IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

CALIFORNIA VALLEY MIWOK TRIBE, Plaintiff and Petitioner, v. **CALIFORNIA GAMBLING CONTROL COMMISSION, ET AL** Defendant and Respondent. **CALIFORNIA VALLEY MIWOK TRIBE, CALIFORNIA (A.K.A. SHEEP RANCH RANCHERIA OF ME-WUK INDIANS, CALIFORNIA), YAKIMA K. DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, ANTONE AZEVEDO, MICHAEL MENDIBLES, AND EVELYN WILSON,** Intervenors and Respondents.	Case No. D061811

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

INTERVENOR-RESPONDENTS' RETURN TO PETITION FOR WRIT OF MANDATE; SUPPORTING MEMORANDUM

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CERTIFICATE FO INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons to list in this certificate pursuant to California Rules of Court, rule 8.208(e)(3).

Dated: June 18, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

MATTHEW S. MCCONNELL

Attorneys for Intervenors and Real Parties in Interest

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I.

INTRODUCTION

This case grows out of a long running dispute over the membership and leadership of the California Valley Miwok Tribe ("Tribe"). Intervenors-Respondents represent the rightful members of the Tribe—242 adults, and their children, who are lineal descendants of known historical members of the Tribe. Intervenors maintain, consistent with Miwok custom and federal law, that all members of the Tribal community are entitled to a voice in the Tribe's governance.

Plaintiff/Petitioner Silvia Burley claims that the Tribe consists solely of five persons: herself, her two daughters, her granddaughter, and Intervenor Yakima Dixie (whom she has purported to "disenroll" on at least one occasion). She claims to be the leader of this "tribe" by virtue of "elections" in which only she and her daughters participated. Her attempts to oust the Tribe's real members and seize control of this Tribe have lasted more than a decade and spawned multiple federal lawsuits, including a published opinion by the Court of Appeals for the District of Columbia holding that "[Burley's] antimajoritarian gambit deserves no stamp of approval from the Secretary [of the Interior]." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008). Currently,

neither the Tribe's 242 adult members nor the United States government recognize Ms. Burley as a proper representative of the Tribe.

Undeterred, Ms. Burley pressed forward with this lawsuit, seeking access to millions of dollars that the state of California holds in trust for the Tribe and intends to release when the Tribe's rightful government is identified. Intervenors, supported by the Tribe's full membership, interceded to protect the Tribe's interest in the funds. While Ms. Burley's claim was pending, the United States Department of the Interior ("Department"), which has exclusive authority over relations with Indian tribes, issued a decision purporting to determine the membership and governance of the Tribe. Intervenors challenged that decision in federal court, and the Department stayed the effect of its decision pending the outcome of judicial review. The outcome of the federal litigation will determine who speaks for the Tribe and who is entitled to the funds that the State holds in trust for it.

Recognizing that the federal government has the exclusive power to recognize Indian tribes and their governments, the trial court stayed this case to await the resolution of the federal litigation. Ms. Burley has intervened in the federal litigation, but she is not content with one bite at the apple. She has repeatedly sought to have the trial court in this case

lift the stay and proceed with a trial or dispositive motions, which would necessarily require the state court to determine for itself who should be recognized as the Tribe's members and government. The trial court correctly denied those requests.

Ms. Burley now asks this Court for a writ compelling the trial court to enter judgment in her favor, based on the Department's stayed decision that is currently undergoing judicial review. Alternatively, she asks that the court be required to lift the stay and decide her claims to Tribal authority, based on irrelevant deposition testimony concerning events that allegedly occurred 13 years ago.

Ms. Burley's claims have no merit. The Department's decision is stayed by its own terms and has no force or effect pending judicial review. Until the federal court rules on that decision, the United States does not and will not recognize any government of the Tribe. The state court, for its part, has no power or jurisdiction to determine the membership or leadership of the Tribe. Without such a determination, it cannot find that Ms. Burley is entitled to the funds held in trust for the Tribe. Therefore, there is no basis to lift the stay or to enter judgment for Ms. Burley.

Moreover, Ms. Burley's petition is not timely. She claims that the trial court erred in interpreting the Department's decision as stayed by its own terms—or, in the alternative, that the trial court must somehow decide her entitlement to the Tribe's funds without a determination of whether she is the Tribe's authorized representative. But the trial court considered and rejected those arguments, at the latest, in October of last year. Having failed to seek relief from the trial court's decision within a reasonable time, Ms. Burley cannot now resurrect her untimely challenge by filing yet another application for ex parte relief on the same issues and then challenging the denial of that application before this Court.

At bottom, Ms. Burley is simply attempting to obtain the Tribe's money before the federal court can rule on whether she has any right to represent the Tribe. If she succeeds, it will be the Tribe and its members, not Ms. Burley, that are irreparably injured. There is little chance of ever recovering the RSTF funds if they are erroneously released to Ms. Burley. The trial court recognized this and properly stayed the case. This Court should uphold the trial court's exercise of its discretion and deny Ms. Burley's petition for writ relief.

ANSWER TO PETITION FOR WRIT OF MANDATE

Intervenors The California Valley Miwok Tribe, The Tribal Council, Yakima Dixie, Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antone Azevedo ("Intervenors" or "Real Parties in Interest") answer the Petition by admitting, denying and alleging as follows:

1. Real Parties in Interest admit the allegation in paragraph 1 based on information provided by petitioner.

2. Real Parties in Interest admit the allegations in paragraph 2.

3. Real Parties in Interest admit the allegations in paragraph 3.

4. Real Parties in Interest deny that the challenged ruling occurred on March 7, 2012. Instead, the stay that is at issue in this petition was imposed by the trial court on April 6, 2011. (Burley's Exhibits at 0383.)[1] In addition, the trial court previously heard and rejected Petitioner's arguments concerning the effect of the stay language within the Assistant Secretary-Indian Affairs' ("AS-IA") August 31, 2011 decision on September 7, 2011. (Burley's Exhibits at 417.) Real Parties in Interest deny 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

[1] "Burley's Exhibits" refers by Bates number to the exhibits filed by Plaintiff Burley in support of her Petition for Writ of Mandate.

stay on dispositive motions, and over six months after the trial court rejected Petitioner's arguments regarding the stay language within the AS-IA's August 31, 2011 decision.

5. Real parties in interest admit the allegation in paragraph 5.

6. Real parties in interest admit the allegation in paragraph 6.

7. Real Parties in Interest admit that this Court's April 16, 2010 decision contains the text quoted in paragraph 7, but deny 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 deny that such a mandatory direction to the trial court is the "law of the case" and must be followed by the trial court.

8. Real Parties in Interest admit that in footnote 8 of its April 16, 2010 decision, this Court took judicial notice of a January 28, 2010 order issued by the Interior Board of Indian Appeals. Real parties in interest deny the final sentence as argumentative and speculative.

9. Real Parties in Interest admit that the Interior Board of Indian Appeals (IBIA) concluded that it lacked jurisdiction to adjudicate tribal enrollment disputes and dismissed and referred Ms. Burley's second claim to the AS-IA.

10. Real Parties in Interest admit that this Court did not stay the Superior Court action pending resolution of the "enrollment dispute" issue by the AS-IA. Real parties in interest deny the remaining allegations in

this paragraph.

11. Real Parties in Interest admit the allegations contained in paragraph 11.

12. Real Parties in Interest admit the allegation contained in paragraph 12.

13. Real parties in interest admit that the AS-IA issued a decision regarding the Tribe on December 22, 2010, as stated in paragraph 13. Real Parties in Interest submit that the AS-IA's December 22, 2010 decision speaks for itself and does not require admission or denial.

14. Real Parties in Interest admit that Plaintiff filed a motion for judgment on the pleadings against the Commission and that Plaintiff requested judicial notice of the AS-IA's December 22, 2010 letter. Real parties in interest deny the remaining allegations in this paragraph.

15. Real Parties in Interest admit that on March 11, 2011, the trial court took judicial notice of the AS-IA'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 AS-IA's December 22, 2010 letter. Real Parties in Interest admit that the trial 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 Parties in Interest deny the remaining allegations in this paragraph.

16. Real Parties in Interest admit the allegations contained in paragraph 16.

17. Real Parties in Interest lack sufficient information to admit of deny and on that basis deny the allegations contained in paragraph 17.

18. Real Parties in Interest admit the allegations contained in paragraph 18.

19. Real Parties in Interest admit the allegations contained in paragraph 19.

20. Real Parties in Interest admit that before the trial court could sign the judgment, the AS-IA issued a letter dated April 1, 2011, setting aside his December 22, 2010 decision letter. Real Parties in Interest submit that the AS-IA's April 1, 2011 letter speaks for itself and does not require admission or denial. Real Parties in Interest admit that the parties appeared before the trial court on April 6, 2011, advising the trial court of the AS-IA's April 1, 2011 letter. Real parties in interest submit 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 parties in interest deny each and every allegation contained in paragraph 20.

21. Real Parties in Interest admit allegations contained in paragraph 21.

22. Real Parties in Interest admit that on August 31, 2011, the AS-IA issued a reconsidered decision. Real Parties in Interest submit that the Assistant Secretary's August 31, 2011 letter speaks for itself and does not require admission or denial. Except as expressly admitted herein, Real Parties in Interest deny each and every allegation contained in paragraph 22.

23. Real Parties in Interest admit that on September 7, 2011, the plaintiff unsuccessfully sought an ex parte application for an order entering judgment against the Commission based on the AS-IA's August 31, 2011 letter, and further admit that the Commission and the Intervenors opposed the application, arguing that the stay language in the AS-IA's August 31, 2011 letter prevented the trial court from entering judgment. Real Parties in Interest submit that the AS-IA's August 31, 2011 letter speaks for itself and the contents do not require admission or denial. Real Parties in Interest admit that the trial court ordered that the Clerk hold onto the proposed judgment. Real Parties in Interest lack 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, deny each and every such allegation contained in paragraph 23.

24. Real Parties in Interest admit that on October 21, 2011, the trial court denied the plaintiff s formal motion for entry of judgment. Real parties in interest submit that the trial court's minute order dated October 21,

2011 (Burley's Exhibits at 0418-0419) speaks for itself and its contents do not require admission or denial. Real Parties in Interest admit that the federal court in *California Valley Miwok Tribe v. Salazar* did not sign the joint status report and that plaintiff had not yet been granted intervention in the federal case at the time. Real Parties in Interest admit that plaintiff has more recently been granted intervention in the federal case. Except as expressly admitted herein, Real Parties in Interest deny each and every allegation contained in paragraph 24.

25. Real Parties in Interest admit that the Clerk returned the judgment as unsigned. Real Parties in Interest submit that the Clerk's note speaks for itself and does not require admission or denial. Real Parties in Interest deny the remaining allegations as speculative and argumentative.

26. Real Parties in Interest admit the allegations contained in paragraph 26.

27. Real Parties in Interest submit 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 parties in interest deny each and every allegation contained in paragraph 27.

28. Real Parties in Interest submit 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

Parties in Interest deny each and every allegation contained in paragraph 28.

29. Real Parties in Interest admit that the plaintiff took the deposition of Yakima Burley on February 7, 2012. Real Parties in Interest submit 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. During the deposition, Mr. Dixie repeatedly testified that he did not resign as Tribal chairperson. (Burley's Exhibits at 135 (p. 166, lines 17-20), 139 (p. 202, line 20)-140 (p. 203, line 7), 145 (p. 33, lines 15-16), 147 (p. 44, lines 3-4), 147 (p. 44, lines 16-18), 147 (p. 45, line 8)-148 (p. 49, line 20).) He testified that he believed his resignation had been forged. (Burley's Exhibits at 135 (p. 166, lines 7-11), 136 (p. 178, lines 15-19), 137 (p. 183, lines 4-11), 145 (p. 31, line 24)-146 (p. 32, line 9), 146 (p. 34, lines 4-7).) He testified that he did not believe he signed the purported resignation. (Burley's Exhibits at 138 (p. 200, lines 10-22), 139 (p. 202, lines 7-11).) Except as expressly admitted herein, Real Parties in Interest deny each and every allegation contained in paragraph 29.

30. Real Parties in Interest admit 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 Parties in Interest deny that Dixie stated at his deposition that he "resigned from the Tribe." Real parties in interest deny that Dixie stated at his deposition that "Burley is

the Chairperson of the Tribe." During the deposition, Mr. Dixie repeatedly testified that he did not resign as Tribal chairperson. (Burley's Exhibits at 135 (p. 166, lines 17-20), 139 (p. 202, line 20)-140 (p. 203, line 7), 145 (p. 33, lines 15-16), 147 (p. 44, lines 3-4), 147 (p. 44, lines 16-18), 147 (p. 45, line 8)-148 (p. 49, line 20).) He testified that he believed his resignation had been forged. (Burley's Exhibits at 135 (p. 166, lines 7-11), 136 (p. 178, lines 15-19), 137 (p. 183, lines 4-11), 145 (p. 31, line 24)-146 (p. 32, line 9), 146 (p. 34, lines 4-7).) He testified that he did not believe he signed the purported resignation. (Burley's Exhibits at 138 (p. 200, lines 10-22), 139 (p. 202, lines 7-11).) Real Parties in Interest admit that Dixie also stated at his deposition that the signature on the resignation document was his signature. Real Parties in Interest admit 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 Parties in Interest admit that the Commission opposed the ex parte application. Real Parties in Interest submit that the Commission's opposition speaks for itself and does not require Real Parties in Interest to admit or deny its contents. Real Parties in Interest admit that the Plaintiff requested that the stay be lifted so that Plaintiff could bring a dispositive motion. Real Parties in Interest deny that the "pending federal litigation . . . has nothing to do with

RSTF money" and aver 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 Parties in Interest admit that the trial court explained its denial of Plaintiff s application in the manner quoted in paragraph 30. Except as expressly admitted herein, Real Parties in Interest deny each and every allegation contained in paragraph 30.

31. Real Parties in Interest admit 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 Parties in Interest deny that the trial court misunderstood this Court's "directions on remand" and incorporates by this reference their response to paragraph 7, above, concerning the scope and meaning of this Court's April 16, 2010 decision. Real Parties in Interest submit 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 Parties in Interest admit that the Compact requires that a Non-Compact (RSTF eligible) tribe be a federally recognized tribe. Except as expressly admitted herein, Real Parties in Interest deny each and every allegation contained in paragraph 31.

32. Real Parties in Interest deny that the trial court erred in not allowing the matter to be briefed on a formal motion, and further deny that the trial court erred by imposing a stay "that runs contrary to the specific instructions of this Court on remand." Real Parties in Interest incorporate by this reference their response to paragraph 7, above, concerning the scope and meaning of this Court's April 16, 2010 decision.

33. Real Parties in Interest admit 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 Parties in Interest deny each and every allegation contained in paragraph 33.

34. Real Parties in Interest admit that the Commission 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 Parties in Interest admit that the Commission asked this Court to take judicial notice of the IBIA decision, a portion of which is quoted in paragraph 34. Real Parties in Interest admit that this Court rejected the

Commission's contention that the Plaintiff lacked standing or capacity to sue until the AS-IA ruled on the issues identified in paragraph 34. Real Parties in Interest deny the remaining allegations in paragraph 34. The trial court lacks jurisdiction to decide the membership and leadership disputes at issue in the federal litigation. The trial court cannot determine to whom the trust fund monies are to be disbursed until and unless the membership and leadership disputes are resolved.

35. Real Parties in Interest deny that the Plaintiff will suffer irreparable injury if the writ is not granted and aver that there is no evidence before the Court that Plaintiff cannot wait for the federal litigation to conclude. Real Parties in Interest admit that the AS-IA's decision that the Intervenors are challenging in federal court was in the Plaintiff s favor, and that it if it were in effect it would be sufficient to cause the trial court to grant judgment on the pleadings against the Commission. Real Parties in Interest admit that the trial court ordered the release of RSTF money by the Commission to the Plaintiff, but denies that judgment to that effect was ever entered and avers that the AS-IA set aside his decision on April 1, 2011. Real Parties in Interest aver that the trial court then stayed entry of judgment pending the issuance of a new decision by the AS-IA, and that the AS-IA's decision, when reissued on August 31, 2011, contained a provision staying that decision pending the resolution of *California Valley Miwok Tribe v. Salazar*. (Burley's Exhibits at 415.)

Real Parties in Interest deny 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 Parties in Interest deny each and every allegation contained in paragraph 35.

36. Real Parties in Interest deny that Plaintiff is suffering financially because of the stay, and aver that there is no evidence before the Court of such suffering, and, further aver that it is entirely speculative whether lifting the stay would result in an earlier distribution of RSTF payments to Ms. Burley than would occur if the stay is left in place until the outcome of *California Valley Miwok Tribe v. Salazar* is known. Except as expressly admitted herein, Real Parties in Interest deny each and every allegation contained in paragraph 36.

37. Real Parties in Interest admit that the AS-IA has issued two separate decisions stating that the Tribe is a federally-recognized tribe consisting of five adult members that functions 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 Parties in Interest submit that the AS-IA's decisions currently have no force or effect. Real Parties in Interest admit that Mr. Dixie testified that he believes he resigned as Tribal Chairperson. Mr. Dixie also repeatedly testified that he did not resign as Tribal chairperson. (Burley's Exhibits at 135 (p. 166, lines 17-20), 139 (p. 202, line 20)-140 (p. 203, line 7), 145 (p.

33, lines 15-16), 147 (p. 44, lines 3-4), 147 (p. 44, lines 16-18), 147 (p. 45, line 8)-148 (p. 49, line 20).) He testified that he believed his resignation had been forged. (Burley's Exhibits at 135 (p. 166, lines 7-11), 136 (p. 178, lines 15-19), 137 (p. 183, lines 4-11), 145 (p. 31, line 24)-146 (p. 32, line 9), 146 (p. 34, lines 4-7).) He testified that he did not believe he signed the purported resignation. (Burley's Exhibits at 138 (p. 200, lines 10-22), 139 (p. 202, lines 7-11).) Real Parties in Interest deny that Mr. Dixie has admitted that Burley is the rightful Tribal Chairperson. Real Parties in Interest deny Plaintiff s allegations concerning Intervenors' "litigation tactics" as being speculative, argumentative, and false. Except as expressly admitted herein, Real Parties in Interest deny each and every allegation contained in paragraph 37.

38. Real Parties in Interest deny each and every allegation contained in paragraph 38 on the ground that they are conclusory and argumentative.

39. Real Parties in Interest deny each and every allegation contained in paragraph 39 on the ground that they are conclusory and argumentative.

40. Real Parties in Interest deny each and every allegation contained in paragraph 40 and aver that there is no evidence before the court that the Plaintiff will suffer irreparable injury if the writ is not granted.

41. Real Parties in Interest deny 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 Intervenors' Appendix in Support of Return to Petition for Writ of Mandate 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 Parties In Interest Intervenors pray that:

1. The Petition for Writ of Mandate and/or Prohibition or other appropriate relief be denied in its entirety;

2. Petitioner takes nothing from this action;

3. Intervenors recover their costs; and

4. This Court grant other relief it deems just and proper.

Dated: June 18, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

MATTHEW S. MCCONNELL

Attorneys for Intervenors/Real Parties in Interest THE CALIFORNIA VALLEY MIWOK TRIBE, THE TRIBAL COUNCIL, YAKIMA DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, MICHAEL MENDIBLES, EVELYN WILSON AND ANTOINE AZEVEDO

VERIFICATION

I, Matthew S. McConnell, declare as follows:

I am one of the attorneys for Intervenors, the Real Parties In Interest in the case *California Valley Miwok Tribe v. California Gambling Control Commission, et al.*, San Diego Superior Court Case No. 37-2008-00075326-CU-CO-CTL. I have represented Intervenors in connection with this matter since January 2011. I have read the foregoing Return to Petition for Writ of Mandate and know its contents. The facts alleged in the answer are within my own knowledge or are based upon my review of the pleadings, briefs, and other documents filed in this case. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than the Real Parties In Interest, verify this answer.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on June 18, 2012, at San Diego, California.

Matthew S. McConnell

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. Parties

Intervenors and Respondents are the California Valley Miwok Tribe ("Tribe"), and Tribe members Yakima Dixie, Velma WhiteBear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antone Azevedo, individually and as members of the Tribal Council ("Council"). The Council is the legitimate governing body of the Tribe, representing the Tribe's 242 adult members and their children, each of whom is a lineal descendant of known historical members of the Tribe. Intervenors seek to protect the Tribe's interest in the more than $8 million in gaming revenues that the state of California currently holds in trust for the Tribe.

The Plaintiff and Petitioner is Silvia Burley, who filed this action in the name of the Tribe without authorization. Although Ms. Burley and her family had no contact with the Tribe prior to 1998, *she now maintains that the entire membership of the Tribe is limited to five people*: herself, her two daughters, her granddaughter, and (sometimes) Yakima

Dixie. Ms. Burley claims to be the chairperson of the Tribe based on "Tribal elections" in which only she and her family members participated.

The California Gambling Control Commission ("Commission") is the state agency that oversees gaming in California. The Commission administers the Revenue Sharing Trust Fund ("RSTF"), which collects fees from Indian tribes within the state of California that operate gambling casinos, and distributes the funds to federally recognized tribes that operate fewer than 350 gaming devices. Each non-gaming tribe receives approximately $1.1 million annually. *California Valley Miwok Tribe v. California Gambling Control Commission*, 2010 WL 1511744 *1 (4th App. Dist. 2010) (*CVMT v. CGCC*).

B. History of Ms. Burley's Efforts to Control the Tribe

This case continues Silvia Burley's long running efforts to gain control of the Tribe, exclude its rightful members, and plunder the Tribe's economic resources for the exclusive benefit of herself and her immediate family. Ms. Burley first contacted the Tribe around 1998 through Intervenor Yakima Dixie, whom the federal Bureau of Indian Affairs ("BIA") regarded as a spokesperson for the Tribe because he still resided on the Tribe's rancheria (reservation). At the BIA's suggestion, Ms. Burley and Mr. Dixie soon began preliminary steps to formally organize the

Tribe by identifying its members and adopting written governing documents. Almost immediately, however, the Burleys ousted Mr. Dixie and purported to name Ms. Burley as the chairperson of a Tribal government controlled by Ms. Burley and her adult daughter. *See California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197, 201 (D.D.C. 2006) (*Miwok I*), *affirmed*, 515 F.3d 1262 (D.C. Cir. 2008) (*Miwok II*).

Although Ms. Burley's "government" was created without any notice to, or consent by, the Tribe's actual members, the BIA incorrectly recognized Ms. Burley as an appointed or elected official of the Tribe from approximately 1999 to 2004, over the protests of Mr. Dixie and other Tribal members. *Id.* During this time period the federal government provided Ms. Burley with funds intended to help the Tribe complete the organization process and provide services to its members, *id.* at 198, but the Burleys instead gobbled up all of the money for themselves. (Intervenors' Exhibits at 248-262.)[2] In 2005, the BIA withdrew its recognition of Ms. Burley's purported government, on the grounds that it did not reflect the participation or consent of the full Tribal community. (Intervenors' Exhibits at 117-122.) The BIA also stopped providing federal funding to Ms. Burley's government. *Miwok I*, 424 F.Supp.2d at 201.

Ms. Burley filed a federal lawsuit (in the name of the Tribe and without authorization), challenging the Department's refusal to recognize her government and constitution. The federal court upheld the Department's refusal to recognize Ms. Burley, holding that it fulfilled the Department's "responsibility to ensure that [it] deals only with a tribal government that actually represents the members of a tribe." *Id.* at 201.

C. The Commission's Decision to Hold Funds In Trust for the Tribe Until a Tribal Authority Is Recognized

Based on the federal government's refusal to recognize any Tribal government or representative, and its suspension of federal contracting with the Tribe, the Commission in 2005 suspended disbursements of RSTF funds to the Tribe until "the Tribe's leadership and organizational status is resolved to a degree sufficient to allow the BIA to resume government-to-government relations." *CVMT v. CGCC*, 2010 WL 1511744, *2 (4th App. Dist. 2010).

D. Chronology of the Current Litigation

In January 2008, Ms. Burley, purportedly in the name of the Tribe, filed suit in San Diego Superior Court against the Commission. In

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[2] "Intervenors' Exhibits" refers by Bates number to the exhibits added by Intervenors with their Return to Petition for Writ of Mandate.

August 2008, she filed a First Amended Complaint, seeking an order compelling the Commission to pay RSTF monies to the Tribe "in care of Silvia Burley." (Burley's Exhibits at 513.) The Commission demurred to the complaint, and the trial court sustained the demurrer on the grounds that "the Tribe, as currently represented in this lawsuit, lacks the capacity or standing to bring this action." *CVMT v. CGCC*, 2010 WL 1511744, *5.

1. The Court of Appeal Ruled Only that the Tribe Does Not Lack Standing or Capacity

Ms. Burley appealed the trial court's dismissal of her complaint to the Court of Appeal. This Court reversed, holding that the allegations in Ms. Burley's complaint were sufficient to establish the Tribe's standing *at the pleading stage*, and that there was no basis to question the Tribe's capacity to sue, despite the existence of an ongoing Tribal leadership dispute. *CVMT*, 2010 WL 1511744, *6, *8. The Court specifically disclaimed any intent to address the merits of Ms. Burley's claims and recognized that "the trial court will be better able to *explore the legal impact of the tribal leadership dispute and the BIA's relationship with the Miwok Tribe* when the pertinent facts are more fully developed later in the litigation." *Id.* at *8 (emphasis added).

2. The Trial Court Proceeded with the Case in Compliance with the Court of Appeal's Order and Explored the Legal Impact of the Leadership Dispute and the BIA's Relationship With the Tribe

After the Court of Appeal remanded the case to the trial court, the court proceeded with the case and, on December 17, 2010, granted Intervenors permission to participate in the case. On December 22, 2010, the Assistant Secretary – Indian Affairs in the United States Department of the Interior ("AS-IA") issued a decision that recognized Ms. Burley's five-person General Council as the government of the Tribe, reversing a decade of Department decisions and ignoring the federal court decisions in *Miwok I* and *II* (the "December 22 Decision"). (Burley's Exhibits at 248-253.) Intervenors in this case timely filed a challenge to the December 22 Decision in the federal district court for the District of Columbia.

On February 7, 2011, Ms. Burley filed a motion for judgment on the pleadings in this case. On March 11, 2011, the trial court granted the motion, relying entirely on the AS-IA's December 22 Decision. The Court's order stated in relevant part:

> **[I]n light of the December 22, 2010 decision** . . . the Commission's answer does not state facts sufficient to constitute a defense to the complaint. **The December 22, 2010 decision definitively establishes** the Tribe's membership, governing body and leadership, including Sylvia Burley's status as representative . . . of the Tribe. **[T]he [December 22] decision establishes Plaintiff's right** to the

> RSTF monies . . .. **Given the effect of the December 22, 2010 decision**, the Commission's answer fails to state [facts supporting an adequate defense.]

(Burley's Exhibits at 254-255; emphasis added.) But on April 1, 2011, before judgment was entered, the AS-IA rescinded his December 22 Decision and announced that he would issue a reconsidered decision after further briefing by Ms. Burley and the Intervenors in this case. (Burley's Exhibits at 350-351.)

3. The Trial Court Stayed the Case to Await the United States' Recognition of a Tribal Government

Based on the AS-IA's rescission of the decision that had formed the entire basis for granting judgment to Ms. Burley, the trial court on April 6, 2011, stayed the entry of judgment and stayed the case for all purposes except discovery. (Burley's Exhibits at 381-385.) The AS-IA issued a new decision on August 31, 2011, reaching many of the same conclusions as the December 22 Decision (the "August 31 Decision"). (Burley's Exhibits at 408-416.) But in his new decision, the AS-IA stated, "This decision is final for the [Interior] Department and effective immediately,[3] but implementation shall be stayed pending resolution of the litigation in . . . *California Valley Miwok Tribe v. Salazar* . . . ." (Burley's

[3] As discussed *infra*, "final for the Department and effective immediately" simply means that the decision was not subject to further appeal within the Department and that it was ripe for judicial review.

Exhibits at 415) The AS-IA, through his attorney, then stipulated in a joint status report to the District Court 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." (Intervenors' Exhibits at 104.) The AS-IA thereby made it clear that he intended to preserve the status quo—under which the federal government does not recognize any authorized representative of the Tribe—until the federal court had ruled on the validity of the August 31 Decision.

Nonetheless, Ms. Burley immediately filed an ex parte application for an order entering judgment in her favor based on the August 31 Decision, which the trial court denied on September 7, 2011. (Burley's Exhibits at 417; Intervenors' Exhibits at 25-75, 76-132.) She then filed a formal "motion for entry of judgment" (in reality, an improper motion for reconsideration) based on the same grounds, which the court also denied on October 21, 2011. (Burley's Exhibits at 418-421; Intervenors' Exhibits at 133-156, 157-175, 176-199.) The court recognized that "[t]his court's ruling on Plaintiff's motion for judgment on the pleadings is dependent on the final outcome of the judicial review of the decisions by Assistant Secretary [Echo] Hawk. Therefore, the court orders that this matter remain

stayed . . . pending final resolution of *California Valley Miwok Tribe v. Salazar*." (Burley's Exhibits at 419.)

The trial court's stay order reflects the court's assessment of the "legal impact of the tribal leadership dispute and the BIA's relationship with the Miwok Tribe," as directed by the Court of Appeal, and its conclusion that the BIA's recognition is a prerequisite to establishing Ms. Burley's claim to be a Tribal member and an authorized Tribal representative with a legitimate claim to the RSTF funds.

E. Ms. Burley Sought to Lift the Stay Based on Irrelevant Deposition Testimony Obtained After Threatening the Life of Yakima Dixie

Because the trial court had stayed the case for all purposes *except* discovery, Ms. Burley sought to take the deposition of Yakima Dixie, a Council member and Intervenor whom the BIA previously recognized as a spokesperson for the Tribe. In an attempt to establish Ms. Burley's status as Tribal representative, Ms. Burley primarily sought to ask Mr. Dixie questions about his alleged resignation as Tribal chairperson in 1999 (which was submitted by Ms. Burley)—a topic that is totally irrelevant to the question of whether Ms. Burley is currently the authorized representative of the Tribe.

During the deposition, Mr. Dixie repeatedly testified that he did not resign as Tribal chairperson. (Burley's Exhibits at 135 (p. 166, lines 17-20), 139 (p. 202, line 20)-140 (p. 203, line 7), 145 (p. 33, lines 15-16), 147 (p. 44, lines 3-4), 147 (p. 44, lines 16-18), 147 (p. 45, line 8)-148 (p. 49, line 20).) He testified that he believed his resignation had been forged. (Burley's Exhibits at 135 (p. 166, lines 7-11), 136 (p. 178, lines 15-19), 137 (p. 183, lines 4-11), 145 (p. 31, line 24)-146 (p. 32, line 9), 146 (p. 34, lines 4-7).) He testified that he did not believe he signed the purported resignation. (Burley's Exhibits at 138 (p. 200, lines 10-22), 139 (p. 202, lines 7-11).)

Mr. Dixie's initial deposition was continued approximately seven months. Mr. Dixie is elderly, frail and suffers from permanent physical disabilities resulting from an attempt on his life in 2002. On the second date, after several hours of repetitive questioning, the following exchange occurred between Mr. Dixie and counsel for Ms. Burley:

> Q: I heard what you said. You don't have to slap your hand on the desk.
>
> A: I'll slap you in your face.
>
> Q: Do you want to do that?
>
> A: Yeah.

Q: You'll be a dead man.

(Burley's Exhibits at 141:22-142:2.) Shortly after this exchange, Mr. Dixie testified that he had resigned in 1999.

Not only is Mr. Dixie's testimony internally inconsistent, it is totally irrelevant to establish who is currently the representative of the Tribe, because the BIA has issued a number of decisions since 1999 in which it stated that it did not recognize any representative for the Tribe.[4] Nonetheless, Ms. Burley filed an ex parte application with the trial court on March 7, 2012, seeking to lift the stay based on Mr. Dixie's' supposed admission. The trial court reasoned that "if I were to lift the stay and go forward, I would in effect be deciding who is the proper representative of the Tribe and who is the Tribe, precisely the issues that are within the exclusive jurisdiction of the Tribe and the federal courts . . .." (Burley's Exhibits at 4.) "Until the federal court decides, the ultimate issue won't be resolved and I don't see how I could issue a final judgment . . .." (Burley's Exhibits at 12.) The court therefore properly denied Ms. Burley's application, and this petition for writ of mandate followed.

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[4] As detailed in Intervenors' motion for summary judgment in the federal litigation, whether or not Mr. Dixie resigned in 1999 is a non-issue. (See Burley's Exhibits at 60-131.)

F. Summary and Current Status of *CVMT v. Salazar*

Although the Superior Court has stayed this litigation, that does not mean that no progress is being made toward resolving Ms. Burley's claims to represent the tribe and, ultimately, her claim to the RSTF money. Intervenors' federal court challenge to the Department's August 31 Decision proceeds in a timely manner. After the Department withdrew its original December 22, 2011 decision and issued its August 31 Decision, Intervenors filed an amended complaint in the federal district court on October 17, 2011. (Intervenors' Exhibits at 202-234) Intervenors filed a motion for summary judgment on March 2, 2012. (Burley's Exhibits at 60-131.) The federal defendants filed a cross motion for summary judgment on March 29, 2012. Ms. Burley intervened and filed a motion to dismiss on March 26, 2012. Briefing on all of these motions was completed by May 18, 2012. (See Docket Report in *CVMT v. Salazar*) The parties await oral argument (if granted by the district court) and a ruling on the motions.

II.

STANDARD OF REVIEW

A. A Writ of Mandate Is an Extraordinary Remedy

Relief through writ review is an extraordinary remedy that is not available as a matter of course and that lies completely within the

discretion of the Court of Appeal. *Roden v. AmerisourceBergen Corp.*, 130 Cal.App.4th 211, 213 (2005); *Omaha Indem. Co. v. Super. Ct. (Greinke)* 209 Cal.App.3d 1266, 1268 (1989). Before the Court may grant a writ of mandate, there must be no other adequate remedy at law. CCP §§ 1086 (writ of mandate), 1103 (writ of prohibition). In addition, the petitioner must show that it will suffer irreparable injury if the writ is not granted—*i.e.*, harm or prejudice that cannot be corrected on appeal. *Los Angeles Gay & Lesbian Center v. Super.Ct. (Bomersheim)* 194 Cal.App.4th 288, 300 (2011). Ms. Burley's petition does not even discuss this stringent standard.

B. A Writ of Mandate Will Issue Only If the Trial Court Has Abused Its Discretion

A writ of mandate will issue only to correct an abuse of discretion (or, not relevant here, to compel a nondiscretionary duty). *State Farm Mut. Auto. Ins. Co. v. Super.Ct. (Corrick)*, 47 Cal.2d 428, 432 (1956). An abuse of discretion exists where the court's exercise of discretion exceeded "all bounds of reason, all of the circumstances before it being considered." *Id. See also Bricker v. Super.Ct. (Stunich)*, 133 Cal.App.4th 634, 638–639 (2005) (finding abuse of discretion where trial court violated petitioner's due process rights by dismissing claims without proper notice or hearing). The petitioner has the burden of showing the abuse of discretion. *Arnold v. Williams*, 222 Cal.App.2d 193, 196–197

(1963); *Taliaferro v. Locke*, 182 Cal.App.2d 752, 755 (1960). Again, Ms. Burley's petition fails even to discuss the standard of review.

III.

THE EXTRAORDINARY REMEDY OF MANDAMUS IS NOT APPROPRIATE

A. Plaintiff Has Not Shown That Its Remedies at Law Are Inadequate

Ms. Burley has a perfectly adequate legal remedy in this case, and that is to continue conducting discovery, prepare for trial, and vindicate her claims once the federal court has ruled in *CVMT v. Salazar* (assuming that the court rules in her favor). Ms. Burley has failed to show any specific facts that make this remedy inadequate. *Phelan*, *supra*, 35 Cal.2d at 370. The fact that the stay may delay that remedy does not make the remedy inadequate; adequacy of legal remedies is not judged by speed or expense. *Phelan*, *supra*, 35 Cal.2d at 370–371 (appeal not inadequate remedy because it would require more time than writ petition); *Science Applications Int'l Corp. v. Super.Ct. (Dept. of Gen. Services)*, 39 Cal.App.4th 1095, 1101 (1995) (same).

An available legal remedy is inadequate when, for example, it would not prevent an unnecessary trial, *see, e.g., Coulter v. Super.Ct.*

(Schwartz & Reynolds & Co.), 21 Cal.3d 144, 148 (1978); *Fair Employment & Housing Comm'n v. Super.Ct. (Las Brisas Apt., Ltd. Partnership)*, 115 Cal. App. 4th 629, 633 (2004), or the possibility of multiple trials, *see Lopez v. Super.Ct. (Friedman Bros. Invest. Co.)* 45 Cal.App.4th 705, 710 (1996), or unnecessary discovery and trial preparation, *see Smith v. Super.Ct. (Bucher)*, 10 Cal.App.4th 1033, 1036–1037 (1992). In these situations, immediate intervention by the Court of Appeal may be appropriate in the form of a writ. The situation here is just the opposite. Ms. Burley seeks a writ ordering the trial court to proceed immediately with a trial, or dispositive motions, that will almost certainly be rendered unnecessary by the federal court's decision in *CVMT v. Salazar*. This situation does not warrant the extraordinary relief of a writ, and Ms. Burley has offered no authority even suggesting that writ relief is appropriate here.

B. Plaintiff Has Not Shown That It Will Suffer Irreparable Injury Absent a Writ

Ms. Burley claims that she will suffer irreparable injury if the writ is denied because she will be unable to access the Tribe's RSTF funds until the federal court has ruled on the validity of the Department decision that limits the Tribe to five members and recognizes Burley's "general council" as a Tribal government. She argues that she "cannot wait for the

federal litigation to conclude," that "the Tribe is suffering financially because of the stay," and that the Tribe "is in desperate need of funding." Burley Petition ¶¶ 35, 36. In reality, these references to "the Tribe" actually refer to Ms. Burley and her immediate family.

On their face, these general references to "great and irreparable harm and injury" are insufficient to justify issuance of a writ. *Phelan v. Super.Ct.*, 35 Cal.2d 363, 370 (1950). In addition, it is the Tribe, not Ms. Burley, that stands to suffer injury. Releasing millions of dollars to the Burleys, before the federal court settles the dispute over Tribal membership and leadership, creates the unacceptable risk that the Tribe's 242 adult members and their children will be deprived of these desperately needed funds. Considerations of equity and justice demand that the stay remain in effect until the federal case is resolved.

At bottom, Ms. Burley complains of nothing more than a potential delay in obtaining the relief she seeks. This is inadequate to establish irreparable injury, for two reasons. First, there is no showing that the stay imposed by the trial court will actually delay the ultimate resolution of this case. The case is stayed pending resolution of *CVMT v. Salazar*, which is likely to determine the central issue in this case: whether Ms. Burley is properly recognized as a Tribal authority despite the fact that

she does not have the support or consent of the Tribe's 242 adult members. Dispositive motions by all parties (including Ms. Burley) are already pending in *CVMT v. Salazar*, and that litigation may well be resolved before discovery and trial could be completed in this case were the stay lifted. Ms. Burley's vague claims that Intervenors intend to "starve out" the Tribe by dragging out the federal litigation are empty hyperbole without evidentiary support or citation.

Second, mere delay in obtaining the desired relief is not irreparable injury, absent a showing that some specific and noncompensable injury will occur during or because of the delay. *See Schmier v. Supreme Court of Calif.*, 78 Cal.App.4th 703, 707–708 (2000) ("writ of mandate is granted only . . .when it is shown that some substantial damage will be *suffered by the petitioner* if said writ is denied" (emphasis in original; internal quotes omitted). The cases cited by Ms. Burley demonstrate this. In *Kawasaki Motors Corp. v. Superior Court*, 85 Cal.App.4th 200, 205-206 (2000), denial of the writ would have forced the petitioner to remain in an undesirable business relationship for two years, with attendant unrecoverable economic losses. In *Zenide v. Superior Court*, 22 Cal.App.4th 1287, 1293 (1994), children had been deprived of contact with their mother and would continue to be deprived absent writ relief. These cases involved palpable, ongoing and unremediable injuries

that would occur *during* the period in which resolution of the petitioners' claims was delayed.

In contrast to those irreparable injuries, Ms. Burley is simply being told that she cannot have the Tribe's money until it is established that she actually belongs to, and represents, the Tribe. Any financial "injury" resulting from the delay is only temporary and easily remedied. If the federal court upholds the AS-IA's decision recognizing Ms. Burley, she will be able to pursue her claim against the Commission and recover all of the RSTF money currently being held in an interest-bearing account for the Tribe, as well as any additional funds that accrue in the interim. Ms. Burley has identified no way in which the delay in obtaining the relief she seeks will result in any specific injury that cannot be repaired if and when she gains access to the Tribe's funds.

In summary, Ms. Burley cannot meet the threshold requirements for writ relief, because she has failed to show that her legal remedies are inadequate or that she will suffer irreparable harm in the absence of a writ.

IV. THE PETITION FOR WRIT RELIEF IS UNTIMELY

Ms. Burley claims that the trial court erred by (1) misinterpreting the August 31 Decision as stayed pending judicial review (Burley Petition pp. 39-42), and (2) imposing a stay on this litigation until the federal court issues a decision in *CVMT v. Salazar* (Burley Petition pp. 31-39). Ms. Burley's petition is not timely, because the trial court's actions that she complains of occurred, at the latest, approximately eight months ago. Ms. Burley cannot resuscitate her untimely claims by styling her petition as a challenge to the trial court's denial of her ex parte application in March, which sought exactly the same relief that the court had already denied.

The trial court imposed the stay on April 6, 2011, after the AS-IA rescinded his December 22, 2010 decision regarding the Tribe. (Burley's Exhibits at 381-385.) That was more than 14 months ago. After the AS-IA issued his August 31 Decision, Ms. Burley first sought ex parte relief and then filed her bogus "motion for entry of judgment," claiming that the trial court should give the August 31 Decision immediate effect despite the stay language it contains and despite the AS-IA's stipulation that the Decision have "no force or effect" pending a decision in *CVMT v. Salazar*. (Intervenors' Exhibits at 30-32, 150-151.) The trial court

considered and rejected those arguments, denying Ms. Burley's requests on September 7, 2011 and October 21, 2011, respectively. (Burley's Exhibits at 417, 418-421.)

In her petition, Ms. Burley now raises the exact same arguments that the trial court rejected *last year*, claiming that the court must give the August 31 Decision immediate effect and enter judgment in her favor. (Burley Petition p. 42.) In the alternative, she argues that the court can and must decide her claim to the Tribe's assets *without* a determination of whether she actually represents the Tribe. (*See* Burley Petition p. 34, claiming the federal litigation is "irrelevant.") As Ms. Burley admits in her petition, the "historically acceptable . . . time frame" for bringing a writ petition is 60 days—not eight months or even 14 months. (Burley Petition p. 8, citing *Popelka, Allard, McCowan & Jones v. Superior Court*, 107 Cal.App.3d 496, 499 (1980).)

Ms. Burley attempts to overcome her lack of timeliness by pointing to Mr. Dixie's deposition testimony as a new reason to lift the stay. While the trial court first addressed that particular argument in denying Ms. Burley's second ex parte motion on March 7, 2012, that cannot turn back the clock on the arguments that the court had already rejected. Moreover, it is those untimely arguments, and not Mr. Dixie's testimony, that truly form

the basis for Ms. Burley's writ petition. In fact, she states in her petition that "[t]his lawsuit is not about . . . who is the proper Tribal leader or 'who is the Tribe.'" (Burley Petition p. 35) If that is the case, then Mr. Dixie's testimony about whether or not he resigned as tribal chairperson in 1999 simply has no relevance to Ms. Burley's claims.

If Ms. Burley believed that the trial court's imposition of a stay and refusal to enter judgment based on the August 31 Decision caused her irreparable injury, she was required to seek relief within a reasonable time after the court took those actions. Not only did she fail to do so, but she also fails to provide any explanation or justification for her unwarranted delay in the writ itself. She cannot revive her untimely claims by obtaining a second (or third) ruling on the same arguments and then attacking that ruling through a writ petition.

V.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY STAYING THE CASE PENDING THE OUTCOME OF *CVMT v. SALAZAR*

Even if the threshold requirements for writ relief were met here, a writ should not issue because the trial court's decision to stay this action was not an abuse of discretion and does not violate the Court of

Appeal's order remanding the case to the trial court. The stay is reasonable under all the circumstances, because it will prevent unnecessary and duplicative litigation, avoid the need for the state court to determine matters of Tribal membership and governance that lie outside its jurisdiction, and prevent the enormous injustice of releasing millions of dollars to a party that does not represent the Tribe.

Ms. Burley argues that the trial court's decision to stay the case pending the outcome of *California Valley Miwok Tribe v. Salazar* was an abuse of discretion because (1) the trial court misinterpreted the "stay" language found in the AS-IA's August 31 Decision and in his stipulation in federal court; (2) she has obtained new evidence, in the form of Mr. Dixie's deposition testimony, which allows the court to determine the Tribe's membership and leadership even without a decision by the federal government; and (3) the Court of Appeal previously ordered the trial court to adjudicate the issue of whether Ms. Burley is entitled to the RSTF funds. All of these arguments lack merit.

A. The AS-IA Stayed His August 31 Decision Pending Judicial Review, and the Federal Government Currently Recognizes No Tribal Representative

The issue before the trial court is not whether the Commission must pay the RSTF money to the Tribe. The Commission

does not dispute that obligation. The sole dispositive issue is whether the Plaintiff, Silvia Burley (who filed her suit in the name of the Tribe), actually belongs to and represents the Tribe and is entitled to receive more than $8 million dollars in RSTF money on its behalf.

Ms. Burley argues that the AS-IA's August 31 Decision recognized Ms. Burley as the Tribe's leader and that the decision is currently in effect. As explained above, this argument is untimely. In addition, both the August 31 decision itself, and the AS-IA's stipulation in *CVMT v. Salazar*, make clear that the decision will have no force or effect until the District Court rules on the validity of the decision. Until then, previous Department decisions remain in effect which provide that the Department recognizes no one, including Silvia Burley, as the Tribe's representative. (Intervenors' Exhibits at 112-115, 117-122, 124-125, 127-132.)

1. The August 31 Decision Is Stayed By Its Own Terms

The August 31 Decision states that the current membership of the Tribe consists of Ms. Burley, her two daughters, her granddaughter, and Yakima Dixie. It states that those five people comprise a "general council," which has the sole authority to make membership and governance decisions for the Tribe. This effectively reverses a decade of Department decisions

and litigation positions stating that the Department could not recognize any Tribal government that was not formed with the participation and consent of the entire Tribal community, which both Ms. Burley and the federal government previously estimated to number around 250 members. *See Miwok I*, 424 F.Supp.2d at 203 n. 7; *Miwok II*, 515 F.3d at 1265 n. 5. The validity of the AS-IA's Tribal membership and leadership determinations are precisely the issues involved in *CVMT v. Salazar*. (*See* Intervenors' First Amended Complaint in the federal litigation, Intervenors' Exhibits at 202-234.)

Recognizing the important interests affected by his decision and the fact that Intervenors have a right to judicial review of the decision, the AS-IA stayed the implementation of his decision to protect the status quo. The August 31 Decision states:

> [T]his 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, [*CVMT v. Salazar*].

(Burley's Exhibits at 415.)

The first part of this language, "final for the Department and effective immediately," indicates that the decision is not subject to further appeal within the Department and is ripe for judicial review. It restates language from the Department's regulations regarding the Department's

decision making procedures, making clear that the decision is not subject to further appeal or consideration within the Department. *See* 25 C.F.R. §2.20(c)(2) (stating that a decision signed by the AS-IA shall be "final for the Department and effective immediately" unless the decision provides otherwise). This phrase is a term of art that indicates the decision is "final agency action" subject to judicial review under the federal Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 704 (making "final agency action . . . subject to judicial review").

Under the APA, a "final agency action" is one that "marks the consummation of the agency's decisionmaking process" and one "by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997). The language used in the August 31 Decision indicates that the decision meets the two prongs of the finality test: It is not subject to further appeal or consideration within the Department and therefore marks the "consummation" of the Department's decision making process. It is also an action from which "legal consequences will flow." *See Bennett*, 520 U.S. at 178 (distinguishing as not final certain agency actions that merely made non-binding recommendations for future action).

The fact that the August 31 Decision is ready for judicial review does not mean, however, that the Decision is currently enforceable or can be given effect by the trial court. The second part of the quoted

language from the August 31 Decision orders that "implementation shall be stayed" pending judicial review. The effect of a stay of an administrative order is to "suspend . . . alteration of the status quo" by holding the decision in abeyance pending further review. *Nken v. Holder*, __ U.S. __, 129 S.Ct. 1749, 1754 (2009) (discussing judicial stay of deportation order). *See also id.* at 1758 ("[a] stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it"). Thus, by its own terms the August 31 Decision is held in abeyance pending the federal court's review and cannot form the basis for action by the Department or the trial court while that review is pending.

2. The AS-IA Further Confirmed by Stipulation that the August 31 Decision Shall Have No Force or Effect

In order to avoid any confusion, and after being informed of Plaintiff's efforts to obtain entry of judgment in this case based on the stayed August 31 Decision, the AS-IA also stipulated to a joint status report and proposed order in *CVMT v. Salazar* that confirms the status of the August 31 Decision. The joint status report and proposed order were filed with the federal court on September 1, 2011. The joint status report states in relevant part:

> While the August 31, 2011 decision is final for the Department **for purpose of judicial review**, the Assistant Secretary stayed the effectiveness of the August 31, 2011 decision pending resolution of

> this matter. As a result, **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**.

(Intervenors' Exhibits at 104; emphasis added.) In light of the AS-IA's stipulation, it is perfectly clear that the AS-IA did not intend to recognize any person or entity as a member or representative of the Tribe, or to take any action based on the August 31 Decision, until the federal litigation is resolved. By voluntarily staying his decision, the AS-IA made it unnecessary for Intervenors to seek a stay or injunction against the August 31 Decision while the federal litigation is pending. The status quo, as discussed below, is that the United States does not currently recognize any government or official representative of the Tribe.

Plaintiff makes much of the fact that the federal court did not sign the parties' proposed order. But that has no bearing on the effectiveness of the stay. The federal Administrative Procedure Act specifically authorizes federal agencies to stay the effect of their actions pending judicial review, as an alternative to court-ordered interim relief: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. Thus, the AS-IA's stay of his own August 31 Decision does not require a court order to make it effective. *See also Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713, 719 (9th Cir. 1989) (court properly gave effect

to parties' stipulation that plaintiff could file an amended complaint, by dismissing defendant's appeals which were intended to prevent plaintiff from doing so); *Consol. Grain & Barge v. Archway Fleeting*, 712 F.2d 1287, 1289-1290 (8th Cir. 1983) (recognizing binding effect of stipulation between parties in federal court and finding that district court erred in not giving effect to parties' stipulation) (citations omitted).

In an attempt to avoid the effect of the stay, Plaintiff claims that implementation of the August 31 Decision concerns only the Tribe's right to federal funding. This argument proves too much, for if Plaintiff were correct, the August 31 Decision would not establish anything about the membership or leadership of the Tribe and could not possibly entitle Plaintiff to the RSTF money at issue in this case.

In any case, Ms. Burley's argument is obviously false. The August 31 Decision arises out of her challenge to the BIA's efforts to assist the Tribe with involving its full membership in Tribal organization. *The decision makes no mention of federal funding*, and it explicitly attempts to determine the members of the Tribe and to identify the Tribe's current form of government. It directs the Department to conduct government-to-government relations with that purported Tribal government. (Burley's Exhibits at 415.) There can be no doubt that implementation of the August

31 Decision, *if not stayed,* would involve precisely the recognition that Plaintiff needs in order to prove her entitlement to the RSTF funds. The stay of the Decision prevents that recognition from occurring until the federal court has heard Intervenors' challenge.

Ms. Burley also tries to draw a distinction between "implementation" of the August 31 Decision and giving effect to its findings. This distinction is illusory. According to Webster's Third New International Dictionary, to "implement" something means "to carry out; esp. *to give practical effect to* and ensure of actual fulfillment by concrete measures" (emphasis added). If the trial court were to give Ms. Burley access to more than $8 million held in trust for the Tribe, it would surely give practical effect to, or implement, the AS-IA's August 31 Decision. The AS-IA's decision to stay implementation of the August 31 Decision clearly means that the AS-IA did not intend for that to happen until the federal court reviews the August 31 Decision.

3. The Department Currently Recognizes No Tribal Authority

Prior to the August 31 Decision, the status quo was that the Department did not recognize any government of the Tribe. Although the BIA had previously (and erroneously) recognized Ms. Burley as a Tribal representative, the AS-IA on February 11, 2005, issued a decision stating

that "the BIA does not recognize any Tribal government." (Intervenors' Exhibits at 118.) Ms. Burley challenged that decision in *Miwok I* and *II*, and lost. *See Miwok I*, 424 F.Supp.2d at 200-201. The BIA reiterated its position in 2007 in another decision issued to Ms. Burley, stating that "in this situation, where the BIA does not recognize a tribal government," the BIA would assist the Tribe in identifying its full membership and proceeding with organization. (Intervenors' Exhibits at 127.)

The August 31 Decision does not rescind those prior decisions; in fact, it explicitly disclaims any intent to do so, and states that the Decision shall apply prospectively only. (Burley's Exhibits at 415.) As a result, the prior decisions remain in effect pending judicial review of the August 31 Decision, and the federal government currently does not recognize any government of the Tribe.

Because the August 31 Decision clearly states that it shall be stayed pending the outcome of *CVMT v. Salazar*, and because the AS-IA separately confirmed that he intended the Decision to have "no force and effect" until the federal court ruled on Intervenors' claims, the trial court did not abuse its discretion in refusing to enter judgment for Ms. Burley based on the August 31 Decision.

B. Neither the Commission Nor the Trial Court Has the Power to Determine the Leadership of the Tribe

Ms. Burley's demand to have the trial court determine her entitlement to the RSTF money necessarily requires that the court determine the membership and proper government of the Tribe. Ms. Burley strains to avoid this conclusion, arguing that "the trial court is not being asked to decide a leadership dispute" and that she "only seeks to have the trial court determine if . . . the Commission has any legitimate basis to continue to withhold the RSTF money from the Tribe." (Burley Petition p. 35) This position defies logic and common sense.

As stated above, no one denies that the Commission is obligated to pay RSTF funds to the Tribe. But in order to do so, the Commission must know who is authorized to receive those funds on behalf of the Tribe. Indeed, Ms. Burley's complaint demands that the Commission be ordered to pay RSTF money to the Tribe "in care of Silvia Burley." (Burley's Exhibits at 513) If the court granted that relief without establishing whether Ms. Burley represents the Tribe, it would simply be taking Ms. Burley at her word that she is entitled to receive more than $8 million in Tribal funds.

All parties agree that the state court cannot determine the membership or leadership of the Tribe, nor can the Commission. "An

Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress." *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134,154(1980). [A]n Indian tribe's right to self-government cannot be abrogated absent an unequivocal expression of Congress' intention to do so." (*Bowen v. Doyle*, 880 F.Supp. 99, 118 (W.D.N.Y. 1995) (New York state court lacked jurisdiction over tribal election dispute). *See also Williams v. Lee*, 358 U.S. 217, 220 (1959) (states cannot exercise jurisdiction over tribes where it would interfere with tribal self-government); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (state jurisdiction is preempted by federal law if it interferes with federal interests in Indian self-government).

Congress has delegated broad power over federal relations with Indian tribes to the Secretary of the Interior, who in turn has delegated that authority to the AS-IA. 25 U.S.C. § 2 (giving the Secretary authority to "manage all Indian affairs and [] all matters arising out of Indian relations"). The AS-IA's decisions are subject to judicial review under the Administrative Procedure Act. 5 U.S.C. § 706. Thus, outside of the Tribe itself, the United States government has the exclusive authority to

recognize a Tribal government and to resolve disputes regarding Tribal representation and membership, and those decisions are subject to review only in the federal courts. *See Ackerman v. Edwards,* 121 Cal.App.4th 946, 954 (2004); *Lamere v. Superior Court*, 131 Cal.App.4th 1059, 1067 (2005).

Ms. Burley has consistently argued this very position in this litigation. For instance, when Ms. Burley sought judgment on the pleadings, based on the AS-IA's original December 22, 2010 decision, this exchange between the trial court and Burley's attorney occurred during oral argument on March 11, 2011:

> The Court: Let's make it very clear here. This is the ultimate chicken-and-egg case because I don't have the authority to determine any of the issues that would cause me to rule that –
>
> Mr. Corrales: Correct.
>
> The Court: — money has to be disbursed. I have to look to agencies or federal courts or someone else with this issue.
>
> Mr. Corrales: That's correct.

(Burley's Exhibits at 292:27-293:5.) And in her Demurrer to Intervenors' Complaint in Intervention, Ms. Burley argued:

> Dixie's claims in intervention would require the court to determine a leadership dispute, but the court has no jurisdiction to decide that issue.

(Intervenors' Exhibits at 17:17-19.) In the same motion, Ms. Burley further stated:

Ultimately, the leadership dispute turns not on whether Mr. Dixie resigned in 1999 but on the issue of Tribal membership. Ms. Burley claims that the entire membership of the Tribe consists of five people, of whom four are, conveniently, herself and her immediate family. According to her, these are the only people entitled to select a Tribal leader. Intervenors maintain that all 242 adult lineal descendants of known historical members are members of the Tribe and are entitled to a voice in Tribal governance. Those 242 members have chosen the Tribal Council, not Ms. Burley, to represent them. Mr. Dixie's deposition testimony cannot resolve this conflict. But the membership question lies at the heart of the AS-IA's August 31 Decision, and Intervenors' federal court challenge to that Decision. (Intervenors' Exhibits at 202-234 (federal First Amended Complaint).) Intervenors urge this Court to read their motion for summary judgment in *CVMT v. Salazar*, which sets out the issues surrounding the Tribe's membership and government in much greater detail. (*See* Burley's Exhibits at 60-131.) Notably, whether or not Mr. Dixie resigned in 1999 is a complete non-issue for Intervenors' and federal Defendants' cross-motions for summary judgment in the federal case.

Finally, Ms. Burley's repeated statement in her petition that Mr. Dixie "admitted . . . that Burley is the present authorized Tribal Chairperson" (*e.g.*, Petition for Writ at p. 5) is simply false and a gross

mischaracterization of Mr. Dixie's deposition testimony. There is a reason this statement is not accompanied by any citation to Mr. Dixie's testimony.

While Mr. Dixie's deposition testimony cannot provide a basis for lifting the stay in any event, Intervenors also submit that the probative value of that testimony is limited by the circumstances under which it was acquired. As described above, Mr. Dixie's deposition testimony that Ms. Burley seeks to use as the basis for deciding this case was given under duress, after Ms. Burley's attorney threatened his life. His single statement that he resigned as chairperson in 1999 must be weighed against multiple statements by Mr. Dixie, across two depositions, that he never resigned as chairperson of the Tribe. He specifically testified that he never resigned and could not resign. (Burley's Exhibits at 135 (p. 166, lines 17-20), 139 (p. 202, line 20)-140 (p. 203, line 7), 145 (p. 33, lines 15-16), 147 (p. 44, lines 3-4), 147 (p. 44, lines 16-18), 147 (p. 45, line 8)-148 (p. 49, line 20).) He testified that he believed his resignation had been forged. (Burley's Exhibits at 135 (p. 166, lines 7-11), 136 (p. 178, lines 15-19), 137 (p. 183, lines 4-11), 145 (p. 31, line 24)-146 (p. 32, line 9), 146 (p. 34, lines 4-7).) He testified that he did not believe he signed the purported resignation. (Burley's Exhibits at 138 (p. 200, lines 10-22), 139 (p. 202, lines 7-11).) After the threat from Ms. Burley's counsel and at the end of a very contentious deposition, he also testified that he did resign.

Thus, at most, Mr. Dixie's testimony, taken during two sessions over seven months apart, is contradictory regarding an entirely non-material issue. Further, it is just one piece of information in the record on this issue. Should this matter ever come to trial, and should this issue be deemed to be relevant and within the trial court's jurisdiction, the court will have the opportunity to weigh all of the facts in the record.

In summary, Mr. Dixie's deposition testimony regarding his alleged resignation is of questionable probative value and has no bearing on whether Ms. Burley is the Tribe's authorized representative today. Under BIA decisions currently in effect, the BIA does not recognize any Tribal government and will not do so until after the federal court issues its decision in *CVMT v. Salazar*. Therefore, the trial court did not abuse its discretion by refusing to lift the stay based on Mr. Dixie's testimony.

D. The Court of Appeal Did Not Order the Trial Court to Decide Whether Ms. Burley Represents the Tribe

Ms. Burley argues that the trial court's stay violates the Court of Appeal's order in *CVMT v. CGCC*, because the Court of Appeal ordered the trial court to litigate her entitlement to the RSTF funds. This argument entirely misconstrues the Court of Appeal's opinion, which dealt only with whether the Plaintiff had standing and capacity to file suit *based on the allegations in the pleadings*. At the time of Ms. Burley's appeal,

Intervenors were not yet participating in the case, and the Court of Appeal therefore held:

> [T]here is no basis to question [the] Miwok Tribe's standing to bring this lawsuit, even if it is involved in a leadership dispute. Regardless of who is the proper leader of the Miwok Tribe and whether the BIA approves of the Miwok Tribe's constitution, it is undisputed that the lawsuit was brought by the Miwok Tribe itself as the sole plaintiff. The Miwok Tribe is undoubtedly a real party in interest . . .. Thus, we conclude that there is no defect in the standing in this action sufficient to support an order sustaining a demurrer.

CVMT, 2010 WL 1511744, *6. This Court also held that "the Commission ha[d] identified no authority . . . to support a finding that the Miwok Tribe lacks the capacity to bring suit" due to the existence of an ongoing leadership dispute. *Id.* at *8. In doing so, the Court relied on the *allegations* in Ms. Burley's complaint that it was filed by a "person of authority" within the Tribe who was the Tribe's "selected spokesperson." *Id.*

The Court of Appeal specifically disclaimed any intent to rule on the merits of Ms. Burley's claims:

> In our view, the issues of standing and capacity are separate from the issue of whether the Miwok Tribe should prevail on the merits of its lawsuit. We reject the Miwok Tribe's suggestion that if it establishes standing to bring this lawsuit, it is automatically entitled to payment of the RSTF funds. . . . That is a separate issue that must be litigated upon remand of this action to the trial court.

Id. Read in context, the last sentence of this quotation, on which Ms. Burley relies, simply indicates that the issue of Ms. Burley's entitlement to the funds remained to be litigated, not that the trial court must litigate the issue without any delay and without taking into account other relevant decisions and litigation, including *CVMT v. Salazar.*

Nothing in the Court of Appeal's opinion required the trial court to make findings regarding Ms. Burley's claim to represent the Tribe, or to order the funds released before the validity of Ms. Burley's claim is determined. On the contrary, this Court stated:

> The Commission contends that because it has a fiduciary duty as trustee of the RSTF funds, the current uncertainties regarding the Miwok Tribe's government and membership require it to withhold the RSTF funds and hold them in trust until it can be assured the funds, if released, will be going to the proper parties. Nothing in our decision is intended to foreclose the Commission from pursuing such an argument in the trial court. Indeed, the trial court will be better able to explore the legal impact of the tribal leadership dispute and the BIA's relationship with the Miwok Tribe when the pertinent facts are more fully developed later in the litigation . . ..

Id. In other words, the trial court could consider how the ongoing Tribal leadership dispute, and the BIA's decision to deny recognition of Ms. Burley's purported government, bear on Ms. Burley's claim to the RSTF funds. The trial court did exactly that, and it concluded that the *federal government's* decision whether to recognize Ms. Burley's Tribal

government would dispose of her claim to the funds. Because the AS-IA's August 31 Decision has been challenged in federal court, and stayed by the AS-IA pending resolution of that challenge, the trial court properly stayed this case to await the outcome of *CVMT v. Salazar*.

Nothing about the trial court's subsequent management of the case conflicts with the Court of Appeal's opinion in *CVMT v. CGCC* that the Tribe has standing and capacity. Thus, the court's imposition of a stay does not violate the law of the case and is not an abuse of discretion.

VI.

CONCLUSION

The trial court properly stayed the case for all purposes except discovery pending the outcome of *CVMT v. Salazar*, which is likely to be dispositive of this case. The stay was not an abuse of discretion, and it does not cause irreparable injury to Ms. Burley or deny her an opportunity to have her claims heard. On the contrary, the stay avoids the potential for irreparable injury and grave injustice to Intervenors should Ms. Burley gain access to the Tribe's funds before a determination by the federal court.

Nor does it ignore the Court of Appeal's holding that the Tribe had standing and capacity to bring this lawsuit. It merely defers to the federal court, which has exclusive jurisdiction, to determine the validity of Ms. Burley's claim to represent the Tribe. That issue is essential to determining whether the RSTF funds should be released "in care of Silvia Burley," as her complaint demands.

The AS-IA's August 31 Decision does not establish Ms. Burley as the Tribe's representative, because the Decision is stayed by its own terms and by the AS-IA's stipulation. It therefore cannot provide the basis for entry of judgment against the Commission. Mr. Dixie's deposition testimony also does not warrant lifting the stay, because it is irrelevant to establish who is the current Tribal authority. Ms. Burley's arguments to the contrary are without merit, and her petition for a writ of mandate should be denied.

DATED: June 18, 2012

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204, the attached answer and supporting memorandum is proportionately spaced in 13 point Times New Roman typeface, and contains 13,430 words, according to the counter of the word processing program with which it was prepared.

DATED: June 18, 2012

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