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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN DIEGO
12 CENTRAL DISTRICT
13

14 **CALIFORNIA VALLEY MIWOK TRIBE,**

15 Plaintiff.

16 v.

17 **THE CALIFORNIA GAMBLING**
18 **CONTROL**
19 **COMMISSION; AND DOES 1 THROUGH**
20 **50, inclusive,**

21 Defendants.
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27
28

No. 37-2008-00075326-CU-Co-Ctl

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF CALIFORNIA
GAMBLING CONTROL
COMMISSION'S DEMURRER
TO THE FIRST AMENDED
COMPLAINT COMBINED
WITH PETITION FOR WRIT
OF MANDATE**

Date: December 12, 2008

Time: 8:30 a.m.

Dept: 65

Judge: The Hon. Joan M. Lewis

Trial Date:

Action Filed: January 8, 2008

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INTRODUCTION

The California Valley Miwok Tribe (formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California) ("Miwok") is listed in the Federal Register as a federally-recognized tribe. (72 Fed. Reg. 13648; First Amended Compl. ("FAC") ¶ 1.) The FAC alleges that Silvia Burley ("Burley") is a Miwok "person of authority" and a "person duly elected or selected under [Miwok's] organic documents, customs or traditions to serve as the primary spokesperson for the Tribe" within the meaning of essentially identical tribal-state class III gaming compacts entered into between sixty-one federally-recognized tribes and the State of California ("Compacts") pursuant to the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"). (FAC ¶ 24.) The FAC further asserts that because of her status, Burley is authorized to act for and receive money on behalf of the Miwok. (*Id.*) As a result, the FAC seeks an order compelling defendant California Gambling Control Commission ("Commission") to pay "in care of Burley" certain monies it asserts are due and owing the Miwok on the basis of the Tribe's status as a third-party beneficiary under the terms of the Compacts. (FAC. ¶ 30.)

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

RELEVANT FACTS

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

1 **A. The Compacts' Revenue Sharing Trust Fund Provisions**

2 The preamble to the Compacts recites that the "State has an interest in promoting the purposes
3 of IGRA for all federally-recognized Indian tribes in California, whether gaming or Non-Compact."
4 (FAC., Exh. A, Preamble, § F.) The RSTF was established in furtherance of this interest, as a means
5 of redistributing the wealth accumulated from tribal gaming among all federally recognized tribes
6 – including those that are not in a position to conduct gaming operations of their own. (*In re Indian*
7 *Gaming Related Cases* (9th Cir. 2003) 331 F.3d 1094, 1105 ("Coyote Valley").) The general intent
8 of section 4.3.2.2 of the Compacts is to have Compact Tribes fund the RSTF by purchasing
9 "licenses" to acquire and maintain gaming devices. (*Coyote Valley, supra*, 331 F.3d at p. 1105.) The
10 Compacts provide that "Non-Compact Tribes shall be deemed third party beneficiaries of this and
11 other compacts identical in all material respects" (FAC., Exh. A, § 4.3.2, subd. (a)(i)), and
12 establishes that Non-Compact Tribes are to receive \$1.1 million annually, provided funds are
13 available within the RSTF. While it is clear that Non-Compact Tribes are the appropriate recipients
14 of distributions from the RSTF, the Compacts expressly preclude third parties from bringing legal
15 action to enforce the terms of the Compacts. (FAC., Exh. A, § 15.1.) Moreover, the waivers of
16 sovereign immunity contained in the Compacts are limited to civil actions between the State and the
17 signatory tribe not involving monetary damages, "provided that nothing herein shall be construed
18 to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such
19 third party." (FAC., Exh. A, § 9.4, subds. (a)(3), (b).)

20 **B. Miwok Status**

21 On June 25, 1999, the federal government recognized Burley as tribal chairperson of the
22 Miwok. (*California Valley Miwok Tribe v. United States* (D.C.D.C. 2006) 424 F.Supp.2d 197, 198.)
23 Late in 1999, a leadership dispute developed within the Miwok. (*Id.* at p. 199.) During this dispute,
24 in March 2000, Burley submitted a proposed constitution to the federal government and requested
25 a Secretarial election so that the Miwok could become an organized tribe. (*Id.*) On June 7, 2001,
26 because the federal government had not held the requested election, Burley withdrew the proposed
27 constitution. (*Id.*) In September 2001, Burley submitted a new proposed constitution to the United
28 States which the federal government did not approve. (*Id.*) In November 2003, the United States

1 did acknowledge, however, the existence of a government-to-government relationship with an
2 "interim" tribal council chaired by Burley. (*Id.* at p. 200.) On March 26, 2004, the United States
3 advised Burley that the Miwok was considered an unorganized tribe and that no governing
4 documents would be approved until such time as the Miwok membership base and membership
5 criteria were identified. (*Id.*) On February 25, 2005, the federal government stated that it had
6 rejected Burley's proposed constitution, that it did not recognize Burley as the Miwok chairperson,
7 and that no one would be recognized as the Miwok chairperson until the Miwok had been organized.
8 (*Id.*) The United States did, however, recognize Burley as a "person of authority" within the Miwok.
9 (*Id.*) In March 2005, the federal government convened a series of meetings designed to facilitate the
10 organization of the Miwok. (*Id.*) At those meetings concerns were raised by presumptive Miwok
11 members over Burley's use of federal government contract funds designated for tribal organization
12 as well as her use of RSTF monies that the Commission had distributed to Burley on the Miwok's
13 behalf. (*Id.*) Subsequent to those meetings and the concerns raised, on July 19, 2005, the United
14 States suspended the contract providing organizational funds to Burley. (*Id.* at p. 201.) On October
15 26, 2005, the federal government informed Burley that there was no government-to-government
16 relationship between the United States and the Miwok. (*Id.*) That position was re-affirmed on
17 December 4, 2005. (*Id.*) On December 14, 2007, the United States rejected an application by Burley
18 for a contract to provide funds for tribal organization on the basis that the Miwok were unorganized
19 and without a governing body. (Exh. 4 to Commission Req. for Jud. Not.) On December 19, 2007,
20 the Pacific Regional Director of the Bureau of Indian Affairs filed a brief in an administrative
21 proceeding before the Interior Board of Indian Appeals stating the Bureau "no longer contracts with
22 Silvia Burley as a person of authority on behalf of the Tribe [and that] Burley lacks authority to act
23 on the Tribe's behalf." (*Id.*)

24 **C. Commission Actions Regarding the Miwok**

25 Because the Miwok had been placed on the federal government's list of federally-recognized
26 tribes and because the federal government had recognized Burley first as the chairperson of that tribe
27 and then a "person of authority" within the Miwok authorized to act on behalf of the Miwok, the
28 Commission not only made quarterly distributions of RSTF funds to Burley, it also defended that

1 determination against a suit seeking to prohibit the payment of RSTF funds to Burley by an
2 individual claiming to be the rightful chairperson of the Miwok. (Exh.1 to Commission Req. for
3 Judicial Not., Commission Memo. of P. & A. In Supp. of Opp. to TRO, at 3.) When, however, the
4 federal government stopped providing funds to Burley because she was not authorized to act on
5 behalf of the Miwok, the Commission, on August 4, 2005, informed Burley that it would no longer
6 issue RSTF funds to her on behalf of the Miwok. (*California Valley Miwok v. United States, supra*,
7 424 F.Supp.2d at p. 201.) On December 5, 2005, the Commission filed an interpleader action in the
8 Superior Court for the State of California for the County of Sacramento seeking an order determining
9 to whom it should distribute RSTF funds on behalf of the Miwok. (*Id.*) When that action was
10 dismissed on the basis of the court's lack of subject matter jurisdiction, the Commission began
11 depositing the Miwok RSTF funds into a separate interest-bearing account, pending the federal
12 government's resolution of the questions surrounding the Miwok's status and the identity of its
13 membership, government and leadership. The Commission, thus, has distributed RSTF funds from
14 the RSTF into an account in which the Miwok is the beneficiary. The Miwok's right to utilization
15 of those funds, however, is dependent upon the federal government's exercise of its trust
16 responsibility to determine who is eligible to withdraw those funds on the Miwok's behalf.

17 **D. Procedural History of this Case**

18 The original complaint in this matter was filed on January 8, 2008. The Commission removed
19 the case to federal court on January 22, 2008. On February 1, 2008, Burley dismissed the third and
20 fourth causes of action of the original complaint. On April 23, 2008, the United States District Court
21 for the Southern District of California, Judge Roger T. Benitez, granted the Commission's motion
22 for a change of venue and transferred the case to the United States District Court for the Eastern
23 District of California. A copy of that order is attached hereto and incorporated by reference herein
24 as Exhibit A. On July 24, 2008, Judge William B. Shubb granted Burley's motion to remand the
25 case back to this Court, finding that the federal court lacked subject matter jurisdiction over the case
26 because it had no jurisdiction to determine who had standing to file suit on behalf of the Miwok and
27 because the Miwok lacked standing to enforce a third-party beneficiary claim against the
28 Commission or to maintain a private right of action to enforce the provisions of Government Code

1 section 12012.75 or 12012.90. Upon finding that it lacked subject matter jurisdiction, the court was
2 of the opinion that it was required to remand the case to state court. (See 28 U.S.C. § 1447(c).) A
3 copy of the court's order is attached hereto and incorporated by reference herein as Exhibit B. On
4 July 28, 2008, Burley filed the FAC.

5 ARGUMENT

6 I. ABSENT FEDERAL RECOGNITION OF A GOVERNMENT CAPABLE OF 7 AUTHORIZING SOMEONE TO SO ACT, NO ONE HAS THE CAPACITY OR 8 STANDING TO FILE SUIT ON BEHALF OF THE MIWOK

9 The federal government's position is that it has no government-to-government relationship with
10 the Miwok because it recognizes no Miwok membership, constitution, or officers. (*California*
11 *Valley Miwok v. United States, supra*, 424 F.Supp.2d at p. 201.) It has also stated that Burley has
12 no authority to act on behalf of the Miwok. (Commission Req. for Judicial Not., Exh. 3.) It is well
13 established that a government that is not recognized by the United States has no capacity to sue in
14 the courts of this country. (*Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione* (2nd Cir.1991) 937
15 F.2d 44, 48 [unrecognized regimes are generally precluded from appearing as plaintiffs in an official
16 capacity without the Executive Branch's consent]; *Banco Nacional de Cuba v. Sabbatino* (1964) 376
17 U.S. 398, 410-411.) As the United States Supreme Court put it in *Sabbatino*, non-recognition
18 "signifies this country's unwillingness to acknowledge that the government in question speaks as the
19 sovereign authority for the territory it purports to control." (*Id.* at p. 410.)¹ In this case, the federal
20 government has stated its unwillingness to have a government-to-government relationship with the
21 Miwok because the Burley "government" does not represent the putative Miwok membership.
22 (*California Valley Miwok v. United States, supra*, 424 F.Supp.2d at p. 201.) Moreover, because the
23 Miwok's entitlement to RSTF funds is premised on federal recognition, it follows that the
24 Commission is not required to distribute RSTF monies to a Miwok government the United States
25 does not recognize or to a person, such as Burley, that the United States, in the exercise of its trust

26
27 1. This rule does not, of course, preclude a group from asserting in federal court that it
28 should be a federally-recognized tribe or should be restored to that status. (*Miami Nation of Indians*
of Indiana, Inc. v. U.S. Dept. of the Interior (7th Cir. 2001) 255 F.3d 342.) It does, however,
preclude an entity or individual from filing suit in any court in the United States on the basis of that
status before it has, in fact, been recognized as such by the federal government.

1 responsibility to the Miwok, does not recognize as authorized to act on behalf of or to receive,
2 possess, or expend for any purpose Miwok funds.

3 Under federal law, a tribe may only sue in federal court if it has a "governing body duly
4 recognized by the Secretary of the Interior." (See, 28 U.S.C. § 1362.) Simply put, without a
5 federally-recognized government, the Tribe has no capacity to seek judicial enforcement of any claim
6 that is based on its status as a tribe on the list of federally-recognized tribes.

7 **II. THIS COURT LACKS JURISDICTION TO DETERMINE WHO HAS THE**
8 **CAPACITY OR STANDING TO SUE ON BEHALF OF THE MIWOK**

9 Absent federal recognition of a tribal government, no one has the capacity to sue on behalf
10 of a federally-recognized tribe. Recognition of a tribal government and the officials entitled to act
11 on a tribe's behalf are matters wholly within the exclusive purview of the executive branch. (*Miami*
12 *Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior, supra*, 255 F.3d at p. 346.) Moreover,
13 those questions are essentially political in nature and normally beyond the jurisdiction of the courts
14 unless the federal government has actually acted and that action can be said to have failed to have
15 met legal criteria that a court has the capacity to apply in making a reasoned judicial decision. (*Id.*
16 at pp. 348-49.)

17 Burley, however, has already fought and lost her attack on the federal government's refusal
18 to recognize her "government" as the government of the Miwok and to approve the constitution for
19 the Miwok that she proposed. In *California Valley Miwok Tribe v. United States* (D.C. Cir. 2008)
20 515 F.3d 1262, the district court decision in *California Valley Miwok v. United States, supra*, 424
21 F.Supp.2d 197, was affirmed when the appellate court determined that Ms. Burley only represented
22 a small cluster of people within the Miwok and that the United States' trust responsibility to tribes
23 precluded federal recognition of an unrepresentative government. (*California Valley Miwok Tribe*
24 *v. United States, supra*, 515 F.3d at p. 1263.) As a result, any cause of action against the United
25 States compelling it to recognize her as a person entitled to sue on the Miwok's behalf would
26 undoubtedly be a futile act - either because it is a political question over which the judiciary lacks
27 jurisdiction, or because the matter has already been decided against Burley.

28 Further, on two prior occasions Judge Loren E. McMaster of the Sacramento County Superior

1 Court has determined that California courts lack jurisdiction to rule on the question of who is entitled
2 to the Miwok's RSTF funds. Initially, just prior to the federal government's determination to no
3 longer recognize Burley as the chairperson of the Miwok, another faction of the Tribe, represented
4 by the Miwok's alleged hereditary chief Yakima Dixie, asked the court to either order that the RSTF
5 distributions be paid to him or preclude Burley from receiving them. Judge McMaster declined to
6 grant such relief, finding that:

7 The federal government has exclusive jurisdiction, if any, over determining the
8 Tribe's acknowledged representative. Apparently, the appropriate agency has made
9 a determination that Silvia Burley is currently the rightful person to receive RSTF
10 funds on behalf of the Tribe. It is this determination that plaintiff contests. This
11 court has no jurisdiction over that dispute. Plaintiff's exclusive remedy is with the
12 appropriate federal agency.

13 (See, Commission Req. for Jud. Not. Exh.2.)

14 After the federal government determined that Burley could not act on behalf of the Miwok,
15 the Commission itself deposited the Miwok RSTF distribution with the court and asked the court,
16 in another lawsuit, to determine who could receive the money on the Miwok's behalf. Judge
17 McMaster denied the Commission's request because the relief requested by the Commission would:

18 compel the Court to determine which individual, or individuals, constitute the lawful
19 governmental representatives of [sic] Tribe, if at all. That determination, based upon
20 the Commission's "practice," requires the federal government to "recognize" a
21 government of the Tribe. This Court has no jurisdiction to make either
22 determination. Instead, those decisions lie entirely within the exclusive jurisdiction
23 of the BIA, the federal government, or the federal courts.

24 (See, Commission's Req. for Jud. Not. Exh. 5.)

25 In this instance, Burley has asked this Court to determine the truth of her allegation that she
26 is the rightful chairperson of the Miwok and its spokesperson (FAC, ¶ 24) and that, therefore, she
27 should receive the Miwok's RSTF distribution (FAC, ¶ 30). Because, however, this Court lacks the
28 authority to determine who may act on the Miwok's behalf and because the federal government has
already determined that Burley lacks the authority to act on the Tribe's behalf, this suit may not
proceed.

29 **III. NEITHER STATE LAW NOR THE COMPACTS PERMIT A NON-PARTY** 30 **TO ENFORCE THE TERMS OF THE COMPACTS**

31 Even if Burley had the capacity to file suit on behalf of the Miwok, the Miwok Tribe has no
32 standing to sue for a breach of the Compacts. The FAC asserts that state law (Gov. Code, §§

1 12012.75 & 12012.90, subd.(d)) has created a private right of action under California's Indian
2 gaming regime and that the Compacts have made the Miwok third-party beneficiaries entitled to sue
3 the Commission for an alleged failure to distribute RSTF monies to the Miwok on the basis of the
4 Miwok's alleged status as a Non-Compact Tribe. (FAC, ¶¶ 20, 21, 22, 23, and 25.) Nothing in the
5 Compacts entitles a Non-Compact tribe or the Miwok, assuming it is one, to sue the Commission
6 to enforce any term of the Compacts. Indeed, the Compacts specifically provide in section 9.4, subd.
7 (a)(3) and 15.1 (FAC, Exh. A, at 33, 42) that third parties, including third-party beneficiaries, have
8 no right to enforce any of the Compacts' terms. Likewise, nothing in state law provides a basis for
9 a suit against the Commission.

10 **A. The Compacts Specifically Preclude Suits by Third-Party Beneficiaries To**
11 **Enforce Any Terms of the Compacts**

12 In drafting the Compacts, the State and signatory tribes did not intend to provide Non-
13 Compact Tribes with the rights that might otherwise accrue to a third-party beneficiary, such as the
14 right to insist on continued performance of an agreement--even if the agreement were abrogated.
15 (See, e.g. Civ. Code § 1559; *Principal Mutual Life Insurance Company v. Vars, Pave, McCord &*
16 *Freedman* (1998) 65 Cal. App. 4th 1469, 1486; [third-party beneficiary may enforce a contract for
17 his benefit, if he has acted in reliance upon the promised benefits, even if it has been terminated for
18 reasons other than rescission].) As sovereigns, neither the State nor the signatory tribes intended to
19 allow a Non-Compact Tribe, as a third-party beneficiary, to be able to file suit to prevent the State
20 and signatory tribes (should they determine it to be in their sovereign interests) from acting to change
21 the RSTF or the amount of any future distributions from it.

22 It is true the Compacts deem Non-Compact Tribes "third party beneficiaries" in section 4.3.2
23 subdivision(a) (FAC, Exh. A, at p. 7). It is also correct that the Compacts, in section
24 4.3.2.1subdivision(a), provide that all signatory tribes agree that each Non-Compact Tribe shall
25 receive up to \$1.1 million per year from the RSTF. Likewise, there is no dispute that the Compacts,
26 in section 4.3.2.1 subdivision (b), declare that the Commission shall serve as the trustee of the RSTF
27 and disburse funds from the RSTF to Non-Compact Tribes (FAC, Exh. A, at pp. 7-8). The
28 Compacts, however, also expressly preclude actions by third-party beneficiaries to enforce any

1 provisions of the Compact. Section 9.4 of the Compacts provides a limited waiver of sovereign
2 immunity by the signatory tribes and the State for the purpose of allowing suit by the State or the
3 tribe to enforce the Compacts' dispute resolution provisions. (*Id.* at p. 33.) This waiver is
4 specifically predicated upon the condition that "[n]o person or entity other than the Tribe and the
5 State is party to [such] action." (*Id.*) Compact section 15.1 makes matters even more clear. It
6 states:

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

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

14 It is certainly true that under California Civil Code section 1559: "a contract, made expressly
15 for the benefit of a third person, may be enforced by him at any time before the parties thereto
16 rescind it." It is also true, however, that an individual or entity's status as a third-party beneficiary
17 is completely dependent upon the intent of the parties in privity with one another as well as with the
18 entirety of the circumstances surrounding formation of the contract at issue. (*Martinez v. Socoma*
19 *Companies, Inc.* (1974) 11 Cal.3d 394, 401-402.) As the court held in *Marina Tenants Association*
20 *v. Deauville Marina Development* (1986) 181 Cal. App.3d 122, 129, in relying upon the holding in
21 *Martinez, supra*, "standing to sue as a third-party beneficiary to a government contract depends on
22 the intent of the parties as manifested by the terms of the contract, and the circumstances surrounding
23 the formation of the agreement."

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

28 The present contracts manifest no intent that the defendants pay damages to
 compensate plaintiffs or other members of the public for their nonperformance. To
 the contrary, the contracts' provisions for retaining the Government's control over
 determination of contractual disputes and for limiting defendants' financial risks

1 indicate a governmental purpose to exclude the direct rights against defendants
2 claimed here.

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

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

12 (*Id.*, italics added.)

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

27 Further, to the extent there is any ambiguity with regard to the rights of third-party
28 beneficiaries to sue to enforce the Compacts, that ambiguity must be resolved in favor of the State
and the protection of State and tribal sovereign powers. (*United States v. Winstar Corp.* (1996) 518
U.S. 839, 878-879 [ambiguous terms in a contract will not be construed to surrender a sovereign

1 power].)

2 Finally, Civil Code section 1559 precludes enforcement of a contract by persons who benefit
3 only incidentally or remotely from an agreement." (*Harper v. Wausau Ins. Co.*, (1997) 56 Cal. App.
4 4th 1079, 1087.) In *Martinez v. Socoma Companies, Inc.*, *supra*, 11 Cal. 3d 394, the California
5 Supreme Court held that, even though the government entered into a contract to benefit plaintiffs,
6 plaintiffs were only incidental beneficiaries because the public policy giving rise to the contract
7 established a bar to the beneficiaries ability to enforce that agreement:

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

12 (*Id.* at p. 401.)

13 In this case, the RSTF serves a public purpose. This purpose provides the consideration that
14 makes Non-Compact Tribes mere incidental third-party beneficiaries. (See FAC, Exh. 1 at § A
15 [explaining a primary purpose of the Compacts "as a means of promoting tribal economic
16 development, self-sufficiency, and strong tribal governments"].) Thus, the Compacts' express intent
17 to limit third-party beneficiaries' rights, combined with Non-Compact Tribes' status as only
18 incidental beneficiaries, precludes the Miwok from enforcing the Compacts.

19 **B. No Private Right of Action Exists Under State Law**

20 In similar fashion, nothing in California law suggests that third-party actions were intended
21 as part of California's Indian gaming regime. Proposition 1A established broad authority in the
22 Governor to negotiate, and the Legislature to ratify, compacts with Indian tribes "[n]otwithstanding
23 . . . any other provision of state law," neither mandating nor limiting the subject matter of
24 negotiations, but leaving such determinations to the discretion of the Governor as ratified by the
25 California Legislature. Thus, under California law, the State's duties and obligations vis a vis
26 gaming are established by the compacts negotiated by the Governor and ratified by the State's
27 legislature. Government Code sections 12012.75 and 12012.90, therefore, were not enacted to create
28 State obligations, duties or responsibilities to any individual or entity beyond those set forth in the

1 Compacts, or to grant any right to an individual or entity beyond those set forth in those agreements,
2 but rather to provide funding sources and mechanisms by which the Commission could carry out its
3 existing obligations under the Compacts.

4 **1. The Legislature Has Manifested No Intent to Permit a Private Right of**
5 **Action to Enforce The Government Code Provisions at Issue**

6 Whether a statute provides for a private right of action depends on the Legislature's intent.
7 (*Animal Legal Def. Fund v. Mendes* (2008) 160 Cal. App. 4th 136, 142.) If "the Legislature
8 expressed no intent on the matter either way, directly or impliedly, there is no private right of action,
9 with the possible exception that compelling reasons of public policy might require judicial
10 recognition of such a right." (*Id.*)

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

17 **i. Government Code Section 12012.75 Does not Give the Plaintiff a Private Right**
18 **of Action**

19 Government Code section 12012.75 does nothing more than create the RSTF fund within the
20 State treasury and require that the money therein be available to the Commission "for the purpose
21 of making [RSTF] distributions." (*Id.*) The statutory text of this section neither compels the
22 Commission to make payments to Non-Compact Tribes nor provides a remedy for Non-Compact
23 Tribes should they fail to receive RSTF payments.²¹

24
25 2. Government Code Section 12012.75 provides: There is hereby created in the State
26 Treasury a special fund called the "Indian Gaming Revenue Sharing Trust Fund" for the receipt
27 and deposit of moneys derived from gaming device license fees that are paid into the fund
28 pursuant to the terms of tribal-state gaming compacts for the purpose of making distributions to
noncompact tribes. Moneys in the Indian Gaming Revenue Sharing Trust Fund shall be available
to the California Gambling Control Commission, upon appropriation by the Legislature, for the
purpose of making distributions to noncompact tribes, in accordance with distribution plans
specified in tribal-state gaming compacts.

1 Further, the legislative history of this section does not in suggest the Legislature
2 contemplated a private right of action. In 1999, the Legislature added the language in section
3 12012.75 to Assembly Bill 1385 ("AB 1385") at the end of its consideration of that legislation. As
4 originally introduced, AB 1385 did not envision the RSTF and was principally intended as a
5 response to a judicial decision that found "the Governor lacked the requisite authority to execute
6 compacts without legislative approval." (Assem. Com. on Governmental Organization, Com.
7 Analysis of Assem. Bill No. 1385, at p. 2 (Apr. 2, 1999).) In addition, after the Senate amended AB
8 1385 to include creation of the RSTF, neither the Legislative Counsel's Digest nor any of the bill
9 analyses suggested that the new law would circumvent the Compacts' limitations on third-party
10 beneficiaries' rights. As a result, no private cause of action exists under Government Code section
11 12012.75.

12 **ii. Government Code Section 12102.90 Does not Provide Plaintiff With A Private**
13 **Right of Action**

14 Unlike Government Code section 12012.75, the express language of section 12012.90,
15 subdivision (e)^{3/} requires the Commission to timely make payments provided for in the Compacts.
16 Section 12012.90, however, does not expressly provide for—or clearly contemplate—a Non-Compact
17 Tribe bringing a claim to enforce the Commission's duties under that section.

18 Moreover, nothing in Government Code section 815.6 (which authorizes a private right of
19 action to enforce statutes that create mandatory duties) authorizes suit on the basis of section
20 12012.90. In this regard, Government Code section 815.6, provides:

21 Where a public entity is under a mandatory duty imposed by an enactment that is
22 designed to protect against the 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
24 unless the public entity establishes that it exercised reasonable diligence to discharge

25 3. In relevant part, section 12012.90 subdivision (e) states: For each fiscal year commencing
26 with the 2005-06 fiscal year . . . (2) The Legislature shall transfer from the Indian Gaming Special
27 Distribution Fund to the Indian Gaming Revenue Sharing Trust Fund an amount sufficient for each
28 eligible recipient tribe to receive a total not to exceed two hundred seventy-five thousand dollars
(\$275,000) for each quarter in the upcoming fiscal year an eligible recipient tribe is eligible to
receive moneys, for a total not to exceed one million, one 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. (Italics added.)

1 the duty.

2 Though use of the word "shall" in section 12012.90, subdivision (e)(2) compels the
3 Commission to make RSTF payments within forty-five days, the "mandatory duty" this section
4 creates is not designed to protect against the particular kind of injury it is alleged in this case that the
5 Miwok have suffered. Review of the legislative history of Assembly Bill 1750 ("AB 1750") creating
6 section 12012.90, subdivision (e), demonstrates that the Legislature was focused on the timeliness
7 of the Commission's payments and the benefits afforded Non-Compact Tribes by the receipt of
8 quarterly rather than annual RSTF payments. The Legislature's concern, therefore, did not arise
9 from any Commission failure to make payments, but rather from the Commission's inability to make
10 payments because the RSTF had insufficient funds. (See, Judge Shubb's description of the
11 legislative history of section 12012.90, subdivision (e) in his remand order at pp. 17-18, attached
12 hereto as Exhibit C.)

13 As a result, the injury alleged in the FAC (the withholding of RSTF funds) is not the
14 "particular kind of injury" the Legislature sought to preclude when it enacted Government Code
15 section 12012.90. (*Haggis v. City of Los Angeles* (2000) 22 Cal. 4th 490, 499.) Simply put, the
16 intent of section 12012.90, subdivision (e) is the creation of an administrative process designed to
17 assure that there are sufficient RSTF at the beginning of a fiscal year to make quarterly RSTF
18 payments to Non-Compact Tribes. Thus, neither Government Code section 12012.90, subdivision
19 (e), nor section 815.6 provide Burley with a private right to sue the Commission over a decision to
20 withhold an RSTF distribution.

21 Further, no public policy compels judicial recognition of a private right of action under
22 Government Code sections 12012.75 or 12012.90. (*Animal Legal Def. Fund v. Mendes, supra*, 60
23 Cal.App.4th at p. 142.) In this regard, if Burley could use either section as a means of enforcing the
24 RSTF provisions of the Compacts, it would constitute an end run around an express restriction in
25 the Compacts by permitting a third-party beneficiary to enforce the Compacts. (See *Vikco Ins.*
26 *Servs., Inc. v. Ohio Indem. Co., supra*, 70 Cal. App. 4th at p. 61; ["Where uncertainty exists
27 consideration should be given to the consequences that will flow from a particular
28 interpretation.(citations omitted)."] In this case, because the Legislature did not mention, let alone

1 express any disapproval of, the Compacts' restrictions on enforcement when enacting either statute,
2 this Court should not resort to public policy to create a remedy where the Legislature did not intend
3 for one to exist.

4 Finally, there is no allegation in the FAC that the Commission failed to exercise "reasonable
5 diligence" in the exercise of its duty. In point of fact, the Commission has demonstrably exercised
6 reasonable diligence. In accord with its obligation to disburse RSTF funds and its trust obligation
7 to assure the money goes to the correct recipient, it has disbursed the monies due the Miwok into a
8 special account to be accessed by the Miwok pending a federal government determination as to who
9 is entitled to withdraw the money on the Miwok's behalf.

10 **iii. Code of Civil Procedure Section 1085 Does not Provide Plaintiff a Remedy**

11 It is well established that mandamus is not available to enforce contractual obligations. (300
12 *DeHaro Street Investors v. Dept. of Housing & Com. Dev.* (2008) 161 Cal. App. 4th 1240, 1254.)
13 Here, any Commission duty to act is a creation of the Compacts -- not the statutes that merely
14 implement the Commission's contractual obligation. Thus, there is no mandate remedy.

15 **iv. Code of Civil Procedure Section 1060 Does not Provide Plaintiff With a Cause**
16 **of Action**

17 Plaintiff also bases its claims on section 1060 of the Code of Civil Procedure, which allows
18 "[a]ny person interested under a written instrument" to obtain a declaratory judgment resolving an
19 "actual controversy relating to the legal rights and duties of the respective parties . ." (Code Civ.
20 Proc. § 1060.) As discussed previously, however, section 15.1 of the Compacts expressly prohibits
21 third parties from "enforcing" the Compacts. In this case, the declaratory judgment Plaintiff requests
22 amounts to an effort to "enforce" the Compacts because Plaintiff seeks to establish that the
23 Commission has disregarded a duty established by the Compacts.

24 **IV. THE OTHER PARTIES TO THE MIWOK LEADERSHIP DISPUTE ARE**
25 **NECESSARY PARTIES THAT HAVE NOT BEEN JOINED**

26 In this case, the FAC alleges that there is a leadership dispute within the Miwok and that
27 other parties claim a right to represent the Miwok and, hence claim a right to distributions from the
28 RSTF. (FAC, ¶¶ 9, 38.) As a result, these individuals definitely have an interest in the subject
matter of this action and should be joined pursuant to Code of Civil Procedure section 389,

1 subdivision (a). In this regard, the disposition of this action unquestionably impairs those
2 individuals' ability to protect that interest. If Burley were to prevail in this suit and obtain the
3 monies held for the Miwok by the Commission, those funds could be lost to them. Further, the
4 Commission cannot protect the individuals' interest because it has taken the position that the Miwok
5 is not entitled to file suit to compel distribution of RSTF funds. Finally, the failure to join these
6 individuals in this action could subject the Commission to multiple or inconsistent obligations
7 because the Commission could be faced with both tribal factions seeking payment to them of more
8 than \$3 million.

9 CONCLUSION

10 For these reasons, the Commission respectfully requests that this Court sustain its
11 demurrer to the first, second, and fourth causes of action, without leave to amend.

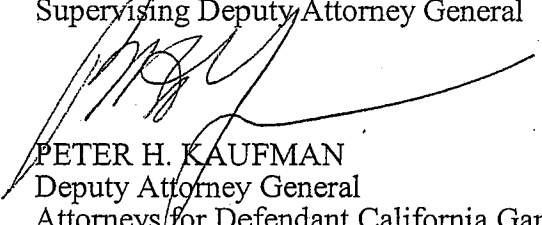
12 Dated: September 2, 2008

13 Respectfully submitted,

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Attorney General of the State of California

15 ROBERT L. MUKAI
Senior Assistant Attorney General

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17 
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21 Control Commission

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EXHIBIT “A”

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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 CALIFORNIA VALLEY MIWOK TRIBE,
12 Plaintiff,
13 vs.
14 CALIFORNIA GAMBLING CONTROL
15 COMMISSION,
16 Defendant.

CASE NO. 08-CV-0120 BEN (AJB)

**ORDER GRANTING
DEFENDANT'S MOTION TO
TRANSFER VENUE**

[Doc. # 4]

17 **I. INTRODUCTION**

18 Plaintiff, California Valley Miwok Tribe ("Plaintiff" or "Miwok") brought this action against
19 the Defendant, California Gambling Control Commission ("Defendant"). Plaintiff claims that
20 Defendant failed to pay Plaintiff its share from the Indian Gaming Revenue Sharing Trust Fund
21 ("RSTF"). Defendant removed the case from state court. Defendant now moves for a change of
22 venue to the United States District Court for the Eastern District of California under 28 U.S.C. §
23 1404(a). For the reasons that follow, the motion is **GRANTED**.

24 **II. BACKGROUND**

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

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

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

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

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

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

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

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

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

10 III. DISCUSSION

11 Transfer of this case to the Eastern District of California is appropriate. Under 28 U.S.C. §
12 1404(a), "for the convenience of parties and witnesses, in the interest of justice, a district court
13 may transfer any civil action to any other district or division where it might have been brought."

14 A district where the action might have been brought is one in which the case could have
15 properly been filed at the time Plaintiff filed the case. *Hoffman v. Blaski*, 363 U.S. 335, 344
16 (1960). A preliminary review of Plaintiff's Complaint indicates that Plaintiff could have properly
17 filed this case in the United States District Court for the Eastern District of California. Plaintiff
18 and Defendant are both located in the Eastern District of California – Sacramento, California and
19 Stockton, California. Additionally, it appears Plaintiff's allegations implicate a Tribal-State
20 Compact which the federal courts have jurisdiction to enforce. *Cabazon Band of Mission Indians*
21 *v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).

22 This Court has discretion to transfer cases based on "an individualized case-by-case
23 consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29
24 (1998). The Court must consider a number of factors in determining whether a transfer is
25 appropriate. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (citing *Stewart*
26 *Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1998)). In addition to considering the "convenience of
27 the parties and witnesses" courts may also consider other factors. "For example, the court may
28 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

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

7 **A. Convenience of the Parties and Witnesses**

8 The convenience of the parties and witnesses is served by transfer to the Eastern District.
9 Defendant is located in Sacramento, California and Plaintiff is located in Stockton, California.
10 Stockton and Sacramento are both within the Eastern District. The Doe Defendants named under
11 Plaintiff's Fifth Cause of Action are also likely within the Eastern District. Plaintiff claims the
12 Doe Defendants conspired to "take over the Miwok Tribe." (Compl. ¶ 18). Based on this
13 allegation, the Doe Defendants are probably near the tribe's location within the Eastern District.
14 While Plaintiff's counsel is located in the Southern District, the convenience of counsel is not
15 relevant to consideration of a § 1404(a) transfer. *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*,
16 472 F. Supp. 2d 1183, 1196-97 (S.D. Cal. 2007) (citing *In re Volkswagen AG*, 371 F.3d 201, 206
17 (5th Cir. 2004)).

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

23 **B. Parties' Contacts with Forum and Access to Proof**

24 The parties' contacts with the forum and ease of access to proof weigh in favor of transfer.
25 Neither party has contacts in the Southern District related to this action, but both parties have
26 contacts in the Eastern District related to this action. Plaintiff's Complaint identifies a variety of
27 events, including: leadership disputes; a refusal to approve the Miwok's new constitution; requests
28 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'

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

6 C. Plaintiff's Choice of Forum

7 Plaintiff's choice of forum weighs against transfer, but this factor only merits minimal
8 consideration. While a Plaintiff's choice of forum is often given great deference, that choice only
9 merits minimal consideration when the "operative facts have not occurred within the chosen forum
10 and the forum has no interest in the parties or subject matter." *Lou v. Belzberg*, 834 F.2d 730, 739
11 (9th Cir. 1987). As discussed above, none of the operative facts alleged occurred within the
12 Southern District. Additionally, the Court sees no reason the Southern District would have any
13 particular interest in hearing the claims of these parties or this subject matter. While Plaintiff's
14 choice is still a factor, it is only given minimal consideration. Plaintiff's choice of forum does
15 weigh against transfer, but this factor is outweighed by other factors.

16 IV. CONCLUSION

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

21 IT IS SO ORDERED.

22
23 DATED: April 23, 2008

24
25 
26 Hon. Roger T. Benitez
27 United States District Judge
28

EXHIBIT “B”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA VALLEY MIWOK TRIBE,
Plaintiff,

NO. CIV. 08-984 WBS GGH

ORDER RE: MOTION FOR REMAND,
MOTION TO DISMISS, AND MOTION
TO INTERVENE

v.

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

Defendant.

-----oo0oo-----

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

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

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

I. Factual and Procedural Background

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

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

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

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
27 and laws, and issue tribal membership determinations lies with
28 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,
assuming the underlying leadership dispute appears on the face of
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 Lapidus 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
21

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

for each eligible recipient tribe⁸ to receive a total not to exceed two hundred seventy-five thousand dollars (\$275,000) for each quarter in the upcoming fiscal year an eligible recipient tribe is eligible to receive moneys, for a total not to exceed one million, one 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.

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

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

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is 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.

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

⁸ Subsection 12012.90(a)(2) defines "eligible recipient Indian tribe" as "a noncompact tribe, as defined in Section 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.

1 **DECLARATION OF SERVICE BY U.S. MAIL**

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

3 Court: **San Diego Superior Court, Case No. 37-2008-00075326-CU-CO-CTL**

4 I declare:

5 I am employed in the Office of the Attorney General, which is the office of a member of the
6 California State Bar, at which member's direction this service is made. I am 18 years of age or
7 older and not a party to this matter. I am familiar with the business practice at the Office of the
8 Attorney General for collection and processing of correspondence for mailing with the United
9 States Postal Service. In accordance with that practice, correspondence placed in the internal
10 mail collection system at the Office of the Attorney General is deposited with the United States
11 Postal Service that same day in the ordinary course of business.

12 On **September 2, 2008**, I served the attached:

- 13 1. **DEMURRER OF DEFENDANT CALIFORNIA GAMBLING**
14 **CONTROL COMMISSION TO THE FIRST AMENDED**
15 **COMPLAINT COMBINED WITH PETITION FOR WRIT OF**
16 **MANDATE**
- 17 2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
18 **CALIFORNIA GAMBLING CONTROL COMMISSION'S DEMURRER**
19 **TO THE FIRST AMENDED COMPLAINT COMBINED WITH PETITION**
20 **FOR WRIT OF MANDATE; and**
- 21 3. **DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S**
22 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS DEMURRER**
23 **TO THE FIRST AMENDED COMPLAINT COMBINED WITH PETITION**
24 **FOR WRIT OF MANDATE.**

25 by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid,
26 in the internal mail collection system at the Office of the Attorney General at 110 West A Street,
27 Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

28 Manuel Corrales, Jr.
Attorney at Law
11753 Avenida Sivrita
San Diego, CA 92128
Attorney for Plaintiff

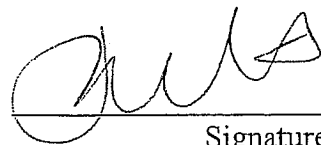
CALIFORNIA VALLEY MIWOK TRIBE

Terry Singleton
Singleton and Associates
1950 Fifth Avenue, Suite 200
San Diego, CA 92101
Co-Counsel for Plaintiff
CALIFORNIA VALLEY MIWOK TRIBE

29 I declare under penalty of perjury under the laws of the State of California the foregoing is true
30 and correct and that this declaration was executed on **September 2, 2008**, at San Diego,
31 California.

32 Roberta L. Matson

33 _____
34 Declarant

35 
36 _____
37 Signature