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Attorneys for Defendant the California Gambling
Control Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

v.

**THE CALIFORNIA GAMBLING CONTROL
COMMISSION; and DOES 1 THROUGH 50,
Inclusive,**

Defendants.

No. 08-CV-0120 BEN AJB

**DEFENDANT CALIFORNIA
GAMBLING CONTROL
COMMISSION'S MOTION TO
DISMISS THE COMPLAINT FOR
INJUNCTIVE RELIEF,
DECLARATORY RELIEF,
BREACH OF CONTRACT,
BREACH OF FIDUCIARY DUTY
AND INTENTIONAL
INTERFERENCE WITH
PROSPECTIVE ECONOMIC
ADVANTAGE, OR, IN THE
ALTERNATIVE, TO STAY
PROCEEDINGS**

Hearing: March 10, 2008
Time: 10:30 a.m.
Courtroom: 3
Judge: The Hon. Roger T. Benitez

Defendant California Gambling Control Commission ("Commission") hereby moves this
Court pursuant to Rule 12(b)(1), 12(b)(6) and 12(b)(7) to dismiss this action in its entirety as to

1 this defendant, or, in the alternative, to stay proceedings in this matter pursuant to this Court's
2 inherent authority to control its caseload pending final adjudication of the complaint which is the
3 subject matter of the district court decision in *California Valley Miwok v. United States*, 424 F.
4 Supp. 2d 197 (D.D.C. 2006).

5 The grounds for this motion are that:

6 1. As more fully set forth in the concurrently filed memorandum of points and authorities,
7 Plaintiff lacks standing to pursue the recovery of monies purportedly due and owing the
8 California Valley Miwok Tribe or to seek injunctive, declaratory or other relief on that Tribe's
9 behalf as requested in the First, Second, Third and Fourth Claims for Relief of the Complaint in
10 that the United States Department of the Interior, Bureau of Indian Affairs recognizes no
11 individual or entity authorized to act on behalf of the California Valley Miwok. Thus, pursuant
12 to Rule 12(b)(1) of the Federal Rules of Civil Procedure, this Court lacks jurisdiction to rule on
13 those claims for relief, or, in the alternative, the Complaint fails to state a claim upon which
14 relief may be granted and should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of
15 Civil Procedure.

16 2. As more fully set forth in the concurrently filed memorandum of points and authorities,
17 even if Plaintiff has the capacity to act on behalf of the California Valley Miwok Tribe, the tribe
18 lacks standing to seek injunctive, declaratory or other relief as requested in the First, Second,
19 Third and Fourth Claims for Relief of the Complaint in that the tribal-state class III gaming
20 compacts upon which those claims are based bar third parties, such as the California Valley
21 Miwok, from filing suit against the Commission for any alleged breach of those compacts.
22 Thus, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, this Court lacks
23 jurisdiction to rule on those claims for relief, or, in the alternative, the Complaint fails to state a
24 claim upon which relief may be granted and should be dismissed pursuant to Rule 12(b)(6) of the
25 Federal Rules of Civil Procedure.

26 3. As more fully set forth in the concurrently filed memorandum of points and authorities,
27 the State's Eleventh Amendment immunity from suits for damages in federal court bars Plaintiff
28 from seeking compensatory damages against the Commission as sought in the Complaint's Third

1 Claim for Relief. Thus, this Court lacks jurisdiction to consider such relief pursuant to Rule
2 12(b)(1) of the Federal Rules of Civil Procedure.

3 4. As more fully set forth in the concurrently filed memorandum of points and authorities,
4 the United States is a necessary and indispensable party within the meaning of Rule 19 of the
5 Federal Rules of Civil Procedure. Plaintiff's failure to join the United States as a party,
6 therefore, warrants dismissal of the Complaint in its entirety pursuant to Rule 12(b)(7).

7 5. As more fully set forth in the concurrently filed memorandum of points and authorities,
8 Mr. Yakima Dixie among others improperly named as DOE defendants in this action are
9 necessary parties within the meaning of Rule 19 of the Federal Rules of Civil Procedure.
10 Plaintiff's failure to join them parties, therefore, warrants dismissal of the Complaint in its
11 entirety pursuant to Rule 12(b)(7).

12 6. As more fully set forth in the concurrently filed memorandum of points and authorities,
13 there is another action pending, involving issues that are central to Plaintiff's standing to pursue
14 the issues in the Complaint. Thus, as an alternative to the dismissal of the Complaint, the Court,
15 in the exercise of its inherent powers to control its calendar, may stay the proceedings in this
16 matter pending final adjudication of that other action.

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1 This motion is based on the pleadings, papers and files in this matter, this motion, notice or
2 motion and supporting memorandum of points and authorities filed concurrently herewith, the
3 Commission's Request for Judicial Notice filed concurrently herewith and whatever evidence
4 and argument is presented at the hearing of this motion.

5 Dated: January 31, 2008

6 Respectfully submitted,

7 EDMUND G. BROWN JR.
Attorney General of the State of California

8 ROBERT L. MUKAI
Senior Assistant Attorney General

9 SARA J. DRAKE
Supervising Deputy Attorney General

10 RANDALL A. PINAL
Deputy Attorney General

11
12
13
14 /s/Peter H. Kaufman
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for Defendant California Gambling Control
Commission
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18 Motion to Dismiss.wpd
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CERTIFICATE OF SERVICE

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

Court: **United States District Court, Southern District, Case No. 08-CV-0120 BEN
AJB**

I declare:

On **January 31, 2008**, I electronically filed the following document(s):

1. **DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S
MOTION TO DISMISS THE COMPLAINT FOR INJUNCTIVE RELIEF,
DECLARATORY RELIEF, BREACH OF CONTRACT, BREACH OF
FIDUCIARY DUTY AND INTENTIONAL INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE, OR, IN THE
ALTERNATIVE, TO STAY PROCEEDINGS;**
2. **NOTICE OF MOTION TO DISMISS THE COMPLAINT FOR
INJUNCTIVE RELIEF, DECLARATORY RELIEF, BREACH OF
CONTRACT, BREACH OF FIDUCIARY DUTY AND INTENTIONAL
INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE,
OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS;**
3. **DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION MOTION TO DISMISS THE COMPLAINT FOR INJUNCTIVE
RELIEF, DECLARATORY RELIF, BREACH OF CONTRACT, BREACH
OF FIDUCIARY DUTY AND INTENTIONAL INTERFERENCE WITH
PROSPECTIVE ECONOMIC ADVANTAGE, OR, IN THE
ALTERNATIVE, TO STAY PROCEEDINGS;**
4. **DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S
REQUEST FOR JUDICIAL NOTICE ;**

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case:

mannycorrales@yahoo.com

Manual Notice List


The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

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 **January 31, 2008**, at San Diego, California.

Roberta L. Matson

Declarant


Signature

EDMUND G. BROWN JR.
Attorney General of the State of California
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Senior Assistant Attorney General
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Hearing: March 10, 2008

Time: 10:30 a.m.

Courtroom: 3

Judge: The Hon. Roger T. Benitez

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE: that on March 10, 2008 at 10:30 a.m. or as soon thereafter as the
matter may be heard in Department 3 of the United States Courthouse located at 940 Front

1 Street, San Diego, California, Defendant California Gambling Control Commission will move
2 the Court for an order dismissing the Complaint in the above entitled matter pursuant to Rule
3 12(b)(1), 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure, or, in the alternative,
4 staying the proceedings pursuant to the Court's inherent authority.

5 Dated: January 31, 2008

6 Respectfully submitted,

7 EDMUND G. BROWN JR.
Attorney General of the State of California

8 ROBERT L. MUKAI
9 Senior Assistant Attorney General

10 SARA J. DRAKE
Supervising Deputy Attorney General

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13
14 /s/Peter H. Kaufman
15 PETER H. KAUFMAN
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17 Commission

18 Notice to Dismiss.wpd
19 SA2008300115

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**DEFENDANT CALIFORNIA
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MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF ITS MOTION
TO DISMISS THE
COMPLAINT FOR
INJUNCTIVE AND
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Date: March 10, 2008

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Judge: The Hon. Roger T. Benitez

I.**INTRODUCTION**

The California Valley Miwok Tribe (formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California) (“Miwok”) is listed in the Federal Register as a federally-recognized tribe. (72 Fed. Reg. 13648; Compl. ¶ 1.) The complaint in this case alleges that an individual by the name of “Silva (sp) Burley” (“Burley”) is recognized by the federal government as a Miwok “person of authority” and that because of this status, Burley is authorized to act for and receive money on behalf of the Miwok. (Compl., ¶¶ 24, 36.) As a result, the complaint seeks an order compelling defendant California Gambling Control Commission (“Commission”) to pay to Burley certain monies it asserts are due and owing the Miwok on the basis of the tribe’s status as a third-party beneficiary under the terms of sixty-one essentially identical tribal-state class III gaming compacts entered into between sixty-one federally-recognized tribes and the State of California (“Compacts”) pursuant to the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (“IGRA”). It also seeks compensatory damages from the Commission as a result of the alleged failure to provide the money it asserts is due under the Compacts. (Compl. at 12.)

Under the terms of the Compacts, a California federally-recognized tribe that does not operate slot machines or operates less than 350 slot machines is designated as a “Non-Compact Tribe” and is entitled to receive a disbursement of up to \$1.1 million each year from a fund entitled the Revenue Sharing Trust Fund (“RSTF”). All sixty-one tribal signatories to the Compacts contribute a portion of their gaming revenues into that fund. If the RSTF should lack sufficient monies to pay \$1.1 million to eligible tribes, California law provides that monies from another fund, the Special Distribution Fund (“SDF”), may be utilized for the purpose of making up any deficiency. The SDF is funded by sixteen of the sixty-one signatory tribes and by statute is designed primarily to provide monies to fund programs that mitigate the off-reservation impacts of tribal gaming. The Compacts designate the Commission as the trustee of the RSTF with the duty to distribute the RSTF to the Non-Compact Tribes through their authorized officials or agencies.

SUMMARY OF ARGUMENT

This action should be dismissed without leave to amend for the following reasons:

First, the United States Department of the Interior, Bureau of Indian Affairs (“federal government” or “United States”) recognizes no individual or entity authorized to act on behalf of the Miwok. Thus, there is no one with standing to sue for the right to collect any monies that might be due and owing the Miwok. In this regard, the complaint alleges that a leadership dispute exists within the Miwok. (Compl., ¶¶ 9, 13) It also asserts that the federal government has declared the Miwok to be unorganized (*Id.* ¶ 12) - that the Miwok are without a government, a constitution or a federally-acknowledged membership. Indeed, it is a judicially noticeable fact that the federal government, in furtherance of its trust responsibilities to Indians, does not recognize any Miwok governing body and that its official position is that no individual, including Burley, can act in the name of or on behalf of the Miwok. (See, Ex. 1 to Commission Req. For Judicial Not., filed concurrently herewith.) As noted by the court in *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197 (D.C.D.C. 2006), in upholding the federal government’s refusal, over Burley’s objection, to approve a Miwok constitution, the federal government’s trust responsibility to Indians precludes its recognition of a tribal government it has determined to be unrepresentative of the Miwok.

Second, even if Burley were entitled to proceed with this case despite her dispute with the federal government over her authority to represent the Miwok, this suit cannot proceed without joinder of the United States. This Court lacks jurisdiction either to overturn the federal government’s determination that Burley is not authorized to represent the Miwok, or to independently determine who is authorized to represent the Miwok in the absence of the United States. The federal government is plainly necessary and indispensable to any judicial order involving or affecting the validity of its decision on the status of the Miwok and who might be authorized to represent that group. The validity of the United States’ determination regarding Burley’s status, however, has been upheld in *California Valley Miwok Tribe v. United States*, *supra*, 424 F. Supp. 2d 197, and is now pending on appeal (Compl., ¶ 17). Thus, this suit should either be dismissed because Burley presently has no standing to sue on behalf of the Miwok, or

1 stayed pending resolution of Burley's appeal of the district court's decision.

2 Third, this Court lacks jurisdiction because Burley has failed to join the other parties to the
3 "leadership dispute" the complaint asserts exists within the Miwok, as well as the "other putative
4 members" of the Miwok described in the complaint. These individuals are necessary parties
5 because of their direct interest in the outcome of this proceeding, given that an order forcing the
6 Commission to pay monies to Burley could deprive those individuals of money to which they
7 might otherwise be entitled. Alternatively, they are necessary parties because an order
8 granting Burley's requested relief could lead to a multiplicity of suits against the Commission
9 and the possibility of inconsistent judgments. For example, these individuals could claim that
10 they were the authorized representatives of the Tribe and seek money from the Commission on
11 the same basis Burley has.

12 Fourth, even if Burley were entitled to file suit on behalf of the Miwok, she lacks standing
13 and cannot state a claim upon which relief may be granted because the Compacts specifically
14 provide that no third-party beneficiary, such as the suit asserts the Miwok is, may seek to enforce
15 the terms of the Compacts.

16 Fifth, though the State of California, in California Government Code section 98005, has
17 waived its Eleventh Amendment immunity for suits for breach of compact, it has not waived its
18 immunity to any suit that is not authorized by a compact. As a consequence, because the
19 Compacts preclude suits by third-party beneficiaries, Burley's suit is barred by both the
20 Compacts and California's Eleventh Amendment immunity.

21 Sixth, to the extent the suit seeks compensatory damages rather than money due and owing
22 under the Compacts, it is barred by the express terms of the Compacts and by the Eleventh
23 Amendment because the Compacts reserve the parties' immunity from suits for damages.

24 **RELEVANT FACTS**

25 The following facts are either alleged in the Complaint or are subject to judicial notice.

26 **A. History of the Compacts**

27 In September 1999, pursuant to IGRA's compacting requirements (25 U.S.C. § 2710(d)(3)),
28 the State and three tribal negotiating groups reached a final agreement upon the terms of class III

1 gaming compacts. Cal. Gov. Code, § 12012.25. On September 10, 1999, the State executed the
2 Compacts with 57 tribes. 65 Fed.Reg. 31189 (May 16, 2000). Subsequently, four additional
3 tribes executed the Compacts with the State. 65 Fed.Reg. 41721 (July 6, 2000); 65 Fed. Reg.
4 62749-02 (Oct. 19, 2000). Under the terms of the Compacts, their effectiveness was
5 conditioned upon the completion of three events: State legislative ratification; United States
6 Secretary of the Interior approval; and passage of Constitutional Amendment 11 ("Proposition
7 1A"), which amended article IV, section 19, of the California Constitution to permit limited
8 forms of class III gaming by Indian tribes, on Indian lands. (Compl., Ex. A, § 11.1.) These
9 conditions were all met, and the Compacts became effective on May 16, 2000. Notice of
10 Approved Tribal-State Compacts, 65 Fed.Reg. 31,189 (May 16, 2000).

11 **B. The Compacts' Revenue Sharing Trust Fund Provisions**

12 The preamble to the Compacts recites that the "State has an interest in promoting the
13 purposes of IGRA for all federally-recognized Indian tribes in California, whether gaming or
14 Non-Compact." (Compl., Ex. A, Preamble, § F.) The RSTF was established in furtherance of
15 this interest, as a means of redistributing the wealth accumulated from tribal gaming among all
16 federally recognized tribes—including those that are not in a position to conduct gaming
17 operations of their own. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1105 (9th Cir.
18 2003) ("*Coyote Valley*"). The general intent of section 4.3.2.2 of the Compacts, is to have
19 Compact Tribes fund the RSTF by purchasing "licenses" to acquire and maintain gaming
20 devices. *Coyote Valley, supra*, 331 F.3d at 1105. The Compacts provide that "Non-Compact
21 Tribes shall be deemed third party beneficiaries of this and other compacts identical in all
22 material respects" (Compl., Ex. A, § 4.3.2, (a)(i)), and establishes that Non-Compact Tribes are
23 to receive \$1.1 Million annually, provided funds are available within the RSTF. While it is clear
24 that Non-Compact Tribes are the appropriate recipients of distributions from the RSTF, the
25 Compacts expressly preclude third parties from bringing legal action to enforce the terms of the
26 Compacts:

1 Third Party Beneficiaries. Except to the extent expressly provided under this
 2 Gaming Compact, this Gaming Compact is not intended to, and shall not be
 3 construed to, create any right on the part of a third party to bring an action to
 4 enforce any of its terms.

5 (Compl., Ex. A, § 15.1.) Moreover, the waivers of sovereign immunity contained in the
 6 Compacts are limited to civil actions between the State and the signatory tribe not involving
 7 monetary damages, “provided that nothing herein shall be construed to constitute a waiver of the
 8 sovereign immunity of either the Tribe or the State in respect to any such third party.” (Compl.,
 9 Ex. A, § 9.4, (a)(3), (b).)

10 **C. Miwok Status**

11 On June 25, 1999, the federal government recognized Burley as tribal chairperson of the
 12 Miwok. *California Valley Miwok v. United States*, *supra*, 424 F. Supp. 2d at 198. Late in 1999,
 13 a leadership dispute developed within the Miwok. *Id.* at 199. During this dispute, in March
 14 2000, Burley submitted a proposed constitution to the federal government and requested a
 15 Secretarial election so that the Miwok could become an organized tribe. *Id.* On June 7, 2001,
 16 because the federal government had not held the requested election, Burley withdrew the
 17 proposed constitution. *Id.* In September 2001, Burley submitted a new proposed constitution to
 18 the United States which the federal government did not approve. *Id.* In November 2003, the
 19 United States did acknowledge, however, the existence of a government-to-government
 20 relationship with an “interim” tribal council chaired by Burley. *Id.* at 200. On March 26, 2004,
 21 the United States advised Burley that the Miwok was considered an unorganized tribe and that
 22 no governing documents would be approved until such time as the Miwok membership base and
 23 membership criteria were identified. *Id.* On February 25, 2005, the federal government stated
 24 that it had rejected the Burley’s proposed constitution, that it did not recognize Burley as the
 25 Miwok chairperson, and that no one would be recognized as the Miwok chairperson until the
 26 Miwok had been organized. *Id.* The United States did, however, recognize Burley as a “person
 27 of authority” within the Miwok. *Id.* In March 2005, the federal government convened a series
 28 of meetings designed to facilitate the organization of the Miwok. *Id.* At those meetings
 concerns were raised over Burley’s use of federal government contract funds designated for

1 tribal organization as well as her use of RSTF monies that the Commission had distributed to
2 Burley on the Miwok's behalf. *Id.* Subsequent to those meetings and the concerns raised, on
3 July 19, 2005, the United States suspended the contract providing organizational funds to Burley.
4 *Id.* at 201. On October 26, 2005, the federal government informed Burley that there was no
5 government-to-government relationship between the United States and the Miwok. *Id.* That
6 position was re-affirmed on December 4, 2005. *Id.* On December 14, 2007, the United States
7 rejected an application by Burley for a contract to provide funds for tribal organization on the
8 basis that the Miwok were unorganized and without a governing body. (Ex. 2 to Commission
9 Req. for Jud. Not.) On December 19, 2007, the Pacific Regional Director of the Bureau of
10 Indian Affairs filed a brief in an administrative proceeding before the Interior Board of Indian
11 Appeals stating the Bureau "no longer contracts with Silvia Burley as a person of authority on
12 behalf of the Tribe [and that] Burley lacks authority to act on the Tribe's behalf." *Id.*

13 **D. Commission Actions Regarding the Miwok**

14 Because the Miwok had been placed on the federal government's list of federally-
15 recognized tribes and because the federal government had recognized Burley first as the
16 chairperson of that tribe and then a "person of authority" within the Miwok authorized to act on
17 behalf of the Miwok, the Commission not only made quarterly distributions of RSTF funds to
18 Burley, it also defended that determination against a suit seeking to prohibit the payment of
19 RSTF funds to Burley by an individual claiming to be the rightful chairperson of the Miwok.
20 (Ex. 3 to Commission Req. for Judicial Not., Commission Memo. of P. & A. In Supp. of Opp. to
21 TRO, at 3.) When, however, the federal government stopped providing funds to Burley, the
22 Commission, on August 4, 2005, informed Burley that it would no longer issue RSTF funds to
23 her on behalf of the Miwok. *California Valley Miwok v. United States*, *supra*, 424 F.Supp. 2d at
24 201. The Commission based its action on its understanding that the federal government no
25 longer considered Burley to be authorized to act on behalf of or receive funds for the Miwok.
26 Subsequent actions by the federal government on October 26, 2005, and December 5, 2005,
27 stating that there was no longer a government-to-government relationship between the United
28 States and the Miwok confirmed the Commission's understanding. On December 5, 2005, the

Commission filed an interpleader action in the Superior Court for the State of California for the County of Sacramento seeking an order determining to whom it should distribute RSTF funds on behalf of the Miwok. *California Valley Miwok v. United States*, *supra*, 424 F. Supp. 2d at 201. When that action was dismissed on the basis of the Court's lack of subject matter jurisdiction, the Commission began depositing the Miwok RSTF funds into a separate interest bearing account pending the federal government's resolution of the questions surrounding the Miwok's status and the identity of its membership, government and leadership.

ARGUMENT

I.

BECAUSE THE UNITED STATES RECOGNIZES NO MIWOK CONSTITUTION, GOVERNMENT, MEMBERSHIP OR CHAIRPERSON, NO ONE, INCLUDING BURLEY, HAS THE CAPACITY TO FILE SUIT ON BEHALF OF THE MIWOK

The federal government's position is that it has no government-to-government relationship with the Miwok because it recognizes no Miwok membership, constitution, or officers. *California Valley Miwok v. United States*, *supra*, 424 F. Supp. 2d at 201. It has also stated that Burley has no authority to act on behalf of the Miwok. (Commission Req. for Judicial Not., Ex. 2.) It is well established that a government that is not recognized by the United States has no capacity to sue in the courts of this country. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 48 (2nd Cir.1991) (unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch's consent); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410-11 (1964). As the United States Supreme Court put it in *Sabbatino*, non-recognition "signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control." *Id.* at 410.^{1/} In this case, the federal government has stated its unwillingness to have a government-to-government relationship with the Miwok because the

1. This rule does not, of course, preclude a group from asserting in federal court that it should be a federally-recognized tribe or should be restored to that status. *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, 255 F.3d 342 (7th Cir. 2001). It does, however, preclude a group from filing suit in federal court on the basis of that status before it has, in fact, been recognized as such by the federal government.

Burley “government” does not represent the putative Miwok membership. *California Valley Miwok v. United States*, *supra*, 424 F. Supp. 2d at 201. Moreover, because the Miwok’s entitlement to RSTF funds is premised on federal recognition, it follows that the Commission is not required to distribute RSTF monies to a Miwok government the United States does not recognize.

II.

THIS COURT LACKS JURISDICTION TO DETERMINE A TRIBE’S STATUS IN THE FEDERAL GOVERNMENT’S ABSENCE AND BECAUSE THE ISSUE OF BURLEY’S CAPACITY TO FILE SUIT ON BEHALF OF THE MIWOK IS ALREADY IN LITIGATION, THIS COURT SHOULD EITHER DISMISS OR STAY THIS SUIT

Although Burley may be entitled to challenge the federal government’s refusal to recognize her government, her status as Miwok chairperson, and her authority to act on behalf of the Miwok, she cannot do so, without joining the federal government as a party because the United States is plainly a necessary and indispensable party to the resolution of those questions. Tribal status and recognition are within the exclusive purview of the executive branch (*Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, *supra*, 255 F.3d at 346) and judicial authority to render decisions on tribal status and recognition can only be brought in the context of prior federal action and only where the federal government’s action can be said to have failed to have met legal criteria that a court has the capacity to apply in making a reasoned judicial decision. (*Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior*, *supra*, 255 F.3d at 348-49.)

Burley, however, as conceded in the complaint (Compl., ¶ 17), is presently in litigation with the federal government over her authority to represent the Miwok. In *California Valley Miwok v. United States*, *supra*, 424 F. Supp. 2d 197, the district court upheld the federal government’s determination that Burley and her government did not represent the Miwok and that ruling is now on appeal. (Compl., ¶17.)

A decision in that case will have res judicata effect on issues regarding the status of Burley’s government and her capacity to represent the Miwok because res judicata bars re-litigation in a subsequent proceeding of all issues that were raised or that could have been raised

1 in a prior proceeding between the parties. *Troutt v. Colorado Western Ins. Co.*, 246 F.3d 1150,
 2 1156 (9th Cir. 2001). As a result, pursuant to its inherent power to control the disposition of
 3 causes before it, the Court should either dismiss this case because Burley and her government do
 4 not presently possess the federal recognition essential to her capacity to file suit on behalf of the
 5 Miwok, or stay these proceedings until there is a final judgment in that proceeding. Such a result
 6 would serve the interests of judicial economy by saving the time and effort of the Court, counsel,
 7 and the parties. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

8 III.

9 NEITHER STATE LAW NOR THE COMPACTS PERMIT A NON-PARTY 10 TO ENFORCE THE TERMS OF THE COMPACTS

11 Even if Burley had the capacity to file suit on behalf of the Miwok, the Miwok has no
 12 standing to sue for a breach of the Compacts. The complaint asserts that state law (Cal. Gov.
 13 Code §§ 12012.75 and 12012.90(d)) has created a private right of action under California's
 14 Indian gaming regime and that the Compacts have made the Miwok third-party beneficiaries
 15 entitled to sue the Commission for an alleged failure to distribute RSTF monies to the Miwok on
 16 the basis of the Miwok's alleged status as a Non-Compact Tribe. (Compl., ¶¶ 25, 33, 39, 47.)
 17 Nothing in the Compacts entitles a Non-Compact tribe or the Miwok, assuming it is one, to sue
 18 the Commission to enforce any term of the Compacts. Indeed, the Compacts specifically provide
 19 in section 9.4(3) and 15.1 (Compl, Ex. A, at 33, 42) that third parties including third party
 20 beneficiaries, have no right to enforce any of the Compacts' terms.

21 In drafting the Compacts, therefore, the State and signatory tribes did not intend to
 22 provide Non-Compact tribes with the rights that might otherwise accrue to a third-party
 23 beneficiary such as the right to insist on continued performance of an agreement-even if the
 24 agreement were abrogated. See, e.g. Cal. Civ. Code §§ 1559; *Principal Mutual Life Insurance*
 25 *Company v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1486; third party
 26 beneficiary may enforce a contract for his benefit, if he has acted in reliance upon the promised
 27 benefits, even if it has been terminated for reasons other than rescission). As sovereigns, neither
 28 the State nor the signatory tribes intended to allow a Non-Compact Tribe, as a third-party

beneficiary, to be able to file suit to prevent the State and signatory tribes (should they determine it to be in their sovereign interests) from acting to change the RSTF or the amount of any future distributions from it.

A. No Private Right of Action Exists Under State Law

Nothing in California law suggests that third-party actions were intended as part of California's Indian gaming regime. Proposition 1A established broad authority in the Governor to negotiate and the Legislature to ratify compacts with Indian tribes "[n]otwithstanding . . . any other provision of state law," neither mandating nor limiting the subject matter of negotiations, but leaving such determinations to the discretion of the Governor as ratified by the California Legislature. Thus, under California law, the State's duties and obligations vis a vis gaming are established by the compacts negotiated by the Governor and ratified by the State's legislature. California Government Code sections 12012.75 and 12012.90, therefore, were not enacted to create State obligations, duties or responsibilities to any individual or entity beyond those set forth in the Compacts, or to grant any right to an individual or entity beyond those set forth in those agreements, but rather to provide funding sources and mechanisms by which the Commission could carry out its existing obligations under the Compacts.

In this regard, section 12012.75 merely establishes the RSTF as a fund in the State Treasury and permits the Commission to draw upon that fund to make distributions as required by the Compacts. It provides:

There is hereby created in the State Treasury a special fund called the "Indian Gaming Revenue Sharing Trust Fund" for the 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.

Cal. Gov't Code § 12012.75.

Likewise, section 12012.90(d) is part of a process whereby the State legislature has agreed to appropriate funds from one State treasury account (the SDF) to another State treasury

1 account (the RSTF) for the purpose of making up any account shortfalls in the RSTF.

2 California Government Code section 12012.90(d) merely instructs the Commission to make
3 distributions to eligible tribes upon the deposit of the SDF monies into the RSTF when it
4 provides:

5
6 Upon a transfer of moneys from the Indian Gaming Special
7 Distribution Fund to the Indian Gaming Revenue Sharing Trust
8 Fund and appropriation from the trust fund, the California
9 Gambling Control Commission shall distribute the moneys without
10 delay to eligible recipient Indian tribes for each quarter that a tribe
11 was eligible to receive a distribution during the fiscal year
12 immediately preceding.

13 Tribal eligibility, however, is a function of a tribe's rights under the Compacts and nothing in
14 these Government Code sections creates any greater right to enforce the terms of the Compacts
15 than are set forth in the Compacts themselves.

16 **B. The Compacts Specifically Preclude Suits by Third-Party Beneficiaries To**
17 **Enforce Any Terms of the Compacts**

18 It is true the Compacts deem Non-Compact Tribes "third party beneficiaries" in section
19 4.3.2(a) (Compl., Ex. A, at 7). It is also correct that the Compacts, in section 4.3.2.1(a), provide
20 that all signatory tribes agree that each Non-Compact Tribe shall receive up to \$1.1 million per
21 year from the RSTF. Likewise, there is no dispute that the Compacts, in section 4.3.2.1(b),
22 declare that the Commission shall serve as the trustee of the RSTF and disburse funds from the
23 RSTF to Non-Compact Tribes (Compl., Ex. A, at 7-8). The Compacts, however, also expressly
24 preclude actions by third-party beneficiaries to enforce any provisions of the Compact. Section
25 9.4 of the Compacts provides a limited waiver of sovereign immunity by the signatory tribes and
26 the State for the purpose of allowing suit by the State or the tribe to enforce the Compacts'
27 dispute resolution provisions. (*Id.* at 33.) This waiver is generally conditioned upon the notion
28 that "[n]o person or entity other than the Tribe and the State is party to [such] action." (*Id.*)
Compact section 15.1 makes matters even more clear. It states that:

1 Except to the extent expressly provided under this Gaming
2 Compact, this Gaming Compact is not intended to, and shall not be
3 construed to, create any right on the part of a third party to bring
4 an action to enforce any of its terms.

(*Id.* at 44.) No other provision of the Compacts expressly creates a right on the part of a third party beneficiary to sue either the Commission or the signatory tribes for any breach of the Compacts.

It is certainly true that under California Civil Code section 1559: “a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” It is also true, however, that an individual or entity’s status as a third party beneficiary is completely dependent upon the intent of the parties in privity with one another as well as with the entirety of the circumstances surrounding formation of the contract at issue. *Martinez v. Socoma Companies, Inc.*, 11 Cal.3d 394, 401-02 (1974). As the court held in *Marina Tenants Assn. v. Deauville Marina Development*, 181 Cal. App.3d 122, 129 (1986), in relying upon the holding in *Martinez, supra*, “standing to sue as a third-party beneficiary to a government contract depends on the intent of the parties as manifested by the terms of the contract, and the circumstances surrounding the formation of the agreement.” *Marina Tenants Assn. v. Deauville Marina Development, supra*, 181 Cal. App.3d at 129.

In *Martinez*, the California Supreme Court construed a government contract intended to benefit certain individuals as part of a government program. The program was to be administered by a private party. The private party failed to carry out its obligations under the contract and the intended beneficiaries filed suit to enforce the agreement. The court found, however, that

The present contracts manifest no intent that the defendants pay damages to compensate plaintiffs or other members of the public for their nonperformance. To the contrary, the contracts' provisions for retaining the Government's control over determination of contractual disputes and for limiting defendants' financial risks indicate a governmental purpose to exclude the direct rights against defendants claimed here.

Martinez v. Socoma Companies, Inc., supra, 11 Cal.3d at 402. Thus, even though the plaintiffs in that case were the intended beneficiaries of the contract, the court found plaintiffs had no standing to sue because the contract did not provide for suit against the party that was obligated, under that agreement, to provide benefits to the plaintiff. Such a result is consistent with the Restatement (Second) of Contracts § 304(b) which provides that:

1 The parties to a contract have the power, if they so intend, to create
 2 a right in a third person. The requirements for formation of a
 3 contract must of course be met, and the right of the beneficiary,
 like that of the promisee, may be conditional, voidable, or *un-*
enforceable.

4 (Emphasis added.)

5 In this case, the signatory tribes and the State determined not to provide third-party
 6 beneficiary Non-Compact Tribes with a right to judicially enforce the terms of the Compacts.
 7 Thus, the Miwok has no standing to sue the Commission for a breach of the Compacts. As
 8 contracts between sovereigns, the State and the signatory tribes while desirous of providing
 9 economic assistance to Non-Compact Tribes were, nonetheless, no doubt wary of granting the
 10 Non-Compact Tribes the ability to judicially compel State or tribal action. For example, in some
 11 cases under California law, a third party beneficiary that has acted in reliance upon benefits
 12 conferred by a contract may enforce that contract even if it has been terminated for reasons other
 13 than rescission. *Principal Mutual Life Insurance Company v. Vars, Pave, McCord & Freedman*,
 14 *supra*, 65 Cal. App. 4th at 1486. If that rule were applied to the Compacts, the State and
 15 signatory tribes could be subject to an action seeking to preclude new compacts between them
 16 that might alter the benefits presently available to Non-Compact Tribes. Such an impact on the
 17 State and signatory tribes' police power authority to execute agreements between them, even if
 18 highly unlikely under other principles of law, would plainly justify the elimination of any such
 19 risk through the insertion of a provision such as section 15.1 of the Compacts, which precludes
 20 third-party beneficiary enforcement of any terms of the Compacts.

21 IV.

22 **THE COURT LACKS JURISDICTION TO CONSIDER THIS COMPLAINT** 23 **BECAUSE THE OTHER PARTIES TO THE MIWOK LEADERSHIP DISPUTE** **ARE NECESSARY PARTIES THAT HAVE NOT BEEN JOINED**

24 Under Rule 19(a) of the Federal Rules of Civil Procedure, a party is necessary if:

25 (1) in the person's absence complete relief cannot be accorded
 26 among those already parties, or (2) the person claims an interest
 27 relating to the subject of the action and is so situated that the
 28 disposition of the action in the person's absence may (i) as a
 practical matter impair or impede the person's ability to protect
 that interest or (ii) leave any of the persons already parties subject

1 to a substantial risk of incurring double, multiple or otherwise
2 inconsistent obligations by reason of the claimed interest.

3 Fed.R.Civ.Proc. 19(a).

4 In this case, the complaint alleges that there is a leadership dispute within the Miwok and
5 that other parties claim a right to represent the Miwok and, hence claim a right to distributions
6 from the RSTF. (Compl., ¶¶ 7, 50.) As a result, these individuals definitely have an interest in
7 the subject matter of this action. Second, the disposition of this action unquestionably impairs
8 those individuals' ability to protect that interest. If Burley were to prevail in this suit and obtain
9 the monies held for the Miwok by the Commission, those funds could be lost to them. Third, the
10 Commission cannot protect the individuals' interest because it has taken the position that the
11 Miwok is not entitled to file suit to compel distribution of RSTF funds. Finally, the failure to
12 join these individuals in this action could subject the Commission to multiple or inconsistent
13 obligations. For example, these individuals could claim that they were the authorized
14 representatives of the Miwok and seek money from the Commission on the same basis Burley
15 has. The Commission would then be faced with both tribal factions seeking payment to them of
16 more than \$3 million.

17 From the decision in *California Valley Miwok v. United States*, *supra*, 424 F. Supp. 2d at
18 200, it appears that an individual by the name of Yakima Dixie should be joined in this action as
19 he has claimed leadership of the Miwok. Indeed, Mr. Dixie has previously filed suit against the
20 Commission over RSTF distributions. (Ex. 1 to Commission Req. for Jud. Not.) Moreover, the
21 complaint alleges that certain DOE defendants have also claimed leadership of the Miwok. The
22 Commission is informed and believes that Burley is presently aware of the names of those
23 individuals and should be compelled to identify them and join them in this action.

24 **V.**

25 **PLAINTIFF'S CLAIM FOR COMPENSATORY DAMAGES IS BARRED BY**
26 **THE STATE'S ELEVENTH AMENDMENT IMMUNITY**

27 In the complaint's Third Claim for Relief, Miwok alleges that it has "suffered damages,
28 including, but not limited to the loss of RSTF money and interest thereon." (Compl., ¶ 43.) In

1 addition, in the complaint's prayer for relief, Miwok asks for compensatory damages as a result
 2 of the withholding of RSTF funds. (Compl., at ¶ 12.) These claims are barred by the State's
 3 sovereign immunity under the Eleventh Amendment to the United States Constitution because
 4 the State has not waived its immunity from suits for damages.

5 Though the State waived its immunity from suit for a breach of the Compacts in
 6 California Government Code section 98005, that waiver extends only to suits for specific
 7 performance, injunctive, declaratory relief and compact interpretation. Section 98005 provides
 8 in part as follows:

9 California also submits to the jurisdiction of the courts of the
 10 United States in any action brought against the state by any
 11 federally recognized California Indian tribe asserting any cause of
 12 action arising from the state's refusal to enter into negotiations
 13 with that tribe for the purpose of entering into a different Tribal-
 14 State compact pursuant to IGRA or to conduct those negotiations
 in good faith, the state's refusal to enter into negotiations
 concerning the amendment of a Tribal-State compact to which the
 state is a party, or to negotiate in good faith concerning that
 amendment, or the state's violation of the terms of any Tribal-State
 compact to which the state is or may become a party.

15 Nothing in this section specifically waives the State's sovereign immunity against suits
 16 for monetary damages. Under the rule enunciated in *Atascadero State Hosp. v. Scanlon*, 473
 17 U.S. 234, 241 (1985), such a waiver can only be found where it has been stated by the most
 18 express language or by such overwhelming implication from the text as will leave no room for
 19 any other reasonable construction. California Government Code section 98005 was enacted
 20 through Proposition 5 on the California Ballot, and was subsequently struck down by the
 21 California Supreme Court in *Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 21
 22 Cal. 4th 585 (1999). In that case, the court struck down all of Proposition 5 with the exception
 23 of the portion of California Government Code section 98005 quoted above. *Id.* at 615. The
 24 purpose of this section was to make the State amenable to suits for a violation of the provisions
 25 of IGRA, or for the compacts that IGRA authorizes in the aftermath of the United States
 26 Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-56 (1996)
 27 which struck down IGRA's abrogation of state sovereign immunity. *Hotel Employees &*
 28 *Restaurant Employees Int'l Union v. Davis*, *supra*, 21 Cal. 4th at 614-15. Because nothing in

1 IGRA authorized a suit for damages against a state, it follows that nothing in California
2 Government Code section 98005 would authorize it either, since that section was only intended
3 to allow what the United States Supreme Court had disallowed.

4 In any event, the Compacts themselves specifically provide that the State has not waived
5 its sovereign immunity with respect to suits for damages arising under the Compacts. Section
6 9.4(a)(2) expressly provides with respect to claims for monetary damages:

7 The State and the Tribe expressly consent to be sued therein and
8 waive any immunity therefrom that they may have provided
9 that . . . (2) Neither side makes any claim for monetary damages
10 (that is only injunctive, specific performance, including
11 enforcement of a provision of this Compact requiring payment of
12 money to one or another of the parties, or declaratory relief is
13 sought.

14 (Compl., Ex. A, at 33.) As a result, plaintiff's suit for compensatory damages is barred by the
15 Eleventh Amendment.
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1 **CONCLUSION**

2 For these reasons, the Commission respectfully requests that the claims against the
 3 Commission set forth in the First, Second, Third and Fourth Claims for relief be dismissed
 4 without leave to amend as each of them is precluded by Burley's lack of capacity to file suit on
 5 behalf of the Miwok as well as upon the Miwok's lack of standing to enforce the provisions of
 6 the Compact, and the Commission's Eleventh Amendment immunity to suits not authorized by
 7 the Compacts, including suits for damages. In the alternative, the Commission requests that this
 8 proceeding be stayed until such time as a final judgment is entered in *California Valley Miwok v.*
 9 *United States, supra*, 424 F. Supp.2d 197.

10 Dated: January 31, 2008

11 Respectfully submitted,

12 EDMUND G. BROWN JR.
 Attorney General of the State of California

13 ROBERT L. MUKAI
 Senior Assistant Attorney General

14 SARA J. DRAKE
 Supervising Deputy Attorney General

15 RANDALL A. PINAL
 Deputy Attorney General

16
 17
 18
 19 /s/Peter H. Kaufman
 PETER H. KAUFMAN
 Deputy Attorney General
 Attorneys for Defendant California Gambling Control
 Commission

20
 21
 22 P's and A's.wpd
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Attorneys for Defendant California Gambling Control
Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

v.

**THE CALIFORNIA GAMBLING CONTROL
COMMISSION; and DOES 1 THROUGH 50,
Inclusive,**

Defendants.

NO. 08-CV-0120 BEN AJB

**DEFENDANT CALIFORNIA
GAMBLING CONTROL
COMMISSION'S REQUEST FOR
JUDICIAL NOTICE**

Hearing: March 10, 2008

Time: 10:30 a.m.

Courtroom: 3

Judge: The Hon. Roger T. Benitez

Defendant California Gambling Control Commission ("Commission") hereby
respectfully requests that the Court take judicial notice of the following records:

1. A true and correct copy of a pleading filed with the United States Department of the
Interior, Interior Board of Indian Appeals, in the matter of California Valley Miwok Tribe vs.
Pacific Regional Director, Docket No. IBIA 07-100-A, entitled APPELLEE'S SUPPLEMENT
TO ITS OPPOSITION TO APPELLANT'S MOTION TO ENFORCE STAY filed by the Pacific
Regional Director and dated December 19, 2007. It is attached hereto and incorporated by

reference herein as Exhibit 1.

2. A true and correct copy of a letter dated December 14, 2007, from Troy Burdick, Superintendent of the Central California Agency of the Bureau of Indian Affairs to Silvia Burley that was attached as an exhibit to the above pleading. It is attached hereto and incorporated by reference herein as Exhibit 2.

3. A true and correct copy of a memorandum of points and authorities filed on October 22, 2004, by the Commission in the Superior Court of the State of California for the County of Sacramento in Case No. 04AS04205, entitled *Yakima Dixie v. State of California, California Gambling Control Commission*. It is attached hereto and incorporated by reference herein as Exhibit 3.

This request is based upon Federal Rule of Evidence 201(b)(2) in that the matters set forth in pleadings filed in administrative proceedings such as those before the Interior Board of Indian Appeals as well as pleadings filed in a court of competent jurisdiction constitute facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See, *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241 (C.D. Cal. 2006); contents of an administrative agency decision; *Santos v. County of Los Angeles Department of Children and Family Services*, 299 F.Supp. 2d 1070 (C.D. Cal. 2004); records in a state court case file.

Dated: January 30, 2008

Respectfully submitted,

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/s/Peter H. Kaufman
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California Gambling Control Commission

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EXHIBIT “1”

INTERIOR BOARD OF INDIAN APPEALS

California Valley Miwok Tribe

Appellant,

42.

Pacific Regional Director,

Appellec.

Docket No.: IBLA 07-100-A

APPELLEE'S SUPPLEMENT TO ITS OPPOSITION TO APPELLANT'S MOTION
TO ENFORCE STAY

Appellee Regional Director hereby submits the attached letter in support of its Opposition to Appellants Motion to Enforce Stay. This letter makes clear that Silvia Burley cannot act in the name of the California Valley Miwok Tribe because the Bureau of Indian Affairs does not recognize that the Tribe has a governing body and no longer contracts with Silvia Burley as a person of authority on behalf of the Tribe. Because Ms. Burley lacks authority to act on the Tribe's behalf, the Board should deny her motion to enforce stay.

Submitted December 19, 2007

Jane M. Smith
Attorney Advisor

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2007 I caused to be served on Phillip E. Thompson and Chad Everone a copy of the Appellee's Supplement to Its Opposition to Appellant's Motion to Enforce Stay by regular first-class mail at the following addresses:

Phillip E. Thompson, Esq.
9450 Pennsylvania Avenue, Suite 4
Upper Marlboro, MD 20772

Chad Everone
2140 Shattuch Ave., # 602
Berkley, CA 94704

Dated: December 19, 2007


Jane M. Smith
Counsel for Appellee

EXHIBIT “2”

12/17/2007 10:01 FAX 916 930 3780

BIA CENTRAL CAL AGENCY

2004



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO

DEC 14 2007

CERTIFIED MAIL NO. 7001 2510 0009 4494 1906
RETURN RECEIPT REQUESTED

Silvia Burley
10601 Escondido Place
Stockton, California 95212

Dear Ms. Burley:

In accordance with 25 CFR Part 900.6, Subpart B, Definitions, we are returning your application to contract FY 2008 funding from the Bureau of Indian Affairs, under P.L. 93-638, as amended as it does not meet the definition stated below:

"Tribal Organization means the recognized governing body of any Indian tribe, any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which included the maximum participation of Indians in all phases of its activities; provided, that, in any case where a contract is let or a grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract of grant."

Under this Part, consideration to contract federal funds to operate Bureau of Indian authorized programs will only be given to an application submitted by federally recognized tribe with a recognized governing body. The Department of the Interior does not recognize that the California Valley Miwok Tribe has a governing body. The District Court for the District of Columbia has upheld that determination, California Valley Miwok Tribe v. United States, 424 F Supp. 2d 197 (D.C.D.C. 2006). That decision is now on appeal.

Because we do not recognize any current governing body for the California Valley Miwok Tribe, we are unable to accept the proposal for the above stated reason. We are hereby returning the proposal.

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BIA CENTRAL CAL AGENCY

0005

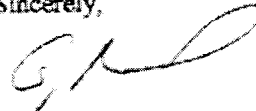
Should you wish to appeal any portion of this letter, you are advised that you may do so by complying with the following:

This decision may be appealed to the Regional Director, Pacific Regional Office, Bureau of Indian Affairs, 2800 Cottage Way, W-2820, Sacramento, California 95825. In accordance with the regulations in 25 CFR Part 2 (copy enclosed), your notice of appeal must be filed in this office within 30 days of the date you receive this decision. The date of filing your notice of appeal is the date it is postmarked or the date it is personally delivered to this office. Your notice of appeal must include your name, address and telephone number. It should clearly identify the decision to be appealed. If possible attach a copy of the decision. The notice of appeal and the envelope which it is mailed, should be clearly labeled "NOTICE OF APPEAL." The notice of appeal must list the names and addresses of the interested parties known to you and certify that you have sent them copies of the notice.

You must also send a copy of your notice to the Regional Director, at the address given above.

If no timely appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Sincerely,



Troy Burdick
Superintendent

Enclosure

000009

EXHIBIT “3”

COPY

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8 Attorneys for Defendants State of California and
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9

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SACRAMENTO
12
13

14 YAKIMA DIXIE, an individual; and,
15 CALIFORNIA VALLEY MIWOK TRIBE fka
16 SHEEP RANCH RANCHERIA OF ME-WUK
INDIANS OF CALIFORNIA, an unorganized tribe,

17 Plaintiffs,

18 v.

19 STATE OF CALIFORNIA, CALIFORNIA
20 GAMBLING CONTROL COMMISSION, an
Agency of the State of California, and DOES 1
21 through 10, inclusive,

22 Defendants.
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26
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FILED
ENDORSED

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SACRAMENTO COURTS
DEPT. #53 #54

CASE NO. 04AS04205

MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO THE
APPLICATION FOR
TEMPORARY
RESTRAINING ORDER
AND/OR ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION

Date: October 27, 2004
Time: 2:00 p.m.
Dept: 53
Judge: The Honorable Loren E.
McMaster
Trial Date: Not Set
Action Filed: October 18, 2004

INTRODUCTION

Plaintiff Yakima Dixie ("Dixie") seeks to enjoin the defendants California Gambling Control Commission ("the Commission") and the State of California ("the State") from issuing a disbursement check to the California Valley Miwok Tribe that would be drawn on the Revenue Sharing Trust Fund ("RSTF") established by the 1999 tribal-state gaming compacts entered into between the State of California and sixty-one signatory Indian tribes. Because the defendants have no substantial interest in this litigation, or the subject funds, other than ensuring that the Commission meets its obligations under the 1999 Compacts, this response to the pending application for a temporary restraining order is limited to the identification of issues that may be of importance to this Court, and which may not be emphasized by Dixie, or by the real party in interest, the California Valley Miwok Tribe,¹ which may or may not be represented at the October 27, 2004, hearing. This memorandum will explain the Commission's role with respect to the RSTF and its current practice with respect to the distribution of funds to Indian tribes in the midst of leadership disputes.

DISCUSSION

In September 1999, the State of California entered into a series of tribal-state class III gaming compacts ("1999 Compacts"), the core of which provided that the State granted the tribes the exclusive right to conduct lucrative Las Vegas-style class III gaming, free from non-tribal competition in the State. (*In re Indian Gaming Related Cases (Coyote Valley)* (9th Cir. 2003) 331 F.3d 1094, 1104.) These compacts established the Revenue Sharing Trust Fund that is at the heart of this litigation.

1. The California Valley Miwok Tribe ("the Tribe") is named as a plaintiff in this lawsuit. However, as is discussed below, the Tribe is apparently represented by Silvia Burley, and her legal counsel, not by Dixie. Accordingly, if the Court determines that the Tribe is absent from this litigation, Code of Civil Procedure section 389 is implicated. Section 389 requires a plaintiff to join as parties to an action all whose interests are so directly involved that the court cannot render a fair adjudication in their absence. (Code Civ. Proc., § 389, subd. (a); see *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 808-809.) If such a party cannot be joined, a court must then determine whether "in equity and good conscience," the action should proceed among the parties before it, or should be dismissed. (Code Civ. Proc., § 389, subd. (b); see also *Quileute Indian Tribe v. Babbitt* (9th Cir. 1994) 18 F.3d 1456, 1458.)

1 The preamble to the 1999 Compacts^{2/} recite that the "State has an interest in promoting the
 2 purposes of IGRA for all federally-recognized Indian tribes in California, whether gaming or
 3 non-gaming." In furtherance of this interest, Section 4.3.2.1 of the 1999 Compact creates the
 4 RSTF, which grants a maximum of \$1.1 million dollars annually to each of the State's Non-
 5 Compact tribes, as defined by the 1999 Compacts. (1999 Compact, § 4.3.2.1, subd. (a); *see also*
 6 *Coyote Valley, supra*, 331 F.3d at 1105.) Under Section 4.3.2.2 of the 1999 Compacts, gaming
 7 tribes fund the RSTF by purchasing "licenses" on a graduated fee schedule to acquire and
 8 maintain gaming devices beyond the number they are authorized to use under Section 4.3.1.
 9 (*Coyote Valley, supra*, 331 F.3d at 1105.)

10 Under the 1999 Compacts, the Commission has a ministerial duty to distribute the corpus of
 11 the RSTF to "Non-Compact Tribes,"^{3/} on the following terms.

12 (b) Payments made to Non-Compact Tribes shall be made quarterly and in
 13 equal shares out of the Revenue Sharing Trust Fund. The Commission shall
 14 serve as the trustee of the fund. *The Commission shall have no discretion*
 15 *with respect to the use or disbursement of the trust funds. Its sole authority*
 16 *shall be to serve as a depository of the trust funds and to disburse them on a*
 17 *quarterly basis to Non-Compact Tribes.* In no event shall the State's General
 18 Fund be obligated to make up any shortfall or pay any unpaid claims.

16 (1999 Compact, § 4.3.2.1, subd. (b), emphasis added; *see also* Qualset Decl.^{4/}, ¶¶ 2-5.) This
 17 provision of the 1999 Compacts was designed to ensure prompt disbursement of RSTF assets to
 18 those tribes in most desperate need of funding—tribes with small or no gaming operation. The
 19 granting of the relief sought by Dixie here would subvert this important objective of the 1999
 20 Compacts.

21 2. Relevant provisions of the 1999 Compacts are appended to this memorandum.

22 3. The 1999 Compacts define a "Non-Compact Tribe as follows:

24 Federally-recognized tribes that are operating fewer than 350 Gaming
 25 Devices are "Non-Compact Tribes." Non-Compact Tribes shall be
 26 deemed third party beneficiaries of this and other compacts identical
 in all material respects.

27 (1999 Compacts, § 4.3.2, subd. (a)(i).) Notably, a Non-Compact Tribe must be federally-recognized,
 28 as is the California Valley Miwok Tribe. (68 Fed. Reg. 68180-01 (Dec. 5, 2003).)

4. The Declaration of Gary Qualset is submitted with this memorandum.

The Commission has been faced on more than one occasion with the prospect of making a RSTF disbursement to a tribe in the midst of a leadership dispute. In the past, it has been the practice of the Commission to refrain from disbursing the RSTF funds until the resolution of the tribal leadership dispute, in order to ensure that the funds were submitted to the proper party and address. (Qualset Decl., ¶¶ 6-10.) However, the Commission has recently determined that it should change this practice, in conformity with the practice of the Bureau of Indian Affairs, by disbursing funds to the tribal representative with which the federal government carries on its government-to-government relationship with the Tribe. (Qualset Decl., ¶¶ 11-14.) It appears to the State that the Tribe's representative for such purposes remains Silvia Burley ("Burley"), notwithstanding what may or may not be a meritorious challenge to her leadership. In a March 26, 2004, letter, the Bureau of Indian Affairs' Superintendent for the California Central District, Dale Risling, wrote to Burley as follows:

As you know, the BIA's Central California Agency (CCA) has a responsibility to develop and maintain a government-to-government relationship with each of the 54 federally recognized tribes situated within CCA's jurisdiction. This relationship, includes among other things, the responsibility of working with the person or persons from each tribe who either are rightfully elected to a position of authority within the tribe or who otherwise occupy a position of authority within an unorganized tribe. *To that end, the BIA has recognized you, as a person of authority within the California Valley Miwok Tribe.*

(Risling-Burley Letter, Mar. 26, 2004, emphasis added, Everone Decl.⁵, Ex. 7.) The BIA has also indicated that Burley is the proper representative of the Tribe on other occasions. (Qualset Decl., ¶¶ 15-17.) The Commission's determination that it should issue a RSTF disbursement check to Burley is rooted in the practice of the federal government to continue the government-to-government relationship, notwithstanding the existence of a leadership dispute, and in the BIA's representations that at this time, Burley is the proper representative of the Tribe.

CONCLUSION

The defendants contend that the Commission's determination to issue a RSTF disbursement check to Burley is correct and that the application for a temporary restraining order ought to be

5. The Declaration of Chadd Everone has been submitted by Dixie in support of his application.

1 denied because granting the application would not serve the interests of the Tribe, and because
2 the Court should refuse to exercise jurisdiction over this action because the Tribe, whose
3 interests are most affected, is likely absent from the litigation.

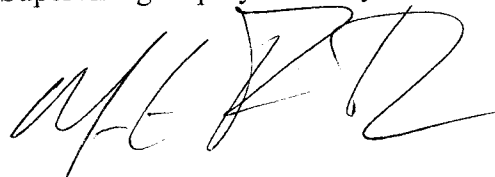
4 Dated: October 22, 2004

5 Respectfully submitted,

6 BILL LOCKYER
Attorney General of the State of California

7 ROBERT L. MUKAI
Senior Assistant Attorney General

8 SARA J. DRAKE
Supervising Deputy Attorney General

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12 MARC A. LE FORESTIER
13 Deputy Attorney General
14 Attorneys for Defendants State of California,
California Gambling Control Commission

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16 10093928.wpd

APPENDIX

TRIBAL-STATE GAMING COMPACT
Between the *1, a federally recognized Indian Tribe,
and the
STATE OF CALIFORNIA

This Tribal-State Gaming Compact is entered into on a government-to-government basis by and between the *1, a federally-recognized sovereign Indian tribe (hereafter "Tribe"), and the State of California, a sovereign State of the United States (hereafter "State"), pursuant to the Indian Gaming Regulatory Act of 1988 (P.L. 100-497, codified at 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) (hereafter "IGRA"), and any successor statute or amendments.

PREAMBLE

A. In 1988, Congress enacted IGRA as the federal statute governing Indian gaming in the United States. The purposes of IGRA are to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; to provide a statutory basis for regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; to ensure that the Indian tribe is the primary beneficiary of the gaming operation; to ensure that gaming is conducted fairly and honestly by both the operator and players; and to declare that the establishment of an independent federal regulatory authority for gaming on Indian lands, federal standards for gaming on Indian lands, and a National Indian Gaming Commission are necessary to meet congressional concerns.

B. The system of regulation of Indian gaming fashioned by Congress in IGRA rests on an allocation of regulatory jurisdiction among the three sovereigns involved: the federal government, the state in which a tribe has land, and the tribe itself. IGRA makes Class III gaming activities lawful on the lands of federally-recognized Indian tribes only if such activities are: (1) authorized by a tribal ordinance, (2) located in a state that permits such gaming for any purpose by any person, organization or entity, and (3) conducted in conformity with a gaming compact entered into between the Indian tribe and the state and approved by the Secretary of the Interior.

C-1. The Tribe is currently operating a tribal gaming casino offering Class III gaming activities on its land. On September 1, 1999, the largest number of Gaming Devices operated by the Tribe was *2.

C-2. [ALTERNATE PARAGRAPH] The Tribe does not currently operate a gaming facility that offers Class III gaming activities. However, on or after the effective date of this Compact, the Tribe intends to develop and operate a gaming facility offering Class III gaming activities on its reservation land, which is located in *3 County of California.

D. The State enters into this Compact out of respect for the sovereignty of the Tribe; in recognition of the historical fact that Indian gaming has become the single largest revenue-producing activity for Indian tribes in the United States; out of a desire to terminate pending "bad faith" litigation between the Tribe and the State; to initiate a new era of tribal-state cooperation in areas of mutual concern; out of a respect for the sentiment of the voters of California who, in approving Proposition 5, expressed their belief that the forms of gaming authorized herein should be allowed; and in anticipation of voter approval of SCA 11 as passed by the California legislature.

E. The exclusive rights that Indian tribes in California, including the Tribe, will enjoy under this Compact create a unique opportunity for the Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming referred to in Section 4.0 of this Compact on non-Indian lands in California. The parties are mindful that this unique environment

is of great economic value to the Tribe and the fact that income from Gaming Devices represents a substantial portion of the tribes' gaming revenues. In consideration for the exclusive rights enjoyed by the tribes, and in further consideration for the State's willingness to enter into this Compact, the tribes have agreed to provide to the State, on a sovereign-to-sovereign basis, a portion of its revenue from Gaming Devices.

F. The State has a legitimate interest in promoting the purposes of IGRA for all federally-recognized Indian tribes in California, whether gaming or non-gaming. The State contends that it has an equally legitimate sovereign interest in regulating the growth of Class III gaming activities in California. The Tribe and the State share a joint sovereign interest in ensuring that tribal gaming activities are free from criminal and other undesirable elements.

Section 1.0. PURPOSES AND OBJECTIVES.

The terms of this Gaming Compact are designed and intended to:

- (a) Evidence the goodwill and cooperation of the Tribe and State in fostering a mutually respectful government-to-government relationship that will serve the mutual interests of the parties.
- (b) Develop and implement a means of regulating Class III gaming, and only Class III gaming, on the Tribe's Indian lands to ensure its fair and honest operation in accordance with IGRA, and through that regulated Class III gaming, enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs.
- (c) Promote ethical practices in conjunction with that gaming, through the licensing and control of persons and entities employed in, or providing goods and services to, the Tribe's Gaming Operation and protecting against the presence or participation of persons whose criminal backgrounds, reputations, character, or associations make them unsuitable for participation in gaming, thereby maintaining a high level of integrity in tribal government gaming.

Sec. 2.0. DEFINITIONS.

Sec. 2.1. "Applicant" means an individual or entity that applies for a Tribal license or State certification.

Sec. 2.2. "Association" means an association of California tribal and state gaming regulators, the membership of which comprises up to two representatives from each tribal gaming agency of those tribes with whom the State has a gaming compact under IGRA, and up to two delegates each from the state Division of Gambling Control and the state Gambling Control Commission.

Sec. 2.3. "Class III gaming" means the forms of Class III gaming defined as such in 25 U.S.C. Sec. 2703(8) and by regulations of the National Indian Gaming Commission.

Sec. 2.4. "Gaming Activities" means the Class III gaming activities authorized under this Gaming Compact.

Sec. 2.5. "Gaming Compact" or "Compact" means this compact.

Sec. 2.6. "Gaming Device" means a slot machine, including an electronic, electromechanical, electrical, or video device that, for consideration, permits: individual play with or against that device or the participation in any electronic, electromechanical, electrical, or video system to which that device is connected; the playing of games thereon or therewith, including, but not limited to, the playing of facsimiles of games of chance or skill; the possible delivery of, or entitlement by the player to, a prize or something of value as a result of the application of an element of chance; and a method for viewing the outcome, prize won, and other information regarding the playing of games thereon or therewith.

Sec. 2.7. "Gaming Employee" means any person who (a) operates, maintains, repairs, assists in any Class III gaming activity, or is in any way responsible for supervising such gaming activities or persons who conduct, operate, account for, or supervise any such gaming activity, (b) is in a category under federal or tribal gaming law requiring licensing, (c) is an employee of the Tribal Gaming Agency with access to confidential information, or (d) is a person whose employment duties require or authorize access to areas of the Gaming Facility that are not open to the public.

Sec. 2.8. "Gaming Facility" or "Facility" means any building in which Class III gaming activities or gaming operations occur, or in which the business records, receipts, or other funds of the gaming operation are maintained (but excluding offsite facilities primarily dedicated to storage of those records, and financial institutions), and all rooms, buildings, and areas, including parking lots and walkways, a principal purpose of which is to serve the activities of the Gaming Operation, provided that nothing herein prevents the conduct of Class II gaming (as defined under IGRA) therein.

Sec. 2.9. "Gaming Operation" means the business enterprise that offers and operates Class III Gaming Activities, whether exclusively or otherwise.

Sec. 2.10. "Gaming Ordinance" means a tribal ordinance or resolution duly authorizing the conduct of Class III Gaming Activities on the Tribe's Indian lands and approved under IGRA.

Sec. 2.11. "Gaming Resources" means any goods or services provided or used in connection with Class III Gaming Activities, whether exclusively or otherwise, including, but not limited to, equipment, furniture, gambling devices and ancillary equipment, implements of gaming activities such as playing cards and dice, furniture designed primarily for Class III gaming activities, maintenance or security equipment and services, and Class III gaming consulting services.

"Gaming Resources" does not include professional accounting and legal services.

Sec. 2.12. "Gaming Resource Supplier" means any person or entity who, directly or indirectly, manufactures, distributes, supplies, vends, leases, or otherwise purveys Gaming Resources to the Gaming Operation or Gaming Facility, provided that the Tribal Gaming Agency may exclude a purveyor of equipment or furniture that is not specifically designed for, and is distributed generally for use other than in connection with, Gaming Activities, if the purveyor is not otherwise a Gaming Resource Supplier as described by of Section 6.4.5, the compensation received by the purveyor is not grossly disproportionate to the value of the goods or services provided, and the purveyor is not otherwise a person who exercises a significant influence over the Gambling Operation.

Sec. 2.13. "IGRA" means the Indian Gaming Regulatory Act of 1988 (P.L. 100-497, 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) any amendments thereto, and all regulations promulgated thereunder.

Sec. 2.14. "Management Contractor" means any Gaming Resource Supplier with whom the Tribe has contracted for the management of any Gaming Activity or Gaming Facility, including, but not limited to, any person who would be regarded as a management contractor under IGRA.

Sec. 2.15. "Net Win" means "net win" as defined by American Institute of Certified Public Accountants.

Sec. 2.16. "NIGC" means the National Indian Gaming Commission.

Sec. 2.17. "State" means the State of California or an authorized official or agency thereof.

Sec. 2.18. "State Gaming Agency" means the entities authorized to investigate, approve, and regulate gaming licenses pursuant to the Gambling Control Act (Chapter 5 (commencing with Section 19800) of Division 8 of the Business and Professions Code).

Sec. 2.19. "Tribal Chairperson" means the person duly elected or selected under the Tribe's organic documents, customs, or traditions to serve as the primary spokesperson for the Tribe.

Sec. 2.20. "Tribal Gaming Agency" means the person, agency, board, committee, commission, or council designated under tribal law, including, but not limited to, an intertribal gaming regulatory agency approved to fulfill those functions by the National Indian Gaming Commission, as primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance. No person employed in, or in connection with, the management, supervision, or conduct of any gaming activity may be a member or employee of the Tribal Gaming Agency.

Sec. 2.21. "Tribe" means the Dry Creek Rancheria, a federally-recognized Indian tribe, or an authorized official or agency thereof.

Sec. 3.0 CLASS III GAMING AUTHORIZED AND PERMITTED. The Tribe is hereby authorized and permitted to engage in only the Class III Gaming Activities expressly referred to in Section 4.0 and shall not engage in Class III gaming that is not expressly authorized in that Section.

Sec. 4.0. SCOPE OF CLASS III GAMING.

Sec. 4.1. Authorized and Permitted Class III gaming. The Tribe is hereby authorized and permitted to operate the following Gaming Activities under the terms and conditions set forth in this Gaming Compact:

- (a) The operation of Gaming Devices.
- (b) Any banking or percentage card game.
- (c) The operation of any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law.
- (e) Nothing herein shall be construed to preclude negotiation of a separate compact governing the conduct of off-track wagering at the Tribe's Gaming Facility.

Sec. 4.2. Authorized Gaming Facilities. The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act. The Tribe may combine and operate in each Gaming Facility any forms and kinds of gaming permitted under law, except to the extent limited under IGRA, this Compact, or the Tribe's Gaming Ordinance.

Sec. 4.3. Sec. 4.3. Authorized number of Gaming Devices

Sec. 4.3.1 The Tribe may operate no more Gaming Devices than the larger of the following:

- (a) A number of terminals equal to the number of Gaming Devices operated by the Tribe on September 1, 1999; or
- (b) Three hundred fifty (350) Gaming Devices.

Sec. 4.3.2. Revenue Sharing with Non-Gaming Tribes.

(a) For the purposes of this Section 4.3.2 and Section 5.0, the following definitions apply:

- (i) A "Compact Tribe" is a tribe having a compact with the State that authorizes the Gaming Activities authorized by this Compact. Federally-recognized tribes that are operating fewer than 350 Gaming Devices are "Non-Compact Tribes." Non-Compact Tribes shall be deemed third party beneficiaries of this and other compacts identical in all material respects. A Compact Tribe that becomes a Non-Compact Tribe may not thereafter return to the status of a Compact Tribe for a period of two years becoming a Non-Compact Tribe.

- (ii) The Revenue Sharing Trust Fund is a fund created by the Legislature and 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.

(iii) The Special Distribution Fund is a fund created by the Legislature for the receipt, deposit, and distribution of monies paid pursuant to Section 5.0.

Sec. 4.3.2.1. Revenue Sharing Trust Fund.

(a) The Tribe agrees with all other Compact Tribes that are parties to compacts having this Section 4.3.2, that each Non-Compact Tribe in the State shall receive the sum of \$1.1 million per year. In the event there are insufficient monies in the Revenue Sharing Trust Fund to pay \$1.1 million per year to each Non-Compact Tribe, any available monies in that Fund shall be distributed to Non-Compact Tribes in equal shares. Monies in excess of the amount necessary to \$1.1 million to each Non-Compact Tribe shall remain in the Revenue Sharing Trust Fund available for disbursement in future years.

(b) Payments made to Non-Compact Tribes shall be made quarterly and in equal shares out of the Revenue Sharing Trust Fund. The Commission shall serve as the trustee of the fund. The Commission shall have no discretion with respect to the use or disbursement of the trust funds. Its sole authority shall be to serve as a depository of the trust funds and to disburse them on a quarterly basis to Non-Compact Tribes. In no event shall the State's General Fund be obligated to make up any shortfall or pay any unpaid claims.

Sec. 4.3.2.2. Allocation of Licenses.

(a) The Tribe, along with all other Compact Tribes, may acquire licenses to use Gaming Devices in excess of the number they are authorized to use under Sec. 4.3.1, but in no event may the Tribe operate more than 2,000 Gaming Devices, on the following terms, conditions, and priorities:

(1) The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(2) The Tribe may acquire and maintain a license to operate a Gaming Device by paying into the Revenue Sharing Trust Fund, on a quarterly basis, in the following amounts:

Number of Licensed Devices		Fee Per Device Per Annum
1-350		\$0
351-750		\$900
751-1250		\$1950
1251-2000		\$4350

--	--	--

(3) Licenses to use Gaming Devices shall be awarded as follows:

(i) First, Compact Tribes with no Existing Devices (i.e., the number of Gaming Devices operated by a Compact Tribe as of September 1, 1999) may draw up to 150 licenses for a total of 500 Gaming Devices;

(ii) Next, Compact Tribes authorized under Section 4.3.1 to operate up to and including 500 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (i)), may draw up to an additional 500 licenses, to a total of 1000 Gaming Devices;

(iii) Next, Compact Tribes operating between 501 and 1000 Gaming Devices as of September 1, 1999 (including tribes, if any, that have acquired licenses through subparagraph (ii)), shall be entitled to draw up to an additional 750 Gaming Devices;

(iv) Next, Compact Tribes authorized to operate up to and including 1500 gaming devices (including tribes, if any, that have acquired licenses through subparagraph (iii)), shall be entitled to draw up to an additional 500 licenses, for a total authorization to operate up to 2000 gaming devices.

(v) Next, Compact Tribes authorized to operate more than 1500 gaming devices (including tribes, if any, that have acquired licenses through subparagraph (iv)), shall be entitled to draw additional licenses up to a total authorization to operate up to 2000 gaming devices.

(vi). After the first round of draws, a second and subsequent round(s) shall be conducted utilizing the same order of priority as set forth above. Rounds shall continue until tribes cease making draws, at which time draws will be discontinued for one month or until the Trustee is notified that a tribe desires to acquire a license, whichever last occurs.

(e) As a condition of acquiring licenses to operate Gaming Devices, a non-refundable one-time pre-payment fee shall be required in the amount of \$1,250 per Gaming Device being licensed, which fees shall be deposited in the Revenue Sharing Trust Fund. The license for any Gaming Device shall be canceled if the Gaming Device authorized by the license is not in commercial operation within twelve months of issuance of the license.

Sec. 4.3.2.3. The Tribe shall not conduct any Gaming Activity authorized by this Compact if the Tribe is more than two quarterly contributions in arrears in its license fee payments to the Revenue Sharing Trust Fund.

Sec. 4.3.3. If requested to do so by either party after March 7, 2003, but not later than March 31, 2003, the parties will promptly commence negotiations in good faith with the Tribe concerning any matters encompassed by Sections 4.3.1 and Section 4.3.2, and their subsections.

SEC. 5.0 REVENUE DISTRIBUTION

Sec. 5.1. (a) The Tribe shall make contributions to the Special Distribution Fund created by the Legislature, in accordance with the following schedule, but only with respect to the number of Gaming Devices operated by the Tribe on September 1, 1999:<div align="center">

<u>Number of Terminals in Quarterly Device Base</u>	<u>Percent of Average Gaming Device Net Win</u>
1 - 200	0%
201 - 500	7%

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DECLARATION OF SERVICE BY MESSENGER

Case Name: **YAKIMA DIXIE, an individual; and, CALIFORNIA VALLEY MIWOK TRIBE fka SHEEP RANCH RANCHERIA OF ME-WUK INDIANS OF CALIFORNIA, an unorganized tribe v. STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION, an Agency of the State of California, and DOES 1 through 10, inclusive**

No.: **04AS04205**

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, P.O. Box 944255, Sacramento, California 94244-2550.

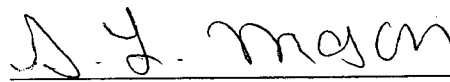
On October 22, 2004, I served the attached **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND/OR ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION; DECLARATION OF GARY QUALSET IN OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING ORDER AND/OR ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION** by placing a true copy thereof to be delivered by messenger service to the following person(s) at the address(es) as follows:

Peter E. Glick
400 Capitol Mall, Suite 1100
Sacramento, CA 95814
Attorney for Plaintiffs

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 October 22, 2004, at Sacramento, California.

S. L. Mason

Declarant



Signature

ENDORSED

Ru

2004 OCT 22 PM 2:30

SACRAMENTO COURTS
DEPT. #53 #54

COPY

BILL LOCKYER
Attorney General of the State of California
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General
MARC A. LE FORESTIER, State Bar No. 178188
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5452
Fax: (916) 322-5609

Attorneys for Defendants State of California, and
the California Gambling Control Commission

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

YAKIMA DIXIE, an individual; and,
CALIFORNIA VALLEY MIWOK TRIBE fka
SHEEP RANCH RANCHERIA OF ME-WUK
INDIANS OF CALIFORNIA, an unorganized tribe,

Plaintiffs,

v.

STATE OF CALIFORNIA, CALIFORNIA
GAMBLING CONTROL COMMISSION, an
Agency of the State of California, and DOES 1
through 10, inclusive,

Defendants.

CASE NO. 04AS04205

DECLARATION OF GARY
QUALSET IN OPPOSITION
TO APPLICATION FOR
TEMPORARY
RESTRAINING ORDER
AND/OR ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION

Date: October 27, 2004
Time: 2:00 p.m.
Dept: 53
Judge: The Honorable Loren
E. McMaster
Trial Date: Not Set
Action Filed: October 18, 2004

I, Gary Qualset, hereby declare:

- I am the Deputy Director of the Licensing and Compliance Division of the California Gambling Control Commission ("the Commission").
- The Commission is charged with the responsibility of being the "Trustee" of the Revenue Sharing Trust Fund ("RSTF") pursuant to section 4.3.2(a)(ii) of the tribal-state class III

1 gaming compacts completed between the State of California and sixty-one Indian tribes in 1999
2 ("the 1999 Compacts").

3 3. My staff and I administer the Commission's responsibilities with regard to the
4 RSTF, pursuant to section 4.3.2.1 of the 1999 Compacts.

5 4. Pursuant to the 1999 Compacts, my staff and I ensure that quarterly payments are
6 made from the RSTF to eligible Non-Compact Tribes as defined in section 4.3.2(a)(i) of the 1999
7 Compact.

8 5. RSTF payment checks are made payable to the name of the recipient Tribes rather
9 than to the name of an individual representative of the Tribe.

10 6. The Commission relies upon the records of the United States Department of the
11 Interior, Bureau of Indians Affairs (BIA), to verify the tribal address of record and the recognized
12 tribal chairperson or authorized representative with whom the BIA is conducting government-to-
13 government relations on an ongoing basis.

14 7. RSTF payment checks are mailed to the Tribe at its official address of record to
15 the attention of the Tribal Chairperson, or representative, and it has been the practice of the
16 Commission to mail RSTF distribution checks via United States Postal Service Priority Mail,
17 with signature verification service, to ensure the establishment of a record of delivery and receipt.

18 8. On occasion over the past years, the Commission has been contacted by tribal
19 members, tribal officials, and their legal representatives to advise the Commission of internal
20 tribal disputes regarding a number of issues such as inappropriate use of funds, dis-enrollment of
21 tribal members, and other tribal government problems and membership disputes. In many of
22 these instances, the Commission was requested to withhold the distribution of funds from the
23 RSTF to the tribe or was requested to mail the check to a different address from that on record
24 with the BIA.

25 9. If each of these request had been honored, a substantial sum of money, running
26 into the millions of dollars of RSTF funds would not have been distributed in a timely manner to
27 an otherwise eligible tribe or may have been sent to the address of a person not authorized to
28 receive the funds.

1 10. Because of these requests, the Commission established procedures to avoid
2 becoming involved in tribal leadership disputes and to properly carry out its duties regarding
3 RSTF funds in a manner that would, in the vast majority of cases, allow for the proper
4 distribution of funds as quickly as possible, while exercising due care in performing its trustee
5 responsibilities under the 1999 Compacts.

6 11. Until recently, when a tribal leadership dispute has arisen, and a BIA leadership
7 decision has been administratively appealed, it has been the practice of the Commission to hold
8 RSTF checks during the pendency of that appeal.

9 12. Recently, the Commission determined that it should change this practice to
10 conform to the practice of the BIA and send the RSTF funds to the Tribe via the tribal
11 representative with whom the BIA conducts government-to-government relations on an ongoing
12 basis, regardless of whether there is a challenge to tribal leadership.

13 13. It appears to the Commission that Sylvia Burley is presently recognized as the
14 tribal representative for the California Valley Miwok Tribe.

15 14. The Commission has determined to send the checks payable to the Tribe, to the
16 attention of Ms. Burley, based on the fact that the BIA has indicated on several occasions that the
17 tribal representative with whom its conducts government-to-government relations is Ms. Burley.
18 That the BIA continues to recognize Ms. Burley has been indicated on several occasions.

19 15. In a March 26, 2004, letter, the BIA's Superintendent for the California Central
20 District, Dale Risling ("Risling"), wrote to Burley as follows:

21 As you know, the BIA's Central California Agency (CCA) has a responsibility to
22 develop and maintain a government-to-government relationship with each of the
23 54 federally recognized tribes situated within CCA's jurisdiction. This
24 relationship, includes among other things, the responsibility of working with the
25 person or persons from each tribe who either are rightfully elected to a position of
26 authority within the tribe or who otherwise occupy a position of authority within
27 an unorganized tribe. To that end, the BIA has recognized you, as a person of
28 authority within the California Valley Miwok Tribe.

26 A copy of this letter is appended to the Declaration of Chadd Everone, in Exhibit 7, which has
27 been submitted to the Court by plaintiff Yakima Dixie.

000027
 ** TOTAL PAGE.02 **

EXHIBIT “1”



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Central California Agency
650 Capitol Mall, Suite 8-800
Sacramento, CA 95814

IN BUREAU OF INDIAN AFFAIRS
Indian Self-Determination

AUG 26 2004

Silvia Burley, Chairperson
California Valley Miwok Tribe
10601 Escondido Place
Stockton, California 95212

Dear Ms. Burley:

Enclosed is a fully executed duplicate of Modification No. Twelve (12) for Contract No. CTJ51762802 (FY 04 Mature Status-Consolidated Tribal Government Program).

For future payments regarding this contract, please contact Terri Williams, Indian Self-Determination Secretary at (916) 930-3747.

Should you have any questions regarding this contract, please contact Janice Whipple-DePina, Indian Self-Determination Officer at (916) 930-3742.

Sincerely,


Dale Kelling, Sr.
Superintendent

Enclosures

cc: Raymond Fry, Tribal Operations Officer, AOTR
Carol Rogers-Davis, Tribal Operations Specialist, SAOTR

Manuel Corrales, Jr., Esq. (SBN 117647)
Attorney at Law
11753 Avenida Sivrita
San Diego, CA 92128
Tel: (858) 521-0634
Fax: (858) 521-0633

Attorney for Plaintiff California
Valley Miwok Tribe

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,)
)
Plaintiff,)
)
v.)
)
THE CALIFORNIA GAMBLING)
CONTROL COMMISSION; AND DOES 1)
THROUGH 50, Inclusive,)
)
Defendants.)

No. 08-CV-0120 BEN AJB

NOTICE OF DISMISSAL WITHOUT
PREJUDICE OF THIRD CAUSE OF ACTION
FOR BREACH OF CONTRACT AND
FOURTH CAUSE OF ACTION FOR BREACH
OF FIDUCIARY DUTY
[Rule 41(a)(1) of FRCP]

Date: March 10, 2008
Time: 10:30 a.m.
Courtroom: 3
Judge: Hon. Roger T. Benitez
Location: 940 Front Street
San Diego, CA 92101

TO: DEFENDANT THE CALIFORNIA GAMBLING CONTROL COMMISSION AND
TO THE CLERK OF THE U.S. DISTRICT COURT, SOUTHERN DISTRICT OF
CALIFORNIA

PLEASE TAKE NOTICE that, pursuant to Rule 41(a)(1) of the Federal Rules of Civil
Procedure, Plaintiff California Valley Miwok Tribe ("Miwok Tribe") hereby withdraws and
dismisses, without prejudice, the Third Cause of Action for Breach of Contract and the Fourth Cause
of Action for Breach of Fiduciary Duty in the Complaint.

Date: February 1, 2008

s/ Manuel Corrales, Jr., Esq.
MANUEL CORRALES, JR., Esq.
Attorney for Plaintiff California Valley
Miwok Tribe

CERTIFICATE OF SERVICE

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

Court: United States District Court, Southern District, Case No. 08-CV09129 BEN AJB

I declare:

On February 1, 2008, I electronically filed the following document(s):

1. NOTICE OF DISMISSAL WITHOUT PREJUDICE OF THIRD CAUSE OF ACTION FOR BREACH OF CONTRACT AND FOURTH CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY [Rule 41(a)(1) of FRCP]

Electronic Mail Notice List

I have caused the above-mentioned document(s) to be electronically served on the following person(s), who are currently on the list to receive e-mail notices for this case:

Peter H. Kaufman
Peter.Kaufman@doj.ca.gov

Manual Notice List

The following are those who are not on the list to receive e-mail notices for this case (who therefore require manual noticing):

None

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct and that it was executed on February 1, 2008, at San Diego, California.

s/ Manuel Corrales, Jr., Esq.

1 Manuel Corrales, Jr., SBN 117647
2 **Attorney at Law**
3 11753 Avenida Sivrita
4 San Diego, CA 92128
5 Phone: (858) 521-0634
6 Fax: (858) 521-0633

7 Attorney for Plaintiff
8 CALIFORNIA VALLEY MINOK TRIBE

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 CALIFORNIA VALLEY MIWOK TRIBE,
12 Plaintiff,
13 v.
14 THE CALIFORNIA GAMBLING
15 CONTROL COMMISSION; and DOES
16 1 THROUGH 50, Inclusive,
17 Defendants.

Case No. 08 CV 0120 BEN AJB

**PLAINTIFF'S RESPONSE RE: ORDER
TO SHOW CAUSE WHY VENUE IS
PROPER IN THE SOUTHERN DISTRICT
OF CALIFORNIA**

DATE: March 10, 2008
TIME: 10:30 A.M.
COURTROOM: 3
LOCATION: 940 Front Street
San Diego, A 92101
JUDGE: Hon. Roger J. Benitez

18 Plaintiff California Valley Miwok Tribe ("Miwok Tribe" or Plaintiff) submits the
19 following in response to the U.S. District Court's Order of January 25, 2008, requesting
20 briefing by the parties by February 7, 2008 on an "Order to Show Cause" why venue is
21 proper in the Southern District of California. Plaintiff submits that venue is proper, without
22 prejudice to Plaintiff's pending Motion to Remand back to the San Diego Superior Court
23 (set for hearing on March 10, 2008).

24 **VENUE IS "AUTOMATICALLY" PROPER IN**
25 **THIS COURT BY VIRTUE OF DEFENDANT'S REMOVAL ACTION**

26 When a defendant removes a state court action to the district where the state court
27 action was pending, venue is proper in that district. *Polizzi v. Cowles Magazines, Inc.*
28 (1953) 345 U.S. 663, 665-666. The general venue statutes do not apply to actions that

08 CV 0120 BEN AJB

1 have been removed from the state court. Removal automatically satisfies federal venue
 2 requirements, i.e., venue is proper as long as removal is to the district in which the state
 3 action was pending. 28 U.S.C. § 1441(a); *PT United Can Co., Ltd. V. Crown Cork & Seal*
 4 *Co., Inc.* (2nd Cir. 1998) 1998) 138 F.3d 65, 72.

5 28 U.S.C. Section 1441(a) provides that removal of state court actions “may be
 6 removed by the defendant or the defendants, to the district court of the United States for
 7 the district and division embracing the place where such action is pending.” (Emphasis
 8 added.) The Supreme Court has interpreted this language to mean that venue of a
 9 removed action is proper in the district where the state court action was pending, i.e.,
 10 removal automatically satisfied venue. *Polizzi, supra*, at 666.

11 In *Polizzi, supra*, the plaintiff sued an Iowa corporation in Dade County Florida
 12 State Court. The defendant removed the state court action to the U.S. District Court which
 13 was in the district where Dade County was situated. Under those circumstances, the
 14 Supreme Court concluded venue was proper, and explained that 28 U.S.C. Section
 15 1441(a) automatically establishes venue upon removal. It stated:

16 Section 1441(a) expressly provides that the proper venue of
 17 a removed action is “the district court of the United States for
 18 the district and division embracing the place where such
 19 action is pending.” The Southern District of Florida is the
 20 district embracing Dade County, the place where the action
 21 was pending.

22 345 U.S. at 666.

23 The reason for making venue proper automatically on removal is because venue is
 24 the defendant’s privilege, and the defendant chooses to transfer the case to that local
 25 district court. *Polizzi, supra* at 665-666; see also *Rutter Group, California Practice Guide,*
 26 *Federal Civil Procedure Before Trial*, Sections 2:1048 and Section 4.3.2.1(b):394-396
 27 (2007).

28 Even if venue was originally improper in the State Court action, venue is still proper
 in the U.S. District Court where the action was removed. *Hollis v. Florida State Univ.* (9th
 Cir. 2001) 259 F.3d 1295, 1299. This is because federal removal jurisdiction is not

1 “derivative” of state court jurisdiction. 28 U.S.C. § 1411(f); *Nishomoto v. Federman-*
 2 *Bachrach & Assocs.* (9th Cir. 1990) 903 F.2d 709, 714, fn. 11. However, here venue in
 3 the San Diego Superior Court was proper in the first instance. Cal. Bus. & Prof. Code
 4 Section 19807.

5 **VENUE WAS PROPER IN THE SAN DIEGO**
 6 **SUPERIOR COURT PRIOR TO REMOVAL**

7 The California State Legislature made it clear that any lawsuit filed against the
 8 Commission could be, at Plaintiff’s choosing, venued in San Diego County. To this end,
 9 the California Legislature enacted Cal. Bus. & Prof. Code Section 19807, which provides
 10 as follows:

11 Except as otherwise provided in this chapter, whenever the
 12 department or commission [*i.e.*, the California Gambling
 13 Control Commission; see Section 198059e)] is a defendant or
 14 respondent in any proceeding, or when there is any legal
 15 challenge to regulations issued by the commission or
 department, venue for the proceeding shall be in the County of
 Sacramento, the City and County of San Francisco, the
 County of Los Angeles, or the County of San Diego.
 (Emphasis added.)

16 Thus, Plaintiff properly filed suit in the San Diego Superior Court prior to removal.
 17 Therefore, should the Court remand back to State Court, the action would remain in the
 18 San Diego Superior Court by virtue of Cal. Bus. & Prof. Code Section 19807.

19 **THIS CASE IS ALSO NOT SUBJECT TO DISCRETIONARY**
 20 **“CONVENIENCE” TRANSFER UNDER 28 USC SECTION 1404(a)**

21 Although the U.S. District Court has the discretion under 28 USC Section 1404(a)
 22 to transfer an action to another district “for convenience of the parties, witnesses and in
 23 the interest of justice”, it can only do so if the “transferee” district is where the case “might
 24 have been brought” originally. 28 USC Section 1404(a). To this end, it must be shown
 25 that:

- 26 (1) The transferee district court would have had subject matter jurisdiction; and
- 27 (2) The defendants would have been subject to personal jurisdiction; and
- 28 (3) Venue would have been proper in the transferee district.

1 *Hoffman v. Blaski* (1960) 363 US 335, 343-344, 80 S.Ct. 1084, 1089-1090. However, as
 2 shown in Plaintiff's Motion to Remand (which Plaintiff incorporates herein by reference),
 3 there is no federal question jurisdiction. The complaint seeks only equitable relief in the
 4 form of an injunction and a judicial determination of the obligations of the Commission
 5 under State law. As such, no federal subject matters jurisdiction is implicated, and the
 6 case should be remanded. Without this key element, there is no right to transfer to
 7 another district court in Sacramento, or elsewhere.

8 Moreover, the trial court will be asked to decide issues of law based for the most
 9 part on stipulated facts. For example, the parties will likely (and should), stipulate that the
 10 Commission has withheld RSTF money from the Plaintiff, the amount withheld, and the
 11 Commission's reasons for doing so. The court will then be asked to simply determine
 12 whether the Commission is correct in doing so under California statutory law governing
 13 the Commission's obligations as trustee of the RSTF money. In this regard, the
 14 convenience of the "witnesses" or "parties" is irrelevant. The case will be decided as a
 15 matter of law, for the most part on undisputed facts.

16 **THE OSC SHOULD BE CONTINUED UNTIL THE**
 17 **PLAINTIFF'S MOTION TO REMAND IS HEARD AND DECIDED**

18 Plaintiff has on calendar for March 10, 2008, a motion to remand back to state
 19 court. If the Court grants it, the Court's "OSC why venue is proper in this district" will be
 20 moot. Accordingly, Plaintiff requests the Court continue the OSC until March 10, 2008.

21 **CONCLUSION**

22 Venue is proper in this district, for the foregoing reasons. However, the OSC
 23 should be continued to March 10, 2008, the date of Plaintiff's Motion to Remand. If the
 24 Court grants the remand motion, the OSC regarding venue is moot.

25
 26 DATED: February 5, 2008

s/ Manuel Corrales, Jr.

27 Manuel Corrales, Jr.
 28 Attorney for Plaintiff
 The California Valley Miwok Tribe

CERTIFICATE OF SERVICE

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

Court: United States District Court, Southern District, Case No. 08-CV-0120 BEN AJB

I Declare: On **February 6, 2008**, I electronically filed the following documents:

- 1. PLAINTIFF'S RESPONSE RE: ORDER TO SHOW CAUSE WHY VENUE IS PROPER IN THE SOUTHERNDISTRICT OF CALIFORNIA**
- 2. CERTIFICATE OF SERVICE**

ELECTRONIC MAIL NOTICE LIST

I have caused the above-mentioned document(*s) to be electronically served on the following person(s) who are currently on the list to receive e-mail notices for this case:

Peter.Kaufman@doj.ca.gov

MANUAL NOTICE LIST

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

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 **February 6, 2008**, at San Diego, California.

Manuel Corrales, Jr., Esq.

s/Manuel Corrales, Jr.

Declarant

Signature

1 Manuel Corrales, Jr., SBN 117647
2 **Attorney at Law**
3 11753 Avenida Sivrita
4 San Diego, CA 92128
5 Phone: (858) 521-0634
6 Fax: (858) 521-0633

7
8 Attorney for Plaintiff
9 CALIFORNIA VALLEY MIWOK TRIBE

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,
Plaintiff,
v.
THE CALIFORNIA GAMBLING
CONTROL COMMISSION; and DOES
1 THROUGH 50, Inclusive,
Defendants.

Case No. 08 CV 0120 BEN AJB

**NOTICE OF HEARING AND MOTION TO
REMAND BACK TO STATE COURT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

DATE: March 10, 2008
TIME: 10:30 A.M.
COURTROOM: 3
LOCATION: 940 Front Street
San Diego, A 92101
JUDGE: Hon. Roger J. Benitez

TO: DEFENDANT THE CALIFORNIA GAMBLING CONTROL COMMISSION AND
ITS ATTORNEYS OF RECORD, AND ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that on March 10, 2008, at 10:30 a.m., or as soon
thereafter as the matter can be heard in Courtroom 3, before the Hon. Roger T. Benitez,
Plaintiff California Valley Miwok Tribe ("Miwok Tribe") will, and hereby does, move this
Court for an order remanding this case back to the State Superior Court in San Diego
from whence it came, on the grounds that no federal question jurisdiction exists and
removal was therefore improper, and on the further ground that Plaintiff's complaint
seeks only declaratory/injunctive relief under State law. Moreover, the Compact which
forms part of the basis for relief does not permit a claim for monetary damages, only
equitable relief with respect to enforcement of the Compact provisions.

1 **PLEASE TAKE FURTHER NOTICE** that opposition papers must be filed and
2 served within 14 days of the hearing date.

3 This motion will be based on this notice, the attached memorandum of points and
4 authorities, the complete file and records of this action, and such other oral and
5 documentary evidence as may be presented at the time of hearing.

6
7 DATED: February 5, 2008

s/ Manuel Corrales, Jr.

8 Manuel Corrales, Jr.
9 Attorney for Plaintiff
The California Valley Miwok Tribe
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Miwok Tribe submits the following memorandum of points and authorities
3 in support of its motion to remand.

4 **I.**

5 **INTRODUCTION**

6 As a non-Compact Tribe, Plaintiff is entitled to receive a share of Indian Gaming
7 revenue through the Indian Gaming Revenue Sharing Trust Fund ("RSTF"). Under State
8 law, the California Gambling Control Commission ("Commission") is to act as trustee of
9 the funds collected into the RSTF and distribute proportionate shares to non-Compact
10 Tribes, including Plaintiff. The Commission did so, until 2005, when the Miwok Tribe
11 became involved in a tribal leadership dispute.

12 Under State law, the Commission is to distribute RSTF money to non-Compact
13 Tribes, like Plaintiff, "in accordance with distribution plans specified in the tribal-state
14 gaming compacts". Cal. Gov. Code Section 12012.75. Thus, the Compact serves as a
15 guide or basis for the Commission's state, statutory duties to distribute those funds. For
16 example, the Compact provides that the Commission "shall have no discretion" in
17 deciding whether to distribute RSTF payments. Compact Section 4.3.2.1(b).3.2.1(b).

18 Plaintiff alleged the Commission violated State law in connection with its duties to
19 disburse RSTF payments to Plaintiff. Nowhere does Plaintiff allege the Commission
20 violated federal law in withholding these funds.

21 Plaintiff alleges simply that the Commission is "wrongfully withholding RSTF
22 money" belonging to the Tribes, because the Commission has incorrectly determined that
23 the Plaintiff is not entitled to continued payment because it is not "organized." (Complaint,
24 para 23, 32 and 34.) To this end, Plaintiff only seeks equitable relief by way of an
25 injunction "restraining the Commission from withholding Plaintiff's money", and most
26 importantly by way of a declaration of rights and duties. Plaintiff's declaratory relief claim
27 (Second Cause of Action) asks the Court to make a judicial determination under State law
28 (*i.e.*, pursuant to CCP § 1060) that the Commission's decision to withhold these RSTF

1 funds from Plaintiff is contrary to its state statutory duties. (Complaint, para 32, 34.)

2 To clarify that the main thrust of its claim is for equitable relief under State law,
3 Plaintiff has withdrawn its Third Cause of Action for Breach of Contract and its Fourth
4 Cause of Action for Breach of Fiduciary Duty. These causes of action are surperfolus and
5 unnecessary. The Compact does not permit suit for damages, other than equitable relief
6 to obtain specific performance for payment of funds or declaration relief for that purpose.
7 (See Section 9.4(2) of Compact.)

8 Accordingly, Plaintiff's claims do not arise (and never have arisen) under federal
9 law. The case of *Cabazon Band of Mission Indians v. Wilson* (9th Cir. 1997) 124 F.3d
10 1050, cited by the Commission in support of its removal petition does not apply. The
11 Compact there predated the 1997 Compacts at issue here. Moreover, the Compact in
12 *Cabazon* contained a specific clause requiring resolution of the licensing fee dispute to be
13 by way of declaratory relief in a federal U.S. District Court. No such language exists in
14 the present 1999 Compact with regard to any dispute. Beyond that, the Commission can
15 point to no other reason to remove this case to federal court. No federal question exists.

16 This Court has the discretion, nevertheless, to remand based on abstention
17 principles, since Plaintiff seeks only equitable relief under state law.

18 The Commission nevertheless waived removal to federal court, because it
19 previously sought the same equitable relief in the State Superior Court.

20 Venue is proper in San Diego County, because State law permits the Commission
21 to be sued in San Diego County. Cal. Bus. & Prof. Code Section 19807.

22 Accordingly, this case should be remanded back to the San Diego Superior Court.

23 II.

24 ARGUMENT

25 A. THERE IS NO SUBJECT MATTER JURISDICTION

26 1. Plaintiff's Claims Do Not "Arise Under" Federal Law

27 As stated, Plaintiff seeks only equitable relief with respect to the Commission's
28 state statutory duties in administering the RSTF money. Plaintiff seeks an order under

CCP § 326 (injunctive relief) restraining the Commission from withholding Plaintiff's share of RSTF money. Plaintiff also seeks a judicial declaration under CCP § 1060 regarding the Commission's obligations under State law (Cal. Gov. Code Section 12012.75) to distribute RSTF to the Plaintiff. The Commission is presently withholding those funds, making it necessary for a judicial determination of its duties under State law. Plaintiff is not seeking monetary changes. The question is whether Plaintiff is entitled to the RSTF money the Commission is withholding. As such, no federal question is implicated, and thus Plaintiff's claims (which are equitable in nature) do not "arise under" federal law. 28 U.S.C. Section 1467(c).

28 U.S.C. Section 1447(c) mandates remand of State law claims where the court lacks removal jurisdiction. See *Mills v. Harmon Law Offices, P.C.* (1st Cir. 2003) 344 F.3d 42, 45.

Accordingly, the Court should remand back to State Court because no federal question existed at the time of removal. In this regard, *Cabazon, supra*, has no application. In *Cabazon*, the Compact predated the present 1999 Compact. 124 F.3d at 1053 (1990 and 1991 Compacts). Moreover, the *Cabazon* Compact had a specific provision that required the license fee dispute at issue to be decided by declaratory relief in a U.S. District Court. The relevant *Cabazon* Compact provision provided in pertinent part as follows:

Cabazon shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the State license fee under Business and Professions Code Section 19516.6 ... are permissible under the Act [IGRA].

124F.3d at 1054.

In contrast, no such provision exists in the 1999 Compact which forms a part of the basis for Plaintiff's equitable relief claims. Nowhere in the 1999 Compact is there any mandate that the present dispute, or any dispute, be determined in a federal court. Indeed, the parties to the 1999 Compact have an option to file in state or federal courts. For this reason, *Cabazon* is distinguishable.

Moreover, *Cabazon* does not stand for the proposition urged by the Commission that any dispute involving the 1999 Compact involves a federal question and thus must be brought in federal court. In fact, the 1999 Compact was not even in existence when *Cabazon* was decided.

2. Plaintiff Seeks Only Equitable Relief, Not Money Damages

As shown, the thrust of Plaintiff's claims are equitable in nature. No money damages are sought. To clarify this point, Plaintiff has withdrawn its Third and Fourth Causes of Action for Breach of Contract and Breach of Fiduciary Duty, respectively

Plaintiff does not allege the Commission has "taken" money from the Tribes in violation of federal law. Rather, Plaintiff's complaint alleges the Commission has withheld funds from the RSTF belonging to the Tribe, and that the Commission's actions are in violation of State law, not federal law.

B. THE U.S. DISTRICT COURT SHOULD REMAND BASED ON ABSTENTION

Alternatively, Plaintiff requests the Court remand based on abstention principles. *Quackenbush v. Allstate Ins. Co.* (1996) 517 U.S. 706, 730-731, 116 S.Ct. 1712, 1723. The court has the discretion to do so, based on "scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." *Quackenbush v. Allstate Ins. Co.*, *supra* 517 U.S. at 718, 116 S.Ct. at 1718, 1721. In light of Plaintiff's sought after relief being equitable in nature, remand based on abstention is particularly appropriate. *Quackenbush*, *supra* at 718. See also *Beach Cove Assocs. V. United States Fire Ins. Co.* (D.SC 1995) 903 F.Supp. 959, 962-963 (holding that declaration relief abstention is a discretionary ground for remand to state court); *Maryland v. Ins. Group v. Roskam Baking Co.* (WD MI 1998) 6 F.Supp.2d 670, 672-673 (declaratory relief abstention).

Here, Plaintiff only seeks injunctive and declaratory relief as to the Commission's obligations to release the withheld RSTF funds and resume its state statutory duty to disburse to Plaintiff. It should be noted that the RSTF was created by state law, not federal law. Thus, Cal. Gov. Code Section 12012.75 provides in pertinent part:

There is hereby created in the State Treasury a special fund called the “Indian Gaming Revenue Sharing Trust Fund” ... 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 non-compact tribes, in accordance with distribution plans specified in tribal-state gaming compacts. (Emphasis added.)

The fact that the Commission must disburse “in accordance with [the provisions] specified in the tribal-state gaming compacts”, as called for under Cal. Gov. Code Section 12012.75, does not make the Commission’s disbursement obligations federal in nature. The Commission’s obligations to disburse RSTF funds to Plaintiff are founded on state law, not federal law. The dispute can be, and should be, decided in state court. *See Gila River Indian Comm. V. Henningson, etc.* (9th Cir. 1980) 626 F.2d 708, 714-715 (reasoning that there was no reason to extend the reach of the federal common law to cover all contracts entered into by Indian Tribes. Otherwise the federal court might become a small claims court for all such disputes).

C. THE COMPACT DOES NOT MANDATE DISPUTE RESOLUTION IN FEDERAL COURT

Plaintiff, as a non-Compact Tribe, is not a party to the Compact. It has no casino or Indian Gaming operations. It is merely beholden to the State, via the Commission, to disburse RSTF money which the Compact Tribes (who operate casinos) pay to the State from their gaming winnings. The Commission is guided by the Compact in how it should disburse. However, what is important is that the RSTF is disbursed from the State Treasury, not directly from the Compact Tribes. As such, it becomes a matter of State money, and the Commission’s duties and obligations are to be determined under State law.

Since Plaintiff is not a party to the Compact, the dispute resolution provisions under Section 9.0 of the Compact do not necessarily apply to Plaintiff. For example, Section 9.0(d) provides that the parties (*i.e.*, the Compact Tribes and the State) “may” (not “shall”) resolve their disputes in the U.S. District Court “where the Tribes’ gaming

1 facility” is located. See also 11.2.1(Compact) (same language). Since Plaintiff has no
 2 “gaming facility”, this provision does not apply to the Tribe. Even if it did, there is no
 3 mandatory requirement that the dispute be resolved in the federal court, because
 4 subsection (d) further provides:

5 ... (or, if those federal courts lack jurisdiction, in any state court
 6 of competent jurisdiction and its related courts of appeal) ...
 (Emphasis added.)

7 As shown, there is no federal question jurisdiction with respect to Plaintiff’s claims for
 8 equitable relief. Thus, even if Plaintiff were a party, Plaintiff has the option of suing in state
 9 court. Unlike the Compact in *Cabazon, supra*, there is no provision mandating resolution
 10 of a declaratory relief claim, or any dispute, in the U.S. District Court. 124 F.3d at 1054.

11 Moreover, Section 9.4(a)(2) provides:

12 (a) In the event that a dispute is to be resolved in federal or a
 13 state court [the parties waive any immunity] ... provided
 that :

14 ***

15 (2) Neither side makes any claim for
 16 monetary damages (that is, only injunctive,
 17 specific performance, including enforcement of a
 18 provision of this Compact requiring payment of
 money to one another of the parties, or
 declaratory relief is sought) ... (Emphasis
 added.)

19 Thus, even if Plaintiff were a party, the Compact limits judicial action to equitable relief.
 20 Monetary damages are prohibited, and can only be equitable in nature. In other words, if
 21 the State feels the Compact Tribes are underpaying their fair share of Indian Gaming
 22 winnings, the State could sue the Compact Tribes in equity requiring the Tribes to pay as
 23 agreed. While the end result is the same, it is the form of relief that is permitted.

24 Similarly, while the end result may be the same for the Miwok Tribe to get paid its
 25 entitled share of RSTF funds, the relief sought is equitable, *i.e.*, a declaration concerning
 26 the Commission’s duty to pay and an order compelling it to pay.

27 Accordingly, the Compact, assuming it applies directly to Plaintiff’s claims, does
 28 not mandate that Plaintiff’s claims be adjudicated in federal court, especially since there is

1 no federal question. The Compact applies indirectly, insofar as it provides a guideline as
2 to how the Commission should discharge its State defined duties in disbursing RSTF
3 money to non-Compact Tribes, such as the Plaintiff. The RSTF money comes from the
4 State Treasury, not the Compact, and thus the Commission's duty to disburse involve
5 only state law.

6 **D. THE COMMISSION BY PRIOR ACTION HAS AGREED TO A**
7 **STATE COURT FORUM**

8 In its complaint, Plaintiff cited the District Court Decision in *California Valley Miwok*
9 *Tribe v. USA* (D.D.C. 2006 424 F.Supp.2d 197. Plaintiff alleges in its complaint that the
10 Compact erroneously interpreted that decision to justify withholding the RSTF money
11 from Plaintiff. In that decision, the Commission is mentioned of having filed an
12 interpleader action in State Court, seeking a judicial determination of its duty to pay RSTF
13 money to Plaintiff.

14 The Commission's actions are tantamount to a concession that there is no federal
15 question jurisdiction with respect to Plaintiff's present claims. The dispute is identical.
16 Plaintiff is not asking for anything different than what the Commission was seeking in the
17 interpleader action. An interpleader action functions similarly to a declaratory relief
18 action. *Morongo Band of M.Ind. v. Cal. State Board of Equalization* (9th Cir. 1988) 849
19 F.2d 1197, 1203. Thus, the Commission should be barred from seeking removal, based
20 upon its prior actions essentially embracing State Court resolution of these identical
21 claims.

22 **E. VENUE IS PROPER IN SAN DIEGO COUNTY**

23 As provided in the complaint, Cal. Bus. & Prof. Code Section 19807, the
24 Commission may be sued in San Diego County, if Plaintiff chooses.

25 ///

26 ///

27 ///

28 ///

1 III.

2 **CONCLUSION**

3 For the foregoing reasons, this case should be remanded back to the San Diego
4 Superior Court.

5
6 DATED: February 5, 2008

s/ Manuel Corrales, Jr.
Manuel Corrales, Jr.
Attorney for Plaintiff
The California Valley Miwok Tribe

CERTIFICATE OF SERVICE

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

Court: United States District Court, Southern District, Case No. 08-CV-0120 BEN AJB

I Declare: On **February 6, 2008**, I electronically filed the following documents:

- 1. NOTICE OF HEARING AND MOTION TO REMAND BACK TO STATE COURT; MEMORANDUM OF POINTS AND AUTHORITIES**
- 2. CERTIFICATE OF SERVICE**

ELECTRONIC MAIL NOTICE LIST

I have caused the above-mentioned document(*s) to be electronically served on the following person(s) who are currently on the list to receive e-mail notices for this case:

Peter.Kaufman@doj.ca.gov

MANUAL NOTICE LIST

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

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 **February 6, 2008**, at San Diego, California.

Manuel Corrales, Jr., Esq.

s/Manuel Corrales, Jr.

Declarant

Signature

CERTIFICATE OF SERVICE

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8 CALIFORNIA VALLEY MIWOK TRIBE

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 CALIFORNIA VALLEY MIWOK TRIBE,

12 Plaintiff,

13 v.

14 THE CALIFORNIA GAMBLING
15 CONTROL COMMISSION; and DOES
16 1 THROUGH 50, Inclusive,

17 Defendants.

Case No. 08 CV 0120 BEN AJB

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE
COMPLAINT; MEMORANDUM OF POINTS
AND AUTHORITIES**

DATE: March 10, 2008

TIME: 10:30 A.M.

COURTROOM: 3

LOCATION: 940 Front Street
San Diego, A 92101

JUDGE: Hon. Roger J. Benitez

18
19 Plaintiff California Valley Miwok Tribe ("Miwok Tribe" or "the Tribe" or "Plaintiff")
20 submits the following Memorandum of Points and Authorities in opposition to Defendant
21 The California Gambling Control Commission's ("the Commission") Motion to
22 Dismiss the Complaint.

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I.

INTRODUCTION

This is a suit for equitable relief as it pertains to the Commission's duty under California State law to distribute Revenue Sharing Trust Fund ("RSTF") money to a federally recognized, unorganized, non-compact Indian Tribe. Here, Plaintiff merely seeks a judicial declaration that the Commission must continue to pay it RSTF money, despite its present status of being recognized by the Bureau of Indian Affairs ("BIA") as "unorganized" due to the Tribe's ongoing Tribal leadership dispute.

The suit seeks no compensatory relief in the form of monetary damages.

II.

RELEVANT FACTUAL ALLEGATIONS

In 1994, Plaintiff was placed on the list of federally recognized tribes when Congress enacted the Federally Recognized Tribe List Act. Plaintiff was never removed from that list. As such, it continues to be a federally recognized Tribe.

In September of 1999, the State of California and various Indian Tribes in the State entered into what has been referred to as a "Tribal-State Gambling Compact" (hereinafter referred to as "Compact"), which enabled various "Compact" Tribes to operate gambling casinos on their reservations.

The Compact requires that the "Compact" Tribes contribute a certain percentage of their casino winnings to the State for placement in two separate funds, the Special Distribution Fund ("SDF") and the RSTF. This dispute involves the RSTF. The money placed in the RSTF is earmarked for Non-Compact Tribes who have less than 350 slot machines or no gambling facilities at all. Plaintiff has no gambling casinos.

Under State law, the RSTF money is placed in the State Treasury and designated as the "Indian Gaming Revenue Sharing Trust Fund". The Commission, a State agency, is charged with the responsibility under State law to distribute to Non-Compact Tribes, like Plaintiff, in accordance with the distribution plans specified tribal-state gaming compacts. Cal. Gov. Code Section 12012.75. The "distribution plans" under the

1 Compact specify the Commission's duties in paying out RSTF money to Non-Compact
2 Tribes, like Plaintiff.

3 Under Section 4.3.2.1 of the Compact, the Commission is to pay each Non-
4 Compact Tribe \$1.1 million per year, and if there is not enough money in the RSTF to
5 pay each Non-Compact Tribe this amount, then the funds are to be distributed in equal
6 shares. However, Cal. Gov. Code Section 12012.90(d) was later enacted to require the
7 Commission to take funds from the SDF to make up any shortfall in RSTF money, i.e., so
8 as to insure that each Non-Compact Tribe receives its full entitled share. Under Section
9 4.3.2.1(b) of the Compact, the Commission has no discretion as to how the RSTF money
10 is to be disbursed.

11 In late 1999, a leadership dispute arose within the Miwok Tribe that continues to
12 the present day. In addition, beginning in October of 2001 the Tribe and the BIA
13 disputed how the Tribe should be "organized" with respect to a governing constitution.
14 The dispute concerning the Tribe's constitution resulted in the Tribe suing the BIA in the
15 U.S. District Court in Washington D.C., seeking a judicial declaration that the BIA could
16 not interfere with the Tribe's right to establish its own constitution. The U.S. District
17 Court, however, dismissed the Complaint, concluding that the BIA could request the
18 Tribe to establish a constitution under certain guidelines. The U.S. District Court made
19 no ruling on whether the Tribe was no longer "federally recognized", or whether Sylvia
20 Burley, or anyone else, was an official representative of the Tribe.

21 In March of 2004 (prior to the U.S. District Court suit), the BIA wrote the Miwok
22 Tribe to advise that although it considered the Tribe to be "unorganized", it still
23 recognized Sylvia Burley, the former Tribal Chairperson, to be the official representative
24 of the Tribe, or otherwise a "person of authority". To date, the BIA has never withdrawn
25 that statement, even despite the U.S. District Court's decision dismissing the Tribe's suit.

26 In October of 2004, a former Tribal Councilmember, Yakima Dixie, who has
27 challenged (and continues to challenge) the Miwok Tribe leadership, sued the
28 Commission for a Temporary Restraining Order ("TRO"), seeking to restrain the

1 Commission from further distribution of RSTF money to the Tribe via Sylvia Burley. The
2 Commission opposed the suit, arguing that despite the Tribe being “unorganized”, Sylvia
3 Burley was still considered a person of authority for the Tribe by the BIA, and therefore it
4 was obligated to continue making RSTF payments to the Tribe via Ms. Burley. (See Ex.
5 3 to Defendant’s Request for Judicial Notice). Yakima Dixie’s request for a TRO was
6 denied, and the Commission continued to make quarterly RSTF payments to the Tribe
7 via Sylvia Burley, until August 4, 2005, two weeks after the BIA suspended the Tribe’s
8 federal (PL 93-638) contract funds, after the BIA’s efforts to resolve the Tribe’s internal
9 leadership dispute failed and the Tribe still had no governing constitution acceptable to
10 the BIA. Despite having suspended the Tribe’s federal contract funds, the BIA continued
11 to recognize the Tribe as an “unorganized” Tribe and Sylvia Burley as its official
12 representative.

13 The Commission’s decision to withhold the Tribe’s RSTF money on August 4,
14 2005, was inconsistent with its previous position as highlighted in its opposition papers to
15 Yakima Dixie’s TRO application. The Commission informed the Tribe at that time that it
16 would be withholding the Tribe’s RSTF money until the Tribe’s leadership was firmly
17 established. Later, in December 2005, the Commission filed an interpleader action
18 against Sylvia Burley, Yakima Dixie, and others it thought to be involved in the Tribal
19 leadership dispute, seeking to get the State Superior Court to make a determination on
20 whether the Tribe was properly organized and to resolve the Tribe’s internal leadership
21 dispute. It sought no relief with respect to its duties and responsibilities in disbursing
22 RSTF money, however. As a result, the Commission’s interpleader action was denied
23 on June 16, 2006.

24 The Commission has inexplicably decided to withhold RSTF money from Plaintiff,
25 because it is “unorganized” or otherwise because the BIA purportedly does not recognize
26 Sylvia Burley as an authorized representative of the Tribe. However, the BIA still
27 recognizes the Tribe, even though it is “unorganized”, the Tribe has never been taken off
28 of the federally recognized list of tribes pursuant to the Federally Recognized Indian

1 Tribe List Act of 1994, and the Compact does not disqualify a Non-Compact Tribe from
 2 receiving RSTF money because it is “unorganized”. Indeed, the Compact does not
 3 require the Commission to determine whether a Non-Compact Tribe is “organized” prior
 4 to making RSTF distributions. Moreover, the Compact specifically defines a “Tribe” as a
 5 “federally-recognized Indian tribe, or an authorized official or agency thereof.” Under this
 6 definition, the Miwok Tribe still qualifies for RSTF distributions. Even though it may be
 7 “unorganized”, it still remains federally recognized, and the BIA has never withdrawn its
 8 position that Sylvia Burley is an authorized representative of the Tribe. It is for these
 9 reasons that Plaintiff contends that the Commission’s actions in withholding its RSTF
 10 money is erroneous, and requests a judicial determination in State Court that the
 11 Commission has a duty to resume those payments to Plaintiff.

12 Presently, Yakima Dixie is incarcerated in the Deuel Vocational Institution in
 13 Tracy, California.

14 III.

15 **DISMISSAL OF CERTAIN CLAIMS**

16 After the Commission removed this case to the U.S. District Court, Plaintiff filed a
 17 FRCP 41(a)(1) Notice of Dismissal of its Third Cause of Action for Breach of Contract
 18 and its Fourth Cause of Action for Breach of Fiduciary Duty. Thus, no “compensatory”
 19 damages are sought.

20 IV.

21 **SUMMARY OF LAW ON RULE 12(b) MOTIONS TO DISMISS**

22 The Commission has moved to dismiss the Complaint pursuant to FRCP 12(b)(1),
 23 12(b)(6) and 12(b)(7). The following is a summary of the law in connection with such
 24 motions in federal court.

25 **A. Rule 12(b)(1): Dismissal for Lack of Subject Matter Jurisdiction**

26 The Complaint is subject to dismissal under FRCP 12(b)(1), if the court lacks the
 27 statutory authority to hear and decide the dispute. This includes where there is no
 28 federal question at issue, if the parties are not completely diverse, or if the amount in

1 controversy does not exceed \$75,000.

2 In evaluating subject matter jurisdiction attacks, the court ordinarily construes the
3 complaint liberally, accepts all uncontroverted, well-pleaded factual allegations as true,
4 and views all reasonable inferences in plaintiff's favor. Whisnant v. United States (9th
5 Cir. 2005) 400 F.3d, 1177, 1179. Whether subject matter jurisdiction exists is
6 determined as of the date the lawsuit was filed. Grupo Dataflux v. Atlas Global Group,
7 L.P. (2004) 541 U.S. 567, 574, 124 S.Ct. 1920, 1925.

8 **B. Rule 12(b)(6): Dismissal For Failure To State A Claim Upon Which**
9 **Relief Can Be Granted**

10 A motion to dismiss for failure to state a claim has its roots in the common law
11 demurrer. See De Sole v. United States (4th Cir. 1991) 947 F.2d 1169, 1178, fn. 13.
12 Like a common law demurrer, it tests the legal sufficiency of the allegations in the
13 complaint.

14 A claim is subject to dismissal under FRCP 12(b)(6) where it either asserts a legal
15 theory that is not cognizable as a matter of law or because it fails to state sufficient facts
16 to support a legally cognizable claim. See SmileCare Dental Group v. Delta Dental Plan
17 of Cal., Inc. (9th Cir. 1996) 88 F.3d 780, 783. However, when ruling on a 12(b)(6) motion
18 to dismiss, the court assumes the truth of the allegations pled in the complaint, resolves
19 all doubts and inferences in the plaintiff's favor, and views the pleadings in the light most
20 favorable to the non-moving party. Jackson v. Birmingham Bd. Of Educ. (2005) 544 U.S.
21 167, 170-71, 125 S.Ct. 1497, 1502-03.

22 In ruling on a motion to dismiss for failure to state a claim, the court reads the
23 allegations in the complaint liberally, and will dismiss only when the pleadings show on
24 their face "some insuperable bar to relief". Strand v. Diversified Collection Serv., Inc. (8th
25 Cir. 2004) 380 F.3d 316. Such dismissals are disfavored and are not routinely granted.
26 Test Masters Educ. Serv. V. Singh (5th Cir. 2005) 428 F.3d 559,570. To this end, a claim
27 will only be dismissed under Rule 12(b)(6) if it appears beyond doubt that the pleader
28 can prove no set of facts in support of the claim that would entitle the pleader to relief.

1 Conley v. Gibson (1957) 355 U.S. 41, 78 S.Ct. 99.

2 Neither will the court dismiss a claim under Rule 12(b)(6) merely because the
3 court doubts the pleader's allegations or suspects that the pleader will ultimately not
4 prevail at trial. See Ideal Steel Supply Corp. v. Anza (2d Cir. 2004) 373 F.3d 251, 264.
5 Indeed, the courts are particularly hesitant to dismiss at the pleading stage those claims
6 advancing novel legal theories, reasoning that the claims could be better examined
7 following development of the facts through discovery. See McGary v. City of Portland
8 (9th Cir. 2004) 386 F.3d 1259, 1270.

9 Lastly, plaintiffs need not anticipate the defendants' likely defenses, nor attempt to
10 preemptively "plead around" them in the complaint. See Hollander v. Brown (7th Cir.
11 2006) 457 F.3d 688. The viability of plaintiff's claims is not dependent upon whether the
12 defendant has a defense. See United States v. Northern Trust Co. (7th Cir. 2004) 372
13 F.3d 886, 888. Thus, plaintiff's failure to "plead around" a likely defense is typically not a
14 proper basis for dismissal. See Xechem, Inc. v. Bristol-Myers Squibb Co. (7th Cir. 2004)
15 372 F.3d 899, 901.

16 **C. Rule 12(b)(7): Dismissal For Failure To Join A Rule 19 Party**

17 A case will be dismissed if there is an absent party under Rule 19, without whom
18 relief cannot be granted or whose interest in the dispute is of such a nature that to
19 proceed without that party could prejudice that party or others. See Hammond v.
20 Clayton (7th Cir. 1996) 83 F.3d 191, 195.

21 The courts are hesitant to dismiss for failure to join absent parties, and will not do
22 so on a vague possibility that unjoined persons may have an interest in the litigation.
23 See Sever v. Glickman (D.Conn.2004) 298 F.Supp.2d 267, 275. In ruling on a Rule
24 12(b)(7) motion to dismiss, the court is to apply the standards of Rule 19(a) to determine
25 whether joinder is essential and, if so, whether the factors of Rule 19(b) make dismissal
26 appropriate. See HS Resources, Inc. v. Wingate (5th Cir. 2005) 327 F.3d 432, 439. The
27 court will also accept plaintiff's allegations as true in ruling on the motion, and will draw
28 all reasonable inferences in the plaintiff's favor. See Rotec Indus., Inc. v. Aecon Group,

1 Inc. (N.D.Ill.2006) 436 F.Supp.2d 931, 933.

2 V.

3 **ARGUMENT**

4 **A. A RULING GRANTING PLAINTIFF'S MOTION TO REMAND BACK TO**
 5 **STATE COURT WILL MAKE DEFENDANT'S 12(b) MOTIONS TO DISMISS**
 6 **MOOT**

7 Plaintiff has pending a motion to remand this case back to State Court on the
 8 grounds that there is no federal question at issue. If the court grants the motion, then the
 9 Commission's motion to dismiss on various grounds will be moot. In this regard, the
 10 Court should rule on the motion to remand first.

11 **B. PLAINTIFF HAS THE CAPACITY TO SUE FOR THE SOUGHT AFTER**
 12 **EQUITABLE RELIEF**

13 **1. The Defendant's Claim Of Lack Of Subject Matter Jurisdiction Is**
 14 **Inconsistent With Its Removal Petition**

15 When the Commission removed this case to the U.S. District Court, it claimed that
 16 federal question jurisdiction exists, because the Tribal Compact forming the basis of the
 17 Commission's duties is governed by federal law. While Plaintiff disagrees with that
 18 contention, the point is that the Commission now asserts in its motion to dismiss that the
 19 Court lacks subject matter jurisdiction, because the Miwok Tribe is not federally
 20 recognized, and that the Compact bars 3rd party claims for compensatory damages (See
 21 pg. 2 of Defendant's Motion to Dismiss, paragraphs 1 and 2).

22 These contentions are not only inconsistent with the Commission's position on
 23 removal, but they are factually and legally erroneous.

24 Plaintiff agrees that this Court does not have jurisdiction, but only in the context of
 25 opposing the original removal action. No federal question is at issue, since the Plaintiff
 26 only seeks declaratory and injunctive relief with respect to the Commission's duty under
 27 State law to distribute to Plaintiff its RSTF money.

28 ///

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1 **2. The U.S. District Court In Washington D.C. Has recognized Plaintiff**
 2 **As Having The Capacity To Sue**

3 In its Decision, the U.S. District Court in California Valley Miwok Tribe v. The
 4 United States (D.C.D.C.2006) 424 F.Supp.2d 197, stated:

5 “The California Valley Miwok Tribe, an Indian Tribe ‘recognized and
 6 eligible for funding and services’ pursuant to Section 104 of the Act of
 7 November 2, 1994,...seeks declaratory and injunctive relief against what
 8 it calls federal government interference with its internal affairs....”

9 424 F.Supp.2d at 197. At no time did the U.S. government move to dismiss the Miwok
 10 Tribe’s complaint, because the Tribe purportedly lacked the capacity to sue. In its
 11 Decision, the U.S. District Court made no mention or ruling that the Tribe had no
 12 capacity to sue, even though the Decision contains a factual rendition on how the Tribe
 13 reached the point of being recognized by the BIA as “unorganized”, because of the
 14 Tribe’s dispute with the BIA over its constitution and the ongoing Tribal leadership
 15 dispute. Instead, the U.S. District Court began its written Decision with the undisputed
 16 observation that the Tribe filed suit as a Tribe that was “recognized and eligible for
 17 funding and services” under federal law.

18 The Commission relies heavily on the U.S. District Court’s Decision in advancing
 19 various theories in its Motion to Dismiss. Indeed, the Commission has made it clear in
 20 its brief that one of the main reasons it has decided to withhold RSTF money from the
 21 Plaintiff, is because of the U.S. District Court’s Decision. Thus, the Commission should
 22 be estopped from arguing the Plaintiff lacks the capacity to sue in this lawsuit, while at
 23 the same time trying to reap the benefits of a ruling on Plaintiff’s prior lawsuit where the
 24 Plaintiff’s capacity to sue was never challenged, but was instead established.

25 **3. Plaintiff’s Breach Of Contract Damage Claims**
 26 **Have Been Dismissed**

27 The Commission further argues that Plaintiff has no capacity to sue for breach of
 28 contract or compensatory damage claims, because the Compact does not permit such
 29 claims. This is no longer a valid argument, because the Plaintiff has dismissed its

1 Breach of Contract and Breach of Fiduciary Duty claims. As stated, Plaintiff's suit is for
2 equitable relief with respect to the Commission's duties to disburse RSTF money under
3 the facts in this case.

4 **4. The Federal Government Has Never Withdrawn Its**
5 **Recognition Of The Miwok Tribe**

6 Pointing to the U.S. District Court Decision, the Commission argues that because
7 the federal government purportedly does not recognize the Tribe as "organized", the
8 Plaintiff lacks the capacity to sue. It further argues that Plaintiff further lacks the capacity
9 to sue, because the federal government has rejected Sylvia Burley as a person of
10 authority for the Tribe, based upon a letter dated December 14, 2007 from the BIA
11 (Defendant's Ex. 2 for Req. for Judicial Notice). These contentions are without merit and
12 a misreading of both the U.S. District Court's Decision and the BIA letter of December
13 14, 2007.

14 The U.S. District Court in Miwok, supra, made no ruling or determination that the
15 Miwok Tribe was not federally recognized. Nor did it rule that the Tribe had no
16 government-to-government relationship with the federal government. Its Decision was
17 limited to whether the Tribe in its suit had a legally cognizable claim for "federal
18 government interference with its internal affairs". No other issue was before the Court at
19 that time.

20 As stated, the Miwok Tribe is a federally recognized Tribe, not because of what
21 the BIA says about it. Rather, it is a recognized Tribe by virtue of it having been placed
22 on the "Federally Recognized Indian Tribe List Act of 1994". (See page 2 of Decision,
23 attached as Plaintiff's Exhibit). The Commission has not shown that the federal
24 government has ever removed the Tribe from that list.

25 The Commission then points to a letter dated December 14, 2007 from the BIA to
26 Sylvia Burley, returning her application for the Tribe for P.L. 93-638 money, i.e., federal
27 contract money. (Defendant's Ex. 2). It also attaches an appellant brief from an attorney
28 from the BIA, wherein the attorney argues that the December 14, 2007 letter from the

1 BIA to Burley “makes it clear” that Burley is not the Tribe’s official representative.
2 (Defendant’s Ex. 1). The appellant brief (Defendant’s Ex. 1) is, however, purely
3 argumentative and cannot be considered as fact. It lack proper foundation and is
4 hearsay. Moreover, the appellate counsel’s statements are not an official statement of
5 policy from the BIA. Indeed, the December 14, 2007 letter from the BIA doesn’t say that
6 the BIA does not consider Burley anymore as a person of authority for the Miwok Tribe.

7 The December 14, 2007 letter from the BIA only says that the BIA could not
8 accept the application for 638 funding for the Tribe, because the Tribe was not
9 “organized”. It stated:

10 “...[C]onsideration to contract federal funds to operate Bureau of
11 Indian authorized programs will only be given to an application
12 submitted by [a] federally recognized tribe with a recognized governing
body...

13 Because we do not recognize any current governing body for the
14 California Valley Miwok Tribe, we are unable to accept the proposal for
the above stated reason...” (Emphasis added).

15 The Commission’s interpretation of this letter is strained at best. The letter says nothing
16 about Ms. Burley having no authority to act for the Tribe.

17 As shown by this letter, disbursement of P.L. 93-638 federal funds requires (at
18 least according to the BIA) that the recipient Tribe be organized. Being merely federally
19 recognized is apparently not sufficient. While the Miwok Tribe is indeed federally
20 recognized, it presently suffers from being unorganized. It is a federally recognized,
21 “unorganized” Tribe, with Silvia Burley as its representative. However, according to the
22 BIA, in order for the Tribe to receive 638 funding, it must be organized. The reason for
23 this obviously is because the Tribe must enter into a contract with the BIA for such
24 funding. (See Letter of December 14, 2007 from BIA, first paragraph: “...we are
25 returning your application to contract FY 2008 funding from the Bureau of Indian Affairs,
26 under P.L. 93-638...). No such requirement exists with respect to RSTF money under
27 California State law. Indeed, Non-Compact Tribes do not have to enter into a contract
28 each year, or at all, in order for them to receive RSTF money. It is for this reason that

1 the Commission cannot refuse to continue RSTF disbursements to the Tribe because
 2 the Tribe is not organized. That may be a purported reason for the BIA not to contract
 3 with the Tribe for 638 funding, but it cannot be the reason for the Commission to withhold
 4 RSTF money. The standards and requirements are entirely separate and different. The
 5 source of funding for 638 funding is federal, whereas the source of funding for RSTF
 6 money is the California State Treasury. "Apples and oranges".

7 As stated more fully below, the Tribe's status as "unorganized" does not disqualify
 8 it from RSTF disbursements. Indeed, the Commission has admitted as much in its prior
 9 pleading in opposing Yakima Dixie's TRO. It paid out these moneys to Sylvia Burley as
 10 the Tribe's authorized or "official" representative. It has pointed to no evidence that the
 11 BIA has stated that it no longer considers Ms. Burley as the Tribe's official
 12 representative. According to the Compact, the Commission must distribute the
 13 accumulated RSTF money to Ms. Burley, whether or not the Tribe is "organized", as long
 14 as it can be shown that Ms. Burley remains as the Tribe's representative. (See Section
 15 2.21 of Compact: "'Tribe' means a federally-recognized Indian tribe, or an authorized
 16 official or agency thereof"). The Compact does not require that the Tribe be organized in
 17 order to qualify for RSTF money.

18 **C. PLAINTIFF IS NOT SEEKING A DETERMINATION OF ITS STATUS AS**
 19 **A TRIBE IN THIS ACTION**

20 **1. The Defendant has Misrepresented The Holding In The U.S.**
 21 **District Court Decision In "Miwok v. USA"**

22 In an effort to bring in a res judicata argument where none exists, the Commission
 23 makes several misstatements in its moving papers. With respect to the U.S. District
 24 Court Decision in "Miwok v. USA", the Commission falsely asserts that the Court "upheld
 25 the federal government's determination that [Sylvia] Burley and her government did not
 26 represent the Miwok and that ruling is now on appeal." (pg. 8, lines 23-24 of Defendant's
 27 P/A's). It then goes on to argue:
 28

1 “A decision in that case will have res judicata effect on issues
 2 regarding the status of Burley’s government and her capacity
 3 to represent the Miwok because res judicata bars relitigation in a
 4 subsequent proceeding of all issues that were raised or that could
 5 have been raised in a prior proceeding between the parties....”

6 (Ibid. at lines 26-28, and line 1, page 9). A quick and cursory review of that Decision will
 7 reveal that the U.S. District Court made no such holding or finding.

8 Moreover, nowhere in the Complaint in this case does the Plaintiff seek a judicial
 9 determination concerning its status as a Tribe. That is simply not what this case is
 10 about.

11 **2. Plaintiff’s Complaint Focuses Solely On The Commission’s 12 Duty Under State Law To Distribute RSTF Money To Plaintiff**

13 As stated, the main thrust of Plaintiff’s lawsuit is for equitable relief in the form of a
 14 judicial declaration of Plaintiff’s rights to RSTF money and the Commission’s duties to
 15 distribute such funds to the Plaintiff, as well as an injunction restraining the Commission
 16 from withholding these moneys and compelling distribution. There are no other issues to
 17 be decided.

18 Specifically, Plaintiff does not ask the Court to make a judicial determination of its
 19 Tribal status. The Commission had made that mistake previously, when it filed an
 20 interpleader action. The State Superior Court dismissed that suit, because, instead of
 21 seeking a judicial determination of its duties with respect to disbursement of the RSTF
 22 funds, the Commission only sought a judicial determination of the Tribe’s status as a
 23 federally recognized tribe, and who was authorized to represent it. (See Minute Order on
 24 Ruling dismissing the Commission’s interpleader action, Plaintiff’s Ex. 3). The Plaintiff is
 25 not doing so here, however.

26 **D. PLAINTIFF MERELY SEEKS A JUDICIAL DETERMINATION OF THE 27 COMMISSION’S DUTY TO PAY RSTF MONEY TO “UNORGANIZED”, 28 FEDERALLY-RECOGNIZED, NON-COMPACT TRIBES, OR THEIR AUTHORIZED REPRESENTATIVE**

It is undisputed that Plaintiff is a federally-recognized tribe. The Commission has

1 admitted it is. (See the Declaration of Gary Qualset, Defendant's Ex.3, Appendix). The
 2 U.S. District Court in "Miwok v. USA" concluded it was in its Decision (See 1st paragraph
 3 of the Decision). The BIA has never withdrawn its recognition of the Tribe. Most
 4 importantly, the Tribe remains on the "Federally Recognized Indian Tribe List Act of
 5 1994", and has never been taken off of that list.

6 The dispute here centers around the Commission's mistaken belief that it cannot
 7 continue paying Plaintiff RSTF money, because the Tribe is not "organized" and thus
 8 purportedly not entitled to federal P.L. 93-638 contract money from the BIA. While that
 9 may be the purported standard for the BIA in granting 638 federal contract money to
 10 various Indian Tribes, that is not the standard for the Commission to be guided by in
 11 distributing RSTF money from the State Treasury. The Compact contains no provision
 12 requiring a Non-Contract Tribe to be "organized" as a condition for entitlement to RSTF
 13 money. Indeed, Non-Compact Tribes are not required to enter into a contract with the
 14 Commission or the State to get RSTF money. The Plaintiff seeks a judicial declaration
 15 that the Commission must release its withheld RSTF money to the Tribe via Sylvia
 16 Burley, the Tribe's authorized representative, in the same manner as it has been doing
 17 before.

18 **E. THE COMPACT DOES NOT BAR PLAINTIFF, A NON-COMPACT**
 19 **TRIBE, FROM SUING THE COMMISSION FOR EQUITABLE RELIEF**

20 The Commission argues that the Compact bars the Plaintiff from enforcing the
 21 Compact as a third-party beneficiary. This contention is misleading.

22 Section 4.3.2(a)(i) specifically provides in pertinent part as follows:

23 "...Non-Compact Tribes shall be deemed third party beneficiaries of
 24 this and other compacts identical in all material respects...."

25 Section 15.1 then reads as follows:

26 "Third Party Beneficiaries. Except to the extent expressly provided
 27 under this Gaming Compact, this Gaming Compact is not intended to,
 28 and shall not be construed to, create any right on the part of a third
 party to bring an action to enforce any of its terms. (Emphasis added).

1 The right to enforce any of the terms of the Compact is limited to the State, the Compact
2 Tribes, and the Non-Compact Tribes as third party beneficiaries under Section
3 4.3.2(a)(i).

4 Suit is limited to equitable relief, in the form of injunctive and declaratory relief,
5 and specific performance. (See Section 9.4(a)(2) of Compact).

6 The bar to third party suits under Section 15.1 of the Compact, does not extend to
7 Non-Compact Tribes seeking payment of RSTF money under Section 4.3.2, because
8 Section 15.1 specifically provides: "Except to the extent expressly provided under this
9 Gaming Compact..." Section 4.3.2 is one of those exceptions, thus permitting Plaintiff to
10 sue the Commission for declaratory relief with respect to the Tribe's entitlement to RSTF
11 money.

12 The Plaintiff, by virtue of its dismissal of its breach of Contract and Breach of
13 Fiduciary Duty claims, no longer seeks (and really never did seek) compensatory
14 damages. Thus, by its own terms, the Compact permits the Plaintiff, a Non-Compact
15 Tribe, deemed to be a third-party beneficiary under Section 4.3.2 of the Compact, to sue
16 for equitable relief to enforce the terms of the Compact. However, here Plaintiff is not
17 technically doing that, even though it is entitled to do so. Instead, Plaintiff is suing for
18 equitable relief against the Commission, seeking a judicial determination of the
19 Commission's duties regarding disbursement of RSTF money. The terms of the Compact
20 are indirectly implicated, because they serve as a basis for the Commission's duties.
21 Having the Plaintiff categorized as a third-party beneficiary is more of an effort to provide
22 Non-Compact Tribes with standing to obtain equitable relief with respect to the RSTF
23 money.

24 The Plaintiff is not attempting to enforce the Compact to obtain monetary or
25 compensatory damages.

26 ///

27 ///

28 ///

F. PLAINTIFF'S BREACH OF CONTRACT AND BREACH OF FIDUCIARY DUTY CLAIMS HAVE BEEN DISMISSED, MAKING THE COMMISSION'S "NO COMPENSATORY DAMAGE" ARGUMENT MOOT

Since the Plaintiff has dismissed its Breach of Contract and Breach of Fiduciary Duty claims, the Commission's argument in Section III of its brief is moot.

As stated, the Compact permits the Plaintiff to sue for third-party equitable relief, but not for third-party compensatory damages. (See Sections 15.1, 4.3.2(a)(i), and 9.4(a)(2)).

G. PARTIES TO THE TRIBE'S LEADERSHIP DISPUTE ARE NOT NECESSARY AND INDISPENSABLE PARTIES

1. The Commission Has Already Admitted That Its Decision To Distribute RSTF Money Should Not Be Affected By The Present Tribal Leadership Dispute

The Commission argues that parties to the Tribal leadership dispute need to be joined as "necessary and indispensable parties" under Rule 19, because purportedly these "other parties claim a right to represent the Miwok [Tribe] and, hence claim a right to distributions from the RSTF", citing paragraphs 7 and 50 of the Complaint. (Defendant's P/A's, pg. 14, lines 5-6). This contention is without merit and a gross misreading of the Plaintiff's Complaint.

Nowhere in paragraphs 7 or 50, or anywhere in the Complaint, is there any allegation that certain individuals involved in the Tribal leadership dispute are claiming a right to distribution from the RSTF. The Commission's representation in that regard is completely false.

In addition, the Commission falsely asserts that "the complaint alleges that certain DOE defendants have also claimed leadership of the Miwok[Tribe]." (Defendant's P/A's, pg. 14, lines 20-21).

Moreover, the Commission has already previously admitted in Court papers that its decision to distribute RSTF money to the Plaintiff should not, and cannot, be affected by the present Tribal leadership dispute. In a sworn declaration, Gary Qualset, the then Deputy Director of the Licensing and Compliance Division of the Commission, stated in

2004 as follows:

Until recently, when a tribal leadership dispute has arisen, and a BIA leadership decision has been administratively appealed, it has been the practice of the Commission to hold RSTF checks during the pendency of the appeal.

Recently, the Commission determined that it should change this practice to conform to the practice of the BIA and send the RSTF funds to the Tribe via the tribal representative with whom the BIA conducts government-to-government relations on an ongoing basis, regardless of whether there is a challenge to tribal leadership.

It appears to the Commission that Sylvia Burley is presently recognized as the tribal representative for the California Valley Miwok Tribe.

(Declaration of Gary Qualset, pg. 3, paragraph 11-13, Defendant's Ex. 3).

2. The Commission's Duty To Disburse RSTF Money Has Nothing To Do With The Merits Of The Tribal Leadership Dispute

As shown, the Compact does not bar the Plaintiff from receiving RSTF funds because it is "unorganized". So long as it is a federally-recognized Tribe with an official representative, it is entitled to RSTF money, and the Commission has no discretion to withhold such funding, where such facts are established. In addition, nothing in the Compact bars a Non-Compact Tribe from receiving RSTF funds, because of an existing Tribal leadership dispute.

As stated, Plaintiff's suit focuses on the Commission's duty to disburse RSTF money to Non-Compact Tribes who are "unorganized". It does not seek to enforce the terms of the Compact for money damages, nor does it seek to resolve a Tribal leadership dispute. Accordingly, the parties to the present Tribal leadership dispute are not "necessary and indispensable parties" under Rule 19. See People ex rel. Lungren v. Community Development Agency (1997) 56 CA4th 868.

The provisions in California's Compulsory Joinder Statute, CCP Section 389, are derived from Rule 19 of the FRCP. As a result, California State Courts look to federal precedents in resolving joinder disputes. Countrywide Home Loans, Inc. v. Superior

1 Court (1999) 69 CA4th 785, 792. Such State Court cases are therefore helpful in
2 resolving joinder disputes in federal court, where remand is likely for improper removal.

3 The case of Community Redevelopment Agency, is instructive. There, a certain
4 redevelopment agency for Palm Springs, California ("Agency") contracted with the Agua
5 Caliente Band of Cahuilla Indians ("Tribe") to sell certain land in Palm Springs to the
6 Tribe to build gambling casinos, in exchange for a share of the gambling proceeds.
7 Because the contract essentially prevented the State from exercising complete civil and
8 criminal jurisdiction over the transferred land and casino operations, the State Attorney
9 General filed a complaint to set aside the contract.

10 The Agency in Community Redevelopment Agency, supra, aligning itself with the
11 interests of the Tribe, demurred, and argued that the Tribe was a necessary and
12 indispensable party to the "contract". It argued because of the Tribe's sovereign
13 immunity status, the action had to be dismissed. The Court of Appeal rejected this
14 contention and reversed the trial court's judgment of dismissal for nonjoinder of the
15 Tribe. It held that while the Tribe was a "necessary" party (because the suit was to set
16 aside a contract to which it was a party), "equity and good conscience" dictated that it
17 was not an indispensable party. The Court reasoned that the Tribe was not prejudiced
18 by nonjoinder, largely because the sought after relief only addressed the scope of the
19 Agency's authority (in entering into such contracts and putting public land beyond the
20 reach of the State's police power), and thus would only incidentally impact or adjudicate
21 the Tribe's interests. Moreover, public policy or "the interest of the public" weighed in the
22 Court's decision, in light of the Agency's attempt to "permanently relinquish [the State's]
23 interest in property within its control." 56 CA4th at 883.

24 Similarly, plaintiff's sought-after relief merely addresses the duty of the
25 Commission to disburse RSTF money. It has nothing to do with any Tribal leadership
26 dispute. Neither does Plaintiff's suit seek a determination of the Tribe's status.

27 For these reasons, the parties to the Tribe's present leadership dispute are not
28 necessary or indispensable parties.

CERTIFICATE OF SERVICE

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

Court: United States District Court, Southern District,
Case No. 08-CV-0120 BEN AJB

I Declare: On **February 20, 2008**, I electronically filed the following documents:

- 1. PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES**

ELECTRONIC MAIL NOTICE LIST

I have caused the above-mentioned document(*s) to be electronically served on the following person(s) who are currently on the list to receive e-mail notices for this case:

Peter.Kaufman@doj.ca.gov

MANUAL NOTICE LIST

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct, and that this declaration was executed on **February 20, 2008**, at San Diego, California.

Manuel Corrales, Jr.

s/ Manuel Corrales, Jr.

Declarant

Signature

1 Manuel Corrales, Jr., SBN 117647
2 **Attorney at Law**
3 11753 Avenida Sivrita
4 San Diego, CA 92128
5 Phone: (858) 521-0634
6 Fax: (858) 521-0633

7
8 Attorney for Plaintiff
9 CALIFORNIA VALLEY MINOK TRIBE
10

11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
13

14 CALIFORNIA VALLEY MIWOK TRIBE,
15 Plaintiff,
16 v.
17 THE CALIFORNIA GAMBLING
18 CONTROL COMMISSION; and DOES
19 1 THROUGH 50, Inclusive,
20 Defendants.

Case No. 08 CV 0120 BEN AJB

**PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE**

DATE: March 10, 2008
TIME: 10:30 A.M.
COURTROOM: 3
LOCATION: 940 Front Street
San Diego, A 92101
JUDGE: Hon. Roger J. Benitez

21 Plaintiff California Valley Miwok Tribe ("the Miwok Tribe" or "the Tribe"), pursuant to
22 Fed. Rules of Evid. 201, requests the Court take judicial notice of the following attached
23 documents and records:

- 24 1. Exhibit "A": U.S. District Court Decision in California Valley Miwok Tribe v.
25 USA, Civil Action No. 05-0739 (JR).
- 26 2. Exhibit "B": First Amended Complaint in Interpleader, in California Gambling
27 Control Commission v. Sylvia Burley, etc, Case No. 05AS05385.
- 28 3. Exhibit "C": Minute Order on demurrer to First Amended Complaint, in Case No.
05AS05385.

///

///

1 4. Exhibit "D": Judgment of Dismissal in California Gambling Control Commission
2 v. Sylvia Burley, etc., Case No. 05AS05385, Filed August 1, 2006.

3
4 DATED: February 20, 2008

s/ Manuel Corrales, Jr.
Manuel Corrales, Jr.
Attorney for Plaintiff
CALIFORNIA VALLEY
MIWOK TRIBE

CERTIFICATE OF SERVICE

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

Court: United States District Court, Southern District
Case No. 08-CV-0120 BEN AJB

I Declare: On **February 20, 2008**, I electronically filed the following documents:

1. PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE; EXHIBITS

ELECTRONIC MAIL NOTICE LIST

I have caused the above-mentioned document(*s) to be electronically served on the following person(s) who are currently on the list to receive e-mail notices for this case:

Peter.Kaufman@doj.ca.gov

MANUAL NOTICE LIST

The following are those who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing):

NONE

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct, and that this declaration was executed on **February 20, 2008**, at San Diego, California.

Manuel Corrales, Jr.

s/ Manuel Corrales, Jr.

Declarant

Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

V.

THE CALIFORNIA GAMBLING CONTROL
COMMISSION; AND DOES 1 THROUGH 50,
INCLUSIVE,

Defendants.

No. 08-CV-0120 BEN AJB

TABLE OF CONTENTS TO EXHIBITS

Date: March 10, 2008

Time: 10:30 a.m.

Courtroom: 3

Judge: Hon. Roger T. Benitez

EXHIBIT A A1-A16

EXHIBIT B B17-B20

EXHIBIT C C21-C22

EXHIBIT D D23-D25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, :

Plaintiff, :

v. :

USA, et al., :

Defendants. :

Civil Action No. 05-0739 (JR)

Case 3:08-cv-00120-BEN-AJB Document 10-3 Filed 02/20/2008

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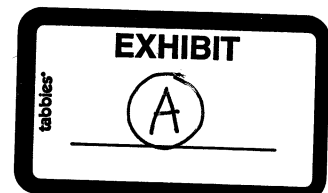
MEMORANDUM

The California Valley Miwok Tribe, an Indian tribe "recognized and eligible for funding and services" pursuant to Section 104 of the Act of November 2, 1994, Pub. L. 103-454, 108 Stat. 4791, see 70 FR 71194, seeks declaratory and injunctive relief against what it calls federal government interference with its internal affairs. The government moves to dismiss for failure to state a claim upon which relief can be granted. Dkt. #15-1. For the reasons set forth below, the government's motion to dismiss [Dkt. #15-1] will be granted.

1. **Background**

In 1915, a federal Indian Agent located a cluster of thirteen Miwork living on 160 acres in or near the city of Sheep Ranch, California. Dkt. #18-1 at 3. The government purchased two of the 160 acres, in trust for the Miwok, in April 1916. The two-acre parcel came to be known as "Sheep Ranch Rancheria." The number of people living there dwindled, to the point that, when

A1



the 1934 Indian Reorganization Act, 25 U.S.C. §§ 461-479, was adopted, the government recognized only one individual as a Tribe member. Dkt. #18-1 at 4.

In 1965, the government (i.e., the Bureau of Indian Affairs - BIA) began investigating the possibility, under the federal legislation known as the Rancheria Act, of terminating the Sheep Ranch Rancheria of Miwok Indians. P. L. 85-671, 72 Stat. 619; amended by P.L. 88-419, 78 Stat. 390.¹ A December 30, 1965 list, prepared pursuant to the Rancheria Act, named Mabel Hodge Dixie as the only Indian living on Sheep Ranch. Id. In 1966, finding no evidence that Lena Shelton, her brother Tom Hodge, her daughter Dora Shelton Mata or her two granddaughters had ever lived on the Rancheria, the government denied their claims to membership in the Tribe, conveyed Sheep Ranch to Mabel Dixie by deed, and terminated the Tribe. Id. at 5.

In 1994, Congress enacted the Federally Recognized Indian Tribe List Act of 1994, Pub. Law 103-454, and the Tribe's name was placed on the list of federally recognized tribes. Dkt. #18-1 at 8. On September 24, 1998, the Superintendent of the

¹ The Rancheria Act terminated federal supervision in the State of California, and the Department of the Interior oversaw the distribution of the land and assets involved in the termination. As a result, numerous Indian land parcels in California passed out of federal ownership and were no longer held in trust for the tribes by the United States Government. See <http://www.nigc.gov/nigc/documents/land/drake.jsp>.

Bureau of Indian Affairs Central California Agency (BIA CCA) advised Yakima Dixie, as tribal chairman, that Yakima Dixie, Melvin Dixie, Silvia Burley,² Rashel Reznor, Anjelica Paulk, and Tristan Wallace "possess[ed] the right to participate in the initial organization of the Tribe." Id. The BIA letter recommended a general council form of government for the initial organization process. On November 5, 1998, by Resolution #GC-98-01, the Tribe established the tribal council. Dkt. #1 at 5.

On April 20, 1999, for reasons not explained in the record, Yakima Dixie resigned as tribal chairman. Dkt. #18-1 at 8. On May 8, 1999, the Tribe held a general election. Yakima Dixie participated in the unanimous vote to elect Silvia Burley as chairperson and to ratify the Tribe's constitution. Subsequently, he participated in several more tribal council meetings and signed several documents as vice-chairman. Dkt. #18 at 8-9. On June 25, 1999, the BIA CCA recognized Silvia Burley as tribal chairperson. Id. at 9.

² The relationship between Yakima Dixie and Silvia Burley is explained only by Mr. Dixie, a proposed intervenor whose motion to intervene is mooted by this decision. He alleges that he is the son of Mabel Hodge Dixie and the putative hereditary chief of the Tribe and BIA-recognized tribal representative, and that he was approached by Silvia Burley in 1996. Ms. Burley was a distant relative who was "tribeless." Dkt. #19 at 5. She asked that he give her and her daughters tribal status so that they could receive educational and medical benefits from the government. Mr. Dixie agreed. Id.

On July 20, 1999, the Secretary of the Interior and the Tribe entered into a "self-determination contract" that would provide funding for tribal government activities, and, on September 30, 1999, the Tribe became a "contracting Tribe" pursuant to the Indian Self-Determination Act, PL 93-638. Dkt. #18-1 at 9. On October 9, 1999, the Tribe adopted an "Interim Operations Authorities and Rights Resolution." Dkt. #1 at 5.

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At some time in late 1999, a leadership dispute developed within the Tribe. Apparently³ responding to an inquiry by vice-chairperson Yakima Dixie, the superintendent of the BIA CCA office wrote on February 4, 2000 that only Tribe members over the age of 19 (Mr. Dixie, Silvia Burley, and Rashel Reznor) were entitled to participate in the organization of the Tribe, and that all issues involving tribal leadership were internal matters to be resolved by the Tribe. Dkt. #1 at 5.

Yakima Dixie apparently then made a complaint within the Tribe about his removal from tribal leadership. On February, the Tribal Council notified him that he had 30 days to initiate a review of his claims regarding his resignation. There is no record of a timely response. Dkt. #1 at 5.

On March 6, 2000, the Tribe ratified its Constitution. A March 7, 2000 letter from the Superintendent of the BIA CCA to

³ The word "apparently," which appears more than once in this opinion, reflects the state of the record.

Silvia Burley indicated that, as of that date, the BIA believed the Tribe's General Council to consist of Mr. Dixie, Ms. Burley, and Ms. Reznor, and stated that the leadership dispute between Mr. Dixie and Ms. Burley was an internal tribal matter. The BIA informed the tribe that the appropriate forum for resolving the tribal leadership dispute was the Tribal General Council, and that, generally, the rights of others to participate in the governance of the Tribe should be determined by the appropriate Tribal Forum. The BIA stated that, as a matter of federal law and policy, there was no basis for agency involvement in the leadership dispute. Dkt. #1 at 6.

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The Tribe then requested that the BIA CCA review the Tribe's Constitution, and that the BIA CCA set up a secretarial election, pursuant to the Indian Reorganization Act, 25 U.S.C. § 476, so that the Tribe could become fully "organized" under federal law. On March 9, 2000, the BIA CCA acknowledged receipt of the Tribe's requests. Under the Act, the BIA CCA was required to conduct the requested election no later than 180 days after the Tribe's request. In this case, that time period would have ended on September 7, 2000 - 180 days after the BIA's acknowledgment letter. Dkt. #1 at 6.

On March 16, 2000, the Tribe passed a resolution that Yakima Dixie had waived his right to contest his resignation as Tribal chairperson by failing to respond to the February 9

notice. Dkt. #1 at 6. A July 12, 2000 letter from the BIA CCA to Ms. Burley recognized her as chairperson of the Tribe, with the vice chairperson seat empty and Ms. Reznor as the secretary/treasurer. Dkt. #1 at 6.

On June 7, 2001, when the BIA CCA had not conducted the secretarial election that should have been done nine months

earlier, Ms. Burley withdrew the Tribe's request. Dkt. #15-1 at 6. On July 18, 2001, Yakima Dixie sued the Tribe in the Eastern District of California challenging its membership and leadership. (The suit was dismissed in 2002.) Dkt. #15-1 at 11.

Up to this point, the confusion that surrounded the Miwok Tribe seems attributable to internecine squabbling among a very small group of people. Now, however, the BIA became active, and its activity multiplied the confusion. In September 2001, the Tribe adopted a new version of its constitution, and sent it to the BIA CCA. On October 31, 2001, the BIA acknowledged receipt of the Tribe's new constitution, but did not approve it, stating:

The Agency will continue to recognize the Tribe as an *unorganized Tribe* and its elected official as an *interim Tribal Council* until the Tribe takes the necessary steps to complete the Secretarial election process.

Dkt. #18-1 at 10 (emphasis added). (A few months later, however, the BIA CCA advised Ms. Burley that the provision in the Tribe's PL 93-638 contract requiring the tribe to develop a tribal constitution subject to the IRA's process would be deleted until

an official opinion supporting that requirement was issued. No such opinion has been issued.) In November 2003, the BIA acknowledged the existence a "government-to-government relationship" with the Tribe through the tribal council that Ms. Burley chaired. In January 2004, the BIA CCA granted the Tribe "Mature Contract Status" with the federal government, Dkt. #18-1 at 10. In February 2004, the Tribe provided a new copy of its Constitution to the BIA, not for review, but only for the BIA's records.

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Enter the Native American Technical Corrections Act of 2004. Enacted in March 2004, the statute added a new subsection (h) to Section 16 of IRA. 26 U.S.C. § 476(h). Subsection (h) states:

(h) Tribal sovereignty. Notwithstanding any other provision of this Act-

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

Almost immediately after the enactment of subsection 476(h), on March 26, 2004, for reasons unexplained in the record, the BIA advised the Tribe by letter that it still considered the Tribe to be unorganized, and that the Tribe should only draft

governing documents "after the greater tribal community is initially identified ... [so that] the Tribe's base and membership criteria [are] identified." Letter of March 26, 2004; Dkt. #1 at 9-10. That letter recognized Silvia Burley only as "a person of authority," not the head of an organized tribe.

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On February 11, 2005, the Acting Assistant Secretary for Indian Affairs dismissed (as untimely) an administrative appeal that Yakima Dixie had filed more than two years earlier. The dismissal decision letter stated:

- that the BIA had rejected the Tribe's constitution;
- that the BIA did not recognize Silvia Burley as Tribal Chairperson, but as a "person of authority" within the Tribe;
- that the BIA would not recognize anyone as the Tribal Chairperson until the tribe had organized as described in the March 26, 2004 letter; and
- that the BIA did not recognize the tribal hearing process as a legitimate tribal forum.

Dkt. #18-1 at 11. It is this letter that plaintiffs now assert constituted final agency action, reviewable under the APA.

In March 2005, BIA CCA convened a series of meetings, attended by Mr. Dixie, his tribal consultants, attorneys, and prospective tribal members, and representatives of Ms. Burley (who did not participate in person). The principal subjects discussed were the identification of putative members of the Tribe; the organizational methods that the Tribe should be considering; Yakima Dixie's concerns about the current leadership's use of government PL 93-638 contract funds; and the

Burley faction's use of non-gaming revenues. Dkt. #31-1 at 3. The meetings did not resolve the Tribe's leadership disputes, and, on August 30, 2005, the Tribe "disenrolled" Yakima Dixie.

On July 19, 2005, the BIA, acting upon its February 11 letter, unilaterally suspended the Tribe's federal contract. Dkt. #29-1 at 10. On August 4, 2005, the California Gambling Control Commission notified the Tribe that it would be withholding distributions from the California Revenue Sharing Trust Fund until such time as the tribal leadership was firmly established.⁴ Dkt. #18-1 at 12. On August 19, 2005, the BIA again modified the Tribe's contract, only partially revoking the July changes.

On October 26, 2005, Raymond Fry, BIA CCA Tribal Operations Officer, returned a tribal resolution to Ms. Burley without having taken the action requested in the resolution, asserting that there was no "government-to-government" relationship with the California Valley Miwok. On December 5, 2005, the BIA ratified Mr. Fry's position. Dkt. #29-1 at 9. That same day, the Tribe received notice that the State of

⁴ The California Indian Gambling Revenue Sharing Trust Fund provides fixed payments, on a quarterly basis, to non-gaming tribes within the state of California. Each non-gaming tribe receives \$1.1 million per year, distributed on a quarterly basis. In the event that the fund has insufficient monies to make payments in that amount, available funds are distributed to the tribes in equal shares, on a per-tribe basis. See <http://www.cgcc.ca.gov/rstfi/funddist.pdf>.

California had filed an interpleader in California Superior Court in order to determine the Tribe's leadership for Trust Fund payment purposes. Id. at 10.

2. **The Complaint**

The Tribe alleges that, at least since June 25, 1999, the BIA has recognized its government, its documents, and its chairperson, Silvia Burley, and that the BIA is now trying to reverse that position. The Tribe seeks declaratory and injunctive relief affirming that it possesses the "inherent authority" to adopt the governing documents outside of the Indian Reorganization Act, pursuant to 25 U.S.C. § 476(h); that the documents the Tribe has adopted are valid, governing documents; and that the Tribe has lawfully organized pursuant to its inherent sovereign authority. The plaintiffs argue that the letter from the Acting Assistant Secretary for Indian Affairs to Yakima Dixie on February 11, 2005 was, under 25 C.F.R. § 2.6(c), "final for the department, and effective immediately," and thus reviewable in this court under the APA as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 704, 706.⁵

⁵ For the purposes of this opinion only, the court accepts that the letters of February 11, 2005 and March 26, 2004 were final agency actions.

3. Analysis

Congress has delegated to the Secretary of the Interior broad authority over "public business relating to ... Indians."

43 U.S.C. § 1457.⁶ At the core of this authority is a responsibility to ensure that Secretary deals only with a tribal government that actually represents the members of a tribe. As early as 1942, when the government still held lands in trust for many tribes, the Supreme Court stated that the Department had a duty to conduct business only with lawfully-constituted governing bodies who represent the tribal membership.

In carrying out its treaty obligations with the Indian tribes, the Government ... has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people ... would be a clear breach of the Government's fiduciary obligation.

Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

The IRA charges the Secretary, broadly, with supervising tribal elections and ensuring their fundamental integrity, Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F.3d 667, 670 (8th Cir. 1997), and sections of the

⁶ In turn, the Secretary has delegated this responsibility to the BIA and the Principal Deputy Assistant Secretary - Indian Affairs. Dkt. #18-12 at 1.

IRA require that tribal actions reflect the will of a majority of the tribal community - whether or not they choose to organize under the IRA procedures. See 25 U.S.C. §§ 476(a)(1), 478. The fair and full participation of tribal members is critical to the legitimacy of any constitutional reform. Morris v. Andrus, 640 F.2d 404, 415 (D.C. Cir. 1981). A judge of this court has chastised the Department of the Interior when it was "derelict in [its] responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe." Ransom v. Babbitt, 69 F. Supp. 2d 141, 153 (D.D.C. 1999).

In plaintiffs' submission, subsection 476(h) was added to free Indian tribes from the onerous organization requirements BIA had put in place to implement § 476(a)-(g). BIA's response, however, is that while subsection 476(h) does give Indian tribes more procedural flexibility, it does not relieve BIA of the duty to ensure that the interests of all tribe members are protected during organization and that governing documents reflect the will of a majority of the Tribe's members. BIA thus defends its refusal to recognize the California Valley Miwok Tribe as an organized tribe on the ground that the Tribe has failed to take necessary steps to protect the interests of its potential members. Dkt. #15-1 at 28.

The legislative history of subsection 476(h) is limited, see Dkt #15-1 at 25, and of considerably less help than the canons of statutory interpretation. A statute is to be read as a whole, Massachusetts v. Morash, 490 U.S. 107, 115 (1989), since the meaning of statutory language, plain or not, depends on context, King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991).

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Courts presume that Congress knows the law when it enacts a statute, Garrett v. United States, 471 U.S. 773, 793-94 (1985). When a specific section and a general section conflict, the specific section controls; courts "must be 'reluctant to treat statutory terms as surplusage' in any setting," Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal citation omitted).

These rules teach that subsection 476(h)'s references to documents adopted by a tribe must be understood as references to documents that have been "ratified by a majority vote of the adult members," as required by subsection 476(a). Subsection 476(h) did not repeal the provisions of subsection 476(a), nor will it be construed to repeal or water down the protections afforded by the IRA when tribes organize: notice, a defined process, and minimum levels of tribal participation.⁷

⁷ The factual subtext of this litigation illuminates the importance of these protections. At the inception of this suit, Ms. Burley and her two daughters were seeking approval of a tribal constitution that conferred tribal membership upon only them and their descendants. See Dkt. #15-1 at 5. The Tribe received approximately \$400,000 in federal funds last year, and could receive \$600,000 this year. Because the Tribe is also a

4. Conclusion

Plaintiffs's claim of government interference in the internal affairs of the Tribe depends entirely on their reading of subsection 476(h), which, as I have explained, is erroneous. The first count of plaintiffs' complaint, asserting a "violation" of 25 U.S.C. § 476(h), thus fails to state a claim upon which relief can be granted. The second count, asserting arbitrary, capricious, or unlawful agency action under the Administrative Procedure Act, also depends upon plaintiffs' reading of subsection 476(h) - nothing arbitrary or capricious has been pointed to in the briefs - and also fails to state a claim.⁸ The additional counts added by plaintiffs' proposed second supplemental complaint, Dkt. #34-2, are derivative of plaintiffs'

non-gaming California tribe, the California Gambling Control Commission, a state agency, makes additional payments to the tribe from the California Revenue Sharing Trust Fund (CRSTF). Dkt. #18-5; Dkt. #18-9. CRSTF payments are made on a per-tribe basis - the amount does not change based on the number of tribe members - and amounted to about \$1 million last year. The Tribe now proposes a revised constitution that includes non-Burley descendants, and it has submitted a list of 29 possible members, but the government estimates that the greater tribal community, which should be included in the organization process, may exceed 250 members. See Dkt. #15-2 at 2. As H.L. Mencken is said to have said: "When someone says it's not about the money, it's about the money."

⁸ The government's motion is to dismiss for lack of jurisdiction or failure to state a claim. Dkt. #15-1. Summary judgment would be available on plaintiff's APA claim, see, e.g., Judicial Watch, Inc. v. United States Dep't of Commerce, 34 F. Supp. 2d 28, 46 (D.D.C. 1998), but, since the only issue being decided is one of statutory interpretation, dismissal is appropriate.

subsection 476(h) theory and would also fail to state a claim if leave to file them were granted.⁹ Defendant's motion to dismiss will be **granted**.

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JAMES ROBERTSON
United States District Judge

⁹ Leave to file will be denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, :

Plaintiff, :

v. :

USA, et al., :

Defendants. :

Civil Action No. 05-0739 (JR)

Case 3:08-cv-00120-BEN-AJB Document 10-3 Filed 02/20/2008

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ORDER

For the reasons stated in the accompanying memorandum, the plaintiffs' motion to file a second supplemental complaint [Dkt. #34] and motion for preliminary injunction [Dkt. #29] are **denied**. Defendant's motion to dismiss [Dkt. #15] is **granted**. The case is dismissed.

JAMES ROBERTSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

V.

THE CALIFORNIA GAMBLING CONTROL
COMMISSION; AND DOES 1 THROUGH 50,
INCLUSIVE,

Defendants.

No. 08-CV-0120 BEN AJB

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Date: March 10, 2008

Time: 10:30 a.m.

Courtroom: 3

Judge: Hon. Roger T. Benitez

EXHIBIT A A1-A16

EXHIBIT B B17-B20

EXHIBIT C C21-C22

EXHIBIT D D23-D25

1 **BILL LOCKYER**
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 2 **ROBERT L. MUKAI**
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8 **Attorneys for Plaintiff California Gambling**
Control Commission

10 **SUPERIOR COURT OF CALIFORNIA**

11 **COUNTY OF SACRAMENTO**

13 **CALIFORNIA GAMBLING CONTROL**
COMMISSION,

CASE NO. 05AS05385

15 **Plaintiff,**

16 **v.**

FIRST AMENDED
COMPLAINT IN INTERPLEADER

17 **SYLVIA BURLEY; YAKIMA DIXIE;**
MELVIN DIXIE; DEQUITA BOIRE; and
 18 **VELMA WHITEBEAR,**

19 **Defendants.**

22 **Plaintiff California Gambling Control Commission ("Plaintiff") alleges as follows:**

23 1. Plaintiff is the California Gambling Control Commission, an agency of the State of
 24 California, vested with jurisdiction over all persons or things having to do with the operation of
 25 gambling establishments within the State of California. Plaintiff also has responsibilities defined
 26 by certain tribal-state class III gaming compacts completed between the State of California and
 27 various California Indian tribes, under which the Plaintiff is identified as "the State Gaming
 28 Agency."

EXHIBIT

(B)

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 LEGAL PROCESS #12

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1 2. Plaintiff is informed and believes and thereon alleges, that Defendant Sylvia Burley
2 ("Burley") is an individual who claims to be a person of authority within the government of the
3 California Valley Miwok Tribe, and who claims a right to receive disputed funds, described more
4 fully in the paragraphs below.

5 3. Plaintiff is informed and believes and thereon alleges, that Defendant Yakima Dixie
6 ("Yakima Dixie") is an individual who claims to be a person of authority within the government
7 of the California Valley Miwok Tribe, and who claims a right to receive disputed funds,
8 described more fully in the paragraphs below.

9 4. Plaintiff is informed and believes and thereon alleges, that Defendant Melvin Dixie
10 ("Melvin Dixie") is an individual who claims to be a person of authority within the government
11 of the California Valley Miwok Tribe, and who claims a right to receive disputed funds,
12 described more fully in the paragraphs below.

13 5. Plaintiff is informed and believes and thereon alleges, that Defendant Dequita Boire
14 ("Boire") is an individual who claims to be a person of authority within the government of the
15 California Valley Miwok Tribe, and who claims a right to receive disputed funds, described more
16 fully in the paragraphs below.

17 6. Plaintiff is informed and believes and thereon alleges, that Defendant Velma Whitebear
18 ("Whitebear") is an individual who claims to be a person of authority within the government of
19 the California Valley Miwok Tribe, and who claims a right to receive disputed funds, described
20 more fully in the paragraphs below.

21 7. The California Valley Miwok Tribe ("CVMT") (fka Sheep Ranch Rancheria of Mi-
22 Wuk Indians) is a federally recognized Indian tribe, and Plaintiff is informed and believes, and
23 thereon alleges, that at present CVMT has few members, no recognized or functioning tribal
24 government, and does not conduct tribal gaming activities.

25 8. The tribal-state class III gaming compacts completed between the State of California
26 and various federally-recognized California Indian Tribes in 1999, and at other times
27 ("Compacts"), continue in effect, and provide for the creation and maintenance of a Revenue
28 Sharing Trust Fund ("RSTF"), under which fund California Indian tribes that either do not

1 engage in casino-style gambling at all, or do so only on a limited basis ("Non-Compact Tribes"),
2 are entitled to a share of revenue from California Indian tribes engaged in larger-scale casino
3 operations. CVMT is a Non-Compact Tribe within the meaning of the 1999 Compacts. An
4 exemplar of the 1999 Compacts is attached to this complaint at Exhibit A, and is incorporated by
5 reference here. The RSTF provisions are contained in section 4.3.2 of the 1999 Compacts.

6 9. The Compacts provide that Non-Compact Tribes are entitled to receive up to \$11
7 Million annually in distributions from the RSTF.

8 10. Plaintiff is identified by the Compacts as a limited "Trustee" of the RSTF, and in that
9 role is required to make RSTF distributions to Non-Compact Tribes, but has "no discretion with
10 respect to the use or disbursement of the trust funds." (Compacts, § 4.3.2.1, subd. (b).) The
11 Compacts provide that Plaintiff's sole authority "shall be to serve as a depository of the trust
12 funds and to disburse them on a quarterly basis to Non-Compact Tribes." (Compacts, § 4.3.2.1,
13 subd. (b).)

14 11. Plaintiff is now in possession of approximately SEVEN HUNDRED EIGHTY-EIGHT
15 THOUSAND and ONE DOLLARS and 99 CENTS (U.S. \$ 788,001.99) ("RSTF Money"),
16 derived from the RSTF, which is to be distributed to CVMT.

17 12. Burley, Yakima Dixie, Melvin Dixie, Boire and Whitebear have made conflicting
18 claims to leadership of the Tribe's government, and to distributions from the RSTF, including the
19 RSTF Money, on the Tribe's behalf.

20 13. Plaintiff is informed and believes, and thereon alleges, that the federal Department of
21 the Interior, Bureau of Indian Affairs ("BIA"), does not recognize any tribal government of the
22 CVMT, does not recognize any individual with authority to represent the CVMT for general
23 purposes, and at present does not conduct government-to-government relations with the CVMT.

24 14. It is Plaintiff's practice to make RSTF distributions to the federally recognized
25 government of each recipient Non-Compact Tribe.

26 15. Plaintiff lacks knowledge and authority to determine the validity of the defendants'
27 conflicting claims to control of the CVMT's government, or to the authority to represent it, and
28 so cannot determine to whom the RSTF monies should be distributed, on behalf of the CVMT.

1 16. Plaintiff claims no interest in the RSTF Money, or in future RSTF distributions to
2 which the CVMT will be entitled under the terms of the Compacts, except that it seeks a
3 determination of whether and to whom the RSTF Money should be distributed.

4 17. Concurrently with the filing of the original complaint in this action on December 5, 2005, Plaintiff deposited the RSTF Money with the clerk of this Court pursuant to Code of Civil
5 Procedure, section 386, subdivision (c).
6

7 18. Plaintiff has incurred costs and reasonable attorney's fees in connection with these
8 proceedings, and may incur additional costs and fees hereafter.

9 WHEREFORE Plaintiff prays for judgment as follows:

10 1. That defendants and each of them be ordered to interplead and litigate their claims to
11 receive the RSTF Money, and future RSTF distributions, on behalf of the CVMT;

12 2. That Plaintiff be discharged from liability to each of the defendants, if any, with respect
13 to the RSTF money;

14 3. That Plaintiff be permitted to deposit future RSTF distributions to the CVMT with the
15 clerk of this Court, until the defendants resolve this litigation, or until further Order of this Court.

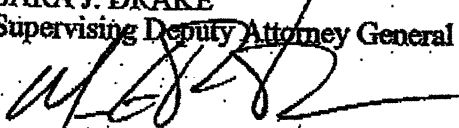
16 4. That Plaintiff be awarded costs and reasonable attorney's fees to be paid to Plaintiff
17 from the funds deposited with the Court clerk as described above; and

18 5. For such other and further relief as the Court deems just and proper.

19 Dated: December 28, 2005
20

21 Respectfully submitted,

22 BILL LOCKYER
Attorney General of the State of California
23 ROBERT L. MUKAI
Senior Assistant Attorney General
24 SARA J. DRAKE
Supervising Deputy Attorney General

25 
26 MARC A. LE FORESTIER
27 Deputy Attorney General
Attorney for the CVMT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

V.

THE CALIFORNIA GAMBLING CONTROL
COMMISSION; AND DOES 1 THROUGH 50,
INCLUSIVE,

Defendants.

No. 08-CV-0120 BEN AJB

TABLE OF CONTENTS TO EXHIBITS

Date: March 10, 2008

Time: 10:30 a.m.

Courtroom: 3

Judge: Hon. Roger T. Benitez

EXHIBIT A A1-A16

EXHIBIT B B17-B20

EXHIBIT C C21-C22

EXHIBIT D D23-D25

Filed By:

The motion of Silvia Burley ("Burley") to quash service of summons issued upon the First Amended Complaint of California Gambling Control Commission ("Commission") is denied.

Burley's motion is based upon the premise that she is named in the action solely in her capacity as a person of authority over the California Valley Miwok Tribe ("Tribe"), and in that capacity, she is entitled to the sovereign immunity held by the Tribe. Commission disputes this claim, arguing that Burley is named simply as a private individual who has made a competing claim to the subject fund. Specifically, Commission argues that "because there is no recognized tribal government or representative with authority to represent the Tribe for general purposes, none of the defendants could be acting in an official representative capacity."

With this admission by Commission, and having no evidence that the service of summons was otherwise procedurally defective, Burley was properly

This minute order is immediately effective. A formal order pursuant to Rules of Court, rule 391 is not necessary, and further notice of this ruling is not required.

EXHIBIT

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(C)

Item 14

05AS05385 CALIFORNIA GAMBLING CONTROL COMM VS. SYLVIA BURLEY ET AL

Nature of Proceeding: Demurrer

Filed By:

The demurrer of Silvia Burley ("Burley") to the First Amended Complaint (FAC) of California Gambling Control Commission ("Commission") is sustained without leave to amend.

Burley demurs upon two related grounds: (1) the interpleader action necessarily requires a determination of the "federally recognized government" of the California Valley Miwok Tribe ("Tribe") and the authorized representative thereof - a determination over which this Court lacks subject matter jurisdiction and is otherwise unsettled with the federal government; and (2) since Burley is named in the action solely as a private individual (not an official representative of Tribe) with no potential claim of right to the subject fund, the complaint fails to state a cause of action as against her. Burley's demurrer is sustained upon both grounds.

Commission alleges that it is the Commission's "practice to make RSTF distributions to the federally recognized government of each recipient Non-Compact Tribe." (FAC, p.3:24-25.) Commission alleges that the U.S. Department of Interior, Bureau of Indian Affairs ("BIA") "does not recognize any tribal government of the [Tribe], does not recognize any individual with authority to represent the [Tribe] for general purposes, and at present does not conduct government-to-government relations with the [Tribe]." (FAC, p.3:20-23.) Commission asserts no interest in the subject fund except for its statutory and Compact obligation to act as trustee over the fund, and to distribute it to eligible recipient Indian tribes "without delay." (Gov't Code section 12012.90(d).) Thus, the Commission states that its interpleader action "seeks a judicial determination of which, if any, of the various interested parties it named as

defendants is entitled to the RSTF monies deposited with the court." (Opp. p.3:13-14.)

Based upon these allegations, it is an inescapable conclusion that the relief sought by Commission would compel the Court to determine which individual, or individuals, constitute the lawful governmental representatives of Tribe, if at all. That determination, based upon the Commission's "practice," requires the federal government to "recognize" a government of the Tribe. This Court has no jurisdiction to make either determination. Instead, those decisions lie entirely within the exclusive jurisdiction of the BIA, the federal government, or the federal courts.

As an alternative, Commission suggests that the Court may function as a warehouse, in perpetuity, for the subject funds until the federal government, or the Tribe, finally achieve a "federally recognized government." This is not the proper role of the Court, or the interpleader process.

Commission also contends that the Court has jurisdiction over this matter because the Court may avoid the "impermissible intrusion into issues of tribal self-governance" and "properly limit the scope of the litigation to the Commission's responsibilities and obligations related to distribution of the RSTF monies." (Opp. p.5:23-25.) However, the FAC does not seek such relief. The FAC does not seek a declaration of Commission's responsibilities and obligations as to the RSTF. Commission does not contend that there is a dispute over its legal obligations and responsibilities. Commission does not argue that there is a legitimate dispute that it may distribute the RSTF monies to someone or some entity other than the "federally recognized government" of the Tribe. Instead, Commission seeks a declaration of who or what constitutes the "federally recognized government" of the Tribe. Again, that declaration cannot issue from this Court.

Furthermore, Commission has admitted that it named Burley as a private individual, not as an official representative of the Tribe. Since Commission alleges that its trusteeship of the fund requires it to disburse the fund only to the "federal recognized government" of the Tribe, Burley could not be a proper recipient of the fund in her individual capacity under any circumstance.

Requests for judicial notice are denied.

This minute order is immediately effective. A formal order pursuant to California Rules of Court, rule 391 is not necessary, and further notice of this ruling is not required.

Item 15

05AS05385 CALIFORNIA GAMBLING CONTROL COMM VS. SYLVIA BURLEY ET AL

Nature of Proceeding: Miscellaneous Motion

Filed By:

The motion of California Gambling Control Commission ("Commission") for discharge of liability from interpleader action pursuant to Code of Civil Procedure section 386, is denied.

Commission has not established that this Court has jurisdiction to adjudicate the named defendants' alleged competing claims to the deposited fund.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

V.

THE CALIFORNIA GAMBLING CONTROL
COMMISSION; AND DOES 1 THROUGH 50,
INCLUSIVE,

Defendants.

No. 08-CV-0120 BEN AJB

TABLE OF CONTENTS TO EXHIBITS

Date: March 10, 2008

Time: 10:30 a.m.

Courtroom: 3

Judge: Hon. Roger T. Benitez

EXHIBIT A A1-A16

EXHIBIT B B17-B20

EXHIBIT C C21-C22

EXHIBIT D D23-D25

COPY**FILED
ENDORSED**

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SACRAMENTO COURTS
DEPT. #53

Case 3:08-cv-00120-BEN-AJB Document 10-3 Filed 02/20/2008 Page 31 of

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**CALIFORNIA GAMBLING CONTROL
COMMISSION,**

CASE NO. 05AS05385

Plaintiff,

JUDGMENT OF DISMISSAL.

v.

**SYLVIA BURLEY; YAKIMA DIXIE;
MELVIN DIXIE; DEQUITA BOIRE; and
VELMA WHITEBEAR,**

Defendants.

EXHIBIT**D**

This case came on regularly for hearing on June 16, 2006, upon the demurrer of defendant Silvia Burley, in Department 53 of the above named Court, the Honorable Loren E. McMaster, presiding. Plaintiff was represented by Deputy Attorney General Christine M. Murphy. Defendant Silvia Burley was represented by her attorney, Karla D. Bell, and all the other named defendants were represented by their attorney Peter Glick.

The Court having heard and considered the arguments of the parties, oral and written, concluded the Court did not have jurisdiction over Plaintiff Gambling Control Commission's interpleader action, ordered that the funds deposited with the Court by way of the interpleader action be returned to the Gambling Control Commission, and granted Defendant Silvia Burley's demurrer, without leave to amend.

1 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
2 that Plaintiff California Gambling Control Commission's First Amended Complaint in
3 Interpleader is dismissed.

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5 Dated: July 3, 2006


6 HONORABLE STEVEN H. RODDA
7 Judge of the Superior Court

8 APPROVED AS TO FORM:

9 Dated: July 17, 2006

LAW OFFICES OF KARLA D. BELL

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By: 
KARLA D. BELL
Attorney for Defendant Silvia Burley

1 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
2 that Plaintiff California Gambling Control Commission's First Amended Complaint in
3 Interpleader is dismissed.
4

LOREN E. MCMASTER

5 Dated: July __, 2006

6 AUG 1 2006

HONORABLE LOREN E. MCMASTER
Judge of the Superior Court

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8 APPROVED AS TO FORM:

9 Dated: July __, 2006

LAW OFFICES OF KARLA D. BELL

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12 By: _____

KARLA D. BELL

Attorney for Defendant Silvia Burley
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