one year after the trial court imposed the stay on dispositive motions.

5. Real party in interest admits the allegation in paragraph 5.

6. Real party in interest admits the allegation in paragraph 6.

7. Real party in interest admits that this Court’s April 16, 2010 decision contains the text quoted in paragraph 7, but denies that the phrase “must be litigated upon remand of this action to the trial court[]” constitutes a mandatory direction to the trial court, and further denies that such a mandatory direction to the trial court is the “law of the case” and must be followed by the trial court.

³ All citations herein to “Bates xxxx” refer to the pagination of the three volumes of exhibits filed by the petitioner.

8. Real party in interest admits that in footnote eight of its April 16, 2010 decision, this Court, at the Commission's request, took judicial notice of a January 28, 2010 order issued by the Interior Board of Indian Appeals. Real party in interest admits that the January 28, 2010 order (erroneously cited as "Ex. 11") does, at Bates 0221-0222, contain the language quoted in paragraph 8. The last sentence of paragraph 8 is interpretive and argumentative, and real party in interest therefore denies that "[t]he BIA had taken the position that this was necessary, so that the Tribe could be 'organized' under the IRA, and thus qualify for P.L. 638 federal contract funding."

9. Real party in interest admits that the Interior Board of Indian Appeals (IBIA) concluded that it lacked jurisdiction to adjudicate tribal enrollment disputes and dismissed and referred the Tribe's (Burley's) second claim to the Assistant Secretary of Indian Affairs.

10. Real party in interest admits that this Court did not stay the Superior Court action pending resolution of the "enrollment dispute" issue by the Assistant Secretary of Indian Affairs. Real party in interest denies that this Court ordered the lower court to litigate the issue of "whether the Commission is properly withholding funds from the Miwok Tribe" upon remand to the trial court.

11. Real party in interest admits the allegations contained in paragraph 11.

12. Real party in interest admits the allegation contained in paragraph 12.

13. Real party in interest admits the allegations contained in paragraph 13.

14. Real party in interest admits that it contends in this action that it is withholding the RSTF payments from the Burley Faction because the BIA does not recognize an individual or leadership group of the Tribe for the purpose of conducting government-to-government business between the federal government and the Tribe, and, further, because a dispute exists as to which individual or group properly represents the Tribe as a whole. Real party in interest admits that the Plaintiff moved for judgment on the pleadings with respect to the Commission's answer to the first amended complaint. Real party in interest admits that the Plaintiff asked the trial court to take judicial notice of the ASI's December 22, 2010 decision letter. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 14, and further notes that petitioner's citation to "Ex. '49,' '52,' '55'" appears erroneous.

15. Real party in interest admits that on March 11, 2011, the trial court took judicial notice of the ASI's December 22, 2010 decision letter, and granted the motion for judgment on the pleadings, ruling that the Commission's answer did not state facts sufficient to constitute a defense to the first amended complaint in light of the ASI's December 22, 2010

decision letter. Real party in interest admits that among its contentions were that the Tribe did not have a governing body recognized by the BIA, and that a leadership dispute existed within the Tribe. Real party in interest admits that the Court directed plaintiff's counsel to prepare the judgment and to prepare a separate order giving the Commission a statutory, temporary stay of execution on the judgment. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 15, and notes that petitioner's citation to "Ex. '49,' '52,' '55'" appears to be erroneous.

16. Real party in interest admits the allegations contained in paragraph 16.

17. Real party in interest admits the allegations contained in paragraph 17.

18. Real party in interest admits the allegations contained in paragraph 18.

19. Real party in interest admits the allegations contained in paragraph 19.

20. Real party in interest admits that before the trial court could sign the judgment, the ASI issued a letter dated April 1, 2011, setting aside his December 22, 2010 decision letter. Real party in interest avers that the ASI's April 1, 2011 letter speaks for itself and does not require admission or denial. Real party in interest admits that the parties appeared before the

trial court on April 6, 2011, advising the trial court of the ASI's April 1, 2011 letter. Real party in interest avers that the trial court's order dated April 6, 2011, speaks for itself and does not require admission or denial. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 20.

21. Real party in interest admits the allegations contained in paragraph 21.

22. Real party in interest admits that on August 31, 2011, the ASI issued a reconsidered decision. Real party in interest avers that the ASI's August 31, 2011 letter speaks for itself and does not require admission or denial. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 22.

23. Real party in interest admits that on September 7, 2011, the plaintiff unsuccessfully sought an ex parte application for an order entering judgment against the Commission based on the ASI's August 31, 2011 letter, and further admits that the Commission and the Intervenors opposed the application, arguing that the stay language in the ASI's August 31, 2011 letter prevented the trial court from doing so. Real party in interest avers that the ASI's August 31, 2011 letter speaks for itself and the contents do not require admission or denial. Real party in interest admits that the trial court ordered that the Clerk hold onto the proposed judgment. Real party in interest lacks sufficient information or belief to either admit or deny what

the plaintiff interpreted or believed at the time of the hearing on September 7, 2011, and, on that basis, denies each and every such allegation contained in paragraph 23.

24. Real party in interest admits that on October 21, 2011, the trial court denied the plaintiff's formal motion for entry of judgment. Real party in interest avers that the trial court's minute order dated October 21, 2011 (Bates 0418-0419) speaks for itself and its contents do not require admission or denial. Real party in interest admits the plaintiff's allegations in paragraph 24 concerning its participation in *California Valley Miwok Tribe v. Salazar*, based on the information provided by the plaintiff. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 24.

25. Real party in interest admits that the Clerk returned the judgment as unsigned. Real party in interest denies that this action made it clear that the trial court is not going to enter judgment if the federal court ultimately upholds the ASI's August 31, 2011 decision letter.

26. Real party in interest admits the allegations contained in paragraph 26.

27. Real party in interest avers that the trial court's order dated November 18, 2011 (Bates 0430-0433), speaks for itself and its contents do not require admission or denial. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 27.

28. Real party in interest avers that the trial court's order dated December 23, 2011 (Bates 0436-0438), speaks for itself and its contents do not require admission or denial. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 28, and notes that the portion of the trial court's order quoted in paragraph 28 omits the word "claims" before the final word "moot."

29. Real party in interest avers that the transcript of the deposition of Yakima Dixie on February 7, 2012, speaks for itself and its contents do not require admission or denial. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 29.

30. Real party in interest admits that Plaintiff brought an ex parte application on March 7, 2012, for an order lifting the stay on this action so that dispositive motions could be filed. Real party in interest denies that Dixie stated at his deposition that he "resigned from the Tribe." As indicated in Petitioner's paragraph 29, Dixie testified that he resigned as Tribal Chairman. Real party in interest denies that Dixie stated at his deposition that "Burley is the Chairperson of the Tribe." As indicated in Petitioner's paragraph 29, Dixie instead testified that his signature appeared on a document which, in part, stated that "[t]he General Counsel [sic] has appointed Silvia Burley as Chairperson." Real party in interest admits, on information and belief, that Dixie had previously stated that the resignation document was a forgery. Real party in interest admits that Dixie stated at

his deposition that the signature on the resignation document was his signature. Real party in interest admits that Plaintiff asserted at the time of its ex parte application for an order lifting the stay on dispositive motions that Dixie's admission concerning his resignation resolved the Tribal leadership dispute which the Commission claimed prevented it from releasing the RSTF payments to the Tribe. Real party in interest admits that the Commission opposed the ex parte application. Real party in interest avers that in its opposition to the ex parte application, the Commission denied that it was withholding RSTF payments from the Tribe solely on the basis of a leadership dispute between Dixie and Burley.

(Bates 0047:1-11.) Real party in interest avers that in its opposition to the ex parte application, the Commission asserted that Dixie's admission that he resigned as Chairman of the Tribe "is immaterial to the Commission's position." (*Id.*) Real party in interest avers that in its opposition to the ex parte application, the Commission asserted that "the Commission does not independently investigate and decide the merits of the claims of individuals or groups to disbursements of RSTF monies, but instead relies upon the final agency actions of the BIA." (Bates 0047:19-21.) Real party in interest further avers that in its opposition to the ex parte application, the Commission asserted that "[t]he Commission disburses RSTF monies only to those individuals or leadership bodies recognized by the BIA for the government-to-government business of the disbursement of federal Public

Law (P.L.) 638 contract funds.” (Bates 0047:21-23.) Real party in interest admits that the Plaintiff requested that the stay be lifted so that Plaintiff could bring a dispositive motion concerning the propriety of the Commission’s “policy” as described above. Real party in interest denies that the “pending federal litigation . . . has nothing to do with RSTF money[]” and avers that the federal litigation is relevant to the payment of the RSTF money on the ground that the pending federal litigation involves the BIA’s recognition of an individual or leadership body for the purposes of conducting government-to-government business. Real party in interest admits that the trial court explained its denial of Plaintiff’s application in the manner quoted in paragraph 30. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 30.

31. Real party in interest admits that at the ex parte hearing, Plaintiff was not asking the trial court to rule on any dispositive motion, but was instead asking the trial court to lift the stay so that a dispositive motion could be filed. Real party in interest denies that the trial court misunderstood this Court’s “directions on remand” and incorporates by this reference its response to paragraph 7, above, concerning the scope and meaning of this Court’s April 16, 2010 decision. Real party in interest avers that the issues of “the Commission’s asserted reasons for withholding RSTF payments from the Tribe” and “the issues decided by the ASI

presently under judicial review in the federal court[]” are inextricably intertwined because the latter issues bear directly upon final agency actions of the BIA concerning the recognition of individuals or groups for the purpose of conducting government-to-government business between the federal government and the Tribe, and that the separation urged by the Plaintiff is artificial and illusory. Real party in interest admits that the Compact requires that a Non-Compact (RSTF eligible) tribe be a federally-recognized tribe. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 31.

32. Real party in interest denies that the trial court erred in not allowing the matter to be briefed on a formal motion, and further denies that the trial court erred by imposing a stay “that runs contrary to the specific instructions of this Court on remand.” Real party in interest incorporates by this reference its response to paragraph 7, above, concerning the scope and meaning of this Court’s April 16, 2010 decision.

33. Real party in interest admits the allegations contained in paragraph 33 as to the plaintiff’s petition for relief concerning the trial court’s imposition of a stay on dispositive motions. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 33.

34. Real party in interest denies that the trial court’s stay order “has deprived the Plaintiff of an opportunity to have its claims litigated and

resolved in the Superior Court[.]” and instead avers that the trial court’s stay order has only reasonably postponed the litigation of Plaintiff’s claims in the Superior Court pending the outcome of *California Valley Miwok Tribe v. Salazar*, and, further, that the litigation of Plaintiff’s claims in the Superior Court may prove unnecessary depending on the outcome of *California Valley Miwok Tribe v. Salazar*, which may result in the entry of judgment in favor of Plaintiff in this action without further litigation. (See Bates 0382.) Real party in interest denies that the trial court’s stay order is contrary to this Court’s April 16, 2010 decision, and incorporates by this reference its response to paragraph 7, above, concerning the scope and meaning of this Court’s April 16, 2010 decision. Real party in interest admits that it demurred to the Complaint on the ground that the Plaintiff Burley Faction lacked capacity and standing to bring this lawsuit because of a pending Tribal leadership dispute and the lack of a recognized governing body for the Tribe. Real party in interest admits that the Commission asked this Court to take judicial notice of the IBIA decision, a portion of which is quoted in paragraph 34. Real party in interest admits that this Court rejected the Commission’s contention that the Plaintiff lacked standing or capacity to sue until the ASI ruled on the issues identified in paragraph 34. Real party in interest denies that the Superior Court’s stay order “does what this Court has already ruled cannot be done[.]” and avers that the issues under review in *California Valley Miwok*

Tribe v. Salazar, including, but not limited to, “the ASI’s decision recognizing the Tribal governing body and Burley as the rightful Tribal leader[,]” concern matters that are different from capacity and standing to sue, and that are directly related to the identification of the individual or group properly entitled to receive the RSTF payments on behalf of the Tribe. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 34.

35. Real party in interest denies that the Plaintiff will suffer irreparable injury if the writ is not granted and avers that there is no evidence before the Court that the Tribe cannot wait for the federal litigation to conclude. Real party in interest admits that the ASI’s decision that the Intervenor’s are challenging in federal court was in the Plaintiff’s favor, and that it was, while in effect, sufficient to cause the trial court to grant judgment on the pleadings against the Commission. Real party in interest admits that the trial court ordered the release of RSTF money by the Commission to the Plaintiff (Bates 0319), but denies that judgment to that effect was ever entered and avers that the ASI set aside his decision on April 1, 2011. (Bates 0350.) Real party in interest avers that the trial court then stayed entry of judgment pending the issuance of a new decision by the ASI (Bates 0381-0383), and that the ASI’s decision, when reissued on August 31, 2011, contained a provision staying implementation pending the resolution of *California Valley Miwok Tribe v. Salazar* (Bates 0415). Real

party in interest denies that the current circumstances of this case are comparable to those of the cases cited in the argument contained in paragraph 35. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 35.

36. Real party in interest denies that the Tribe is suffering financially because of the stay, and avers that there is no evidence before the court of such suffering, and, further avers that it is entirely speculative whether lifting the stay would result in an earlier distribution of RSTF payments to the Plaintiff Burley Faction than would occur if the stay is left in place until the outcome of *California Valley Miwok Tribe v. Salazar* is known. Real party in interest denies that the argument contained in paragraph 36 concerning section 4.3.2.1(b) of the Compact is relevant to the current circumstances of this case, and avers that in 2004, the BIA recognized an individual for the purposes of conducting government-to-government business between the California Valley Miwok Tribe and the federal government, but at the present time does not. Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 36.

37. Real party in interest admits that the ASI has issued two separate decisions stating that the Tribe is a federally-recognized tribe consisting of five adult members that function with a recognized resolution form of government, and that neither the BIA nor anyone else can force the Tribe to

organize under the IRA or expand its membership. Real party in interest avers that the ASI's decisions currently have no force or effect. (Bates 0415; 0419.) Real party in interest admits that Dixie has admitted that he resigned as Tribal Chairman, but denies that Dixie has admitted that Burley is the rightful Tribal Chairperson. Real party in interest avers that Dixie has only admitted that his signature appears on a document purporting to designate Burley as Tribal Chairperson. Real party in interest incorporates by this reference its response to paragraph 29, above, concerning the admissions made by Dixie at his February 7, 2012 deposition. Real party in interest avers that the Plaintiff's allegations concerning Intervenors' "litigation tactics" are speculative and argumentative. Real party in interest denies that the issue of whether the Commission is properly withholding RSTF money from the Burley Faction is not before the federal court in *California Valley Miwok Tribe v. Salazar*, and avers that the federal case directly concerns whether the ASI's decision recognizing the Burley Faction will be affirmed or vacated with the result of reinstating prior BIA decisions denying such recognition and finding that the Tribe was unorganized and lacked a tribal chairperson. (See CGCC RJN 030; Bates 0408-0415.) Except as expressly admitted herein, real party in interest denies each and every allegation contained in paragraph 37.

38. Real party in interest denies each and every allegation contained in paragraph 38 on the ground that they are conclusory and argumentative.

39. Real party in interest denies each and every allegation contained in paragraph 39 on the ground that they are conclusory and argumentative.

40. Real party in interest denies each and every allegation contained in paragraph 40 and avers that there is no evidence before the court that the Plaintiff will suffer irreparable injury if the writ is not granted.

41. Real party in interest denies each and every allegation contained in paragraph 41 on the ground that they are conclusory and argumentative.

AUTHENTICITY OF EXHIBITS

42. Each of the exhibits contained in the Appendix in Support of Return to Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief is a true and correct copy of the original document on file with the respondent court. The Appendix is paginated consecutively, and page references in this Return are to the consecutive pagination.

PRAYER

Wherefore, real party in interest, California Gambling Control Commission, prays that this Court:

1. Deny the petition for writ of mandate and/or prohibition or other appropriate relief in its entirety;
2. Award real party in interest, California Gambling Control Commission, its costs incurred in this proceeding.

Dated: June 15, 2012

Respectfully submitted,

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VERIFICATION

“Ordinarily an answer to a petition for an extraordinary writ, like the petition itself, must be verified. However, no verification is required where an answering defendant is ‘the state, [or] any . . . public agency . . . is defendant.’ *Epstein v. Super. Ct. (Brown)* (2011) 193 Cal.App.4th 1405, 1409 (citing Code Civ. Proc., § 446, subd. (a)) (internal citations omitted). In such cases, an unverified answer is sufficient to establish the truth of its uncontroverted allegations. (*Ibid.*)

SUPPORTING MEMORANDUM

I. RELEVANT FACTUAL BACKGROUND.

On March 26, 2004, the BIA issued a letter to Silvia Burley in which the BIA stated that it did not yet view the Tribe as an “organized” Indian tribe, and observed that the Tribe’s organizational efforts up to that time had involved only Silvia Burley and her two daughters, and did not reflect any effort to reach out to the larger Indian community surrounding the Rancheria. (CGCC Appx. 010-013.) The BIA made suggestions as to how the organizational effort could be improved, and offered to assist the Tribe with that effort. (*Id.*) This determination was an appealable decision under the procedures of the BIA.

On February 11, 2005, the BIA issued a letter to Yakima Dixie in which it dismissed Dixie’s challenge of the BIA’s recognition of Silvia Burley as “tribal Chairman” as moot in light of the BIA’s March 26, 2004 decision that rejected the Tribe’s proposed constitution and “made it clear that the Federal government did not recognize Ms. Burley as the tribal Chairman.” (CGCC Appx. 014-015.) The BIA encouraged Dixie, “either in conjunction with Ms. Burley, other tribal members, or potential tribal members, to continue your efforts to organize the Tribe” (*Id.*) The letter stated that “the BIA does not recognize any tribal government” (*Id.*)

In 2005, the Commission, which had previously disbursed RSTF payments to Silvia Burley, began to withhold and set them aside for later disbursement once the Tribe became organized and the BIA recognized an individual or leadership group for the purpose of doing business with the Tribe.

On November 6, 2006, the BIA sent a letter to Yakima Dixie reiterating its desire to assist the Tribe in its organizational efforts and noting the BIA's responsibility "to determine that it is dealing with a government that is representative of the Tribe as a whole." (CGCC Appx. 016-017.)

On December 12, 2008, the BIA responded to an inquiry from Deputy Attorney General Peter Kaufman, an attorney for the Commission, concerning the status of the leadership for the Tribe. (CGCC Appx. 018-020.) The letter contained a summary of the history of the Tribe and "the current leadership dispute." (*Id.*) The letter observed that the Tribe "has no government"

On January 14, 2009, the BIA again wrote to Peter Kaufman and advised him that the Tribe was "in the midst of a leadership dispute between Ms. Burley and Yakima Dixie [and that] the United States does not recognize any tribal government or governmental leader of the Tribe." (CGCC Appx. 021.)

Through the time period encompassed by the above described letters, the Commission continued to withhold and set aside the Tribe's quarterly RSTF payments on the ground that the BIA had not identified any individual or governmental entity that was representative of the Tribe as a whole.

On April 16, 2010, this Court reversed the trial court's dismissal of this action, which had been entered on the ground that the Burley Faction lacked the capacity and standing to sue the Commission on behalf of the Tribe. This Court held that the Burley Faction did have capacity and standing, but the Court expressly declined to rule on the merits of the underlying dispute, observing that the trial court was better situated to do so. (Bates 0208.)

On December 22, 2010, the Assistant Secretary for Indian Affairs, Larry Echo Hawk (ASI), issued a decision letter that reversed many of the findings that had previously been expressed by the BIA, and declared that the Burley Faction constituted the federally-recognized leadership of the Tribe. (Bates 0248-0253.)

On January 24, 2011, Plaintiffs California Valley Miwok Tribe, its Tribal Council, Yakima Dixie, Velma Whitebear, Antonia Lopez, Michael Mendibles, Evelyn Wilson, and Antoine Azevedo filed an action in the United States District Court for the District of Columbia challenging and seeking to vacate the ASI's December 22, 2010 decision. (*California*

Valley Miwok Tribe v. Salazar, et al., Case No. 1:11-cv-00160.) (CGCC Appx. 022-064.)

On March 11, 2011, the trial court granted the Plaintiff's motion for judgment on the pleadings on the basis of the ASI's December 22, 2010 decision. (Bates 0254-0255.) However, on April 1, 2011, before judgment had been entered on that motion, the ASI withdrew his December 22, 2010 decision for reconsideration in light of the filing of *California Valley Miwok Tribe v. Salazar*, which directly challenged the decision. (Bates 0350.) As a result of the withdrawal of the decision upon which the trial court's ruling on Plaintiff's motion for judgment on the pleadings had been based, on April 6, 2011, the trial court stayed entry of judgment and imposed a stay on proceedings, other than discovery, pending a further order of the court. (Bates 0381-0383.)

On August 31, 2011, the ASI issued his reconsidered decision, the effect of which was, by its terms, stayed pending the resolution of *California Valley Miwok Tribe v. Salazar*. (Bates 0408-0415.) The Plaintiff then brought an ex parte application for entry of judgment based upon the August 31, 2011 decision. The trial court took judicial notice of that decision, and denied the application without prejudice, leaving the stay on proceedings, other than discovery, in place. (Bates 0417.) The Plaintiff then brought a noticed motion seeking entry of judgment that was denied, with the trial court observing that the ASI's decision furnished the only

basis for the judgment the Plaintiff sought, and that the ASI's decision was stayed until the resolution of *California Valley Miwok Tribe v. Salazar*.

(Bates 0419.)

On September 1, 2011, a joint status conference statement was filed in *California Valley Miwok Tribe v. Salazar* in which the ASI stipulated that "the August 31, 2011 decision will have no force and effect until such time as this court renders a decision on the merits of plaintiffs' claims or grants a dispositive motion of the Federal defendants." (See Bates 0421.)

On March 7, 2012, the Plaintiff brought an ex parte application for an order lifting the stay so that dispositive motions, and possibly trial, could proceed, purportedly on the basis of certain admissions made by Yakima Dixie at his deposition in February of 2012. The trial court denied the application, observing that Dixie's testimony "is not going to end the case . . . and . . . until the federal court decides, the ultimate issue won't be resolved, and I don't see how I could issue a final judgment, so I'm going to deny the application." (Bates 0012.) This Petition ensued.

II. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

The Petition seeks a common law writ intended to correct an abuse in the exercise of discretion by the trial court, in this instance the imposition of a stay of all proceedings, other than discovery, pending the outcome of *California Valley Miwok Tribe v. Salazar*. Alternatively, the Petition could

be construed to seek a writ to enforce a nondiscretionary duty on the part of the court to hear and determine the merits of all matters properly before it.

A writ of mandate will not issue simply to “control” the exercise of judicial discretion. (*Robbins v. Super. Ct. (County of Sacramento)* (1985) 38 Cal.3d 199, 205.) Mandate will lie where it appears judicial discretion could be exercised in only one way, as where the court is under a duty to act in a particular way but refuses to do so or where the facts support only one decision. (*Nathanson v. Super. Ct.* (1974) 12 Cal.3d 355, 361.) In the present case, the Commission is unaware of any mandatory duty bearing upon the trial court to vacate a stay imposed for the purposes of case management.

If there was a choice of action, judicial discretion is abused when the court’s exercise of discretion exceeded “all bounds of reason, all of the circumstances before it being considered.” (*State Farm Mut. Auto. Ins. Co. v. Super. Ct. (Corrick)* (1956) 47 Cal.2d 428, 432.)

The petitioner has the burden of showing an abuse of discretion or that there was a mandatory duty to act in a particular way, not involving judgment or discretion. (*Arnold v. Williams* (1963) 222 Cal.App.2d 193, 196-197.) In this case, the Burley Faction has primarily presented an unsupported and speculative equitable argument (delay in receiving the RSTF payments) in support of its Petition, and has not shown that the trial

court's imposition of the stay and refusal to lift the stay exceeded all bounds of reason, all of the circumstances before it being considered.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO ENTER JUDGMENT ON THE BASIS OF THE ASI'S AUGUST 31, 2011 DECISION.

A. The ASI's August 31, 2011 Decision Is Stayed Pending the Outcome of *California Valley Miwok Tribe v. Salazar*.

The language of the ASI's August 31, 2011 decision, amplified by the conduct of the ASI's attorney in the *California Valley Miwok Tribe v. Salazar* case, makes it clear that the ASI intends that the application and effect of his August 31, 2011 decision be stayed until the resolution of the federal case. The ASI's August 31, 2011 decision provides:

This decision is final for the Department and effective immediately, but implementation shall be stayed pending resolution of the litigation in the District Court for the District of Columbia, *California Valley Miwok Tribe v. Salazar*, C.A. No. 1:11-cv-00160-RWR (filed 03/16/11).

(Bates 0415.) Petitioner urges the Court to misinterpret the first portion of the first sentence, and thus apply the decision in a manner the ASI did not intend. That the decision "is final for the Department and effective immediately," does not mean, as the Plaintiff urges, that some portion of the decision remains in effect notwithstanding the subsequent phrase, "but implementation shall be stayed" The first phrase is instead a term of art that means the decision is a "final agency action" not subject to further appeal or review within the Department of the Interior, and subject to

judicial review under the federal Administrative Procedure Act. (See 5 U.S.C. § 704 (making a final agency action subject to judicial review).)1 No decision, which at the time of its rendition is subject to appeal to a superior authority within the Department, is final for purposes of judicial review unless the deciding official makes the decision “effective immediately.” (25 C.F.R. § 2.6(a) (2011).)

The ASI’s intent to stay the effect of his August 31, 2011 decision is confirmed by his stipulation in a joint status report dated September 1, 2011, and filed in *California Valley Miwok Tribe v. Salazar* that except for purposes of judicial review, the August 31, 2011 decision is stayed and “will have no force or effect” until such time as the federal court renders a decision on the merits of plaintiffs’ claims or grants a dispositive motion of the federal defendants in the action.” (Bates 0421.)

This Court should reject any contention that the ASI’s August 31, 2011 decision has been, or is currently, effective for any purpose other than judicial review. Accordingly, for this reason alone, the ASI’s August 31, 2011 decision cannot serve at this time as a basis for compelling the trial court to enter judgment on its prior order granting judgment on the pleadings in favor of the Burley Faction on the basis of the ASI’s earlier, December 22, 2010 decision.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED THE STAY ON DISPOSITIVE MOTIONS PENDING THE OUTCOME OF *CALIFORNIA VALLEY MIWOK TRIBE V. SALAZAR*.

A. The Issues In This Case Are inextricably Intertwined With the Issues In *California Valley Miwok Tribe v. Salazar*, and the Trial Court Lacks Jurisdiction to Independently Adjudicate The Legitimacy of the Burley Faction's Claim to the Tribe's RSTF Payments.

The plaintiff Burley Faction seeks in the trial court to compel the Commission to disburse to it approximately eight million dollars in quarterly RSTF payments the Commission has withheld and set aside for the benefit of the Tribe during the intra-tribal governance and leadership dispute that has caused the BIA to deem the Tribe unorganized and lacking a tribal chairperson or government. The Commission has refused to disburse the RSTF payments to the Burley Faction because substantial doubt exists as to whether the Burley Faction is the legitimate governing body of the Tribe and whether the Burley Faction represents the Tribe as a whole. In order to prevail in this action, the Burley Faction must either prove that it is the legitimate governing body of the Tribe, or that the Commission must disburse the retained RSTF payments to the Burley Faction for some other reason even though it is not recognized by the BIA as the legitimate governing body of the Tribe, e.g., that the Burley Faction was the first claimant purporting to represent the Tribe, and the terms of the 1999 Tribal-State Compacts (Compact) provide the Commission with no

discretion to withhold the RSTF payments from a claimant purporting to represent a federally-recognized Indian tribe, including no discretion to maintain a policy of deferring to the findings of the BIA as to the recognized leadership of the Tribe. The latter appears to be the Burley Faction's primary motivation for seeking to lift the stay to permit it to file a dispositive motion and, if necessary, proceed to trial in the trial court without regard to the outcome of *California Valley Miwok Tribe v. Salazar*.

Alternatively, the Burley Faction may wish to argue that the terms of the Compact require the Commission to conduct its own independent investigation of the legitimacy of a claimant to RSTF payments, without regard for whatever conclusions the BIA may have reached, or may in the future reach, concerning the identity of the individual or governing body authorized to receive and administer funds on behalf of the Tribe as a whole. If the latter is the Burley Faction's objective, it is clear that many, if not all, of the material facts relevant to a determination of the legitimacy of the Burley Faction as the representative of the Tribe are directly at issue in *California Valley Miwok Tribe v. Salazar*.

Plaintiffs in *California Valley Miwok Tribe v. Salazar*, consisting of the California Valley Miwok Tribe, its Tribal Council, Yakima Dixie, and five other individuals, seek to vacate and set aside the ASI's August 31, 2011 decision as "arbitrary, capricious, unsupported by substantial evidence in the record, an abuse of discretion and otherwise not in accordance with

law[.]” (First Amended Complaint, CGCC Req. Jud. Not. 030.⁴) The ASI’s August 31, 2011 decision (Bates 0408-0415), which would be vacated and set aside if the plaintiffs prevail in *California Valley Miwok Tribe v. Salazar*, contains both factual findings and the following conclusions that would be directly relevant to an independent determination by the Commission that the Burley Faction is authorized to receive and administer the RSTF payments on behalf of the Tribe:

1. “At the present date, the citizenship of the CVMT consists solely of Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace;” (Bates 0408.)
2. “The CVMT today operates under a General Council form of government, pursuant to Resolution #CG-98-01” (Bates 0409.)
3. “[T]he CVMT’s General Council is vested with the governmental authority of the Tribe, and may conduct the full range of government-to-government relations with the United States[.]” (*Id.*)
4. “[T]he five acknowledged citizens are the only citizens of the Tribe, and the General Council of the Tribe has the exclusive authority to determine the citizenship criteria for the Tribe.” (Bates 0410.)

⁴ The initial Complaint filed in *California Valley Miwok Tribe v. Salazar* is attached to the Commission’s appendix in support of return to petition for writ of mandate (CGCC Appx.) at CGCC Appx. 022-064.)

5. “Only upon a request from the General Council will the Department assist the Tribe in refining or expanding its citizenship criteria, or developing and adopting other governing documents.” (Bates 0415.)

The foregoing, and other factual findings and conclusions, which are included in the ASI’s August 31, 2011 decision and were also included in the ASI’s December 22, 2010 decision, form the basis of the trial court’s existing ruling in the Burley Faction’s favor on the Burley Faction’s motion for judgment on the pleadings in this action. (Bates 0418-0419.)

Assuming the trial court has the jurisdiction to adjudicate the identity of the Tribe’s leadership, which the Commission does not concede and which this Court, contrary to the Burley Faction’s representation in its petition,⁵ did not expressly rule upon in its April 16, 2010 decision, the trial court cannot adjudicate the legitimacy of the Burley Faction as the authorized governing body of the Tribe without determining the foregoing and other facts stated in the ASI’s decision. With respect to the BIA, the foregoing facts may be set aside as a result of the outcome of *California Valley Miwok Tribe v. Salazar*, and be replaced by prior BIA decisions that found the Tribe unorganized and lacking a tribal chairperson or government. Accordingly, an adjudication of the entitlement of the Burley Faction to disbursement of the Tribe’s RSTF monies is inextricably

⁵ See Petition at p. 5.

intertwined with the outcome of *California Valley Miwok Tribe v. Salazar* unless the Court adopts the position that a leadership dispute of an Indian tribe may be adjudicated by a state court without reference to the BIA's determinations. Such a position would be inconsistent with the principle that only the Department of the Interior, acting through the BIA, is authorized, and has the jurisdiction, to resolve a tribal leadership dispute. Recognition of a tribal government and the officials entitled to act on a tribe's behalf are matters that are generally within the exclusive purview of the federal executive branch. (*Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior* (7th Cir. 2001) 255 F.3d 342, 346-347.)

The trial court's decision to stay all proceedings other than discovery is consistent with the limits of the trial court's jurisdiction, recognizes the importance of the outcome of *California Valley Miwok Tribe v. Salazar* to this case, and therefore does not constitute an abuse of discretion.

B. There Is a Substantial Likelihood That the Outcome of *California Valley Miwok Tribe v. Salazar* Will be dispositive of This Case.

In the event the ASI's August 31, 2011 decision is affirmed in *California Valley Miwok Tribe v. Salazar*, the primary factual basis of the trial court's ruling on the Burley Faction's motion for judgment on the pleadings will be reinstated, possibly disposing of this action without significant further proceedings. It is arguable that only in the event the

ASI's decision is vacated by *California Valley Miwok Tribe v. Salazar* would further dispositive motions and/or trial be appropriate or required.

Accordingly, the trial court's decision to stay proceedings (except for discovery) pending the outcome of the federal case may spare the parties, and the court, the burden of one or more unnecessary dispositive motions, and possibly an unnecessary trial, and thus reflects reasonable case management and does not constitute an abuse of discretion.

C. The Stay Is Not Inconsistent With This Court's April 16, 2010 Decision.

The Burley Faction argues in its petition that this Court *ordered* the trial court, on remand, to try the issue of whether the Commission is properly withholding funds from the Tribe, citing this Court's April 16, 2010 decision at page 19 (Bates 0208). This appears to be an overly literal reading of that portion of the decision, which more reasonably appears to explain why this Court did not stray into the merits of this issue at that time. Moreover, the trial court has not refused to try this issue. But for the interruption caused by the withdrawal and stay of the ASI's decision(s) as a result of the filing of *California Valley Miwok Tribe v. Salazar*, the trial court has already adjudicated the Burley Faction's claims by granting its motion for summary adjudication. (See Petition, ¶¶ 15-20 and documents cited therein.) Further, the stay in the trial court does not constitute a refusal to try the issue if it becomes necessary to do so—it constitutes only

a case management decision as to when and under what circumstances to do so, i.e., after the outcome of *California Valley Miwok Tribe v. Salazar* is known.

It is also important to note that this Court issued its April 16, 2010 decision more than eight months before the ASI issued his December 22, 2010 decision, nine months before *California Valley Miwok Tribe v. Salazar* was filed on January 24, 2011, and nearly 12 months before the trial court imposed the stay that is at issue in this petition. The circumstances of the case clearly changed during that interval, and the trial court's hands should not be tied by the Burley Faction's overly literal reading of this Court's April 16, 2010 decision.

Accordingly, it cannot reasonably be said that the trial court's stay disregards this Court's April 16, 2010 decision or, as the Burley Faction urges, disregards the law of the case.

D. Yakima Dixie's Admissions Are Immaterial to the Merits of the Stay.

Yakima Dixie's admissions that he signed a document that appears to constitute his resignation as Tribal Chairman, and signed a Tribal Council document appearing to appoint Silvia Burley as Tribal Chairperson are the purported basis for this petition. The Burley Faction oversimplifies the Commission's reason for withholding and setting aside the RSTF payments for the benefit of the Tribe by suggesting that it is only the leadership

dispute between Yakima Dixie and Silvia Burley that concerns the Commission—this is not so. In and of itself, Dixie's admission that he resigned as Tribal Chairman is immaterial to the Commission's position.

The Commission contends that its designation in the Compact as trustee of the RSTF requires it to take reasonable steps to ensure that RSTF funds are disbursed to individuals or groups properly authorized to receive and administer the funds on behalf of their respective tribes. In order to discharge this duty in a manner requiring the least possible discretion on its part and thus consistent with the general intent of the Compact to minimize the Commission's discretion with regard to collecting and disbursing RSTF monies, and in recognition of the fact that no entity other than the Department of the Interior, acting through the BIA, has the authority and jurisdiction to decide matters concerning the organization and leadership of Indian tribes (see *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, *supra*, 255 F.3d at pp. 346-347), the Commission does not independently investigate and decide the merits of the claims of individuals or groups to disbursements of RSTF monies to a tribe, but instead relies upon the final agency actions of the BIA. The Commission disburses RSTF monies only to those individuals or leadership bodies recognized by the BIA for the government-to-government business of the disbursement and receipt of federal Public Law 638 contract funds. By applying this standard, the Commission has implicitly adopted the same fiduciary

standard for the disbursement of RSTF monies as the BIA applies with respect to the disbursement of P.L. 638 contract funds to federally recognized Indian tribes.

As the Commission has repeatedly stated during this litigation, it will disburse the accrued RSTF monies to whatever individual or leadership group is finally recognized by the BIA for the purpose of disbursing federal P.L. 638 funds to the California Valley Miwok Tribe. As the outcome of *California Valley Miwok Tribe v. Salazar* will provide direction to the BIA in that regard, the stay imposed by the trial court is appropriate and should be maintained until the federal case has been decided, notwithstanding Dixie's admissions.

CONCLUSION

For the reasons stated above, the Commission respectfully requests that the Burley Faction's petition for writ of mandate and/or prohibition be denied in its entirety.

Dated: June 15, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached CALIFORNIA GAMBLING CONTROL COMMISSION'S RETURN TO PETITION FOR WRIT OF MANDATE; SUPPORTING MEMORANDUM uses a 13 point Times New Roman font and contains 8,349 words.

Dated: June 15, 2012

KAMALA D. HARRIS
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DECLARATION OF SERVICE

Case Name: California Valley Miwok Tribe v. Superior Court

Case No.: D061811

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On June 15, 2012, I served the attached **CALIFORNIA GAMBLING CONTROL COMMISSION'S RETURN TO PETITION FOR WRIT OF MANDATE; SUPPORTING MEMORANDUM** by placing a true copy thereof enclosed in a sealed envelope and causing such envelope to be personally delivered by Golden State Overnight courier service to the office of the addressee listed below:

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Fourth Appellate District
750 B Street, Suite 300
San Diego, CA 92101

Original + 4 copies

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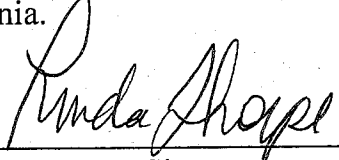
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I declare under penalty of perjury under the laws of the State of California
the foregoing is true and correct and that this declaration was executed on
June 15, 2012, at Sacramento, California.

Linda Thorpe
Declarant



Signature