

Manuel Corrales, Jr., Esq. SBN 117647

**Attorney at Law**

11753 Avenida Sivrita  
San Diego, California 92128  
Tel: (858) 521-0634  
Fax: (858) 521-0633  
Email: mannycorrales@yahoo.com ,

Terry Singleton, Esq. SBN 58316

**SINGLETON & ASSOCIATES**

1950 Fifth Avenue, Suite 200  
San Diego, California 92101  
Tel: (619) 239-3225  
Fax: (619) 702-5592  
Email: terry@terrysingleton.com

Attorneys for Plaintiff  
CALIFORNIA VALLEY MIWOK TRIBE

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO - CENTRAL DISTRICT**

**CALIFORNIA VALLEY MIWOK TRIBE**

Case No.37-2008-00075326-CU-  
CO-CTL

Plaintiff,

vs.

**CALIFORNIA GAMBLING CONTROL  
COMMISSION,**

Defendant

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEMURRER TO FIRST AMENDED  
COMPLAINT**

Date: December 12, 2008  
Time: 8:30 a.m.  
Dept: 65  
Judge: Hon. Joan M. Lewis

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Plaintiff CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or  
"the Plaintiff") submits the following Memorandum of Points  
and Authorities in opposition to the Demurrer to the First  
Amended Complaint ("FAC") filed by Defendant CALIFORNIA

1 GAMBLING CONTROL COMMISSION ("the Commission" or "the  
2 Defendant"):

3 I.

4 INTRODUCTION

5 Plaintiff seeks declaratory and injunctive relief  
6 against the Commission, including a writ of mandate  
7 compelling the Commission to release and distribute to the  
8 Tribe money from the California State Indian gaming fund  
9 called the Revenue Sharing Trust Fund ("RSTF"). The RSTF  
10 was established under State law pursuant to the 1999  
11 "Tribal-State Gaming Compacts" ("Compact"), which  
12 guarantees non-Compact Tribes will receive a certain amount  
13 of revenue from Tribal casino operations.

14 As a non-Compact Tribe, Plaintiff was receiving from  
15 the Commission annual \$1.1 million RSTF payments until  
16 August of 2005, when the Commission notified the Tribe that  
17 it was suspending distribution payments to the Tribe. The  
18 Commission based its decision to withhold payments on  
19 actions taken by the Bureau of Indian Affairs ("BIA")  
20 toward the Tribe, when it (the BIA) suspended payment of  
21 federal contract funds under PL 93-638, because the Tribe  
22 did not establish a constitution acceptable to the BIA and  
23 thus was "unorganized" in the eyes of the BIA. Official  
24 public documents from the Commission show that the  
25 Commission's refusal to distribute RSTF money to the Tribe  
26 was also based on the alleged existence of an ongoing  
27 internal Tribal leadership dispute. None of these reasons  
28

1 are legitimate reasons under California State law or the  
2 compacts for suspending distribution of RSTF money to non-  
3 Compact Tribes.

4 The Tribe remains eligible to receive RSTF money,  
5 because it is a federally recognized Tribe since at least  
6 1915. The Secretary of the Interior acknowledges the Tribe  
7 to exist as an Indian tribe pursuant to the Federally  
8 Recognized Tribe List Act of 1994, 25 U.S.C. Section  
9 479(a), when Congress placed the Tribe on a list of  
10 federally recognized tribes. The Tribe has never been  
11 taken off that list. Only an act of Congress can do that,  
12 and that has not occurred. Being a federally recognized  
13 tribe is all that the Compact requires for the Tribe to  
14 receive RSTF money. The Compact does not require a non-  
15 Compact Tribe to be "organized" as that term is used by the  
16 BIA, or have a "constitution" acceptable to the BIA. The  
17 Tribe has its own constitution, and does not need a BIA  
18 approved constitution to qualify for RSTF money. The BIA's  
19 disputed decision to condition federal contract funds on a  
20 BIA approved constitution has nothing to do with the  
21 Tribe's right to receive California State RSTF money. The  
22 Compact does not require BIA "approval" of RSTF money as a  
23 condition of eligibility.

24 In addition, the Tribe's present government has  
25 selected Silvia Burley to be its "Tribal Chairperson" or  
26 "person of authority" to receive the RSTF for the Tribe.  
27 This is all that is required under the Compact. Burley  
28

1 does not need to show to the Commission that the BIA has  
2 also recognized her as the authorized spokesperson for the  
3 Tribe, even though the BIA has done so. Thus, whether the  
4 BIA purportedly no longer recognizes Burley is irrelevant.

5 As alleged, the Commission has previously paid out RSTF  
6 money to the Tribe via Burley, when: (1) the Tribe was  
7 "unorganized" in the eyes of the BIA, i.e., when it had no  
8 constitution acceptable to the BIA for purposes of  
9 obtaining federal contract funding; and (2) there was an  
10 ongoing Tribal leadership dispute. In doing so, the  
11 Commission recognized Burley as a "person of authority" for  
12 the Tribe. As the Commission admits in its moving papers,  
13 it defended its decision to do so in the Sacramento  
14 Superior Court, when Yakima Dixie, a former Tribal leader,  
15 now imprisoned, filed an application for a TRO to prevent  
16 the Commission from making RSTF distributions to the Tribe  
17 via Burley. Plaintiff asserts that the Commission's  
18 actions in successfully opposing that TRO bars it from  
19 arguing a contrary position in this case under the doctrine  
20 of judicial estoppel.

21 Plaintiff has standing to file this suit. The BIA has  
22 done nothing to preclude the Tribe from having the capacity  
23 to sue in State Court to assert these claims. The Tribe's  
24 existence as a tribal entity has never been terminated, and  
25 the BIA has no power to do so. Presently, the Tribe has  
26 its own constitution which is based on "customs and  
27 traditions", and thus does not need a BIA approved  
28



1 "constitution" to qualify for RSTF money. Neither is the  
2 Tribe barred from suit under 28 USC Section 1362.

3 The Tribe does not seek a judicial determination of who  
4 has the authority to sue on behalf of the Tribe.

5 Plaintiff's requested relief is limited to a determination  
6 of the Commission's duty under State law to distribute RSTF  
7 money under the factual circumstance of this case. The  
8 Commission's previous interpleader action before the  
9 Sacramento Superior Court was unsuccessful, because the  
10 Commission did not limit its requested relief to the narrow  
11 issue of the Commission's duties, but instead sought a  
12 resolution of the internal tribal leadership dispute.

13 Plaintiff has a viable claim for a writ of mandate  
14 under CCP Section 1085 relative to the Commission's duties  
15 under Gov. Code Section 12012.90(e), the source of the  
16 mandamus claim. Plaintiff is not suing to enforce the  
17 Compact as a third party beneficiary. Neither is Plaintiff  
18 suing for a breach of contract.

19 Plaintiff also has a viable claim for declaratory  
20 relief under CCP Section 1060, insofar as the FAC seeks  
21 only an "interpretation" of Gov. Code Section 12012.90(e)  
22 and the Compact provisions regulating distribution of RSTF  
23 money. The case of Cates v. California Gambling Control  
24 Commission (2007) 154 CA4th 1302, controls on this issue.

25 The Commission is barred by judicial estoppel from  
26 arguing here that: (1) it cannot distribute RSTF to the  
27 Tribe because it is "unorganized" in the eyes of the BIA;

1 and (2) it has no mandatory duty under Gov. Code Section  
2 12012.9. The Commission successfully argued to the  
3 contrary before the Sacramento Superior Court in 2004 and  
4 2005.

5 **II.**

6 **ARGUMENT**

7 **A. PLAINTIFF HAS THE CAPACITY AND STANDING TO SUE FOR THE**  
8 **RELIEF REQUESTED IN THE FIRST AMENDED COMPLAINT**

9 The Commission argues that the Tribe has no  
10 capacity to sue in this Court, because the BIA will not  
11 recognize the Tribe's present constitution for purposes of  
12 awarding the Tribe federal contract funds. It contends  
13 that the BIA's actions have effectively striped the Tribe  
14 of any right to sue, citing 28 U.S.C. Section 1362, and  
15 that the Tribe's "entitlement to [California State] RSTF  
16 funds is premised on federal recognition..." (Def. P/A's,  
17 pg. 5, line 22). These contentions are without merit.

18 The BIA has no power to terminate the Tribe's existence  
19 as a tribal entity or as a federally recognized tribe. Its  
20 refusal to accept the Tribe's governing constitution, so as  
21 to award the Tribe federal contract funds, has no effect on  
22 the Tribe's existence or the Tribe's right to sue in court.

23 Indian tribes are "distinct, independent political  
24 communities, retaining their original natural rights" in  
25 matters of local self-government. Santa Clara Pueblo v.  
26 Martinez (1978) 436 U.S. 49, 55, 98 S.Ct. 1670, 1675  
27 (quoting Worcester v. Georgia (1832) 6 Pet. 515, 559, 8  
28

1 L.Ed. 483 (1832))." [Tribes] remain a 'separate people  
2 with the power of regulating their internal and social  
3 relations.'" Id. (quoting United States v. Kagama (1886)  
4 118 U.S. 375, 381-382, 6 S.Ct. 1109, 1113 (1886).

5 "[Tribes] have power to make their own substantive law in  
6 internal matters, [citation omitted], and to enforce that  
7 law in their own forums." Id. (citation omitted).

8 The United States government deals on a government-to-  
9 government basis with other Indian tribes which do not have  
10 constitutions approved by the BIA, or do not have any  
11 constitution at all. These include, for example, the  
12 Mooretown Rancheria, the Oneida Nation, the Cayuga Nation,  
13 most of the Pueblos, the Navajo Nation, and for many years  
14 the St. Regis Band of Mohawk, the Choctaw Nation of  
15 Oklahoma, the Cherokee Nation of Oklahoma and the Eastern  
16 Band of Cherokee Indians. (See [www.choctawnation.com](http://www.choctawnation.com);  
17 [www.doi.gov/cheeroke.html](http://www.doi.gov/cheeroke.html); [www.oneidanation.org](http://www.oneidanation.org);  
18 [www.puebloindian.com](http://www.puebloindian.com); and  
19 [www.bigorrin.org/cayuga kids.htm](http://www.bigorrin.org/cayuga_kids.htm)); see also Kerr-McGee  
20 Corporation v. Navajo Tribe of Indians (9<sup>th</sup> Cir. 1984) 731  
21 F.2d 597, 603-604 (noting that the Navajo Tribe never  
22 adopted a constitution and that the choice of government  
23 is, itself, and act of self-government), affirmed, 471 U.S.  
24 195, 105 S.Ct. 1900 (1985). Also the St. Regis Mohawk  
25 Tribe had no constitution until 1995. See Seminole Nation  
26 of Oklahoma (D.D.C 2002) 223 F.Supp.2d 122, 135; see also  
27 Williams v. Gover (9<sup>th</sup> Cir. 2007) 490 F.3d 785, 789-791,  
28

fn. 11 (noting that Mooretown Rancheria is not organized under the Indian Reorganization Act, and had the power to define its own membership without BIA approval).

In addition, Congress has provided that: "The term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." Section 102(2) of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. Section 479a(2) (Emphasis added).

Congress has also prohibited any authority, including the BIA, from terminating an Indian tribe's status as a federally-recognized tribe: "[A] tribe which has been recognized in one of these manners [Act of Congress, Part 83 process, or judgment by United States Court] may not be terminated except by an Act of Congress." Section 103(4) of the Federally Recognized Indian Tribe List Act of 1994; see note following 25 U.S.C Section 479a. Accordingly, the BIA has no power to terminate the Tribe's existence or its status as a federally recognized tribe, and its refusal to recognize the Tribe's present governing constitution has no legal effect on the Tribe's status and its right to sue.

28 U.S.C. Section 1362, cited by the Commission, does not alter this conclusion. It simply provides that the U.S. District Court shall have original jurisdiction "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein

1 the matter in controversy arises under the Constitution,  
2 laws, or treaties of the United States." As Judge Schubb  
3 already determined in his remand ruling, there is no  
4 federal question jurisdiction. Had there been federal  
5 question jurisdiction, the Tribe would still be permitted  
6 to sue under Section 1362, because it is federally  
7 recognized by an Act of Congress, and the phrase  
8 "recognized by the Secretary of the Interior" under Section  
9 1362 has been interpreted to mean recognized by "Congress",  
10 because "the Secretary is only using the power delegated by  
11 Congress." Native Village of Noatak v. Hoffman (9<sup>th</sup> Cir.  
12 1989) 872 F.2d 1384, 1388. Thus, 28 U.S.C Section 1362  
13 likewise does not bar the Plaintiff's suit.

14 **B. THE FAC DOES NOT SEEK A JUDICIAL DETERMINATION OF WHO**  
15 **HAS AUTHORITY TO SUE ON BEHALF OF THE TRIBE**

16 The Commission argues that this court lacks  
17 jurisdiction over Plaintiff's suit, because the FAC  
18 purportedly seeks a judicial determination of whether  
19 Silvia Burley is "the rightful chairperson of the [Tribe]  
20 and its spokesperson" for purposes of receiving the RSTF  
21 money for the Tribe. (Defendant's P/A's, pg. 7, lines 19-  
22 24). This contention is without merit, and the Commission  
23 has seriously misrepresented a prior ruling of the  
24 Sacramento Superior Court with respect to the Commission's  
25 prior interpleader suit.

26 First of all, there are no allegations in the FAC  
27 asking the Court to resolve an internal leadership dispute,  
28

1 and so the premise of the Commission's jurisdictional  
2 argument fails at the outset.

3 Secondly, the Commission falsely represents that the  
4 Sacramento Superior Court has already decided that the  
5 State Court lacks jurisdiction to decide the issues  
6 Plaintiff raises with respect to the Commission's duty to  
7 distribute RSTF money to the Tribe. The Commission's  
8 Exhibit 5 to its Request for Judicial Notice does not  
9 contain the actual ruling which the Commission had attached  
10 to its opposition to Plaintiff's motion to remand. In that  
11 ruling (attached), the Court observed that it would have  
12 had jurisdiction over the interpleader action had the  
13 Commission's Complaint limited its relief to the  
14 Commission's duties, rather than its sought-after relief  
15 for a resolution of the tribal leadership dispute. The  
16 Commission never amended its complaint nor re-filed on that  
17 limited issue, however.

18 **C. THE PLAINTIFF HAS A VIABLE CLAIM FOR A WRIT OF MANDATE**  
19 **UNDER CCP SECTION 1085 RELATIVE TO THE COMMISSION'S**  
20 **DUTIES UNDER GOV. CODE SECTION 12012.90(e)**

21 The Commission's only mention of Plaintiff's Fourth  
22 Cause of Action for Writ of Mandate is found in two short,  
23 obscure sentences on page 15 of its P/A's (lines 11-14),  
24 wherein it argues that Plaintiff has no such claim, because  
25 the Commission's duty is purportedly founded solely on a  
26 contract. Since mandamus is the thrust of Plaintiff's  
27 case, the Commission's lack of any analysis or in depth  
28

1 arguments on this claim can only be construed as a  
2 concession that its demurrer is not well taken. See Rule  
3 3.1113(a).

4 Judge Shubb has already ruled in his order remanding  
5 this case back to the State Court that Plaintiff has such a  
6 potential claim, even though it was not pled. That was the  
7 basis for Judge Shubb's remand order. (See pp. 19-21 of  
8 Remand Order). Plaintiff incorporates those points by  
9 reference here.

10 CCP Section 1085(a) governs the issuance of a writ of  
11 mandate in the Superior Court "to compel the performance of  
12 an act which the law specifically enjoins....," and it "will  
13 issue against a county, city or other public body..."  
14 Venice Town Council, Inc. v. City of Los Angeles (1996) 47  
15 CA4th 1547, 1558.

16 A court may issue a writ of mandate under CCP Section  
17 1085, directing a public official to perform a lawful act,  
18 where it is shown that: (1) the defendant has a clear and  
19 present ministerial duty to do an act which the law  
20 specifically enjoins; (2) the plaintiff has a substantial  
21 beneficial interest in the performance of that duty; and  
22 (3) the plaintiff lacks any plain, speedy and adequate  
23 remedy in the course of law. Flora Crane Service, Inc. v.  
24 Ross (1964) 61 Cal.2d 199, 203. The FAC alleges each of  
25 these elements under the Fourth Cause of Action, and the  
26 Commission does not argue otherwise.

1 The source of Plaintiff's mandamus claim is Gov. Code  
2 Section 12012.90(e)(2) which provides that the Commission  
3 "shall make quarterly payments from the Indian Gaming  
4 Revenue Sharing Trust Fund to each eligible recipient  
5 Indian tribe within 45 days of the end of each fiscal  
6 quarter." (Emphasis added) This language, as pointed out  
7 by Judge Shubb in his Remand Order, shows that the  
8 Commission has a clear ministerial duty to act for purposes  
9 of issuing a mandamus. (See pg. 20 of Remand Order); see  
10 also County of San Diego v. State of California (2008) 164  
11 CA4th 580, 593 (noting that "a ministerial duty is one that  
12 is required to be performed in a prescribed manner under  
13 the mandate of legal authority without the exercise of  
14 discretion or judgment"); CCP Section 1086.

15 Accordingly, the Commission's duties to distribute RSTF  
16 money are not contractual, as the Commission argues.  
17 Rather, they are governed by statute (Gov. Code Section  
18 12012.90(e)(2)). Additional duties are also statutory and  
19 merely incorporate by reference the language of the  
20 Compact. See Gov. Code Section 12012.75 (providing that the  
21 RSTF money shall be made available to the Commission to  
22 distribute to non-Compact tribes "in accordance with  
23 distribution plans specified in tribal-state gaming  
24 compacts"). Moreover, nowhere in the FAC does Plaintiff  
25 allege a breach of contract claim. Neither does Plaintiff  
26 seek to enforce the Compact as a 3<sup>rd</sup> party beneficiary, as  
27 was noted by Judge Shubb. (See pg. 13, lines 5-10, of  
28



1 Remand Order). Plaintiff only seeks to enforce the  
2 Commission's duties under Gov. Code Section 12012.90(e)(2),  
3 and other related statutory provisions.

4 Since Gov. Code Section 12012.75 requires the  
5 Commission to distribute RSTF in accordance with the terms  
6 of the Compact, the Court must look to the Compact for  
7 guidance on how a non-compact tribe qualifies for such  
8 funds, what constitutes disqualification of RSTF money, and  
9 how much latitude the Commission has in deciding whether to  
10 suspend payments. Section 4.3.2.1(b) of the Compact  
11 specifically provides that the Commission "shall have no  
12 discretion with respect to the use or disbursement of the  
13 trust funds [RSTF]." It adds that the Commission's "sole  
14 authority shall be to serve as a depository of the trust  
15 funds and to disburse them on a quarterly basis to Non-  
16 Compact Tribes..."

17 These provisions make clear that the Commission's  
18 duties of disbursement do not include making decisions on  
19 how the Tribe will use the funds once they are paid,  
20 whether the Tribe is "organized" in the eyes of the BIA,  
21 whether the Tribe has a constitution acceptable to the BIA,  
22 whether the Tribe qualifies for federal contract funds,  
23 whether there is an internal leadership dispute, or any  
24 other reasons not called for under the Compact. Yet, as  
25 alleged, the Commission has suspended RSTF payments to the  
26 Tribe for each one of these reasons, none of which appear  
27 anywhere in the Compact.

1 The Compact is very specific about the requirements for  
2 non-Compact Tribes to receive RSTF money. All they need to  
3 show is that they are a federally recognized tribe and that  
4 they have an authorized spokesperson under their own  
5 government (whether recognized by the BIA or not) to  
6 receive the payments for the Tribe. The Tribe meets these  
7 basic definitions, and, under Section 4.3.2.1(b) the  
8 Commission cannot create other requirements not called for  
9 under the Compact to refuse disbursement.

10 **D. THE COMMISSION IS BARRED UNDER THE DOCTRINE OF**  
11 **"JUDICIAL ESTOPPEL" FROM ARGUING THAT THE TRIBE'S**  
12 **STATUS AS "UNORGANIZED" PREVENTS IT FROM DISTRIBUTING**  
13 **RSTF MONEY TO THE TRIBE**

14 The Commission's position in this proceeding that it  
15 cannot distribute RSTF money to the Tribe due to the  
16 Tribe's status as "unorganized" in the eyes of the BIA, or  
17 because of an existing internal Tribal leadership dispute,  
18 is completely opposite to its position taken before the  
19 Sacramento Superior Court in 2004, when it opposed Yakima  
20 Dixie's TRO. (See Def. Ex. 1 and 2, RJN). Since the  
21 Commission was successful in this position before the  
22 Sacramento Superior Court previously, the doctrine of  
23 judicial estoppels bars it from taking a completely  
24 opposite position here. Jackson v. County of Los Angeles  
25 (1997) 60 CA4th 171, 181; see also Scripps Clinic v. San  
Diego Superior Court (2003) 108 CA4th 917, 943.

26 **E. PLAINTIFF HAS A VIABLE DECLARATORY RELIEF ACTION UNDER**  
27 **CCP SECTION 1060 WITH RESPECT TO THE COMMISSION'S**  
28 **DUTIES**

1 The Commission further argues that Plaintiff cannot  
2 obtain declaratory relief under CCP Section 1060, because  
3 that Code Section pertains to relief by persons "interested  
4 under a written instrument", and Plaintiff cannot "enforce"  
5 the Compact. This contention is without merit.

6 CCP Section 1060 is not limited to a "written  
7 instrument", but includes relief by anyone "who desires a  
8 declaration of his or her rights or duties with respect to  
9 another..." In any event, Plaintiff can still seek an  
10 interpretation of the Compact with respect to the  
11 Commission's duties, without enforcing the Compact. See  
12 Cates v. California Gambling Control Commission (4<sup>th</sup> Dist.  
13 Div. One 2007) 154 CA4th 1302 (taxpayer action for  
14 declaratory and injunctive relief; Court interpreted  
15 Compact to determine duties of Commission to collect  
16 delinquent contributions from Compact tribes).

17 Accordingly, Plaintiff's injunctive and declaratory  
18 relief actions are viable.

19  
20 **III.**

21 **CONCLUSION**

22 For the foregoing reasons, Defendant's demurrer to the  
23 FAC should be overruled.

24 Dated: 11/28/08



25 Manuel Corrales, Jr., Esq.  
26 Attorney for Plaintiff  
27 California Valley Miwok Tribe  
28