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11 *California Gambling Control Commission*

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN DIEGO, CENTRAL DISTRICT
14

15 **CALIFORNIA VALLEY MIWOK TRIBE,**
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17 Plaintiff,
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19 v.
20 **THE CALIFORNIA GAMGBLING**
21 **CONTROL COMMISSION ; and DOES I**
22 **THROUGH 50, Inclusive,**
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28 **Defendants.**

37-2008-00075326-CU-CO-CTL

**CALIFORNIA GAMBLING CONTROL
COMMISSION'S SUPPLEMENTAL
BRIEF ON WHETHER LEAVE TO
AMEND SHOULD BE GRANTED**

Date: TBD
Time: TBD
Dept: 65
Judge The Honorable Joan M. Lewis
Trial Date NA
Action Filed: January 8, 2008

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The Order also notes, however, that at the hearing on the Commission’s demurrer, no argument occurred on the issue of whether the demurrer should be sustained without leave to amend. The Court expressed concern over a possible negative impact to the Miwok should the Court sustain the Commission’s demurrer without leave to amend if, subsequent to that act, the federal government were ultimately to recognize a leader and government for the Miwok. As a result, the Court asked the parties to provide supplemental briefing on the issue of leave to amend.

Plaintiff's supplemental brief ("Brief") argues that leave to amend should be granted because a complaint could be drafted that would address the two defects the Court noted in the First Amended Complaint. First, contrary to the allegations in that complaint, Plaintiff asserts it could now allege that no leadership dispute exists, because the same Miwok faction the court found unrepresentative of the tribe in *California Valley Miwok Tribe v. United States* (D.C. Cir. 2008) 515 F.3d 1262, has now (a) determined (through a "judicial officer" it appointed) that the leadership dispute should be resolved in its favor, and (b) terminated the disputing member's membership in the tribe.

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1 With respect to the question of federal recognition of a government for the federally-
2 recognized Miwok, Plaintiff argues that, notwithstanding judicially noticeable facts to the
3 contrary, it may plead that the federal government does in fact recognize Silvia Burley as the
4 chairperson of the Miwok and her government as the government of that federally-recognized
5 tribe.

6 Further, Plaintiff contends that even if this were not the case, this Court should, in effect,
7 ignore any statement by the federal government that it does not recognize Burley's government or
8 that she is not authorized to act on behalf of the Miwok. This argument rests on the notion,
9 unsupported by any authority, that the federal government's failure to recognize a government for
10 a federally-recognized tribe is tantamount to termination of federal recognition of a tribe.
11 Plaintiff argues that, because neither the courts nor the federal government possess the authority
12 to terminate federal recognition of a tribe absent Congressional authorization, or to interfere with
13 tribal decisions regarding the establishment of a tribal membership, constitution or government,
14 the federal government has no authority to fail to recognize any tribal government.

15 SUMMARY OF ARGUMENT

16 Plaintiff cannot plead around judicially noticeable facts by alleging they are not true.
17 Similarly, Plaintiff cannot resolve a dispute with others by unilaterally exercising the very
18 authority that is the subject of the dispute and then using those actions as a basis for declaring that
19 the dispute is over.

20 The ongoing dispute among the Miwok over membership in, organization and leadership of
21 the tribe is the subject of judicially noticeable ongoing administrative proceedings within the
22 federal government. Likewise, the fact that the federal government no longer recognizes any
23 Miwok government or leadership is a judicially noticeable fact that even the documents Plaintiff
24 has offered to the Court demonstrate.

25 Contrary to Plaintiff's apparent belief, there is a difference between federal recognition of a
26 tribe and federal recognition of a government for that tribe. Recognition of a tribe does not
27 compel recognition of any purported government for that tribe. Under established law, the United
28 States' trust responsibility to federally-recognized tribes compels it to ensure that where

1 substantial benefits based on federal recognition of a tribe are at issue (such as Revenue Sharing
2 Trust Fund (“RSTF”) monies), the United States not recognize any individual or entity as
3 authorized to receive that benefit on behalf of the tribe unless it is truly representative of the tribe
4 the United States has recognized.

5 Finally, the Bureau of Indian Affairs (“BIA”) is currently seeking to resolve the dispute
6 among the Miwok and has initiated a process for determining the membership of the tribe and its
7 organization and leadership. Unfortunately, the Miwok faction led by Silvia Burley (“Burley”)
8 has sought to prevent this resolution process from occurring through an administrative appeal and
9 stay. As a result, while a resolution of the ongoing dispute is possible, it will apparently take
10 some time.

11 As noted in the Commission’s previously filed papers and at oral argument, the
12 Commission has already approved disbursement of RSTF funds to the Miwok pending the federal
13 government’s resolution of the ongoing dispute. Thus, a decision to sustain the Commission’s
14 demurrer to the complaint on the basis that no one has standing to sue on the Miwok’s behalf
15 until the BIA has recognized a Miwok government and leadership authorized to act on the
16 Miwok’s behalf will not prejudice the Miwok’s ability to obtain RSTF funds.

17 Of course a delay in the receipt of RSTF funds will exact a toll. However, given the fact
18 that Burley’s faction plainly represents only a small cluster of what the court in *California Valley*
19 *Miwok Tribe v. United States*, *supra*, 515 F.3d at p. 1267, found might constitute a 250-member
20 tribe and given the allegations by Burley’s opponents that she has utilized such funds for her
21 personal benefit and not the benefit of the tribe, the course most protective of the Miwok’s
22 interest would be to sustain the Commission’s demurrer without leave to amend.

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I. THE ISSUE IN THIS CASE IS NOT FEDERAL RECOGNITION OF THE MIWOK AS A TRIBE, BUT RATHER WHETHER THE FEDERAL GOVERNMENT NOW RECOGNIZES ANY GOVERNMENT OF THAT TRIBE OR ANY PERSON AUTHORIZED TO OBTAIN BENEFITS DUE THAT TRIBE ON THE BASIS OF ITS FEDERAL RECOGNITION

Contrary to Plaintiff’s suggestion, the issue now before the Court in this case is not federal government recognition of the Miwok. Rather, it is whether the federal government now recognizes any individual or entity as possessing authority to receive any benefits that might accrue to the Miwok as a result of its federal recognition.

A similar situation existed in *Sac & Fox Tribe of the Mississippi in Iowa, Election Board v. Bureau of Indian Affairs* (8th Cir. 2006) 439 F.3d 832 (“*Sac & Fox*”). In that case, the tribe was federally-recognized, but there was an internal dispute regarding leadership and who was authorized to operate the tribe’s gaming casino. One faction of the tribe was recognized as the government of the tribe by the BIA. Another faction, however, was operating the tribe’s casino. Because, under federal statutory law, only a federally-recognized government of a tribe may operate a casino, the National Indian Gaming Commission ultimately ordered the tribe’s casino to be shut down pending resolution of the dispute. (*Sac & Fox, supra*, 439 F.3d at p. 834.) Thereafter, an election was held within the tribe and the resulting government was recognized by the BIA. (*Id.*) The losing faction filed suit against the BIA seeking to have the court set aside the BIA’s recognition of the other faction. The court ruled that it lacked jurisdiction to decide the case because it would have had to interpret tribal rather than federal law. (*Id.* at p. 835.)

This case is instructive on two points. First, it establishes the distinction between federal recognition of a tribe and federal recognition of a tribe's government. The latter does not necessarily follow from the former. Where the ability to obtain a benefit stemming from federal recognition is at stake, the federal government, in the exercise of its trust responsibility, has the authority to determine who shall be entitled to accept any benefits due a tribe on the basis of its federal recognition. As the court noted in *California Valley Miwok Tribe v. United States*, *supra*, 515 F.3d at p. 1267, in describing the extent of the BIA's trust responsibility where benefits based on federal recognition were at stake:

1 A cornerstone [of the BIA's trust responsibility] is to promote a tribe's
2 political integrity, which includes ensuring that the will of tribal members
3 is not thwarted by rogue leaders when it comes to decisions affecting
4 federal benefits. *See id.* at 297, 62 S.Ct. 1049 ("Payment of funds at the
5 request of a tribal council which, to the knowledge of the Government
6 officers charged with the administration of Indian affairs..., was
7 composed of representatives faithless to their own people and without
8 integrity would be a clear breach of the Government's fiduciary
9 obligation."); *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 140
10 (D.D.C. 2002) (noting that the Secretary "has the responsibility to ensure
11 that [a tribe's] representatives, with whom [she] must conduct
12 government-to-government relations, are valid representatives of the
13 [tribe] as a whole").

14 (*Id.*) (Emphasis in original.) As a result, the BIA has the authority to determine whether it will
15 recognize a government of a federally-recognized tribe.

16 Second, this case affirms the fact that courts lack jurisdiction to determine who is the
17 authorized representative of a federally-recognized tribe. (*Sac & Fox, supra*, 439 F.3d at p. 835.)
18 That determination is necessarily left to the BIA where the receipt of benefits based on federal
19 recognition is concerned.

20 In this case, any Miwok entitlement to the receipt of RSTF money is based on the tribe's
21 federal recognition. Thus, the BIA, not this Court, is entitled to determine which individuals or
22 entities are entitled to act on the Miwok's behalf with respect to the receipt of those funds.

23 **II. THERE IS A DISPUTE OVER WHO IS ENTITLED TO ACT ON THE MIWOK'S BEHALF**
24 **WITH RESPECT TO THE RECEIPT OF FUNDS OWING THE MIWOK ON THE BASIS**
25 **OF ITS FEDERAL RECOGNITION**

26 Plaintiff's unilateral and self-serving determination regarding who is entitled to act on the
27 Miwok's behalf with respect to the receipt of benefits accruing to the tribe as a result of its federal
28 recognition is irrelevant to the question of whether there is a dispute over who is entitled to act on
the Miwok's behalf.²

This Court has already recognized the existence of a leadership dispute in its Order.
Plaintiff cannot plead around that judicial finding. Similarly, Plaintiff cannot plead around the
fact that the existence of a dispute on this issue has also been recognized judicially by the court in

² The BIA, in a February 11, 2005, letter from an Acting Assistant Secretary of Indian Affairs, has, in fact, rejected the decision rendered by Mr. Troy Woodward on behalf of the Burley faction. (Com. Req. for Jud. Not. Exh. D, final paragraph.)

1 *California Valley Miwok Tribe v. United States*, *supra*, 515 F.3d at p. 1263 n.1. Moreover, the
2 BIA's attempt to resolve that dispute is currently being challenged by Plaintiff in an
3 administrative proceeding now pending before the Interior Board of Indian Appeals ("IBIA").
4 On April 2, 2007, the Pacific Regional Director of the BIA issued a ruling affirming a decision by
5 the Superintendent of the Central California Agency of the BIA in which it was decided to assist
6 the Miwok in determining its membership and organization because of the existence of this
7 leadership dispute. (See, Com. Req. for Jud. Not. Exh. A.) On April 20, 2007, Plaintiff filed an
8 appeal of the Pacific Regional Director's decision in an effort to prevent any resolution of the
9 leadership dispute under the BIA's auspices. *Id.* Plaintiff also sought a stay of the Pacific
10 Regional Director's decision. (See, *id.* Exh. B.)

11 The Order, the federal court decision and the administrative decisions and appeals
12 demonstrate that there is, in fact, an ongoing dispute regarding the Miwok's membership and
13 organization. Plaintiff cannot extinguish that dispute by unilaterally expelling tribal members or
14 creating its own judicial forum for the resolution of the dispute.

15 **III. THE BUREAU OF INDIAN AFFAIRS DOES NOT RECOGNIZE BURLEY OR HER**
16 **GOVERNMENT AS HAVING THE AUTHORITY TO RECEIVE BENEFITS THAT ARE**
17 **DUE THE MIWOK ON THE BASIS OF ITS FEDERAL RECOGNITION**

18 In a declaration filed by Plaintiff's counsel, Mr. Corrales, he asserts that Plaintiff's position
19 is that "the federal government recognizes Silvia Burley as the Chairperson of the [Miwok], that
20 the federal government recognizes the Tribe's presently constituted government, and that the
21 federal government presently has a government-to-government relationship with the Tribe."³
22 This declaration is not only inconsistent with express positions taken by the BIA before the
23 federal courts and the IBIA – that: the United States does not recognize any Miwok government,
24 there is no government-to-government relationship between the Miwok and the United States, and

25 ³ Mr. Corrales bases these statements on the fact that the salutation of a November 10,
26 2008, letter from the Department of the Interior addresses Burley as the chairperson of the
27 Miwok. The letter does not contain any statement that Interior, by virtue of this salutation, is
28 thereby reversing its position expressed to the federal courts and the IBIA that the federal
government does not recognize any Miwok government or chairperson. As set forth in a January
14, 2009, letter from the Department of the Interior, the November 10th letter was "an
administrative oversight" and does not reflect any change in the BIA's position that it does not
recognize any Miwok tribal government or leader. (Com. Req. for Jud. Not. Exh. E.)

1 the BIA does not recognize Burley as the chairperson of the tribe -- it is also inconsistent with
2 Ms. Burley's declaration on the same subject.

3 In her declaration, the most that Ms. Burley states is that the BIA has recognized her as a
4 "person of authority" within the tribe for the purpose of receiving federal contract funds designed
5 to assist in the organization of a tribe. In this regard, documents attached to Ms. Burley's
6 declaration demonstrate only that in June 2007, the sole authority the BIA believed Burley had
7 was the authority to receive Miwok's P.L. 93-638 contract funds. (See, Burley Dec., Exh 11, p.
8 1, ¶ 2.) Indeed, in that document, the BIA specifically states that it "does not recognize a tribal
9 governing body or governmental leader." (*Id.*) Even that very limited authority granted to Ms.
10 Burley has since been withdrawn by the BIA. In the IBIA's June 10, 2008 ruling regarding
11 Burley's appeal of a BIA decision refusing to consider her application for additional P.L. 93-638
12 contract funds, the IBIA notes that the BIA rejected her application for such funds on behalf of
13 the Miwok "on the grounds that BIA does not recognize any current governing body for the
14 Tribe, in effect concluding that Burley had not shown that the Tribe had authorized her to submit
15 the [P.L. 93-638] contract proposal." (See, Com. Req. Jud. Not. Exh. C.)

16 Simply put, the BIA does not recognize any Miwok government or any Miwok leader. As a
17 result, there is no one capable of receiving any benefit due the Miwok on the basis of its status as
18 a federally-recognized tribe.

19 **IV. DECISION SUSTAINING THE COMMISSION'S DEMURRER WITHOUT LEAVE TO**
20 **AMEND WILL NOT HARM THE MIWOK'S POSITION WITH RESPECT TO RECEIPT**
21 **OF RSTF FUNDS**

22 An order sustaining the Commission's demurrer without leave to amend will not jeopardize
23 the Miwok's ability to obtain RSTF funds at such time as the BIA determines to recognize a
24 Miwok government and an individual or entity authorized to receive funds on behalf of the
25 Miwok on the basis of that tribe's status as a federally-recognized tribe. The Commission has
26 approved the disbursement of RSTF funds to the Miwok pending satisfactory resolution of the
27 tribe's internal disputes. Thus, when and if the current dispute is resolved through BIA
28 recognition of an individual or entity authorized to receive monies on behalf of the tribe, the
Miwok will be able to receive those funds independent of this suit pursuant to an action by the

1 Commission. The only impact an order sustaining the Commission's demurrer without leave to
2 amend will have is to preclude further litigation of any claims on behalf of the Miwok to RSTF
3 funds until such time as the BIA has acted to recognize such an individual or entity.

4 The BIA currently is seeking to establish a tribal membership and then to assist the Miwok
5 in establishing a governmental structure to serve that membership. That effort, however, has been
6 stymied by Burley's administrative appeal of the BIA's decision. (See Com. Req. for Jud. Not.
7 Exs. B & C.) Thus, while there is a possible resolution of the tribal dispute now ongoing,
8 unfortunately, it will take some time to be effectuated.

9 Indeed, an order that results in preservation of Miwok RSTF funds pending resolution of
10 this tribal dispute is, in fact, in the best interests of the Miwok.

11 As demonstrated by a website attacking Burley's use of past Miwok RSTF disbursements
12 (see: <http://californiavalleymiwok.com/2008-12-09-Escondido-Pl-Final-Report-Abridged.pdf>),
13 this intra-tribal dispute raises serious questions about how RSTF funds previously distributed to
14 Ms. Burley have actually been utilized and whether those funds have been utilized for the benefit
15 of the Miwok. A copy of the material contained in this website is attached hereto as Exhibit 1 for
16 the Court's convenience.

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CONCLUSION

For the foregoing reasons and those previously set forth in the Commission’s memoranda in support of its demurrer, the Commission respectfully requests that its demurrer be sustained without leave to amend.

Dated: January 16, 2009

Respectfully Submitted,

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