Case No. D064271

IN THE CALIFORNIA COURT OF APPEAL
FOURTH APPELATE DISTRICT, DIVISION ONE

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff/Appellant,

vs.

CALIFORNIA GAMBLING CONTROL COMMISSION,

Defendant/Respondent.

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

APPELLANT'S REPLY BRIEF
(AS TO THE COMMISSION'S RESPONDENT'S BRIEF)

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Plaintiff/Appellant CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or "the Miwok Tribe) submits the following Reply Brief in reply to the Respondent Brief submitted by the Defendant/Respondent CALIFORNIA GAMBLING CONTROL COMMISSION ("the Commission").

I.

SUMMARY OF ARGUMENT IN REPLY

The Commission's reasons for refusing to release the subject Revenue Sharing Trust Fund ("RSTF") proceeds to the Tribe can be

summarized as follows: (1) A Tribal Leadership dispute calls into question who is authorized to receive the funds for the Tribe; (2) The Bureau of Indian Affairs ("the BIA") does not recognize any government body or Tribal leader of the Miwok Tribe, as manifested by the fact that the BIA will no longer award P.L. 638 federal contract funding to the Tribe; and (3) There remains uncertainty with these issues, so long as Yakima Dixie ("Dixie") and his tribal faction ("the Dixie Faction") continue to litigate them in the federal court.

However, the fact that Dixie now admits under oath that he resigned in 1999 as Tribal Chairman, and that his resignation was not forged after all, is a significant game changer for the release of the subject RSTF payments. In addition, the federal government continues to publish in the Federal Register yearly, official statements from the Assistant Secretary of the Interior—Indian Affairs ("the ASI") unequivocally stating that the federal government continues to have a government-to-government relationship with the Miwok Tribe, thus refuting any notion that the Tribe has no recognized governing body. Clearly, the federal government cannot say it has a government-to-government relationship with an Indian Tribe that has no recognized governing body, and the Commission has offered no evidence or arguments to refute this point. Moreover, the federal government "locked in" its recognition of the governing body of the Miwok Tribe under the leadership of Silvia Burley ("the Burley Faction") when, after the ASI issued its December 22, 2010 decision recognizing the Tribal Council under the Burley Faction, prompted the BIA to formally acknowledge the "re-election" of Burley in January 2011, which the BIA

never rescinded or revoked thereafter. Neither the ASI in its August 31, 2011 decision re-affirming its December 22, 2010 decision nor the U.S. District Court remanding back to the ASI for reconsideration of his August 31, 2011 decision ever revoked, rescinded or vacated the BIA's January 2011 letter acknowledging the re-election results and recognizing the Burley Faction. Under well-settled Indian jurisprudence, the last recognized governing body of an Indian tribe is to be recognized and dealt with pending resolution of a tribal leadership dispute, so as not to jeopardize the day-to-day operations of the tribe. Goodface v. Grassrope (8th Cir. 1983) 708 F.2d 335.

Also, ASI Kevin Washburn recognized Burley as Chairperson of the Miwok Tribe in December 2013, after Burley attended a White House Tribal Nations Conference in November 2013.

In addition, the Commission's "standard" of relying on whether the BIA awards P.L. 638 federal contract funding to a particular tribe as determinative of whether that tribe has a recognized governing body is seriously misplaced. The process of awarding P.L. 638 federal contract funding does not involve any formal recognition of a tribal governing body or a resolution of a tribal leadership dispute. The trial court's acceptance of this standard for purposes of deciding whether to authorize release of the subject RSTF proceeds was, therefore, erroneous as a matter of law.

Because the Commission has been distributing RSTF for the Miwok Tribe, the present five-member Tribe has constructively received those payments, despite the fact that the Commission has diverted them into a separate account, and despite the potential that the ASI's

decision is being reconsidered with the potential that future members may be added to the Tribal enrollment.

The Dixie Faction Intervenor's failure to appeal the order denying them intervention binds them to the order confirming Burley as the Tribal leader and confirming that no Tribal leadership dispute exists, thus requiring the Commission to release the funds to Burley as the only one presently authorized to receive those funds for the Tribe.

II.

THE DEPOSITION TESTIMONY OF YAKIMA DIXIE, IGNORED BY THE COMMISSION IN ITS BRIEF, IS CENTRAL TO ALL DISPOSITIVE ISSUES IN THIS CASE

A. THE COMMISSION COMPLETELY IGNORES THE TRIBE'S ARGUMENT THAT DIXIE'S DEPOSITION TESTIMONY ADMITTING HE RESIGNED AS TRIBAL CHAIRMAN REFUTES THE COMMISSION'S CLAIM THAT A LEADERSHIP DISPUTE PREVENTS IT FROM RELEASING THE RSTF PAYMENTS TO THE TRIBE

In the Tribe's Opening Brief, it points out that Yakima Dixie ("Dixie") ultimately admitted in his 2012 deposition taken in this case that he in fact resigned in 1999 and that his signed resignation was not forged after all, as he had previously maintained since 1999. Dixie also testified that he in fact signed documents concurring in the Tribal Council's actions appointing Burley as the new Chairperson. The Tribe argued that this essentially resolved the leadership dispute and paved the way for the Commission to release the funds to Silvia Burley ("Burley") whose Tribal leadership Dixie had disputed. Inexplicably,

the Commission completely ignored these points in its Respondent Brief.

The Commission's failure and refusal to address the Tribe's arguments in its Opening Brief with respect to Dixie's deposition testimony admitting he resigned as Tribal Chairman, and the legal effect of that fact with respect to this case, is a concession that those arguments and points are meritorious. Berry v. Ryan (1950) 97 CA2d 492, 493 (Because Respondent failed to file a brief Court assumed the ground urged by Appellant for reversing the judgment is meritorious).

B. THE COMMISSION HAS REPEATEDLY STATED SINCE 2005 THAT A TRIBAL LEADERSHIP DISPUTE JUSTIFIES WITHHOLDING THE SUBJECT RSTF PAYMENTS

The record is replete with references by the Commission that a Tribal leadership dispute between Dixie and Burley justifies its actions in withholding the Revenue Sharing Trust Fund ("RSTF") payments from the Tribe. The purported reasons are that the Commission does not know which of the two claimed leaders is authorized by the Tribe to accept the funds for the Tribe. (Commission RSTF Report, dated 2008, stating: "Distribution to California Valley Miwok Tribe is withheld pending resolution of tribal leadership dispute."). The Commission also stated that the Tribe's lack of a governing body also factored into it decision to withhold those funds, but the so-called lack of a governing body is inextricably related to Dixie's false claim to be the Tribal leader over Burley.

C. THE COMMISSION SOUGHT AND OBTAINED FROM THE BIA INFORMATION THAT THE TRIBAL LEADERSHIP DISPUTE WAS THE CAUSE OF THE TRIBE'S ON-GOING PROBLEMS

Because the Commission felt the Tribal leadership dispute was preventing it from releasing the RSTF money, it contacted the U.S. Department of Interior ("DOI"), specifically the Solicitor's Office for Indian Affairs to obtain a status of the leadership dispute, presumably so it could determine when and how it might release the funds. In a letter dated December 12, 2008, to Deputy Attorney General Peter Kaufman, one of the previous attorneys for the Commission in this case, Ms. Edith Blackwell of the DOI summarized the Tribe's leadership dispute as follows:

> "Mr. Dixie and Ms. Burley became interested in organizing the tribe formally—that is establishing a tribal government. In 1999, the two of them approached the BIA for assistance. At that time, Mr. Dixie acted as the Tribe's leader and he held the title of 'Chairman.' On April 20, 1999, Ms. Burley submitted a purported letter of resignation from Mr. Dixie. The next day, Mr. Dixie asserted he never resigned his position and refused to do so. He claims that Ms. Burley forged his name on the resignation letter..."

CT 2780. Ms. Blackwell's statement that "the next day" Dixie claimed he never resigned is contradicted not only by Dixie's 2012 deposition testimony that he in fact resigned and that his resignation was not forged, but by the fact that ten (10) days thereafter and then again in July of 1999, Dixie signed multiple documents referring to himself as "Tribal Member" or "Vice President of the Tribe," directly under the

signature block of Silvia Burley who signed as "Tribal Chairperson." CT 9415, 9420-9421, 9417. Ms. Blackwell then wrote:

> "When the BIA is faced with a situation such as this, when it cannot determine who the legitimate leader of the Tribe is, the **BIA must first defer to the Tribe to resolve the dispute**." (citations omitted) (Emphasis added).

CT 2782. At the time this letter was written, Dixie had not been deposed. Had the BIA known that Dixie was lying about his resignation being forged, and that he had resigned after all in 1999, the BIA would have deferred to Dixie's testimony and concluded that the leadership dispute resolved itself in the context of Dixie's admission under oath.

Ms. Blackwell also asserted that the Bureau of Indian Affairs ("the BIA") "faced a stand-off between Ms. Burley...and Mr. Dixie...," and that because the Miwok Tribe purportedly had no government, "it has no governmental forum for resolving the [leadership] dispute." CT 2782. Ms. Blackwell then added:

> "The only answer is for the BIA to wait for the Tribe to organize itself...In the meantime, neither the BIA nor any court has authority to resolve the leadership dispute that is crippling the Tribe." (citing Goodface, supra) (Emphasis added).

CT 2782. Based on what occurred thereafter with the ASI and his decisions, and the BIA's ultimate acknowledgement of Burley's re-election and its recognition of the Burley Faction in its January 2011 letter, the Miwok Tribe did in fact have a tribal governmental forum in which to resolve this Tribal leadership dispute. However, in light of

Dixie's deposition testimony in February 2012, that became unnecessary.

D. IN HIS AUGUST 31, 2011 DECISION THE ASSISTANCE SECRETARY OF INTERIOR OBSERVED THAT THE TRIBAL LEADERSHIP DISPUTE WAS THE SOURCE OF THE TRIBE'S LONG-STANDING PROBLEMS, BUT DID NOT DECIDE IT

Contrary to the Commission's assertion, and the erroneous conclusions of the trial court, the ASI's August 31, 2011 decision did not address or attempt to resolve any Tribal leadership dispute. The ASI was tasked with the responsibility of resolving a membership or "enrollment" issue, not a Tribal leadership dispute. As a result, it is erroneous to assume that the ASI, the BIA or even the federal court will resolve any Tribal leadership dispute. It follows that the Commission's position that before it can release the subject RSTF money it must wait for the BIA or the federal court to decide the leadership dispute is erroneous. The following shows why this will never happen.

Because of the Tribal leadership dispute that apparently was not getting resolved, and thus "crippling the Tribe," the BIA took it upon itself to "indirectly" resolve the Tribal leadership dispute by taking steps to re-organize the Tribe's governing body by itself and enrolling new members itself to vote on a new Tribal government, all against the will of the Tribe being led by the Burley Faction. Under the guise of "assisting" the Tribe, the BIA announced:

> [It] would sponsor a "general council meeting of the Tribe," to which BIA would invite tribal members (apparently numbering six) as well as "potential" or "putative" members (apparently numbering in the several hundreds). BIA decided the criteria for

> (and intends to make individual eligibility determinations for) the class of "putative" members who would be allowed to participate in the general council meeting, and whose involvement BIA deemed necessary in order to include the "whole tribal community" in the tribal organization and membership decisions.

CT 2409. According to the IBIA decision, the BIA felt its actions were necessary because:

> [U]ntil the tribal organization and membership issues were resolved, a leadership dispute between Burley and Yakima...could not be resolved, and resolution of that dispute was necessary for a functioning government-to-government relationship with the Tribe. (Emphasis added).

CT 2409-2410. Accordingly, it was in this context that the ASI was to decide the issue of "enrollment." In short, the BIA sought to improperly enroll potential members against the Tribe's will so as to indirectly resolve the on-going Tribal leadership dispute. Thus, the ASI was never referred any Tribal leadership dispute to resolve, although he acknowledged that that dispute prompted the enrollment issue. He stated:

> "This decision is necessitated by a long and complex tribal leadership dispute that resulted in extensive administrative and judicial litigation."

CT 8920. The ASI then summarized his task as deciding a membership issue and the related issue of whether the BIA could require the Tribe to "organize" itself under the Indian Reorganization Act of 1934 ("the IRA") or adopt its own governing body outside the IRA and still qualify for federal funding. He stated:

> "It is clear to me that the heart of this matter is a misapprehension about the nature and extent of the Secretary's role, if any, in determining tribal citizenship of a very small, uniquely situated tribe. Related to this issue is the Tribe's current reluctance to 'organize' itself under the IRA, choosing instead to avail itself of the provisions in 25 U.S.C. Section 476(h), first enacted in 2004, which recognizes the inherent sovereign powers of tribes 'to adopt governing documents under procedures other than those specified...[in the IRA.]"

CT 8922.

Knowing that he could not, and did not, resolve the then pending Tribal leadership dispute, and having resolved the "enrollment" issue, the ASI then encouraged Dixie and Burley to "work within the Tribe's existing government structure to resolve this longstanding dispute and bring this contentious period in the tribe's history to a close." CT 8925. There is no doubt that the ASI was referring to the Tribal leadership dispute.

As stated, for purposes of determining who should receive the RSTF proceeds for the Tribe, that issue resolved itself when Dixie testified in his deposition in 2012 that he in fact resigned as Tribal Chairman and signed documents concurring in Burley's appointment as the new Tribal Chairperson.

E. THE TRIBE PREVIOUSLY SOUGHT TO RESOLVE THE LEADERSHIP DISPUTE INTERNALLY, CONSISTENT WITH INDIAN LAW OF SELF-GOVERNANCE, BUT THE COMMISSION REFUSED TO ACCEPT THOSE RESULTS

On February 4, 2004, the Tribe passed a resolution establishing an administrative forum, together with an administrative officer, to

hear and decide Dixie's challenge to Burley as the Tribal Chairperson. CT 1189-1191. The parties submitted their respective documents, and the matter was heard on January 18, 2005. CT 1194. Dixie submitted his written documents and argued that his resignation was forged and that he never resigned as Tribal Chairman. CT 1201-1203.

The administrative officer ultimately concluded that Dixie did resign and rejected Dixie's forgery claim. He also concluded that Burley was the newly appointed and elected Tribal Chairperson. CT 1218-1219. Despite this, the Commission rejected this decision. CT 0663. If, in fact, the Tribe had authority to pass a resolution to change the name of the Tribe, which the BIA accepted and placed that new name in the Federal Register, then the Tribe had the authority to set up this administrative forum to resolve the then pending tribal leadership dispute. Whether the BIA accepted or rejected that administrative decision is moot, given Dixie's recent deposition testimony admitting he resigned.

If in 2008 the Commission refused to acknowledge and accept the administrative officer's decision resolving the tribal leadership dispute because the BIA had rejected it (largely because the BIA erroneously believed the Tribe had no governing body), then there is no reason now for it to reject Dixie's own deposition testimony in this case that he in fact resigned.

F. THE U.S. DISTRICT COURT'S RULING REMANDING THE ASI'S DECISION BACK FOR RECONSIDERATION CITED NUMEROUS REFERENCES TO THE TRIBAL LEADERSHIP DISPUTE AS A BASIS FOR ITS RULING, BUT THE COURT WAS NEVER TOLD THAT DIXIE RECENTLY ADMITTED HE IN FACT RESIGNED

The U.S. District Court remanded back to the ASI for him to reconsider his August 31, 2011 decision, because, according to the U.S. District Court, the ASI merely assumed the Tribe's membership is limited to five persons and further merely assumed that the Tribe is governed by a duly constituted Tribal council, without setting forth its reasons for these conclusions, in light of the administrative record that questioned the validity of those assumptions.

However, because Dixie's deposition testimony came after the ASI's August 31, 2011 decision, it was not part of the administrative record for the U.S. District Court to review. As a result, the U.S. District Court was misled into thinking that Dixie still maintained that he never resigned as Tribal Chairman, and the court relied upon that on-going claim in her court as a basis for her ruling.

For example, the U.S. District Court stated:

> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the General Council. From as early as April 1999, Yakima contested the validity of the Council. *See* AR 000182 (April 21, 1999 letter from Yakima to the BIA stating that he "cannot and will not resign as chairman of the Sheep Ranch Indian Rancheria"); *see also*, AR 000205 (October 10, 1999 letter from Yakima to BIA raising questions about Burley's authority); AR 001690, 000231 (Yakima

notifying the BIA of "fraud and misconduct" with respect to the Tribe's leadership).

CVMT v. Jewell (formerly Salazar) (D.C. Dist. Ct. 2013) 2013 U.S. Dist. LEXIS 174535. Accordingly, based solely on the administrative record, the U.S. District Court concluded that Dixie's claim that his resignation was forged and that he never resigned raised doubts about the validity of the Tribal Council under the Burley Faction. However, once the matter is remanded and the administrative record is supplemented to include Dixie's sworn deposition testimony admitting that he in fact did resign and that his resignation was never forged as Dixie falsely claimed, upon reconsideration, the ASI will likely affirm his conclusion that the Tribe is validly governed by the Tribal Council.

Moreover, Dixie's false claim that his resignation letter is a forgery is contradicted by several other documents he admits signing thereafter, which were never part of the administrative record. For example, after resigning, Dixie admits signing another Tribal document appointing Burley as the new Chairperson. CT 6663 (Dixie deposition acknowledging his signature on document (Exhibit "34") accepting his resignation); CT 6665 (Exhibit "34"). Then, ten (10) days after resigning, Dixie signs a document for the development of a casino with the Tribe. However, he signs as "Tribal Member" directly beneath the signature of Silvia Burley who signed as "Chairperson" of the Tribe, such that he could not have missed seeing her signature block and in what capacity she was signing her name. CT 9415. On July 7, 1999, Dixie wrote the BIA, through his attorney who had a power of attorney, and referred to himself as the "Vice President" of the Tribe, not the

Chairman. CT 9420-9421. Later, on July 23, 1999, Dixie signed an Addendum to the Development Agreement. He again signed as "Tribal Member," not as Tribal Chairperson, under the signature of Burley who signed as "Chairperson" of the Tribe. CT 9417. The administrative record will be supplemented to include this additional evidence showing that Dixie's claim that he never resigned was false from the outset, in light of his recent deposition testimony.

In addition, Dixie's resignation documents will, upon remand, further show that the Tribal Council was validly organized. For example, the U.S. District Court noted, but did not decide as determinative, the fact that the 1998 Resolution forming the Tribe's General Council did not have the signature of Rashel Reznor, one of the adult members. CVMT v. Jewell, supra at 10, fn. 6. However, the administrative record can and will be easily supplemented to show that Ms. Reznor subsequently executed the 1998 Resolution nunc pro tunc, since she was away at school at the time. Moreover, other documents were signed by Dixie, Burley and Reznor together, thus confirming that the Tribal Council was functioning as it was intended when it was organized under the 1998 Resolution. For example, on April 20, 1999, upon receipt of Dixie's resignation, Dixie, Burley, and Reznor all signed a document entitled "General Council Governing Body of the Sheep Ranch Tribe of Me-Wuk Indians" regarding a special meeting about Dixie's resignation and Burley being appointed as the new Chairperson. CT 6665. Significantly, Dixie signed as the Chairperson and Burley as the Secretary/Treasurer. The document states:

> "The General Council as the Governing Body of the Sheep Ranch Tribe of Me-Wuk Indians has agreed to accept the resignation of Chairperson from Mr. Yakima K. Dixie. The General Council has appointed Silvia Burley as Chairperson." (Emphasis added)

CT 6665. Clearly, this document, as signed by all three adult members of the General Council, ratifies the Resolution (Resolution #CG-98-01) establishing the 1998 Tribal Council that purportedly did not have the signature of Raznor. This document was not discussed by the U.S. District, presumably because it was not part of the administrative record, but upon remand, the ASI will consider it and conclude it ratified the Resolution establishing the Tribal Council.

Under the circumstances, the Commission cannot expect the ASI or the U.S. District Court to ignore Dixie's deposition testimony, and, therefore, neither should it as well.

Indeed, the Dixie Faction's attorneys of record in the federal litigation had a duty as officers of the court not to mislead the court on this critical issue. They purposely concealed Dixie's deposition testimony in this case in order to gain an unfair advantage in the pending federal litigation. Notably, those attorneys, Sheppard, Mullin, Richter & Hampton, LLP, are the same attorneys in this case, and attended and defended Dixie at his deposition in this case, and therefore purposely misled the Court on these critical and material facts.

G. THE COMMISSION'S ASSERTION THAT THE TRIBE HAS NO RECOGNIZED GOVERNING BODY AS A REASON TO WITHHOLD RSTF PROCEEDS FROM THE TRIBE IS INTERTWINED WITH DIXIE'S CLAIM THAT HE, NOT BURLEY, IS THE TRIBAL LEADER

As stated, the Tribe's problems with the BIA concerning its governing body can be traced to Dixie's false claim for over 15 years that he never resigned and that his resignation was a product of fraud. But for this false claim, the Tribe would have continued to operate under its present Tribal Council form of government and received P.L. 638 federal contract funding from the BIA and RSTF payments from the Commission without objection.

H. AFTER DIXIE RESIGNED IN 1999, NEITHER THE BIA NOR THE DOI EVER RECOGNIZED HIM AS THE AUTHORIZED TRIBAL LEADER OR HIS FACTION AS THE TRIBE'S AUTHORIZED GOVERNING BODY

As stated, the record shows that the BIA early on recognized Burley as the Chairperson of the Tribe, and later as a "person of authority" for the Tribe. It accepted the authority of the Tribal Council under Burley's leadership in 2001 when the Tribal Council passed a resolution changing the name of the Tribe from the "Sheep Ranch Tribe of Me-wuk Indians" to the "California Valley Miwok Tribe," by placing that new name in the Federal Register each year. However, it never accorded the same recognition to Dixie, after he resigned. He was never thereafter referred to as the Tribal Chairman, and his new Tribal Faction and group of followers were never recognized. Significantly, his tribe which he calls the "California Valley Miwok Tribe, California," has

never been placed in the Federal Register. Neither Dixie nor his faction was ever awarded P.L. 638 federal contract funding. In short, his organization is a fraud.

In fact, the present Tribal Council headed by Burley is the same Tribal Council created by Dixie in 1998. There is only one Tribe and two competing faction vying for control of the Tribe. However, Dixie admits resigning as Tribal Chairman thus effectively giving control of the Tribe over to Burley.

The Commission knows this, but continues to falsely maintain that it does not know who might be authorized to receive the subject RSTF payments. Significantly, the Compacts do not require that the RSTF proceeds be paid over to a Tribal Chairperson; only to a Non-Compact Tribe. Since it is undisputed that the Tribe changed its name to the California Valley Miwok Tribe by a Resolution passed by the Tribal Council headed by Burley, which was accepted by the BIA, it cannot be disputed that Burley's Tribal Council is the authorized governing body for the correct Tribe, and not Dixie's faction which he organized around his group of followers.

III.

DIXIE'S PREVIOUS CLAIM THAT HE NEVER RESIGNED IS RELEVANT TO THE ISSUE OF WHO IS NOT AUTHORIZED TO RECEIVE THE SUBJECT RSTF PROCEEDS

The Commission's decision to purposely ignore Dixie's deposition testimony is consistent with its view, and that of the Dixie Faction Intervenors' view, that his deposition is "disputed" and irrelevant. In

fact, the trial court took the same view and made the following erroneous conclusion that is the subject of this appeal:

> Plaintiff also argues that "[t]here is no dispute concerning the leadership of the Tribe, in light of recent deposition testimony of Yakima Dixie confirming that he had resigned as Tribal Chairman and acknowledging that Burley is the new Chairperson." [Plaintiff's response to SSUMF 9]. While Dixie does testify that he resigned as chairperson of the Tribe, it is not Dixie's resignation and/or Dixie's purported recognition of Burley as the new Chairperson that is at issue. Rather, it is the BIA's recognition of Burley, or another person or entity, as the authorized representative of the Miwok Tribe that is the determining factor. A determination as to the effect of the Dixie testimony on the issue of the authorized representative of the Miwok Tribe is beyond the jurisdiction of this court.

CT 9133. As stated, neither the BIA nor the courts have the authority to decide whether Burley should be the "authorized" leader of the Tribe. That is an intra-tribal matter that must be decided by the Tribe itself under the principle of tribal sovereignty. Timbisha Shoshone Tribe v. Salazar (D.C. Cir. 2012) 678 F.3d 935, 938 ("It is a 'bedrock principle of federal Indian law that every tribe is "capable of managing its own affairs and governing itself." ' "(citing Cal. Valley Miwok Tribe v. United States (D.C. Cir. 2008) 515 F.3d 1262, 1263, and quoting other authorities). In fact, in Timbisha, supra, the ASI Larry Echo Hawk allowed the tribe there to resolve its own leadership dispute through an election process before "recognizing" the winner of the election. 678 F.3d at 938.

Just as the ASI allowed the two factions in Timbisha, supra to resolve their own leadership dispute before "recognizing" the winner,

the trial court here should have treated Dixie's deposition testimony in the same way. While Dixie's deposition testimony will ultimately have an impact on the ASI in reconsidering his decision, the Commission does not have to wait for that to occur to determine for itself now who (between Burley and Dixie) the Miwok Tribe has selected internally to lead the Tribe. Dixie's deposition testimony resolved that issue for the Tribe. The effect is the same, whether the Tribe resolved it internally or by election, or whether Dixie simply gave up his false leadership dispute claim and instead acknowledged that he had resigned. Thus, it was not beyond the jurisdiction of the trial court to acknowledge Dixie's deposition testimony taken in the same case over which the court presided and in the same case in which the trial court has previously ordered Dixie to submit to deposition testimony over Dixie's objection. CT 6418-6433.

Dixie's deposition testimony is relevant for purposes of determining whom between Burley and Dixie the Tribe has authorized to receive the RSTF proceeds for the Tribe. Since Dixie admits he resigned, that person cannot be him.

IV.

DIXIE'S PREVIOUS CLAIM THAT HE NEVER RESIGNED IS GROUNDED ON FRAUD

Dixie's deposition testimony is devastating, as it goes to the core issue of the dispute in this case and the ongoing leadership dispute that has crippled the Tribe for so many years. Significantly, Dixie's testimony admitting that he in fact resigned came from the

examination of his own lawyer during the deposition. Dixie testified as follows:

BY MR. McCONNELL:

Q: Mr. Dixie, I know this has been a long day, but again turning to Exhibits 33 and 34, both of these documents purporting to show your resignation, the two signatures [on] Exhibit 33 and 34, did you write those signatures?

A: It appears.

Q: Exhibit 33, is that a signature that you believe you wrote on Exhibit 33?

A: Uh-huh.

Q: You believe that's your signature?

A: Umm, I don't—umm, they're pretty close.

Q: This is the document indicating on Tuesday, April 20th, 1999, that you are resigning as chairperson. Do you believe that you wrote the signature on Exhibit 33 resigning as chairperson?

A: I don't remember that one.

Q: On Exhibit 34—

A: Okay. Yeah. Yeah. [*referring to his signature on Exhibit 33*].

Q: Okay. Yeah. This is or is not your signature? [*referring again to Exhibit 33*].

MR. CORRALES: I'll object to the question.

THE WITNESS: It is. [*referring to Exhibit 33*].

Q: You think it is?

A: Yeah.

Q: And on Exhibit 34, do you think that's your signature? Again, this is—

A: Yes.

Q: —accepting the resignation of chairperson?

A: Uh-huh.

Q: **And did you resign as chairperson of the Miwok Sheep Ranch Tribe?**

A: Yeah. Yes.

Q: You did. **Were you able to resign as chairperson?**

A: Yeah.

MR. McCONNELL: No further questions.

(Dixie deposition, pages 217-218) (Emphasis added).

Dixie clearly testified that Exhibits 33 and 34 contain his signatures, before his attorney tried to get him to change his testimony. For example, early on in the deposition Dixie testified as follows:

BY MR. CORRALES:

Q: And this [Exhibit 33] purports to be a Formal Notice of Resignation signed by Yakima Kenneth Dixie. Have you seen that before, sir?

* * *

Q: Is that your signature?

A: Yeah, that's my signature.

* * *

Q: ...Now, next in order is Exhibit Number 34. This purports to be a General Council Governing Body Special Meeting.

* * *

Q: Is that your signature on the document?

A: That is yes.

(Dixie deposition pages 170-173).

The parties then later took a break for fifteen (15) minutes, which gave Dixie a chance to consult with his attorney about his damaging testimony. (Dixie deposition, page 188, lines 1-4). After the break, Plaintiff's counsel finished up his examination on other topics, and Mr. McConnell went right in and asked Dixie questions about his signatures on Exhibit's 33 and 34, in an attempt to get Dixie to change his testimony, presumably based upon a discussion they had had during the break. However, as stated, Dixie conceded that he was not changing his testimony the first time he was asked the question about his resignation, and then, under the examination of his own attorney, specifically testified that he resigned and that the signatures on documents showing that he resigned were his.

Dixie's now admitted false claim that he never resigned as Tribal Chairman runs deeper than a simple lie. It is part of a fraudulent scheme to take away Burley's position as Tribal Chairperson, so that non-Indian joint venturers can build a casino for profit. These joint venturers, headed by a person by the name of Chadd Everone ("Everone") are simply using Dixie as their "puppet." The notion that Dixie purportedly never resigned as Tribal Chairman, and that his signed resignation was a forgery, were all concocted by Everone and his investor team. Dixie simply went along with it. Everone is the driving force behind the Intervenors' present litigation team, not Dixie.

This evidence was not in the administrative record for the U.S. District Court to consider, but will be submitted to the ASI, together with Dixie's deposition testimony, for the ASI to review when reconsidering his decision. They show that Dixie and his team committed a fraud on the Court in connection with their challenge of the ASI's August 31, 2011 decision. Had the U.S. District known of these facts and Dixie's deposition testimony, its ruling would likely have been different.

A. EVERONE, THE DIXIE FACTION'S "DEPUTY AND CONSUL GENERAL," IS USING DIXIE TO CHALLENGE BURLEY'S TRIBAL LEADERSHIP AS A MEANS TO STEAL THE TRIBE AND BUILD A GAMBLING CASINO FOR HIS OWN FINANCIAL GAIN.

In 1999, two California developers by the names of Bill Martin and LeRoi Chapell read a newspaper article about Yakima Dixie and the Tribe. CT 4895. Thinking they could profit from Dixie's situation, they contacted Dixie and entered into an agreement with him to build a tribal gambling casino. CT 4895. Unfortunately, Dixie had already resigned as Chairperson of the Tribe, and Burley was the current Chairperson. CT 4895. Martin and Chapell then contacted Everone who agreed to take over and help formulate a plan. CT 4895.

Everone then took over control of Dixie's affairs, and made himself Dixie's and the Dixie Faction's Tribal "Deputy & Consol General". CT 4871 (Everone's Tribal business card). As the Dixie Faction's "Deputy and Consul General," Everone is the managing agent and "officer" of that organization for purposes of making authorized, binding

admissions on that organization. Evidence Code §1222, 2330; Colarossi v. Coty US Inc. (2002) 97 CA4th 1142, 1150. Everone manages all loaned money for this scheme through an entity called "Friends of Yakima." CT 4917. He also manages and directs the Intervenors' litigation in this case and manages the "Tribal Organization," known as the "Dixie Faction." CT 4918. Indeed, when Plaintiff sought to take Everone's deposition in this case, the Dixie Faction passed a resolution (presumably drafted by Everone) whereby it purported to "invoke its sovereign immunity in the instance of Everone's deposition," and "instruct[ed] Mr. Everone to not be a witness in any court proceeding...unless specifically approved by the Tribal Council." CT 6481. The Resolution was signed by Yakima Dixie and the other Intervenors in this case. CT 6482. Despite these efforts, the trial court in this case twice denied Everone's motion for protective order with respect to the taking of his deposition, and ordered him to pay $3,000.00 in sanctions for refusing to submit to a deposition without substantial justification. CT 6570-6571.

Everone himself admits he "controls" Dixie. For example, he stated:

> "They [Chadd Everone and Bill Martin] asked for investment monies and provided me with a prospectus without asking how much I could give. They said my return would be by November 2006. I then asked them why would I give monies to Yakima who can't stay out of jail, and how is he going to run an Indian Casino? Both laughed and **Everone stated he controlled Yakima and the casino venture** and told me not to worry about that...." (Emphasis added)

CT 4896 (August 31, 2006 Email quoting Everone in meeting).

Thus, in light of Dixie's instability, serious criminal history, including murder and alcohol problems, Everone was easily able to manipulate and control Dixie, and use him for his own personal, financial benefit. He continues with that control today. Thus, the Intervenors' assertions in this litigation are really the assertions of Everone, not that of Dixie or the Dixie Faction. Everone is the Dixie Faction.

B. THE PHONY "FORGERY" CLAIM RELATIVE TO DIXIE'S RESIGNATION WAS FABRICATED BY EVERONE.

When he met Dixie in late 1999, one of the first things Everone did was to tackle the problem of Burley being the Chairperson of the Tribe as a result of Dixie's resignation. CT 4895. He told someone he thought was a potential investor that he "went to work using the UC Berkeley Law Library to study up on Indian Law to begin his quest for removing Burley as Chairperson of the Tribe." CT 4895. For his scheme to take over control of the Miwok Tribe to work, however, he needed Dixie to be the Chairperson, not Burley. His plan was simply to fabricate a forgery claim with respect to Dixie's letter of resignation.

The fact that the issue of forgery relative to Dixie's resignation letter was never raised until after the Everone team became involved strongly suggests that it was, and continues to be, a sham claim as part of Everone's scheme to take over the Tribe for his own financial purposes. Indeed, Everone admitted as much, when he was interviewed by someone he thought was a potential investor. He is reported to have said the following:

> "Only after signing up Yakima did Chapelle (later) find out (from the BIA) that the Tribe was under the control of Silvia Burley. That was when Martin enlisted the help of Everone who came up with a plan to take the tribe out of Silvia's control by saying Yakima only gave up [the] 'spokesperson' role to Silvia and not the Chair." (Emphasis added).

CT 4895 (Email from C. Ray, dated August 31, 2006). Dixie's ultimate admission in his deposition on February 7, 2012 that he in fact resigned, and that his signature on his resignation was not forged after all, only further supports the view that Everone in fact concocted this false claim to the detriment of the Tribe. See CT 6679 (Dixie admits he resigned and admits he signed Exhibit "33," the "Formal Notice of Resignation"); CT 6681 (Exhibit "33").

Moreover, Dixie's false claim that his resignation letter is a forgery is contradicted by several other documents he admits signing thereafter. For example, after resigning, Dixie admits signing another Tribal document appointing Burley as the new Chairperson. CT 6663 (Dixie deposition acknowledging his signature on document (Exhibit "34") accepting his resignation); CT 6665 (Exhibit "34"). Then, ten (10) days after resigning, Dixie signs a document for the development of a casino with the Tribe. However, he signs as "Tribal Member" under the signature of Silvia Burley who signed as "Chairperson" of the Tribe. CT 9415. On July 7, 1999, Dixie wrote the BIA, through his attorney who had a power of attorney, and referred to himself as the "Vice President" of the Tribe, not the Chairman. CT 9420-9421. Later, on July 23, 1999, Dixie signed an Addendum to the Development Agreement. He again signed as "Tribal Member," not as Tribal Chairperson, under the

signature of Burley who signed as "Chairperson" of the Tribe. CT 9417. Dixie obviously signed these documents before he met with Bill Martin and Everone who most likely convinced Dixie that he could develop a casino without Burley. It is also clear that he knew that Burley was signing as the Chairperson of the Tribe, since that her signature block appears directly above his, yet he signed these documents as a mere Tribal member, not as the Tribe's Chairman. The false notion that Dixie never resigned and that his resignation was forged were then concocted by Everone and Dixie, and that has been their "story," though false, up until February 2012, when Dixie ultimately recanted his story under oath at his deposition.

Thus, by the time Everone and his group came up with the false notion that Dixie's "resignation letter" could be claimed as a purported forgery in late 1999, Dixie had already confirmed Burley's right to be Tribal Chairperson by signing multiple documents to that effect from April 10, 1999 through the end of July 1999.

This forgery claim is carried over into this lawsuit by Dixie's litigation team controlled by Everone. In addition to the forgery claim being alleged in the Complaint in Intervention, Dixie submitted a false declaration in support of the motion to intervene, stating that his resignation letter from the Tribe was a purported "forgery." CT 1395, 1396 (lines 24-25).

C. DIXIE'S LAST WILL AND TESTAMENT.

In an obvious attempt to protect his financial interests, in the event Dixie should die, Everone and his team arranged to have Dixie sign a "Will and Testament", wherein Dixie confirms his agreements

with the Everone group to allow them to build a casino, in the event their scheme succeeds in stealing the Tribe away from Burley, after he dies. CT 4899-4904 (Dixie Will).

D. EVERONE'S TEAM SOUGHT TO INFLUENCE THE COMMISSION TO "FREEZE" THE TRIBE'S RSTF MONEY.

As part of his plan, Everone contacted and hired Arlo Smith, a former Gambling Control Commissioner, and Pete Melincoe, a former Chief Counsel for the Commission. His plan was to get the Commission to stop paying RSTF money to the Tribe under Burley's leadership, and to have the money paid to Dixie instead. Everone is planning on using the RSTF money "as security" to convince other non-Indians to invest in his scheme to take the Tribe away from Burley and place it under Everone's control with Dixie as the "puppet" Tribal Chairman.

To this end, Everone wrote an Email boasting that his hired team was successful in "influencing" the then Chief Counsel for the Commission, Cyrus Rickards, to stop RSTF payments to the Tribe, beginning in 2005. He stated:

> "I have hired Peter Melincoe and Arlos Smith (the former Chief Counsel and the former Commissioner of that agency, respectively); and they were instrumental in getting the money frozen." (Emphasis added).

CT 4911 (September 11, 2006 Email from Everone).

E. EVERONE IS SOLICITING "INVESTMENT MONEY" FOR THE BUILDING OF A CASINO, AND IS OFFERING THE TRIBE'S RSTF MONEY AS SECURITY.

In connection with his strategy to solicit investment money from non-Indians to finance his scheme, Everone prepared a "Bridge-loan Agreement & Prospectus" in 2004, which states in pertinent part as follows:

> "...[A]dministrative procedures and litigation are now in progress to return control of the tribe to Yakima so that he may receive about $1.2 million in income that currently accrues to the tribe from the California Gambling Control Commission and so that the tribe can be position[ed] to create a casino.
>
> "A sum, not to exceed $250,000.00 is being sought, in the form of Bridge Loans, to pay for the expenses that are necessary to regain control of the tribe to Yakima, to reorganize the tribe, and to negotiate the location and financial backing for a casino..."

CT 4914 (Bridge Loan document, dated February 26, 2004). In addition, the prospective investors were promised a "bonus interest" which would be paid to them "from gambling revenue to the tribe...for a period of 5 years after the casino is created." The prospectus then adds that Burley is still the target, stating:

> "This $1.2 million royalty [RSTF money on deposit in 2004] presently goes to the tribe but is under the control of the Chairperson whose appointment we are attempting to nullify in administrative appeal and litigation." (Emphasis added).

CT 4917 (Bridge Loan prospectus). Thus, Everone and his group of investors are not concerned at all about membership or the welfare of other potential Tribal members. They are only concerned about "nullifying" Burley as Chairperson, and stealing the Tribe, so that they

can build a casino for their own financial gain. Dixie is just a tool for their plans.

In fact, the Intervenors' recent claims that they purportedly "represent the rightful members of the Tribe, consisting of over 200 adults and their children," (February 25, 2014 letter to the Court of Appeal requesting to intervene in the appeal, page 1) is contradicted by statements made in Yakima Dixie's "Bridge-loan Agreement and Prospectus" under his letterhead purportedly on behalf of the Tribe, which states:

> "'Sheep Ranch...' is a **very small (<10 members)**, long-established (1916), federally recognized California Indian tribe that is qualified to receive benefits, including the right to establishment a Class III gambling facility..." (Emphasis added).

CT 4914 (Yakima Dixie "Bridge-loan Agreement & Prospectus, 2/26/2004). The sign "<" means "less than." Thus, Dixie's statement here is that the Tribe consists of "less than 10 members," not "over 200 adults and their children" as falsely stated by the Intervenors' attorneys. It is a binding admission by Dixie on behalf of himself, his faction, and the Intervenors. Evidence Code §1222.

Everone has made it clear that any outcome of the litigation favorable to Dixie means ultimate control of the Tribe for his group of investors, not any potential members of the Tribe. Getting control of the Tribe means, to Everone, control for him. For example, in 2006, he wrote in an Email the following:

> "[Burley's] last two court maneuvers were dismissed; and the BIA is moving forward with its determination on the authority for

the tribe, which almost certainly **will give control to Yakima's faction, and that means to us**." (Emphasis added).

CT 4907 (Everone Email dated September 29, 2006). In short, it is not about control of the Tribe for Dixie, but control of the Tribe for Everone and his investors bent on stealing the Tribe so they can build a casino. Finally, Everone puts it all in context, when he stated:

> "There are few opportunities to 'make a financial killing' and this, I sincerely believe, is one of them." (Emphasis added).

CT 4908 (Everone Email dated September 29, 2006).

V.

THE FIVE-MEMBER TRIBE HAS CONSTRUCTIVELY RECEIVED THE RSTF PROCEEDS BECAUSE THEY HAVE BEEN "PAID OUT" AND NOT "ACCRUED"

The Tribe argued in its Opening Brief that the trial court erred in concluding that the Commission is justified in withholding the subject RSTF payments on the grounds the ASI's decision may "potentially" be vacated. The Tribe contended the trial court overlooked the fact that the funds, by the Commission's own judicial admissions, have already been distributed to the Tribe composed of only five enrolled members. The Commission made these distribution payments by placing them in a special account with the Miwok Tribe as a beneficiary, thereby giving these five enrolled members exclusive rights to those proceeds over any possible "future" added members. In response, the Commission incorrectly characterizes these payments as mere "accruals," and argues that the Tribe's assertion is "only a claim by five individual Indians,

upon whom the 1999 Compact confers no rights." (RB at 33). This contention is without merit and misses the point.

It is undisputed that the RSTF payments are to be made to Non-Compact tribes, and not individual Indians, either within or outside the Non-Compact tribe. Here, the Commission takes a contradictory position. On the one hand, it maintains that it cannot distribute the funds to the Miwok Tribe, because it fears the money may not go to all of those persons who should be members of the Tribe. (RB at 24-25). It argues there is a potential that the BIA will be able to resume its efforts to enroll additional members in the Tribe, should the Dixie Faction prevail in challenging the ASI's decision. On the other hand, the Commission, by its own admission, has taken upon itself to actually distribute and disburse, i.e., release and pay out, the quarterly RSTF proceeds into a separate account for the benefit of the Miwok Tribe. (See page 19 of AOB). It admits that it has "disbursed the monies due the Miwok into a special account to be accessed by the Miwok, pending a federal government determination as to who is entitled to withdraw the money on the Miwok's behalf." (RB, 10/20/2009, page 35). By doing so, the Tribe, as presently constituted, has constructively received those payments. Just as release of those payments cannot in all fairness be held up until the offspring of the currently enrolled members are born, so, too, the Commission cannot hold up the release of these funds, which it has paid out and diverted to a special account, until future persons are enrolled in the Tribe. The funds belong to the Miwok Tribe as presently constituted, and there is no legal reason to require each of the five enrolled members to wait to receive those funds until future

persons are enrolled who would have no retroactive claim to those paid funds. This is because there is only one Miwok Tribe, not two as the Dixie Faction would have the Court to believe.

Indeed, the BIA recognized the distinction between the Tribe as presently comprised of five enrolled members and future potential members who must be enrolled in the Tribe to receive benefits, when it sought to enroll additional members against the Tribe's will before the ASI's decision said that was improper. Thus, the present status quo of the Miwok Tribe is that it has five enrolled members, subject to change in the future.

The purported 240 so-called "members" Dixie claims exists are only "potential" members who have yet to be enrolled, and thus are currently not members at all. Dixie's false assertion that there are currently 240 members of the Tribe is contradicted not only by the BIA's previous action in attempting to enroll other members, but by Dixie's own statement to prospective investors in a casino he and others are trying to build with the RSTF money he hopes to get in this case. He stated in 2004 as follows:

> "'Sheep Ranch...' is a **very small (<10 members)**, long-established (1916), federally recognized California Indian tribe that is qualified to receive benefits, including the right to establishment a Class III gambling facility..." (Emphasis added).

CT 4914 (Yakima Dixie "Bridge-loan Agreement & Prospectus, 2/26/2004). The sign "<" means "less than." Thus, Dixie's statement here is that the Tribe consists of "less than 10 members," not "over 200 adults and their children" as falsely stated by the Dixie Faction

Intervenors' attorneys. It is a binding admission by Dixie on behalf of himself, his faction, and the Dixie Faction Intervenors. Evidence Code §1222.

Accordingly, the only issue is who has the Miwok Tribe, not the BIA or anyone else, authorized to receive those funds for the Tribe for disbursement to the five (5) enrolled members (which includes Dixie) who have constructive receipt of those funds by virtue of the fact that the Commission has chosen to disburse them. In light of Dixie's deposition testimony admitting that he resigned, that person can only be Burley.

VI.

THE BIA'S DECISION WHETHER TO AWARD P.L. 638 FEDERAL CONTRACT FUNDING TO THE TRIBE IS NOT A DECISION ON WHO IS THE AUTHORIZED LEADER OF THE TRIBE

The Commission contends throughout its brief that where there exists a tribal leadership dispute with a Non-Compact tribe that is entitled to receive RSTF payments, it is proper for it to "defer to the BIA for the identification of the tribe's authorized leadership." (RB at 5). It then asserts that the "most reliable indicator" of whom the BIA has "identified" is when the BIA awards P.L. 638 federal contract funding. (RB at 5). These contentions are without merit.

As stated, the Commission is wrong in asserting that the BIA has the authority to ever "identify" an authorized tribal leader when there is a tribal leadership dispute. To do so is to resolve a tribal leadership dispute, and well-settled Indian law precludes the BIA from doing so.

Timbisha Shoshone Tribe v. Salazar (D.C. Cir. 2012) 678 F.3d 935. In addition, the process of awarding P.L. 638 federal contract funding has nothing to do with selecting a tribal leader. (See AOB at 22-26). Indeed, the reasons the BIA may have in denying federal contract funding to a particular tribe has nothing to do with the limited reasons the Commission is permitted to give, if at all, for not distributing RSTF payments to a Non-Compact tribe. (See AOB at 23).

Non-Compact tribes enter into no contracts with the State of California or the Commission for receipt of these proceeds.

In contrast, P.L. 638 federal contracts are awarded to Indian tribes under the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA" or "the Act"), 25 U.S.C. §450, et seq., which allow tribes to take control of federal programs and schools for Indians. The DOI may only deny a tribal request to enter into a self-determination contract (i.e., 638 federal contract funding) if the service to the Indian beneficiaries will not be satisfactory, the contract will jeopardize the trust resources of the tribe, the tribe cannot fulfill the contract, the proposed cost is more than that permitted under the Act (i.e., "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract"), or the activity is outside the scope of the Act "because the proposal includes activities that cannot lawfully be carried out by the contractor." 25 U.S.C. §450f (a)(2). See Los Coyotes Band of Chuilla Cupeno Indians v. Jewell (formerly Salazar) (9th Cir. 2013) 729 F.3rd 1025. The "applicable funding level" is the amount that the BIA would have spent on the program if it did not enter the contract with the tribe. 25 U.S.C. §450j-1(a). However, none

of these reasons for denying federal contract funding apply to RSTF payments under the Compacts.

In addition, the ISDEAA requires that the contract provide services in a "fair and uniform" manner, and that the contracting tribe perform significant accounting and auditing. 25 U.S.C. §450c. In contrast, RSTF payments are not conditioned on Non-Compact tribes providing services to their enrolled members in a "fair and uniform manner," or in any manner at all, and the Compacts do not require Non-Compact tribes to give an account to the Commission or submit to an audit of RSTF payments disbursed to them.

Clearly, the reasons for denying 638 federal contract funds differ from the limited reasons a Non-Compact tribe may not qualify for RSTF payments. As a result, the Commission is not legally justified in withholding RSTF payments from a Non-Compact tribe who may have been denied 638 federal contract funding. Nothing in the Compacts conditions RSTF payments to Non-Compact tribes on whether the Non-Compact tribe recipient is receiving 638 federal contract funding.

Accordingly, the Commission's contention that the BIA's actions in awarding P.L. 638 contract funding to a particular Non-Compact tribe is the most reliable indicator of who the authorized Tribal representative should be is misplaced as a matter of law. In reality, the Commission is saying that if the BIA awards P.L. 638 federal contract funding to a Non-Compact tribe, then ipso facto that tribe is qualified to receive RSTF payments. However, the Compacts do not provide for this type of discretion, and contain no language to that effect.

VII.

THE COMMISSION IS REQUIRED TO FOLLOW INDIAN LAW CONCERNING THE LAST RECOGNIZED FACTION PENDING RESOLUTION OF ANY TRIBAL LEADERSHIP DISPUTE

The Commission argues that it has a duty to disburse RSTF payments only to those persons or groups who are authorized to receive them for the Non-Compact tribe, and that it cannot do so here because of the presence of the two competing factions. (RB at 17). This contention ignores established federal Indian law requiring the BIA, for example, to recognize and deal with the last recognized governing body of two competing factions pending the resolution of a tribal leadership dispute, and contradicts the Commission's position that it "defers" to the BIA in situations involving tribal leadership disputes, since the BIA is required to adhere to this same rule of law. (RB at 15 ["Because the Commission has no authority to decide the merits of an intra-tribal dispute, when doubts arise as to the identity of the individual authorized to receive and administer RSTF payments on behalf of the tribe, the Commission defers to the BIA." (Emphasis added)]).

In Goodface v. Grassrope (8th Cir. 1983) 708 F.2d 335, cited in Plaintiff's Opening Brief (AOB at 34, 35), a dispute arose over a tribal election of a tribal council of the Lower Brule Sioux Tribe, a federally-recognized tribe. The losing faction disputed the election results, and the BIA was faced with two competing factions seeking recognition. Because the leadership dispute was an intra-tribal matter, the BIA refused to intervene to resolve it, instead telling the Tribe that it must

resolve it itself. However, pending resolution of that dispute, the BIA would not officially recognize either tribal council. Instead, it stated that pending resolution of that tribal leadership dispute it would recognize both councils on a de facto basis, in order to "maintain basic services to the Tribe." 708 F.2d at 337. Since the U.S. District Court attempted to interpret the Tribe's constitution and bylaws and addressed the merits of the election dispute, the Court of Appeal issued a writ of mandate stating that the U.S. District Court only had jurisdiction to order the BIA to recognize, conditionally, either the new or old tribal council so as to permit the BIA to deal with a single tribal government. It then held that the BIA is to "recognize the members of the tribal council who were elected in 1982 as the governing officials of the tribe."

The Court's reasons for requiring the BIA to deal with the last recognized tribal council pending resolution of a tribal leadership dispute is applicable in the resolution of the issues in this case as it relates to the Commission's obligations to release the subject RSTF payments. It stated:

> [The BIA's action] to recognize both tribal councils only on a de facto basis...amounts to a recognition of neither. Thus, the district court correctly found that the BIA acted arbitrarily and capriciously by effectively creating a hiatus in tribal government which jeopardized the continuation of necessary day-to-day services on the reservation. The BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body in the interim before resolution of the election dispute. We commend the BIA for its reluctance to intervene in the election dispute, but it was an abuse of discretion for the BIA to refuse to recognize one council or

> the other until such time as Indian contestants could resolve the dispute themselves. We conclude that, for the time being, the BIA should be required to deal with the 1982 council as the certified and sworn winners of the tribal election. (Emphasis added).

708 F.2d at 338-339.

Since the Commission admits it defers to the BIA on issues related to tribal leadership disputes, specifically which tribal faction to recognize, it must follow the rule set forth in Goodface v. Grassrope, supra, and accept the Burley Faction as the Tribal Council authorized to receive the subject RSTF payments for the Tribe. As stated, the BIA last recognized the Burley Faction in January 2011, when the Tribe held an election and "re-elected" Burley as the Tribal Chairman, and the BIA, in its letter to the Tribe, acknowledged that election and recognized the Burley Faction as the Tribe's existing governing body. CT 8159-8162. As further stated in Plaintiff's Opening Brief, that acknowledgement letter was never rescinded or vacated by the BIA or the DOI. (AOB at 11). The Dixie Faction Intervenors' attempts to administratively appeal that letter was of no effect and a sham, since the letter is not a "decision" within the meaning of 25 C.F.R.§2.6(b), and the Dixie Faction Intervenors never asked the BIA to take action of their so-called appeal pursuant to 25 C.F.R. §2.8. Thus, the letter is not "stayed" or rescinded, and stands as unrefuted evidence that as of January 2011, the BIA recognized the Burley Faction Tribal Council. In addition, although stayed, the ASI indirectly recognized the Tribal Council under the Burley Faction in his August 31, 2011 decision.

Accordingly, pursuant to Goodface v. Grassrope, supra, the Commission must accept the Burley Faction as the Tribal Council authorized to receive the subject RSTF payments, and Burley as the authorized Tribal Chairperson. To be clear, it is not the January 2011 BIA acknowledgement letter that is determinative. Rather, it is the January 2011 election results re-electing Burley as the Tribal Chairperson that is determinative. That election was done at a time when the BIA officially recognized the Burley Faction as the authorized governing body of the Tribe. In Goodface v. Grassrope, supra, the Court required the BIA to recognize the winners of the last election over the losers as the Tribal Council. Here, despite what the BIA may or may not do in terms of recognizing the Tribal Council under Burley's leadership, it is the "re-election" of Burley that the Commission is to look to for purposes of determining who can accept the RSTF payments. This Court should require the Commission to accept the Burley Faction as the Tribal Council authorized to receive the RSTF payments, consistent with Goodface v. Grassrope, supra, and the Commission's admission that it defers to the BIA on issues related to tribal leadership disputes where the identity of the authorized tribal leader cannot be identified.

The fact that the BIA may not have adhered to this rule of law in this case is beside the point. For example, despite the stay language in the ASI's August 31, 2011 decision, the BIA's January 2011 acknowledgement letter was never rescinded or vacated by the ASI in his decision, or withdrawn by the BIA itself. The BIA's reason for not renewing P.L. 638 federal contract funding with the Miwok Tribe

because of the stay language in the ASI's August 31, 2011 decision may therefore be erroneous. Pursuant to Goodface v. Grassrope, supra, the BIA is required by law to continue dealing with the Tribal Council led by the Burley Faction based on the Tribe's January 2011 election results "re-electing" Burley as Tribal Chairperson and the BIA acknowledging those results, but for whatever reason it is not. The point is, it is required to do so, and the Commission has admitted that it follows the BIA's lead on this issue. Since the BIA may be wrong in not following this rule, it is no defense to argue here that the Commission is likewise not required to do so, simply because the BIA has not done so.

VIII.

BECAUSE THE ASI'S AUGUST 31, 2011 DECISION DID NOT DIRECTLY DECIDE ANY TRIBAL LEADERSHIP DISPUTE, THE STAY HAD NO EFFECT ON WHETHER THE BURLEY FACTION SHOULD BE THE RECOGNIZED GOVERNING BODY PENDING RESOLUTION OF THE FEDERAL LITIGATION

It is undisputed that the ASI, in his August 31, 2011 decision, did not and could not decide the claimed Tribal leadership dispute between Burley and Dixie. As a result, the stay of his decision pending resolution of the federal litigation challenging his decision could have no effect on that leadership dispute, including the effect of the BIA's January 2011 acknowledgement letter recognizing Burley as the "re-elected" Tribal Chairperson.

The continued recognition of the Burley Faction despite the stay of the implementation of the ASI's decision has been manifested in the following ways:

A. THE ASI'S REPEATED STATEMENTS IN THE ANNUAL FEDERAL REGISTER

Before and after the ASI's August 31, 2011 decision, the Federal Register specifically acknowledged the Miwok Tribe as a federally-recognized tribe and contained an official statement from the ASI who specifically states as to each listed tribe, including the Miwok Tribe, as follows:

> "The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes **by virtue of their government-to-government relationship with the United States** as well as the responsibilities, **powers**, limitations and obligations of such tribes..."
> (Emphasis added).

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This is an official government statement verifying that the Miwok Tribe has a government-to-government relationship with the United States. **The United States cannot have a government-to-government relationship with a federally-recognized tribe unless that tribe has a recognized governing body.** Put another way, an Indian tribe must have a recognized governing body in order to have a "government-to-government relationship" with the federal government. Thus, although the ASI stayed the implementation of his decision pending resolution of the pending federal litigation, his continued, official statements in the Federal Register thereafter stating that the Miwok Tribe continues to have a government-to-government relationship with the federal government could only mean that the

Miwok Tribe continued to have a recognized governing body, despite the federal litigation.

Contrary to the Commission's arguments in its Respondent's Brief, these are not mere "boiler-plate" statements, but official government statements by the ASI concerning the status of each of the listed tribes in the Federal Register, including the Miwok Tribe.

Moreover, the use of the word "powers" in this official statement references the Tribe's inherent power to establish its own form of government, thus confirming it has a recognized governing body by whatever government it chooses to have. Cohen's Handbook of Federal Indian Law, 2012 ed., §4.01[2][a], page 213 ("A quintessential attribute of sovereignty is the power to constitute and regulate its form of government. An Indian nation is free to maintain or establish its own form of government..."); see Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 62-63.

When the ASI published these official statements after his August 31, 2011 decision containing the stay language, it is presumed that he did so with knowledge of that stay language and with knowledge of the present controversy with the Dixie Faction in federal court. Timbisha, supra at 938 (citing United States v. Chemical Found, Inc. (1926) 272 U.S. 1, 14-15: "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. Under that presumption, it will be taken that [officials have] acted upon knowledge of the material facts."). In making these official statements, the ASI could have made a disclaimer or modified statement with

respect to the Miwok Tribe by saying, for example, that "except for the Miwok Tribe, the following tribes have a government-to-government relationship with the federal government," or a footnote under his statement indicating that "presently the Miwok Tribe has no recognized governing body and therefore a government-to-government relationship has been suspended or is pending." There are a number of possibilities, but the ASI chose not to make any modification or amendment to his official statement that the Miwok Tribe presently has a government-to-government relationship with the federal government.

Accordingly, by making this official statement, despite knowing about the stay language in his own decision and despite knowing about the present controversy with the Dixie Faction, the ASI acknowledged that the Miwok Tribe has a recognized governing body as identified in his August 31, 2011 decision and as acknowledged by the BIA in its January 2011 letter recognizing Burley as the newly, re-elected Tribal Chairperson.

At no time has the federal government taken the Miwok Tribe off of the list of federally-recognized tribes in the Federal Register or modified this statement with respect to the Miwok Tribe.

B. ASI KEVIN WASHBURN'S DECEMBER 19, 2013 HANDWRITTEN NOTE TO CHAIRPERSON BURLEY

Sometime after ASI Larry Echo Hawk issued his August 31, 2011 decision, he resigned to pursue full-time work with his Church. Kevin Washburn was appointed by President Obama to replace him.

In November 2013, Burley was invited by the White House to attend the 2013 White house Tribal Nations Conference held at the

Department of Interior in Washington, D.C. She attended and gave a speech to a delegation of White House and DOI officials to draw their attention to the plight of "landless" federally-recognized tribes, twelve of which are located in California, including the Miwok Tribe. She asked the delegates to work together to build a stronger relationship to address issues facing federally-recognized "landless" tribes. (See Tribe's official website at http://californiavalleymiwoktribe-nsn.gov).

In response, ASI Kevin Washburn, who attended the conference and heard Burley speak, wrote her a personal, handwritten letter, dated December 19, 2013, addressing her as "Chairperson" and then mailing the card to "Chairperson Silvia Burley—California Valley Miwok Tribe." He wrote her on official, government stationary and signed it, stating as follows:

"Dear Chairman Burley—Thank you for your participation in the White House Tribal Nations Conference. I heard you loud and clear about the needs of landless tribes. The solutions are not simple, but the Administration is committed to insuring that tribes have homelands and I encourage you to continue advocating for your tribe.

"Warm regards, Kevin Washburn." (Emphasis added).

(Appellant's RJN No. 4). The Commission dismisses this letter as a mere thank you letter and ascribes no significance to it at all. However, it is more than a mere thank you letter. It confirms that the DOI and the BIA, and even the White House, recognize her as the Tribal Chairperson, despite the pending federal litigation.

Significantly, ASI Washburn encouraged her to "continue advocating this issue for [your] tribe," suggesting that she indeed had

the authority to do so. He would not have said this if he did not believe she was the recognized leader of the Miwok Tribe.

Notably, ASI Washburn did not tell Burley that she had no business being at the conference or that she was not the recognized leader of the Miwok Tribe. Indeed, he addressed her as "Chairman of the Miwok Tribe," knowing full well of Dixie's claim that he never resigned, and that he, not Burley is the Chairman of the Miwok Tribe. See Timbisha, supra at 938 (courts presume that public officers have properly discharged their duties and have acted upon knowledge of material facts). Dixie was not invited and did not attend. Nor did he attempt to "crash" the conference and insist that he, not Burley, should be the one in attendance to represent the Tribe.

In short, Burley's invitation by the White House to the conference, her attendance at the conference, and her acceptance at the conference by the White House and DOI delegates who heard her speak as the Chairperson of the Miwok Tribe, and then ASI's official letter to Burley afterwards thanking her for her participation in the conference, all point to the undisputed fact that the federal government presently recognizes Burley as the Chairperson of the Miwok Tribe, despite the pending federal litigation, and that the federal government enjoys a government-to-government relationship with the Tribal Council under her leadership.

C. ASI LARRY ECHO HAWK'S NOVEMBER 28, 2011 LETTER TO BURLEY

In addition, ASI Larry Echo Hawk wrote and signed a letter to Burley on November 28, 2011, after his August 31, 2011 decision, and

after the September 1, 2011 Joint Status Report, addressing her as "Chairwoman, California Valley Miwok Tribe." CT 9283-9284.

This is significant, because it trumps the Commission's argument, and the trial court's ruling, that the ASI, through its attorneys of record in the federal litigation, purportedly "stipulated" that, because of the stay, the ASI's decision would have no "force and effect," and therefore there can be no presently recognized tribe or presently recognized Tribal leader to accept the subject RSTF payments for the Tribe. It also confirms that the ASI continued to accept Burley as the recognized Chairperson for the Tribe, and in fact entered into a government-to-government dialogue with her with respect to the Miwok Tribe on an unrelated subject.

IX.

BECAUSE THE DIXIE FACTION INTERVENORS FAILED TO APPEAL THE ORDER DENYING THEM INTERVENTION, THE COMMISSION MUST CONCEDE THAT, AS A MATTER OF LAW, DIXIE IS NOT ENTITLED TO RECEIVE THE SUBJECT RSTF PROCEEDS FOR THE TRIBE

Because the Dixie Faction Intervenors failed to appeal the order denying them intervention, that order, whether right or wrong, binds them to the issues decided in that order, namely the following material points:

1. Because of the January 2011 BIA letter acknowledging the re-election of Burley as the Tribal Chairperson, the on-going Tribal leadership dispute has been resolve,

2. The BIA recognizes Burley as a representative of the Tribe;

3. The December 22, 2010 decision establishes the Tribe's membership, governing body and leadership.

CT 4417. The fact that the ASI later set aside the December 22, 2010 decision only later to re-affirm it is irrelevant. The Dixie Faction Intervenors are bound by this order. As a result, the Commission must concede that Dixie is not authorized to accept the RSTF proceeds for the Tribe.

A. THE DIXIE FACTION INTERVENORS WERE ALLOWED TO PARTICIPATE IN THE TRIAL COURT PROCEEDINGS SO LONG AS THE STAY REMAINED IN EFFECT.

The record is clear that on December 18, 2012 this Court granted Plaintiff's writ of mandate directing the trial court to lift the stay of the litigation. CT 7296. The Court of Appeal issued a remittitur to that effect on February 22, 2013. CT 7295. Upon receipt of the remittitur, the trial court then issued the following order with notice to all parties, including the Dixie Faction Intervenors:

> Following remittitur, the court vacates its March 7, 2012 order denying Plaintiff's ex parte application, and **lifts the stay** to allow the parties to file dispositive motions and, if necessary, proceed to trial. (Emphasis added)

CT 7317. The stay referred to by the trial court was the stay issued in its April 20, 2011 order which, inter alia, stayed the effect of the March 11, 2011 order denying intervention. CT 7219, 1720. That stay order was the subject of Plaintiff writ. In its April 20, 2011 order, the trial court also made it clear that the Dixie Faction Intervenors would be

allowed to participate in the trial court proceedings only so long as the stay was in effect. It stated:

> As a result of these ruling being stayed, Intervenors are reinstated as fully participating parties to this case. (Emphasis added)

CT 7221. Based upon this language in the April 20, 2011 order, the Dixie Faction Intervenors were given the opportunity to fully participate as parties in the litigation, because the order denying intervention had been stayed. However, once the stay of that order was lifted, the Dixie Faction Intervenors were no longer "participating parties." Instead, they reverted back to the status of "rejected Intervenors."

B. WHEN THE STAY WAS LIFTED, THE MARCH 11, 2011 ORDER DENYING INTERVENTION WAS REVIVED.

As stated, the Court of Appeal granted Plaintiff's writ of mandate directing the trial court to lift the stay of the litigation. When the trial court did so, the stay was lifted with respect to the order denying intervention, thereby removing the Dixie Faction Intervenors as "fully participating parties" in the litigation and making them once again "rejected Intervenors" with a right to appeal the order denying intervention.

C. THE DIXIE FACTION INTERVENORS, AS "REJECTED INTERVENORS," FAILED TO FILE A NOTICE OF APPEAL OF THE ORDER DENYING THEM INTERVENTION ONCE THE STAY OF THE LITIGATION WAS LIFTED, THEREBY BINDING THEM TO THAT ORDER.

The trial court's March 1, 2013 order lifting the stay of the litigation, after the Court of Appeal granted Plaintiff's writ of mandate directing the trial court to do so, started the time for the Dixie Faction Intervenors to file a notice of appeal.

The trial court's order denying intervention was an appealable order. Bowles v. Superior Court (1955) 44 C.2d 574, 582 (order denying leave to file complaint in intervention by person claiming to be member of a class on whose behalf representative action was being prosecuted was an appealable order); Bame v. Del Mar (2001) 86 CA4th 1346, 1346 (order denying intervention was appealable). Thus, the Dixie Faction Intervenors had sixty (60) days from the time the trial court gave notice of its order lifting the stay to file a notice of appeal. CRC 8.104(a)(1)(B), (e).

The time to file a Notice of Appeal is jurisdictional and is strictly adhered to. It cannot be extended by waiver or estoppel, and the failure to timely file cannot be excused by excusable neglect of a party's attorney, actions taken by the opposing party, or even by the trial judge's mistake. Estate of Hanley (1943) 23 Cal.2d 120, 122.

Accordingly, the trial court's order denying intervention, which was revived once the stay was lifted, is now binding on the Dixie Faction Intervenors, including the specific language of that order providing that the Tribal leadership dispute has been resolved and that Burley is the authorized leader.

These judicial determinations were not made to decide any leadership dispute concerning which Tribal Faction should be recognized by the federal government. Rather, these judicial

determinations were made solely for purposes of determining which Tribal Faction is authorized under California law and the language of the Compacts to receive the RSTF money for the Miwok Tribe the Commission is presently withholding.

These judicial determinations are also now final as to the Dixie Faction Intervenors. Whether the December 22, 2010 ASI decision was later withdrawn and reaffirmed by the newly written August 31, 2011 ASI decision is irrelevant for purposes of the issues in this case. At the time the trial court's March 11, 2011 order denying intervention was made, it was correct. The Dixie Faction Intervenors had the opportunity to challenge that order, in light of subsequent developing events, but they failed to do so. That opportunity came when the trial court lifted the stay of the litigation, which had the legal effect of reviving the order denying intervention. The Dixie Faction Intervenors then failed to either move for reconsideration, move to vacate, or appeal that order, thereby making it binding on them.

D. BEFORE BEING ALLOWED TO FILE ANY DISPOSITIVE MOTION, THE DIXIE FACTION INTERVENORS WERE FIRST REQUIRED TO MOVE TO SET ASIDE THE ORDER DENYING INTERVENTION OR OTHERWISE APPEAL IT.

The Dixie Faction Intervenors had no right to file any dispositive motions, including a summary judgment motion, once the trial court lifted the stay of the litigation. They had to first deal with the order, now revived as a result of the stay being lifted, denying them intervention. They had the option of filing a motion for reconsideration

or a motion to vacate the order, before launching into an appeal. They chose not to do so, and then allowed the time to appeal to lapse.

When the stay was lifted, the Dixie Faction Intervenors were placed back into the status of "rejected intervenors" with a right to appeal. A "rejected intervenor," like any other dismissed or aggrieved party, has no right to continue with the pending trial court litigation so long as the order denying intervention remains in effect. Accordingly, the Dixie Faction Intervenors had no right to file any summary judgment motion once the stay was lifted. The only right they had was to challenge the March 11, 2011 order denying intervention, and they needed to do that before being allowed to file any dispositive motions, or even participate at trial. Their status as "fully participating parties" was lost once the stay was lifted.

E. THE TRIAL COURT'S JULY 3, 2013 ORDER "OVERRULING" PLAINTIFF'S OBJECTION TO THE DIXIE FACTION INTERVENORS' STANDING AS PARTIES WAS ERRONEOUS.

In their letter brief to the Court of Appeal seeking permission to file a Respondent's Brief, the Dixie Faction Intervenors point out that on July 3, 2013, the trial court, in ruling on Plaintiff's motion for a new trial, specifically overruled Plaintiff's objection to the Dixie Faction Intervenors' standing to file opposition papers or even a motion for summary judgment. They then argue that, as a result, they continued to be "fully participating parties" in the litigation. However, for the reasons set forth above, the trial court was wrong in overruling that

objection. The Dixie Faction Intervenors lost their status as participating parties when the trial court lifted the stay.

Indeed, at no time did the trial court indicate in its order lifting the stay that it was also vacating or setting aside its order of March 11, 2011 denying intervention. And the record is devoid of any evidence that the trial court ever set aside or vacated its order denying intervention any time thereafter.

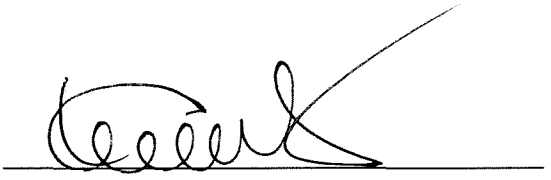
X.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Appellant's Opening Brief, the judgment in favor of the Commission should be reversed.

Dated: May 1, 2014

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 14(c)(1))

The text of this Reply Brief consists of 13,272 words as counted by Microsoft Office Word processing program used to generate this appeal.

I certify that the above is true and correct.

Dated: May 1, 2014

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CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE

COURT OF APPEAL CASE NO. D064271
California Valley Miwok Tribe v. California Gambling Control Commission
Superior Court Case No. 37-2008-00075326-CU-CO-CTL

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare that I am over the age of 18 years and not a party to the action; I am employed and a resident of the County of San Diego and my business address is 17140 Bernardo Center Drive, Suite 210, San Diego, California 92128. I caused to be served the following document(s): **APPELLANT'S REPLY BRIEF** by placing a copy thereof in a separate envelope for each addressee respectively as follows:

PLEASE SEE ATTACHED MAILING LIST

[XX] (BY REGULAR MAIL) I am "readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed May 5, 2014 at San Diego, California.

Heather Turner

COURT OF APPEAL CASE NO. D064271
California Valley Miwok Tribe v. California Gambling Control Commission
Superior Court Case No. 37-2008-00075326-CU-CO-CTL

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