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CALIFORNIA VALLEY MIWOK TRIBE

UNITED STATES DISTRICT COURT

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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE TO THE EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

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

Plaintiff California Valley Miwok Tribe ("Miwok Tribe" or Plaintiff) submits the following memorandum of points and authorities in opposition to Defendant California Gambling Control Commission's ("the Commission") Motion for Change of Venue to the Eastern District of California, Sacramento Division.

I.

INTRODUCTION

The Commission concedes that venue was proper here in San Diego County. (Defendant's Points and Authorities, pg. 2 lines 2-3.) However, since there is no subject matter jurisdiction, the Commission's motion will be moot.

The Compact does not require or "establish" that this dispute be venued in

Sacramento County. In fact, State law specifically permits it to be venued here in San Diego County.

II.

ARGUMENT

A. THIS CASE IS NOT SUBJECT TO DISCRETIONARY "CONVENIENCE" TRANSFER UNDER 28 USC § 1404(a)

Transfer under 28 USC § 1404(a) "for the convenience of parties, witnesses and in the interest of justice" is discretionary. However, before the court can even exercise any discretion to transfer, it must be shown that the proposed transferee court is one in which the action could have been commenced originally, *i.e.,* one "where it might have been brought." 28 USC § 1404(a). This has been interpreted to mean that: (1) the proposed transferee court would have had subject matter jurisdiction; (2) defendants would have been subject to personal jurisdiction; and (3) venue would have been proper, *Hoffman v. Balski* (1960) 363 U.S. 335, 343-344, 80 S.Ct. 1084, 1089-1090.

Based upon these facts, transfer to Sacramento would be improper. As shown in Plaintiff's Motion to Remand, there is no federal question jurisdiction and thus the case could not have been commenced in the Eastern District of California, Sacramento, to begin with. The dispute involves only the Commission's duty to disburse RSTF under state law, and a declaratory relief action to determine that duty. The suit does not ask the Court to make any determination as to whether the Miwok Tribe is a "federally recognized government." Instead, the Plaintiff's suit simply asks the Court to determine what the Commission's duties and responsibilities are as to the RSTF money, based upon undisputed fact, including the fact that the Miwok Tribe is "unorganized" and yet the Bureau of Indian Affairs ("BIA") still recognizes Sylvia Burley as an official representative of the Miwok Tribe, albeit "unorganized". If those facts are true, then Plaintiff contends that the Commission has a duty to continue making RSTF payments, in the same manner as it has done in the past. Accordingly, no federal question jurisdiction is implicated, and the case therefore could never have been brought in the U.S. District Court in

Sacramento, or any other federal district court.

As a result, the issue of convenience of the "witnesses" or "parties" never comes into play and is thus irrelevant.

Because there is no subject matter jurisdiction, the Commission's Motion to Transfer should be denied on this reason alone.

B. THE COMPACT DOES NOT "ESTABLISH A PREFERENCE" FOR ADJUDICATING PLAINTIFF'S CLAIMS IN SACRAMENTO

Inexplicably, the Commission repeatedly misquotes the Compact, falsely saying in its moving papers that the Compact 'states a preference that this action should be brought in the jurisdiction in which the Plaintiff resides." (Defendant's Motion, pg. 2, lines 6-8.) It cites Section 11.2.1(c.) of the Compact and represents the Court that it:

> . . . plainly establish[es] a preference that a breach of compact action such as this be tried in the district in which the tribe alleging a breach is located. (Emphasis added.)

(Defendant's Points and Authorities, pg. 3, lines 7-9); (see also Defendant's Points and Authorities, pg. 3, line 1, and lines 20-21). These state in relevant part as follows:

> Either party may bring an action in federal court . . . for a declaration that the other party has materially breached this Compact . . . In the event a federal court determines that it lacks jurisdiction over such an action, the action may be brought in the superior court for the county in which the Tribe's Gaming Facility is located . . . (Emphasis added.)

(Compact, pg. 40, Section 11.2.1(c)). First of all, this section of the Compact does not state that Plaintiff's suit must be brought in the district where the tribe is located. Secondly, and most importantly, the language of this Section clearly and unequivocably applies only to the State as Compact Tribes, not non-Compact Tribes. Plaintiff is not a party to the Compact, and therefore this section does not apply to it. Non-Compact Tribes by their very definition are Tribes, like Plaintiff, who do not have any gaming facilities, or who operate fewer than 350 devices. Section 4.3.2.1(b).3.2(a)(i). That is why the RSTF was set up. The Compact Tribes who generate money from their respective

gaming facilities (casinos) pay into the RSTF, so that Non-Compact Tribes, like Plaintiff, can share in profits. But the Non-Compact Tribes are not parties to the Compact, and because many of them, like Plaintiff, have no gaming facilities, the phrase "action may be brought in the superior court for the county in which the Tribes' Gaming Facility is located" cannot and does not apply to them. (see pg. 2, para 6 of the complaint.) Thus, the Commission's statement that the Compact (plainly" establishes that Plaintiff's suit must be brought in Sacramento County, because that is where Plaintiff's "gaming facility is located", is misleading and false. Plaintiff has no gaming facility. (Complaint, pg. 2, para 6.) Section 11.2.1(c) does not apply to Plaintiff, a Non-Compact Tribe with no gaming facility.

C. IF THIS CASE IS REMANDED, THE COMMISSION'S MOTION FOR CHANGE OF VENUE WILL BE MOOT

Obviously, should this Court grant Plaintiff's Motion for Remand, the Commission's Motion to Transfer to Sacramento will be moot. It is for this reason that Plaintiff requests the Court first decide the remand motion.

D. THE COMMISSION HAS FAILED TO MEET ITS BURDEN OF SHOWING FACTS SUPPORTING IT'S MOTION

A 28 USC § 1404(a) motion for "convenience" transfer must be supported by a declaration, or affidavit establishing admissible facts pertaining to the residence of the parties, the location of witnesses, physical evidence, etc. Conclusory declarations are not sufficient. *Stop-A-Flat Corp. v. Electra Start of Michigan, Inc.* (ED PA 1981) 507 F.Supp. 647, 652. The Commission's motion is devoid of any such admissible evidence, and no declaration has been attached, as is required.

On this basis alone, the motion should be denied. *Heller Fin'l, Inc., v. Midwhey Powder Co.* (7th Cir. 1989) 883 F.2d 1286, 1293.

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III.

CONCLUSION

For the foregoing reasons, the Commission's Motion for Change of Venue under 28 USC § 1404(a) should be denied, or otherwise determined to be moot.

DATED: February 22, 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 22, 2008**, I filed via e-mail the following documents:

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE TO THE EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

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 that the foregoing is true and correct, and that this declaration was executed on **February 22, 2008,** at San Diego, California.

MANUAL CORRALES, JR. — Declarant

s/ Manuel Corrales, Jr. — Signature

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Attorneys for 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 OPPOSITION TO MOTION FOR REMAND** Hearing: March 10, 2008 Time: 10:30 a.m. Courtroom: 3 Judge: The Honorable Roger J. Benitez

INTRODUCTION

This suit seeks an order compelling Defendant California Gambling Control Commission ("Commission") to pay more than three million dollars from the Revenue Sharing Trust Fund ("RSTF") in the California treasury to an individual claiming to represent the California Valley Miwok Tribe ("Miwok"). The Commission removed this suit from the California courts because any judicially enforceable duty the Commission might have to make an RSTF distribution to the Plaintiff is governed by the terms of the tribal-state class III gaming compacts ("Compact")

attached as Exhibit A to the Complaint that were negotiated and executed by the State of California and 61 federally-recognized California Indian tribes pursuant to the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"). The Ninth Circuit ruled in *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th Cir. 1997), that IGRA "confers jurisdiction on federal courts to enforce Tribal-State compacts and the agreements contained therein." *Id.* at 1056. Thus, because any Commission obligation to distribute money to the Miwok is governed by the Compact, this Court has subject matter jurisdiction over this suit under 28 U.S.C. § 1331 pursuant to the Ninth Circuit's decision in *Cabazon.*

Further, as disclosed by the Complaint itself, this case presents the contested issue over who may act on behalf of the Miwok. The Complaint affirmatively alleges that there is an ongoing leadership dispute within the Miwok. (Compl. at ¶ 15.) Moreover, the federal government has taken the position that because it does not recognize any Miwok constitution or government, no one is authorized to represent or act on behalf of the Miwok. A determination regarding who, if anyone, is entitled to represent the Miwok is an essential prerequisite to a decision in this case. Tribal status is governed by federal law. Thus, this Court has subject matter jurisdiction because an essential prerequisite to the grant of the requested relief involves resolution of an issue of federal law.

Plaintiff's remand motion argues, however, that after the post-removal dismissal of the Complaint's breach of Compact claim (Third Claim for Relief), relief is not sought under the terms of the Compact but rather under the terms of the declaratory and injunctive relief provisions of California law, (Cal. Civ. Proc. Code §§ 326 and 1060) as well as California Government Code § 12012.75. Federal court jurisdiction, however, is based on the complaint at the time of removal, not as subsequently amended. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979). Moreover, even if that were not the case, the Complaint, on its face, makes clear that any right to obtain the requested relief stems not from independent provisions of California law but rather from State statutes that were enacted for the sole purpose of implementing the provisions of a tribal-state class III gaming compact over which federal courts have subject matter jurisdiction.

As the United States Supreme Court has repeatedly ruled, a case arises under federal law for purposes of removal jurisdiction where "the vindication of a right under state law necessarily turn[s] on" an interpretation of federal law (*Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308 (2005); *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,* 463 U.S. 1, 9 (1983)) or an agreement that involves a significant federal interest (*Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 814 n.12 (1986); *Cabazon Band of Mission Indians v. Wilson, supra,* 124 F.3d at 1056). In this case, despite the fact that the suit seeks relief under State law, the right to that relief (a) arises solely under a contract over which federal courts have jurisdiction; and (b) requires resolution of an issue of federal law—the status of the Miwok and the capacity of anyone to sue on its behalf. Thus, this Court has removal jurisdiction over the Complaint.

Finally, prior State court proceedings between the parties involving the RSTF do not, as Plaintiff suggests, compel the conclusion that this case should be resolved in State court or that the State has a greater interest in the subject matter of this suit. To the contrary, those cases which were dismissed for lack of State court jurisdiction demonstrate that federal interests predominate and require federal court adjudication.

ARGUMENT

I.

UNDER *CABAZON*, THIS COURT HAS SUBJECT MATTER JURISDICTION OVER ANY SUIT SEEKING TO ENFORCE THE TERMS OF A TRIBAL-STATE CLASS III GAMING COMPACT OR TO ENFORCE AN OBLIGATION THAT ORIGINATES IN A COMPACT

In *Cabazon Band of Mission Indians v. Wilson, supra,* 124 F.3d 1050, the Ninth Circuit ruled that federal courts have subject matter jurisdiction over suits seeking enforcement of the terms of tribal-state class III gaming compacts, as well as obligations that originate on the basis of a compact. *Id.* at 1056. In reaching this conclusion, the court reasoned as follows in citing the United States Supreme Court's decision in *Merrell Dow Pharmaceuticals Inc. v. Thompson, supra,* 478 U.S. at 814 n.12:

[T]he Supreme Court recognized that "[s]everal commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the nature of the federal interest at stake." The Court noted "the importance of the federal issue in federal-question jurisdiction". The district court recognized the federal interest at stake here and the importance of the enforcement of Tribal-State compacts in the federal courts:

> It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous.

[Citation to district court order, omitted.] We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose. IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein.

Our conclusion is bolstered by IGRA's express authorization of a compact to provide remedies for breach of contract. 25 U.S.C. § 2710(d)(3)(C)(v). This provision invites the tribe and the state to waive their respective immunities and consent to suit in federal court. By envisioning the enforcement of a compact and any contractual obligations assumed pursuant to a compact in federal court, IGRA necessarily confers jurisdiction to the federal courts.

Id.

A. Cabazon Is Applicable to Any Tribal-State Compact Entered Into Pursuant to IGRA not Just the Compact at Issue in That Case

Plaintiff attempts to distinguish the holding in *Cabazon* by arguing that it is limited to tribal-State compacts entered into prior to 1999 (Pl.'s Mem. in Supp. of Mot. Remand ("Mem.") at 5) and that "[n]owhere in the [Compact] is there any mandate that the present dispute, or any dispute, be determined in a federal court." (*Id.*)

The holding in *Cabazon* is not limited to the specific compact at issue in that case and, in fact, this Court in *Rincon Band of Mission Indians v. Schwarzenegger,* No. CV-04-01151 TJW, found, in ruling upon issues involving the Compact, that 25 U.S.C. § 2710(d)(7)(A)(ii) "confers federal court jurisdiction over disputes arising between two parties to a specific gaming Compact." (Order Granting Defs.' Mot. to Dismiss, at 9, Sept. 21, 2004), attached hereto as Ex. A.)

B. The Compact Does not Provide the Parties With a Choice of Forums

Further, contrary to Plaintiff's contention, the Compact does not provide the parties with a

choice of forums. In this regard, the Compact provides, in section 11.2.1, subdivision (c) that if a party seeks a declaration that the Compact has been "materially breached," it is to bring that action in federal court. (Compl., Ex. A. at 40 " [e]ither party may bring an action in federal court . . . for a declaration that the other party has materially breached this Compact.") This section further provides that, it is only if the "federal court determines that it lacks jurisdiction over such an action" that the action may be brought in State court. (*Id.*) Under *Cabazon* and this Court's decision in *Rincon*, however, federal courts have jurisdiction over breach of compact suits. Thus, there is no basis for State court jurisdiction. While section 9.4 of the Compact provides a waiver of sovereign immunity for actions brought in federal or State court, that section must be understood in light of the specific provisions for a declaratory relief action for breach of Compact set forth in section 11.2.1 subdivision (c), which provides that breach of Compact suits are to be filed in federal court unless that court were to determine it lacked subject matter jurisdiction.

II.

WHERE THE VINDICATION OF A RIGHT UNDER STATE LAW NECESSARILY TURNS ON AN INTERPRETATION OF FEDERAL LAW OR AN OBLIGATION CREATED BY FEDERAL LAW AND ADJUDICATION DOES NOT THREATEN TO UPSET A CONGRESSIONALLY APPROVED BALANCE OF FEDERAL AND STATE JUDICIAL RESPONSIBILITIES, DISTRICT COURTS HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1331

Plaintiff's motion for remand to State court is premised on the notion that simply because the Complaint (after Plaintiff's post-removal dismissal of a claim for relief based on breach of the Compact) only alleges a violation of a State statute and seeks relief pursuant to provisions of California law, this case does not arise under the laws of the United States. (Mem. at 3.)

Federal court jurisdiction, however, is based on the complaint at the time of removal—not as subsequently amended. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979). At the time it was removed, the Complaint alleged a breach of the Compact. Thus, the Court has jurisdiction on that basis alone.

In addition, however, even though a complaint alleges only state law violations and seeks relief under a state statute, it may nonetheless "arise under the laws of the United States" for

purposes of federal district court subject matter jurisdiction "if vindication of a right under state law necessarily turned on some construction of federal law." *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., supra,* 545 U.S. 308; *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, supra,* 463 U.S. 1; *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921); *Hopkins v. Walker,* 244 U.S. 486 (1917). As the Supreme Court held in *Grable*:

> [F]ederal question jurisdiction will lie over state-law claims that implicate significant federal issues. [Citation omitted.] The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues [citation omitted].

Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., supra, 545 U.S. at 312. To qualify under this basis for federal question jurisdiction, the *Grable* Court explained that a case must meet specific standards. First, "federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Id.* at 313. Second, even if a question is contested and substantial, the assumption of federal court jurisdiction must be "consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Id.* at 313-14. At issue in this inquiry is whether the acceptance of federal question jurisdiction will herald "a potentially enormous shift of traditionally state cases into federal courts." *Id.* at 319.

This case easily meets the *Grable* standards. First, Plaintiff's right to relief depends upon an interpretation of an obligation created by federal law (a tribal-state class III gaming compact that is the centerpiece of IGRA's class III gaming process). In order to grant relief, the Court must determine whether, under the Compact, a Non-Compact Tribe has the right to judicially enforce the Compact's provisions. Further, the Court must determine whether—even if the Miwok were entitled to judicial enforcement of the Compact's provisions—federal law permits Plaintiff to act on the Miwok's behalf. Both questions are contested in this case and both are essential to the resolution of this suit.

Second, judicial resolution of a complaint such as this does not threaten to upset a congressionally approved balance of federal and state judicial responsibilities. The Ninth Circuit has already found that Congress intended for federal courts to have subject matter jurisdiction over tribal-state compact disputes. *Cabazon Band of Mission Indians v. Wilson, supra,* 124 F.3d at 1056.

Moreover, the State statute at issue, California Government Code § 12012.75 was enacted in the same legislation in which the Compact was ratified (Cal. Stats. 1999, Ch.874, § 2, A.B. No. 1385). Thus, the statute upon which Plaintiff relies has no independent State law existence, but rather has as its sole purpose implementation of the State's duties and responsibilities under the Compact. In this regard, Government Code § 12012.75 fulfills the State's Compact obligation to establish a fund (the RSTF) in the State Treasury, as called for in Compact section 4.3.2(a)(ii) (Compl., Ex. A, at 22), out of which the Commission is to make payments to eligible tribes. Further, this section specifically states that the RSTF has been created "for the purpose of making distributions to non-compact tribes, in accordance with distribution plans specified in tribal-state gaming compacts." Cal. Gov't Code § 12012.75. Thus, California Government Code § 12102.75 creates no new obligation on the part of the State, but rather only provides a mechanism for carrying out the State's Compact obligations. As a result, because there is no distinction between the State's obligation under California Government Code § 12012.75 and its obligation under the Compact, a suit under section 12012.75 is the same as a suit under the Compact and this Court has jurisdiction over an action brought pursuant to section 12012.75 for the same reason it has jurisdiction over a suit brought under the Compact—because the obligation has its genesis in a federal law, IGRA.

Finally, the California courts have already found they lack jurisdiction to rule on the issues in this case. Thus, the assumption of federal court jurisdiction in this instance will not create a conflict with the California judiciary. The issue of the distribution of RSTF payments to the Miwok was the subject of State court litigation in two separate instances and in both cases the California court dismissed the complaint for want of jurisdiction. The first action was initiated by Yakima Dixie, who claims to be the Miwok's hereditary chieftan and the person the federal

government should recognize as the individual authorized to act on behalf of the Miwok. In that action, Mr. Dixie sought an injunction barring the Commission from making RSTF payments to Silvia Burley, pending the federal government's resolution of the Miwok leadership dispute. The California Superior Court for Sacramento County ruled that it had no jurisdiction over a tribal leadership dispute because such jurisdiction resided in the federal government. (See, the court's minute order and January 7, 2005, dismissal order attached as Exhibit 1 to the Commission's Req. for Jud. Not. in Supp. of Opp. to Mot. for Remand filed concurrently herewith.)

In the second action, the Commission brought an interpleader action seeking a declaration as to whom it was obligated to make RSTF distributions under the Compact. Ms. Burley filed a demurrer to the complaint on the ground that the State court lacked subject matter jurisdiction because it would require a determination by the court as to which person—Ms. Burley or Mr. Dixie—was authorized to act on behalf of the Miwok. The court accepted Ms. Burley's argument and ruled that:

> it is an inescapable conclusion that the relief sought by the Commission would compel the Court to determine which individual, or individuals, constitute the lawful governmental representatives of [sic] 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.

(See, the court's June 16, 2006, minute order, item 14 and Aug. 1, 2006, judgment of dismissal attached as Exhibit 2 to the Commission's Req. for Jud. Not. in Supp. of Opp. to Mot. for Remand, filed concurrently herewith.)

CONCLUSION

On the basis of the foregoing, the Commission respectfully requests that this Court deny Plaintiff's motion for remand to the California Superior Court for the County of San Diego on the grounds that the Court has federal question jurisdiction over this action because it requires an interpretation of a Compact over which the Court has subject matter jurisdiction pursuant to *Cabazon Band of Mission Indians v. Wilson, supra,* 124 F.3d at 1056, and because a necessary prerequisite to an award of relief will require a determination under federal law of Plaintiff's

capacity to sue on behalf of the Miwok. The Court's exercise of jurisdiction over this case is consistent with Congress' determination of the proper allocation of judicial responsibilities between the state and federal courts in that Congress intended that the federal courts adjudicate disputes involving tribal-state class III compacts and is also appropriate under the Compact because California courts have twice ruled that they lack jurisdiction over the issues at the heart of this proceeding.

Dated: February 25, 2008

Respectfully submitted,

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

ROBERT L. MUKAI
Senior Assistant Attorney General

SARA J. DRAKE
Supervising Deputy Attorney General

/s/ Peter H. Kaufman
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for the California Gambling Control Commission

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Exhibit "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, aka RINCON SAN LUISENO BAND OF MISSION INDIANS, aka RINCON BAND OF LUISENO INDIANS,

Plaintiff,

v.

ARNOLD SCHWARZENEGGER, Governor of California; WILLIAM LOCKYER, Attorney General of California, STATE OF CALIFORNIA

Defendants.

CASE NO. 04-CV-1151 W (WMc)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants Arnold Shwarzenegger, William Locker, and the State of California ("Defendants") move for an order dismissing this action pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 12(b)(7). Plaintiff Rincon Band of Mission Indians ("Plaintiff")

opposes. All parties are represented by counsel. For the reasons set forth below, the Court **GRANTS** Defendants' motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(7) for failure to join a necessary and indispensable party.

I. BACKGROUND

In mid-1997, California voters approved Proposition 5. This statutory initiative directed the State to enter into Tribal-State gaming compacts with each qualified tribe that so requested. Shortly thereafter, a union challenged Proposition 5's constitutionality. On August 23, 1999 the California Supreme Court declared Proposition 5 unconstitutional. Hotel Employees and Restaurant Employees Int'l Union v. Davis 21 Cal. 4th 585 (1999).

On September 10, 1999 former California Governor Gray Davis entered into Tribal-State Compacts with approximately 57 federally recognized California Indian tribes - including Rincon. These 57 materially identical Compacts allowed the Tribes consistent with the Indian Gaming Regulatory Act ("IGRA"), to engage in what is known as Class III gaming: slot machines, as well as banked and percentage card games. In order for these Compacts to become effective, voters had to approve Proposition 1A, a voter initiative to amend the California Constitution and address the California Supreme Court's concerns in the Hotel Employees case.

The California Legislature eventually ratified the Compacts. See Cal. Gov't Code §12012.25. On March 7, 2000 California voters approved Proposition 1A. This initiative amended the California Constitution to allow the Governor to "negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian land in California in accordance with federal law." CAL. CONST. Art IV, § 19 (f). The United States Secretary of the Interior approved the Compacts. On May 16, 2000 the Compacts were published in the Federal Register and became effective.

Section 4.3.3 of the Compacts expressly states that either the Tribe or the State may request to renegotiate the Compacts on the following matters: (1) the number of authorized gaming devices; (2) revenue sharing with non-gaming tribes; (3) the revenue sharing trust fund; and (4) the allocation of gaming device licenses. All renegotiation requests under this section had to be made between March 7 and March 31, 2003. During this period, several Tribes - including Plaintiff Rincon - requested renegotiations.

In October 2003, the California electorate recalled Governor Gray Davis and elected Arnold Schwarzenegger as Governor. Shortly thereafter, Governor Schwarzenegger reiterated the previous administration's interest in negotiating amended Compacts. To that end, the Governor appointed former California Court of Appeals Justice Daniel Kolkey to conduct these renegotiations. In early June 2004 Rincon met with Mr. Kolkey to renegotiate their compact. While both parties dispute the nature and tone of the negotiations, it is undisputed that those renegotiation efforts have not yielded an amended Compact. In contrast, five tribes - the amici curiae in this case (hereinafter "the five tribes") - successfully negotiated amended Compacts with the State.

On June 21, 2004 Governor Shwarzenegger executed amendments to those five tribes' Compacts. Most notably, the amended Compacts would eliminate the 2000 operating Gaming Device limit. Under the new Compacts, the five tribes would be able to operate unlimited slot machines, with increased license fees per machine at certain threshold levels. In exchange for this increased slot machine allotment, the five tribes would agree to make annual payments to the State for 18 years to securitize a $3 billion dollar State-issued bond, with additional payments thereafter. On July 1, 2004 the California Legislature ratified those Compacts. The Secretary of the Interior must still approve the amended Compacts before they become effective.

On June 9, 2004 Plaintiff commenced this federal action, alleging that the five amended Compacts unconstitutionally impair Plaintiff's Tribal-State Compact. Plaintiff

also claims that the State's bad faith negotiations, coupled with their failure to meet and confer, breached multiple Compact obligations.

On June 28, 2004 Plaintiff sought a temporary restraining order, expedited discovery, and a preliminary injunction. By order dated July 7, 2004 this Court denied Plaintiff's injunction request. On July 26, 2004 Defendants filed this motion to dismiss all claims pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(b)(7).

II. LEGAL STANDARD

A district court has the authority to dismiss a complaint for failure to join a necessary and indispensable party. FED. R. CIV. P. 12(B)(7), FED. R. CIV. P. 19.

Rule 19 analysis requires three steps. First, the district court must "determine if an absent party is 'necessary.'" Quileute Indian Tribe v. Babbitt 18 F.3d 1456, 1458 (9th Cir. 1994) (*citing* FED. R. CIV. P. 19(a)). Second, "[i]f a party is deemed to be necessary, the court must then determine if the party can be joined." Id. "If the party cannot be joined, the court finally must determine whether the party is indispensable so that in 'equity and good conscience' the action should be dismissed." Id. (internal citations omitted). If the party (1) is necessary, (2) cannot be joined, and (3) is indispensable, then dismissal is warranted. See id.; see also American Greyhound Racing Inc. V. Hull, 305 F.3d 1015, 1022 (9th Cir. 2002).

Rule 15(a) allows the court to freely grant leave to amend pleadings when justice so requires. FED. R. CIV. P. 15(a). If a court determines that an unnamed party is in fact necessary and indispensable, it is within the district court's "sound discretion" to allow an amended pleading that adds the necessary parties. See, e.g., Grand Light & Supply v. Honeywell, 771 F.2d 672, 680 (2nd Cir. 1985). If a necessary and indispensable party cannot be joined, however, even an amended pleading cannot save the complaint from dismissal.

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III. DISCUSSION

Having reviewed the parties' moving papers and the applicable law, the Court grants Defendants' motion to dismiss pursuant to Federal Rules 12(b)(7) and 19. Plaintiff failed to join the five tribes, and the five tribes are necessary and indispensable parties. All federal claims regarding the amended 2004 Compacts are hereby dismissed. As to the remaining claims arising under state law, the court declines to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

A. PLAINTIFF FAILED TO JOIN NECESSARY AND INDISPENSABLE PARTIES

The disputed 2004 Compacts were executed by Defendants and five federally recognized Indian tribes, none of which are named in this lawsuit. Since the Compacts were signed, the California Legislature has ratified the Compacts and they are presently before the Secretary of Interior for final approval. Plaintiff Rincon, also a federally recognized Indian tribe, seeks through this lawsuit to invalidate all five Compacts. Among other things, Plaintiff seeks to have the five tribes' Compacts declared illegal, and enjoin their implementation.

Although not expressly named in this lawsuit, the five tribes have appeared before this Court as *Amici Curiae* (hereinafter "amici" or "the five tribes") and submitted additional briefing. According to Defendants, Rule 19 mandates that Plaintiff join the five tribes as named parties to this lawsuit based on their "necessary and indispensable" status. Plaintiff cannot do this, however, because each tribes' sovereign immunity prevents it from being named as a party absent consent. All tribes currently present as *amici* have expressly stated they will neither waive their immunity nor consent to this federal lawsuit.

By order dated July 7, 2004 this Court denied Plaintiff injunctive relief based primarily on Plaintiff's failure to join necessary and indispensable parties under Rule 19. It is well settled that Rule 19's primary purpose affords unnamed necessary and indispensable parties the opportunity to join a lawsuit that could have a potentially detrimental effect on their legal interests. Providing the opportunity for affected parties

to present their arguments in court is a long standing principle of due process. See Mullane v. Central Hanover Bank and TrustCo., 339 U.S. 306, 314 (1950).

For the reasons explained more thoroughly below, this Court finds that the presently named Defendants are not adequate legal representatives of the five tribes. The five tribes should have "an opportunity to present their objections" as parties in this matter. Id. Moreover as noted in the order dated July 7, 2004 this Court maintains its holding that the five tribes are necessary and indispensable parties to this action that cannot be joined due to tribal sovereign immunity. Therefore, this case shall be dismissed insofar as no federal claims remain.

1. THE FIVE TRIBES ARE "NECESSARY"

Rule 19(a) provides that parties are necessary if

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the 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 to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claims interest.

FED. R. CIV. P. 19(a). Here, the Court finds that the five tribes satisfy Rule 19(a)(2)(i)'s requirements for two reasons. First, the five tribes have an interest "relating to the subject of this action." Indeed, the five tribes' interest - their recently ratified 2004 Compacts with Defendants - is the *subject* of this lawsuit. Second, this suit's disposition unquestionably impairs the five tribes' ability to protect that interest. Plaintiff concedes that is seeks to invalidate the five tribes' Compacts. Because this litigation concerns the five tribes' Compacts, and may impair or impede those Compacts, the five tribes are necessary parties.

In response, Plaintiff contends that the five tribes are not necessary because the State adequately represents the five tribes' interests. However, the Ninth Circuit has unequivocally held that a Governor cannot adequately represent the interests of absent tribes, even though both may wish to uphold the legality of a Compact or agreement. American Greyhound 305 F.3d at 1023, fn. 5. The Ninth Circuit continued, "the State

and the tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the tribes." Id.

Plaintiff attempts to distinguish the facts of American Greyhound from the current matter. Plaintiff argues that joinder of absent tribes was necessary in American Greyhound because the Compacts at issue had not yet concluded negotiations. Since the Compacts in the current matter have already been ratified, Plaintiff contends there is no potential for adversity between the State and the five tribes.

The Court finds Plaintiff's suggested distinction unpersuasive. That the five tribes' 2004 Compact negotiations have concluded does not lessen their separable legal interests in the renegotiated Compacts. As the Ninth Circuit held in Shermoan v. United States, "it is the party's *claim* of a protectable interest that makes its presence necessary." 982 F.2d 1312, 1317 (9th Cir. 1992). Multiple parties' mere contract formation does not automatically create identical legal interests. To the contrary, contracts create separate and distinct interests that each party independently possesses and will seek to protect.

In this case the Court need not speculate on potential adverse Compact interests between the State and the five tribes. The State does not (and cannot) adequately represent the five tribes' interests. American Greyhound, 305 F.3d at 1023. Indeed, the Tribal-State Compacts' preamble expressly acknowledges the Tribes' and State's contentious past. (See *Compact Preamble* at D). Further, the five tribes as *amici* in this matter, have put forth legal arguments regarding Compact enforceability different than the State's arguments regarding the same. The five tribes adamantly assert their sovereign immunity from suit, seek Rule 19(c) dismissal, and stress the divergent interests of the State and the five tribes. Each of these arguments is given a cursory mention, if any, by the State's dismissal pleadings here.. Compare, *Amici Curiae Brief of the Pala Band of Mission Indians, et al.* At 3-8, with *Defendants' Memorandum in Support of Motion to Dismiss*, at 8-11. Despite Plaintiff's contentions, the State is not "vigorously defending" the five tribes' interests. Quite the opposite, these adverse

interests make the five tribes "necessary" parties under Rule 19(a)(2) and the Court so finds as a matter of law.

2. THE FIVE TRIBES CANNOT BE JOINED

Having established that the five tribes are necessary parties, the Court must now determine whether they can be joined. For the same reasons mentioned in the order dated July 7, 2004 – this Court finds that the five tribes' sovereign immunity prevents joinder.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez 436 U.S. 49, 58 (1978) (internal citations omitted); see also, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998). While tribes may waive their sovereign immunity, "such waivers must be 'expressly unequivocal' and cannot be implied." Quileute Indian Tribe, 18 F.3d at 1459. (quoting Santa Clara, 436 U.S. at 58).

In this case, the five *amici* tribes have not waived their sovereign immunity. In fact, the 1999 Compacts expressly *prevent* joinder. Compact Section 9.4 (3) only allows sovereign immunity waiver if:

> No person or entity other than the Tribe and the State is party to the action, unless failure to join a third party would deprive the court of jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party.

Compact, Sec. 9.4(3) The Compact's express language limits sovereign immunity waivers to court actions between the State and the Tribe.

Plaintiff no longer argues that the five tribes waived their immunity through the 1999 Compacts. See Plaintiffs Memorandum in Opposition to State's Motion to Dismiss, at 10. Plaintiff now contends that Congress has waived tribal sovereign immunity for the five tribes by enacting IGRA.

25 U.S.C. § 2710(d)(7)(A)(ii) states:

> The United States District Courts shall have jurisdiction over...any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

Plaintiff argues that 25 U.S.C. § 2710(d)(7)(A)(ii) permits Plaintiff to join "any necessary tribes in this suit, as it is seeking to enforce, by way of injunction, the terms of its Tribal-State gaming compact." See Plaintiff's Opposition, at 10. The Court respectfully disagrees.

This Court finds that the language of 25 U.S.C. § 2710(d)(7)(A)(ii) confers federal court jurisdiction over disputes arising between two parties to a specific gaming Compact. Nothing in IGRA confers federal jurisdiction or waives tribal immunity from claims of *third-party tribes* seeking to invalidate another tribe's Compact with the State. Id. To hold otherwise would allow any third party to unilaterally attack legitimate state gaming compacts with any Indian tribe.

The five *amici* tribes are immune from suit, and sovereign immunity has not been waived by IGRA. Plaintiff contends that this Court should grant leave "to make any necessary amendment" to the complaint if the five tribes are deemed necessary, pursuant to Fed. R. Civ. P. 15(a). (See *Plaintiff's Opposition*, at 4, fn 4). However, allowing amendment would be an exercise in futility. The five tribes, as *amici* in this case, have expressly stated their intention to assert their sovereign immunity in this matter. They will not voluntarily submit to this Court's jurisdiction. The five tribes will not - and cannot - be joined as parties.

3. THE FIVE TRIBES ARE INDISPENSABLE

The Court has therefore found that the five *amici* tribes are necessary, and cannot be joined. All that remains to decide is whether they are indispensable.

Rule 19(b) requires the Court to consider four factors in determining whether a party is indispensable. "The district court is directed to balance the following factors: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to

lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum Quileute Indian Tribe, 18 F.3d at 1460. The Ninth Circuit has "consistently applie[d] the four-part test to determine whether Indian tribes are indispensable parties. Confederated Tribes of Chehalis Indian Reservation v. Luhan, 928 F.2d 1496, 1499 (9th Cir. 1991) (citations omitted).

Turning to the first factor, the prejudice to the five tribes "stems from the same legal interest that make [the tribes] a necessary party to the action." Quileute Indian Tribe, 18 F.3d at 1460 (citing Confederated Tribes, 928 F.2d at 1499) (noting that Rule 19(b)'s prejudice test is essentially the same as Rule 19(a)'s legal interest test). Accordingly, the five tribes would be prejudiced by this action.

The second factor asks whether the relief can be "shaped" to lessen the prejudice. See Fed. R. Civ. P. 19(b) (referring to the "shaping of relief"). The simple answer is no. If Plaintiff was successful in this suit, the five *amici* tribes would lose not only their unlimited slot machine gaming Compacts, but also the ability to negotiate those types of Compacts in the future. Just as the Ninth Circuit stated in Quileute,"[n]o partial remedy can be fashioned that would not implicate those interests or would eliminate the prejudice to the [tribes]." 18 F.3d at 1460.

The third factor - whether adequate relief is available in the five tribes' absence - also falls in the five *amici* tribes' favor for two reasons. First, any form of injunctive relief would prejudice both the five tribes and the State. See Dawavendewa v. Salt River Proj. Agr. Imp. & Power Dist., 276 F.3d 1150, 1162 (9th Cir. 2002) (concluding that the prejudice to both Salt River Project and Navajo Nation rendered relief inadequate). Second, the Court's order would not preclude tribes located outside the Southern District of California from seeking to renegotiate their slot machine allotment. Those Compacts, if challenged, could present multiple conflicting district court decisions. Plaintiff's claims here do not address these problems, and are therefore inadequate.

Plaintiff contends that the five tribes are not truly "absent" from the current matter, since they have presented themselves to the Court as *amici*. Plaintiff argues that the five tribes' submission of an *amicus* brief equates them with actual parties in this case, making the five tribes neither necessary nor indispensable. Plaintiff's argument, while creative, is mistaken. While *amicus* briefs serve as a medium to present issues to the Court's attention, *amici* are not substitutes for actual parties. In Wichita & Affiliated Tribes of Oklahoma v. Hodel, the D.C. Circuit held:

> If the opportunity to brief an issue as a non-party were enough to eliminate prejudice, non-joinder would never be a problem since the court could always allow the non-joinable party to file amicus briefs. Being a party to a suit carries with it significant advantages beyond the amicus' opportunities, not the least of which is the ability to appeal an adverse judgment.

788 F.2d 765, 775 (D.C. Cir. 1986). This Court agrees. The five tribes are a necessary and absent party, regardless of their current presence as *amici*.

The final Rule 19(b) factor focuses on an alternative forum. Defendants argue that Plaintiff does have an alternative forum. They suggest that Plaintiff may voice its objections to the Secretary of the Interior, and seek redress before she approves or rejects the ratified Compacts. Whether this constitutes an alternative forum is largely irrelevant. Even if Plaintiff had no alternative forum, the "lack of an alternative forum does not automatically prevent dismissal of a suit." Quileute, 18 F.3d at 1460. Indeed, the Ninth Circuit has dismissed several cases based on an absent, indispensable Indian tribe even though the Plaintiff lacked an alternative forum. See Salt River Project, 276 F.3d at 1162 (listing cases), Turley v. Eddy, 70 Fed. Appx. 934 (9th Cir. 2003) (unpublished), Rosales v United States, 73 Fed. Appx. 913 (9th Cir. 2003) (unpublished), American Greyhound,305 F.3d at 1025. Thus, while this factor may arguably fall in Plaintiff's favor, it is not dispositive here.

In summary, the five *amici* tribes are necessary and indispensable parties to this litigation. Those same give tribes are immune from suit, and have not consented to be sued. See Kiowa Tribe, 523 U.S. at 754. Therefore, absent a public rights exception,

Defendants' motion to dismiss must be granted.

4. THE PUBLIC RIGHTS EXCEPTION DOES NOT APPLY

Despite this Court's order dated July 7, 2004 which denied injunctive relief and explicitly declined to find a Rule 19 public rights exception, Plaintiff seeks to revive this failing argument yet again. See Plaintiff's Opposition, at 9. Once again, this Court does not find a Rule 19 public rights exception.

The public rights exception "permits litigation to proceed in the absence of necessary and indispensable parties when it transcends the private interests of the participants and seeks to vindicate a public right." American Greyhound, 305 F.3d at 1026. Plaintiff has not demonstrated a significant public interest in the current matter that would warrant the disregard of Rule 19. In rejecting the plaintiff's public rights argument, the Ninth Circuit in American Greyhound stated the following (almost as if it were dealing with the case at bar):

> In the present case, the effect of the district court's injunction is not merely to require adherence to certain procedures in entering or extending gaming compacts with the tribes; it is to prevent new compacts or the extension of existing ones. The plaintiffs sought this injunction to avoid competitive harm to their own operations. The general subject of gaming may be of great public interest, but the rights in issue between the plaintiffs in this case, the tribes and the state are more private than public.

Id. This Court overwhelmingly agrees. This case centers exclusively on *Plaintiff's* attempt to prevent other tribes' casinos from expanding, thereby protecting itself from "competitive harm." These rights are private in nature, not public. The public rights exception clearly does not apply.

The Court recognizes that dismissal of this matter severely limits Plaintiff's ability to obtain relief. However, The Ninth Circuit's position on tribal sovereign immunity is clear. In Turley, the Ninth Circuit recently upheld a dismissal under Rule 19 for failing to join CRIT, a necessary party that could not be joined due to sovereign immunity. In remarkably similar circumstances as those arising here, the Ninth Circuit held, "[t]he Plaintiff may have difficulty obtaining relief if the case is dismissed, but

when tribal sovereign immunity is at stake, that factor has little weight." 70 Fed. Appx. 934 (9th Cir. 2003) (unpublished). Similarly, in Rosales, the Ninth Circuit recently held "the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." 73 Fed. Appx. 913 (9th Cir. 2003) (unpublished) (citing American Greyhound, 305, F.3d 1015, 1025 (9th Cir. 2002)). While this Court acknowledges the aforementioned authority remains unpublished, the Court notes the decisions' sound reasoning as another reason to justify dismissal here.

Because the five *amici* tribes are necessary and indispensable parties, and Plaintiff has failed to establish a viable public rights exception, Defendants' motion to dismiss pursuant to Rule 12(b)(7) is **GRANTED.**

B. COURT DECLINES SUPPLEMENTAL JURISDICTION

By dismissing all Plaintiff's claims regarding the 1999 Compacts and IGRA, the Court has disavowed itself of federal question subject matter jurisdiction. The remaining issues and claims (if any) all arise under state, not federal law. See Gila River Indian Community v. Henningham, Durham and Richardson 626 F.2d 708, 714 (9th Cir. 1980) ("we can discern no reason in the present action to extend the reach of the federal common law to cover all contracts entered into by Indian tribes. Otherwise the federal courts might become a small claims court for all such disputes.").

Even assuming this Court were to reach the merits of Plaintiff's remaining claims arising under state law, the Court declines to adjudicate those claims in federal court and declines to exercise supplemental jurisdiction potentially attaching thereto. 28 U.S.C. § 1367; see, e.g., Haynie v. County of Los Angeles, 339 F.3d 1071, 1078 (9th Cir. 2003) (holding "the district court may decline to hear supplemental claims if it has dismissed the claims over which it has original jurisdiction or for "other compelling reasons.")

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IV. CONCLUSION AND ORDER

In light of the foregoing, the Court **GRANTS** Defendants' motion to dismiss pursuant to Rules 12(b)(7) and 19 for failure to join a necessary and indispensable party. (Doc. No. 22-1). The Court declines supplemental jurisdiction over all remaining claims potentially arising under state law. 28 U.S.C. § 1367. The Clerk of Court shall close the district court case file and terminate this action as to all parties and claims.

IT IS SO ORDERED.

DATE: September 21, 2004

HON. THOMAS J. WHELAN
United States District Court
Southern District of California

CC: ALL PARTIES

HON. WILLIAM MCCURINE, UNITED STATES MAGISTRATE JUDGE

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 25, 2008**, I electronically filed the following document(s):

1. **DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S OPPOSITION TO MOTION FOR REMAND;**
2. **DECLARATION OF PETER H. KAUFMAN IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE; AND**
3. **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S OPPOSITION TO MOTION FOR REMAND**

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 **February 25, 2008**, at San Diego, California.

Roberta L. Matson

Declarant

Signature

SA2008300115

80207486.wpd

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Attorneys for 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.	CASE NO. 08 CV 0120 BEN AJB **DECLARATION OF PETER H. KAUFMAN IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE** Hearing: March 10, 2008 Time: 10:30 a.m. Courtroom: 3 Judge: The Honorable Roger J. Benitez

I, Peter H. Kaufman declare as follows:

1. I am a Deputy Attorney General in the California Department of Justice and one of the attorneys assigned to represent Defendant California Gambling Control Commission in the above entitled matter.

2. In the course of my representation of the Commission, I requested that the Department's files in *Yakima Dixie v. State of California, California Gambling Control Commission,* Case No. 04AS04205 in the California Superior Court for the County of Sacramento and *California*

Gambling Control Commission vs. Sylvia Burley, Case No. 05AS05385 in the California Superior Court for the County of Sacramento be provided to me.

3. I received the requested files. Included in the files I received were:

a. A Notice of Entry of Order Re: Dismissal, dated January 24, 2005, and the minute order upon which the dismissal of that action was based. These documents are attached hereto and incorporated by reference herein as Exhibit 1; and

b. A Judgment of Dismissal, filed August 1, 2006, signed by the Honorable Loren E. McMaster, and the minute orders upon which that judgment was based, specifically, Items 13, 14 and 15 on the court's June 16, 2006, 2:00 p.m. calendar. These documents are attached hereto and incorporated by reference herein as Exhibit 2.

I declare under penalty of perjury that the foregoing is true and correct in all respects and that if called as a witness in the above entitled matter, I could and would competently testify thereto.

Executed this 22nd day of February, 2008 in San Diego, California.

/s/Peter H. Kaufman
PETER H. KAUFMAN, Declarant

Exhibit "1"

ITEM 11 04AS04235 YAKIMA DIXIE, ET AL VS. STATE OF CALIFORNIA, ET AL
Nature of Proceeding: TRO
Filed By: GLICK, PETER

The court declines to issue the TRO. The TRO request essentially requires the court to make a preliminary determination as to who is the proper person to receive the funds from the Revenue Sharing Trust Fund ("RSTF") on behalf of the California Valley Miwok Tribe ("Tribe"), a non-gaming tribe.

Injunctive relief of the type sought here may only issue as a provisional remedy attendant to a viable independent claim for legal or equitable relief. In this case, plaintiff's apparent goal is a writ either: (1) commanding the California Gambling Control Commission ("CGCC") to acknowledge plaintiff as the Tribe's authorized representative for RSTF purposes, (2) prohibiting the CGCC from acknowledging Silvia Burley as the Tribe representative pending plaintiff's final litigation of tribal authority related issues before the Bureau of Indian Affairs ("BIA"); or (3) prohibiting the CGCC from disbursing RSTF monies to the Tribe until plaintiff's BIA contest is finally adjudicated. Consequently, any provisional relief in conjunction with these theoretical writ remedies would necessarily depend, at a minimum, upon an interim determination by this court as to the likelihood of plaintiff's success before the BIA. Without such a preliminary determination, the court would not be in a position to conclude that the CGCC's new policy to pay RSTF proceeds to the individual currently recognized by the BIA pending its resolution of the authority dispute is lawfully vulnerable and should be enjoined.

The federal government has exclusive jurisdiction, if any, over determining the Tribe's acknowledged representative. Apparently, the

appropriate agency has made a determination that Silvia Burley is currently the rightful person to receive RSTF funds on behalf of the Tribe. It is this determination that plaintiff contests. This court has no jurisdiction over that dispute. Plaintiff's exclusive remedy is with the appropriate federal agency. The court understands that such a proceeding is now pending.

Moreover, the TRO essentially requests the court to order the California Gambling Control Commission to act contrary to its statutory duty, which the court declines to do. Government Code section 12012.9(d) requires the CGCC to distribute the RSTF money "without delay" to each eligible Indian tribe. Thus, until otherwise determined by the federal government, those funds in question must be distributed to the Tribe. Plaintiff's claims to be the proper and lawfully acknowledged chief of the Tribe must be resolved either by the Tribe or the appropriate federal agency. This court lacks jurisdiction to make such a determination. Since there is no point in holding a further hearing in a matter that the court clearly lacks jurisdiction to render an ultimate remedy, the court declines to issue an order to show cause re: preliminary injunction. The plaintiff is free to make any motion deemed appropriate by regular notice.

The request for issuance of a temporary restraining order and order to show cause re: preliminary injunction is denied.

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

ML 7409

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Attorneys for Plaintiffs
YAKIMA DIXIE and
CALIFORNIA VALLEY MIWOK TRIBE
fka SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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, vs. STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION, an Agency of the State of California, and DOES 1 through10, inclusive. Defendants.	**CASE NO. 04AS04205** **NOTICE OF ENTRY OF ORDER RE DISMISSAL** **Hon. Loren E. McMaster**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT on January 7, 2005, the clerk of this court entered an order of Dismissal of the entire action as to all parties and all causes of action, without prejudice. A copy of said Order is attached hereto as Exhibit "A" and incorporated herein by reference.

Dated: January 24, 2005.

PETER E. GLICK, Attorneys for Plaintiffs/Petitioners, YAKIMA DIXIE; and, CALIFORNIA VALLEY MIWOK TRIBE fka SHEEP RANCH RANCHERIA OF MI-WUK INDIANS OF CALIFORNIA

Peter E. Glick
Attorney at Law
400 Capitol Mall, Suite 1100
Sacramento, CA 95814

Exhibit "A"

20

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):	TELEPHONE NO.:	FOR COURT USE ONLY
Peter E. Glick, Esq. SBN 127979 400 Capitol Mall, Suite 1100 Sacramento, CA 95814	916-558-6182	FILED ENDORSED T. LEVINSON
ATTORNEY FOR (Name): Plaintiffs Y. Dixie & California Valley Miwok Tribe, etc.		
Insert name of court and name of judicial district and branch court, if any: Sacramento County Superior Court		
PLAINTIFF/PETITIONER: Yakima Dixie & California Miwok Tribe fka Sheep Ranch of Me-Wuk Indians of California DEFENDANT/RESPONDENT: State of California, California Gambling Control Commission		
REQUEST FOR DISMISSAL ☐ Personal Injury, Property Damage, or Wrongful Death ☐ Motor Vehicle ☐ Other ☐ Family Law ☐ Eminent Domain ☑ Other (specify): Injunctive Relief	CASE NUMBER: 04AS04205	

— A conformed copy will not be returned by the clerk unless a method of return is provided with the document. —

1. **TO THE CLERK:** Please dismiss this action as follows:
   a. (1) ☐ With prejudice (2) ☑ Without prejudice
   b. (1) ☑ Complaint (2) ☐ Petition
   (3) ☐ Cross-complaint filed by (name): on (date):
   (4) ☐ Cross-complaint filed by (name): on (date):
   (5) ☑ Entire action of all parties and all causes of action
   (6) ☐ Other (specify):*

Date: January 5, 2005

Peter E. Glick, Esq. SBN 127979
(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

Peter E. Glick
(SIGNATURE)

Attorney or party without attorney for:
☑ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross-complainant

* If dismissal requested is of specified parties only, of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

2. **TO THE CLERK:** Consent to the above dismissal is hereby given.**
Date:

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

(SIGNATURE)

Attorney or party without attorney for:
☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross-complainant

** If a cross-complaint—or Response (Family Law) seeking affirmative relief—is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581(i) or (j).

(To be completed by clerk)

3. ☒ Dismissal entered as requested on (date):
4. ☐ Dismissal entered on (date): JAN 7 - 2005 to only (name):
5. ☐ Dismissal **not entered** as requested for the following reasons (specify):

6. ☐ a. Attorney or party without attorney notified on (date):
   b. Attorney or party without attorney not notified. Filing party failed to provide
   ☐ a copy to conform ☐ means to return conformed copy

Date: JAN 7 - 2005

Clerk, by T. LEVINSON, Deputy

Form Adopted by the Judicial Council of California
982(a)(5) [Rev. January 1, 1997]

REQUEST FOR DISMISSAL

Code of Civil Procedure, § 581 et seq.
Cal. Rules of Court, rules 383, 1233
American LegalNet, Inc. www.USCourtForms.com

Yakima Dixie, et al. v. State of California, California Gambling Control Commission, et al.
Sacramento County Superior Court, Case No.: 04AS04205

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Peter E. Glick, Attorney at Law, 400 Capitol Mall, Suite 1100, Sacramento, CA 95814. On January 5, 2005, I served the within documents:

Request for Dismissal

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth on the attached service list.

☐ by causing personal delivery by Federal Express Overnight Service of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Marc LeForestier
Office of the Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

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

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

Executed on January 5, 2005, at Sacramento, California.

Roxane Balison-White

Peter E. Glick
Attorney at Law
400 Capitol Mall, Suite 1100
Sacramento, CA 95814

Yakima Dixie, et al. v. State of California, California Gambling Control Commission, et al.
Sacramento County Superior Court, Case No.: 04AS04205

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Peter E. Glick, Attorney at Law, 400 Capitol Mall, Suite 1100, Sacramento, CA 95814. On January 24, 2005, I served the within documents:

Notice of Entry of Order re Dismissal

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth on the attached service list.

☐ by causing personal delivery by Federal Express Overnight Service of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Marc LeForestier
Office of the Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

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

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

Executed on January 24, 2005, at Sacramento, California.

Roxane Balison-White

Peter E. Glick
Attorney at Law
400 Capitol Mall, Suite 1100
Sacramento, CA 95814

Exhibit "2"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA GAMBLING CONTROL COMMISSION, Plaintiff, **v.** **SYLVIA BURLEY; YAKIMA DIXIE; MELVIN DIXIE; DEQUITA BOIRE; and VELMA WHITEBEAR,** Defendants.	CASE NO. 05AS05385 **JUDGMENT OF DISMISSAL**

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.

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

Dated: July ___, 2006

HONORABLE STEVEN H. RODDA
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: July 17, 2006

LAW OFFICES OF KARLA D. BELL

By: _____
KARLA D. BELL
Attorney for Defendant Silvia Burley

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

LOREN E. McMASTER

Dated: July ___, 2006
AUG - 1 2006

HONORABLE LOREN E. McMASTER
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: July ___, 2006

LAW OFFICES OF KARLA D. BELL

By:_____
KARLA D. BELL
Attorney for Defendant Silvia Burley

DECLARATION OF SERVICE

Case Name: CALIFORNIA GAMBLING CONTROL COMMISSION v. SYLVIA BURLEY, et al.
Case No: Sacramento Superior Court No. 05AS05385

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within cause; my business address is 1300 I Street, Post Office Box 944255 , Sacramento, California 94244-2550.

On August 15, 2006, I served the attached

NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

XX **(BY MAIL)** I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Sacramento, California. I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

Karla D. Bell
Law Offices of Karla D. Bell
4712 Admiralty Way, Suite 580
Marina del Rey, CA 90292

Attorneys for Defendant Silvia Burley

Peter Glick
400 Capitol Mall, #1100
Sacramento, CA 95814

Attorneys for Defendants Yakima Dixie, Melvin Dixie, Dequita Boire, and Velma Whitebear

Thomas Wolfrum
Attorney at Law
1460 Maria Lane, #340
Walnut Creek, CA 94596

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on August 15, 2006.

/S/ Paula Corral
PAULA CORRAL

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

Judge McMaster discloses that attorneys appearing in cases on todays calendar may have donated to the Committee for Judicial Independence which was formed to oppose the attempted recall of judge McMaster. A list of donors and amounts donated is under the custody of court executive officer Jody Patel and can be reviewed at room 611, sixth floor, courthouse, 720 Ninth Street.

Department 53
Superior Court of California
800 Ninth Street, 3rd Floor
LOREN E. MCMASTER, Judge
T. West, Clerk
V. Carroll, Bailiff

Friday, June 16, 2006, 2:00 PM

Item 1 **01AS07723 ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion To Compel Supplemental Interrogatories & Production of Docume

Filed By:

Advanced to and heard on June 1, 2006.

Item 2 **01AS07723 ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion for Protective Order

Filed By: Ragan, Jennifer L.

Defendant's motion for a protective order quashing plaintiff's demand for Exchange of Expert Witnesses on the ground discovery is closed is denied.

Plaintiff's motion to continue the trial in this matter was granted and the trial court vacated all dates set for trial and MSC. Under such circumstances the discovery cut-off is generally tried to the original trial date.

Plaintiff points out that defendant has propounded discovery and insisted that she could do so because all discovery timelines were vacated when the trial date was vacated. The Court granted the unopposed motion to compel. It would be inequitable to allow defendant to obtain a court order compellingt discovery while at the same time asserting that discovery is closed as to plaintiff.

The court views the conversations between the parties followed by defendant's discovery motion to constitute a stipulation that discovery remain open until closed by an arbitriation or trial date.

This minute order is effective immediately and no formal order is required.

Item 3 **01AS07723 ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion to Compel Deposition

and plaintiffs have been living in the house since May of 2003, but that defendants have refused to sign the escrow documents and escrow is still pending. Plaintiffs allege defendant now wishes to sell the property to others for more money.

The first and second causes of action are for specific performance and breach of contract. Plaintiffs have not alleged when the agreement to sell the real property was entered into and have not alleged whether the contract is oral or written. They have also failed to attach a copy of the agreement, There are numerous exhibits attached to the complaint but none have been identified by number or letter and, with the exception of "Exhibit A," none have been incorporated into the complaint. Exhibit A is a subpoena for records, not an escrow agreement.

In their opposition plaintffs refer to one seller signing the agreement. Plaintiffs must allege who was a party to the contract and who signed it.

The third cause of action is for fraud. It is unchanged from the original complaint and fails to state a cause of action. Fraud must be alleged with specificity.

The fourth cause of action for conspiracy fails because no underlying tort has been adequately pled.

Plaintiffs are given leave to amend the first through fourth causes of action **only.** Th

An amended complaint shall be filed and served by June 26, 2006. Responsive pleadings shall be filed and served 10 days thereafter, 15 days if serviced is by mail.

This minute order is effective immediately and no formal order is required.

Item 11 **05AS02607 DINO TRIAS, ET AL VS. ELAIN B FURLOW, ET AL.**

Nature of Proceeding: Motion To Strike

Filed By: White, Gary R.

Defendant Elain Furlow's motion to strike is granted as to the fifth through eighth causes of action without leave to amend.

The Court previously sustained defendant's demurrer without leave to amend as to these causes of action. By including them in the amended complaint, plaintiffs have failed to comply with the Court's order and the complaint is not drawn in conformity with the law. CCP 436(b).

This minute order is effective immediately and no formal order is required.

Item 12 **05AS02681 PRISCILLA ZAIRIS VS. JOSE ALFREDO JIMENEZ, ETAL**

Nature of Proceeding: Motion To Compel

Filed By: Johansing, David

This matter is dropped from calendar.

Item 13 **05AS05385 CALIFORNIA GAMBLING CONTROL COMM VS. SYLVIA BURLEY ET AL**

Nature of Proceeding: Motion To Quash Service Summon

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 served.

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 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.

tem 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.

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

Item 16 **05AS05467** **MARK BUCKMAN VS. JOHN LEFAKIS ET AL**

Nature of Proceeding: Demurrer

Filed By: Prokop, Tyler S.

Dropped. Defendants intend to file an amended answer.

Item 17 **06AS00381** **ECKMAN, FLOYD HERMAN JR. VS. VARANO, ELIZABETH RUTH**

Nature of Proceeding: Settlement and Application for Good Faith Determination

Filed By: Molinelli Jr., James P.

Defendant Varano's motion for a determination that her settlement with plaintiff Eckman is in good faith is granted.

Regional Transit, defendant in a related action brought by Eckman, has opposed the motion because it contends (1) it fails to provide a rough approximation of plaintiff's recovery, (2) RT has not had an opportunity to discover the assets of defendant, and (3) the workers' compensation lien is unsettled.

Defendant has no assets and the settlement is for policy limits. A disproportionate settlement by an insolvent defendant may nonetheless be in good faith. *County of Los Angeles v Guerrero* (1989) 209 Cal.App.3d 1149, 1156-57.

RT has had the opportunity to discover assets and defendant has supplied a supplemental declaration regarding lack of assets. The exact disposition of the workers' compensation lien is irrelevant as RT ie entitled to a credit regardless.

The Court finds the settlement is in good faith and meets the Tech-Bilt standard. The Court will sign the order submitted with the moving papers.

Item 18 **06AS00852** **CHRISTOPHER PENDARVIS VS. JASON GRIEST**

Nature of Proceeding: Preliminary Injunction

Filed By:

This matter is continued to 7/14/2006 at 02:00PM in this department.

Item 19 **06AS00852** **CHRISTOPHER PENDARVIS VS. JASON GRIEST**

Nature of Proceeding: Motion to Appoint Receiver

Filed By: Fathy, Richard G.

This matter is continued to 7/14/2006 at 02:00PM in this department.

Item 20 **06AS00852** **CHRISTOPHER PENDARVIS VS. JASON GRIEST**

Nature of Proceeding: Preliminary Injunction

Filed By:

This matter is continued to 7/14/2006 at 02:00PM in this department.

EDMUND G. BROWN JR.
Attorney General of the State of California
ROBERT L. MUKAI
Senior Assistant Attorney General
SARA J. DRAKE
Supervising Deputy Attorney General
RANDALL PINAL
Deputy Attorney General
PETER H. KAUFMAN, State Bar No. 52038
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2020
Fax: (619) 645-2012
Email: peter.kaufman@doj.ca.gov

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 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S OPPOSITION TO MOTION FOR REMAND** 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 documents which are contained in the records and files of the California Department of Justice:

1. A true and correct copy of a Notice of Entry of Order Re: Dismissal, dated January 24, 2005, 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 and the minute order upon which the dismissal of that action was based. These documents are attached hereto and incorporated by reference herein as Exhibit 1.

2. A true and correct copy of a Judgment of Dismissal, filed August 1, 2006, and signed by the Honorable Loren E. McMaster, Judge of the Superior Court, in the Superior Court of the State of California for the County of Sacramento, in Case No. 05AS05385, entitled *California Gambling Control Commission vs. Sylvia Burley*, and a true and correct copy the minute orders upon which that judgment was based, specifically, Items 13, 14 and 15 on the court's June 16, 2006, 2:00 p.m. calendar. These documents are attached hereto and incorporated by reference herein as Exhibit 2.

This request is based upon the Declaration of Peter H. Kaufman filed concurrently herewith and Federal Rule of Evidence 201(b)(2) in that the records and files of a public agency such as the California Department of Justice as well as the orders of 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, *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; *Tan v. University of CA San Francisco*, Slip Copy, 2007 WL 963222, fn. 1 (N.D. Cal.); records maintained by a public agency.

Dated: February 25, 2008

Respectfully submitted,

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

ROBERT L. MUKAI
Senior Assistant Attorney General

SARA J. DRAKE
Supervising Deputy Attorney General

/s/Peter H. Kaufman
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for Defendants
California Gambling Control Commission

TABLE OF CONTENTS

80209638.wpd

Exhibit "1"

ITEM: 1 04/03/2002 BENAKIBA DIXIE, ET AL VS. STATE OF CALIFORNIA, ET AL
Nature of Proceeding: TRO
Filed By: GLICK, PETER

The court declines to issue the TRO. The TRO request essentially requires the court to make a preliminary determination as to who is the proper person to receive the funds from the Revenue Sharing Trust Fund ("RSTF") on behalf of the California Valley Miwok Tribe ("Tribe"), a non-gaming tribe.

Injunctive relief of the type sought here may only issue as a provisional remedy attendant to a viable independent claim for legal or equitable relief. In this case, plaintiff's apparent goal is a writ either: (1) commanding the California Gambling Control Commission ("CGCC") to acknowledge plaintiff as the Tribe's authorized representative for RSTF purposes, (2) prohibiting the CGCC from acknowledging Silvia Burley as the Tribe representative pending plaintiff's final litigation of tribal authority related issues before the Bureau of Indian Affairs ("BIA"); or (3) prohibiting the CGCC from disbursing RSTF monies to the Tribe until plaintiff's BIA contest is finally adjudicated. Consequently, any provisional relief in conjunction with these theoretical writ remedies would necessarily depend, at a minimum, upon an interim determination by this court as to the likelihood of plaintiff's success before the BIA. Without such a preliminary determination, the court would not be in a position to conclude that the CGCC's new policy to pay RSTF proceeds to the individual currently recognized by the BIA pending its resolution of the authority dispute is lawfully vulnerable and should be enjoined.

The federal government has exclusive jurisdiction, if any, over determining the Tribe's acknowledged representative. Apparently, the

appropriate agency has made a determination that Silvia Burley is currently the rightful person to receive RSTF funds on behalf of the Tribe. It is this determination that plaintiff contests. This court has no jurisdiction over that dispute. Plaintiff's exclusive remedy is with the appropriate federal agency. The court understands that such a proceeding is now pending.

Moreover, the TRO essentially requests the court to order the California Gambling Control Commission to act contrary to its statutory duty, which the court declines to do. Government Code section 12012.9(d) requires the CGCC to distribute the RSTF money "without delay" to each eligible Indian tribe. Thus, until otherwise determined by the federal government, those funds in question must be distributed to the Tribe. Plaintiff's claims to be the proper and lawfully acknowledged chief of the Tribe must be resolved either by the Tribe or the appropriate federal agency. This court lacks jurisdiction to make such a determination. Since there is no point in holding a further hearing in a matter that the court clearly lacks jurisdiction to render an ultimate remedy, the court declines to issue an order to show cause re: preliminary injunction. The plaintiff is free to make any motion deemed appropriate by regular notice.

The request for issuance of a temporary restraining order and order to show cause re: preliminary injunction is denied.

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

ML 7409

PETER E. GLICK, ESQ. (SBN: 127979)
Attorney at Law
400 Capitol Mall, Suite 1100
Sacramento, CA 95814
Telephone: (916) 558-6182
Fax No.: (916) 448-2434

Attorneys for Plaintiffs
YAKIMA DIXIE and
CALIFORNIA VALLEY MIWOK TRIBE
fka SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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, vs. STATE OF CALIFORNIA, CALIFORNIA GAMBLING CONTROL COMMISSION, an Agency of the State of California, and DOES 1 through10, inclusive. Defendants.	**CASE NO. 04AS04205** **NOTICE OF ENTRY OF ORDER RE DISMISSAL** **Hon. Loren E. McMaster**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT on January 7, 2005, the clerk of this court entered an order of Dismissal of the entire action as to all parties and all causes of action, without prejudice. A copy of said Order is attached hereto as Exhibit "A" and incorporated herein by reference.

Dated: January 24, 2005.

PETER E. GLICK, Attorneys for Plaintiffs/Petitioners, YAKIMA DIXIE; and, CALIFORNIA VALLEY MIWOK TRIBE fka SHEEP RANCH RANCHERIA OF MI-WUK INDIANS OF CALIFORNIA

Peter E. Glick
Attorney at Law
400 Capitol Mall, Suite 1100
Sacramento, CA 95814

Exhibit "A"

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):	TELEPHONE NO.:	FOR COURT USE ONLY
Peter E. Glick, Esq. SBN 127979 400 Capitol Mall, Suite 1100 Sacramento, CA 95814	916-558-6182	FILED ENDORSED T. LEVINSON
ATTORNEY FOR (Name): Plaintiffs Y. Dixie & California Valley Miwok Tribe, etc.		
Insert name of court and name of judicial district and branch court, if any: Sacramento County Superior Court		
PLAINTIFF/PETITIONER: Yakima Dixie & California Miwok Tribe fka Sheep Ranch of Me-Wuk Indians of California DEFENDANT/RESPONDENT: State of California, California Gambling Control Commission		
REQUEST FOR DISMISSAL ☐ Personal Injury, Property Damage, or Wrongful Death ☐ Motor Vehicle ☐ Other ☐ Family Law ☐ Eminent Domain ☑ Other (specify): Injunctive Relief	CASE NUMBER: 04AS04205	

— A conformed copy will not be returned by the clerk unless a method of return is provided with the document. —

1. **TO THE CLERK:** Please dismiss this action as follows:
   a. (1) ☐ With prejudice (2) ☑ Without prejudice
   b. (1) ☑ Complaint (2) ☐ Petition
   (3) ☐ Cross-complaint filed by (name): on (date):
   (4) ☐ Cross-complaint filed by (name): on (date):
   (5) ☑ Entire action of all parties and all causes of action
   (6) ☐ Other (specify):*

Date: January 5, 2005

Peter E. Glick, Esq. SBN 127979
(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

* If dismissal requested is of specified parties only, of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

▶ Peter E. Glick
(SIGNATURE)
Attorney or party without attorney for:
☑ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross-complainant

2. **TO THE CLERK:** Consent to the above dismissal is hereby given.**
Date:

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

** If a cross-complaint—or Response (Family Law) seeking affirmative relief—is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581(i) or (j).

▶
(SIGNATURE)
Attorney or party without attorney for:
☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross-complainant

(To be completed by clerk)
3. ☒ Dismissal entered as requested on (date):
4. ☐ Dismissal entered on (date): JAN 7 - 2005 to only (name):
5. ☐ Dismissal **not entered** as requested for the following reasons (specify):

6. ☐ a. Attorney or party without attorney notified on (date):
   b. Attorney or party without attorney not notified. Filing party failed to provide
   ☐ a copy to conform ☐ means to return conformed copy

Date: JAN 7 - 2005 Clerk, by T. LEVINSON, Deputy

Form Adopted by the Judicial Council of California 982(a)(5) [Rev. January 1, 1997]

REQUEST FOR DISMISSAL

Code of Civil Procedure, § 581 et seq.
Cal. Rules of Court, rules 383, 1233
American LegalNet, Inc. | www.USCourtForms.com

Yakima Dixie, et al. v. State of California, California Gambling Control Commission, et al.
Sacramento County Superior Court, Case No.: 04AS04205

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Peter E. Glick, Attorney at Law, 400 Capitol Mall, Suite 1100, Sacramento, CA 95814. On January 5, 2005, I served the within documents:

Request for Dismissal

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth on the attached service list.

☐ by causing personal delivery by Federal Express Overnight Service of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Marc LeForestier
Office of the Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

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

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

Executed on January 5, 2005, at Sacramento, California.

Roxane Balison-White

Peter E. Glick
Attorney at Law
400 Capitol Mall, Suite 1100
Sacramento, CA 95814

Yakima Dixie, et al. v. State of California, California Gambling Control Commission, et al.
Sacramento County Superior Court, Case No.: 04AS04205

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Peter E. Glick, Attorney at Law, 400 Capitol Mall, Suite 1100, Sacramento, CA 95814. On January 24, 2005, I served the within documents:

Notice of Entry of Order re Dismissal

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth on the attached service list.

☐ by causing personal delivery by Federal Express Overnight Service of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Marc LeForestier
Office of the Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, CA 94244-2550

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

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

Executed on January 24, 2005, at Sacramento, California.

Roxane Balison-White

Peter E. Glick
Attorney at Law
400 Capitol Mall, Suite 1100
Sacramento, CA 95814

Exhibit "2"

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA GAMBLING CONTROL COMMISSION, Plaintiff, **v.** **SYLVIA BURLEY; YAKIMA DIXIE; MELVIN DIXIE; DEQUITA BOIRE; and VELMA WHITEBEAR,** Defendants.	CASE NO. 05AS05385 **JUDGMENT OF DISMISSAL**

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.

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

Dated: July ___, 2006

HONORABLE STEVEN H. RODDA
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: July 17, 2006

LAW OFFICES OF KARLA D. BELL

By: _____
KARLA D. BELL
Attorney for Defendant Silvia Burley

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

LOREN E. McMASTER

Dated: July ___, 2006
AUG - 1 2006

HONORABLE LOREN E. McMASTER
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: July ___, 2006

LAW OFFICES OF KARLA D. BELL

By:_____
KARLA D. BELL
Attorney for Defendant Silvia Burley

DECLARATION OF SERVICE

Case Name: CALIFORNIA GAMBLING CONTROL COMMISSION v. SYLVIA BURLEY, et al.
Case No: Sacramento Superior Court No. 05AS05385

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within cause; my business address is 1300 I Street, Post Office Box 944255 , Sacramento, California 94244-2550.

On August 15, 2006, I served the attached

NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

XX **(BY MAIL)** I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Sacramento, California. I am readily familiar with the practice of the Office of the Attorney General for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

Karla D. Bell
Law Offices of Karla D. Bell
4712 Admiralty Way, Suite 580
Marina del Rey, CA 90292

Attorneys for Defendant Silvia Burley

Peter Glick
400 Capitol Mall, #1100
Sacramento, CA 95814

Attorneys for Defendants Yakima Dixie, Melvin Dixie, Dequita Boire, and Velma Whitebear

Thomas Wolfrum
Attorney at Law
1460 Maria Lane, #340
Walnut Creek, CA 94596

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on August 15, 2006.

/S/ Paula Corral
PAULA CORRAL

NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 3.04.

Judge McMaster discloses that attorneys appearing in cases on todays calendar may have donated to the Committee for Judicial Independence which was formed to oppose the attempted recall of judge McMaster. A list of donors and amounts donated is under the custody of court executive officer Jody Patel and can be reviewed at room 611, sixth floor, courthouse, 720 Ninth Street.

Department 53
Superior Court of California
800 Ninth Street, 3rd Floor
LOREN E. MCMASTER, Judge
T. West, Clerk
V. Carroll, Bailiff

Friday, June 16, 2006, 2:00 PM

Item 1 **01AS07723 ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion To Compel Supplemental Interrogatories & Production of Docume

Filed By:

Advanced to and heard on June 1, 2006.

Item 2 **01AS07723 ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion for Protective Order

Filed By: Ragan, Jennifer L.

Defendant's motion for a protective order quashing plaintiff's demand for Exchange of Expert Witnesses on the ground discovery is closed is denied.

Plaintiff's motion to continue the trial in this matter was granted and the trial court vacated all dates set for trial and MSC. Under such circumstances the discovery cut-off is generally tried to the original trial date.

Plaintiff points out that defendant has propounded discovery and insisted that she could do so because all discovery timelines were vacated when the trial date was vacated. The Court granted the unopposed motion to compel. It would be inequitable to allow defendant to obtain a court order compellingt discovery while at the same time asserting that discovery is closed as to plaintiff.

The court views the conversations between the parties followed by defendant's discovery motion to constitute a stipulation that discovery remain open until closed by an arbitriation or trial date.

This minute order is effective immediately and no formal order is required.

Item 3 **01AS07723 ROBERT BURROWAY, JR.,ET AL VS ELSIE FLEMMER, ET AL**

Nature of Proceeding: Motion to Compel Deposition

and plaintiffs have been living in the house since May of 2003, but that defendants have refused to sign the escrow documents and escrow is still pending. Plaintiffs allege defendant now wishes to sell the property to others for more money.

The first and second causes of action are for specific performance and breach of contract. Plaintiffs have not alleged when the agreement to sell the real property was entered into and have not alleged whether the contract is oral or written. They have also failed to attach a copy of the agreement, There are numerous exhibits attached to the complaint but none have been identified by number or letter and, with the exception of "Exhibit A," none have been incorporated into the complaint. Exhibit A is a subpoena for records, not an escrow agreement.

In their opposition plaintffs refer to one seller signing the agreement. Plaintiffs must allege who was a party to the contract and who signed it.

The third cause of action is for fraud. It is unchanged from the original complaint and fails to state a cause of action. Fraud must be alleged with specificity.

The fourth cause of action for conspiracy fails because no underlying tort has been adequately pled.

Plaintiffs are given leave to amend the first through fourth causes of action **only.** Th

An amended complaint shall be filed and served by June 26, 2006. Responsive pleadings shall be filed and served 10 days thereafter, 15 days if serviced is by mail.

This minute order is effective immediately and no formal order is required.

Item 11 **05AS02607 DINO TRIAS, ET AL VS. ELAIN B FURLOW, ET AL.**

Nature of Proceeding: Motion To Strike

Filed By: White, Gary R.

Defendant Elain Furlow's motion to strike is granted as to the fifth through eighth causes of action without leave to amend.

The Court previously sustained defendant's demurrer without leave to amend as to these causes of action. By including them in the amended complaint, plaintiffs have failed to comply with the Court's order and the complaint is not drawn in conformity with the law. CCP 436(b).

This minute order is effective immediately and no formal order is required.

Item 12 **05AS02681 PRISCILLA ZAIRIS VS. JOSE ALFREDO JIMENEZ, ETAL**

Nature of Proceeding: Motion To Compel

Filed By: Johansing, David

This matter is dropped from calendar.

Item 13 **05AS05385 CALIFORNIA GAMBLING CONTROL COMM VS. SYLVIA BURLEY ET AL**

Nature of Proceeding: Motion To Quash Service Summon

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 served.

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 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.

tem 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.

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

Item 16 **05AS05467** **MARK BUCKMAN VS. JOHN LEFAKIS ET AL**

Nature of Proceeding: Demurrer

Filed By: Prokop, Tyler S.

Dropped. Defendants intend to file an amended answer.

Item 17 **06AS00381** **ECKMAN, FLOYD HERMAN JR. VS. VARANO, ELIZABETH RUTH**

Nature of Proceeding: Settlement and Application for Good Faith Determination

Filed By: Molinelli Jr., James P.

Defendant Varano's motion for a determination that her settlement with plaintiff Eckman is in good faith is granted.

Regional Transit, defendant in a related action brought by Eckman, has opposed the motion because it contends (1) it fails to provide a rough approximation of plaintiff's recovery, (2) RT has not had an opportunity to discover the assets of defendant, and (3) the workers' compensation lien is unsettled.

Defendant has no assets and the settlement is for policy limits. A disproportionate settlement by an insolvent defendant may nonetheless be in good faith. *County of Los Angeles v Guerrero* (1989) 209 Cal.App.3d 1149, 1156-57.

RT has had the opportunity to discover assets and defendant has supplied a supplemental declaration regarding lack of assets. The exact disposition of the workers' compensation lien is irrelevant as RT ie entitled to a credit regardless.

The Court finds the settlement is in good faith and meets the Tech-Bilt standard. The Court will sign the order submitted with the moving papers.

Item 18 **06AS00852** **CHRISTOPHER PENDARVIS VS. JASON GRIEST**

Nature of Proceeding: Preliminary Injunction

Filed By:

This matter is continued to 7/14/2006 at 02:00PM in this department.

Item 19 **06AS00852** **CHRISTOPHER PENDARVIS VS. JASON GRIEST**

Nature of Proceeding: Motion to Appoint Receiver

Filed By: Fathy, Richard G.

This matter is continued to 7/14/2006 at 02:00PM in this department.

Item 20 **06AS00852** **CHRISTOPHER PENDARVIS VS. JASON GRIEST**

Nature of Proceeding: Preliminary Injunction

Filed By:

This matter is continued to 7/14/2006 at 02:00PM in this department.

Manuel Corrales, Jr., Esq., SBN 117647
Attorney at Law
11753 Avenida Sivrita
San Diego, California 92128
Tel (858) 521-0634
Fax (858) 521-0633
Attorney for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, Plaintiff, v. THE CALIFORNIA GAMBLING CONTROL COMMISSION, Defendant.	Case No.: 08 CV 0120 BEN AJB **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO REMAND** Date: March 10, 2008 Time: 10:30 a.m. Courtroom: 3 Judge: Hon. Roger J. Benitez

Plaintiff California Valley Miwok Tribe ("Miwok Tribe" or "the Tribe") submits the following in reply to Defendant California Gambling Control Commission's ("the Commission") opposition to Plaintiff's Motion to Remand Back to State Court.

I.

PLAINTIFF INCORPORATES BY REFERENCE ITS OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The Commission filed a motion to dismiss Plaintiff's Complaint under Rule 12(b)(1), (6), and (7), which is set to be heard on the same day of Plaintiff's Motion to Remand Back to State Court. Plaintiff has filed an extensive opposition to that motion, which addresses the same issues raised in the Commission's opposition to Plaintiff's Motion to Remand.

Accordingly, for the sake of judicial economy, Plaintiff incorporates by reference those points and authorities into its reply to the Commission's opposition to Plaintiff's Motion to Remand.

II.

PLAINTIFF ONLY SEEKS EQUITABLE RELIEF, INCLUDING A JUDICIAL DETERMINATION ON THE COMMISSSION'S DUTY TO DISTRIBUTE REVENUE SHARING TRUST FUND MONEY UNDER STATE LAW

A. Plaintiff does not ask the Court to enforce the Compact

The Commission has completely mischaracterized the Plaintiff's Complaint.

For example, the Commission argues that this Court has subject matter jurisdiction, because Plaintiff's suit purportedly seeks to enforce the terms of the Compact. (Defendant's P/A's, pg. 3, lines 20-26). This contention is meritless.

As stated, Plaintiff has withdrawn its Third Party Beneficiary "Breach of Contract" cause of action. Thus, the only claims Plaintiff makes are equitable in nature. Specifically, the Complaint asks the Court (i.e., the State Court) to make a judicial determination of the Commission's duty to distribute Revenue Sharing Trust Fund ("RSTF") money under a specific State statute regulating the Commission's duties with respect to these funds. That State statute is Cal. Gov. Code Section 12012.75, which specifically provides in relevant part as follows:

> …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. (Emphasis added).

This is the statute that governs the Commission's duties. There is no federal statute that preempts Cal. Gov. Code Section 12012.75. The fact that this statute directs that the Commission's duty to distribute be "in accordance with" what is set forth in the Compact, does not make it a federal question. Neither does it make Plaintiff's suit for declaratory relief as to

the Commission's duty an action to enforce the Compact. Moreover, the RSTF money at issue comes from the State Treasury, not from the federal treasury or any arm of the federal government.

In Cates v. California Gambling Control Commission (2007) 154 CA4th 1302, Plaintiff brought a taxpayer action against the Commission, and others, seeking declaratory relief as to the Commission's duty to collect money the Compact-Tribes were supposed to be paying into the Special Distribution Fund ("SDF"). Plaintiff alleged that the Tribes were paying into the SDF their share of gambling winnings according to their own definition of "net win", and not according to the "net win" definition in the Compact. There was no federal question in Cates, simply because the Commission's duty to collect unpaid SDF money was defined, in part, by reference to the Compact (i.e., the definition of "net win"). Plaintiff's counsel in the Cates case was the same counsel as in this (Miwok) case.

Neither the State Superior Court nor the State Court of Appeal in Cates had any difficulty rendering a decision as to the Commission's duties under State law, because of reference to the Compact with respect to some of the Commission's duties. For the same reason, Cal. Gov. Code Section 12012.75's reference to the Compact (i.e., Section 4.3.2.1) to define the Commission's duties in distributing RSTF money does not create federal law. The source of the Commission's duties remains as Cal. Gov. Code Section 12012.75.

Also, nowhere in any operative portion of the Complaint is there any allegation or request that the Court enforce the terms of the Compact with respect to RSTF money.

B. Plaintiff does not seek compensatory damages

As stated, the Plaintiff has dismissed its breach of contract and breach of fiduciary causes of action, such that no request for compensatory damages exists.

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C. The Complaint does not seek a judicial determination of the Tribe's status

The Commission falsely asserts that Plaintiff seeks relief in the form of a judicial determination of the Tribe's status. (Defendant's P/A's pg. 2, lines 13-15). It then argues, that "[t]ribal status is governed by federal law." (Ibid. at line 15). However, the Commission's premise is flawed.

No where in the Complaint is there any claim or request that the Court make a determination of the Tribe's status. In fact the opposite is alleged. What Plaintiff is asking the Court to do, is to accept the undisputed fact that the Tribe is not organized, and make a judicial determination of the Commission's duty to distribute RSTF funds to the Tribe, given that undisputed fact. Plaintiff contends that the Commission has a duty to continue paying out RSTF money to the Tribe, as it had been doing previously, despite the fact that the Tribe is presently "unorganized". It is undisputed that the Tribe is a federally recognized Tribe, because it is on the "Federally Recognized Indian Tribe List Act of 1994", and no federal court has ruled that the Tribe is no longer federally recognized. Indeed, the Bureau of Indian Affairs ("BIA") has never made that determination, and has never withdrawn its determination that Sylvia Burley is the Tribe's representative.

Nowhere in the Compact is there any requirement that a Non-Compact Tribe be "organized" in order to qualify for RSTF money. In fact, the Commission previously recognized this when it paid RSTF money to the Tribe up to 2005, during the Tribal leadership dispute.

In short, the Complaint only asks the Court to make a judicial determination on whether the Commission has a continuing duty to distribute RSTF money to the Tribe, even though the Tribe is presently "unorganized". The Plaintiff is not asking the Court to adjudicate its tribal status, so as to satisfy the Commission's erroneous concerns about continued payment of these funds.

These points are set forth in more detail in Plaintiff's Opposition to Defendant's Motion to Dismiss, which Plaintiff incorporates herein by reference.

D. The Complaint does not ask the Court to resolve any tribal leadership dispute or seek a judicial determination of any competing claims to the RSTF money

The Commission argues that federal jurisdiction still exists, because the Complaint purportedly seeks a determination of who is authorized to act on behalf of the Miwok Tribe. (Defendant's P/A's, pg. 2, lines 9-14). This contention is frivolous at best.

Again, there is no allegation in the Complaint asking the Court to resolve a tribal leadership dispute, so that the Commission can pay the RSTF money to the proper "representative". The facts are what they are. The Tribe is presently unorganized, due, in part, because of a tribal leadership dispute. The Plaintiff's position is that that fact alone does not excuse the Commission from distributing the RSTF money to the Tribe, as it has been doing so in the past. Nothing has changed. However, the Commission has now suddenly changed its mind, and stopped payment, which Plaintiff contends it cannot do, since the Compact provides that the Commission has "no discretion" on how the RSTF money should be distributed. Indeed, the Commission has already admitted that it cannot get involved in any tribal leadership dispute, or make its decisions on distribution dependent upon the status of the Tribe's government. (See Declaration of Gary Qualset, attached to Defendant's motion to Dismiss).

III.

CABAZON DOES NOT COMPEL REMOVAL

The Commission argues that this Court nevertheless has subject matter jurisdiction, because of the case of Cabazon Band of Mission Indians v. Wilson (9th Cir. 1997) 124 F.3d 1050. Reliance on Cabazon is, however, misplaced.

In Cabazon, the Court of Appeals noted that the jurisdictional issue was limited to the Tribe's "action to enforce the Compacts". It stated:

> Initially, we must determine whether the district court had subject matter jurisdiction over the Bands' action to enforce the Compacts and to require the State to pay over to the Bands the license fees…

124 F.3d at 1055. In contrast, the Plaintiff here is not seeking to enforce the Compact. Rather, the Miwok Tribe here is simply seeking a judicial determination, by way of declaratory relief, on the Commission's duty to distribute RSTF money to an "unorganized", non-compact Tribe.

In addition, in Cabazon, the Plaintiff Tribe was seeking to enforce a specific contract provision within the very Compact itself. That provision specifically provided that the Cabazon Tribe was required to sue in the U.S. District Court to obtain a judicial determination of whether certain horse racing licensing fees the State collected from the State's horse racing associations who operated on Tribal facilities, should be turned over to the Tribes. 124 F.3d at 1055. It was, therefore, a "contract within the Compact." Because of this, the Court in Cabazon concluded that the State's obligations originated in the Compact, and because the Compact was a "creation of federal law", the Tribe's suit to enforce the Compact arose under federal law. It stated:

> …[The Bands'] claim is not based on a contract that stands independent of the Compact. Rather, it is based on an agreement contained within the Compacts…The State's obligation to the Bands thus originates in the Compacts. The Compacts quite clearly are a creation of federal law…. We conclude that the Bands' claim to enforce the Compacts arises under federal law and thus that we have jurisdiction….

124 F.3d at 1055-56. In contrast, Plaintiff here does not seek to enforce an agreement within the Compact. Indeed, there is no provision in the Compact that requires Non-Compact Tribes, like the Miwok Tribe, to sue in the U.S. District Court to resolve a dispute over the Commission's duty to pay RSTF money to Non-Compact Tribes. Moreover, unlike what the

Cabazon Tribe did in their case, the Miwok Tribe here seeks declaratory relief as to the Commission's duty under Cal. Gov. Code Section 12012.75, which is not an agreement or provision that originates in the Compact. Indeed, it is not referenced in the Compact. The Miwok Tribe here does not seek to enforce the Compact or any of its terms.

In addition, the Compacts at issue in Cabazon predated the present 1999 Compact by 10 years (1990 and 1991), and thus have no application to the issues in this case.

The Commission's further reliance on Rincon Band of Mission Indians v. Schwartzenegger, attached to its opposition papers, is equally misplaced. In Rincon, the issue was whether five (5) other Tribes the Plaintiff Rincon Tribe failed to join, were necessary and indispensable parties. The Decision in that case made no ruling that the Compact gave rise to subject matter jurisdiction for the issues presented there.

IV.

THE COMMISSION'S OBLIGATION TO DISTRIBUTE RSTF MONEY TO NON-COMPACT TRIBES IS GROUNDED ON STATE LAW, NOT FEDERAL LAW

As shown, the Plaintiff here seeks a judicial determination of the Commission's duty to distribute RSTF money to Non-Compact Tribes, based on Cal. Gov. Code Section 12012.75, a State statute specifically enacted to identify the Commission's duties with respect to RSTF money. Accordingly, no federal question is in dispute.

V.

THE PLAINTIFF IS NOT "STUCK" IN FEDERAL COURT, BECAUSE OF THE INITIAL BREACH OF CONTRACT CLAIM

The Commission argues that the Plaintiff's dismissal of its breach of contract claim was ineffective, because "[f]ederal court jurisdiction…is based on the complaint at the time of the removal, not as subsequently amended," citing Libhart v. Santa Monica Dairy Co. (9th Cir. 1979) 592 F.2d 1062, 1065. This is not the law, and the Commission has misquoted the Libhart case.

First of all, it is not "federal court jurisdiction", but rather "federal removal jurisdiction" that is the proper phrase. The Court in Libhart merely quoted the law, and said:

> In determining the existence of removal jurisdiction based upon a federal question, we must look to the complaint as of the time the removal petition was filed." (citation omitted).

592 F.2d at 1065.

Second, the U.S. District Court has the discretion as to whether to continue to exercise its jurisdiction over a case with only State law claims, after the Plaintiff eliminates a federal question by voluntary dismissal of part of its case. Indeed, "when the federal claims have been dropped out of the lawsuit in its early stages and only state law claims remain, it may be an abuse of discretion for the federal district court to retain the case." Federal Civil Procedure Before Trial, California Rutter Group Practice Guide, Section 2:1069, page 2D-198.13 (2007); see Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 349,108 S.Ct. 614, 618-619; Wren v. Sletten Constr. Co. (9th Cir. 1981) 654 F.2d 529, 536. While the federal court may either dismiss or remand the remaining State law claims, after early dismissal of the federal claims, remand is "preferable", because it avoids any statute of limitations problem and the time and expense of filing new pleadings in State court. Carnegie-Mellon Univ., supra at 351.

Third, if it is discovered at any time in the litigation that removal jurisdiction is lacking (no diversity or federal question at time of removal), the removed case must be remanded to State court rather than dismissed. See Albingia Versicherungs A.G. v. Schenker Int'l, Inc. (9th Cir. 2003) 344 F.3d 931, 936; 28 U.S.C. Section 1447(c). Here, Plaintiff voluntarily dismissed the breach of contract and breach of fiduciary duty claims as a precaution. As pled even under those claims, no federal question existed, because, as the Commission concedes, the Compact does not provide for breach of contract "compensatory damages". Only equitable relief is permitted. Thus, even as originally pled, no federal question was in dispute.

VI.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in Plaintiff's Motion to Remand, the case should be remanded back to State Court.

Dated: February 27, 2008

s/ Manuel Corrales, Jr.
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 of California**
Case No. 08-CV-0120 BEN AJB

I Declare: On **February 27, 2008**, I electronically filed the following documents:

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION

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 27, 2008,** at San Diego, California.

Manuel Corrales, Jr.
Declarant

s/ Manuel Corrales, Jr.
Manuel Corrales, Jr. Esq.

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Attorneys for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, Plaintiff, v. THE CALIFORNIA GAMBLING CONTROL COMMISSION, Defendant.	Case No.: 08 CV 0120 BEN AJB **NOTICE OF APPEARANCE OF COUNSEL** Date: March 10, 2008 Time: 10:30 a.m. Courtroom: 3 Judge: Hon. Roger J. Benitez

TO DEFENDANT THE CALIFORNIA GAMBLING CONTROL COMMISSION, AND ITS ATTORNEY OF RECORD, PETER H. KAUFMAN, ESQ., AND TO ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that Plaintiff's counsel, Manuel Corrales, Jr., Esq., hereby associates as co-counsel for the Plaintiff, CALIFORNIA VALLEY MIWOK TRIBE,

TERRY SINGLETON, ESQ., OF SINGLETON & ASSOCIATES. Accordingly, Mr. Terry Singleton, by this notice, hereby makes an appearance as co-counsel for Plaintiff CALIFORNIA VALLEY MIWOK TRIBE.

Mr. Manuel Corrales, Jr., Esq., will be lead counsel.

Mr. Singleton's address is as follows:

Terry Singleton, Esq.
SINGLETON & ASSOCIATES
1950 Fifth Avenue, Ste. 200
San Diego, CA 92101
Tel: (619) 239-3225
Fax: (619) 702-5592
E-Mail: terry@terrysingleton.com

Please include Mr. Singleton on all future mailing and notices with respect to this case.

Dated: February 29, 2008

s/ Manuel Corrales, Jr.
Manuel Corrales, Jr., Esq.
Attorney at Law
Attorney for Plaintiff
California Valley Miwok Tribe

Dated: February 29, 2008

s/ Terry Singleton
Terry Singleton, Esq.
SINGLETON & ASSOCIATES
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 of California**
Case No. 08-CV-0120 BEN AJB

I Declare: On **February 29, 2008**, I electronically filed the following documents:

NOTICE OF APPEARANCE OF COUNSEL

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

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 and the United States of America the foregoing is true and correct, and that this declaration was executed on **February 29, 2008,** at San Diego, California.

Terry Singleton, Esq.
Declarant

s/ Terry Singleton
Terry Singleton, Esq.

EDMUND G. BROWN JR.
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Attorneys for 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 REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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

INTRODUCTION

In its motion to dismiss ("Motion"), Defendant California Gambling Control Commission ("Commission") demonstrated that: (a) no individual or entity is authorized to file suit on behalf of the "federally-recognized" California Valley Miwok Tribe ("CVM" or "Plaintiff");[1/] (b) Silvia Burley is not authorized to act on behalf of CVM; (c) CVM is not entitled to file suit to enforce the terms of the tribal-state class III gaming compacts ("Compacts") pursuant to which Plaintiff's claim for relief is based; and (d) the individuals named in the complaint that dispute Burley's leadership of CVM are necessary parties to this suit.[2/]

Subsequent to the filing of the Commission's Motion, which relied, in part, upon the district court's decision in *California Valley Miwok v. U.S.*, 424 F. Supp. 2d 197 (D.D.C., 2006), the Court of Appeals for the District of Columbia Circuit decided Burley's appeal and upheld the district court's decision. *California Valley Miwok v. U.S.*, No. 06-5203, 2008 WL 398455 (D.C. Cir. Feb. 15, 2008).[3/] The decision upholds the federal government's refusal to recognize the Burley faction's purported government, constitution and governing documents on the grounds that this faction's claim to tribal leadership and authority is not supported by either the consent or participation of a majority of the tribal community.

The appellate court's ruling supports the Commission's Motion. In reaching its decision, the court notes that an Indian Reorganization Act (25 U.S.C. § 461 et seq. ("IRA")) tribe's authority to hire counsel is not vested until it has been organized. *California Valley Miwok v. U.S.* at *3. It also states that Silvia Burley does not represent anything more than "a small

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1. By the term "federally-recognized" Miwok, the Commission means the entity that was placed on the list of federally-recognized tribes by the United States Department of the Interior and that accepted the Indian Reorganization Act by election in 1938.

2. The Commission's Motion also demonstrated that the Third and Fourth Claims for Relief were barred by California's Eleventh Amendment Immunity and the express terms of the Compacts. Plaintiff's dismissal of those claims on February 1, 2008, makes that portion of the Commission's Motion moot.

3. A copy of the Westlaw opinion is attached hereto as Exhibit A and all citations herein to the opinion will be to that document.

cluster of people within the [CVM]." *Id.* at *2. Further, the court accepts without question that the Commission could appropriately refuse to distribute Revenue Sharing Trust Fund ("RSTF") monies to the CVM prior to its organization as an IRA tribe. *Id.* at *3.[4/]

In her opposition to the Commission's Motion, Silvia Burley (who purports to act in the CVM's name) ignores the appellate court's decision, even though it was filed on February 15, 2008. Her opposition maintains that despite the fact that CVM has no federally-recognized membership, constitution, or government and despite the fact it lacks the power to contract with the federal government and has no government-to-government relationship with the United States, it may nonetheless hire counsel and initiate a lawsuit and thereby bind the tribe to the outcome of this litigation. Ms. Burley also argues that she is authorized to act on the CVM's behalf with respect to the receipt of RSTF monies that Non-Compact Tribes may receive pursuant to the terms of the Compacts, even though the Director of the Pacific Region of the Bureau of Indian Affairs has taken the position that she has no authority to act on behalf of the CVM, and even though the CVM has no government capable of providing her with that authority. Further, notwithstanding the express provisions of the Compacts precluding suits by third parties to enforce any of the Compacts terms, Burley asserts that the CVM may sue to enforce the Compacts' provisions regarding payment of RSTF monies simply because Non-Compact Tribes are designated third party beneficiaries of the Compacts. Finally, Burley argues that the parties named in the Complaint that dispute Burley's claim to the authority to act on the CVM's behalf are not necessary parties because the Commission has previously paid RSTF monies to Burley on the CVM's behalf despite a challenge to Burley's leadership.

SUMMARY OF ARGUMENT

Because any CVM entitlement to RSTF funds is premised on its status as a federally-

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4. While, contrary to the court's perception, the Commission has previously distributed RSTF monies to the CVM despite the fact it is not organized, the fact the appellate court accepted without question that the Commission could have refused to distribute RSTF monies because the tribe was unorganized is significant. It highlights the fact that until there is a federally-recognized government, there can be no individual or entity authorized to receive RSTF monies on behalf of the tribe.

recognized tribe, the CVM may not sue for the performance of any obligations due it on the basis of its federally-recognized status until such time as it has a federally-recognized membership, constitution, and government. Governments that are not recognized by the United States have no capacity to file suit, as that government, in the courts of the United States.[5/] *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2nd 44, 48 (2nd Cir. 1991). In this regard, Burley confuses recognition of the CVM as a tribe with the United States' recognition of its government. The United States may recognize that a country exists but not choose to recognize the government that purports to control that nation's territory or people. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410-11 (1964). It is government recognition not tribal recognition that controls a tribe's ability to file suit to obtain benefits due a federally-recognized tribe.

The United States does not recognize any CVM government with which it has a government-to-government relationship. *California Valley Miwok v. U.S., supra*, 424 F. Supp. 2d at 201. Likewise, the official position of the Bureau of Indian Affairs before the Board of Indian Appeals of the Department of the Interior is that Silvia Burley is not recognized by the federal government as having the capacity to act on behalf of the federally-recognized CVM. (Commission Req. for Judicial Notice, Ex. 2.) Thus, neither Silvia Burley nor the entity she purports to represent has any capacity to sue on behalf of the federally-recognized CVM or to receive any funds due the CVM on the basis of its federally-recognized status.

Even if Burley had the capacity to sue on behalf of the federally-recognized CVM, the CVM has no right to enforce the terms of the Compacts that provide for the disbursement of RSTF funds to Non-Compact Tribes. Though third party beneficiaries generally have the right to enforce the terms of the agreements providing them that status, they may not do so when the

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5. In this regard, though suits seeking acknowledgment of tribal status have been filed in the name of a tribe and allowed to proceed on that basis where there was no challenge to the tribe's capacity to sue (*e.g., California Valley Miwok v. U.S., supra*), the court recognized, nonetheless, that the suit was not by the tribe but rather by a "small cluster of people" within the tribe. *Id.* at 2. Individuals may sue to attain tribal status, but they cannot sue as the tribe to obtain benefits due the tribe on the basis of its status as a tribe.

express terms of the agreement preclude them from suing. In this case, the Compacts, in a section entitled "Third Party Beneficiaries," preclude enforcement of "any of [their] terms" by a third party. Thus, mere third party beneficiary status does not confer upon a Non-Compact Tribe the right to file suit to enforce any of the Compacts' terms. Further, to the extent there is any ambiguity with regard to this preclusion, that ambiguity must be resolved in favor of the State and the protection of the State's sovereign powers. *United States v. Winstar Corporation,* 518 U.S. 839, 878-79 (1996) (ambiguous term in a contract will not be construed to surrender a sovereign power).

The individuals named in the Complaint that either claim leadership of the CVM or are "interfering" with Burley's attempts to lead it have a direct financial interest in this action. By definition, CVM funds belong to the tribe and anyone claiming membership in the tribe has an obvious interest in those funds and to whom they are distributed. Contrary to Plaintiff's belief, what makes these individuals necessary parties is not the fact that there is a leadership dispute but rather that there is a dispute in this case over who is entitled to receive an RSTF distribution and the fact that these individuals who claim membership in the CVM or the right to lead the tribe have an interest in the subject matter of this action – the disbursement of RSTF funds.

I.

BEFORE IT MAY FILE SUIT ON THE BASIS OF ITS STATUS AS A FEDERALLY-RECOGNIZED TRIBE, THE CVM MUST HAVE A FEDERALLY-RECOGNIZED MEMBERSHIP, CONSTITUTION, AND GOVERNMENT

Ms. Burley's opposition papers argue that mere federal recognition of the CVM provides the CVM with the ability to hire counsel and file suit to obtain any benefits due on the basis of its status as a federally-recognized tribe. Indeed, Plaintiff suggests that the district court in *California Valley Miwok v. U.S., supra,* 424 F. Supp.2d 197, accepted the idea that the CVM could sue in federal court. (Plf.'s Opp. to Def.'s Mot. to Dismiss ("Mem.") at 8.) Burley's argument confuses the CVM's status as a federally-recognized tribe with its present capacity to sue to reap the benefits of that status. This confusion perhaps accounts for Burley's total failure to respond to the cases cited in the Commission's moving papers demonstrating that before a government can sue in the courts of the United States, that government must be recognized.

Klinghoffer v. S.N.C. Achille Lauro Ed Alteri-Gestione, supra, 937 F.2d at 48; *Banco Nacional de Cuba v. Sabbatino, supra,* 376 U.S. at 410-11.

In *California Valley Miwok v. U.S., supra,* 2008 W.L. 398455, the court made clear the distinction between a tribe's status as a federally-recognized tribe and its ability to obtain federal benefits. The court noted in quoting from *United States v. Mazurie,* 419 U.S. 544, 557 (1975) that though Indian tribes are a "'separate people possessing the power of regulating their internal and social relations,'" that "[t]o qualify for federal benefits, however, tribes must meet conditions set by federal law." *California Valley Miwok v. U.S., supra,* at *2. One federal benefit, is the capacity to sue in the courts of this country to obtain the benefits that may be due as a result of that status. The court of appeal stated in this regard that:

> Once recognized, a tribe may qualify for additional federal benefits by organizing its government under the [Indian Gaming Regulatory] Act. "[Section 476 of the Act] authorizes any tribe . . . to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior." *Kerr-McGee Corp. v. Navajo Tribe of Indians,* 471 U.S. 195, 198, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985). Organization under § 476 vests in a tribe the power "[t]o employ legal counsel; . . . ." 25 U.S.C. § 476(e).

Id. at *3 (second brackets in original). Thus, absent organization, a tribe has no authority to hire counsel to sue as the federally-recognized tribe. While, in *California Valley Miwok,* at both the district and appellate court levels, Burley sued, in the name of the tribe, to obtain the right to a federal benefit such as approval of a tribal membership, constitution, and government, no challenge was raised to her capacity to sue in the tribe's name. Thus, the issue was not presented for adjudication. However, the appellate court in *California Valley Miwok, supra,* made clear that, even though the issue was not raised by the United States, it was Silva Burley that was suing the federal government for a declaration that the tribe was organized (albeit in the tribe's name) and chose to refer to the plaintiff in that case as Burley rather than the CVM because "we refer to Burley rather than 'CVM' or 'the tribe' because we are mindful that there is an ongoing leadership dispute between Burley and former tribal chairman Yakima Dixie." *Id.* at * 6, n.1.

Finally, Plaintiff concedes that it does not have the capacity to contract with the federal government. (Mem. at 10.) That lack of capacity exists because the CVM has no federally-recognized government. The lack of a federally-recognized government also precludes the CVM

from hiring counsel. 25 U.S.C. § 476(e). Without a government to act on its behalf or an attorney authorized to represent the tribe, the CVM has no capacity to litigate in its own name.

II.

BURLEY HAS NO AUTHORITY TO ACT ON THE CVM'S BEHALF

The official position of the Bureau of Indian Affairs before the Board of Indian Appeals of the Department of the Interior is that Silvia Burley is not recognized by the federal government as having the capacity to act on behalf of the federally-recognized CVM. (Commission Req. for Jud. Not., filed herein on January 31, 2008 Ex. 2.) Further, both the appellate court in *California Valley Miwok v. U.S., supra,* 2008 WL 398455, and the district court in *California Valley Miwok v. U.S., supra,* 424 F. Supp. 2d 197, necessarily concluded, in upholding the federal government's refusal to approve the Burley faction's proposed CVM governing documents, that Burley did not represent the CVM. The appellate court stated, in this regard, that Burley was merely acting on behalf of a "small cluster of people" within the CVM. *California Valley Miwok v. U.S., supra,* 2008 WL 398455, at *2. The district court similarly accepted the federal government's position that Burley did not represent the tribe when it noted that:

> 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 [when the tribe's potential membership could exceed 250 people and where the more people that became members the less money would be available for each member].

California Valley Miwok v. U.S., supra, 424 F. Supp. 2d at 203 n.7.

In her opposition papers, Burley argues that, notwithstanding these facts, the Commission "has pointed to no evidence that the BIA has stated that it no longer considers Ms. Burley as the Tribe's official representative." (Mem. at 11.) In this regard, she argues that the pleading filed on behalf of the Pacific Regional Director of the Bureau of Indian Affairs (Commission Req. for Judicial Notice, Ex. 2) in which the Director states that the Bureau "no longer contracts with Silvia Burley as a person of authority on behalf of the Tribe [and that] Burley lacks authority to act on the Tribe's behalf" is "purely argumentative and cannot be considered as fact" and is "not an official statement of policy from the BIA." (Mem. at 10.) Burley, however, cites no authority

for the proposition that a pleading filed on behalf of the Bureau of Indian Affairs is not the "official" position of the Bureau. The credibility of her position is severely compromised by her acceptance of the Bureau's letters to her as constituting "the official position" of the Bureau while rejecting as "official" a pleading filed with an official tribunal in a case in which she is a party. Moreover, Burley fails to reconcile her concession that she is unable to execute a contract with the federal government on the CVM's behalf because the CVM is not organized (Mem. at 10) with her claim that she is the authorized CVM representative for purposes of entering into a contract with an attorney to represent the tribe in litigation. Plainly, if Burley cannot execute contracts with the federal government because the CVM has no federally-recognized government, she cannot, for the same reason, execute a contract with an attorney to represent the CVM in litigation.

III.

NON-COMPACT TRIBES HAVE NO RIGHT TO ENFORCE ANY TERM OF THE COMPACTS

The Compacts, in section 15.1, entitled "Third Party Beneficiaries," provide that:

> Except to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, 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.

In her opposition papers, Burley argues that a provision in the Compacts providing that Non-Compact Tribes "shall be deemed third party beneficiaries of this and other compacts identical in all material respects" (Compacts § 4.3.2(a)(i), Compl., Ex. A at 7) constitutes an express exemption from the prohibition in the Compacts against enforcement of any term of the Compacts by third parties. (Mem. at 14.) This contention is devoid of merit.

The mere designation of Non-Compact Tribes as third party beneficiaries, without more, does not establish that they are entitled to enforce the Compacts' terms. Section 4.3.2(a)(i) does not state, for example, that Non-Compact Tribes are third party beneficiaries that may sue to enforce the terms of the Compacts with regard to the distribution of RSTF monies, notwithstanding the prohibition against suits by third parties to enforce the terms of the Compacts in section 15.1. Likewise, though third party beneficiaries are generally entitled to sue

to enforce the terms of an agreement created for their benefit, as demonstrated in the Commission's moving papers (Commission's Mem. at 12-13), a third party beneficiary's right to enforce a contract for its benefit may be abrogated by the terms of the contract. *Martinez v. Socoma Companies, Inc.*,11 Cal. 3d 394, 401-02 (1974); Restatement (Second) of Contracts § 304(b). Section 15.1 of the Compacts plainly abrogates a third party beneficiary's right to sue to enforce any term of the Compacts and nothing in section 4.3.2(a)(i) restores that right.

Moreover, if there were any doubt on that question, that doubt must be resolved against a Non-Compact Tribe under the rule enunciated in *United States v. Winstar Corporation, supra,* 518 U.S. at 878-79 where the court held that:

> a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

As noted in the Commission's moving papers, the compacting tribes as well as the State did not wish to provide Non-Compact Tribes with the ability to litigate the Compacts terms because they did not wish to allow Non-Compact Tribes the opportunity to file suit to prevent the State and a tribe from modifying the provisions of the RSTF through a compact amendment, as might be the case under California law, if Non-Compact Tribes were deemed third party beneficiaries with the right to enforce the terms of the Compacts. (Commission's Mem. at 13.)

Read in the light of *Winstar, supra,* nothing in Compacts section 4.3.2(a)(i) expressly provides that Non-Compact Tribes are third party beneficiaries that are entitled to sue to enforce the terms of the Compacts notwithstanding the prohibition against third party suits set forth in Compact section 15.1.

IV.

ALL PUTATIVE MEMBERS OF AN UNORGANIZED TRIBE HAVE AN INTEREST IN LITIGATION BROUGHT TO OBTAIN TRIBAL FUNDS

Though Burley admits that the CVM is unorganized and though the federal government recognizes no CVM government capable of representing the tribe, she argues, nonetheless, that putative members of the CVM lack a sufficient interest in monies it is claimed are due and owing

the tribe to be deemed necessary parties to this action. Her argument, in this regard, relies upon the fact that during the period when the federal government recognized a CVM government with Burley as its leader, the Commission distributed RSTF monies to Burley, even though there was a challenge to the legitimacy of the Burley government and her leadership of the CVM. Burley's argument also rests upon a California case interpreting the California rule with respect to necessary parties and the public interest exception to the joinder of parties deemed necessary and indispensable.

Burley's position is propelled by no rational force.

The fact that the Commission distributed RSTF monies to Burley when she was the head of a CVM government recognized by the United States despite a challenge to the legitimacy of that government and her leadership is not comparable to the situation in this case where there is no federally-recognized government and one of the issues to be resolved in this case is who is entitled to receive RSTF monies on behalf of the CVM. Previously, the Commission did not dispute Burley's entitlement to the receipt of RSTF monies on behalf of the CVM because the federal government maintained a government-to-government relationship with her government and recognized her authority to act on behalf of the tribe. That, however, is not the case today. Now, after the federal government withdrew its recognition of Burley's government and her authority to act on behalf of the tribe, there is a dispute over who is entitled to receive RSTF distributions on behalf of the CVM. The existence of that dispute between the parties to this action provides all putative members of the tribe with an interest in the outcome of the proceedings and, therefore, makes them necessary parties. Plainly, a suit by a small cluster of a tribe to money claimed to be due the tribe as a whole is a suit that affects the interests of every putative member of that tribe. It is clear that neither the Commission nor Burley can adequately represent the interests of those putative members and that the possibility exists of inconsistent judgments if all putative members are not joined in this action.

Furthermore, *People ex rel. Lungren v. Community Development Agency,* 56 Cal. App. 4th 868 (1974), has no application to this case. First, the court in that state court proceeding was not construing Rule 19 of the Federal Rules of Procedure. Second, the case turned on the

application of the public interest exception to the joinder of a necessary and indispensable party under California law. Here, the public interest exception has no application because Burley is suing out of her own personal interest or, at best, the financial interest of a tribe.

CONCLUSION

For these reasons and those previously expressed in the Commission's moving papers, it is respectfully requested that the Court dismiss all remaining claims for relief without leave to amend.

Dated: March 3, 2008

Respectfully submitted,

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

ROBERT L. MUKAI
Senior Assistant Attorney General

SARA J. DRAKE
Supervising Deputy Attorney General

RANDALL PINAL
Deputy Attorney General

/s/Peter H. Kaufman
PETER H. KAUFMAN
Deputy Attorney General
Attorneys for the California Gambling Control Commission

Reply to Plaintiff's Opp.to.Def.MTD.wpd
SA2008300115

EXHIBIT "A"

H

California Valley Miwok Tribe v. U.S.
C.A.D.C.,2008.
Only the Westlaw citation is currently available.
United States Court of Appeals,District of Columbia Circuit.
CALIFORNIA VALLEY MIWOK TRIBE f/k/a Sheep Ranch of Me-Wuk Indians of California, Appellant
v.
UNITED STATES of America, et al., Appellees.
No. 06-5203.

Argued Oct. 12, 2007.
Decided Feb. 15, 2008.

Background: Members of Indian tribe brought action on behalf of tribe challenging Secretary of the Interior's refusal to approve tribal constitution, seeking declaration that tribe was organized pursuant to Indian Reorganization Act. The United States District Court for the District of Columbia, Robertson, J., 424 F.Supp.2d 197, granted government's motion to dismiss. Members appealed.

Holdings: The Court of Appeals, Griffith, Circuit Judge, held that:

(1) Secretary had authority under the Act to refuse to approve constitution, and

(2) any error in district court's denial of members' motions for leave to file supplemental claims was harmless.

Affirmed.

[1] Indians 209 ⇐0

209 Indians
Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations.

[2] Indians 209 ⇐0

209 Indians
To qualify for federal benefits, Indian tribes must meet conditions set by federal law, and the most important condition is federal recognition.

[3] Federal Courts 170B ⇐0

170B Federal Courts
Court of Appeals reviews the grant of a motion to dismiss de novo.

[4] Federal Courts 170B ⇐0

170B Federal Courts
Court of Appeals reviews district court's denial of leave to file supplemental claims for abuse of discretion.

[5] Indians 209 ⇐0

209 Indians
Secretary of the Interior had authority, under Indian Reorganization Act provision that each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in the Act, to refuse to approve tribal constitution on grounds that constitution did not enjoy support from majority of tribe's membership. 25 U.S.C.A. § 476(h).

[6] Federal Civil Procedure 170A ⇐0

170A Federal Civil Procedure
Any error by district court in denying motions for leave to file supplemental claims was harmless, in action brought by members of Indian tribe on behalf of tribe which challenged Secretary of the Interior's refusal to approve tribal constitution, since no fact development had occurred in case, and members could file supplemental claims in a new cause of action. Fed.Rules Civ.Proc.Rules 15(d),

61, 28 U.S.C.A.

Appeal from the United States District Court for the District of Columbia (No. 05cv00739).

Phillip Eugene Thompson argued the cause for appellant. With him on the briefs were Johnine Clark and Sonya Anjanette Smith-Valentine.

Mark R. Haag, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were James Merritt Upton and Katherine J. Barton, Attorneys.

Tim Vollmann argued the cause and filed the brief for amicus curiae Yakima K. Dixie in support of appellees.

Before GRIFFITH, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges.

Opinion for the Court filed by Circuit Judge GRIFFITH.

GRIFFITH, Circuit Judge.

***1** Since the days of John Marshall, it has been a bedrock principle of federal Indian law that every tribe is "capable of managing its own affairs and governing itself."*Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 16, 8 L.Ed. 25 (1831); *see also Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832) (stating that tribes are "distinct, independent political communities, retaining their original natural rights"). But tribes that want federal benefits must adhere to federal requirements. The gateway to some of those benefits is the Indian Reorganization Act of 1934 ("the Act"), which requires tribes to organize their governments by adopting a constitution approved by the Secretary of the Interior ("Secretary").*See*25 U.S.C. § 476.

This case involves an attempt by a small cluster of people within the **California Valley Miwok** tribe ("CVM") to organize a tribal government under the Act. CVM's chairwoman, Silvia Burley, and a group of her supporters adopted a constitution to govern the tribe without so much as consulting its membership. The Secretary declined to approve the constitution because it was not ratified by anything close to a majority of the tribe. Burley and her supporters-in CVM's name-then sued the United States, claiming that the Secretary's refusal was unlawful and seeking a declaration that CVM is organized pursuant to 25 U.S.C. § 476.[FN1]Because we conclude that the Secretary lawfully refused to approve the proposed constitution, we affirm the district court's dismissal of Burley's claim. Burley also argues that the district court erred in denying her motions for leave to file supplemental claims for relief. We conclude that any such error was harmless.

I.

[1][2] Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations."*United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) (internal quotation marks and citations omitted). To qualify for federal benefits, however, tribes must meet conditions set by federal law. The most important condition is federal recognition, which is "a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government."COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138 (2005 ed.). The federal government has historically recognized tribes through treaties, statutes, and executive orders, but it does so today primarily by a standardized application process administered by the Secretary. *See generally*25 C.F.R. pt. 83; *see also id.* § 83.7 (listing the factors the Secretary must consider when deciding whether to recognize a tribe). Among the federal benefits that a recognized tribe and its members may claim are the right to receive financial assistance under the Snyder Act, *see*25 U.S.C. § 13 (authorizing the Secretary to "direct, supervise, and expend" funds for a range of purposes including health and education), and the right to operate gaming facilities under the Indian

Gaming Regulatory Act, *see*25 U.S.C. §§ 2701 *et seq.*[FN2]

***2** Once recognized, a tribe may qualify for additional federal benefits by organizing its government under the Act. "[Section 476 of the Act] authorizes any tribe ... to adopt a constitution and bylaws, subject to the approval of the Secretary of the Interior."*Kerr-McGee Corp. v. Navajo Tribe of Indians,* 471 U.S. 195, 198, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985). Organization under § 476 vests in a tribe the power "[t]o employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments."25 U.S.C. § 476(e). And some governmental benefits may flow only to tribes organized under the Act. For example, in this case the California Gaming Control Commission-which distributes an annual payment to all non-gaming tribes in the state-suspended CVM's allotment of approximately $1 million when it learned that CVM was unorganized.[FN3]

Section 476 of the Act provides two ways a tribe may receive the Secretary's approval for its constitution. The first is, in effect, a safe harbor. Section 476(a) says:

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when-

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

25 U.S.C. § 476(a). Pursuant to subsection (a)(1), the Secretary has promulgated several rules governing special elections. *See generally*25 C.F.R. pt. 81. Compliance with these rules is a prerequisite for the Secretary's approval of a proposed constitution. Among other things, the rules define voter eligibility, *id.* § 81.6, create tribal-election boards, *id.* § 81.8, establish voting districts, *id.* § 81.9, describe voter-registration procedures, *id.* § 81.11, stipulate conditions for election notices, *id.* § 81.14, set poll opening and closing times, *id.* § 81.15, and describe the criteria for ballots, *id.* § 81 .20. According to subsection (d)(1), once shown that the proposed constitution is the product of the § 476(a) process, the Secretary "shall approve the constitution [ ] within forty-five days after the election unless the Secretary finds that the proposed constitution [is] contrary to applicable laws."25 U.S.C. § 476(d)(1).[FN4]

Section 476(h) provides a second way to seek the Secretary's approval for a proposed constitution. Unlike the extensive procedural requirements of § 476(a), under § 476(h) a tribe may adopt a constitution using procedures of its own making:

Notwithstanding any other provision of this Act each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section[.]

***3** 25 U.S.C. § 476(h)(1). But this greater flexibility in process comes with a cost. Section 476(h) does not provide a safe harbor. As discussed in detail in Part III, the central issue in this case is the extent of the Secretary's power to approve a constitution under this section.

II.

CVM is a federally recognized Indian tribe. *See*Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 70 Fed.Reg. 71,194, 71,194 (Nov. 25, 2005). It has a potential membership of 250,[FN5] but its current tribal council-led by Burley-was handpicked by only a tiny minority.[FN6]This case is the latest round of sparring between Burley and the federal government over whether the tribe is organized under the Act. Burley's efforts to organize the tribe began in 2000 when, pursuing the safe harbor

procedure of § 476(a), she and a group of her supporters adopted a constitution and requested the Secretary to call an election for its ratification. Section 476(c) required the Secretary to call an election on the proposed constitution within 180 days. For reasons not apparent from the record, the Secretary never called the election. Rather than press the matter, Burley withdrew her request for a vote on the constitution.

A second effort to organize came in 2001, when Burley's group adopted a new constitution for the tribe. This time, Burley bypassed the § 476(a) process and instead sent the constitution directly to the Secretary for approval. The Secretary informed her that the constitution was defective and the tribe still unorganized.

Perhaps relying on the old adage, Burley made a third attempt in early 2004. Meanwhile, Congress passed the Native American Technical Corrections Act, which added § 476(h). The Secretary then responded to Burley by rejecting her proposed constitution and explaining that she would need to at least attempt to involve the entire tribe in the organizational process before the Secretary would give approval:

> Where a tribe that has not previously organized seeks to do so, [the Secretary] also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence that such general involvement was attempted or has occurred with the purported organization of your tribe.... To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts, were you and your two daughters.
>
> Letter from Dale Risling, Sr., Superintendent, United States Department of the Interior, Bureau of Indian Affairs-Cent. Cal. Agency, to Silvia Burley (Mar. 26, 2004).

Burley, in CVM's name, then sued the United States for its failure to recognize the tribe as organized. She also twice motioned for leave to file supplemental claims for relief. The district court dismissed the original complaint for failure to state a claim and also denied the motions for leave.

[3][4] We review the grant of a motion to dismiss *de novo*. *Broudy v. Mather,* 460 F.3d 106, 116 (D.C.Cir.2006). Although Burley initially filed two claims for relief-one under § 476(h) of the Act and the other under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704-we review only the APA claim because § 476(h) offers no private cause of action. We review the denial of leave to file supplemental claims for abuse of discretion. *Hall v. CIA,* 437 F.3d 94, 101 (D.C.Cir.2006).

III.

***4** [5] The Burley faction has chosen not to repeat its effort to organize under § 476(a). Instead, it has tried to organize under § 476(h). Burley argues that, under § 476(h), the Secretary had no choice but to approve the proposed constitution. The Secretary reads § 476(h) to allow her to reject any constitution that does not "reflect the involvement of the whole tribal community."We consider the question within the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Secretary's legal interpretation did not come in either a notice-andcomment rulemaking or a formal adjudication, the usual suspects for *Chevron* deference. We nonetheless believe that *Chevron*-rather than *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944)-provides "the appropriate legal lens through which to view the legality of the Agency interpretation,"*Barnhart v. Walton,* 535 U.S. 212, 222, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002), because of the "interstitial nature of the legal question" and the "related expertise of the Agency," *id.*We must therefore determine whether Congress has spoken directly to the issue. If it has not, we must defer to the agency's interpretation as long as it is reasonable. *Chevron,* 467 U.S. at 842-43. We hold that the Secretary's interpretation is a permissible one. [FN7]

Burley asserts that § 476(h) unambiguously requires the Secretary to approve any constitution adopted under that provision. In Burley's view, the Secretary has no role in determining whether a tribe has properly organized itself to qualify for the federal benefits provided in the Act and elsewhere. That cannot be. Although the sovereign nature of Indian tribes cautions the Secretary not to exercise freestanding authority to interfere with a tribe's internal governance, the Secretary has the power to manage *"all* Indian affairs and [ ] *all* matters *arising out of Indian relations."*25 U.S.C. § 2 (emphases added).[FN8] We have previously held that this extensive grant of authority gives the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians. *See Udall v. Littell,* 366 F.2d 668, 672 (D.C.Cir.1966) ("In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given [her] reasonable powers to discharge it effectively."); *see also United States v. Eberhardt,* 789 F.2d 1354, 1359 (9th Cir.1986) (noting that § 2 serves "as the source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians"). The exercise of this authority is especially vital when, as is the case here, the government is determining whether a tribe is organized, and the receipt of significant federal benefits turns on the decision.

The Secretary suggests that her authority under § 476(h) includes the power to reject a proposed constitution that does not enjoy sufficient support from a tribe's membership. Her suggestion is reasonable, particularly in light of the federal government's unique trust obligation to Indian tribes. *See Seminole Nation v. United States,* 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942) (noting "the distinctive obligation of trust incumbent upon the Government in its dealings with" tribes). A cornerstone of this obligation is to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits. *See id.* at 297 ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs ..., was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation."); *Seminole Nation v. Norton,* 223 F.Supp.2d 122, 140 (D.D.C.2002) (noting that the Secretary "has the responsibility to ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] *as a whole")* (emphasis added).

***5** The sensibility of the Secretary's understanding of § 476(h) is especially apparent in a case like this one. Although CVM, by its own admission, has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting her proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary. As Congress has made clear, tribal organization under the Act must reflect majoritarian values. *See*25 U.S.C. § 476(a) (requiring majority vote by tribe for adoption of a constitution); *id.* § 476(b) (requiring majority vote by tribe for revocation of a constitution); *id.* §§ 478, 478a (requiring majority vote by tribe in order to exclude itself from the Act). And as we have previously noted, tribal governments should "fully and fairly involve the tribal members in the proceedings leading to constitutional reform."*Morris v. Andrus,* 640 F.2d 404, 414 (D.C.Cir.1981). Because the Secretary's decision not to approve Burley's proposed constitution was permissible, we affirm the dismissal of Burley's claim.

[6] Burley also argues that the district court abused its discretion by denying her motions for leave to file supplemental claims. *See*FED.R.CIV.P. 15(d). Any such error was harmless. *See*FED.R.CIV.P. 61. Because there has been no fact development in this case, no harm is done by requiring Burley to file her supplemental claims in a new cause of action. *See*6A CHARLES ALAN

WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1506, at 197 (2d ed.1990) (noting that "when joinder will not promote judicial economy or the speedy disposition of the dispute between the parties, refusal to allow the supplemental pleading is entirely justified").

For the foregoing reasons, the judgment of the district court is

Affirmed.

FN1. Throughout, we refer to Burley rather than "CVM" or "the tribe" because we are mindful that there is an ongoing leadership dispute between Burley and former tribal chairman Yakima Dixie. Both claim to represent the tribe, and Dixie filed an amicus brief in this case in support of the United States. We pass no judgment on that dispute.

FN2. According to the government, Burley wishes to build and operate a casino for CVM. Government's Brief at 10-11.

FN3. The stakes for CVM may be raised even higher if California's gaming tribes expand their casinos, as news reports suggest they are planning to do. *See The New Indian Wars,* ECONOMIST, Nov. 29, 2007.

FN4. "[A]pplicable laws" means "any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts."Act of Nov. 1, 1988, Pub.L. No. 100-581, § 102(1), 102 Stat. 2938, 2939.

FN5. This figure was offered by the tribe itself in separate litigation. *See* Complaint for Injunctive and Declaratory Relief at 1, ***California Valley Miwok*** *Tribe v. United States,* No. 02-0912 (E.D.Cal. Apr. 29, 2002). We take judicial notice of that document. *See Veg-Mix, Inc. v. U.S. Dep't of Agric.,* 832 F.2d 601, 607 (D.C.Cir.1987).

FN6. In 1999, the Secretary recognized Burley as CVM's chairperson. The Secretary also entered into a "self-determination contract" with the tribe under the Indian Self-Determination Act. *See*25 U .S.C. § 450f. Pursuant to that contract, the tribe received funds for the development of its government. Subsequently, however, the Secretary modified her stance and recognized CVM's leadership only on an interim basis, pending the tribe's organization effort. Burley does not challenge this change.

FN7. We recognize that we typically do not apply full *Chevron* deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs. In the usual circumstance, "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' " *Cobell v. Norton,* 240 F.3d 1081, 1101 (D.C.Cir.2001) (quoting *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)). "This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from the ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people." *Id.* (quoting *Albuquerque Indian Rights v. Lujan,* 930 F.2d 49, 59 (D.C.Cir.1991)). Here, however, the Secretary's proposed interpretation does not run against any Indian

tribe; it runs only against one of the contestants in a heated tribal leadership dispute, *see supra* note 1. In fact, as we later explain, the Secretary's interpretation actually advances "the trust relationship between the United States and the Native American people." Therefore, adherence to *Chevron* is consistent with the customary Indian-law canon of construction.

FN8. This grant of authority was initially lodged in the Secretary of War. *See* Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564. It was eventually transferred to the Secretary of the Interior in 1849. *See* Act of Mar. 3, 1849, ch. 108, § 5, 15 Stat. 228.

C.A.D.C.,2008.
California Valley Miwok Tribe v. U.S.
--- F.3d ----, 2008 WL 398455 (C.A.D.C.)

END OF DOCUMENT

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 **March 3, 2008**, I electronically filed the following document(s):

DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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:

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Manual Notice List

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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 **March 3, 2008**, at San Diego, California.

Roberta L. Matson
Declarant

Signature

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80212880.wpd

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Attorneys for 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.	08-CV-0120 BEN AJB **DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE TO THE EASTERN DISTRICT OF CALIFORNIA SACRAMENTO DIVISION** Hearing: March 10, 2008 Time: 10:30 a.m. Courtroom: 3 Judge: The Honorable Roger J. Benitez

Defendant California Gambling Control Commission's ("Commission") motion to change the venue of this action to the Eastern District of California, Sacramento Division, is based on the fact that the parties to this suit are all located in the Eastern District and that a suit for breach of the tribal-state class III gaming compacts ("Compacts") at issue in this case is to be brought in

the jurisdiction in which the affected tribe is located.

In her opposition to the Commission's motion, Silvia Burley[1/] relies primarily upon the premise of her motion for remand filed concurrently with the Commission's motion for change of venue and motion to dismiss. It is, of course, self-evident that if this Court chooses to remand this case to the California courts, California venue statutes will control and the Commission's motion for change of venue will be moot.

If the Court denies Ms. Burley's motion for remand, however, the Commission's motion for change of venue must be considered. Ms. Burley's only opposition to the Commission's motion for change of venue itself is her contention that the Compacts do not prefer that an action by a third party beneficiary to the Compacts be brought in the jurisdiction where the third party beneficiary is located and that, under state law, an action brought in state court against the Commission could be brought in San Diego County Superior Court.

Ms. Burley, however, completely ignores the other bases for the Commission's motion which is that the parties to this action all reside in the Eastern District and that the distribution of Revenue Sharing Trust Fund monies requested by the Complaint would take place in the Eastern District. Though she asserts that there is no declaration establishing that the parties to this proceeding all reside in the Eastern District, none is required because the Complaint and service documents in this action all establish the location of the parties.

Further, the fact that if this action were tried in state court, state law venue might be proper in San Diego County Superior Court does not control venue in federal court. Under established law, state law cannot control venue in federal courts. *See Steel Motor Service, Inc. v. Zalke*, 212 F.2d 856 (6th Cir.1954); 1 Moore's Fed. Prac. ¶¶.140[1.-3-1]; 32 Am.Jur. at 796.

Finally the fact that the Compacts do not address the question of where a third party beneficiary is required to bring an action for breach of the Compacts does not establish that

---

1. The Commission describes the plaintiff in this case as Silvia Burley instead of the California Valley Miwok for the same reasons the Court of Appeal did so in *California Valley Miwok v. U.S.*, No. 06-5203, 2008 WL 398455 (D.C. Cir. Feb. 15, 2008). The court did so because it found that Ms. Burley was acting on behalf of only a small cluster of tribal members and did not represent the interests or have the consent of the vast majority of putative tribal members.

venue is proper anywhere that entity might choose to file suit. First, the Compacts' failure to address venue for a third party beneficiary suit is readily explained by the fact that no such suit is authorized by the Compacts. (*See* Compact § 15.1, Compl., Ex. A, at 44.) Second, a third party beneficiary is bound by the terms of the contract upon which it seeks relief. *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976). As more fully set forth in the Commission's moving papers, suits for breach of the Compacts are to be brought in the jurisdiction in which the affected tribe is located.

For these reasons and those set forth in the Commission's moving papers, the Court is respectfully requested to grant the Motion for Change of Venue to the Eastern District of California, Sacramento Division.

Dated: March 3, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
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SARA J. DRAKE
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RANDALL PINAL
Deputy Attorney General

/s/Peter H. Kaufman
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Deputy Attorney General
Attorneys for Defendant the California Gambling Control Commission

Reply to Plaintiff's Opp.for.Change.of.Venue.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 **March 3, 2008**, I electronically filed the following document(s):

DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE TO THE EASTERN DISTRICT OF CALIFORNIA SACRAMENTO DIVISION

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:

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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 **March 3, 2008**, at San Diego, California.

Roberta L. Matson
Declarant

Signature

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ADMITTED TO
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March 7, 2008

The Hon. Roger T. Benitez
U.S. District Court Judge
940 Front Street
San Diego, California 92101

Re: California Valley Miwok Tribe v. The Calif. Gambling Control Com.,
Case No. 08-CV-0120 BEN AJB

Dear Judge Benitez:

On March 3, 2008, the Defendant, The California Gambling Control Commission ("the Commission"), filed a "Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss" ("Reply Brief").

In its Reply Brief, the Commission cited, indeed attached a copy of, a Court of Appeals decision in California Valley Miwok Tribe v. The United States, decided on February 15, 2008. This decision was not addressed in my opposition papers, yet the Commission raises new issues in connection with it in its Reply Brief. For example, the Commission argues in its Reply Brief that the Court of Appeals "accepts without question that the Commission could appropriately refuse to distribute Revenue Sharing Trust Fund ("RSTF") monies to the [California Valley Miwok Tribe]..." (Page 2, lines 1-3 of Reply Brief). However, the Court of Appeals never made that statement, and never ruled on the Commission's duties with respect to this case.

Plaintiff wishes to address this and other misleading statements contained in the Reply Brief, should the Court entertain the Motion to Dismiss. However, as Plaintiff has pointed out in its own briefs, in the event the Court grants the Motion to Remand, the Commission's Motion to Dismiss (and other pending motions) would be moot. Should that occur, then the Plaintiff would not need to respond to the Reply Brief with respect to

this recently decided Court of Appeals decision, and this letter request can then be disregarded.

Respectfully submitted,

Manuel Corrales, Jr.

cc: Peter H. Kaufman, Esq.
Terry Singleton, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NOTICE OF DOCUMENT DISCREPANCIES AND ORDER THEREON

CASE NO.: 08cv0120 BEN
TITLE: California Valley Miwok Tribe v. California Gambling Control Commission et al
E-FILED DATE: 03/13/08 DOCKET NO.: 18
DOCUMENT TITLE: Ex Parte MOTION Leave to Respond
DOCUMENT FILED BY: California Valley Miwok Tribe

Upon the electronic filing of the above referenced document(s), the following discrepancies are noted:

	Civil Local Rule or Electronic Case Filing Administrative Policies and Procedures Manual provision ("ECF")	Discrepancy
	ECF § 2(h)	Includes a proposed order or requires judge's signature
x	ECF § 2(a), (g)	Docket entry does not accurately reflect the document(s) filed
	ECF § 2(g)	Multiple pleadings in one docket entry not separated out as attachments
	ECF § 2(f)	Lacking proper signature
x	Civ. L. Rule 5.1	Missing time and date on motion and/or supporting documentation
	Civ. L. Rule 7.1 or 47.1	Date noticed for hearing not in compliance with rules/document(s) are not timely
x	Civ. L. Rule 7.1 or 47.1	Lacking memorandum of points and authorities in support as a separate document
	Civ. L. Rule 7.1 or 47.1	Briefs or memoranda exceed length restrictions
	Civ. L. Rule 7.1	Missing table of contents and/or table of authorities
	Civ. L. Rule 15.1	Amended pleading not complete in itself
x		OTHER: Not in pleading format

IT IS HEREBY ORDERED:

X	The document is accepted despite the discrepancy noted above. Any further non-compliant documents may be stricken from the record.
	The document is rejected. It is ordered that the Clerk **STRIKE** the document from the record, and serve a copy of this order on all parties.
Counsel is advised that any further failure to comply with the Local Rules or Electronic Case Filing Administrative Policies and Procedures Manual may lead to penalties pursuant to Civil Local Rule 83.1.	

Law Clerk: OM Date: March 18, 2008 Chambers: BEN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, Plaintiff, vs. CALIFORNIA GAMBLING CONTROL COMMISSION, Defendant.	CASE NO. 08-CV-0120 BEN (AJB) **ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE** **[Doc. # 4]**

I. INTRODUCTION

Plaintiff, California Valley Miwok Tribe ("Plaintiff" or "Miwok") brought this action against the Defendant, California Gambling Control Commission ("Defendant"). Plaintiff claims that Defendant failed to pay Plaintiff its share from the Indian Gaming Revenue Sharing Trust Fund ("RSTF"). Defendant removed the case from state court. Defendant now moves for a change of venue to the United States District Court for the Eastern District of California under 28 U.S.C. § 1404(a). For the reasons that follow, the motion is **GRANTED.**

II. BACKGROUND

Plaintiff alleges that it is a federally recognized Indian tribe located in Stockton, California. (Compl. ¶ 1). Defendant supervises gambling establishments in the State of California and serves as the Trustee and Administrator of certain funds in the State Treasury, including the RSTF. (Compl. ¶ 2). Defendant's office is located in Sacramento, California.

In September 1999, the State of California entered into a Tribal State Gambling Compact ("Compact") with various Indian tribes located in the state ("the Compact tribes"). (Compl. ¶ 5, Ex. 1). The Compact tribes contribute a percentage of their gambling proceeds to the RSTF. (Compl. ¶ 5).

Plaintiff claims that under the Compact, as a non-Compact tribe with no casinos or gambling operations, Plaintiff qualifies to receive up to $1.1 million from the RSTF annually. (Compl. ¶ 6). The Miwok tribe was placed on the list of federally recognized tribes in 1994 and in 1998 the tribe established a tribal council. (Compl. ¶ 8). On June 25, 1999, the Bureau of Indian Affairs ("BIA") recognized Silva Burley ("Burley") as the tribal chairperson. *Id.*

Plaintiff alleges a leadership dispute developed within the Miwok tribe in late 1999, but the BIA still recognized Burley as the chairperson of the tribe in July 2000. (Compl. ¶ 9). However, in October 2001, the BIA declined to approve the tribe's new constitution, asked the tribe to identify more of its members, and recognized Miwok as an "unorganized Tribe." (Compl. ¶¶ 9-14). BIA continues to recognize the tribe as "unorganized" because the Miwok tribe has not identified other putative members of the tribe in the tribe's constitution. (Compl. ¶ 14). In addition, due to the internal disputes, the BIA now recognizes Burley only as a "person of authority," rather than as a tribal chairperson. *Id.*

In March 2005, BIA met with Plaintiff in an effort to resolve the leadership disputes. However, in August 2005, Defendant advised Miwok that the distributions from the RSTF would be withheld until the Miwok leadership was formally established. (Compl. ¶ 15). Plaintiff claims Defendant's decision was a result of the ongoing leadership dispute and the BIA's designation of Miwok as an "unorganized tribe." *Id.* Plaintiff continues to request the distributions from the RSTF and Defendant has refused to make any further distributions. (Compl. ¶ 16).

Plaintiff's Complaint alleges that under Cal. Gov. Code § 12012.75, Defendant has a mandatory duty to distribute funds from the RSTF to Plaintiff. Additionally, Plaintiff claims that under Section 4.3.2.1(b) of the Compact, Defendant has no discretion in deciding whether a non-Compact tribe is entitled to a distribution. (Compl. ¶ 18). The Complaint alleged five causes of action for injunctive relief, declaratory relief, breach of contract, breach of fiduciary duty, and

intentional interference with prospective economic advantage. Plaintiff sought an order restraining Defendant from withholding the distributions and directing Defendant to pay Plaintiff the money due, a declaratory judgment regarding Plaintiff's rights and Defendant's obligations to Plaintiff, and compensatory and punitive damages.

Defendant removed the case to federal court on January 22, 2008. Since removal, Plaintiff voluntarily dismissed without prejudice its third cause of action for breach of contract and fourth cause of action for breach of fiduciary duty. [Doc. # 6].

On January 31, 2008, Defendant filed this motion to transfer venue to the United States District Court for the Eastern District of California. [Doc. # 4]

III. DISCUSSION

Transfer of this case to the Eastern District of California is appropriate. Under 28 U.S.C. § 1404(a), "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

A district where the action might have been brought is one in which the case could have properly been filed at the time Plaintiff filed the case. *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960). A preliminary review of Plaintiff's Complaint indicates that Plaintiff could have properly filed this case in the United States District Court for the Eastern District of California. Plaintiff and Defendant are both located in the Eastern District of California – Sacramento, California and Stockton, California. Additionally, it appears Plaintiff's allegations implicate a Tribal-State Compact which the federal courts have jurisdiction to enforce. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).

This Court has discretion to transfer cases based on "an individualized case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1998). The Court must consider a number of factors in determining whether a transfer is appropriate. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1998)). In addition to considering the "convenience of the parties and witnesses" courts may also consider other factors. "For example, the court may consider: (1) the location where relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective

parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof." *Jones*, 211 F.3d at 498-99. The most relevant factors in this case are the convenience of parties and witnesses, contacts in the forum relating to the cause of action, ease of access to sources of proof, and plaintiff's choice of forum.

A. Convenience of the Parties and Witnesses

The convenience of the parties and witnesses is served by transfer to the Eastern District. Defendant is located in Sacramento, California and Plaintiff is located in Stockton, California. Stockton and Sacramento are both within the Eastern District. The Doe Defendants named under Plaintiff's Fifth Cause of Action are also likely within the Eastern District. Plaintiff claims the Doe Defendants conspired to "take over the Miwok Tribe." (Compl. ¶ 18). Based on this allegation, the Doe Defendants are probably near the tribe's location within the Eastern District. While Plaintiff's counsel is located in the Southern District, the convenience of counsel is not relevant to consideration of a § 1404(a) transfer. *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1196-97 (S.D. Cal. 2007) (citing *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004)).

Additionally, the convenience of witnesses is also served by transfer. While neither party named specific witnesses, the allegations in Plaintiff's Complaint occurred primarily in either Stockton or Sacramento and any witnesses to those acts are more likely in the Eastern District than the Southern District. The convenience of the parties and witnesses weighs in favor of transfer to the Eastern District.

B. Parties' Contacts with Forum and Access to Proof

The parties' contacts with the forum and ease of access to proof weigh in favor of transfer. Neither party has contacts in the Southern District related to this action, but both parties have contacts in the Eastern District related to this action. Plaintiff's Complaint identifies a variety of events, including: leadership disputes; a refusal to approve the Miwok's new constitution; requests for disbursement pursuant to the Compact; denial of those requests based on Plaintiff's "unorganized" status; a meeting between the parties to discuss this dispute; and Doe Defendants'

attempt to take over the tribe. (Compl. ¶¶ 9-16). The facts as alleged occurred within the Eastern District, rather than the Southern District. This also suggests that any proof related to these allegations is located within the Eastern District. The presence of contacts in the Eastern District, lack of contacts in the Southern District, and ease of access to proof relating to this case in the Eastern District weigh in favor of transfer.

C. Plaintiff's Choice of Forum

Plaintiff's choice of forum weighs against transfer, but this factor only merits minimal consideration. While a Plaintiff's choice of forum is often given great deference, that choice only merits minimal consideration when the "operative facts have not occurred within the chosen forum and the forum has no interest in the parties or subject matter." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). As discussed above, none of the operative facts alleged occurred within the Southern District. Additionally, the Court sees no reason the Southern District would have any particular interest in hearing the claims of these parties or this subject matter. While Plaintiff's choice is still a factor, it is only given minimal consideration. Plaintiff's choice of forum does weigh against transfer, but this factor is outweighed by other factors.

IV. CONCLUSION

Having considered these factors, the Court finds that transfer of this case to the United States District Court for the Eastern District of California will serve the convenience of parties and witnesses and the interest of justice. Accordingly, this case is transferred to the United States District Court for the Eastern District of California.

IT IS SO ORDERED.

DATED: April 23, 2008

Hon. Roger T. Benitez
United States District Judge

UNITED STATES DISTRICT COURT

Southern District Of California
Office Of The Clerk
880 Front Street, Room 4290
San Diego, California 92101-8900
Phone: (619) 557-5600
Fax: (619) 702-9900

W. Samuel Hamrick, Jr.
Clerk of Court

April 24, 2008

Office of the Clerk
United States District Court for the Eastern District of California
4-200 Robert T. Matsui, United States Court House 501 I Street
Sacramento, CA 95814-7300

Re: California Valley Miwok Tribe v. California Gambling Control Commission et al, Case No. 08cv120 BEN (AJB)

Dear Sir or Madam:

Pursuant to Order transferring the above-entitled action to your District, we are transmitting herewith our entire original file (excepting said Order).

Enclosed are a certified copy of our Docket and of the Order transferring the action, the originals of which we are retaining.

Please acknowledge receipt on the copy of this letter and return. Thank you.

Sincerely yours,

W. Samuel Hamrick, Jr.
Clerk of Court

By: S/J. Hathaway
J. Hathaway, Deputy

Copy to Attorney for Plaintiffs:
Copy to Attorney for Defendants:

RECEIVED ITEMS DESCRIBED

THIS DATE OF _____
AND ASSIGNED CASE NUMBER _____

CLERK, U.S. DISTRICT COURT

By: _____, Deputy