16-15096

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Respondent,

v.

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS, a Federally Recognized Indian Tribe,

Appellant.

On Appeal from the United States District Court
for the District of California

No. 1:14-cv-01593-LJO-SAB
Lawrence J. O'Neill, Judge

APPELLEE'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

Appellee State of California (State) agrees that this Court has jurisdiction under 28 U.S.C. § 1291. The district court's final judgment was entered on December 22, 2015. (SER 142 [ECF No. 103].)[1] Appellant "Tribal Council of the Picayune Rancheria of Chukchansi Indians (Distributee(s)) led by Luke Davis"[2] (Appellant) filed a timely notice of appeal.[3]

The district court concluded, and the State agrees, that the court had subject matter jurisdiction under 25 U.S.C. § 2710(d)(7)(A)(ii) and 28 U.S.C. § 1331. (ER 172 [ECF No. 102, 10, Conclusions of Law, ¶¶ 1; 2].)

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[1] In this brief, the State refers to the Excerpts of Record as "ER" and Supplemental Excerpts of Record as "SER." The district court docket number is included in brackets as "[ECF No. __]" after each citation to the ER or SER.

[2] As set forth in more detail below, Appellant is one of several groups in an intra-tribal dispute. That dispute culminated in violence and threats to the public health, safety, and welfare that formed the basis for the State's lawsuit and the district court's judgment.

[3] On January 21, 2016, within the 30-day time for filing, Fed. R. App. P. 4(a)(1)(A), the "Tribal Council of the Picayune Rancheria of Chukchansi Indians of California led by Monica Davis" filed a notice of appeal. (*See* ER 21 [ECF No. 108].) That appellant was also a disputant group in the intra-tribal dispute, but apparently has abandoned its appeal. It did not file a brief. Nonetheless, Appellant's notice of appeal is timely. *See* Fed. R. App. P. 4(a)(3).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

As set forth below, Appellant did not raise the issues now presented for review in the district court. The district court was not given an opportunity to review and rule on the issues. Consequently, the issues that Appellant desires to present now were waived, and should not be reviewed. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008).

If the Court elects not to accept Appellant's waiver, Appellant identifies the following two issues in its opening brief:

- Whether the district court granted "recognition" to one of the groups in the intra-tribal dispute when entering judgment.
- Whether the district court did not "recognize legally issued tribal court" rulings in connection with Appellant's collateral motion regarding enforcement of a preliminary injunction ordered by the district court.

(Appellant's Opening Brief (AOB), 1.)

Neither of these issues affects the substantive rights of the parties to the underlying lawsuit. 28 U.S.C. § 2111. Neither is relevant to, or implicated in, the district court's judgment. Accordingly, the State respectfully requests that this Court affirm the district court's judgment.

STATEMENT OF THE CASE

This appeal arises from the State's successful efforts to enforce its tribal-state class III gaming compact (Compact) with the Picayune Rancheria of Chukchansi Indians of California (Tribe) and to protect the public health, safety, and welfare. Intra-tribal leadership disputes spanning several years led to an armed incursion into the Tribe's Chukchansi Gold Resort and Casino (Casino) on October 9, 2014. That incursion endangered the public health, safety, and welfare and breached the Compact.

The National Indian Gaming Commission (NIGC) issued a closure order shutting down the Casino. Ruling on the State's motions, the district court entered a temporary restraining order and a preliminary injunction ordering the Tribe to shut down its gaming operations and imposing measures to protect the public health, safety, and welfare.[4] Later, based upon uncontested facts agreed upon by three groups in the intra-tribal dispute and undisputed declarations, the district court issued a permanent injunction and judgment (Permanent Injunction) concluding that the Tribe breached the Compact, allowing the Casino to reopen upon the NIGC lifting

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[4] Even though it could have as a matter of right, Appellant did not appeal the preliminary injunction. *See* 28 U.S.C. § 1292(a)(1); *see also Paige v. State of Calif.*, 102 F.3d 1035, 1038 (9th Cir. 1996).

its closure order, and directing that certain measures be in place to protect the public health, safety, and welfare. In recognition of the unresolved intra-tribal dispute and at Appellant's request, the Permanent Injunction's public safety measures did not include certain property near the Casino.

The State's case in the district court was simple. The State and the Tribe entered into the Compact, which provided, among other things, the Tribe would ensure the physical safety of employees and patrons at the Casino and would not conduct gaming in a manner that endangers the public health, safety, and welfare. As a result of an intra-tribal leadership dispute, violence erupted at the Casino. That breached the Compact. The State filed this case requesting that the district court protect the public health, safety, and welfare and enforce the Compact.

The record is clear that the State and district court assiduously stayed out of the intra-tribal dispute. The State's suit was against the Tribe, not the various disputant groups that claimed to be the Tribe's legitimate leadership. The district court's order was, and is, directed to the Tribe, not the various disputant groups that claimed to be the Tribe's legitimate leadership. In sum, the district court did not recognize any disputant group as speaking for the Tribe. As a result, the district court did not decide, or resolve, the intra-

tribal dispute.[5] Instead, it issued the Permanent Injunction based upon findings of fact and conclusions of law.

In this appeal, Appellant does not contest the district court's findings of fact or conclusions of law. Rather, in presenting issues that it failed to raise in the district court, Appellant invites this Court to become involved in the intra-tribal dispute. For the reasons set forth in this brief, the Court should reject that invitation and affirm the district court's judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

While possibly informative, much of Appellant's 23-page statement of the case and statement of facts is not relevant to this appeal. The facts relevant to this appeal are in the district court's findings of fact that Appellant did not contest.[6] (ER 164-172 [ECF No. 102, 2-10].) The district court based the majority of its findings of fact on the uncontested facts

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[5] Appellant concedes this: "This case involves an *intra-tribal* dispute that remains unsettled . . . ." (AOB, 2 (emphasis in original).)

[6] None of Appellant's filings in the district court presented facts to dispute the basic facts set forth in this brief. The only facts proffered by Appellant in the district court were that an intra-tribal dispute existed and had not been resolved. (*See, e.g.*, ER 82 [ECF No. 83-5]; ER 88 [ECF No. 83-6].)

contained in the Joint Scheduling Report.[7] (*Id.*, Findings of Fact ¶¶ 1-8, 10-23, 29-31.)

The Tribe and the State entered into the Compact. (ER 164 [ECF No. 102, Findings of Fact, ¶ 1].) The Compact provided that the Tribe would ensure the physical safety of gaming operation patrons and employees and other persons in the gaming facility and would not conduct gaming in a manner that endangers the public health, safety, and welfare. (*Id.* at ¶¶ 4-5.) An intra-tribal dispute among the Tribe's members began following tribal elections in 2011. (*Id.* at ¶ 10.) At least three groups claimed to speak exclusively for the Tribe, and none of the groups recognized, or acknowledged, the authority of the other groups. (*Id.*)

On October 9, 2014, one disputant group occupied parts of the hotel adjacent to the Casino, had oversight over the Casino's operation, and operated the hotel. (ER 166 [ECF No. 102, Findings of Fact, ¶¶ 15-17].) Another disputant group controlled the Tribe's Government Operations

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[7] The Joint Scheduling Report was filed on March 31, 2015. (SER 016 [ECF No. 70].) It was submitted by the State and three disputant groups purporting to speak for the Tribe. (*Id.* at 016-19 [ECF No. 70, 1-3].) Appellant did not participate in the Joint Scheduling Report. (*Id.* at 019 [ECF No. 70, 3].) At that time, Appellant was not represented. (*See* ER 28 [ECF Nos. 68; 68-1; 69; 72].) The Joint Scheduling Report set forth thirty-seven paragraphs of uncontested facts over eight pages. (SER 023-30 [ECF No. 70, 8-15].)

Complex located near the Casino. (*Id.* at ¶ 18.) In the evening of October 9, 2014, armed security forces hired by a disputant group arrived at the Casino, handcuffed and detained members of the Casino security force, and engaged in pushing and shoving. (*Id.* at ¶¶ 20; 22.) Tasers were fired; firearms were drawn and pointed among the protagonists; threats of violence were made; and confrontations occurred in the hotel lobby. (*Id.* at ¶¶ 22-23.) The disputant group that had invaded the Casino had an operation plan that included a deadly force policy.[8] (*Id.* at ¶ 21.)

On October 10, 2014, the NIGC issued a closure order for the Casino based upon the real and immediate threat to human health and well-being. (ER 168 [ECF No. 102, Findings of Fact, ¶ 24].) The State filed this action, and the district court entered a temporary restraining order. (*Id.* at ¶ 25.) On October 29, 2014, the district court entered a preliminary injunction. (*Id.* at ¶ 27.) The district court's orders, among other things, enjoined the Tribe from operating the Casino unless and until the court was satisfied that the

[8] Appellant incorrectly asserts that "[t]here was absolutely no evidence that was entered into evidence to support [the] contention regarding a deadly force policy." (AOB, 15, n.12.) In opposing the State's motion for a temporary restraining order, one disputant group filed the declaration of its "chief of police" (SER 001 [ECF No. 35]) and attached an operation plan with a deadly force policy (SER 013-14 [ECF No. 35-1, 7-8]). That disputant group also agreed with the uncontested facts regarding a deadly force policy. (*See* SER 027 [ECF No. 70, 12].)

public health and safety of Casino patrons and employees and tribal members could be adequately protected. (*Id.*; *see also* ER 25 [ECF No. 5, 3] (temporary restraining order); ER 36 [ECF No. 48, 10] (preliminary injunction).)

Thereafter, the Bureau of Indian Affairs (BIA) and the NIGC, as well as a disputant group, took various actions with respect to tribal-federal government contracting and potentially reopening the Casino. (ER 169-170 [ECF No. 102, Findings of Fact, ¶¶ 29-33; 37-38].) In the meantime, the intra-tribal dispute continued. One disputant group sought an order from the district court to bar other disputant groups from the Tribe's Government Operations Complex. (*See* ER 18 [ECF No. 79].) The district court rejected that request holding that its jurisdiction was limited to enforcing the public health, safety, and welfare provisions of the Compact. (ER 18 [ECF 81].) Appellant later sought an order to show cause why a disputant group was not in contempt of the preliminary injunction for making efforts to reopen the Casino. (ER 38 [ECF No. 83].) The district court denied that request finding that the efforts did not threaten the public health, safety, and welfare. (*See* ER 160-161 [ECF No. 92, 5-6].)

On December 21, 2015, the State and the successors to two of the disputant groups filed a joint request to enter judgment and a permanent

injunction. (ER 19-20 [ECF Nos. 98; 98-1; 98-2; 99].) The filing included a proposed judgment and permanent injunction (Proposed Order). (SER 038 [ECF No. 98-2].) The district court gave the other disputants, including Appellant, the opportunity to respond to that request and the Proposed Order. (ER 20 [ECF No. 100].) Appellant responded. (SER 132 [ECF No. 101].)

Appellant's response repeated the claim that some activities at the Casino violated the preliminary injunction. (SER 133-134 [ECF No. 101, 2-3].) The response stated that the intra-tribal dispute continued. (*See id.* at 134 [ECF No. 101, 3, ¶¶ 4-5]; *see also id.* at 139 [ECF No. 101, 8] ("there exists continuing conditions that would lead to hostility based upon the unresolved *intra-tribal* dispute")(emphasis in original).) After reciting some history of the case (*id.* at 4-5, ¶¶ 6-9), Appellant objected to the geographical scope of the Proposed Order. Specifically, Appellant argued that the Proposed Order potentially exercised jurisdiction over tribal lands not covered by, or subject to, the Compact. (*Id.* at 5-7, ¶¶ 10-13.)[9]

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[9] Appellant raised two other objections to the Proposed Order. The first related to Appellant's, and another disputant group's, potential exposure to costs and attorneys fees on appeal. (SER 138 [ECF No. 101, 7, ¶ 14].) The second related to the propriety of the district court acting on shortened

(continued…)

After considering Appellant's response, the district court entered its findings of fact, conclusions of law, order, and judgment. (ER 163 [ECF No. 102, 1].) The district court agreed with Appellant regarding the geographic scope of the Proposed Order. (*Id.* at 175-176 [ECF No. 102, 13-14, Conclusions of Law, ¶¶ 9-11].) The Permanent Injunction provided for geographic limitations consistent with Appellant's objection. (*See id.* at 177 [ECF No. 102, 15, Judgment and Permanent Injunction, ¶¶ 2-3] (referring to Compact section 2.9).) The district court issued the Permanent Injunction (*id.*) and entered judgment (SER 142 [ECF No. 103]) on December 22, 2015.

Appellant appeals from the judgment. (ER 4 [ECF No. 111].)

STANDARD OF REVIEW

The appropriate standard of review is abuse of discretion. Because Appellant does not challenge the district court's findings of fact or conclusions of law, other potential standards of review do not apply in this case.

(…continued)
time to enter the Permanent Injunction. (*Id.* at 138-39 [ECF No. 101, 7-8, ¶¶ 15-16].)

In the Permanent Injunction, the district court made findings of fact. (ER 164-172 [ECF No. 102, 2-10].) This Court reviews such findings for clear error. *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002). But Appellant did not contest the findings of fact in the district court, nor does Appellant do so in this Court. Accordingly, the findings of fact are conclusive. *See Mathews v. Chevron Corp.*, 362 F.3d 1172, 1184 (9th Cir. 2004); *see also Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 817 n.2 (9th Cir. 1996)

In the Permanent Injunction, the district court made conclusions of law. (ER 172-176 [ECF No. 102, 10-14].) Those conclusions were based on the facts. This Court reviews such conclusions – *i.e.*, mixed questions of law and fact – de novo or for clear error, depending on whether the legal or factual matters predominate. *Tolbert v. Page*, 182 F.3d 677, 681-82 (9th Cir. 1999) (*en banc*). But Appellant's issues presented in this appeal do not implicate the district court's conclusions of law. Simply stated, Appellant does not challenge the district court's conclusions of law, and this Court should not review them. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (issue not raised or briefed not reached); *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012) (court reviews only issues argued specifically and distinctly in a party's opening brief).

The Permanent Injunction required that the district court exercise its discretion. A decision to grant permanent injunctive relief generally is reviewed under an abuse of discretion standard. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). This Court will not reverse for abuse of discretion unless the district court failed to apply the correct law or rested its decision on clearly erroneous findings of material fact. *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1020 (9th Cir. 2002). But Appellant's issues presented in this appeal do not implicate the district court's Permanent Injunction.

The Permanent Injunction can be seen as involving factual, legal, and discretionary components. This potentially requires all three standards discussed above. *See Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 653 (9th Cir. 2002) (citing *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). As set forth above, Appellant's issues presented in this appeal do not appear to challenge the Permanent Injunction. Nonetheless, because Appellant did not, and does not, contest either the district court's findings of fact or its conclusions of law, the appropriate standard of review is abuse of discretion.

SUMMARY OF ARGUMENT

The Court should affirm the district court's judgment. Appellant did not raise the issues presented in this appeal in the district court. Appellant did not object to the district court's issuing the Permanent Injunction *per se* or entering judgment. The district court specifically addressed Appellant's objections to the Permanent Injunction's geographic scope. In sum, Appellant waived the issues that it now presents.

Even if Appellant did not waive the issues presented in this appeal, those issues do not affect the Permanent Injunction as it pertains to the Tribe. Appellant is incorrect in characterizing the Permanent Injunction as somehow resolving the intra-tribal dispute. Rather, the district court's judgment applies to the Tribe, "including any group claiming to constitute the tribal government." (ER 177 [ECF No. 102, 15].) The district court considered the facts and made findings of fact that are not contested in this Court. The district court made conclusions of law that are not contested in this Court. Thus, the issues raised by Appellant now have no effect on, and are not relevant to, the Permanent Injunction. And the district court did not abuse its discretion by entering the Permanent Injunction.

Accordingly, the Court should affirm the district court's judgment.

LAW AND ARGUMENT

I. BECAUSE APPELLANT FAILED TO RAISE THE ISSUES PRESENTED IN THIS APPEAL IN THE DISTRICT COURT, THEY ARE WAIVED

Appellant identifies, and presents, two issues in this appeal, neither of which was substantively raised in the district court:

- Appellant asserts that the district court granted "recognition" to one of the disputant groups.
- Appellant asserts that the district court did not "recognize legally issued tribal court" rulings when adjudicating a collateral motion for an order to show cause.

These issues were not raised sufficiently for the district court to rule. *Cruz.*, 673 F.3d at 998-99. Appellant, therefore, waived the issues. An appellate court will not consider a claim or issue that was not raised in the trial court. *Singleton*, 428 U.S. at 120. The Court should affirm the district court's judgment.

A. Appellant Did Not Object to the Permanent Injunction Based Upon the District Court's Purported Granting "Recognition" to One of the Disputant Groups

Appellant did not object to, or oppose, the Permanent Injunction on the ground that the district court purportedly would grant "recognition" to one of the disputant groups. Rather, Appellant objected to the Permanent

Injunction on two principal grounds: (1) "there exist[ed] continuing conditions that would lead to hostility based upon the unresolved *intra-tribal* dispute" (SER 139 [ECF No. 101, 8] (emphasis in original)); and (2) the potential scope of the permanent injunction extended beyond the subject matter jurisdiction of the district court regarding lands not defined in the Compact as gaming property (*id.*). In response to Appellant's objections, the district court modified the Proposed Order in terms of geographic coverage. (ER 175-176 [ECF No. 102, 13-14, Conclusions of Law, ¶¶ 10-11].) The district court carved out certain tribal properties from the Permanent Injunction's reach.

Appellant did not object in any way to the findings of fact for the Proposed Order. Those findings of fact came primarily from four sources:

- The statement of uncontested facts contained in the Joint Scheduling Report. (ER 164-169 [ECF No. 102, Findings of Fact ¶¶ 1-8, 10-23, 29-31].)
- The district court's prior orders. (ER 168-169 [ECF No. 102, Findings of Fact ¶¶ 25-28].)

- The declaration of Claudia Gonzales.[10] (ER 169-172 [ECF No. 102, Findings of Fact ¶¶ 32-39, 42].)
- The district court's own findings based upon the other facts. (ER 172 [ECF No. 102, Findings of Fact, ¶¶ 40, 41, 43].)

Except for issues relating to geographic coverage, Appellant did not object to any of the conclusions of law contained in the Proposed Order. In other words, Appellant did not object to the following conclusions: the district court had subject matter jurisdiction (ER 172 [ECF no. 102, 10, Conclusions of Law ¶¶ 1-2]); the Tribe waived its sovereign immunity (*id.*, ¶ 3); Congress abrogated the Tribe's sovereign immunity (*id.*); venue was proper (*id.* At 173 [ECF No. 102, 11, Conclusions of Law ¶ 4); the Compact had been breached (*id.*, ¶¶ 5-6); and the State made a showing for a permanent injunction (*id.* at 173-175 [ECF No. 102, 11-13, Conclusions of Law ¶¶ 7-8).

Importantly, despite repeatedly asserting that the intra-tribal dispute was continuing (*see, e.g.*, SER 134, 137, 139 [ECF No. 101, pp. 3, 6, 8]), Appellant did not object to the Proposed Order based upon any claim that the order was deciding, or somehow resolving, that dispute. Furthermore,

[10] Following an election in October 2015, Claudia Gonzales was installed as the chair of the tribal council. Appellant disputed that election.

Appellant submitted no substantive argument that the district court's entering the Permanent Injunction would grant "recognition" to one of the disputant groups. In its Response in Opposition to Joint Ex Parte Request for Judgment and Permanent Injunction (SER 132 [ECF No. 101]), Appellant's only statement regarding what it now characterizes as "recognition" was a single paragraph in the conclusion:

> Based upon the foregoing the Picayune Rancheria of Chukchansi Indians objects to the entry of any order or judgment that would via some unknown federal statutory provision recognize the illegally elected October 3, 2015 Tribal Council as the permanent governing body of the Tribe with the authority to open and operate the Chukchansi Gold Resort and Casino. It is the opinion of the Distributee(s) who are the only duly enrolled members of the Tribe that the underlying circumstances that led to the closure have not been rectified and consequently, there exists continuing conditions that would lead to hostility based upon the unresolved *intra-tribal* dispute.

(*Id.* at 139 [ECF No. 101, 8] (emphasis in original).) This single statement was not sufficient to give the district court an opportunity to rule on whether it was somehow recognizing one of the disputant groups as the Tribe's governing body by entering the Permanent Injunction, and Appellant thus waived the issue. *See Visendi v. Bank of America, N.A.*, 733 F.3d 863, 869

(9th Cir. 2013) (citing *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir.2010)).

B. Appellant Did Not Request that the District Court "Recognize" Any Tribal Court Ruling

As the case proceeded, one disputant group began efforts to reopen the Casino.[11] Appellant challenged those efforts by seeking, among other things, an order to show cause and an order to cease and desist those efforts. Appellant's challenge sought to enforce the district court's preliminary injunction. Appellant did not seek to enforce any tribal court order or decision. In fact, Appellant did not request the district court recognize, or give deference to, any tribal court order or decision.

On October 5, 2015, Appellant filed a motion for an order to show cause why the 2010 Tribal Council – one of the disputant groups – should not be held in contempt for violating the district court's preliminary injunction. (ER 38 [ECF No. 83].) That motion asserted, among other things: (1) the 2010 Tribal Council violated the preliminary injunction by holding a job fair, executing management agreements, and posting security guards (*id.* at 39 [ECF No. 83, 2, ¶ 4]); and (2) the 2010 Tribal Council paid

[11] In doing so, the disputant group purported to act under the authority of a BIA decision. The disputant also was involved in negotiations with the NIGC to lift the closure order.

funds from the Casino's cage (*id.*, ¶ 5). Appellant requested that the district court issue an order to show cause regarding attempts to prepare the Casino for opening and to compel the 2010 Tribal Council to cease and desist from further attempts to open the Casino.[12] (ER 43 [ECF No. 83-1, p. 2].)

The initial motion and supporting pleadings did not request the district court to enforce, defer to, or "recognize" any tribal court order. (*See* ER 40 [ECF No. 83, 3].) Similarly, Appellant's reply did not request that district court enforce, defer to, or "recognize" any tribal court order. (*See* ER 116, 120-121 [ECF No. 91, 1, 5-6].) Appellant's lack of a request of any kind is demonstrated by its only presentation regarding tribal court rulings:

> Any attempt by Ms. Gonzales by her de facto actions to assume the Tribal Chairpersons' [*sic*] official position of the Picayune Rancheria is in violation of tribal law and absolutely no federal or state court has the jurisdictional authority to interpret tribal law.

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[12] Appellant refers to an injunction issued by a tribal court. (AOB 2, 33-38.) This injunction was first presented to the district court in a reply to a supplemental response filed in connection with the motion for an order to show cause. (*See* ER 146 [ECF No. 91-8].) The reply did not request that the court defer to the tribal court; instead, the reply relied on the injunction to attack a declarant's authority. (*See* ER 118-119 [ECF No. 91, 3-4].) This casual reference did not substantially present any issue for the district court and cannot preserve the issue presented to this Court for appeal. *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1183 (9th Cir. 2013); *Moreno Roofing Co., Inc. v. Nagle*, 99 F.3d 340, 343 (9th Cir. 1996).

> The tribal law of the Picayune Rancheria should be followed not only by this Court, but by the Bureau of Indian Affairs. Recently prior to the alleged "clean slate election" of 2015, the Tribal Court of the Picayune Rancheria issued a Temporary Restraining Order relating to the election and further, issued a Preliminary Injunction.

(ER 118-119 [ECF No. 91, 3-4] (Appellant's reply).)

In support of its motion for an order to show cause, Appellant repeatedly argued that the district court did not have authority to resolve the intra-tribal dispute. (*See*, *e.g.*, ER 46, 48, 50 [ECF No. 83-2, pp. 3, 5, 7].) In response to Appellant's motion, the State took no position:

> As stated multiple times in this action, the State's interest is to protect the health, safety and welfare of its residents, the members of the [Tribe], the patrons and employees of the Tribe's gambling facility, and law enforcement personnel. The State defers to the Tribe's sovereign authority to resolve intra-tribal disputes in accordance with tribal and federal law.

(SER 035 [ECF No. 84, 1].)

On November 19, 2015, the district court denied the request for an order to show cause and the request for a cease and desist order. (ER 161 [ECF No. 92, 6].) The court acknowledged that "three or more separate groups" claimed leadership rights over the Tribe and the rights to control the Casino. (*Id.* at 156 [ECF No. 92, 1].) The court observed that at least five

groups had made appearances through separate counsel. (*Id.*) The district court wrote that its jurisdiction was circumscribed: "the Court's jurisdiction to impose injunctive relief is limited to interventions necessary to protect the public from imminent danger." (*Id.* at 160 [ECF No. 92, 5].) The court found no imminent safety hazard and concluded that it lacked jurisdiction to intervene for any other reason. (*Id.* at 161 [ECF No. 92, 6].)

In sum, Appellant did not request the district court to enforce, defer to, or "recognize" any tribal court order regarding any disputant group in the intra-tribal dispute. Additionally, Appellant repeatedly asserted that the district court had no power to resolve the intra-tribal dispute. The State deferred to the Tribe's sovereign authority to resolve the intra-tribal dispute. The district court addressed the motion as submitted by Appellant and concluded that the preliminary injunction had not been violated and no imminent danger existed to the public. Appellant never gave the district court the opportunity to rule on the issue now presented – *i.e.*, whether the district court should "recognize" unspecified tribal court rulings. Appellant, therefore, waived the issue. *See Visendi*, 733 F.3d at 869.

II. THE ISSUES PRESENTED ARE NOT GROUNDS TO REVERSE THE PERMANENT INJUNCTION AND THE DISTRICT COURT'S ULTIMATE JUDGMENT

The State acknowledges that waiver is in this Court's discretion. *See United States v. Northrop Corp.*, 59 F.3d 953, 957, n.2 (9th Cir. 1995). The Court has stated that it will exercise its discretion to consider waived issues only in three circumstances: "in the 'exceptional' case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process," "when a new issue arises while appeal is pending because of a change in the law," and "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Mercury Interactive,* 618 F.3d at 992 (citing *Bolker v. Comm'r,* 760 F.2d 1039, 1042 (9th Cir.1985)).

None of these circumstances apply here. Nothing makes this case exceptional other than Appellant's repeated efforts to keep the Casino closed. The issues Appellant presents are not new. The issues are not purely "of law," and Appellant did nothing to develop the factual record in the district court. The Court, therefore, should not hear the issues now.

Nonetheless, if this Court chooses to examine the issues presented, the judgment should be affirmed. The issues presented simply do not impact the

substantial rights of any party to the action – *i.e.*, the State and the Tribe. *See* 28 U.S.C. § 2111.

As shown by the record, Appellant's assertions of error are incorrect. The district court did not "recognize" any disputant group or purport to resolve the intra-tribal dispute. Furthermore, the district court's inability to divine Appellant's unexpressed desire for "recognition" of tribal court rulings did not affect the Permanent Injunction. The record shows that the district court did not abuse its discretion by entering the Permanent Injunction.

A. The District Court Did Not "Recognize" Any Disputant Group as Acting for the Tribe

Appellant's recurrent argument is that this Court and other federal courts are not to decide intra-tribal disputes. (*See*, *e.g.*, AOB, 1, 24.) As is clear from the record and the Permanent Injunction, the district court did not decide – or otherwise resolve – the Tribe's intra-tribal dispute. Furthermore, the district court certainly did not "recognize" any disputant group as acting for the Tribe with respect to the Permanent Injunction.

The State's action was against the Tribe under the Compact. Appellant, as well as the other groups claiming to be the legitimate tribal leadership, participated in the action. They purported to act on the Tribe's

behalf. Their arguments were heard. But, in the end, the district court issued the Permanent Injunction and entered judgment in the case between the State and the Tribe based upon findings of fact – uncontested by Appellant – and conclusions of law – also uncontested by Appellant. Moreover, except for geographical scope, Appellant did not contest the Permanent Injunction's substantive terms. On this record, Appellant cannot point to any clear error in the district court's findings of fact, any error of law in the district court's conclusions of law, or an abuse of discretion in the district court's entering the Permanent Injunction.

Contrary to Appellant's contentions here, the district court did not "recognize" any particular disputant group as acting for the Tribe in the Permanent Injunction. Instead, the district court ordered that upon the NIGC lifting the closure order,[13] "the Tribe may operate the Casino." (ER 176 [ECF No. 102, 14, Judgment and Permanent Injunction, ¶ 1].) The Tribe

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[13] In the Permanent Injunction, the district court's findings of fact referred to actions taken by the disputant groups. The findings of fact referred to the 2010 Interim Tribal Council's actions, including involvement with the BIA and the NIGC. (ER 169-170 [ECF No. 102, Findings of Fact, ¶¶ 29-32, 34, 36].) The findings of fact also referred to actions by the New Tribal Council, including negotiating a settlement agreement with the NIGC. (*Id.* at 170-171, ¶¶ 36-39.) As set forth throughout this brief, Appellant did not contest any of the findings of fact.

was not defined as being any disputant group. (*See id.* at 163 [ECF No. 102, 1.)

With respect to the Permanent Injunction's provisions to protect the public health safety and welfare, the district court also did not "recognize" any particular disputant group as acting for the Tribe. Rather, the Permanent Injunction spoke to the continuing, or future, intra-tribal dispute by enjoining "[t]he Tribe, and all of its officers, agents, servants, employees, and attorneys, and all persons acting under the Tribe's direction and control, including any group claiming to constitute the tribal government." (ER 177 [ECF No. 102, 15, Judgment and Permanent Injunction, ¶¶ 2-4].) The Permanent Injunction's duration was not based upon "recognition" of any disputant group: "Unless earlier modified by the Court following application by the Parties, the prohibitions and directions set forth in paragraphs 2 through 4 above shall remain in effect for two yearly Tribal Council election cycles that are conducted without significant incident that threatens or endangers public safety." (*Id.* at ¶ 5.)

In sum, the district court did not "recognize" any disputant group as acting for the Tribe. Nor did the district court purport to resolve the intra-tribal dispute.

B. The District Court's Failure To "Recognize" an Unspecified Tribal Ruling Did Not Affect the Permanent Injunction

As set forth above, Appellant did not request the district court to "recognize" any tribal court ruling.[14] Importantly, had the district court divined Appellant's unarticulated position, this case's outcome would not have changed. As set forth above, the Permanent Injunction was not directed to any particular disputant group. Instead, it permanently enjoined the Tribe, as well as groups claiming to constitute the tribal government, by imposing certain protections at the Casino and properties subject to the Compact. The Permanent Injunction allowed the Tribe – not any particular disputant group – to reopen the Casino upon the NIGC lifting its closure order.[15] The Permanent Injunction was limited to the Tribe's compliance with the Compact – and nothing more.

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[14] Appellant asserts the district court should have taken judicial notice of tribal court rulings. (AOB, 24.) But Appellant never requested that the district court do so. Now in its opening brief in this Court, Appellant devotes more than eight pages to tribal court rulings to which it gave one sentence of attention in the district court. (*Compare* AOB, 30-38 *with* ER 118-119 [ECF No. 91, 3-4].)

[15] The NIGC was not a party to the case. Nor was it a party to the Compact. Consequently, neither the district court nor the State had any power with respect to the NIGC and its negotiations with the Tribe or any disputant group.

In sum, the district court's inability to identify Appellant's unexpressed desire for "recognition" of tribal court rulings did not affect the Permanent Injunction. Irrespective of which, if any, disputant group ultimately entered into a settlement with the NIGC to lift the closure order, the Permanent Injunction pertained to the Tribe while the public protection provisions also enjoined groups claiming to constitute the tribal government. The outcome – *i.e.*, an injunction based upon uncontested findings of fact and uncontested conclusions of law – would have been the same. *Cheffins v. Stewart*, 825 F.3d 588, 596 (9th Cir. 2016) (harmless error where outcome would not have been different); *Chess v. Dovey*, 790 F.3d 961, 977 (9th Cir. 2015) (same); *River City Ranches # 1 Ltd. v. Comm'r*, 401 F.3d 1136, 1139 (9th Cir. 2005) (same).

C. The District Court Did Not Abuse its Discretion by Entering the Permanent Injunction

The decision to grant or deny a permanent injunction is an act of equitable discretion by a district court. *eBay Inc.*, 547 U.S. at 391. This Court will not reverse for abuse of discretion unless a district court failed to apply the correct law or rested its decision on clearly erroneous findings of material fact. *Bird*, 303 F.3d at 1020. Here, Appellant did not, and does not, contest either the law applied by the district court or its findings of fact.

A permanent injunction may be entered when a plaintiff shows that: (a) it has suffered irreparable injury; (b) remedies at law are inadequate to compensate for that injury; (c) considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (d) public interest would not be disserved by the permanent injunction. *eBay Inc.*, 547 U.S. at 391 (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)). The district court identified these standards. (ER 173 [ECF No. 102, 11, Conclusions of Law, ¶ 7].) Appellant did not, and does not now, contest the standards. The district court then concluded that the State had made a showing for a permanent injunction and considered each standard. (*Id.* at 174-175 [ECF No. 102, 12-13, Conclusions of Law, ¶ 8].) Appellant did not, and does not now, contest these conclusions.

As is clear from the Permanent Injunction and the record here, the district court properly exercised its discretion to protect the public health, safety, and welfare. The Permanent Injunction enforced the State's rights under the Compact. Those rights had been negotiated between the State and the Tribe. In exercising its discretion, the district court considered the

Tribe's interest in public safety,[16] as well as the public interest in having a major contributor to the local and tribal economies potentially operating.

In sum, the district court applied the correct law and rested its decision on facts which were clearly not erroneous and were uncontested. The district court, therefore, did not abuse its discretion by entering the Permanent Injunction.

CONCLUSION

For all of these reasons, this Court should affirm the decision of the district court.

Dated: September 9, 2016

Respectfully submitted,
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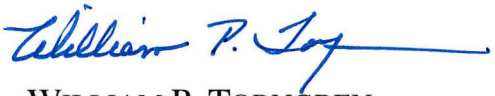

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[16] In exercising its discretion, the district court considered Appellant's earlier statements that "the public safety and welfare will certainly be in danger" if the Casino reopens and the "issues that caused the T.R.O. have been magnified to a more volatile and far more dangerous situation." (ER 174 [ECF No. 102, 12].) These statements demonstrated potential future irreparable injury to the State. (*See id.*)

16-15096

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, Respondent, **v.** **PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS, a Federally Recognized Indian Tribe,** Appellant.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: September 9, 2016

Respectfully Submitted,

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Senior Assistant Attorney General

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Deputy Attorney General
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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 16-15096

I certify that: (check (x) appropriate option(s))

[XX] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[XX] Proportionately spaced, has a typeface of 14 points or more and contains 5,309 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

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☐ 4. **Amicus Briefs.**

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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September 9, 2016

Dated

William P. Torngren

WILLIAM P. TORNGREN
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **State v. Picayune Rancheria** No. **16-15096**

I hereby certify that on September 9, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEE'S ANSWERING BRIEF and APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD, VOLUME 1

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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 September 9, 2016, at Sacramento, California.

William P. Torngren
Declarant

/s/ William P. Torngren
Signature