4TH CIVIL NO. D064271

In the Court of Appeal

OF THE

State of California

FOURTH APPELLATE DISTRICT
DIVISION ONE

CALIFORNIA VALLEY MIWOK TRIBE,
Plaintiff and Appellant,

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

SUPERIOR COURT OF SAN DIEGO COUNTY
THE HONORABLE RONALD L. STYN
Superior Court Case No. 37-2008-00075326-CU-CO-CTL

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, **Fourth** APPELLATE DISTRICT, DIVISION **One**	Court of Appeal Case Number: D064271
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APPELLANT/PETITIONER: California Valley Miwok Tribe RESPONDENT/REAL PARTY IN INTEREST: California Gambling Control Commission	

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I.

INTRODUCTION AND SUMMARY

The State of California currently holds more than $10 million in trust for the California Valley Miwok Tribe ("Tribe"), a federally recognized Indian nation. The money comes from license fees that authorized Indian gaming operations pay to the State under tribal-state gaming compacts (collectively, the "Compact"). Those fees are collected in the Revenue Sharing Trust Fund ("RSTF"), from which the State makes quarterly payments to "Non-Compact" tribes, including this Tribe, that operate fewer than 350 gaming devices.

As the trustee of the RSTF, Defendant-Respondent California Gambling Control Commission ("Commission") has a fiduciary obligation to ensure that the Tribe's RSTF money goes only to an authorized official of the Tribe. But the Commission has no authority to decide who constitutes the Tribe or who is an authorized official of the Tribe. Federal law grants the federal government the exclusive power to acknowledge an Indian tribe or to recognize a tribal government.

Under most circumstances, this does not prevent the Commission from disbursing RSTF funds. The United States, through the Bureau of Indian Affairs ("BIA") within the Department of the Interior,

normally maintains government-to-government relations with each of the more than 500 federally recognized Indian tribes. In doing so, the United States is bound by certain trust obligations to tribes and their members, including the duty to ensure that it "deals only with a tribal government that actually represents the members of a tribe." (*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"*).) Thus, the Commission reasonably relies on the BIA's recognition of a tribal government to establish the identity of the Tribe's authorized officials.

In this case, however, the United States has not recognized any government of this Tribe since 2005, due to a dispute over Tribal membership and government. Intervenor-Respondents ("Intervenors") represent the more than 200 adult members of the Tribe, and their children, who are lineal descendants of historical Tribal members. They maintain that any Tribal government must reflect the participation and consent of a majority of the Tribe. Plaintiff-Appellant Silvia Burley[1] ("Burley") claims that the Tribe's membership should be limited to herself, her two daughters and her granddaughter (and sometimes Intervenor-Respondent Yakima

[1] Burley filed the lawsuit in the name of the California Valley Miwok Tribe without the Tribe's authorization. In reality, Burley sues solely for the benefit of herself, her two daughters, and her granddaughter.

Dixie). She holds herself out as the "chairperson" of the Tribe based on elections in which only she and her three family members participated.

In response to the BIA's 2005 decision not to recognize Burley's purported Tribal government, the Commission suspended RSTF payments to Burley. Burley responded by filing this lawsuit in the Tribe's name, seeking to compel the Commission to pay the Tribe's RSTF money "in care of Silvia Burley." (1 CT 9:28-10:1.) At the same time, she continued to pursue federal administrative appeals and litigation to obstruct the BIA's recognition of a Tribal government that represents the Tribe's entire membership.

After many twists and turns, more fully described below, the federal dispute is nearing a conclusion. On December 13, 2013, the federal district court for the District of Columbia held unlawful an August 31, 2011 BIA decision that accepted at face value Burley's claims about the Tribe's membership and government. (*California Valley Miwok Tribe v. Jewell*, __ F.Supp.2d __, 2013 WL 6524636 (D.D.C. 2013) *("Salazar")*.)[2] The

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[2] This case was originally filed on January 4, 2011 as *California Valley Miwok Tribe v. Salazar* (D.D.C. No. 1-11-cv-00160). During the pendency of the case, Sally Jewell replaced Ken Salazar as lead defendant when she succeeded him as Secretary of the Interior. For consistency with past pleadings and decisions, Intervenors will refer to this case herein, including the December 13, 2013 decision, as the *Salazar* case.

federal court held that it was unreasonable for the BIA to conclude that the Tribe's membership was limited to five people, as Burley claimed, in light of extensive evidence in the record that the Tribe's membership includes approximately 250 other people. (*Id.* at *9.) The court also held it was unreasonable for the BIA to defer to Burley's purported Tribal government without first evaluating whether that government actually represented the will of the Tribe's members. (*Id.* at *11.) The court remanded the decision to the Secretary of Interior for reconsideration consistent with its opinion. (*Id.* at *12.)

Burley is not content to await the Secretary's decision. She wants the Tribe's money now. She asks this Court to find that she is the Tribe's leader, independent of any federal recognition, and even though the federal courts have three times rejected her claims to Tribal authority. The most fundamental problem with Burley's argument is that neither the Commission, nor the trial court, nor even this Court has the authority to adjudicate the Tribe's membership dispute or to recognize a Tribal government. That power belongs to the United States alone, acting through the BIA.

Burley spends much of her opening brief arguing that the Commission, the trial court, and this Court should all exceed their

jurisdictional boundaries and declare Burley the leader of the Tribe, and her four person faction as the entire Tribe. Burley further argues that the Commission should be forced to disburse to Burley the $10 million dollars held in trust for the Tribe. In making these arguments, Burley entirely ignores this Court's careful guidance in *California Valley Miwok Tribe v. Sup. Ct. of San Diego County*, 2012 Cal. App. Unpub. LEXIS 9176, *17 (December 18, 2012) ("*Miwok IV*"), wherein this Court framed the issue to be decided by the trial court as follows:

> Based on the gravamen of the complaint, the fundamental issue presented to the trial court for resolution on the merits is whether the current uncertainty in the federal government's relationship with the Miwok Tribe – including the pendency of the *Salazar* case – constitutes a legally sufficient basis for the Commission, as trustee of the RSTF, to withhold the RSTF funds from the Miwok Tribe. To resolve that issue the trial court need not determine the issues presented in the *Salazar* case or determine the proper tribal leadership body. The trial court need only *acknowledge* that the federal dispute is ongoing, and based on that factual predicate, determine whether the Commission has a legally sufficient basis for withholding the RSTF funds.

(*Miwok IV, at* *17 (italics in original).)

The trial court followed *Miwok IV* when it granted summary judgment against Burley and in favor of the Commission. In conformance with *Miwok IV*, the trial court held:

> [B]ecause the *Salazar* case is pending and because the BIA has not recognized a tribal leadership body for the distribution of PL 638 (ISDEAA) benefits, the Commission is justified in withholding the RSTF funds. As such, each of Plaintiff's claims fail as a matter of law.

(35 CT 9223.)

Burley's opening brief essentially ignores *Miwok IV* and the limited nature of this case. Instead, Burley continues her longstanding tradition of blindly arguing that she is the Tribe because she says so. She resorts to minutiae and trifles such as thank-you notes and public announcements to support her entitlement to the Tribe's money. Putting aside that these arguments are outside this Court's jurisdiction and based on "evidence" not properly before the trial court, the reality is that these arguments were emphatically defeated the moment the *Salazar* decision was issued. It is simply inconceivable that Burley continues to argue that the Commission must, as a matter of law, disburse over $10 million of the Tribe's money to her four-person faction in the face of the *Salazar* decision.

At the end of the day, the issue before this Court is quite simple: Was the Commission's decision to withhold payment of the Tribe's RSTF funds until after the BIA has formally recognized a government and leadership of the Tribe clearly erroneous? Because the undisputed evidence overwhelmingly proves that the answer is "no," the trial court's decision must be affirmed.

II.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. Burley's First Amended Complaint

Burley filed the First Amended Complaint ("FAC") on July 28, 2008. (2 CT 167.) At that time, there was, and there still is, an ongoing dispute over the membership and government of the Tribe, as detailed in subsection C below. The FAC alleges three causes of action against the Commission: a claim for injunctive relief, a claim for declaratory relief, and a claim for ordinary mandamus under Code of Civil Procedure section 1085.[3] (2 CT 171, 175, 179.) All three causes of action seek the

[3] Burley's claims for injunctive and declaratory relief against the Commission are improper; the only proper challenge to the Commission's decision is through a petition for writ of mandamus. (*See DeCuir v. Los Angeles*, 64 Cal. App. 4th 75, 81 (1998); *Briggs v. Rolling Hills Estates*, 40 Cal. App. 4th 637, 645 (1995).)

same thing: an order requiring the Commission to immediately disburse millions of dollars of RSTF money, currently held in trust for the Tribe, "in care of [Silvia] Burley." (2 CT 174:28, 177:22-25, 179:10-13.)

B. Commission's Role and Duties

The Commission is a state agency that has jurisdiction over "all persons or things having to do with the operations of gambling establishments" in California. (Cal. Bus. & Prof. Code § 19811.) In 1999, California entered into the Compact with various Indian tribes allowing them to conduct gaming in California. (2 CT 169:3-8; *Cates v. Chiang*, 154 Cal. App. 4th 1302, 1305 (2007).) Under the Compact, gaming tribes contribute fees to the RSTF, which is shared with Non-Compact tribes. (2 CT 169:11-14; *California Valley Miwok Tribe v. California Gambling Control Comm'n*, 2010 WL 1511744, *2 (4th Dist. 2010) (unpublished) ("*Miwok III*").) A Non-Compact tribe is a federally recognized Indian tribe in California that operates fewer than 350 gaming devices. (1 CT 23 at § 4.3.2(a)(i); *Miwok III* at *2.) Each eligible Non-Compact tribe is entitled to $1.1 million per year. (1 CT 22 at § 4.3.2.1; *Miwok III* at *2.) The Commission serves as the trustee of the RSTF. (2 CT 169:11; 1 CT 23 at § 4.3.2.1(b); *Miwok III* at *3.) As a trustee, the Commission owes a fiduciary duty to the Non-Compact tribes. (2 CT 169:11, 174:9, 174:25,

177:3; *Miwok III* at *9-10.) The Tribe is a Non-Compact tribe. (2 CT 169:9; *Miwok III* at *2.)

C. The Ongoing Dispute Over the Membership and Governance of the Tribe

Burley contends that the Tribe includes just five members: Silvia Burley, her two daughters Rashel Reznor and Anjelica Paulk, her granddaughter Tristian Wallace, and Intervenor Yakima Dixie. (13 CT 3040 at ¶ 3.) Burley contends that the Tribe is governed by a "General Council" that was established by Tribal resolution in 1998 (2 CT 169 at ¶ 8; 13 CT 3040 at ¶ 3.), and that Burley is the "selected spokesperson" for the tribe (2 CT 169-170 at ¶¶ 8-9; 2 CT 180.).

Intervenors are the California Valley Miwok Tribe ("Tribe"), and Tribe members Yakima Dixie, Velma WhiteBear, Antonia Lopez, Michael Mendibles and Evelyn Wilson.[4] Intervenors contend that the Tribe consists of more than 200 adult members, and their children. (29 CT 7616 at ¶ 3.) Intervenors contend that the Tribe is governed by a tribal council consisting of seven members, including the individual Intervenors in this case. (29 CT 7616 at ¶ 4.) Intervenors do not recognize Silvia Burley as

[4] Antone Azevedo also was an Intervenor in this action but passed away while the litigation was pending.

any kind of Tribal official, Tribal representative or member of the Tribal government. (29 CT 7617 at ¶ 8; 9 CT 1960-1964 at ¶¶ 4, 8, 13, 15, 22.)

In 2005, the dispute over the membership and governance of the Tribe led the United States, acting through the BIA, to refuse acknowledgment of any Tribal government until the dispute was resolved with the participation of the entire Tribal community. It also has triggered federal litigation over the BIA's obligation to uphold majoritarian values in its dealings with the Tribe, which litigation continues to this day.

1. The United States Declined to Recognize Plaintiff's Purported Tribal Government

a. BIA Did Not Recognize Any Tribal Government When Plaintiff Filed the FAC

The United States Secretary of the Interior is charged with managing "all Indian affairs and [] all matters arising out of Indian relations." (25 U.S.C. § 2.) The Secretary has delegated authority over Indian relations to the BIA within the Department of the Interior, which is overseen by the Assistant Secretary of the Interior – Indian Affairs ("AS-IA"). (*See generally* 25 C.F.R. Part 2 (BIA regulations).)

In 1999, the BIA recognized Burley as the chairperson of an interim Tribal government.[5] (*Miwok I*, 424 F.Supp.2d at 198; *Miwok II*, 515 F.3d at 1265 n.6. But in 2000, 2001 and 2004, the BIA rejected Tribal constitutions submitted by Burley, on the ground that they did not reflect the "involvement of the whole tribal community." (*Miwok II* at 1265.) By letter dated February 11, 2005, the AS-IA formally withdrew any recognition of Burley's Tribal government, stating that "the BIA does not recognize any Tribal government" (22 CT 5476) and that it could not recognize any government that was not formed with the consent of the whole Tribal community ("2005 Decision"). (22 CT 5475-5480.) By letter dated April 2, 2007, the BIA reiterated that position in deciding an administrative appeal, 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 forming a valid Tribal government ("2007 Decision"). (22 CT 5485-5490.)

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[5] Intervenors contend that recognition was erroneous, but that is immaterial to the issues before the Court in light of the BIA's subsequent repudiation of Burley's tribal government. Moreover, the district court in *Salazar* found that it was "unreasonable" for the BIA to conclude that the 1998 resolution established a valid tribal government, thereby eliminating the legal basis for Burley's purported chairperson designation in 1999. (*See Salazar*, 2013 WL 6524636 at *10.)

As a result of its decision not to acknowledge any Tribal government, the BIA also in 2005 denied funding to Burley under Public Law 93-638 ("PL-638"), the Indian Self-Determination and Education Assistance Act, through which the BIA supports recognized tribal governments in providing services to their members. (3 CT 574-576; *see* 25 U.S.C. § 450 *et seq.*) The BIA stated, "Whereas there is no recognized tribal government . . . we must take appropriate action to safeguard federal funds . . .." (3 CT 574.) The BIA again denied PL-638 funding to Burley in December of 2007, stating:

> Consideration to contract federal funds to operate Bureau of Indian authorized programs will only be given to an application submitted by [a] federally recognized tribe with a recognized governing body. The Department of the Interior does not recognize that the California Valley Miwok Tribe has a governing body.

(4 CT 609.) Burley appealed that decision to the Interior Board of Indian Appeals ("IBIA"), which denied her appeal and upheld the BIA's decision. (11 CT 2409-2430, *California Valley Miwok Tribe v. Central California Superintendent*, 47 IBIA 91 (June 10, 2008).)

b. The Federal Courts Upheld the BIA's Decision to Reject Plaintiff's Tribal Government

Burley filed a federal lawsuit in 2005, challenging the BIA's refusal to recognize her Tribal government. (*Miwok I* at 197.) The district court dismissed her complaint in 2006, finding that the Burley government was not entitled to recognition because it did not "reflect the will of a majority of the tribal community." (*Id.* at 202.) The Court of Appeals for the District of Columbia Circuit affirmed in 2008, holding that Burley's "antimajoritarian gambit deserves no stamp of approval from the Secretary." (*Miwok II* at 1267.)

2. The AS-IA's Disputed Decisions Regarding the Tribe and the Subsequent *Salazar* Federal District Court Decision

On December 22, 2010, the AS-IA issued a decision in response to a federal administrative appeal that Burley had filed before the IBIA ("December 2010 Decision," 9 CT 2063.) The December 2010 Decision recognized a general council as the governing body of the Tribe, consisting of Silvia Burley, her two daughters, her granddaughter, and Yakima Dixie. (9 CT 2067-2068.)

Relying on the December 2010 Decision, Ms. Burley purported to hold a "tribal election" on January 7, 2011, in which she was allegedly elected chairperson of the Tribe by herself and her daughters. (24

CT 6099-6100.) The local BIA superintendent wrote to Burley on January 12, 2011, acknowledging the results of the election. (24 CT 6097.) Intervenors filed an administrative appeal of that decision with the BIA on February 9, 2011, which triggered an automatic stay of the decision during the pendency of the appeal. (26 CT 6102-6104; *see also* 25 C.F.R. §2.6(b); *Yakama Nation v. Northwest Regional Director Bureau of Indian Affairs*, 47 IBIA 117, 119 (2008).) Because the BIA's Regional Director has never responded to Intervenors' appeal (30 CT 7626 at ¶ 3), the appeal remains pending, and the Superintendent's decision remains stayed and has no effect. (25 C.F.R. § 2.6(b).)[6]

Intervenors filed suit in federal district court for the District of Columbia, challenging the December 2010 Decision. (29 CT 7395-7421; 30 CT 7626 at ¶ 4.) In response, the AS-IA rescinded the December 2010 Decision by letter dated April 1, 2011 and announced that he would issue a new decision. (29 CT 7439.) On August 31, 2011, the AS-IA issued that new decision ("August 2011 Decision"). (29 CT 7443-7451.)

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[6] The January 12, 2011 decision also has no effect because the AS-IA has rescinded the December 2010 Decision on which the Superintendent's acknowledgment relied. (*Liesegang v. Secretary of Veterans Affairs,* 312 F.3d 1368, 1371-1372 (Fed. Cir. 2002).)

In the August 2011 Decision, the AS-IA again found that the Tribe is governed by a general council consisting of Burley, her two daughters, her granddaughter and Yakima Dixie. (29 CT 7443-7451.) However, the AS-IA stayed the implementation of his decision pending resolution of Intervenors' federal lawsuit. The August 2011 Decision read in relevant part:

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

(29 CT 7450.) The AS-IA also stipulated to a joint status report and proposed order in *Salazar* that confirmed the August 2011 Decision had "no force and effect" until the federal litigation was resolved. (22 CT 5460-5464.) The joint status report stated 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.**

(22 CT 5462 at ¶13; emphasis added.) Intervenors amended their federal complaint to challenge the August 2011 Decision, and Burley intervened in the *Salazar* litigation to defend that decision. (29 CT 7487-7488.)

In *Salazar*, Intervenors directly challenged the AS-IA's findings regarding the membership and leadership of the Tribe, including the validity of Burley's general council and the governing documents it is based on. (26 CT 6703-6761.) On December 13, 2013, the federal district court in *Salazar* granted in part Intervenors' motion for summary judgment, finding that the August 2011 Decision was arbitrary and capricious in violation of the Administrative Procedure Act. The court found unreasonable the AS-IA's conclusions regarding the membership and government of the Tribe:

> This Court finds that the Assistant Secretary's conclusion that the citizenship of the Tribe consists solely of Yakima, Burley, Burley's two daughters, and Burley's granddaughter is unreasonable in light of the administrative record in this case. The Assistant Secretary rests his conclusion on principles of tribal sovereignty, but ignores—entirely—that the record is replete with evidence that the Tribe's membership is potentially significantly larger than just these five individuals.

(*Salazar,* 2013 WL 6524636 at *9.)

> The Court finds that the August 2011 Decision [assuming that the General Council represents a duly constituted government of the Tribe] is unreasonable in light of the facts contained in the administrative record. ... 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.

(*Id.* at *10.) The district court remanded the August 2011 Decision to the Secretary of the Interior for reconsideration consistent with its opinion. (*Id.* at *12.) Burley initially sought to appeal the district court's decision to the Court of Appeals for the D.C. Circuit, but she voluntarily dismissed her appeal based on authority showing that the district court's order was not appealable until after the Secretary had issued her decision on remand. (Burley's Exh. 3; Exh. 7, p. 2; Exh. 8, p. 1.)

D. Commission Decision to Withhold Payment to the Tribe

In 2005, in response to the ongoing Tribal dispute and the BIA's determination that the Tribe did not have a recognized Tribal government, the Commission suspended RSTF payments to the Tribe. The Commission stated that "our trustee status under the Compact demands that we ensure the RSTF distributions go to the Tribe for the benefit of the Tribe and not merely to an individual member," and therefore it could no longer release RSTF money to Burley. The Commission informed Burley and

Dixie that the withheld funds would be forwarded to the Tribe, with interest, when the BIA acknowledged a Tribal government and reestablished government-to-government relations with the Tribe. (3 CT 578-579.) The Commission consistently repeated this explanation in subsequent letters to Plaintiff. (*E.g.*, 4 CT 581-582, June 27, 2006 Letter from Commission to Silvia Burley; 29 CT 6911-6913, June 26, 2007 Letter from Commission to Karla Bell; 29 CT 6926-6928, January 3, 2008 Letter from Commission to Manuel Corrales; *see also* 2 CT 170:25-28, Burley FAC; *Miwok III* at *2, *8 ("The Commission contends that because it has a fiduciary duty as trustee of the RSTF, 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 that the funds, if released, will be going to the proper parties.").)

The Commission continued to hold the Tribe's RSTF money in trust and refuse payment to Burley during the trial court proceedings because the membership and leadership of the Tribe remained in dispute pending the outcome of the *Salazar* case. (Ex. A to Motion to Correct, or Alternatively Augment, Record on Appeal, at pp. 307-310 (Commission Response to Requests for Admission Nos. 86, 97, 98, 101, 102, 106, 112-114, 119, 121).) Even now, after the federal district court in *Salazar* struck

down the AS-IA's August 2011 decision, the membership and leadership of the Tribe still remain in dispute.

E. Chronology of the Current Litigation

Burley filed suit against the Commission in January 2008 in San Diego Superior Court. (1 CT 1.) In August 2008, she filed her FAC, seeking a writ of mandate under CCP 1085 compelling the Commission to pay RSTF monies to the Tribe "in care of Burley." (2 CT 167.) 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." (*Miwok III at* *5.)

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

Burley appealed the trial court's dismissal of her complaint to the Court of Appeal. This Court reversed, holding that the allegations in 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. (*Miwok III at* *6, *8.) The Court did not address whether Burley represented the Tribe and specifically disclaimed any intent to address the

merits of Burley's claims. It 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. (9 CT 1949.) Shortly thereafter, the Assistant Secretary issued his December 2010 Decision. On February 7, 2011, 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 2010 Decision. (18 CT 4402.) 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.]

(18 CT 4402-4403; emphasis added.) Based on the December 2010 Decision, the trial court also granted reconsideration of its previous order allowing intervention. (18 CT 4398-4399.) But on April 1, 2011, before judgment was entered, the AS-IA rescinded his December 2010 Decision. (29 CT 7443-7444.) As a result, by order dated April 20, 2011, the trial court stayed entry of judgment and stayed the case for all purposes except discovery. (19 CT 4691-4692.) The court also ordered that "Intervenors are reinstated as participating parties for all purposes." (19 CT 4692:2-3.)

On August 31, 2011, the AS-IA issued his reconsidered decision. (29 CT 7443-7451.) As noted above, the AS-IA stayed the August 2011 Decision pending the outcome of the federal litigation in *Salazar*. Nonetheless, Burley immediately filed an ex parte application for an order entering judgment in her favor based on the August 2011 Decision, which the trial court denied on September 7, 2011. (21 CT 5301; 22 CT 5495.) 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. (24 CT 6231-6232.) The court recognized that:

> This 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.[7] Therefore, the court orders that this matter remain stayed . . . pending final resolution of *California Valley Miwok Tribe v. Salazar*.

(24 CT 6232.)

F. Burley Appealed the Trial Court's Stay of the Litigation

Burley filed a petition for writ of mandate with this Court, seeking an order directing the trial court to lift the stay and allow the parties to file dispositive motions and, if necessary, proceed to trial. The Court granted the writ, holding that the trial court could decide the case without resolving the Tribe's leadership dispute, as it need only decide:

> whether the current uncertainty in the federal government's relationship with the Miwok Tribe – including the pendency of the *Salazar* case – constitutes a legally sufficient basis for the Commission, as trustee of the RSTF, to withhold the RSTF funds from the Miwok Tribe.

(*Miwok IV, at* *17.)

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[7] Assistant Secretary Larry Echo Hawk has since been replaced by Assistant Secretary Kevin Washburn.

G. The Trial Court Granted Summary Judgment to the Commission

After remand to the trial court, the parties filed dispositive motions. The Commission and Intervenors filed motions for summary judgment against Burley, and Burley filed a motion for judgment on the pleadings. The trial court granted the Commission's motion for summary judgment. (1 RT 476:9-20; 1 RT 484:4-27; 32 CT 9215-9225.) Applying the deferential standard of review appropriate under CCP 1085, the court found that the Commission's construction of its statutory duty—as including a duty to distribute RSTF money only to a Tribe's authorized representative—was not "clearly erroneous." (35 CT 9222.) The Court also found that the Commission's deference to the BIA to identify the Tribe's authorized leadership was reasonable. (35 CT 9223.) Based on these findings, the Court ultimately concluded that "the Commission has a legally sufficient basis for withholding the RSTF funds." (35 CT 9224.) The court also denied Burley's motion for judgment on the pleadings (35 CT 9136) and ruled that Intervenors' motion for summary judgment was moot. (35 CT 9138.)

On June 4, 2013, Burley filed a motion for new trial which the trial court denied. (35 CT 9226-9236; 37 CT 9753-9761.) This appeal followed.

III.

STANDARD OF REVIEW

This Court reviews the trial court's grant of summary judgment to the Commission *de novo*. (*Wiener v. Southcoast Childcare Ctrs., Inc.*, 32 Cal. 4th 1138, 1142 (2004); s*ee also Riverside Sheriff's Ass'n v. County of Riverside*, 106 Cal. App. 4th 1285 (2003), *review denied* (in reviewing trial court's decision on petition for writ of mandate, Court of Appeal exercises independent judgment on questions of law but reviews trial court's factual determinations under substantial evidence standard).) Like the trial court, this Court must find that "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc. § 437c(a), (c); *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 839 (1999).) The requirement that there be "no triable issue of material fact" means that summary judgment may be granted only if the material facts are either conceded or beyond dispute. (*Id.*) In this case, the only material fact is whether the United States currently recognizes Burley's purported Tribal government, and Burley has failed to establish a genuine dispute as to that fact.

The Commission is entitled to judgment as a matter of law because Burley failed to make the showing necessary to obtain the relief she sought: a writ of ordinary mandamus under CCP 1085, compelling the Commission to pay the Tribe's RSTF funds "in care of Burley." (2 CT 174:28.) In a challenge to agency action under CCP 1085, the petitioner bears the burden of proving that the challenged decision was arbitrary, capricious, entirely lacking in evidentiary support, or contrary to required legal procedures. (*See McGill v. Regents of University of California*, 44 Cal. App. 4th 1776, 1786 (1996); *Marvin Lieblin, Inc. v. Shewry*, 137 Cal. App. 4th 700, 713 (2006).) This very deferential standard of review is also characterized as an "abuse of discretion" standard. (*See Klajic v. Castaic Lake Water Agency*, 90 Cal. App. 4th 987, 995 (2001).) Under this standard, "the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Klajic*, 90 Cal. App. 4th at 995.) The court can compel the agency to act only where the statute "leaves [no] room for discretion," or where "only one choice can be a reasonable exercise of discretion." (*CA Correctional v. CA Dept. of Corrections*, 96 Cal. App. 4th 824, 827 (2002).)

On pure questions of law, where the agency's action "depends solely upon the correct interpretation of a statute," the court may

exercise its independent judgment. "In doing so, however, [the court is] guided by the principle that an "administrative [agency's] interpretation [of controlling statutes] . . . will be accorded great respect by the courts and will be followed if not clearly erroneous." (*City of Arcadia v. State Water Resources Control Bd.*, 191 Cal. App. 4th 156, 170 (2010) (quoting *Wirth v. State of California*, 142 Cal. App. 4th 131, 138 (2006).)

In contrast to the standard of review for summary judgment, the Court of Appeal reviews the trial court's decision whether to grant a new trial under the deferential "abuse of discretion" standard. (*Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 859 (2001);[8] *Wall Street Network,*

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[8] Burley argues, citing *Aguilar*, that review of the trial court's order denying a new trial is subject to *de novo* review because the trial court's grant of summary judgment is subject to *de novo* review. Not so. *Aguilar* applied the rule that a *determination underlying* a trial court's order is reviewed under the standard applicable to that determination. (25 Cal. 4th at 859.) In *Aguilar*, the "sole determination" underlying the trial court's order granting a new trial **was not its order granting summary judgment**, but its determination that it had made a legal error regarding the meaning of decisional law—a "pure question of law" subject to *de novo* review. (*Id.* at 860; *Wall Street Network, supra*, 164 Cal. App. 4th at 1176-1177 (discussing *Aguilar*).) Here, in contrast, the determination underlying the trial court's denial of a new trial was that Burley failed to present any significant new evidence and that the court had already addressed her arguments in granting summary judgment to the Commission, 37 CT 9758, a determination squarely within the trial court's discretion (*see id.* at 1177 (determinations other than questions of law reviewed under the appropriate test).) Burley's interpretation of *Aguilar* would allow the exception to swallow the normal rule that "orders granting a new trial are examined for abuse of discretion." (*Aguilar*, 25 Cal. 4th at 859 (citations omitted).)

Ltd. v. New York Times Co., 164 Cal. App. 4th 1171, 1176 (2008); *ABF Capital Corp. v. Berglass*, 130 Cal. App. 4th 825, 832 (2005).) Under either standard of review, the Court may affirm the trial court's decision on any correct legal theory, even if different from the trial court's reasoning, as long as the parties had an adequate opportunity to address the theory in the trial court. (*California School of Culinary Arts v. Lujan*, 112 Cal. App. 4th 16, 22 (2003).)

IV.

THE UNITED STATES DOES NOT RECOGNIZE BURLEY'S PURPORTED TRIBAL GOVERNMENT

Prior to the December 2010 Decision, the status quo was that the BIA did not recognize any government of the Tribe. (22 CT 5475-5480 (2005 Decision); 22 CT 5485-5490 (2007 Decision).) The December 2010 Decision did briefly recognize Burley's tribal government, but the AS-IA rescinded that decision on April 1, 2011. (29 CT 7439.) The August 2011 Decision *would have* recognized Burley's tribal government, but the AS-IA stayed implementation of that decision, and stipulated that it would have no force or effect pending the outcome of *CVMT v. Salazar*. The district court in *Salazar* ultimately found the August 2011 Decision unlawful. (29 CT 7450.)

Moreover, the August 2011 Decision explicitly disclaimed any intent to rescind the BIA's prior decisions declining to recognize Burley's tribal government, and it stated that the August 2011 Decision would apply prospectively only. (29 CT 7450.) As a result, the prior decisions (including the 2005 Decision and 2007 Decision) remained in effect pending judicial review of the August 2011 Decision, and the federal government did not recognize any government of the Tribe at the time the trial court granted summary judgment to the Commission.

Ignoring those binding decisions, Burley offers various arguments in an attempt to show that the Department actually does recognize her authority to speak for the Tribe. As a threshold matter, several of the form letters, public notices and other trivia that Burley bases her arguments upon were not before the trial court when it issued the decisions from which Burley appeals, and therefore they cannot provide a basis for reversal. "[A]n appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." (*In Re Zeth S.*, 31 Cal. 4th 396, 405 (2003).) But even if all of the information that Burley relies on had been available to the trial court, it would not have warranted a different result.

A. The Annual Federal Register Notices Have No Bearing on Whether the United States Recognizes Burley's Tribal Government

The United States annually publishes a notice in the Federal Register, listing each of the more than 500 federally recognized Indian tribes. (*E.g.*, 2012 notice, 28 CT 7226.) As Burley stated in her brief, "being federally-recognized [sic] is an acknowledgment by the [Department] of tribal existence . . .." (Burley's Opening Brief, p. 5 (emphasis omitted).) Federal recognition of a tribe's existence says nothing about the United States' acknowledgment of any particular government for that tribe, and the Federal Register notice does not purport to acknowledge a tribal government for any tribe. (*See generally* 28 CT 7226-7231.)

The annual notice refers to the recognized tribes as having a "government-to-government relationship with the United States." (*E.g.*, 28 CT 7226.) Burley argues that this generic statement necessarily implies that the United States recognizes *her* purported tribal council as the government of this Tribe. This leap finds no support in logic or fact. The Tribe has been included on the list of federally recognized Tribes since the United States began publishing the list in 1994 (2 CT 25-27; 35 CT 9245:23-25), even though the United States has explicitly declined to recognize any Tribal government since 2005. The fact that the Tribe remained on the list, even while the August 2011 Decision was undergoing

judicial review, implies nothing about the intended meaning or status of that Decision. It indicates only that the United States continues to recognize the Tribe's existence.

Burley tries to analogize the Federal Register notice to a letter that the AS-IA sent to the Timbisha Shoshone tribe in another, unrelated tribal dispute. She claims that the court should presume that the Department was aware of the ongoing Tribal government dispute when it issued the Federal Register notice and that it intended the notice to trump any contrary actions by the Department and to establish federal recognition of Burley's government. This analogy is strained beyond the breaking point. The letter in *Timbisha Shoshone* explicitly addressed the results of a tribal election and recognized a group of individuals as the Tribal Council of the Timbisha Shoshone tribe based on that election. (*Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 937-938 (D.C. Cir. 2012).) *Timbisha Shoshone* says nothing about the meaning of an annual Federal Register notice that lists *all* federally recognized tribes and that says nothing about the government of this Tribe (or of any tribe).

B. The Washburn Note Has No Bearing on the Tribe's Leadership Dispute

Burley next pins her hopes on a thank-you note she allegedly received from the new AS-IA, Kevin Washburn, purportedly in response to

an encounter with Burley at a conference shortly after he took office. The note is dated December 19, 2013. (Burley's Opening Brief, p. 39.) It therefore post-dates the trial court's grant of summary judgment and its denial of Burley's motion for new trial, and cannot be used to demonstrate error. (*Zeth S.*, *supra*, 31 Cal. 4th at 405.)

Even if the note were properly before this Court, a thank-you note allegedly addressing Burley as "Chairman" suggests, at most, that the AS-IA's staff did not verify the attendee information that Burley submitted to the conference organizers. Thank-you notes are hardly the means that the United States uses to announce its recognition of the government of a sovereign nation.[9]

C. The November 2011 Notice of Proposed Rulemaking Has Nothing to Do with the Tribe and Does Not Recognize Burley's Tribal Council

Burley also attaches undue significance to a mass mailing that she allegedly received from the AS-IA's office in November 2011, addressed to her as "chairwoman." This letter was not presented to the trial court on the motion for summary judgment, meaning it cannot be

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[9] The purported note is inadmissible on a number of additional grounds including hearsay, lack of foundation, lack of authentication, and lack of relevance. Intervenors hereby join the Commission's Motion to Strike and Objection to Burley's Request for Judicial Notice as to Exhibit 4.

considered now. (*Zeth S.*, *supra*, 31 Cal. 4th at 405.) Instead, Burley attempted to introduce this purported document in a motion for new trial. (35 CT 9247:24 – 9248:1.) Intervenors opposed the motion on several grounds including the fact that the purported document was never produced in discovery and Burley had no legal justification for not relying on the document in opposing summary judgment. (36 CT 9573-9576.) Burley's motion for new trial was denied. (37 CT 9753-9761.) Given these facts, Burley's belated attempt to rely upon this purported letter must be rejected.

Regardless, this letter was a notice of proposed federal regulations for leasing of Indian lands (35 CT 9283-9284) which Burley has already admitted "had nothing to do with this case" (35 CT 9260:10). It likewise has no bearing on whether the United States recognizes Burley's tribal government. As with the thank-you note, a mass mailing regarding an unrelated rulemaking is not the vehicle by which one would expect the Department to announce its recognition of a Tribal government. In addition, the letter constitutes inadmissible hearsay, it was never properly authenticated and it is entirely irrelevant.

D. The Department's 2001 Action on a Burley Resolution Does Not Imply that the United States Recognizes Burley Today

Burley cites the Department's action on a tribal resolution *in 2001*, changing the name of the Tribe, as evidence that the United States

recognizes her as a Tribal representative *today*. The illogic of this argument speaks for itself. Intervenors need only note that the Department first recognized Burley's tribal government in 1999 and withdrew its recognition of that government in 2005.

E. The August 2011 Decision Was Never Put Into Effect

As explained above, the August 2011 Decision stated that it was "final for the Department and effective immediately, but implementation shall be stayed pending resolution of the litigation in *California Valley Miwok Tribe v. Salazar*." (29 CT 7450.) The AS-IA's statement that the August 2011 Decision is "final for the department and effective immediately" merely indicated that the Decision was not subject to further appeal or consideration within the Department and was subject to judicial review under the Administrative Procedure Act. (*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; 5 U.S.C. § 704 (making "final agency action . . . subject to judicial review").) However, the AS-IA's statement that "implementation shall be stayed" had the effect of "suspend[ing] . . . alteration of the status quo" by holding the decision in abeyance pending further review. (*Nken v. Holder*, 129 S.Ct. 1749, 1754, 1758 (2009) (discussing judicial stay of deportation order).)

The Assistant Secretary subsequently stipulated in *Salazar* that the August 2011 Decision would have "no force and effect" until the litigation was resolved. (22 CT 6460-5464.) The AS-IA's decision to voluntarily stay the effect of the August 2011 Decision pending judicial review is specifically authorized by statute and is binding on the BIA, independent of the stay language in the August 2011 Decision itself. (5 U.S.C. § 705 ("When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review"); *see also 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) (citations omitted); *Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713, 719 (9th Cir. 1989) (court properly gave effect to parties' stipulation).)

The federal district court recognized that the AS-IA had stayed the effectiveness of his decision pending resolution of the federal litigation. (Ex. A to Motion to Correct, or alternatively Augment, Record on Appeal, at pp. 109-123; *see Salazar*, 2013 WL 6524636 at *7.) The trial court in this case also recognized that the August 2011 Decision was stayed. (24 CT 6231-6232.) Finally, in *Miwok IV*, this Court acknowledged that "implementation of the August 31, 2011 decision was stayed." (*Miwok IV* at p. 9.)

Notwithstanding the stay language in the Decision itself and the AS-IA's stipulation, Burley argues that the August 2011 Decision had the effect of immediately recognizing the Burley government. In support, she points to language in the Decision deferring to the "Tribe's existing government structure." But this argument misses the point entirely. No one disputes that the August 2011 Decision, *if not stayed*, would have recognized the Burley government. That in itself says nothing about *whether the Decision was stayed.*

On a related note, Burley argues that "the Burley Faction did not lose recognition when the [August 2011 Decision] was rendered." (Burley Opening Brief at p. 29.) She is correct. The Burleys had *already* lost recognition when the Assistant Secretary rescinded his December 2010 Decision on April 1, 2011. The salient point is that, because of the stay, the Burleys did not *gain* recognition when the August 2011 Decision was rendered.

In addition, Burley's arguments about the effect of the August 2011 Decision are now moot in light of the federal court's decision in *Salazar*, finding the August 2011 Decision unlawful. Although the federal decision occurred after the trial court decided this case, it confirms the wisdom of the trial court's decision not to order the release of more than

$10 million "in care of Burley" based on a federal decision that had been stayed by its author and that was the subject of a pending judicial challenge.

F. The January 2011 Letters from the BIA Field Office Relied on the December 2010 Decision and Have No Independent Effect

After the AS-IA issued his December 2010 Decision recognizing Burley's general council, the superintendent of the BIA's Central California field office wrote to Burley on January 12, 2011, confirming (at Burley's request) that "*as a result of the recent decision by the AS-IA*, I am committed to working with the Tribe's existing governing body - it's [sic] General Council, as established by Resolution #GC-98-01 - . . . *consistent with the AS-IA's direction.*" (31 CT 8159; emphasis added.) The superintendent also sent a letter the same day acknowledging the results of the tribal "election" that Burley and her daughters conducted on January 6, 2011, selecting Burley as "chairperson." (31 CT 8162.)

Intervenors timely filed an administrative appeal of the superintendent's election recognition letter. (30 CT 7626.) The appeal triggered an automatic stay of the challenged decision so long as the appeal remains pending. (*See* 25 C.F.R. §2.6(b); *Yakama Nation, supra*, 47 IBIA at 119.) The appeal was never decided, 30 CT 7626, and therefore the superintendent's decision remains stayed to the extent it would otherwise have any effect. However, Intervenors submit that the appeal is now moot

because the AS-IA's rescission of the December 2010 Decision removed the basis for the superintendent's decision and rendered it null and void. (*See Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1368, 1371-1372 (Fed. Cir. 2002) (where an agency letter "merely implements" a challenged regulation, "its validity stands or falls with the underlying regulation").)

Burley argues that the superintendent's election acknowledgment has some continued legal effect independent of the December 2010 Decision it sought to implement, and that the letter "stands as undisputed evidence that the BIA currently recognizes the Burley Faction." (Burley Opening Brief at p. 32.) At the same time, she attempts to escape the effect of the automatic stay by arguing that "the [superintendent's] letter is not a decision (*id.* at p. 32), "has no characteristics of a 'decision' of a contested matter" (*id.* at p. 31), and is therefore not subject to appeal at all.

Burley cannot have it both ways. If the superintendent's letter was not a decision, then it merely acknowledged the effect of the December 2010 Decision and had no legal effect of its own that would survive the rescission of that Decision. (*Liesegang*, 312 F.3d at 1371-1372.) If the superintendent's letter was a decision with independent legal effect, then it was subject to administrative appeal and remains stayed due

to the BIA's failure to decide Intervenors' appeal. (25 C.F.R. §2.6(b).) Either way, the letter cannot establish that the BIA currently recognizes Burley's tribal government.

Burley's attempt to analogize the superintendent's letter, and the December 2010 Decision on which it relied, to the *Timbisha Shoshone* case is again misplaced. *Timbisha Shoshone* did not involve a decision by the Assistant Secretary that was subsequently rescinded, and it says nothing about the continued effect of any such decision. (*See Timbisha Shoshone*, *supra*, 678 F.3d at 937-938.) Moreover, *Timbisha Shoshone* did not involve a dispute over the identity of the Tribe's members or who must be allowed to participate in the formation of a Tribal government. (*See generally id.* at 936-937 (discussing leadership dispute).) Here, the recognition of Burley's purported tribal council depended entirely on the mistaken premise in the December 2010 Decision that the Tribe's membership is limited to five people—a premise that the federal court has now found "unreasonable" in *Salazar* (2013 WL 6524636 at *9, *10.)

G. The Trial Court Did Not Rely on Any Determination by this Court Regarding the United States' Relationship with the Tribe

Burley also argues that the trial court erroneously assumed that this Court had determined there was a current "uncertainty" in the United States' relationship with the Tribe. The point of this argument is

unclear. The fact that the United States does not recognize any Tribal government, and that its attempts to do so have resulted in federal litigation, obviously does create "uncertainty" in the Tribal-federal relationship. But the trial court did not rely on any findings by this Court about that relationship. In any case, Burley has not explained how the alleged misinterpretation had any prejudicial effect. She has thus waived any argument she might have based on this theory. (*People v. Freeman*, 8 Cal. 4th 450, 482, n.2 (1994) ("a reviewing court need not discuss claims asserted perfunctorily and insufficiently developed") (citing *People v. Turner*, 8 Cal. 4th 137, 214, fn. 19 (1994); *People v. Ashmus,* 54 Cal. 3d 932, 985, fn. 15 (1991).)

V.

THE COMMISSION WAS LEGALLY JUSTIFIED IN DEFERRING RSTF PAYMENTS TO THE TRIBE UNTIL THE UNITED STATES RECOGNIZES A TRIBAL GOVERNMENT

As framed by this Court,

> [T]he fundamental issue presented to the trial court for resolution on the merits is whether the current uncertainty in the federal government's relationship with the Miwok Tribe – including the pendency of the *Salazar* case – constitutes a legally sufficient basis for the Commission, as

> trustee of the RSTF, to withhold the RSTF funds from the Miwok Tribe.

(*Miwok IV* at 17.) As detailed above, there is no material dispute that as of the trial court's order granting summary judgment, and as of today, the federal government has not recognized a valid government or authorized leadership of the Tribe. Accordingly, the only remaining question is whether the Commission, acting as a trustee with fiduciary obligations, had a legally sufficient basis to withhold payment of the Tribe's RSTF funds. As detailed below, the undisputed evidence confirms that the Commission's decision to await federal recognition of the Tribe's government in order to ensure that the Tribe's money actually goes to the Tribe was not clearly erroneous. Thus, the trial court correctly entered summary judgment in favor of the Commission.

A. The Commission Has No Mandatory Duty to Pay the Tribe's RSTF Funds to Silvia Burley

At bottom, Burley's position in this litigation is that the Commission has a mandatory, non-discretionary duty to perform the action demanded in the FAC: to pay the Tribe's RSTF money "in care of [Silvia] Burley." (2 CT 174:28.) Burley never identifies the source of this alleged duty to her, despite her repeated assertions that the Commission has "no discretion" in its disbursement of RSTF funds. (*See, e.g.*, Burley Opening

Brief, p. 41.) That is because the Commission's statutory duty is to the Tribe, not to Burley.

The Commission's duty arises under the Government Code—not under the Compact, which Plaintiff has no right to enforce in this Court. (*Miwok III* at *8-9; 1 CT 57 at § 15.1.) The Government Code provides that "[t]he [Commission] shall make quarterly payments from the [RSTF] to each eligible recipient Indian tribe within 45 days of the end of each fiscal quarter." (Cal. Gov. Code § 12012.95(e)(2).) The Code also states that money in the RSTF "shall be available to the [Commission] . . . for the purpose of making distributions to noncompact tribes, in accordance with distribution plans specified in tribal-state gaming compacts." (Cal. Gov. Code § 12012.75.)

Although there is nothing in the Compact explicitly called a "distribution plan," section 12012.75 is reasonably understood as referring to the provisions of the Compact that direct the Commission to pay $1.1 million annually to each eligible Non-Compact Tribe, in quarterly payments, and to the definitions of relevant terms in the Compact. (*See* 1 CT 22 at § 4.3.2.1.) The Compact defines Non-Compact Tribes as those "federally recognized tribes operating fewer than 350 gaming devices." (1 CT 22 at § 4.3.2.1(a).) A "tribe," in turn, is defined as a "federally-

recognized Indian tribe, or an authorized official or agency thereof." (1 CT 21 at § 2.21.)

All parties agree that the Government Code provisions create a statutory duty for the Commission to pay RSTF money to the Non-Compact Tribes, including this Tribe. But they do not, on their face, create a nondiscretionary duty to pay the Tribe's RSTF money "in care of Burley," as Burley seeks.[10] (2 CT 174:28.) The Compact's "distribution plan," likewise, makes no mention of Silvia Burley. Burley's claims thus depend on her attempt to equate "Silvia Burley" with the "authorized official" of the Tribe. The Commission, however, is not required to accept that claim at face value.

B. As the RSTF Trustee, the Commission Must Exercise Its Discretion to Ensure that RSTF Money Actually Goes to Eligible Tribes

The Compact states that the Commission "shall serve as the trustee of the [RSTF]," and that it shall have "no discretion as to the use or disbursement of the [RSTF] funds" other than the authority to disburse the funds on a quarterly basis. (1 CT 23 at § 4.3.2.1(b).) As a trustee, the

---

[10] Put another way, the Commission has a duty to pay RSTF money to the Tribe, but it is far from clear that *Burley* is the party with the "clear, present and beneficial right . . . to the performance of that duty." CCP § 1086.

Commission has fiduciary duties to beneficiaries of the trust, which include the Tribe. This relationship carries with it an "obligation of the highest good faith" (*Brown v. Wells Fargo Bank*, 168 Cal. App. 4th 938, 961 (2008) (citation omitted)), as well as specific duties imposed by statute that include the duty to control and preserve trust property. (*Hearst v. Ganzi*, 145 Cal. App. 4th 1195 (2006) (*citing* Cal. Prob. Code § 16006); *see also Manchester Band of Pomo Indians, v. United States*, 363 F.Supp. 1238, 1245 (N.D.Cal. 1973) (the conduct of the government as a trustee is measured by the same standards applicable to private trustees) (*citing United States v. Mason*, 412 U.S. 391, 398 (1973).) Violation of these fiduciary duties would be a breach of trust and would make the Commission liable for any resulting loss in the value of the trust property. (*Uzyel v. Kadisha*, 188 Cal. App. 4th 866, 888-889 (2010) (*citing* Prob. Code §§ 16400, 16440).) Specifically, it would be a fraud upon the Tribe, as a beneficiary, for the Commission to fail to protect the Tribe's interests by releasing RSTF funds to someone other than the Tribe's authorized official or agency. (*See Dougherty v. Cal. Kettleman Oil R., Inc.,* 13 Cal. 2d 174 (1939).)

A large body of case law confirms the application of these fiduciary duties where the government provides benefits to Indian tribes. As the federal Court of Appeals said in a case rejecting Burley's claim to

federal recognition, the government's obligations include "ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." (*Miwok II* at 1267 (*citing Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).) The Court of Appeals further stated:

> Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs . . . , was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.

(*Id.* (quotation marks and citation omitted).) Although these cases involved the federal government's relations with Indian tribes, the Commission also serves as a trustee to federally recognized tribes and has analogous obligations in disbursing state benefits to tribes.

Nothing in the Code or the Compact explains how the Commission is to identify an "authorized official or agency" of a Non-Compact Tribe for purposes of making RSTF payments. This necessarily leaves some room for the Commission to exercise its discretion in making RSTF distributions, especially when a legitimate dispute exists as to the identity of a Tribe's authorized officials. For purposes of a mandamus claim, "[t]he scope of discretion always resides in the particular law being

applied, *i.e.*, in the legal principles governing the subject of [the] action. . . ." (*City of Sacramento v. Drew*, 207 Cal. App. 3d 1287 (1989) (quotation marks and citation omitted).) In this case, the legal principles that govern the Commission's distribution of RSTF money are its fiduciary duties as a trustee. (1 CT 23 at § 4.3.2.1(b).) In light of those duties, the statement in the Compact that the Commission "shall have no discretion as to the use or disbursement of the [RSTF] funds" must be read as a statement that the Commission can only use the funds for disbursements to eligible tribes, and that it cannot alter the timing or amount of disbursements specified in the Compact. It cannot reasonably be read as a statement that the Commission must pay the funds to any party that claims to represent the Tribe, regardless of the veracity of that claim.

C. The Commission's Reliance on the BIA to Identify the Tribe's Authorized Representative Is Not Arbitrary, Capricious or an Abuse of Discretion

Outside of a tribe itself, the United States government acting through the BIA has the exclusive authority to acknowledge a tribal government, and those decisions are subject to review only in the federal courts. (*See, e.g., Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 552 (10th Cir. 1987) ("since the Department is sometimes required to interact with tribal governments, it may need to determine which tribal government to recognize"); *Ransom v. Babbitt*, 69 F.Supp.2d 141, 151 (D.D.C. 1999)

(BIA acted arbitrarily and capriciously by recognizing a tribal government based on a constitution it should have realized was not validly adopted); *Seminole Nation v. Norton*, 223 F.Supp.2d 122, 138-140 (D.D.C. 2002) (DOI upheld its trust obligation by refusing to recognize tribal government based on tribal elections from which members were excluded).)

Neither the Commission nor the state courts have jurisdiction to resolve a tribal dispute or to decide who is an authorized tribal official. (*See Ackerman v. Edwards,* 121 Cal. App. 4th 946, 954 (2004); *Lamere v. Superior Court*, 131 Cal. App. 4th 1059, 1067 (2005).) The Commission also has no expertise in the area of tribal membership or governance; it was created to oversee casino gambling, not to make determinations about the makeup of Indian tribes. (Cal. Bus. & Prof Code § 19811.) In light of those limitations, the Commission has chosen to rely on the BIA's determinations in deciding whether a claimant is an "authorized official" of a tribe for purposes of disbursing RSTF money. (*See* 3 CT 579, Aug. 4, 2005 Letter from Commission to Burley.) This is a reasonable exercise of discretion that allows the Commission to fulfill its fiduciary duties as the RSTF trustee while acting within its authority and respecting tribal sovereignty.

In deciding to suspend payment of the Tribe's RSTF money to Burley, the Commission explicitly relied on the BIA's decision to withdraw acknowledgement of Burley's tribal government. (3 CT 578-579; 22 CT 5475-5480.) As a trustee, the Commission had a duty to act on that information, because it called into question whether payments of RSTF money to Burley would actually go to the Tribe. In continuing to withhold the RSTF funds, the Commission has relied on a number of other BIA determinations including: (1) the BIA's decisions to deny funding to the Tribe under PL-638 (3 CT 574-576; 4 CT 609-610); (2) the BIA's resolution of an administrative appeal, confirming that the BIA does not recognize Burley's Tribal government (22 CT 5485-5490, 2007 Decision); (3) letters from the BIA to the Commission in 2008 and 2009 confirming that the Tribe has "no government" (10 CT 2367-2369; 10 CT 2365); and (4) two federal court opinions affirming the BIA's determination that the Tribe can only establish a valid government through the participation and consent of the entire Tribal community. (*See Miwok I* and *Miwok II*.)

The Commission's decision was reasonable under the circumstances. If the trial court had found otherwise, and ordered immediate disbursement of the Tribe's RSTF money, it would have been forced to specify *to whom* the money should be paid, without waiting for the BIA to acknowledge a Tribal government. The trial court and this

Court both lack the jurisdiction to make that determination. (*Ackerman,* 121 Cal. App. 4th at 954; Lamere, 131 Cal. App. 4th at 1067.)

In 2005, after suspending RSTF payments to the Tribe, the Commission filed an interpleader action in state court, asking the court to determine to whom the Commission should release the Tribe's RSTF money. (Ex. A to Motion to Correct, or alternatively Augment, Record on Appeal, at pp. 255-258.) Burley successfully opposed that action, arguing that neither the court nor the Commission had any authority to determine the proper representative of the Tribe for purposes of RSTF distribution. (Ex. A to Motion to Correct, or alternatively Augment, Record on Appeal, at pp. 260-269 and 271-273.) That argument was correct then, and it is correct now. It necessarily follows that the Commission's decision to await acknowledgment of a Tribal government by the BIA is not arbitrary, capricious or an abuse of discretion and that Plaintiff was not entitled to a writ of mandamus.

On appeal, Burley now argues that the BIA's termination of federal contract funding for Burley's tribal government under PL-638 is not a valid basis for the Commission to withhold RSTF funds from Burley, because the criteria for the two types of funds are different. (Burley Opening Brief, pp. 22-25.) This argument misses the point. The BIA's

reason for terminating federal funding to Burley is that the BIA does not recognize Burley (or anyone) as the government of this Tribe. (*See* 3 CT 574-576; 4 CT 609-610; Burley RJN Exhibit 1.) The same underlying reason justifies the Commission's refusal to release the Tribe's RSTF funds to Burley.

D. The Tribe, Not Its Individual Members, Has the Right to RSTF Money

In her briefs opposing Intervenors' participation before the trial court, Burley argued that individual tribal members have no claim to RSTF funds:

> The RSTF monies at issue in this case are held in the name of the ***Tribe***. The Compact recognizes only Tribes as recipients for those funds.

(13 CT 3012:12-15 (emphasis in original).) And again:

> [T]he Compact specifically provides that the RSTF money is payable to the Non-Compact Tribe only, *not to individual members* of the Non-Compact Tribe. Thus, the only person with standing to assert a claim to the RSTF money is the Tribe, *not its individual members*.

(9 CT 2045:12-16; emphasis added.) As Burley pointed out, cases brought by individual tribal members involving claims to tribal assets have been dismissed for lack of standing. (*Canadian St. Regis Band of Mohawk Indians v. State of N.Y.*, 573 F.Supp. 1530, 1537 (1983).)

In a complete reversal of her earlier position, Burley now argues on appeal that five "existing members" of the Tribe "have a vested interest and an exclusive claim" to the Tribe's RSTF funds accrued to date (Burley Opening Brief at p. 20), and that "these five enrolled members are thus entitled to the presently withheld RSTF money now." (*Id.* at p. 22 (emphasis in original).) As a threshold matter, this argument assumes the truth of Burley's claims that the Tribe is limited to five members—a claim that the *Salazar* court recently found "unreasonable." (*Salazar* at *9.) Moreover, Burley is bound by her prior judicial admissions that individual tribal members have no claim to RSTF funds—admissions that, as Burley points out, are "binding on the party asserting them" and conclusive evidence as to the truth of a matter. (Burley Opening Brief, p. 20 (citing *Electric Supplies Distrib. Co. v. Imperial Hot Min. Spa*, 122 Cal. App. 3d 131, 134 (4th Dist. 1981).)

E. The Commission Is Not Required to Release Funds to Burley Based on the January 2011 Recognition Letter

Burley also argues on appeal that she is entitled to receive all of the Tribe's RSTF money accumulated between 2005 and 2011, because the BIA allegedly recognized the Burley council in early 2011. (Burley Opening Brief, p. 52.) Even if the BIA's recognition of Burley had not been stayed (*see* section IV.F, *supra*), the brief "window" of recognition

would have lasted only three months—the period after the AS-IA issued the December 22, 2010 Decision but before he rescinded it on April 1, 2011. But Burley apparently believes that decisions rescinded more than three years ago somehow entitle her to the Tribe's RSTF money *today*.

As a threshold issue, Burley did not raise this argument before the trial court's grant of summary judgment, and she cannot rely on it now to overturn that judgment. (*Greenwich S.F., LLC v. Wong*, 190 Cal. App. 4th 739, 767 (2010); *Giraldo v. California Dept. of Corrections & Rehabilitation*, 168 Cal. App. 4th 231, 251 (2008).) She also fails to cite any legal authority for her position, thus waiving any argument she might have had. (*People v. Stanley*, 10 Cal. 4th 764, 793 (1995) (citations omitted).) More to the point, the Commission's duty is to distribute the Tribe's RSTF money to the Tribe's *current* authorized representative, not to someone who may or may not have been a Tribal representative years ago. (*See* 1 CT 21 at § 2.21.) The Commission's ongoing decision to withhold payment is fully justified by the BIA's continued refusal to recognize any Tribal government.

F. The Trial Court Applied the Correct Standard of Review

Burley argues on appeal that the trial court erroneously applied a "reasonableness" standard in determining whether the

Commission's actions were legally justified. (Burley Opening Brief, p. 50.) In a related argument, she claims that the Commission is not entitled to any deference because it is not charged with "enforcing" any statute with respect to RSTF payments. (*Id.* at 41.) Burley has provided no legal authority for these arguments and has thereby waived them. (*Stanley*, *supra*, 10 Cal. 4th at 793 (1995).)

Regardless, the record shows that the trial court applied the correct standard. In its tentative ruling on the Commission's motion for summary judgment (which it adopted in full after oral argument, 35 CT 9198), the trial court found that "the Commission's construction [of the statute and Compacts] that its duty includes the obligation to take reasonable steps to distribute RSTF payments to the authorized representative of the tribe is not clearly erroneous." (35 CT 9201.) The trial court did not merely defer to the Commission's interpretation of the statute and Compacts; instead it was "persuaded" that:

> [I]mplicit in the Commission's duty under the Compacts to distribute RSTF funds, is the Commission's duty to ascertain the identity of representatives authorized by their respective tribes to receive and administer the tribe's RSTF payments. *The Court agrees* that the Commission cannot reasonably be deemed to discharge its responsibility to make a RSTF distribution to a tribe by making the payment to

> a person or group other than the one properly authorized . . . pursuant to a tribe's directives.

(35 CT 9201-9202 (emphasis added).) The trial court thus exercised its independent judgment in interpreting the controlling law. (*See City of Arcadia, supra*, 191 Cal. App. 4th at 170.)

Having found that the Commission has a duty to ensure the Tribe's RSTF funds go only to an authorized representative of the Tribe, the trial court determined that "it is *reasonable* for the Commission to rely on the BIA for a determination of the authorized representative of a tribe for purposes of distribution of RSTF funds." (35 CT 9202 (emphasis added).) Because the statute is silent as to how the Commission should fulfill this duty (*see* Gov. Code § 12012.90), it necessarily involves the exercise of some discretion, as explained above. Thus, the court correctly applied a "reasonableness" standard. (*See CA Correctional, supra*, 96 Cal. App. 4th at 827 ("Where a statute leaves room for discretion, a challenger must show the official acted arbitrarily, *beyond the bounds of reason* or in derogation of the applicable legal standards.") (emphasis added).)

G. The Trial Court's March 11, 2011 Order Did Not Adjudicate Intervenors' Claim to the Tribe's RSTF Funds

Burley argues at length that Intervenors have no claim to the Tribe's RSTF funds because they did not appeal the trial court's March 11,

2011 Order granting reconsideration and denying intervention ("March 11 Order"). (March 11 Order found at 18 CT 4417-4418.) Burley's claim is based on the same arguments that this Court implicitly rejected in denying Burley's efforts to exclude Intervenors from this appeal. We will briefly recap the flaws in Burley's arguments.

The trial court's March 11 Order was based entirely on the AS-IA's December 2010 Decision. (18 CT 4417-4418.) After the AS-IA rescinded the December 2010 Decision, the trial court issued a new order on April 20, 2011, staying the effect of the March 11 Order and reinstating Intervenors as "fully participating parties in this case" ("April 20 Order"). (19 CT 4692:2-3.) The trial court's April 20 Order was not untimely because it was not based on a motion for reconsideration under CCP 1008(a), as Burley claims. Instead, based upon the "new or different facts, circumstances, or law" in the federal government's April 1, 2011 decision, Intervenors applied under Section 1008(b) for an order reversing the trial court's March 11 Order denying intervention. (18 CT 4582:20-23.) Unlike Section 1008(a), there is no time limit under Section 1008(b) for challenging a prior denial of a motion. (*See* Code Civ. Proc. § 1008(b).)

Furthermore, Intervenors had no need to appeal the March 11 Order, because the April 20 Order negated the effect of the March 11 Order

and effectively reinstated the court's December 17, 2010 order granting intervention. (19 CT 4691-4692.) Nor do Intervenors seek to appeal the March 11 Order now. That would be unnecessary in light of the trial court's April 26, 2013 order granting summary judgment to the Commission and denying as moot Burley's motion to reinstate the March 11 Order. (35 CT 9140.)

Burley's claim that the March 11 Order somehow remains in effect and establishes that the BIA recognizes Burley as the Tribe's representative (Burley Opening Brief, p. 45) lacks any merit, especially since the December 2010 decision that the March 11 Order relied on was rescinded more than three years ago.

VI.

THE TRIAL COURT PROPERLY DECLINED TO ADJUDICATE THE TRIBAL LEADERSHIP DISPUTE

In a last-ditch effort, Burley argues that the trial court should have found that she is the Tribe's authorized representative based on deposition testimony obtained from Yakima Dixie during this case. Although Dixie's testimony is disputed and irrelevant, the bigger problem with Burley's theory is that the state courts have no power to resolve Tribal membership or leadership disputes. 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, supra,* 121 Cal. App. 4th at 954; *Lamere*, *supra*, 131 Cal. App. 4th at 1067.)

"[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), *superseded by statute on other grounds*; s*ee also 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); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (states cannot exercise jurisdiction over tribes where it would interfere with tribal self-government).)

Burley has consistently argued this very position throughout this litigation. For instance, when Burley sought judgment on the pleadings, based on the AS-IA's original December 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.

(2 RT 197:9-17.) And in her Demurrer to Intervenors' Complaint in Intervention, 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.

(9 CT 2099:17-19.) In the same motion, Burley stated that "the court has no jurisdiction to resolve tribal leadership disputes." (9 CT 2105:11-13.) Burley is now bound by those judicial admissions. (*Electric Supplies*, *supra*, 122 Cal. App. 3d at 134.) As the trial court recognized in its decision granting summary judgment to the Commission:

> [I]t is not Dixie's resignation . . . that is at issue. Rather, it is the BIA's recognition of Burley, or

> another person or entity, as the authorized representative of the [Tribe] that is the determining factor.

(35 CT 9125.)

In addition to being beyond the jurisdiction of a California court or the Commission, Burley's endless attempts to interject Dixie's purported resignation in 1999 are and both misleading and irrelevant. First, Burley fails to inform the Court that during the course of two contentious depositions, Dixie also testified repeatedly that he never resigned and could not resign. (26 CT 6776 (p. 166, lines 17-20); 26 CT 6780-6781 (p. 202, line 20 – p. 203, line 7); 26 CT 6787 (p. 33, lines 15-16); 26 CT 6789 (p. 44, lines 3-4); 26 CT 6789 (p. 44, lines 16-18); 26 CT 6789-6790 (p. 45, line 8 – p. 49, line 20).) He testified that he believed his resignation had been forged. (26 CT 6776 (p. 166, lines 7-11); 26 CT 6777 (p. 178, lines 15-19); 26 CT 6778 (p. 183, lines 4-11); 26 CT 6787 (p. 31, line 24 – p. 32, line 9); 26 CT 6788 (p. 34, lines 4-7).) And he testified that he did not believe he signed the purported resignation. (26 CT 6779 (p. 200, lines 10-22); 26 CT 6780 (p. 202, lines 7-11).) All of this testimony remains valid, meaning that, at most, Dixie's testimony was contradictory regarding an entirely non-material issue.

Second, the disputed testimony on which Burley relies would establish, at most, that Dixie resigned or was ousted as chairperson of an unauthorized Tribal government in *1999*, allowing Burley to take control. That does nothing to establish that Burley was the leader of the Tribe's authorized government as of the summary judgment order (or even today). As explained above, the BIA clearly repudiated Burley's government and purported leadership in the AS-IA's 2005 Decision, which stated that the BIA "does not recognize any tribal government." (22 CT 5476.) It reiterated the same position in its 2007 Decision, which informed Burley that it did not recognize any tribal government and that "a determination of who is a tribal member must, however, preclude [sic, probably should be "precede"] any determination of who is a tribal leader." (22 CT 5489.) Most recently, the BIA attempted to recognize Burley's tribal government through the August 2011 Decision, but the federal court in *Salazar* found that Decision unlawful. Those decisions render it completely irrelevant who was the purported leader of the Tribe in 1999.

VII.

BURLEY HAS WAIVED ANY CHALLENGE TO THE TRIAL COURT'S OTHER DECISIONS

A. Burley's Motion for Judgment on the Pleadings

On the final page of her opening brief, Burley states:

> All of the judicially-noticed documents established that the Commission is not legally justified in withholding the RSTF money from the presently constituted Tribe with the five (5) enrolled members. As a result, for the same reasons expressed herein, judgment on the pleadings should have been granted, as it was previously.

(Burley Opening Brief, p. 53.) This paragraph constitutes Burley's entire argument and analysis of the Court's denial of her motion for judgment on the pleadings. By citing no authority, by citing no specific evidence, and by failing to provide any substantive argument, Burley has waived any appeal of this decision. (*Stanley*, *supra*, 10 Cal. 4th at 793; *Freeman*, *supra*, 8 Cal. 4th at 482 n.2.)

Regardless, as detailed in Intervenors' Opposition to Plaintiff's Motion for Judgment on the Pleadings, Burley's motion was without merit for at least the following reasons: (1) it was filed almost two years after the deadline set in Code of Civil Procedure section 438(e)

(33 CT 8501:4-7); (2) it was based on purported "facts" supported with judicially noticed documents, in violation of the rule that while the existence of documents may be judicially noticed, the truth of the matters asserted therein may not be judicially noticed (*Steed v. Department of Consumer Affairs*, 204 Cal. App. 4th 112, 121 (2012)); (3) it depended in large part on "facts" in the FAC which were denied by the Commission in its Answer (Answer ¶¶ 1, 6, 7, 8, 15, 18, 20, 22, 23, 24, 25, 26, 30, 32, 34, 35, 43, 44, *at* 4 CT 808:2-3, 809:3-6, 809:10-11, 809:18-20, 810:23-25, 811:10-11, 811:17-18, 811:27-28, 812:5-7, 812:12-14, 812:17-20, 813:8-9, 813:20-22, 814:10-12, 814:13-14, 815:10-13); (4) it sought to enforce the terms of the Compact, which this Court has already held that Burley is barred from doing (*Miwok III* at *8-9; *see also* 1 CT 57, Compact at § 15.1); and (5) as detailed above, it fails on its merits because the undisputed evidence proves that the Commission's decision to withhold payment of the Tribe's RSTF funds until the BIA recognizes a valid Tribal government was not clearly erroneous.

B. Burley's Motion for New Trial

Burley also claims that the trial court should have granted her motion for a new trial because the court's summary judgment ruling "was erroneous as a matter of law." (Burley Opening Brief, p. 53.) Again, Burley offers no factual or legal support for this perfunctory argument and

has thereby waived it. (*Stanley*, *supra*, 10 Cal. 4th at 793; *Freeman*, *supra*, 8 Cal. 4th at 482 n.2.)

In addition, as detailed in Intervenors' Opposition to Plaintiff's Motion for New Trial (36 CT 9568-9583), Burley's motion was without merit for at least the following reasons: (1) it purported to rely on "new" evidence that did not satisfy the requirements of Code of Civil Procedure section 657(4); and (2) it failed to identify any purported legal error by the trial court in granting summary judgment.

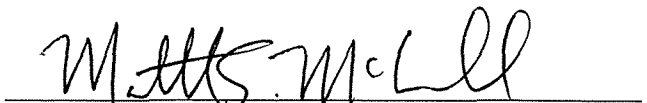
VIII.

CONCLUSION

For all the reasons set forth above, this Court should deny Burley's appeal and affirm the trial court's grant of summary judgment to the Commission.

DATED: May 1, 2014

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

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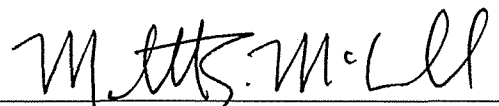
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204, the attached Respondents' Brief is proportionately spaced in 13 point Times New Roman typeface, and contains 13,359 words, according to the counter of the word processing program with which it was prepared.

DATED: May 1, 2014

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

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et al.

PROOF OF SERVICE

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

I am employed in the County of San Diego, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 12275 El Camino Real, Suite 200, San Diego, California 92130.

On **May 1, 2014**, I served the following document(s) described as **INTERVENOR-RESPONDENTS' BRIEF** on the interested party(ies) in this action by placing the original thereof enclosed in sealed envelopes and/or packages addressed as follows:

See Attached Service List

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of 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.

☐ **BY EMAIL**: I served the above-referenced document(s) by sending a true and correct copy in PDF Format by electronic mail.

☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to Rule 2.306 of the California Rules of Court. The telephone number of the sending facsimile machine was 858-509-3691. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The sending facsimile machine (or the machine used to forward the facsimile) issued a transmission report confirming that the transmission was complete and without error. Pursuant to Rule 2.306(g)(4), a copy of that report is attached to this declaration.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☐ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on **May 1, 2014**, at San Diego, California.

Joanna Keeping

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