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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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11 CALIFORNIA VALLEY MIWOK TRIBE,
12 Plaintiff,
13

NO. CIV. 08-984 WBS GGH

14 ORDER RE: MOTION FOR REMAND,
15 MOTION TO DISMISS, AND MOTION
16 TO INTERVENE

17 v.

18 THE CALIFORNIA GAMBLING CONTROL
19 COMMISSION; and DOES 1 through
20 50, inclusive,

21 Defendant.
22 _____/

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24 Plaintiff California Valley Miwok Tribe filed an action
25 in state court to enforce its alleged third party beneficiary
26 right to receive payments from the Indian Gaming Revenue Sharing
27 Trust Fund ("RSTF").¹ The RSTF trustee, defendant California

28 ¹ Although the "California Valley Miwok Tribe" is the
named plaintiff in this action, the court recognizes that members
of the tribe dispute whether Silvia Burley, the tribal member who

1 Gambling Control Commission, removed the case to federal court
2 and venue was subsequently transferred to this court. Presently
3 before the court are plaintiff's motion to remand the case to
4 state court, defendant's motion to dismiss, and Yakima K. Dixie
5 and Melvin Dixie's motion to intervene.

6 I. Factual and Procedural Background

7 In 1994, Congress enacted the Federally Recognized
8 Tribes List Act, 25 U.S.C. § 479a-1, and plaintiff's name was
9 placed on the list of federally recognized tribes. (Compl. ¶ 8.)
10 As of the date plaintiff initiated this lawsuit, its name
11 remained on that list. (Id. at ¶ 6); see also Cal. Valley Miwok
12 Tribe, 515 F.3d at 1265 (indicating that plaintiff is a
13 "federally recognized Indian tribe"). In 1998, plaintiff
14 established a tribal council and, on June 25, 1999, the Bureau of
15 Indian Affairs (BIA) recognized Silvia Burley as the tribal
16 chairperson. (Compl. ¶ 8.) In late 1999, however, a leadership
17 dispute developed between Burley and other putative tribe
18 members, including the alleged hereditary chief, Yakima K. Dixie,
19 and his brother, Melvin Dixie. (Id. at ¶ 9; Dixie's Mem. in
20 Supp. of Mot. to Intervene 2:10-13.)

21 In September of 2001, plaintiff adopted a new
22 constitution; however, the BIA declined to approve the proposed
23

24 has pursued this action on behalf of plaintiff, has the authority
25 to do so. The court does not express an opinion on this issue.
26 See also Cal. Valley Miwok Tribe v. United States, 515 F.3d 1262,
27 1263 n.1 (D.C. Cir. 2008) ("Throughout, we refer to Burley rather
28 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").

1 constitution and classified plaintiff as an "unorganized" tribe
2 on October 31, 2001. (Compl. ¶ 10.) About two years later, the
3 BIA recognized a "government-to-government relationship" with
4 plaintiff through the tribal council Burley allegedly chaired.
5 (Id. at ¶ 11.) On March 26, 2004, the BIA indicated that it
6 recognized Burley as only "a person of authority" and requested
7 plaintiff to submit a new constitution that more accurately
8 identified plaintiff's membership base. (Id. at ¶ 12.)

9 Due to plaintiff's "unorganized" status and the BIA's
10 recognition of Burley as only "a person of authority," defendant
11 notified plaintiff in August of 2005 that it would not disburse
12 plaintiff's funds pursuant to California's Tribal-State Gaming
13 Compacts ("Compacts"). (Id. at ¶ 15.) Plaintiff's right to
14 receive such funds originated in 1999 when, pursuant to the
15 Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, 18
16 U.S.C. §§ 1166-1168, California entered into Compacts with
17 numerous California Indian tribes. (Compl. Ex. 1 at § 4.3.2-
18 4.3.2.1.) The Compact each tribe executed was substantially
19 similar and allowed the compacting tribe to operate gambling
20 facilities in exchange for regulations and financial commitments.
21 (Id. at ¶ 5, Ex. 1.)

22 While plaintiff was not a compact tribe, it qualified
23 as a non-compact tribe because it was a "[f]ederally-recognized
24 tribe[] . . . operating fewer than 350 Gaming Devices." (Id. Ex.
25 1 at § 4.3.2.) As a non-compact tribe, plaintiff became a third
26 party beneficiary of the Compacts and was entitled to receive
27 \$1.1 million per year from the RSTF, which the Compacts created
28 and the compact tribes funded through gambling revenues. (Id.

1 Ex. 1 at §§ 4.3.2.1(a), 5.0.) The Compacts required defendant,
2 as trustee of the RSTF, to disburse RSTF payments on a quarterly
3 basis to non-compact tribes. (Id. at § 4.3.2.1(b).) In doing
4 so, defendant had "no discretion with respect to the use or
5 disbursement of the trust funds." (Id.) As of September 30,
6 2007, defendant had withheld \$3,121,397.76 in RSTF funds that
7 plaintiff was allegedly entitled to pursuant to the Compacts.²
8 (Id. at ¶ 18.)

9 On January 7, 2008, plaintiff filed its Complaint in
10 the Superior Court for the County of San Diego, Central District,
11 alleging claims for: 1) injunctive relief; 2) declaratory relief;
12 3) breach of contract; 4) breach of fiduciary duty; and 5)
13 intentional interference with a prospective economic advantage
14 (alleged against only Does twenty-one through fifty).³ Defendant
15 removed the action to the United States District Court for the
16

17 ² Defendant contends that it "began depositing the
18 [plaintiff's] RSTF funds into a separate interest bearing account
19 pending the federal government's resolution of the questions
20 surrounding the [plaintiff's] status and the identity of its
membership, government and leadership." (Def.'s Mem. in Supp. of
Mot. to Dismiss 7:4-7.)

21 ³ Based on plaintiff's fifth cause of action, defendant
22 contends this court has jurisdiction because, as a "prerequisite"
23 to resolving plaintiff's claims, the court must resolve the
24 underlying tribal leadership dispute. (Def.'s Mem. in Opp'n to
Pl.'s Mot. to Remand 2:13-17.) The court, however, cannot
25 resolve plaintiff's leadership dispute because "[j]urisdiction to
26 resolve internal tribal disputes, interpret tribal constitutions
and laws, and issue tribal membership determinations lies with
Indian tribes and not in the district courts." In re Sac & Fox
Tribe of Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 764
(8th Cir. 2003) (citing United States v. Wheeler, 435 U.S. 313,
323-36 (1978)) (additional citations omitted). Therefore,
27 assuming the underlying leadership dispute appears on the face of
28 plaintiff's well-pled Complaint, neither that dispute nor
plaintiff's fifth cause of action give rise to federal question
jurisdiction.

1 Southern District of California, then moved to change venue and
2 to dismiss the case. After voluntarily dismissing its third
3 (breach of contract) and fourth (breach of fiduciary duty)
4 claims,⁴ plaintiff moved to remand the case to state court. On
5 April 23, 2008, the court granted defendant's motion to change
6 venue and transferred the case to this district. After the
7 transfer to this district, Yakima K. Dixie and Melvin Dixie filed
8 a motion to intervene pursuant to Federal Rule of Civil Procedure
9 24.

10 "Under the 'law of the case' doctrine, 'a court is
11 generally precluded from reconsidering an issue that has already
12 been decided by the same court, or a higher court in the
13 identical case.'" United States v. Alexander, 106 F.3d 874, 876
14 (9th Cir. 1997) (citation omitted). In its Order granting
15 defendant's motion to transfer venue, the District Court for the
16 Southern District of California stated that "[a] preliminary
17 review of Plaintiff's Complaint indicates that Plaintiff could
18 have properly filed this case in the United States District Court
19

20 ⁴ Although defendant initially asserted Eleventh
21 Amendment immunity with respect to plaintiff's third and fourth
22 causes of action for damages, defendant withdrew this defense
23 after plaintiff voluntarily dismissed those claims. (See Def.'s
24 Reply in Supp. of Mot. to Dismiss 1:n.2); see also Cal. Gov't
25 Code § 98005 ("[T]he State of California also submits to the
26 jurisdiction of the courts of the United States in any action
27 brought against the state by any federally recognized California
28 Indian tribe asserting any cause of action arising from . . . the
state's violation of the terms of any Tribal-State compact to
which the state is or may become a party."), invalidated in part
by Hotel Employees & Rest. Employees Int'l Union v. Davis, 21
Cal. 4th 585, 589 (1999); see also Lapides v. Bd. of Regents of
Univ. Sys. of Ga., 535 U.S. 613, 617-18, 620 (2002) (state
voluntarily waives its sovereign immunity when it removes state-
law claims to federal court and had explicitly waived immunity in
the state-court proceedings).

1 for the Eastern District of California. . . . Additionally, it
2 appears Plaintiff's allegations implicate a Tribal-State Compact
3 which the federal courts have jurisdiction to enforce." (Order
4 Apr. 23, 2008 3:16-21.) This court does not understand the
5 transferor court's preliminary remarks about the appearance of
6 jurisdiction to constitute an affirmative finding that
7 plaintiff's Complaint gives rise to federal jurisdiction.

8 An argument could be made, however, that a finding of
9 federal subject matter jurisdiction was implicit in the
10 transferor court's decision to grant defendant's motion to
11 transfer venue. See 28 U.S.C. § 1404 ("For the convenience of
12 parties and witnesses, in the interest of justice, a district
13 court may transfer any civil action to any other district or
14 division where it might have been brought.") (emphasis added).
15 Nonetheless, a transferor court's finding of jurisdiction does
16 not relieve this court of its independent duty to ensure that it
17 only exercises jurisdiction over cases that Congress or the
18 Constitution authorize. See 28 U.S.C. § 1447(c) ("If at any time
19 before final judgment it appears that the district court lacks
20 subject matter jurisdiction, the case shall be remanded."); see
21 also Intercontinental Travel Mktg., Inc. v. F.D.I.C., 45 F.3d
22 1278, 1286 (9th Cir. 1994) ("[A]n objection to subject matter
23 jurisdiction may be raised at any time, by any party or the
24 court."); Hanna Boys Ctr. v. Miller, 853 F.2d 682, 686 n.1 (9th
25 Cir. 1988) ("[T]he law of the case doctrine 'is inapplicable to
26 the question of our jurisdiction to consider an appeal.'")
27 (citation omitted). Therefore, this court must determine whether
28 this case may remain in federal court.

1 II. Discussion

2 "Any civil action may be removed to federal district
3 court so long as original jurisdiction would lie in the court to
4 which the case is removed." Matheson v. Progressive Speciality
5 Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003); 28 U.S.C. §
6 1441(a). When a plaintiff moves to remand a case, the defendant
7 bears the burden of establishing that removal was proper. Gaus
8 v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). Any questions
9 regarding the propriety of removal should be resolved in favor of
10 the party moving for remand. Matheson, 319 F.3d at 1090. If
11 removal was improper, "the district court lack[s] subject matter
12 jurisdiction, and the action should [be] remanded to the state
13 court." Toumajian v. Frailey, 135 F.3d 648, 653 (9th Cir. 1998)
14 (citing 28 U.S.C. § 1447(c)).

15 "Federal courts are courts of limited jurisdiction.
16 They possess only that power authorized by Constitution and
17 statute, which is not to be expanded by judicial decree."
18 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377
19 (1994) (citations omitted). "A federal court is presumed to lack
20 jurisdiction in a particular case unless the contrary
21 affirmatively appears." Stock W., Inc. v. Confederated Tribes of
22 the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir.1989)
23 (citing Cal. ex rel. Younger v. Andrus, 608 F.2d 1247, 1249 (9th
24 Cir. 1979)); see also Meek v. City of Sacramento, 132 F.Supp. 546
25 (N.D. Cal. 1955). District courts have "original jurisdiction of
26 all civil actions, brought by any Indian tribe or band with a
27 governing body duly recognized by the Secretary of the Interior,
28 wherein the matter in controversy arises under the Constitution,

1 laws, or treaties of the United States." 28 U.S.C. § 1362.

2 A claim arises under a federal law if it is apparent
3 from the face of the plaintiff's well-pled complaint that "a
4 federal law creates the plaintiff's cause of action." Virgin v.
5 County of San Luis Obispo, 201 F.3d 1141, 1142-43 (9th Cir.
6 2000); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987).

7 An action may also arise under federal law "where the vindication
8 of [plaintiff's] right under state law necessarily turn[s] on
9 some construction of federal law." Merrell Dow Pharms., Inc. v.
10 Thompson, 478 U.S. 804, 808 (1986) (citation omitted); see also
11 Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S.
12 308, 314 (2005) ("[T]he question is, does a state-law claim
13 necessarily raise a stated federal issue, actually disputed and
14 substantial, which a federal forum may entertain without
15 disturbing any congressionally approved balance of federal and
16 state judicial responsibilities.").

17 A. Claims Under IGRA and the Compacts

18 While plaintiff's allegations derive from Compacts
19 entered into pursuant to IGRA, IGRA's limited grant of federal
20 jurisdiction does not encompass plaintiff's claims. See 25
21 U.S.C. § 2710(d)(7)(i)-(iii) (assuming the Eleventh Amendment
22 does not bar the claims, IGRA vests federal courts with
23 jurisdiction to hear only 1) claims by a tribe arising from the
24 State's failure to enter IGRA negotiations; 2) claims by a state
25 or tribe to enjoin certain gaming activities; and 3) claims by
26 the Secretary to enforce certain IGRA provisions); see also Hein
27 v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d
28 1256, 1260 (9th Cir. 2000) ("[P]laintiffs [can] not sue for every

1 violation of IGRA by direct action under the statute."); cf.
2 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996)
3 ("[IGRA] cannot grant jurisdiction over a State that does not
4 consent to be sued.").

5 While IGRA does not expressly extend federal
6 jurisdiction to claims to enforce Compacts, the Ninth Circuit has
7 held that "IGRA necessarily confers jurisdiction onto federal
8 courts to enforce Tribal-State compacts and the agreements
9 contained therein." Cabazon Band of Mission Indians v. Wilson,
10 124 F.3d 1050, 1056 (9th Cir. 1997). But see Wisconsin v.
11 Ho-Chunk Nation, 463 F.3d 655, 661 (7th Cir. 2006) ("The question
12 here is: since the IGRA enables and regulates contracts between
13 tribes and the states, does any dispute arising from the
14 resulting compact present a question under the IGRA? We think
15 not.").

16 In holding that a federal district court had
17 jurisdiction to hear four compact tribes' claims to enforce a
18 provision in their Compacts, the Cabazon court reasoned that a
19 claim to enforce a Compact created federal question jurisdiction
20 for two reasons. First, the court recognized the significance of
21 the "federal interest at stake [] and the importance of the
22 enforcement of Tribal-State compacts in the federal courts" to
23 prevent states from making "empty promises to Indian tribes
24 during good-faith negotiations of Tribal-State compacts"
25 Cabazon Band of Mission Indians, 124 F.3d at 1056. Second, the
26 Cabazon court reasoned that, because Congress envisioned
27 enforcement of Compacts' contractual obligations in federal
28 court--by allowing Compacts to include remedies and inviting

1 waivers of sovereign immunity--"IGRA necessarily confers
2 jurisdiction to the federal courts." Id.⁵

3 While this court has jurisdiction over compact tribes
4 or the State's claims to enforce Compacts, plaintiff, as a non-
5 compact tribe, lacks the right to enforce the Compacts. See
6 Unite Here v. Pala Band of Mission Indians, 184 L.R.R.M. 2365,
7 2368-69 (S.D. Cal. 2008) (interpreting Cabazon as applying only
8 to Compact signatories). Section 4.3.2(a)(i) of the Compacts
9 provides that "Non-Compact Tribes shall be deemed third party
10 beneficiaries of this and other compacts identical in all
11 material respects." (Compl. Ex. 1 at 4.3.2.) Assuming plaintiff
12 comes within the Compacts' definition of "Tribe,"⁶ it is
13 undisputed that it would qualify as a non-compact tribe and a
14 third party beneficiary under section 4.3.2(a)(i). Ordinarily,
15 the Compacts' identification of plaintiff as a third party
16 beneficiary would entitle it to enforce the Compacts. See Cal.
17 Civ. Code § 1559 ("A contract, made expressly for the benefit of
18 a third person, may be enforced by him at any time before the
19 parties thereto rescind it.").

21 ⁵ In his dissent, Judge Wiggins questioned the majority's
22 "terse . . . conclusion that the nature of the federal interest
23 in this case is substantial enough to warrant concluding that
24 IGRA confers jurisdiction" and remained unconvinced by its "'IGRA
is not so vacuous' argument." Cabazon Band of Mission Indians,
124 F.3d at 1062-64 (Wiggins, J. dissenting).

25 ⁶ The Compacts indicate that a "Tribe" is "a federally-
26 recognized sovereign Indian tribe," define "Tribe" as "a
27 federally-recognized Indian tribe, or an authorized official or
28 agency thereof," and define "Non-Compact Tribe" as "[f]ederally-
recognized tribes that are operating fewer than 350 Gaming
Devises" (Id. Ex. 1 at 1, §§ 2.21, 4.3.2(a)(1).) The
court need not determine whether plaintiff qualifies as a non-
compact tribe.

1 Conflicting with section 4.3.2(a)(i)'s use of the term
2 "third party beneficiary," however, is the Compacts' clear intent
3 to allow only compacting tribes and the State to enforce the
4 Compacts. Specifically, section 15.1 unambiguously limits third
5 party beneficiary rights: "Third Party Beneficiaries. Except to
6 the extent expressly provided under this Gaming Compact, this
7 Gaming Compact is not intended to, and shall not be construed to,
8 create any right on the part of a third party to bring an action
9 to enforce any of its terms." (Compl. Ex. 1 at § 15.1 (emphasis
10 added).) Because section 15.1 is titled "Third Party
11 Beneficiaries," the court finds that the parties unequivocally
12 intended the limitation in that section to apply to the third
13 party beneficiaries identified in the Compacts.

14 Not only do the Compacts fail to "expressly provide"
15 for third party beneficiaries to enforce any of the terms, (see
16 id. Ex. 1 at § 4.3.2.1(a) (providing for non-compact tribes to
17 receive \$1.1 million per year from the RSTF, but declining to
18 grant recipient tribes the power to enforce their receipt of RSTF
19 payments)), the parties' intent to preclude enforcement actions
20 by non-compact tribes is also clear from the compact tribes and
21 State's exclusion of third parties from their waivers of
22 sovereign immunity. (See id. Ex. 1 at §§ 9.4(a)(3), 9(b)
23 ("[N]othing herein shall be construed to constitute a waiver of
24 the sovereign immunity of either the Tribe or the State in
25 respect to any [] third party.").)

26 Moreover, "[i]t is well settled[] that Civil Code
27 section 1559 excludes enforcement of a contract by persons who
28 are only incidentally or remotely benefited by the agreement."

1 Harper v. Wausau Ins. Co., 56 Cal. App. 4th 1079, 1087 (1997).
2 In Martinez v. Socoma Cos., Inc., 11 Cal. 3d 394 (1974), the
3 California Supreme Court held that, even though the government
4 entered into a contract to benefit plaintiffs, plaintiffs were
5 only incidental beneficiaries because the public policy giving
6 rise to the contract prevented plaintiffs from being intended
7 donee beneficiaries with enforcement rights:

8 [T]he fact that a Government program for social
9 betterment confers benefits upon individuals who are not
10 required to render contractual consideration in return
11 does not necessarily imply that the benefits are intended
12 as gifts. . . . The benefits of such programs are
13 provided not simply as gifts to the recipients but as a
14 means of accomplishing a larger public purpose. The
15 furtherance of the public purpose is in the nature of
16 consideration to the Government, displacing any
17 governmental intent to furnish the benefits as gifts.

14 Id. at 401; see also Zigas v. Superior Court, 120 Cal. App. 3d
15 827, 237 (1981) ("[U]nder Martinez, "standing to sue as a
16 third-party beneficiary to a government contract depends on the
17 intent of the parties as manifested by the contract and the
18 circumstances surrounding its formation.").

19 As expressed in the Compacts, the RSTF served a public
20 purpose that constitutes sufficient consideration to render the
21 non-compact tribes as only incidental third party beneficiaries.
22 (See Compl. Ex. 1 at § A (explaining a primary purpose of the
23 Compacts "as a means of promoting tribal economic development,
24 self-sufficiency, and strong tribal governments").) Therefore,
25 the Compacts' unequivocal intent to limit third party
26 beneficiaries' rights combined with non-compact tribes' status as
27 only incidental beneficiaries preclude plaintiff from enforcing
28 the Compacts.

1 Consequently, because plaintiff cannot assert a claim
2 to enforce the Compacts, the court lacks federal question
3 jurisdiction as contemplated in Cabazon.

4 B. State Law Claims

5 Recognizing the technical nature of its argument,
6 plaintiff contends that, instead of seeking to enforce the
7 Compacts, plaintiff is only attempting to enforce defendant's
8 duties pursuant to California Government Code sections 12012.75
9 and 12012.90 and to obtain declaratory relief pursuant to
10 California Code of Civil Procedure section 1060.⁷ The court must
11 determine, therefore, whether plaintiff is entitled to relief
12 under any of these state statutes. If any of the statutes
13 provide a remedy, the court must then determine whether the
14 claims give rise to federal question jurisdiction.

15 Whether a statute provides for a private right of
16 action depends on the Legislature's intent: "If the Legislature
17 intended a private right of action, that usually ends the
18 inquiry. If the Legislature intended there be no private right
19 of action, that usually ends the inquiry." Animal Legal Def.
20 Fund v. Mendes, 160 Cal. App. 4th 136, 142 (2008). If "the
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22 ⁷ As the Supreme Court has recognized, "[i]t may seem odd
23 that, for purposes of determining whether removal was proper,
24 [courts] analyze a claim . . . by a party who has continuously
25 objected to district court jurisdiction over its case, as if that
26 party had been trying to get original federal court jurisdiction
27 all along." Franchise Tax Bd. of State of Cal. v. Constr.
28 Laborers Vacation Trust for S., 463 U.S. 1, 20 n.18 (1983). That
"irony," which is further escalated by defendant's concurrently-
filed motion to dismiss and the parties' inconsistent arguments
made in support of or opposition to a respective motion, "is a
more-or-less constant feature of the removal statute, under which
a case is removable if a federal district court could have taken
jurisdiction had the same complaint been filed." Id.

1 Legislature expressed no intent on the matter either way,
2 directly or impliedly, there is no private right of action, with
3 the possible exception that compelling reasons of public policy
4 might require judicial recognition of such a right." Id.
5 (citations omitted).

6 To determine legislative intent with respect to a
7 particular statute, the court "first examine[s] the words
8 themselves because the statutory language is generally the most
9 reliable indicator of legislative intent." Hassan v. Mercy Am.
10 River Hosp., 31 Cal. 4th 709, 715 (2003). Beyond the statutory
11 language, the court may also ascertain legislative intent from
12 "the legislative history of the statute and the wider historical
13 circumstances of its enactment" Vikco Ins. Servs., Inc.
14 v. Ohio Indem. Co., 70 Cal. App. 4th 55, 61 (1999) (citations
15 omitted).

16 1. Section 12012.75

17 California Government Code section 12012.75 provides:

18 There is hereby created in the State Treasury a special
19 fund called the "Indian Gaming Revenue Sharing Trust
20 Fund" for the receipt and deposit of moneys derived from
21 gaming device license fees that are paid into the fund
22 pursuant to the terms of tribal-state gaming compacts for
23 the purpose of making distributions to noncompact tribes.
24 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.

25 Cal. Gov't Code § 12012.75. This section merely creates the RSTF
26 fund within the State Treasury and requires that the funds be
27 availble to defendant "for the purpose of making [RSTF]
28 distributions." Id. As explicitly contemplated in section

1 12012.75, however, defendant's duty to make the distributions
2 begins and ends in the Compacts. The statutory text of this
3 section thus neither creates an express duty on behalf of
4 defendant to make payments to non-compact tribes nor provides a
5 remedy for non-compact tribes that do not receive their RSTF
6 payments.

7 The legislative history of section 12012.75 also does
8 not support finding a private right of action. In 1999, the
9 California Legislature added what is now section 12012.75 to
10 Assembly Bill 1385 ("AB 1385") on the day of its final vote and
11 enrollment. As originally introduced, therefore, AB 1385 did not
12 contemplate creation of the RSTF and served primarily as a
13 response to a state trial court ruling that "the Governor lacked
14 the requisite authority to execute compacts without legislative
15 approval." Assembly Committee on Governmental Organization,
16 Committee Analysis of AB 1385, at 2 (Apr. 2, 1999). Even after
17 the Senate amended AB 1385 to include creation of the RSTF,
18 neither the Legislative Counsel's Digest nor any of the bill
19 analyses suggested that the new law would circumvent the
20 Compacts' limitations on third party beneficiaries' rights.
21 Plaintiff cannot, therefore, assert a claim under section
22 12012.75.

23 2. Section 12012.90

24 In relevant part, subsection 12012.90(e) states:

25 For each fiscal year commencing with the 2005-06 fiscal
26 year . . . (2) The Legislature shall transfer from the
27 Indian Gaming Special Distribution Fund to the Indian
28 Gaming Revenue Sharing Trust Fund an amount sufficient

1 for each eligible recipient tribe⁸ to receive a total not
2 to exceed two hundred seventy-five thousand dollars
3 (\$275,000) for each quarter in the upcoming fiscal year
4 an eligible recipient tribe is eligible to receive
5 moneys, for a total not to exceed one million, one
6 hundred thousand dollars (\$1,100,000) for the entire
fiscal year. The California Gambling Control Commission
shall make quarterly payments from the Indian Gaming
Revenue Sharing Trust Fund to each eligible recipient
Indian tribe within 45 days of the end of each fiscal
quarter.

7 Cal. Gov't Code § 12012.90(e)(2) (emphasis added). Unlike
8 section 12012.75, the express language of subsection 12012.90(e)
9 appears to create a duty on behalf of defendant to timely make
10 payments provided for in the Compacts. Weighing against this
11 clear duty, however, is the fact that section 12012.90 does not
12 expressly provide for--or clearly contemplate--a non-compact
13 tribe bringing a claim to enforce defendant's duties under the
14 subsection.

15 Even though "specific legislative" intent to create a
16 private right of action does not appear in the statute,
17 defendant's affirmative duty in the statute could give rise to a
18 private right of action pursuant to Government Code section
19 815.6, which provides:

20 Where a public entity is under a mandatory duty imposed
21 by an enactment that is designed to protect against the
22 risk of a particular kind of injury, the public entity is
23 liable for an injury of that kind proximately caused by
its failure to discharge the duty unless the public
entity establishes that it exercised reasonable diligence
to discharge the duty.

24 Cal. Gov't Code § 815.6; Dep't of Corps. v. Superior Court, 153

26 ⁸ Subsection 12012.90(a)(2) defines "eligible recipient
27 Indian tribe" as "a noncompact tribe, as defined in Section
28 4.3.2(a)(i) of the tribal-state gaming compacts" Cal.
Gov't Code § 12012.90(a)(2). Again, the court expresses no
opinion about whether plaintiff qualifies as an eligible
recipient tribe.

1 Cal. App. 4th 916, 935 (2007) ("Of course, a specific legislative
2 intent need not appear [in a statute] to create a private right
3 of action to enforce that section as it is Government Code
4 'section 815.6, not the predicate enactment, that creates the
5 private right of action.'").

6 As section 815.6 requires, subsection 12012.90(e)(2)'s
7 use of the word "shall" imposes a mandatory duty on defendant to
8 make the RSTF requisite payments within forty-five days. See
9 Walt Rankin & Assocs., Inc. v. City of Murrieta, 84 Cal. App. 4th
10 605, 614 (2000) ("[T]he usual rule with California codes is that
11 'shall' is mandatory and 'may' is permissive unless the context
12 requires otherwise.") (citation omitted). Contrary to claims
13 section 815.6 normally supports, however, the "mandatory duty"
14 subsection 12012.90(e)(2) creates is not "'designed' to protect
15 against the particular kind of injury the plaintiff suffered."
16 Haggis v. City of Los Angeles, 22 Cal. 4th 490, 499 (2000).

17 Specifically, the legislative history of Assembly Bill
18 1750 ("AB 1750"), which enacted subsection 12012.9(e), reveals
19 that the Legislature was concerned about the timeliness of
20 defendant's payments and the benefit of quarterly payments for
21 non-compact tribes. The Legislature's concern, however, did not
22 stem from defendant's decision not to make timely payments, but
23 from defendant's inability to make timely payments because the
24 RSTF had insufficient funds. See Senate Committee on
25 Governmental Organization, Committee Analysis of AB 1750, at 2
26 (June 29, 2005) ("The sponsor states that the bill seeks to make
27 a technical change to the current provision of law that
28 authorizes a backfill to the [RSTF recipient tribes. Currently,

1 the [backfill] occurs in a lump sum payment at the end of a
2 fiscal year, which does not afford the recipient, most of which
3 are needy Tribes, to maximize the use of their [RSTF funds.");
4 Assembly Floor, Analysis of AB 1750, at 2 (Aug. 8, 2005) ("Under
5 current law, . . . [non-compact] tribes are distributed a
6 quarterly amount in the range of \$100,000 each, and then at the
7 end of each fiscal year, each tribe is paid a backfill amount so
8 that the total annual payments to each non-gaming tribe equates
9 \$1.1 million."); Assembly Committee on Appropriations, Committee
10 Analysis of AB 1750, at 2 (May 3, 2005) ("[RSTF] funds are
11 subject to statutory accounting and administrative approval
12 processes as well as some budget act appropriations. Therefore,
13 distributions seem to be delayed under certain circumstances such
14 as when the budget passes late."). To remedy the lack of funds
15 available at each quarter, therefore, the Legislature provided
16 for defendant to estimate the total deficient funds that it would
17 encounter for the upcoming year and for the Legislature to then
18 transfer that amount into the RSTF account at the beginning of
19 the fiscal year.⁹

20 The injury plaintiff allegedly suffered as a result of
21 defendant's decision to withhold its RSTF payments, therefore, is
22

23 ⁹ As originally proposed, AB 1750 also provided for the
24 state auditor to review "the timeliness of payments from [a non-
25 RSTF account] to recipient local jurisdictions and to backfill
26 the RSTF." Assembly Analysis of AB 1750, Third Reading, at 3
27 (May 26, 2006). While the review by the state auditor was
28 removed from the final version of AB 1750 (Amended Version of AB
1750 (June 30, 2005)), the Legislature's decision not to extend
the auditor's review to defendant's payment of RSTF funds to non-
compact tribes underscores that the Legislature was concerned
about the insufficient funds in the RSTF account, not defendant's
willingness to make the payments.

1 not the "particular kind of injury" the Legislature sought to
2 prevent when it enacted section 12012.90. Haggis, 22 Cal. 4th at
3 499. To the contrary, subsection 12012.90(e) sought only to
4 implement administrative procedures to ensure that the RSTF had
5 sufficient funds at the beginning of a fiscal year, as opposed to
6 the end. Consequently, neither subsection 12012.90(e) nor
7 section 815.6 provide plaintiff with a private right of action
8 based on defendant's decision to withhold plaintiff's RSTF funds.

9 The court is also unconvinced that "compelling reasons
10 of public policy [] require judicial recognition" of a private
11 right of action under section 12012.75 or 12012.90. Animal Legal
12 Def. Fund v. Mendes, 160 Cal. App. 4th 136, 142 (2008). Most
13 notably, if the court found that plaintiff could use either
14 section as a vehicle to enforce payments allegedly provided for
15 in the Compacts, the court would be circumventing the Compacts'
16 express restrictions--i.e., allowing a third party beneficiary to
17 enforce the Compacts. See Vikco Ins. Servs., Inc. v. Ohio Indem.
18 Co., 70 Cal. App. 4th 55, 61 (1999) (citations omitted) ("Where
19 uncertainty exists consideration should be given to the
20 consequences that will flow from a particular interpretation.').
21 As the Legislature did not express dissatisfaction with the
22 Compacts' limitations when enacting either statute, the court
23 will not resort to public policy to create a remedy where the
24 Legislature did not intend for one to exist.

25 Although plaintiff fails to raise the claim, it could
26 potentially seek relief via a writ of mandamus pursuant to
27 California Code of Civil Procedure section 1085, which provides:
28

1 A writ of mandate may be issued by any court to any
2 inferior tribunal, corporation, board, or person, to
3 compel the performance of an act which the law specially
4 enjoins, as a duty resulting from an office, trust, or
5 station, or to compel the admission of a party to the use
and enjoyment of a right or office to which the party is
entitled, and from which the party is unlawfully
precluded by such inferior tribunal, corporation, board,
or person.

6 Cal. Civ. Proc. Code § 1085(a). While a "'mandamus may issue to
7 compel the performance of a ministerial duty,'" Cal. Trout, Inc.
8 v. Superior Court, 218 Cal. App. 3d 187, 202 (1990) (citation
9 omitted), it cannot compel a purely contractual obligation. See
10 Cal. Teachers Ass'n v. Governing Bd., 161 Cal. App. 3d 393, 399
11 (1984) (mandamus cannot compel arbitration agreement because
12 "participation in arbitration[] is not an act required by law").
13 Thus, only section 12012.90, which imposes a nondiscretionary
14 duty on defendant to disburse RSTF payments within forty-five
15 days of the end of each quarter, could give rise to a mandamus
16 claim.

17 Nonetheless, even if plaintiff could successfully
18 assert a mandamus claim against defendant in state court,
19 plaintiff could not have brought that claim in federal court.
20 See Matheson v. Progressive Speciality Ins. Co., 319 F.3d 1089,
21 1090 (9th Cir. 2003) ("Any civil action may be removed to federal
22 district court so long as original jurisdiction would lie in the
23 court to which the case is removed."). This court could exercise
24 jurisdiction over plaintiff's writ of mandamus claim only if the
25 claim "necessarily turn[s] on some construction of federal law,"
26 Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 808 (1986)
27 (citation omitted), or "necessarily raise[s] a stated federal
28 issue, actually disputed and substantial, which a federal forum

1 may entertain without disturbing any congressionally approved
2 balance of federal and state judicial responsibilities." Grable
3 & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308,
4 314 (2005).

5 Subsection 12012.90(e), the source of any possible
6 mandamus claim, neither turns on the construction of a federal
7 law nor raises an important federal issue. See Cabazon Band of
8 Mission Indians v. Wilson, 124 F.3d 1050, 1056 (1997) (noting the
9 importance of the federal interest at stake when determining
10 whether federal question jurisdiction exists). To the contrary,
11 it is a budgetary statute that provides for earlier allocation of
12 funds to the RSTF so that defendant can distribute RSTF funds on
13 a quarterly basis. While the Compacts, and defendant's duties
14 created therein, are lurking in the background of any state law
15 claim regarding RSTF funds, the federal component (IGRA) is too
16 far removed to create federal question jurisdiction. See, e.g.,
17 Rains v. Criterion Systems, Inc., 80 F.3d 339, 344 (9th Cir.
18 1996) (in wrongful termination action, direct and indirect
19 references to Title VII are not sufficient to establish federal
20 jurisdiction).

21 3. California Code of Civil Procedure Section 1060

22 Plaintiff also bases its claims on section 1060 of the
23 California Code of Civil Procedure, which allows "[a]ny person
24 interested under a written instrument" to obtain a declaratory
25 judgment resolving "actual controversy relating to the legal
26 rights and duties of the respective parties" Cal. Civ.
27 Proc. Code § 1060. Section 1060 cannot give rise to federal
28 jurisdiction unless plaintiff could seek the same relief under

1 the federal Declaratory Judgment Act (DJA), 28 U.S.C. §§ 2201-
2 2202. See Franchise Tax Bd. of State of Cal. v. Constr. Laborers
3 Vacation Trust for S., 463 U.S. 1, 18 (1983) ("If federal
4 district courts could take jurisdiction, either originally or by
5 removal, of state declaratory judgment claims raising questions
6 of federal law, without regard to the doctrine of Skelly Oil [Co.
7 v. Phillips Petroleum Co., 339 U.S. 667 (1950)], the federal
8 [DJA]--with the limitations Skelly Oil read into it--would become
9 a dead letter.").

10 To assert a claim under the DJA, an independent basis
11 for federal jurisdiction must exist because the DJA "does not by
12 itself confer federal subject-matter jurisdiction"
13 Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158, 1161 (9th
14 Cir. 2005). Because section 15.1 of the Compacts expressly
15 prohibits third parties from "enforcing" the Compacts, plaintiff
16 could seek a declaratory judgment with respect to its rights
17 under the Compacts only if such relief did not constitute
18 "enforcing" the Compacts.

19 The Ninth Circuit has distinguished between declaratory
20 relief that seeks to "enforce" the terms of a contract from such
21 relief that seeks only to "interpret" that contract.
22 Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d
23 1249, 1252 (9th Cir. 1987). Here, the declaratory judgment
24 plaintiff requests amounts to an effort to "enforce" the Compacts
25 because plaintiff seeks to "establish[] that the party against
26 whom it is brought is charged with carrying out [a] [] duty which
27
28

1 that party is allegedly disregarding."¹⁰ Id.

2 Therefore, because section 15.1 of the Compacts
3 effectively precludes plaintiff from seeking a declaratory
4 judgment to enforce defendant's alleged duties, neither section
5 1060 nor the DJA give this court jurisdiction to hear plaintiff's
6 claim for declaratory relief.

7 Because plaintiff is not entitled to relief under the
8 aforementioned state statutes, the court need not address whether
9 any of plaintiff's purported statutory claims give rise to
10 federal question jurisdiction. Accordingly, because plaintiff's
11 Complaint does not plead any claims giving rise to federal
12 question jurisdiction, this court lacks subject matter
13 jurisdiction and must remand the case to state court, thereby
14 rendering defendant's motion to dismiss and the motion to
15 intervene moot.

16 IT IS THEREFORE ORDERED that plaintiff's motion to
17 remand the action to state court be, and the same hereby is,
18 GRANTED.

19 This matter is hereby REMANDED to the Superior Court of
20 the State of California in and for the County of San Diego.

21 DATED: July 23, 2008

22
23 

24 WILLIAM B. SHUBB

25 UNITED STATES DISTRICT JUDGE
26

27 ¹⁰ Similarly, section 15.1 precludes the plaintiff from
28 seeking an injunction pursuant to California Code of Civil
Procedure section 526(7) to enforce the Compacts.