

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,**

Defendant and Respondent.

Case No. D064271

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

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Case Name: CALIFORNIA VALLEY MIWOK TRIBE v. CALIFORNIA GAMBLING CONTROL COMMISSION Court of Appeal No.: D064271

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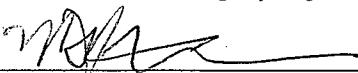
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INTRODUCTION

Since 2005, the California Gambling Control Commission (Commission), which serves as the administrator and trustee of the Revenue Sharing Trust Fund (RSTF) under the 1999 Tribal-State gaming compacts (1999 Compact), has withheld and accrued the California Valley Miwok Tribe's quarterly RSTF payments because the United States Department of the Interior's Bureau of Indian Affairs (BIA) does not recognize an authorized leader or leadership body for the Tribe. In this action, a five-member group styling itself as the California Valley Miwok Tribe seeks to compel the Commission to release the accrued RSTF payments to it, primarily asserting that it constitutes the California Valley Miwok Tribe and that the 1999 Compact does not provide the Commission with the authority to withhold RSTF payments for any reason.

The trial court granted summary judgment in favor of the Commission, finding that the Commission was legally justified in withholding the RSTF payments in light of the current uncertainty as to the identity of the authorized leadership of the California Valley Miwok Tribe, and finding that the Commission's practice of deferring to the BIA for the identification of the authorized leadership of a federally-recognized tribe is a reasonable expression of the Commission's duties as administrator and trustee of the RSTF. This appeal ensued.

It is undisputed that the “California Valley Miwok Tribe” is a federally-recognized Indian tribe and is therefore routinely listed in the Federal Register as a tribe eligible for benefits and services from the federal government. The federally-recognized entity known as the California Valley Miwok Tribe is referred to in this brief as the “CVMT.” The appellant in this action consists of Silvia Burley, an adoptee into the Sheep Ranch Rancheria of Me-Wuk Indians (as the CVMT was formerly known), her two daughters, her granddaughter, and, nominally, Yakima Dixie, who was the Sheep Ranch Rancheria’s, and now is the CVMT’s, hereditary chief. The distinction between the CVMT and the appellant is central to this case. For clarity, the appellant is referred to herein as the “Burley Faction,” and the intervenor, which is a group nominally led by Yakima Dixie, is referred to as the “Dixie Faction.”

The Burley Faction has been engaged in a long-running membership, organizational, and leadership dispute with the much larger Dixie Faction of the CVMT. From 2004 to the present, except for a three-month interval in 2010-2011, which is discussed elsewhere in this brief, the BIA has deemed the CVMT to not be an “organized” Indian tribe, and has not recognized a tribal government for the purpose of conducting government-to-government business with the CVMT. The dispute between the Burley and Dixie Factions reached a climax in *California Valley Miwok Tribe v. Salazar* (D.D.C. No. 1:11-cv-00160, filed January 24, 2011) (*Salazar*), in

which the Dixie Faction challenged and sought to set aside Assistant Secretary for Indian Affairs¹ (AS-IA) Larry Echo Hawk's December 22, 2010 recognition of the Burley Faction as the CVMT.²

Salazar was pending in 2012 when this Court granted the Burley Faction's petition for a writ of mandate to compel the trial court to allow the filing of the dispositive motions that are the subject of this appeal. *Salazar* was still pending when the trial court decided the dispositive motions and granted summary judgment in favor of the Commission, Respondent in this action. *Salazar* has since been decided.

When this Court granted the Burley Faction's petition, the Court clearly defined the issue that was properly before the trial court. That issue is whether, given the current uncertainty as to the federal government's relationship with the CVMT, including the pendency of the *Salazar* case, the Commission is legally justified in withholding the CVMT's RSTF payments from the Burley Faction, pending the BIA's identification of the CVMT's authorized leadership. As the judgment indicates, the trial court answered the question this Court had posed, and, by doing so, preserved

¹ The Assistant Secretary for Indian Affairs oversees the BIA, the Bureau of Indian Education (BIE), and a variety of offices related to the federal government's relationship with Indians.

² As described more fully below, the BIA's December 22, 2010 decision was withdrawn on April 1, 2011, and replaced by a modified, but stayed, decision on August 31, 2011. The *Salazar* complaint was then amended to challenge the latter decision.

approximately \$10 million in accrued RSTF payments for eventual disbursement by the Commission once the BIA has identified the CVMT's authorized and representative leadership for purposes of conducting government-to-government business.

On December 13, 2013, six months after the entry of judgment in this case, *Salazar* was decided. (*California Valley Miwok Tribe v. Sally Jewell*³ (D.D.C. Dec. 13, 2013) 2013 U.S. Dist. LEXIS 174535.)⁴ Because the extent to which this Court will take judicial notice of the *Salazar* decision is unknown, this brief treats the *Salazar* case as though it were still pending, as it was at the time judgment was entered in this case. Although the *Salazar* court provided substantial guidance to the BIA while doing so, the principal effect of the *Salazar* decision has been to set aside Echo Hawk's August 31, 2011 decision and remand the question of the CVMT's organization and membership to the BIA for reconsideration. Accordingly, the identity of the authorized leadership of the CVMT remains as uncertain at this time as it was when the Commission first suspended the Tribe's RSTF payments in 2005.

³ Sally Jewell replaced Ken Salazar as lead defendant when she succeeded him as Secretary of the Interior. For clarity, the case will continue to be referred to as "*Salazar*" in this brief.

⁴ Appellant and Respondent have both moved for judicial notice of the *Salazar* decision. (See Appellant's Mot. and Req. for Jud. Notice, filed Jan. 29, 2014; Respondent's Mot. and Req. for Jud. Notice, filed concurrently with this brief.)

On the basis of the facts, argument, and authority provided below, the Commission respectfully requests that the Court affirm the judgment in all respects and thus preserve the CVMT's accrued RSTF payments for disbursement by the Commission pursuant to the BIA's eventual identification of the Tribe's authorized and representative leadership.

STATEMENT OF THE CASE

A. Summary of Contentions

The Commission contends that its role as administrator and trustee of the RSTF impliedly requires it to take reasonable steps to ensure that RSTF payments are made to the correct recipients. The correct recipients are Non-Compact Tribes, as defined in the 1999 Compact. To effectively convey an RSTF payment to a tribe, the Commission must make the payment to a representative authorized by the tribe as a whole to receive and administer financial benefits on its behalf.

The Commission has no authority to make decisions on the merits of internal tribal disputes, and therefore takes no position on them. When tribal leadership disputes arise, the Commission defers to the BIA for the identification of the tribe's authorized leadership. The BIA's identification of the authorized leader(s) of a tribe is most reliably indicated by the BIA's agency actions of entering into and funding Public Law 638 (P.L. 638) contracts, which are a common conduit of substantial financial aid from the federal government to Indian tribes.

In 2005, the Commission learned that the BIA had suspended P.L. 638 contracting with the CVMT through the Burley Faction, and considered the CVMT not to be an “organized” tribe, to have no recognized tribal chairperson, and to have no recognized tribal government. On the basis of this, the Commission suspended the CVMT’s RSTF payments, which had previously been made through the Burley Faction. The Commission has accrued the RSTF payments for the CVMT for eventual disbursement once the BIA determines its authorized leadership.

The Burley Faction primarily contends that it is the CVMT, and that it remains recognized as such by the BIA, notwithstanding the BIA’s suspension of P.L. 638 contract funding. The Burley Faction contends that the Commission has no authority under the 1999 Compact to withhold RSTF payments for any reason. The Burley Faction also contends that the Commission’s practice of relying upon the BIA’s execution and funding of P.L. 638 contracts for the identification of the authorized leadership of a tribe is unreasonable. On appeal, the Burley Faction contends that it has constituted the CVMT since 2005, and is therefore entitled to the RSTF payments that have accrued since that time, regardless of whether additional members are added to the CVMT as a result of whatever future action the BIA may take concerning the CVMT’s membership and organization. The Burley Faction contends that the trial court was presented with sufficient evidence to independently determine that Burley,

rather than Dixie, is entitled to receive the RSTF payments on behalf of the CVMT. On appeal, the Burley Faction also asserts a variety of technical errors by the trial court, and contends that its motion for judgment on the pleadings and its motion for new trial were erroneously denied.

B. Procedural History and Statement of Facts

1. Background Facts

In 1999-2000, the State of California entered into substantively identical bilateral gaming compacts with 61 federally-recognized California Indian tribes (collectively referred to as the 1999 Compact). (2 CT 169 at ¶ 5; Com. Req. Jud. Not. (CRJN) Ex. A.) The 1999 Compact provides a mechanism for revenue sharing between gaming (“Compact”) and small gaming (fewer than 350 slot machines) or non-gaming tribes (“Non-Compact Tribes”). (29 CT 7380 at § 4.3.2 et seq.) The CVMT is a federally-recognized Indian tribe and is also a non-gaming tribe, and thus qualifies as a “Non-Compact Tribe” under the 1999 Compact. (30 CT 7670 at ¶ 5.)

Under the 1999 Compact, Non-Compact Tribes are entitled to receive quarterly payments from the RSTF totaling up to \$1.1 million per tribe per year. (29 CT 7381 at § 4.3.2.1; 30 CT 7668 at ¶¶ 1-2.) The Commission is designated as the administrator and “Trustee” of the RSTF. (30 CT 7669 at ¶ 3; 29 CT 7381 at §§ 4.3.2(a)(ii), 4.3.2.1(b).) The Commission makes no

independent determinations on the merits of intra-tribal leadership disputes.

(30 CT 7672 at ¶ 12; 29 CT 7346 at ¶ 3.)

2. Uncertainty Exists as to the Membership, Organization, and Leadership of the CVMT

Uncertainty exists as to the identity of the CVMT's membership, organization, and leadership. This uncertainty is evidenced by: 1) the BIA deeming the CVMT not to be an "organized" tribe, and to be lacking a tribal chairperson (2 CT 170 at ¶¶ 12, 14; see also 32 CT 8470, 8477, 8484); and 2) by the BIA suspending the disbursement of P.L. 638 contract funding to the CVMT (29 CT 7346 at ¶¶ 6-7; 30 CT 7674 at ¶¶ 15-16).

This uncertainty is further evidenced by the presence, as adversarial parties in this action, of two factions of the CVMT—the plaintiff five-member "Burley Faction," and the intervenor 240-member "Dixie Faction." From January 24, 2011 through the date of entry of judgment in this action, this uncertainty was also evidenced by the pendency of *Salazar*. (30 CT 7670 at ¶ 6; 29 CT 7394-7436.)

3. Commission Withholds RSTF Payments from the Burley Faction

When uncertainty exists as to the identity of the individuals authorized to receive and administer RSTF monies on behalf of an eligible recipient tribe, the Commission defers to the BIA's identification of tribal leaders for the purpose of conducting business relating to P.L. 638 contracts. (30 CT 7673 at ¶ 14; 29 CT 7346 at ¶ 5.) In 2005, the BIA

stopped disbursing P.L. 638 funds to the CVMT because the BIA then deemed the CVMT “unorganized” and lacking a tribal chairperson. (29 CT 7346 at ¶¶ 6-7; 30 CT 7674 at ¶¶ 15-16.) On the basis of the BIA’s cessation of P.L. 638 funding for the CVMT, the Commission suspended the disbursement of quarterly RSTF payments to the CVMT. (29 CT 7346 at ¶ 6; 30CT 7674 at ¶ 15.) Since 2005, the Commission has held the CVMT’s RSTF payments in an interest-bearing account. The Commission will disburse the accrued RSTF payments to the CVMT once the BIA identifies the CVMT’s authorized leadership as evidenced by the BIA’s resumption of P.L. 638 contracting with the CVMT. (29 CT 7346 at ¶¶ 6, 8; 30 CT 7674 at ¶ 15.)

4. The BIA Briefly Recognizes the Burley Faction as the CVMT

This case was originally filed in 2008, but the events relevant to the primary contentions made in this appeal began on December 22, 2010, when AS-IA Echo Hawk issued a decision recognizing the Burley Faction as the CVMT. (29 CT 7384-7389.) The Echo Hawk decision expressly rescinded earlier BIA determinations that the CVMT was “not an ‘organized’ Indian Tribe” (32 CT 8470), and “the BIA does not recognize any tribal government” (32 CT 8477). (29 CT 7388-7389 at ¶ 3-4.) Shortly thereafter, the Burley Faction conducted an election on January 7, 2011,

and elected Silvia Burley as Chairperson—this election was acknowledged by the BIA on January 12, 2011. (28 CT 7288.)

5. The Dixie Faction Challenges the December 2010 Echo Hawk Decision

On January 24, 2011, the Dixie Faction filed the *Salazar* case in the District Court for the District of Columbia challenging Echo Hawk's December 22, 2010 decision and seeking to set it aside. (29 CT 7394-7436; see 29 CT 7420-7421.)

6. The Burley Faction Moves for Judgment on the Pleadings in This Action

On the basis of the December 22, 2010 Echo Hawk decision, the Burley Faction moved for judgment on the pleadings in this action. (14 CT 3379, see 3380-81.) The Burley Faction's motion was granted. (18 CT 4409-4412.)

After the Echo Hawk decision, the BIA appears to have briefly resumed funding P.L. 638 contracts for the CVMT through Silvia Burley, though the evidence from February and March of 2011 does not reflect any actual payments. (35 CT 9292-9297.)

7. AS-IA Echo Hawk Sets Aside the Decision Recognizing the Burley Faction

On April 1, 2011, before judgment was entered in favor of the Burley Faction in the trial court, AS-IA Echo Hawk set aside his December 22, 2010 decision for further briefing and reconsideration in light of

“[s]ubsequent actions by the parties involved in this dispute” (18 CT 4570 at ¶ 3; 18 CT 4573.) The principle action taken by parties to the dispute between December 22, 2010 and April 1, 2011, was the Dixie Faction’s filing of the *Salazar* case. (30 CT 7670 at ¶ 6; 30 CT 7671 at ¶ 7 [the Burley Faction did not dispute that *Salazar* figured in AS-IA Echo Hawk’s withdrawal of his December 22, 2010 decision].) There is no evidence in the record that the BIA conducted any further P.L. 638 business with the Burley Faction after Echo Hawk set aside his December 22, 2010 decision.

8. The Trial Court Stays Entry of Judgment and Stays Dispositive Motions in This Action

In response to the withdrawal of the Echo Hawk decision, the Dixie Faction, as Intervenor, asserted that the basis of the trial court’s ruling on the Burley Faction’s motion for judgment on the pleadings no longer existed, and moved to stay entry of judgment. (18 CT 4581-4588.) The trial court agreed and issued an order staying entry of judgment against the Commission, and staying dispositive motions while permitting discovery to continue. (18 CT 4615-4617 at ¶¶ 2, 4-5.)

9. AS-IA Echo Hawk Reissues His Decision Recognizing the Burley Faction, but Stays Implementation Pending Resolution of the *Salazar* Case

On August 31, 2011, Echo Hawk reissued his December 22, 2010 decision with modifications, but reaffirmed the BIA’s recognition of the

Burley Faction as the CVMT. (29 CT 7344 at ¶ 6; 29 CT 7443-7451.) The August 31, 2011 decision canceled the rescission of earlier BIA decisions that had been part of the December 22, 2010 decision. (29 CT 7450.) Importantly, the August 31, 2011 decision expressly provides that its “implementation shall be stayed pending resolution of the litigation in the District Court for the District of Columbia [*Salazar*].” (*Ibid.*)

10. The Trial Court Denies the Burley Faction’s Motion to Lift the Stay on the Filing of Dispositive Motions

In early February of 2012, the Burley Faction took the deposition of Yakima Dixie. (26 CT 6656 at ¶ 2.) On the basis of Dixie’s deposition testimony purportedly admitting that he had signed a document resigning as the Sheep Ranch Rancheria’s chairperson in 1999 (26 CT 6663), the Burley Faction moved for an order lifting the stay to allow the filing of a dispositive motion on the ground that, by virtue of Dixie’s testimony, a leadership dispute no longer existed. (26 CT 6653.) The trial court denied the motion. (26 CT 6795.)

11. The Burley Faction Petitions for Mandamus

The Burley Faction then filed a petition for writ of mandate with this Court to compel the trial court to lift the stay to permit the filing of dispositive motions on the Commission’s duty to disburse the CVMT’s accrued RSTF payments to the Burley Faction.

On December 18, 2012, this Court issued its decision granting the petition for writ of mandate and directing the trial court to lift the stay to permit the filing of dispositive motions on the following issue:

Put simply, the issue for the trial court to resolve is limited to whether the Commission is justified in withholding the RSTF funds because the Salazar case is pending and the BIA has not recognized a tribal leadership body for the distribution of ISDEAA benefits. It need not decide the issues being considered in federal court or resolve an internal tribal dispute.

(California Valley Miwok Tribe v. Sup. Ct. of San Diego County (2012)

2012 Cal.App. Unpub. LEXIS 9176, *24.) Stating the issue slightly differently, the Court added:

The important point for our present discussion is that the Miwok Tribe has filed this action to obtain a ruling that the Commission is not fulfilling its duty as trustee with respect to the RSTF funds *under the present circumstances*, including the BIA's lack of recognition of a tribal leadership body for the distribution of ISDEAA benefits.

*(Id. at *26, italics in original.)*

12. Mandamus is Granted; the Trial Court Hears Dispositive Motions and Rules in Favor of The Commission

Following this Court's issuance of the writ of mandate, the trial court scheduled the filing and hearing of dispositive motions. (26 CT 6812.)

The motions were heard on April 26, 2013. (1 RT 451-486.) At the hearing, the trial court adopted its tentative ruling granting the

Commission's motion for summary judgment. (1 RT 476:9-20.) The

tentative ruling was incorporated in the judgment, filed on June 3, 2013. (1 RT 484:4-27; CT 9215-9225.) An order denying the Burley Faction's motion for judgment on the pleadings, also incorporating the trial court's tentative rulings, was filed contemporaneously (35 CT 9205-9214), as was the dismissal of the Burley Faction's First Amended Complaint, with prejudice. (35 CT 9215-9225.)

13. The Burley Faction Unsuccessfully Moves for a New Trial; This Appeal Ensues

On June 4, 2013, the Burley Faction filed a Notice of Intention to Move for New Trial. (35 CT 9226-9232.) On July 3, 2013, the trial court issued its tentative ruling denying the motion (37 CT 9741-9742). The Burley Faction's motion was heard on July 5, 2013. (1 RT 550-564.) On July 8, 2013, the trial court issued its Notice of Ruling Denying Plaintiff's Motion for New Trial, which affirmed its tentative decision. (37 CT 9753-9761.)

The Burley Faction filed its notice of appeal on July 10, 2013. (37 CT 9762.)

SUMMARY OF ARGUMENT

The 1999 Compact designates the Commission as administrator and Trustee of the RSTF. By its express terms, the 1999 Compact provides money from the RSTF to *tribes*, rather than to individual Indians or groups of Indians, and the Commission believes it has a duty to remit RSTF

payments only to the representatives who are authorized to receive and administer them on behalf of their respective tribes.

The Commission and the state courts have no authority to determine the merits of intra-tribal disputes. That authority resides exclusively with the federal executive branch, which primarily acts through the BIA. 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 a tribe, the Commission defers to the BIA. The BIA most reliably and conclusively indicates its identification of the authorized leadership of a tribe by entering into P.L. 638 contracts with the tribe through that leadership.

When the BIA stopped disbursing P.L. 638 funds to the CVMT because the BIA did not recognize a tribal government for the CVMT, the Commission suspended the disbursement of the CVMT's quarterly RSTF payments through Silvia Burley and has held the CVMT's RSTF payments in an interest-bearing account. The Commission will disburse the accrued RSTF payments to the CVMT once the BIA identifies the CVMT's authorized leadership as evidenced by the resumption of P.L. 638 contracting.

Deferring to the BIA for the identification of authorized tribal leaders is a reasonable expression of the Commission's duty as administrator and

trustee of the RSTF to ensure that RSTF payments are made to tribes only through individuals authorized to receive and administer funds on behalf of the tribe as a whole. The BIA's identification of tribal leaders is most reliably expressed through its identification of those with whom it will conduct the government-to-government business of executing and funding P.L. 638 contracts.

Because the Burley Faction's appeal is primarily based, directly or indirectly, upon a determination of the intra-tribal dispute, it does not fall within the state courts' subject matter jurisdiction, and was excluded from this Court's definition of the issue before the trial court. The appeal is also based on the unfounded assumption that the CVMT has consisted exclusively of the Burley Faction since 2005, or earlier, and that the intra-tribal dispute is between Burley and Dixie exclusively within the context of the Burley Faction. The intra-tribal dispute, as defined by *Salazar*, is profoundly wider, includes the Dixie Faction, and is not based on any assumption of the validity of the Burley Faction's tribal council form of government.

ARGUMENT

I. THE COMMISSION HAS A SUFFICIENT LEGAL BASIS FOR WITHHOLDING THE CVMT'S RSTF PAYMENTS PENDING THE BIA'S IDENTIFICATION OF THE AUTHORIZED REPRESENTATIVE(S) OF THE TRIBE.

A. The Commission Has a Duty to Disburse RSTF Payments to Individuals or Groups Who Are Authorized to Receive and Administer Them on Behalf of the Tribe

The 1999 Compact establishes the RSTF to be “administered by the California Gambling Control Commission, as Trustee, for the receipt, deposit, and distribution of monies paid pursuant to this Section 4.3.2.” (29 CT 7381 at § 4.3.2(a)(ii).) Section 4.3.2 is denominated “Revenue Sharing with Non-Gaming Tribes.” (29 CT 7380.) The Commission’s duties with regard to disbursing RSTF payments arise from the foregoing section of the 1999 Compact, which is codified and implemented by Government Code sections 12012.75 and 12012.90. Government Code section 12012.75 formally establishes the RSTF within the state treasury, and provides that the RSTF is established by the Legislature for:

[T]he receipt and deposit of moneys derived from gaming device license fees that are *paid into the fund pursuant to the terms of tribal-state gaming compacts* for the purpose of making distributions to noncompact tribes. Moneys in the Indian Gaming Revenue Sharing Trust Fund shall be available to the California Gambling Control Commission, upon appropriation by the Legislature, for the purpose of making distributions to noncompact tribes, *in accordance with distribution plans specified in tribal-state gaming compacts.*

(Gov. Code, § 12012.75, italics added.) Government Code section 12012.75 therefore incorporates the collection, deposit, and distribution provisions of the 1999 Compact. Government Code section 12012.90 ensures that the RSTF will be adequately funded to permit the Commission to make quarterly disbursements to the eligible recipient tribes, and adds that the Commission shall make the quarterly disbursements within 45 days of the end of each fiscal quarter. (Gov. Code, § 12012.90, subd. (e)(2).)

The express purpose of the RSTF, and of the Commission's designated function with respect to it, is to implement revenue sharing between the gaming ("Compact") and small or non-gaming ("Non-Compact") tribes.⁵ (See 29 CT 7381 at § 4.3.2.1.) To do this, the Commission must effectively convey quarterly RSTF payments to the Non-Compact Tribes. To do this, the Commission must ascertain the identity of the representatives authorized by their respective tribes to receive and administer the tribe's payments. The Commission cannot reasonably be deemed to discharge its responsibility to make a payment to a tribe simply by making the payment to any person or group purporting to represent the tribe.

The Burley Faction has made an issue of the fact that the 1999 Compact states that the Commission "shall have no discretion with respect

⁵ "Non-Compact Tribes" are those operating fewer than 350 slot machines.

to the use or disbursement of the trust funds,” and contends that this provision precludes the Commission from withholding RSTF payments for any reason. However, this limitation cannot reasonably be construed to relieve the Commission of the obligation to take reasonable steps to convey quarterly RSTF payments to Non-Compact Tribes’ authorized representatives.

Where a statute or instrument contains several provisions or particulars, “such a construction is, if possible, to be adopted as will give effect to all.” (Code Civ. Proc., § 1858.) Similarly, under the Restatements, where the whole can be read to give significance to each part, that reading is preferred. (Rest.2d Contracts, § 202, com. d, p. 88.) Here, the Compacts’ provision limiting the Commission’s discretion with regard to the “use or disbursement” of RSTF monies can be harmonized with the Commission’s express obligation to disburse payments to Non-Compact Tribes by construing that limitation to apply to matters other than ascertaining the identity of a tribe’s authorized representatives to whom payments may properly be made. This interpretation is consistent with the principle that in the absence of a contrary indication, it will be assumed that each term of an agreement has a reasonable rather than an unreasonable meaning. (Rest.2d Contracts, § 203, subd. (a), com. c, p. 94.) Here, it is patently unreasonable to require the Commission to make payments to Non-Compact Tribes while precluding the Commission from taking

reasonable steps to ensure that it is actually doing so by making the payments to those tribes' authorized representatives, rather than to potentially unauthorized and unrepresentative, or rogue, subsets of those tribes.

Accordingly, the Commission construes its role as administrator and trustee of the RSTF to require it to take reasonable and prudent steps to disburse RSTF monies to eligible recipient tribes by making the payments through individuals or groups duly authorized to receive and administer funds on behalf of the tribe as a whole. The trial court concurred, stating “[t]he court is persuaded that, implicit 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.” (35 CT 9222.)

“The construction of an act by the agency charged with its enforcement is entitled to considerable deference from the courts, ‘and will be followed if not clearly erroneous [Citations].’” (*League of Women Voters v. Countrywide Crim. Justice Committee* (1988) 203 Cal.App.3d, 529, 557, quoting *Bodinson Mfg. Co. v. California Employment Com.* (1941) 17 Cal.2d 321, 325-326.) The trial court found that the Commission’s construction of its duties to include the obligation to take reasonable steps to distribute RSTF payments only to the authorized representatives of the tribe was not clearly erroneous. (35 CT 9222.)

B. When Uncertainty Exists as to the Identity of a Tribe's Authorized Representative(s), the Commission Reasonably Relies Upon the BIA's Identification of the Tribe's Leadership

Recognition of a tribal government and the officials entitled to act on the tribe's behalf are matters that are generally within the exclusive purview of the federal executive branch. (*Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior* (7th Cir. 2001) 255 F.3d 342, 346-347.)

"Congress has delegated to the Secretary of the Interior broad authority over 'public business relating to . . . Indians.' (43 U.S.C. § 1457.) At the core of this authority is a responsibility to ensure that [the] Secretary deals only with a tribal government that actually represents the members of a tribe." (*California Valley Miwok Tribe v. United States* (D.C. Cir. 2006) 424 F.Supp.2d 197, 201.) "Although the sovereign nature of Indian tribes cautions the Secretary not to exercise freestanding authority to interfere with a tribe's internal governance, the Secretary has the power to manage 'all Indian affairs and . . . all matters arising out of Indian relations.'" (*Timbisha Shoshone Tribe v. Salazar* (D.C. Cir. 2012) 768 F.3d 935, 938, quoting *California Valley Miwok Tribe v. United States* (D.C. Cir. 2008) 515 F.3d 1262, 1267, italics in original.) "[T]he [Department of the Interior] has the authority and responsibility to ensure that the [Seminole] Nation's representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a

whole.” (*Seminole Nation of Oklahoma v. Norton* (D.D.C. 2002) 223 F.Supp.2d 122, 140, citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).) “A cornerstone of [the federal government’s trust obligation to Indian tribes] is to promote a tribe’s political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits.” (*California Valley Miwok Tribe v. United States, supra*, 515 F.3d at p. 1267.)

Neither the 1999 Compact, nor the Government Code, confers upon the Commission the authority to independently determine the identity of the authorized representatives of a California Indian tribe when there is an intra-tribal dispute. To discharge its duties as the administrator and trustee of the RSTF in a prudent manner, the Commission relies upon the BIA’s decisions when questions as to a tribe’s authorized leadership arise (29 CT 7346 at ¶ 5), thus effectively adopting the same standards of proof and documentation that are applied by the federal executive branch.

In this case, the trial court determined that “the Commission’s reliance on the BIA’s decisions as to a tribe’s authorized leadership, as fulfilling the Commission’s duty under the Compact and accompanying statutes, is not clearly erroneous.” (35 CT 9223.)

C. The Commission's Reliance Upon the BIA's Identification of the Authorized Leadership of a Tribe, As Evidenced By the BIA's Execution and Funding of P.L. 638 Contracts, is Reasonable

The BIA does not have a separate "free-standing" procedure for declaring the identity of a tribe's authorized leadership—the BIA's identification of a tribe's authorized leaders is evidenced by the BIA's final agency actions, which include conducting government-to-government business with a particular individual or group acting on behalf of a tribe. Among these actions, the most persuasive and frequent form of identification occurs when the BIA enters into P.L. 638 contracts with a tribe and disburses federal funds or other benefits thereunder.⁶ In such cases, the BIA has, as a prerequisite, identified those capable of entering into binding agreements with respect to the tribe's federal benefits and capable of administering them on behalf of the tribe.

Accordingly, the Commission's reliance upon the BIA to identify a tribe's authorized representatives by entering into and funding P.L. 638 contracts through those representatives constitutes a reasonable, and practical, performance of the Commission's implied duty as the administrator and trustee of the RSTF to take steps to distribute the RSTF

⁶ The relationship indicated by the act of P.L. 638 contracting is particularly significant because it implicates the provision of federal benefits to the tribe as a whole. (See *California Valley Miwok Tribe v. United States*, *supra*, 515 F.3d at p. 1267.)

only to a Non-Compact Tribe's properly authorized representatives who are acting on behalf of the tribe as a whole. The trial court concurred, finding that "[t]he Commission's decision to discharge its duty by disbursing RSTF funds only to those individuals or leadership bodies recognized by the BIA for the government-to-government business of the disbursement and receipt of federal P.L. 638 contract funds is reasonable." (35 CT 9223.) Indeed, no better or more legally appropriate standard is available to the Commission to identify the representatives properly authorized to receive and administer financial benefits on behalf of a tribe as a whole.

D. At All Relevant Times, the Identity of the Individual or Group Authorized to Receive RSTF Payments on Behalf of the CVMT Has Been Uncertain

Beginning in 2004, the BIA determined that the CVMT was "unorganized" and lacking a tribal chairperson. (32 CT 8218 at ¶ N, 8470; 8218 at ¶ O, 8476.) For this reason, the BIA discontinued P.L. 638 contracting with the CVMT. (30 CT 7674 at ¶¶ 15 [fact not denied].) This circumstance persisted through the filing of the original complaint in this action in 2008, in 2009 (32 CT 8218 at ¶ Q, 8484), and up to December 22, 2010, when AS-IA Echo Hawk issued a letter decision recognizing the five-member Burley Faction as the CVMT. (29 CT 7384-7389.) On the basis of the December 22, 2010 Echo Hawk decision, the Burley Faction conducted an election on January 7, 2011, and elected Silvia Burley as the CVMT's Chairperson. (28 CT 7288.) However, on January 24, 2011, the

240-member Dixie Faction filed the *Salazar* case in the District of Columbia challenging the validity of the December 22, 2010 Echo Hawk decision and seeking to set it aside. (29 CT 7343 at ¶ 4, 7394-7421.)

The nature of the uncertainty as to the CVMT's membership, organization, and leadership is well-illustrated by the allegations made in the *Salazar* case. For this purpose the Court need only take judicial notice of the existence of the allegations. The introductory paragraph and portions of the prayer of the first amended complaint in *Salazar* identified what was at stake in that case (32 CT 8217 at ¶ H, 8351, 8379.) and how its outcome could affect the Burley Faction's entitlement to relief in this action:

Plaintiffs ask the Court to vacate an erroneous decision of the Assistant Secretary-Indian Affairs for the United States Department of the Interior ("Department") that arbitrarily limits the membership of a federally recognized Indian tribe to five people and disenfranchises 242 adult members of the tribe plus their children, without due process and in violation of the Department's trust responsibilities to Indian tribes and their members. Because the decision knowingly recognizes a tribal government based on a tribal document adopted without the knowledge, participation or consent of the vast majority of the tribe's members, it violates federal law and must be reversed.

(32 CT 8351.) The *Salazar* plaintiffs sought a variety of relief including:

- A. Vacating and setting aside the August 31 Decision as arbitrary, capricious, unsupported by substantial evidence in the record, an abuse of discretion and otherwise not in accordance with law;

[. . . .]

- F. Directing the AS-IA and the BIA to establish government-to-government relations only with a Tribal government that reflects the participation of the entire Tribal community, including individual Plaintiffs and all other current members;
- G. Preliminarily and permanently enjoining the Secretary, AS-IA and BIA from taking any action to implement the August 31 Decision, including any award of federal funds to the Burleys under PL 638 or any other federal law or program.

(32 CT 8379.)

Despite the pendency of the *Salazar* case, the BIA for a short time continued to recognize the Burley Faction as the CVMT, as evidenced in part by a brief resumption of P.L. 638 contracting with the CVMT. (35 CT 9292-9297.)⁷ However, on April 1, 2011, Echo Hawk set aside his December 22, 2010 decision for reconsideration in light of the parties recent actions (which most significantly included the filing of *Salazar*). (18 CT 4570 at ¶ 3; 18 CT 4573.) Echo Hawk's withdrawal of his December 22, 2010 decision recognizing the Burley Faction also had the effect of withdrawing the rescission of the BIA's several prior determinations concerning the CVMT's status, thereby reinstating those determinations. (See 29 CT 7389 at ¶ 3-4.) There is no evidence of any formal BIA recognition of the Burley Faction after AS-IA Echo Hawk set aside his December 22, 2010 decision on April 1, 2011, including no evidence of any

⁷ This evidence was first produced on June 4, 2013 in connection with the Burley Faction's motion for new trial.

further P.L. 638 contracting through the Burley Faction after March 16, 2011.

On August 31, 2011, Echo Hawk reissued his decision recognizing the Burley Faction as the CVMT, but expressly stayed the “implementation” of his decision pending the outcome of the *Salazar* case. (29 CT 7344 at ¶ 6; 29 CT 7443-7451.) Unlike the December 22, 2010 decision, the August 31, 2011 decision did not rescind the BIA’s earlier determinations concerning the CVMT’s status, e.g., that the tribe was not “organized,” had no recognized tribal chairperson, and had no recognized tribal government. (See 29 CT 7450.)

When it decided the parties’ dispositive motions on April 26, 2013 in this action, the trial court appreciated the uncertainty created by the pendency of the *Salazar* case. Citing the *Salazar* case, the trial court observed that:

If the plaintiffs prevail in this action [*Salazar*], the Assistant Secretary’s August 31 decision will be vacated, the Bureau [BIA] will be ordered to cease government-to-government relationships with the Tribe as organized in the form of the General Council, and the defendants will be enjoined from awarding any federal funds to Burley.

(35 CT 9203, citing *California Valley Miwok Tribe v. Salazar* (D.D.C. 2012) 281 F.R.D. 43, 47.) Accordingly, ample undisputed evidence existed for the trial court to determine that substantial uncertainty existed as to the

CVMT's membership, organization, and the identity of its authorized leadership.

E. The Commission Has a Legally Sufficient Basis for Withholding RSTF Funds From the Burley Faction

On the basis of the foregoing interpretation of the Commission's duties under the 1999 Compact, the federal executive branch's jurisdiction to identify the authorized leadership of Indian tribes, and the existing uncertainty as to the CVMT's authorized leadership, primarily as evidenced by the pendency of the *Salazar* case, the trial court found that "the Commission's suspension of RSTF payments is justified." (35 CT 9224.) And, further, "[a]s long as *Salazar* remains pending, and the August 31, 2011, decision remains stayed, Plaintiff [Burley Faction] cannot establish that it is the recognized tribe and entitled to receive RSTF monies." (*Ibid.*)

F. The *Salazar* Court Has Set Aside the August 2011 Decision and Remanded the CVMT's Dispute to the BIA

This section of the brief concerns the *Salazar* decision that was issued after judgment was entered in this case. Both Appellant and Respondent have requested that judicial notice be taken of this decision. Although post-judgment events are ordinarily not considered on appeal, the *Salazar* decision has altered the context of the underlying dispute by permanently setting aside Echo Hawk's August 31, 2011 decision recognizing the

Burley Faction as the CVMT and providing guidance for the BIA's reconsideration of the membership and organization of the CVMT.

(*California Valley Miwok Tribe v. Jewell, supra*, 2013 U.S. Dist. LEXIS 174535 at p. *41.)

Six months after the trial court entered judgment in favor of the Commission in this case, the *Salazar* case was decided. That court ruled in favor of the Dixie Faction, with the effect of setting aside Echo Hawk's August 31, 2011 decision and remanding the matter to the BIA "for reconsideration consistent with the terms of this order" (*California Valley Miwok Tribe v. Jewell, supra*, 2013 U.S. Dist. LEXIS 174535 at p. *41.) In doing so, the court found that:

[T]he 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.

(*Id.* at p. *32.) The court observed that "even Burley at one time represented to a federal district court that the Tribe consists of at least 250 individuals." (*Ibid.*) The court also observed that Echo Hawk's August 31, 2011 decision:

[F]ails 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.

(*Id.* at p. *38.)

While the Burley Faction may urge that the *Salazar* decision merely shifts the venue of the CVMT's intra-tribal dispute from the district court to the BIA, the decision in fact provides substantial guidance concerning the analysis to be undertaken by the BIA. At a minimum, the *Salazar* decision removes any doubt as to the current status of Echo Hawk's August 31, 2011 decision, and establishes that the BIA's relationship to the Burley Faction remains at least as uncertain as it was when the trial court granted summary judgment in favor of the Commission.

II. THE TRIAL COURT PROPERLY ADDRESSED THE ISSUE PUT BEFORE IT BY THIS COURT AND ITS JUDGMENT SHOULD BE UPHOLD ON APPEAL.

When this Court issued the writ that compelled the trial court to lift the stay it had imposed to await the *Salazar* case's resolution of CVMT's membership, organizational, and leadership dispute, it did so with clear direction as to the issue that was properly before the trial court—whether, in light of the current uncertainty as to the CVMT's authorized leadership, including the pendency of the *Salazar* case, the Commission was legally justified in withholding RSTF payments from the Burley Faction. The Court pointed out that the trial court “need not decide the issues being considered in the federal court or resolve an internal tribal dispute.

(*California Valley Miwok Tribe v. Sup. Ct. of San Diego County, supra*, 2012 Cal.App. Unpub. LEXIS 9176, *24, *26.) The Court's articulation of the issue properly recognized that state courts lack subject matter jurisdiction to adjudicate the leadership of an Indian tribe or the propriety of organizational requirements imposed by the BIA. The judgment ultimately entered by the trial court shows that the trial court followed this Court's guidance to the letter. On appeal, the Burley Faction's principal arguments stray beyond the issue that was before the trial court and would require adjudications the state courts cannot make.

A. The Burley Faction's Effort to Appropriately the Accrued RSTF Payments for Itself, Irrespective of the Outcome of *Salazar*, is Based on an Assumption That is Both Unwarranted and One This Court Cannot Make

Although it was barely mentioned in the trial court (see 1 RT 475:15-19), the Burley Faction now argues that, whatever the outcome of *Salazar*, the only possible result would be the addition of new members to a CVMT that already consists of the Burley Faction, thus, the Burley Faction's five members have a vested right to the RSTF payments accrued up to that point, and the new members can have an interest only in the payments received by the CVMT subsequent to their enrollment in the Tribe.

This argument rests on the erroneous assumption that the outcome of *Salazar*, or of the BIA's subsequent reconsideration of the CVMT's membership, organization, and leadership, can only, or otherwise will,

result in a determination that the Burley Faction constituted the CVMT from 2005 to the date of the BIA's determination. Nothing in the record, *not even the Echo Hawk August 31, 2011 decision*, suggests this will occur. It was not true at the time the trial court entered the judgment that is appealed from here—at that time, the Echo Hawk's August 31, 2011 decision recognizing the Burley Faction was stayed pending the outcome of *Salazar* (29 CT 7344 at ¶ 6, 7450), and, accordingly, the CVMT was still not recognized by the BIA as an “organized” tribe, nor did the BIA recognize a government for the CVMT⁸ If this Court considers the post-judgment outcome of *Salazar* in deciding this appeal, Echo Hawk's August 31, 2011 decision has been set aside by the *Salazar* court, and the matter has been remanded to the BIA for reconsideration in light of the *Salazar* decision, which rejected Echo Hawk's August 31, 2011 decision, and, by logical extension, rejected Echo Hawk's nearly identical December 22, 2010 decision. (See *California Valley Miwok Tribe v. Jewell*, *supra*, 2013 U.S. Dist. LEXIS 174535 at pp. *30-*33; *36-*39.) In light of the *Salazar* decision, it is highly unlikely that the BIA will retroactively acknowledge the Burley Faction's anti-majoritarian “tribal council” form of government,

⁸ When Echo Hawk's December 22, 2010 decision was withdrawn on April 1, 2011, Echo Hawk's rescission of the BIA's earlier determinations of the CVMT's status was withdrawn with it, thus reinstating the CVMT's status to what it had been when the BIA suspended P.L. 638 contracting in 2005.

or accord retroactive tribal citizenship to the members purportedly “enrolled” thereunder. (*Ibid.*) In summary, the Burley Faction’s “enrolled member” argument depends upon a determination that does not currently exist, that appears unlikely to be made, and that cannot, in the meantime, be made or presumed by a state court.

Besides being unable to establish the Burley Faction’s members as “enrolled members” of the CVMT, the Burley Faction has provided no legal authority whatsoever for the proposition that the accrual of the RSTF payments by the Commission in a separate account for the eventual benefit of the CVMT in any way creates a vested interest in any particular individuals based on the dates of accrual. The 1999 Compact makes it clear that RSTF benefits are to be distributed to “Non-Compact Tribes.” (29 CT 7381 at § 4.3.2.1, subds. (a) & (b).) When the accrued RSTF payments are eventually disbursed to the authorized and representative leadership of the CVMT, the leadership, representing the CVMT as a whole, will have the authority to apply the proceeds for the CVMT’s benefit as it sees fit.

The 1999 Compact creates no right in any individual Indian to claim benefits from the RSTF. The Burley Faction’s “enrolled members” argument, without a retroactively effective determination of valid enrollment in the CVMT, constitutes only a claim by five individual Indians, upon whom the 1999 Compact confers no rights.

The Commission's statements in its trial court pleadings concerning the status of the CVMT's accrued RSTF payments are entirely consistent with the Commission's intent to disburse the accrued funds to the leadership of the CVMT that the BIA ultimately recognizes as authorized to conduct government-to-government business on behalf of the CVMT as a whole.

The Burley Faction also mischaracterizes the Commission's reason for withholding the CVMT's RSTF payments. The record reflects that the Commission has stated repeatedly that it is withholding the CVMT's RSTF payments pending the BIA's identification of the authorized leadership of the CVMT, not simply because of the "'potential' that the Dixie Faction may prevail" (see AOB at p. 18) in *Salazar*. That possibility is simply an implication of the current intra-tribal dispute and uncertain status of the CVMT's membership, organization, and leadership.

B. P.L. 638 Contracting Is A Reliable Indicator of the BIA's Identification of the Authorized Leadership of a Federally-Recognized Tribe Irrespective of the Differences Between P.L. 638 Contracts and RSTF Payments.

As explained in detail in part I (B), above, the nature of the federal government's unique trust obligation to Indian tribes requires the BIA to take particular care with regard to conducting government-to-government business only with the authorized representatives of a tribe as a whole, and particularly when federal benefits are involved. (*Seminole Nation of*

Oklahoma v. Norton (D.D.C. 2002) 223 F.Supp.2d 122, 140; *California Valley Miwok Tribe v. United States*, *supra*, 424 F.Supp.2d at p. 201; *California Valley Miwok Tribe v. United States*, *supra*, 515 F.3d at p. 1267.)

The Commission does not dispute that there are many differences between the RSTF and P.L. 638 contract benefits, but there is one very salient similarity—both involve the disbursement of substantial financial sums to tribes, and thus require that care be taken to ensure that the individuals receiving the funds are authorized to do so by the recipient tribe as a whole.

The Commission does not dispute that there are a variety of reasons that might cause the BIA to suspend P.L. 638 contract funding for a tribe. But in *this* case, the reason, in 2005, after the BIA determined that the CVMT was not an “organized” tribe and lacked a recognized tribal chairperson and recognized government, and after April 1, 2011, when Echo Hawk set aside his December 22, 2010 decision for reconsideration, was uncertainty as to the CVMT’s membership, organization, and leadership. There is no evidence that the Commission suspends RSTF payments upon the cessation of P.L. 638 contracting per se—in this case, the Commission did so only when that cessation was caused by uncertainty as to the CVMT’s authorized leadership. (29 CT 7346 at ¶ 6; 30 CT 7674 at ¶¶ 15 [fact not denied].)

Finally, the Burley Faction's argument that the BIA has presently declined to fund the CVMT's P.L. 638 contracts "solely because of the stay language in the ASI's [sic] August 31, 2011 decision" (AOB at pp. 25-26, emphasis in original) changes nothing. The effect of the "stay language" was to preclude the BIA from "implementing" the August 31, 2011 decision. The primary effect of not implementing the August 31, 2011 decision was to stay the BIA's recognition of the Burley Faction as the CVMT. The BIA's suspension of the then only recently resumed P.L. 638 contracting was an incident of staying recognition of the Burley Faction. The BIA's October 22, 2012 communication to Silvia Burley declining to renew the CVMT's P.L. 638 contracts does not substantively indicate otherwise. (Burley Faction Req. Jud. Not. Ex. 1.)

C. The Trial Court Lacks Subject Matter Jurisdiction to "Conclude Independently" That Silvia Burley, Not Yakima Dixie, is the CVMT's Current Authorized Tribal Representative

The Burley Faction's argument that the trial court had sufficient evidence to independently conclude that Silvia Burley is the CVMT's authorized representative for the purpose of receiving RSTF payments contains seven subparts, all of which would require the state court to adjudicate the dispute between the Burley Faction and the Dixie Faction regarding the RSTF payments, whether by determining the significance of various BIA actions and publications, such as the publication of the list of

federally-recognized tribes in the Federal Register, or the meaning of the particular salutation on a thank you note or other correspondence. These matters do not fall within state courts' subject matter jurisdiction, and, as this Court put it in its decision on the Burley Faction's petition for the writ, the trial court "need not decide the issues being considered in federal court or resolve an internal tribal dispute." (*California Valley Miwok Tribe v. Sup. Ct. of San Diego County, supra*, 2012 Cal.App. Unpub. LEXIS at p. *24.)

The Burley Faction's arguments are also based on pure conjecture, such as that the inclusion of the AS-IA's putative signature at the conclusion of the "boilerplate" language that precedes the list of federally-recognized tribes that is periodically published in the Federal Register constitutes a certification of the recognition of a specific tribal government for each of the 566 tribes on the list. The Burley Faction's "Federal Register" argument also ignores the enormous difference between the act of federal recognition of an Indian tribe and the ministerial act of sending a tribe an acknowledgment of a tribal election. (See 31 CT 8162.) The Federal Recognition of tribes may occur by Congressional action, but is more commonly governed by the Code of Federal Regulations, sections 83.1 through 83.12, and the process is complex and lengthy. Notably, the duty of the BIA to publish a list of federally-recognized tribes in the Federal Register, arises under 25 United States Code, § 479a-1, and

25 Code of Federal Regulations section 83.5(a), neither of which contains any indication that the contemporaneous existence of a recognized tribal government is a prerequisite for the inclusion of a tribe in the list. Tribal recognition is a major and generally enduring event, but tribal governments come and go, and tribes may at times be subject to uncertainty as to their leadership, without affecting their status as federally-recognized tribes. Accordingly, the listing of the CVMT in the Federal Register cannot reasonably be construed to mean that the BIA at that time recognized a specific tribal government for the Tribe, let alone that it recognized the Burley Faction in particular.

With respect to the BIA's acceptance of the Burley Faction's resolution changing the name of the Tribe, it is relevant to note that this occurred in 2001, four years before the BIA suspended P.L. 638 funding as a result of uncertainty as to the CVMT's organization and governance, and also 4 years before the Commission suspended disbursement of the CVMT's RSTF payments, both of which began in 2005. (29 CT 7346 at ¶ 6.) That the name of the Tribe did not automatically revert to Sheep Ranch Rancheria of Me-Wuk Indians when the BIA determined that the CVMT lacked a recognized tribal government is unremarkable.

D. The RSTF Mechanism Is Both Contractual and Statutory; Agency Deference Is Appropriate

The Burley Faction attacks the trial court's observation in its ruling on the Commission's summary judgment motion that the construction of an act by the agency charged with its enforcement is entitled to considerable deference from the courts, on the ground that the 1999 Compacts are not statutes and the Commission does not enforce them. (AOB at p. 41.) The revenue-sharing provisions of the 1999 Compact are codified in Government Code section 12012.75, which provides that the RSTF is established by the Legislature for:

[T]he receipt and deposit of moneys derived from gaming device license fees that are paid into the fund pursuant to the terms of tribal-state gaming compacts for the purpose of making distributions to noncompact tribes. *Moneys in the Indian Gaming Revenue Sharing Trust Fund shall be available to the California Gambling Control Commission, upon appropriation by the Legislature, for the purpose of making distributions to noncompact tribes, in accordance with distribution plans specified in tribal-state gaming compacts.*

(Gov. Code, § 12012.75, italics added.) Government Code section 12012.75 expressly incorporates the collection, deposit, and distribution provisions of the 1999 Compact. The "distribution plans" specified in the 1999 Compact designate the Commission as administrator and Trustee of the RSTF. Government Code section 12012.90, subdivision (e)(2) provides that the Commission "shall make quarterly payments from the Indian

Gaming Revenue Trust Fund to each eligible recipient Indian tribe within 45 days of the end of each fiscal quarter.” (Gov. Code, § 12012.90, subd. (e)(2).)

In 2010, when this Court overruled the Commission’s demurrer, which asserted that the Burley Faction, as a third party beneficiary of the 1999 Compact, was precluded by the terms of the 1999 Compact from bring suit to enforce the terms of the 1999 Compact, the Court noted that the Burley Faction’s complaint “repeatedly cites the Government Code as the source of the Commission’s duty to pay over the RSTF funds.” (*California Valley Miwok Tribe v. California Gambling Control Com.* (2010) 2010 Cal.App. Unpub. LEXIS 2765 at p. *31-*33.) The Court then concluded that the Burley Faction’s causes of action for declaratory and injunctive relief “depend on a statutory provision rather than the terms of the Compacts” and ruled that the Burley Faction’s causes of action were not precluded by the 1999 Compact provision precluding suits brought by third party beneficiaries to enforce the terms of the Compacts. (*Id.* at *32.) Given that the Burley Faction’s case was allowed to proceed on the ground that its claims arose from statute rather than the contractual terms of the 1999 Compact, the Burley Faction should be estopped from now arguing that the Commission’s duties arise exclusively from contract.

The Commission has construed its duties as administrator and trustee of the RSTF to include an obligation to take reasonable steps to ensure that

RSTF payments go to the authorized representatives of the eligible recipient tribes. This is necessary in order to ensure that the clear intent of the 1999 Compact's revenue-sharing provisions—to provide RSTF payments to Non-Compact Tribes—is accomplished. The trial court found this construction of the Commission's duties to be "not clearly erroneous" (35 CT 9222). The trial court also found that:

[t]he court is persuaded that, implicit 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.

(Ibid.) The trial court also found that the Commission's reliance on the BIA's decisions as to a tribe's authorized leadership "as fulfilling the Commission's duty under the Compact and accompanying statutes, is not clearly erroneous." (35 CT 9223.) The trial court further found the Commission's decision to discharge its duty by disbursing RSTF funds to individuals or leadership bodies recognized by the BIA for the disbursement and receipt of federal P.L. 638 contract funds was reasonable.

(Ibid.)

There is no indication in the record of what degree of deference the trial court gave to the Commission's construction of its duties under the 1999 Compact and Government Code section 12012.75, nor is there any indication that the trial court's conclusion concerning the Commission's

construction of its duties would have been different if agency deference were not granted.

E. The Trial Court's Ruling on the Commission's Motion for Summary Judgment Is Independent of Any Ruling on Any Claim By Any Other Party

The trial court's decision on the Commission's motion for summary judgment contains no reference whatsoever to any argument by the Commission concerning possible multiple liability. The trial court's decision bears only on the Commission's alleged obligation to disburse the accrued RSTF payments to the Burley Faction, and turns upon the existence of uncertainty as to the identity of the authorized leadership of the CVMT.

F. The Stay Language in Echo Hawk's August 31, 2011 Decision Withdrew the BIA's Recognition of the Burley Faction as the CVMT, Pending the Outcome of *Salazar*

The Burley Faction's argument that it remained recognized as the CVMT, notwithstanding the stay language in Echo Hawk's August 2011 Decision, is based on the same circular reasoning that has characterized the Burley Faction's arguments throughout this case—that the Burley Faction is the CVMT because it declared itself to be so when it enacted Tribal Resolution #GC 98-01 and established its tribal council form of government. (See AOB at p. 48.) The Burley Faction construes its ability to declare itself to be the CVMT to be an expression of a “fundamental right of self-government.” Were the Burley Faction creating a tribe out of nothing, this might be the case, but the Burley Faction is declaring itself to

be the sovereign governing body of a tribe that, according to the allegations of the *Salazar* case, may actually consist of as many as 240 people, nearly all of whom were excluded from the Burley Faction's creation of its tribal council in 1998. Accordingly, the Burley Faction's "potential citizens" argument (*ibid.*) is inapposite.

The Burley Faction's reliance upon Echo Hawk's precatory language encouraging "the parties to work within the Tribe's existing government structure to resolve this longstanding dispute" (AOB at p. 47) to establish that the stay language in his August 31, 2011 decision did not extend to the decision's recognition of the Burley Faction as the CVMT is an exercise in conjecture and semantics. Given that Echo Hawk stayed the decision pending the outcome of *Salazar*, a case involving a wholesale challenge to the legitimacy of the Burley Faction's tribal council form of government, it is implausible to suggest that the stay did not apply to all manifestations of the BIA's recognition of the Burley Faction. A more reasonable explanation of Echo Hawk's precatory language is that it recognized that the *Burley Faction* had an "existing government structure," even though not then recognized by the BIA because of the stay, and that Echo Hawk hoped the parties might resolve their differences within it.

The record indicates that the BIA has extended no substantive recognition to the Burley Faction as the CVMT since Echo Hawk withdrew

his December 22, 2010 decision. The stayed August 31, 2011 decision did not change this.

Finally, the Burley Faction's argument concerning the parameters of the stay language in Echo Hawk's August 31, 2011 decision would require the state court to interpret a BIA agency action for the purpose of adjudicating the Burley Faction's entitlement to the accrued RSTF payments relative to such entitlement as the Dixie Faction may have. Such an adjudication is not within the subject matter jurisdiction of state courts.

G. Withholding the CVMT's RSTF Payments from the Burley Faction Was a Reasonable Expression of the Commission's Duties Under the 1999 Compact

As discussed in part I (A), above, principles of contract interpretation support the Commission's construction of its duties under the 1999 Compact. The Burley Faction's literal interpretation of the "no discretion" language of section 4.3.2.1, subdivision (b) of the 1999 Compact (29 CT 7381) would preclude the Commission from taking reasonable steps to avoid making RSTF payments to potentially unauthorized and unrepresentative subsets of otherwise eligible tribes, and would require the Commission to disburse RSTF payments to *anyone* claiming to represent an eligible recipient tribe. This interpretation does not constitute a reasonable reading of the 1999 Compact's revenue-sharing provisions.

The Burley Faction's description of the Commission's reasons for withholding the RSTF payments (AOB at p. 50) is not supported by the

evidence cited. The cited communications clearly state that the Commission has withheld RSTF payments due to uncertainty as to the recognized leadership of the CVMT. (See 30 CT 7822, 7827-7829, 7833.)

H. The Commission's Withholding of RSTF Payments From the Burley Faction is Not an Exercise of "Discretion"

The Commission has withheld RSTF payments from the Burley Faction because the Burley Faction is not recognized by the BIA as the CVMT or as authorized leadership of the CVMT. The Burley Faction is not a federally-recognized Indian tribe, and therefore is not an eligible recipient tribe under the 1999 Compact. The CVMT is an authorized recipient Indian tribe, but the identity of its authorized and representative leadership is uncertain, as reflected in the BIA's suspension of P.L. 638 contracting with the CVMT, and in the pendency of the *Salazar* case. The Commission has taken reasonable steps to effectuate the clear purpose of the 1999 Compact's revenue-sharing provisions. Contrary to the Burley Faction's repeated assertions, these steps arise from the Commission's implied duties under the 1999 Compact, and not from an "exercise of the Commission's purported discretion." The word "discretion" describes the freedom to exercise choice. By deferring to the BIA for the identification of the authorized leadership of a tribe, the Commission is not exercising any choice regarding whom to pay—it is deferring to the BIA's designation, which is understood to be made on the basis of federal Indian

law and applicable regulations. Ironically, this is the same authority the Burley Faction is attempting to rely upon to establish that it is recognized as the CVMT.

The judgment in this case provides a detailed explanation of the trial court's reasoning in arriving at the conclusion that the Commission is legally justified in withholding the RSTF payments from the Burley Faction. The judgment does not characterize the Commission's position as an exercise of the Commission's discretion. (See 35 CT 9220-9224.)

I. The Trial Court Did Not Assume That the Appellate Court Had Ruled That Uncertainty Existed in the CVMT's Relationship With the Federal Government

The judgment states, “[t]he Commission submits evidence that, at the present time, a dispute exists as to the composition and leadership of the Miwok Tribe, as evidenced by the pending *Salazar* matter [].” (35 CT 9223.) The judgment further states, “[t]he court is not persuaded by Plaintiff's argument that there is no dispute as to the composition and leadership of the Miwok Tribe.” (*Ibid.*) While the trial court noted this Court's direction to “consider *Salazar* in determining whether the Commission's conduct is justified” (*ibid.*), there is no indication in the judgment that the trial court relied upon a finding by this Court that uncertainty existed as to the CVMT's relationship with the federal government.

J. The Commission is Not Required to Release to the Burley Faction “All of the RSTF Money” Accrued as of January 2011

The Burley Faction argues that the Commission’s representation that it would disburse the accrued RSTF payments to the CVMT once its authorized leadership had been determined by the BIA requires the Commission to disburse all of the RSTF money accrued as of January 2011 to the Burley Faction on the basis of Echo Hawk’s December 22, 2010 decision recognizing the Burley Faction, the Burley Faction’s subsequent tribal election, and the BIA’s January 12, 2011 acknowledgment of that election.

As argued elsewhere in this brief, the Commission’s practice when doubt exists as to the identity of the authorized leadership of a Non-Compact Tribe is to defer to the BIA’s identification of the authorized leadership as evidenced by the BIA’s execution and funding of P.L. 638 contracts with the tribe.

The record reflects that while the BIA apparently did briefly resume P.L. 638 contracting with the CVMT during the window of time between the issuance of Echo Hawk’s December 22, 2010 decision and its withdrawal on April 1, 2011, evidence of the resumption of P.L. 638 contracting was not produced by the Burley Faction until June 4, 2013, when it sought judicial notice of two letters submitted in support of the Burley Faction’s motion for new trial. These letters are from the BIA to

Silvia Burley concerning P.L. 638 contracts, and are dated February 2, 2011, and March 16, 2011. (35 CT 9292-9293; 9296-9297.) As Mr. Corrales' declaration indicates, the Burley Faction did not make him aware of the existence of these letters until after the April 26, 2013 hearing on the parties' dispositive motions. (35 CT 9261 at ¶ 5; 9262 at ¶ 6.) Mr. Corrales' declaration indicates that the Burley Faction had not previously produced these letters because "it had nothing to do with this case." (*Ibid.*)

Accordingly, the record contains no evidence that the Commission had notice of the BIA's resumption of P.L. 638 funding for the CVMT through the Burley Faction until June 4, 2013, more than two years after the BIA's recognition of the Burley Faction had been withdrawn and the P.L. 638 funding had once again ceased due to uncertainty as to the organization and leadership of the CVMT.

The larger question raised by this particular claim, which was not before the trial court when it ruled on the parties' dispositive motions (37 CT 9758), is whether eight years of accrued quarterly RSTF payments now totaling over \$10 million should be disbursed to a currently unrecognized group based on a three month period of BIA recognition that was withdrawn, not reinstated, and, in light of the critical *Salazar* decision, appears unlikely to be reinstated. (See *California Valley Miwok Tribe v. Jewell, supra*, 2013 U.S. Dist. LEXIS 174535 at pp. *30-*33; *36-*39.)

The Commission respectfully urges the Court that the full balance of accrued RSTF payments should be preserved for eventual disbursement to the CVMT through its authorized and representative leadership as identified by the BIA through the process that was begun by the *Salazar* decision in December 2013.

K. The Trial Court Properly Denied the Burley Faction's Motion for Judgment on the Pleadings

Judgment on the pleadings was previously granted in this case during the short time when the Burley Faction was recognized by the BIA as a result of Echo Hawk's December 22, 2010 decision, and before Echo Hawk had withdrawn that decision in response to the filing of the *Salazar* case. For the reasons stated above, the circumstances now are entirely different, and summary judgment was properly granted in favor of the Commission.

L. The Trial Court Properly Denied the Burley Faction's Motion for New Trial

For the reasons stated above, the trial court properly granted summary judgment in favor of the Commission. The trial court's decision was not erroneous, and the trial court properly denied the Burley Faction's motion for new trial.

CONCLUSION

It cannot reasonably be disputed that uncertainty currently exists as to the membership, organization, and leadership of the CVMT. The trial court properly found that the Commission's practice of withholding RSTF

payments in times of such uncertainty, and of deferring to the BIA for the identification of the authorized and representative leaders of federally-recognized Indian tribes, as evidenced by the BIA's agency action of entering into P.L. 638 contracts with the tribes, is a legally justified expression of the Commission's implied duties as administrator and trustee of the RSTF under the 1999 Compact. The Commission respectfully requests that the Court affirm the judgment in all respects and thus preserve the CVMT's accrued RSTF payments for disbursement to the CVMT's authorized and representative leader(s) once those leader(s) have been identified by the BIA as evidenced by the BIA's resumption of P.L. 638 contracting with the CVMT.

Dated: April 17, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 11,270 words.

Dated: April 17, 2014

KAMALA D. HARRIS
Attorney General of California



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California Gambling Control Commission*

DECLARATION OF SERVICE

Case Name: California Valley Miwok Tribe v. California Gambling Control Commission

Case No.: D064271

I declare:

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

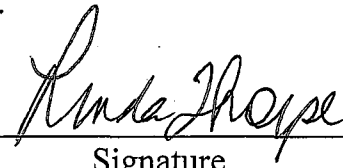
On April 17, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed overnight envelope and causing such envelope to be personally delivered by Golden State Overnight courier service to the office of the addressee listed below

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 17, 2014, at Sacramento, California.

Linda Thorpe
Declarant



Signature