IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

CALIFORNIA VALLEY MIWOK TRIBE, Appellant, v. **THE CALIFORNIA GAMBLING CONTROL COMMISSION,** Respondent.	Case No. D054912

San Diego County Superior Court, Case # 37-2008-00075326-CU-CO-CTL
Joan M. Lewis, Judge

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

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[x] Interested entities or persons are listed below:

Full Name of Interested Entity or Party	Party *Check One*	Non-Party *Check One*	Nature of Interest *(Explain)*
YAKIMA DIXIE	[ ]	[x]	Claims to be true Miwok Chief
Up to 250 Unknown Individuals	[ ]	[x]	Putative Members of the Miwok
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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INTRODUCTION

This appeal raises three broad questions. First, whether Silvia Burley (Burley) – whom the federal government and a federal court of appeals have held does not represent the California Valley Miwok (Miwok), a federally recognized tribe -- can bring an action in state court in the name of the Miwok,[1] for an order compelling Respondent California Gambling Control Commission (Commission) to hand Burley over five million dollars from an account now held in trust for the benefit of the Miwok.[2]

Second, may Government Code sections 12012.75 and 12012.90 be construed to override the express provisions of sixty-one tribal-state class III gaming compacts (Compacts),[3] precluding Non-Compact Tribes (a status to which Burley asserts the Miwok are entitled) from seeking a judicial order compelling the Commission to make distributions to Appellant from the Revenue Sharing Trust Fund (RSTF)?[4]

Third, are the individuals identified by the federal court in *California Valley Miwok v. United States* (D.C. Cir. 2008), 515 F.3d 1262 (*California Valley II*), as putative members of the Miwok and who challenge Burley's claim to represent the Miwok necessary parties to this action?

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[1] All references to Burley in this brief are a reference to Appellant.

[2] Though Burley asks that the Commission make the payee of any distribution check the Miwok, she also asks that the check be delivered in her care. (Clerk's Trans. (C.T.) Vol. 1 at p. 174.) As a result, the money would go into an account for the Miwok completely controlled by Burley.

[3] The Compacts were negotiated pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168 (IGRA).

[4] The RSTF is a fund the Compacts establish as the depository for certain license fees required by the Compacts.

The trial court sustained the Commission's demurrer to Burley's First Amended Complaint Combined With Petition for Writ of Mandate (FAC) on the ground that no one presently has standing to sue in the name of the Miwok because the United States does not currently recognize a government for the Miwok. (C.T. Vol. 4, at pp. 767-768.) It did not rule on the other issues raised in the Commission's demurrer. (*Id.*)

In her Opening Brief, Burley responds to the first issue by arguing that the federal government and the federal court of appeals erred in concluding that she does not represent the Miwok and that this Court can either: (a) ignore these judicially noticeable facts because of that purported error and allow her to plead around them, or (b) rule, in the federal government's absence and in contravention of a federal court ruling on a question of federal law, that Burley, in fact, represents the Miwok.

Burley addresses the second issue by asserting that dicta in a federal court decision speculating that Burley *might* be able to seek relief under Code of Civil Procedure section 1085 is law of the case, and thus binding on the Commission, notwithstanding the fact that the federal court ruled that it lacked jurisdiction to hear this case, and that the issue of whether Burley could seek relief under section 1085 was not before that court, and in fact was not alleged or even argued by Burley or the Commission until this case was remanded to the California courts and Burley filed the FAC.

Last, Burley argues that the individuals the federal court identified as putative members of the Miwok and who challenge her ability to represent the Miwok are not necessary parties because a court that she herself created and that the federal government has determined has no authority to act as a Miwok institution has determined that these individuals are not members of the Miwok.

SUMMARY OF ARGUMENT

This Court should reject Burley's contentions and affirm the trial court's decision for the following reasons.

1. No one presently has standing to sue on behalf of the Miwok, given the absence of a government-to-government relationship between the Miwok and the United States as a result of the United States' present refusal to recognize any Miwok government.

2. Burley has already lost a challenge to the federal government's determination that she does not represent the Miwok in *California Valley II, supra,* 515 F.3d 1262, and cannot, as a matter of federal law, compel the United States to recognize her as the government of the Miwok because that is an unreviewable political question. Moreover, even if such a suit were possible, Burley cannot accomplish that end in the absence of the United States.

3. This Court lacks jurisdiction either to determine who is authorized to file suit on behalf of the Miwok or to compel the United States to recognize a government authorized to initiate such a suit.

4. In enacting Government Code sections 12012.75 and 12012.90, the Legislature not only did not authorize a private right of action to enforce the provisions of those statutes but could not lawfully do so because any such attempt would constitute an unlawful attempt to amend the prohibition in the Compacts against suits by third party beneficiaries seeking to compel the payment of RSTF distributions.

5. Assuming, arguendo, a private right of action were authorized, the FAC fails to allege that the Commission did not to exercise "reasonable diligence" in the performance of any duty owed to the Miwok where, as here, the Commission has, in fact, disbursed any monies due and owing into a special account for the Miwok, pending a federal government

determination as to who is entitled to withdraw money on the Miwok's behalf.

6. The FAC does not seek to enforce a duty separate and distinct from the Commission's contractual duty to make RSTF distributions. Thus, under established law, mandate will not lie.

7. Mandate does not lie to compel an unlawful act. An order compelling the Commission to make an RSTF distribution to a Non-Compact Tribe on the basis of Government Code section 12012.90 would compel an unlawful act because the Legislature does not have the authority to require an act inconsistent with the Compacts.

8. Mandate does not lie to compel an act an agency has already performed. The Commission has already set aside the Miwok distribution in a special interest-bearing account. Thus, the question is not the Commission's compliance with Government Code section 12012.90, but rather whether the Commission has any duty to make the funds available to Burley.

9. No action for declaratory relief can be stated because the Miwok has no right to seek a declaration of its rights under the Compacts.

10. The federal court's decision to remand this case is binding only to the extent that it holds that federal courts lack jurisdiction to consider the issues raised by Burley's original complaint.

11. The FAC fails to join necessary parties when it alleges that there is a dispute over who is entitled to represent the Miwok, and then does not join those individuals in this action, and nothing in the decision of a court established by Burley—that the United States does not recognize as having any authority to act as a Miwok institution—is in any way binding on this Court.

STATEMENT OF FACTS

The Miwok (formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California) is listed in the Federal Register as a federally recognized tribe. (72 Fed. Reg. 13648; C.T. Vol. 1 at p. 168.) The FAC alleges that 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 the Compacts. (C.T. Vol. 1 at pp. 173-174.) 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 the Commission to pay "in care of Burley" certain monies the FAC 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. (C.T. Vol. 1 at p. 174.)

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 the RSTF. All signatories to the Compacts operating 700 or more Gaming Devices (slot machines) contribute a certain fee per Gaming Device license into that fund. (C.T. Vol. 1 at p. 194, Compact § 4.3.2.2, subd. (a)(2).) 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.

A. The Compacts' Revenue Sharing Trust Fund Provisions

The preamble to the Compacts recites that the "State has an interest in promoting the purposes of IGRA for all federally-recognized Indian tribes in California, whether gaming or Non-Compact." (C.T. Vol. 1 at p. 185 § F.) The RSTF was established in furtherance of this interest, as a means of redistributing the wealth accumulated from tribal gaming among all federally recognized California tribes–including those that are not in a position to conduct gaming operations of their own. (*In re Indian Gaming Related Cases* (9th Cir. 2003) 331 F.3d 1094, 1105 ("*Coyote Valley*").) The general intent of section 4.3.2.2 of the Compacts is to have Compact Tribes fund the RSTF by purchasing "licenses" to acquire and maintain Gaming Devices. (*Coyote Valley*, *supra*, 331 F.3d at p. 1105.) The Compacts provide that "Non-Compact Tribes shall be deemed third party beneficiaries of this and other compacts identical in all material respects" (C.T. Vol. 1 at p. 193 § 4.3.2, subd. (a)(i)), and establish that Non-Compact Tribes are to receive $1.1 million annually, provided funds are available within the RSTF (*id.* at p. 193 § 4.3.2.1). While it is clear that Non-Compact Tribes are the appropriate recipients of distributions from the RSTF, the Compacts expressly preclude third parties from bringing legal action to enforce the terms of the Compacts. (C.T. Vol. 1 at p. 228 § 15.1.) Moreover, the waivers of sovereign immunity contained in the Compacts are limited to civil actions between the State and the signatory tribe not involving monetary damages, "provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party." (C.T. Vol. 1 at p. 219 § 9.4, subds. (a)(3), (b).)

B. Miwok Status

On June 25, 1999, the federal government recognized Burley as tribal chairperson of the Miwok. (*California Valley* (D.C.D.C. 2006) 424 F.Supp.2d 197, 198 (*California Valley I*).) Late in 1999, a leadership dispute developed within the Miwok. (*Id.* at p. 199.) During this dispute, in March 2000, Burley submitted a proposed constitution to the federal government and requested a Secretarial election so that the Miwok could become an organized tribe. (*Id.*) On June 7, 2001, because the federal government had not held the requested election, Burley withdrew the proposed constitution. (*Id.*) In September 2001, Burley submitted a new proposed constitution to the United States which the federal government did not approve. (*Id.*) In November 2003, the United States did acknowledge, however, the existence of a government-to-government relationship with an "interim" tribal council chaired by Burley. (*Id.* at p. 200.) On March 26, 2004, the United States advised Burley that the Miwok was considered an unorganized tribe and that no governing documents would be approved until such time as the Miwok membership base and membership criteria were identified. (*Id.*) On February 25, 2005, the federal government declared that it had rejected Burley's proposed constitution, that it did not recognize Burley as the Miwok chairperson, and that no one would be recognized as the Miwok chairperson until the Miwok had been organized. (*Id.*) The United States did, however, recognize Burley as a "person of authority" within the Miwok. (*Id.*)

In March 2005, the federal government convened a series of meetings designed to facilitate the organization of the Miwok. (*Id.*) At those meetings concerns were raised by presumptive Miwok members over Burley's use of federal government contract funds designated for tribal organization, as well as her use of RSTF monies that the Commission had distributed to Burley for the Miwok's use. (*Id.*) Subsequent to those

meetings and the concerns raised, on July 19, 2005, the United States suspended the contract providing organizational funds to Burley. (*Id.* at p. 201.) On October 26, 2005, the federal government informed Burley that there was no government-to-government relationship between the United States and the Miwok. (*Id.*) That position was re-affirmed on December 4, 2005. (*Id.*) On the basis that the Miwok were unorganized and without a governing body, on December 14, 2007 the United States rejected Burley's application for a contract to provide funds for tribal organization. (C.T. Vol. 2 at pp. 329-330.)

On December 19, 2007, the Pacific Regional Director of the Bureau of Indian Affairs filed a brief in an administrative proceeding before the Interior Board of Indian Appeals (IBIA) stating the Bureau "no longer contracts with Silvia Burley as a person of authority on behalf of the Tribe [and that] Burley lacks authority to act on the Tribe's behalf." (C.T. Vol. 2 at p. 326.) As recently as January 14, 2009, the Department of the Interior reiterated its position that the United States does not recognize any Miwok tribal government or leader. (C.T. Vol. 4 at p. 752.)

C. Commission Actions Regarding the Miwok

Because the Miwok had been placed on the federal government's list of federally-recognized tribes and because the federal government had recognized Burley first as the chairperson of that tribe and then a "person of authority" within the Miwok authorized to act on behalf of the Miwok, the Commission not only made quarterly distributions of RSTF funds to Burley, it also defended that determination against a suit seeking to prohibit the payment of RSTF funds to Burley, brought by an individual claiming to be the rightful chairperson of the Miwok. (C.T. Vol. 2 at pp. 299-303.) When, however, the federal government stopped providing funds to Burley because she was not authorized to act on behalf of the Miwok, the Commission, on August 4, 2005, informed Burley that it would no longer

issue RSTF funds to her on behalf of the Miwok. (*California Valley I, supra,* 424 F.Supp.2d at p. 201.) On December 5, 2005, the Commission filed an interpleader action in the Superior Court for the State of California for the County of Sacramento seeking an order determining to whom it should distribute RSTF funds on behalf of the Miwok. (*Id.*) When that action was dismissed on the basis of the court's lack of subject matter jurisdiction, the Commission began depositing the Miwok RSTF funds into a separate interest-bearing account, pending the federal government's resolution of the questions surrounding the Miwok's status and the identity of its membership, government and leadership. The Commission, thus, has distributed RSTF funds from the RSTF into an account of which the Miwok is the beneficiary. The Miwok's right to utilization of those funds, however, is dependent upon the federal government's exercise of its trust responsibility to determine who is eligible to withdraw those funds on the Miwok's behalf.

D. Procedural History of this Case

The original complaint in this matter was filed on January 8, 2008. The Commission removed the case to federal court on January 22, 2008. On February 1, 2008, Burley dismissed the third and fourth causes of action of the original complaint. On April 23, 2008, the United States District Court for the Southern District of California, Judge Roger T. Benitez, granted the Commission's motion for a change of venue and transferred the case to the United States District Court for the Eastern District of California. (C.T. Vol. 1 at p. 143.) On July 24, 2008, Judge William B. Shubb granted Burley's motion to remand the case back to the San Diego County Superior Court, finding that the federal court lacked subject matter jurisdiction over the case because it had no jurisdiction to determine who had standing to file suit on behalf of the Miwok and because the Miwok lacked standing to enforce a third-party beneficiary claim against the

Commission or to maintain a private right of action to enforce the provisions of Government Code section 12012.75 or section 12012.90. Upon finding that it lacked subject matter jurisdiction, the court was of the opinion that it was required to remand the case to state court. (C.T. Vol. 1 at pp. 142-164; 28 U.S.C. § 1447(c).) On August 28, 2008, Burley filed the FAC. (C.T. Vol. 1 at p. 167.) On March 3, 2009, the trial court sustained the Commission's demurrer without leave to amend. (*Id.* Vol. 4 at pp. 767-68.) Burley appealed the court's decision on April 8, 2009. (*Id.* Vol. 4 at pp. 794-95.)

STANDARD OF REVIEW

The standard of review for a judgment sustaining a demurrer without leave to amend for lack of standing is set forth in *Martin v. Bridgeport Community Association, Inc.* (2009) 173 Cal.App.4th 1024, 1031-32. The court held that a de novo review is required to determine whether, as a matter of law, the complaint states a cause of action and that proper standing is a threshold element in stating a cause of action. (*Id.* at p. 1031.) Unless a plaintiff has met its burden to prove that a reasonable possibility exists that standing can be demonstrated, the court ruled that a trial court determination sustaining a demurrer will not be reversed as an abuse of discretion. (*Id.*) Although a court in reading a complaint must treat all properly pleaded facts as true (*id.*), in reviewing the allegations in a complaint, the court may consider as part of the complaint any judicially noticeable facts. (*Four Star Elec. v. F & H Const.* (1992) 7 Cal.App.4th 1375, 1379, citing Code of Civ. Proc. § 430.30.)

ARGUMENT

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

The federal government's declared position is that it has no government-to-government relationship with the Miwok because it recognizes no Miwok membership, constitution, or officers. (*California Valley I, supra,* 424 F.Supp.2d at p. 201.) The federal government has also stated that Burley has no authority to act on behalf of the Miwok. (C.T. Vol. 4 at p. 752.) It is well established that a government that is not recognized by the United States has no capacity to sue in the courts of this country. (*Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione* (2d Cir. 1991) 937 F.2d 44, 48 [unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch's consent]; *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398, 410-411.) As the United States Supreme Court put it in *Sabbatino*, non-recognition "signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control." (376 U.S. at p. 410.)[5/] In this case, the federal government has stated its unwillingness to have a government-to-government relationship with the Miwok because the Burley "government"

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[5] This rule does not, of course, preclude a group from asserting in federal court that it should be a federally recognized tribe, or should be restored to that status where a judicially reviewable standard has been adopted by the United States. (*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 unless the federal government has in fact recognized that status.

does not represent the putative Miwok membership. (*California Valley I, supra,* 424 F.Supp.2d at p. 201.) Moreover, because the Miwok's entitlement to RSTF funds is premised on federal recognition, it follows that the Commission is not required to distribute RSTF monies to a Miwok government the United States does not recognize or to a person, such as Burley, that the United States, in the exercise of its trust responsibility to the Miwok, does not recognize as authorized to act on behalf of the Miwok or to receive, possess, or expend for any purpose Miwok funds.

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

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

Absent federal recognition of a tribal government, no one has the capacity to sue on behalf of a federally recognized tribe. Recognition of a tribal government and the officials entitled to act on a tribe's behalf are matters wholly within the exclusive purview of the federal executive branch. (*Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior, supra,* 255 F.3d at p. 346-347.) Moreover, those questions are essentially political in nature and normally beyond the jurisdiction of the courts unless the federal government has actually acted and that action can be said to have failed to have met legal criteria that a court has the capacity to apply in making a reasoned judicial decision. (*Id.* at pp. 348-349.)

Burley, however, has already fought and lost her attack on the federal government's refusal to recognize her "government" as the government of the Miwok and to approve the constitution for the Miwok that she

proposed. In *California Valley II, supra,* 515 F.3d 1262, the district court decision in *California Valley I, supra,* 424 F.Supp.2d 197, was affirmed when the appellate court determined that Burley only represented a small cluster of people within the Miwok and that the United States' trust responsibility to tribes precluded federal recognition of an unrepresentative government. (*California Valley II, supra,* 515 F.3d at p. 1263.) As a result, any cause of action against the United States compelling it to recognize her as a person entitled to sue on the Miwok's behalf would undoubtedly be a futile act – both because it is a political question over which the judiciary lacks jurisdiction and because the matter has already been decided against Burley by the federal judiciary.

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

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

(C.T. Vol. 2 at pp. 318-319.)

After the federal government determined that Burley could not act on behalf of the Miwok, the Commission itself deposited the Miwok RSTF

distribution with the court and asked the court, in another lawsuit, to determine who could receive the money on the Miwok's behalf. Judge McMaster denied the Commission's request because the relief requested by the Commission would:

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

(C.T. Vol. 2 at pp. 332-334.)

Burley conceded in the trial court (C.T. Vol. 3 at p. 483) that California courts lack jurisdiction to determine who is the tribal leader and has argued in her Opening Brief that the parties to this appeal should be bound by Judge Mc Master's identical conclusion. (Opening Br. at pp. 25-26.)

Notwithstanding her concessions, Burley has asks this Court to determine the truth of her allegation that she is the rightful chairperson of the Miwok and its spokesperson (C.T. Vol. 1 at p. 77), and that, therefore, she should receive the Miwok's RSTF distribution (*id.* at p. 78). Because, however, this Court lacks the 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.

III. BECAUSE THAT STANCE VIOLATES FEDERAL LAW, BURLEY ERRS IN SUGGESTING EITHER THAT THE FEDERAL GOVERNMENT ACTUALLY RECOGNIZES A MIWOK GOVERNMENT FOR NON-INDIAN REORGANIZATION ACT PURPOSES, OR THAT EVEN IF NO MIWOK GOVERNMENT IS RECOGNIZED FOR ANY PURPOSE, THIS COURT MAY IGNORE ANY SUCH FEDERAL POSITION

Burley argues that the trial court erred when it found that the federal government did not recognize a Miwok government capable of filing suit on the Miwok's behalf to force the Commission to distribute RSTF funds to Burley. The error Burley alleges is twofold. First, she contends that the federal government's non-recognition of a Miwok tribal government relates only to the Miwok's ability to obtain certain federal contract funds available only to tribes organized under the Indian Reorganization Act, title 25 United States Code, section 451 et seq. (IRA). (Opening Br. at p. 13.) Therefore, Burley argues, the federal government's non-recognition of a tribal government for the receipt of IRA benefits does not amount to non-recognition of a tribal government for purposes of receiving benefits available to any federally recognized tribe. Thus, because the Miwok are not required to be organized under the IRA to obtain an RSTF distribution, the fact that the Miwok are not organized under the IRA is irrelevant, inasmuch as the Miwok are on the list of federally recognized tribes and that is all that is required for the receipt of an RSTF distribution.

Second, Burley argues in the alternative that even if the federal government does not recognize a Miwok government capable of obtaining benefits due the Miwok stemming from its placement on the list of federally recognized tribes, the federal government's non-recognition violates federal law because the federal government is compelled to recognize any government a federally recognized tribe selects inasmuch as the federal government cannot dictate a tribe's membership, or governmental organization. (Opening Br. at p. 14.) Thus, to the extent the

federal government refuses to recognize a Miwok government for non-IRA purposes, the trial court committed error in relying upon any such determination.

Burley's contentions misstate the federal government's position, the holdings in the district and appellate court decisions in *California Valley I, supra,* 424 F.Supp.2d 197, and *California Valley II, supra,* 515 F.3d 1262, and federal law. Further, Burley fails to explain how this Court would have jurisdiction to determine that Burley may represent the Miwok–despite the federal government's contrary position, the Commission's contrary position, and the allegations in the FAC asserting that others challenge her authority to represent the Miwok–when Burley concedes that California courts lack jurisdiction to determine who is the lawful representative of a federally recognized tribe. (C.T. Vol. 3 at p. 483.)

A. The United States Does Not Recognize a Miwok Government for any Purpose

Burley's position that the United States recognizes a Miwok government for non-IRA purposes is premised on a misreading of the District of Columbia Circuit's decision in *California Valley II, supra,* 515 F.3d 1262, and the federal government's explicit statements.

1. The Holding in *California Valley II* Rests on the Secretary's 25 U.S.C. § 2 Authority, Which is Greater in Scope Than the IRA. Thus, the Secretary's Finding That Burley Does not Represent the Federally Recognized Miwok is Just as Applicable to Miwok Claims to benefits based on federal recognition as it is to IRA-Derived Benefits

Burley argues that the decision in *California Valley II* and the Secretarial decision which it upholds only implicate Burley's ability to obtain benefits that would be due the Miwok were it deemed to be a tribe organized under the IRA. This contention ignores the fact that the holding

in *California Valley II* is based upon the Secretary's authority under title 25 United States Code section 2 (25 U.S.C. § 2)–a provision that encompasses the Secretary's responsibilities and authority with respect to both IRA and non-IRA federally recognized tribes. Thus, a Secretarial decision under that provision is applicable to both IRA and non-IRA derived tribal benefits and Burley's contention is, therefore, devoid of merit.

In *California Valley II, supra,* 515 F.3d at p. 1263, Burley sought a declaration that the federal government's refusal to approve a constitution she had submitted on behalf of the Miwok was an abuse of discretion and in violation of the requirements of title 25 United States Code section 476(h) of the IRA. In addition, she sought a declaration that the Miwok is an organized tribe under the IRA. (*Id.*) The court in that case upheld the federal government's refusal to approve the submitted constitution. In so doing, the court rejected both of Burley's claims. The court dismissed Burley's notion that the United States had a duty to approve any constitution submitted by Burley's government, or that the Secretary of the Interior "has no role in determining whether a tribe has properly organized itself to qualify for the federal benefits provided in the [IRA] and elsewhere." (*Id.* at p. 1267.)

Burley argued that under title 25 United States Code section 476(h), the United States had a duty to approve any constitution she submitted on behalf of the Miwok because that section provides that "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section" (476(h)(1)), and that nothing in the IRA "invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934." (25 U.S.C. § 476(h)(2).)

The court in *California Valley Miwok II, supra,* 515 F.3d at p. 1267, rejected that construction in the following analysis.

> Burley asserts that § 467(h) unambiguously requires the Secretary to approve any constitution adopted under that provision. In Burley's view, the Secretary has no role in determining whether a tribe has properly organized itself to qualify for the federal benefits provided in the Act and elsewhere. That cannot be. Although the sovereign nature of Indian tribes cautions the Secretary not to exercise freestanding authority to interfere with a tribe's internal governance, the Secretary has the power to manage "*all* Indian and [ ] *all* matters *arising out of Indian relations.*" 25 U.S.C. § 2 (emphases added). We have previously held that this extensive grant of authority gives the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians. *See Udall v. Littell,* 366 F.2d 668, 672 (D.C. Cir 1966) ("In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given [her] reasonable power to discharge it effectively.") *See also United States v. Eberhardt* 789 F.2d 1354, 1359 (9th Cir. 1986) (noting that § 2 serves "as the source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians"). The exercise of this authority is especially vital when, as is the case here, the government is determining whether a tribe is organized, and the receipt of significant federal benefits turns on the decision.

The District of Columbia Circuit then went on to find that the Secretary's exercise of her 25 U.S.C. § 2 powers was justified because the constitution submitted by Burley did not enjoy sufficient support from the tribe's membership. (*California Valley II, supra,* 515 F.3d at p. 1267.) The court reasoned that a "cornerstone" of the Secretary's exercise of this authority:

> [is] to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits.

(*Id.,* citing *Seminole Nation v. United States* (1942) 316 U.S. 286, 297 ["Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs . . . , was composed of representatives faithless to their own

people and without integrity would be a clear breach of the Government's fiduciary obligation."].) For additional support, the District of Columbia Circuit also cited *Seminole Nation v. Norton* (D.D.C. 2002) 223 F.Supp.2d 122, 140, for the proposition that the Secretary "has the responsibility to ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] *as a whole"*) (emphasis added). (*California Valley II, supra,* 515 F.3d at p. 1267.)

As a result, because the decision in *California Valley II, supra,* 515 F.3d 1262, is based on Secretarial powers affecting both IRA and non-IRA tribes and the right to benefits based on both IRA and federal recognition status, the District of Columbia Circuit decision that Burley does not represent anything more than a "small cluster of people within the" Miwok (*id.*), which Burley conceded may include up to 250 people (*id.* at p. 1267), is a finding as applicable to her ability to collect tribal benefits based on federal recognition as it is to collect IRA benefits based on status as a tribe organized under the IRA.

2. The United States has Made Explicit That it Does not Presently Have a Government-to-Government Relationship With the Miwok and That No One Presently Represents the Miwok it has Recognized

Burley's Opening Brief and the decision in *California Valley II,* contain a series of recitals indicating that in the past, the United States has either acted as though Burley represented the Miwok for certain purposes, or has indicated that it then had a government-to-government relationship with Burley's government. Whatever its reasons in the past, the United States has made explicit that at present it "does not recognize any tribal government or governmental leader of the [Miwok]." (C.T. Vol. 4 at p. 752 [Jan. 14, 2009 position of the Dept. of the Interior Solicitor].) Indeed, that was the very reason for the Secretary's rejection of the Burley constitution

in *California Valley II* and has been set forth in pleadings that the BIA has filed in federal administrative proceedings involving Burley. (C.T. Vol. 4 at p. 740 [June 10, 2008 BIA position]; Vol. 2 at p. 326 [Dec. 19, 2007 BIA position ("the Bureau of Indians Affairs does not recognize that the Tribe has a governing body and no longer contracts with Silvia Burley as a person of authority on behalf of the Tribe. Because Ms. Burley lacks authority to act on the Tribe's behalf, the Board should deny her motion")].)[6]

As a result, there is no question that at present the United States does not recognize a government of the Miwok capable of receiving benefits due the Miwok on the basis of the fact it has been placed on the list of federally recognized tribes by the Department of the Interior. [7]

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[6] Though Burley argues that the BIA actually recognizes her government, documents attached to her declaration filed in the trial court demonstrate only that in June 2007, the sole authority the BIA believed Burley had was the authority to receive Miwok's P.L. 93-638 contract funds. (C.T. Vol. 3 at p. 594 ¶ 2.) Indeed, in that document, the BIA specifically states that it "does not recognize a tribal governing body or governmental leader." (*Id.*) Even that very limited authority granted to Burley has since been withdrawn by the BIA. In the IBIA's June 10, 2008 ruling regarding Burley's appeal of a BIA decision refusing to consider her application for additional P.L. 93-638 contract funds, the IBIA notes that the BIA rejected her application for such funds on behalf of the Miwok "on the grounds that BIA does not recognize any current governing body for the Tribe, in effect concluding that Burley had not shown that the Tribe had authorized her to submit the [P.L. 93-638] contract proposal." (C.T. Vol. 4 at p. 740.)

[7] Burley notes that the United States Internal Revenue Service (IRS) receives tax payments from the Miwok on the basis of its federal recognition. (Opening Br. at p. 17.) The IRS, however, does not award federal tribal benefits nor is it authorized to determine who should receive them–that is the function of the Secretary of the Interior who has plenary authority to administer the entirety of the United States trust obligations to

(continued...)

B. This Court Lacks Jurisdiction to Ignore the Federal Government's Position and to Resolve a Tribal Leadership Dispute by Finding That Burley has the Capacity to Sue in the Name of the Miwok

Burley argues that this Court should ignore the United States' position that it recognizes no Miwok leader or Miwok government[8] and thereafter resolve a tribal leadership dispute alleged in the FAC by accepting the allegations in the FAC that Burley is the Miwok's leader by Miwok custom and tradition. (Opening Br. at p. 9; C.T. Vol. 1 at pp. 173-174.)[9] Burley asserts that having placed the Miwok on a list of federally recognized tribes, the United States is compelled to recognize her Miwok government for three reasons. First, Burley contends that a failure to recognize her Miwok government would constitute unlawful termination of the tribe.

(...continued)
tribes under 25 U.S.C. § 2. (*California Valley II, supra,* 515 F.3d at p. 1267.)

[8] Burley asserts that "[h]ere, this Court may independently determine whether the Tribe has the capacity to sue the Commission against claims there is an alleged leadership dispute by a former Tribal member, and that the BIA will not recognize the Tribal Government under Burley's leadership." (Opening Br. at p. 9.)

[9] The FAC alleges, in pertinent part:

> Burley fits the definition of "spokesperson" for the Tribe under Section 2.19 of the Compact.

(C.T. Vol. 1 at p. 173.)

> Under the existing Tribal "customs and traditions," Burley has been "selected" to represent the Tribe, despite the BIA not yet approving the Tribe's constitution.

(C.T. Vol. 1 at p. 174.)

(Opening Br. at pp. 17-18.) Second, she argues that a lack of recognition constitutes unlawful interference with the Miwok's internal affairs. (*Id.* at pp. 15-17.) Third, Burley asserts that, notwithstanding the allegations in the FAC, there is no longer a leadership dispute within the Miwok because a judicial officer she appointed has ruled that the individuals disputing her leadership are not members of the Miwok. (*Id.* at p. 21.)

Burley's contentions are devoid of merit. First, the notion that the federal government is compelled to recognize any tribal government was plainly rejected by the court in *California Valley II, supra,* 515 F.3d at p. 1267, where the court held that the Secretary was not required to recognize a tribal government it determined did not represent the tribe. Second, the failure to recognize a tribal government does not constitute termination of the tribe itself. As Burley repeatedly notes, the Miwok has not been removed from the list of federally recognized tribes. The United States simply does not recognize a tribal government with which it can have a government-to-government relationship or a leadership able to receive benefits stemming from that recognition. This lack of government recognition does not constitute interference with the Miwok's internal affairs. The Miwok are entitled to determine their own tribal practices and officers and are free to operate as a tribe. However, if the United States determines that the selected officers do not adequately represent that tribe, the United States has the discretion under 25 U.S.C. § 2 to withhold recognition of those leaders. Just as tribes are free to decide whether to organize under the IRA and receive federal benefits stemming from that form of government, they are free to choose governmental practices that will preclude recognition of their governments by the United States.

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 United States 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.)

Sac & Fox 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 II, 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:

> A cornerstone [of the BIA's trust responsibility] is to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits. *See id.* at pp. 297, 62 S. Ct. 1049 ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs . . . , was composed of representatives faithless to their own people and

> without integrity would be a clear breach of the Government's fiduciary obligation."); *Seminole Nation v. Norton,* 223 F.Supp.2d 122, 140 (D.D.C. 2002) (noting that the Secretary "has the responsibility to ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] *as a whole*").

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

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

In the present case, any Miwok entitlement to the receipt of RSTF money is based on the tribe's federal recognition. Thus, the BIA, not this Court, is entitled to determine which individuals or entities are entitled to act on the Miwok's behalf with respect to the receipt of those funds.[10]

Finally, Burley cannot, on the basis of her faction's unilateral actions, plead around the allegations in the FAC and the judicially noticeable fact that there is a leadership dispute among the Miwok (C.T. Vol. 1 at p. 178) or the fact that the existence of this dispute was recognized judicially by the court in *California Valley II, supra,* 515 F.3d at p. 1263, fn. 1. Moreover, the BIA's attempt to resolve that dispute is currently being challenged by

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[10] Burley also argues that even if a tribal government has not been recognized, that lack of recognition has no effect on a tribal member's ability to received benefits stemming from membership in a federally recognized tribe. (Opening Br. at pp. 18-19.) Burley then asserts that the Commission has a fiduciary duty to make RSTF distribution to individual tribal members. (*Id.* at p. 19.) This contention is devoid of merit. Compact section 4.3.2.1 makes explicit that Compact RSTF distributions are to tribes not individual tribal members. (C.T. Vol. 1 at pp. 193-94, Compact § 4.3.2.1(a) & (b).)

Burley in an administrative proceeding now pending before the IBIA. On April 2, 2007, the Pacific Regional Director of the BIA issued a ruling affirming a decision by the Superintendent of the Central California Agency of the BIA to assist the Miwok in determining its membership and organization because of the existence of this leadership dispute. (C.T. Vol. 4 at p. 728.) On April 20, 2007, Burley filed an appeal of the Pacific Regional Director's decision in an effort to prevent any resolution of the leadership dispute under the BIA's auspices. (*Id.*) Burley also sought a stay of the Pacific Regional Director's decision. (C.T. Vol. 4 at pp. 733-737.)

The FAC, the federal court decision and the administrative decisions and appeals demonstrate that there is, in fact, an ongoing dispute regarding the Miwok's membership and organization. Although Burley asserts that a judicial officer (a Mr. Troy Woodward) she appointed has concluded that there is no dispute because the parties disputing her leadership are no longer Miwok members, (Opening Br. at p. 21), Burley cannot extinguish that dispute by unilaterally expelling tribal members or creating her own judicial forum for the resolution of the dispute.[11]

IV. NEITHER STATE LAW NOR THE COMPACTS PERMIT A NON-PARTY TO ENFORCE THE TERMS OF THE COMPACTS

Even if Burley had the capacity to file suit on behalf of the Miwok, the Miwok have no standing to sue for a breach of the Compacts. The FAC asserts that state law (Gov. Code, §§ 12012.75 & 12012.90, subd. (d)) has created a private right of action under California's Indian gaming regime and that the Compacts have made the Miwok third-party beneficiaries

[11] 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 (the purported tribal judicial officer) on behalf of the Burley faction. (C.T. Vol. 4 at p. 750, final paragraph.)

entitled to sue the Commission for an alleged failure to distribute RSTF monies to the Miwok on the basis of the Miwok's alleged status as a Non-Compact Tribe. (C.T. Vol. 1 at pp. 172-74.) Nothing in the Compacts entitles a Non-Compact Tribe or the Miwok, assuming it is one, to sue the Commission to enforce any term of the Compacts. Indeed, the Compacts specifically provide in sections 9.4, subd. (a)(3), and 15.1 (C.T. Vol. 1 at pp. 219, 228), that third parties, including third-party beneficiaries, have no right to enforce any of the Compacts' terms. Likewise, nothing in state law provides a basis for a suit against the Commission.

A. The Compacts Specifically Preclude Suits by Third-Party Beneficiaries to Enforce Any Terms of the Compacts

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

It is true the Compacts deem Non-Compact Tribes "third party beneficiaries" in section 4.3.2 subdivision (a). (C.T. Vol. 1 at p. 193.) It is also correct that the Compacts, in section 4.3.2.1 subdivision (a), provide that all signatory tribes agree that each Non-Compact Tribe shall receive up

to $1.1 million per year from the RSTF. Likewise, there is no dispute that the Compacts, in section 4.3.2.1 subdivision (b), declare that the Commission shall serve as the trustee of the RSTF and disburse funds from the RSTF to Non-Compact Tribes (C.T. Vol. 1 at pp. 193-194). The Compacts, however, also expressly preclude actions by third-party beneficiaries to enforce any provisions of the Compact. Section 9.4 of the Compacts provides a limited waiver of sovereign immunity by the signatory tribes and the State for the purpose of allowing suit by the State or the tribe to enforce the Compacts' dispute resolution provisions. (*Id.* at p. 219.) This waiver is specifically predicated upon the condition that "[n]o person or entity other than the Tribe and the State is party to [such] action." (*Id.*) Compact section 15.1 makes matters even more clear. It states:

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

(C.T. Vol. 1 at p. 228.) No other provision of the Compacts expressly creates a right on the part of a third-party beneficiary to sue either the Commission or the signatory tribes for any breach of the Compacts.

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

third-party beneficiary to a government contract depends on the intent of the parties as manifested by the terms of the contract, and the circumstances surrounding the formation of the agreement."

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

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

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

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

(*Id.,* italics added.)

In this case, the signatory tribes and the State determined not to provide third-party beneficiary Non-Compact Tribes with a right to judicially enforce the terms of the Compacts. Thus, the Miwok have no

standing to sue the Commission for a breach of the Compacts. As contracts between sovereigns, the State and the signatory tribes, while desirous of providing economic assistance to Non-Compact Tribes, were, nonetheless, no doubt wary of granting the Non-Compact Tribes the ability to judicially compel State or tribal action and thereby control the exercise of their police power authority. For example, in some cases under California law, a third-party beneficiary that has acted in reliance upon benefits conferred by a contract may enforce that contract even if it has been terminated for reasons other than rescission. (*Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman, supra,* 65 Cal.App.4th at p. 1486.) Such an impact on the State and signatory tribes' police power authority to execute agreements between them, even if highly unlikely under other principles of law, would plainly justify the elimination of any such risk through the insertion of a provision such as section 15.1 of the Compacts, which precludes third-party beneficiary enforcement of any terms of the Compacts.

Further, to the extent there is any ambiguity with regard to the rights of third-party 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 power].)

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

because the public policy giving rise to the contract established a bar to the beneficiaries ability to enforce that agreement:

> [T]he fact that a Government program for social betterment confers benefits upon individuals who are not required to render contractual consideration in return does not necessarily imply that the benefits are intended as gifts. . . . The benefits of such 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.

(*Id.* at p. 401.)

In this case, the RSTF serves a public purpose. This purpose provides the consideration that makes Non-Compact Tribes mere incidental third-party beneficiaries. (C.T. Vol. 1 at p. 184, Compact § A [explaining a primary purpose of the Compacts "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"].) Thus, the Compacts' express intent to limit third-party beneficiaries' rights, combined with Non-Compact Tribes' status as only incidental beneficiaries, precludes the Miwok from enforcing the Compacts.

B. No Private Right of Action Exists Under State Law

In similar fashion, nothing in California law suggests that third-party actions were intended as part of California's Indian gaming regime. Proposition 1A established broad authority in the Governor to negotiate, and the Legislature to ratify, class III gaming compacts with Indian tribes "[n]otwithstanding . . . any other provision of state law," neither mandating nor limiting the subject matter of negotiations, but leaving such determinations to the discretion of the Governor as ratified by the California Legislature. Thus, under California law, the State's duties and obligations vis-avis tribal gaming are established by the compacts negotiated by the Governor and ratified by the State's legislature.

Government Code sections 12012.75 and 12012.90, therefore, were not enacted to create State obligations, duties or responsibilities to any individual or entity beyond those set forth in the Compacts, or to grant any right to an individual or entity beyond those set forth in those agreements, but rather to provide funding sources and mechanisms by which the Commission could carry out its existing obligations under the Compacts.

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

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

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

2. Government Code Section 12012.75 Does Not Give the Miwok a Private Right of Action

Government Code section 12012.75 does nothing more than create the RSTF fund within the State treasury and require that the money therein be available to the Commission "for the purpose of making [RSTF] distributions." (*Id.*) The statutory text of this section neither compels the

Commission to make payments to Non-Compact Tribes nor provides a remedy for Non-Compact Tribes should they fail to receive RSTF payments. [12/]

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

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[12] Government Code section 12012.75 provides:

> There is hereby created in the State Treasury a special fund called the "Indian Gaming Revenue Sharing Trust Fund" for the receipt and deposit of moneys derived from gaming device license fees that are paid into the fund 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.

3. Government Code Section 12102.90 Does Not Provide the Miwok with a Private Right of Action

Unlike Government Code section 12012.75, the express language of section 12012.90, subdivision (e)[13/] requires the Commission to timely make payments provided for in the Compacts. Government Code section 12012.90, however, does not expressly provide for–or clearly contemplate– a Non-Compact Tribe bringing a claim to enforce the Commission's duties under that section.

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

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[13] In relevant part, section 12012.90 subdivision (e) states:

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

duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Though use of the word "shall" in Government Code section 12012.90, subdivision (e)(2) compels the Commission to make RSTF payments within forty-five days, the "mandatory duty" this section creates is not designed to protect against the particular kind of injury it is alleged in this case that the Miwok has suffered. Review of the legislative history of Assembly Bill 1750 ("AB 1750") creating section 12012.90, subdivision (e), demonstrates that the Legislature was focused on the timeliness of the Commission's payments and the benefits afforded Non-Compact Tribes by the receipt of quarterly rather than annual RSTF payments. The Legislature's concern, therefore, did not arise from any Commission failure to make payments, but rather from the Commission's inability to make payments because the RSTF had insufficient funds. (C.T. Vol. 2 at pp. 287-288.)

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

Further, no public policy compels judicial recognition of a private right of action under Government Code sections 12012.75 or 12012.90. (*Animal Legal Def. Fund v. Mendes, supra,* 60 Cal.App.4th at p. 142.) In

this regard, if Burley could use either section as a means of enforcing the RSTF provisions of the Compacts, that would constitute an end run around an express restriction in the Compacts by permitting a third-party beneficiary to enforce the Compacts. (See *Vikco Ins. Servs., Inc. v. Ohio Indem. Co., supra,* 70 Cal.App.4th at p. 61 ["'Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citations omitted.]'"].) In this case, because the Legislature did not mention, let alone express any disapproval of, the Compacts' restrictions on enforcement when enacting either statute, this Court should not resort to public policy to create a remedy where the Legislature did not intend for one to exist.

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

4. Code of Civil Procedure Section 1085 Does Not Provide the Miwok a Remedy

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

As the court noted in *300 DeHaro Street Investors v. Department of Housing & Community Development, supra,* 161 Cal.App.4th at p. 1254,

"the duty which the writ of mandamus enforces is not the contractual duty of the entity, but the official duty of the respondent officer or board." In this case, Burley has not alleged–and cannot allege–that there is any difference between the Commission's obligations under the Compacts and any obligation imposed by Government Code sections 12012.75 or 12012.90. Indeed, Burley's memoranda in the trial court argue forcefully that that "Government Code section 12012.75 requires the Commission to distribute RSTF in accordance with the terms of the Compact." (C.T. Vol. 2 at p. 428.) Further, Burley similarly argued in the lower court that to understand the Commission's duties and responsibilities under Government Code sections 12012.75 or 12012.90, the Court must look to the Commission's obligations under the Compacts. (*Id.*) Thus, the obligation Burley seeks to enforce is not an official obligation of the Commission separate and distinct from the Compacts, but rather an obligation that is wholly contractual. As a result, mandamus is not the appropriate remedy.

In addition, mandamus will not lie to compel the performance of an illegal act or one against public policy. (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 154; 5 Witkin, Cal. Procedure (5th Ed. 2008) at p. 967.) Under California law, the State's duties and obligation with respect to Non-Compact Tribes are established by the Compacts negotiated by the Governor and ratified by the Legislature. The provisions of the Compacts may not be altered except by an amendment negotiated between those tribes and the State, ratified by the Legislature and approved by the Secretary of the Interior. (C.T. Vol. 1 at pp. 126-27; Cal. Const., article IV, § 19(f); 25 U.S.C. § 2710(d)(8).) Though the State may enact legislation that implements its duties and responsibilities under the Compacts, it may not alter the express terms of the Compacts or alter the Commission's obligations under the Compacts by legislation. The Compacts' provisions may be altered only by an amendment negotiated between the Governor

and a signatory tribe, ratified by the Legislature and approved by the Secretary of the Interior. Government Code sections 12012.75 and 12012.90, therefore, cannot be construed to allow a Non-Compact Tribe to bring suit to compel the Commission to make an RSTF distribution to anyone.

In this case, the Legislature lacks the authority to amend the provision of the Compacts that precludes Non-Compact Tribes from seeking to compel the Commission to distribute RSTF funds. As a result, this Court lacks the jurisdiction to issue an order compelling the Commission to distribute RSTF monies to a Non-Compact Tribe because such an order would constitute an unlawful act.

Mandate will also not lie to compel an act that has already been performed. (*State Bd. Of Education v. Honig* (1993) 13 Cal.App.4th 720, 742.) The FAC alleges that the Commission has failed to make an RSTF distribution to the Miwok. However, Burley does not dispute that the Commission has set up a separate interest bearing account in which it has deposited the Miwok RSTF distributions. (Opening Br. at p. 2.) As a result, the Commission has in fact performed its duty under the Government Code and, therefore, mandamus is unnecessary.

5. Code of Civil Procedure Section 1060 Does not Provide the Miwok With a Cause of Action

Burley also bases her claims on section 1060 of the Code of Civil Procedure, which allows "[a]ny person interested under a written instrument" to obtain a declaratory judgment resolving an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) As discussed previously, however, section 15.1 of the Compacts expressly prohibits third parties from "enforcing" the Compacts. In this case, the declaratory judgment Burley requests amounts

to an effort to "enforce" the Compacts because Burley seeks to establish that the Commission has disregarded a duty established by the Compacts.

V. THE FEDERAL DISTRICT COURT'S REMAND ORDER DOES NOT CONSTITUTE LAW OF THE CASE ON ANY ISSUE EXCEPT THE FACT THAT THE FEDERAL COURTS LACK JURISDICTION TO CONSIDER THE ISSUES RAISED BY THE FAC

Burley asserts that the federal district court's order remanding this case to state court is law of the case on the question of whether, assuming she has the capacity to sue in the Miwok's name, Burley may bring an action for a writ of mandate under Code of Civil Procedure section 1085. (Opening Br. at p. 24.) This contention is devoid of merit.

Under the rule enunciated in *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498, an issue is law of the case only if that issue was necessarily resolved in the prior proceeding. As the court held:

> The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case. (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 633, at p. 4552, original italics; see *Tally v. Ganahl* (1907) 151 Cal. 418, 421, 90 P. 1049.) But, the "discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally recorded as obiter dictum and not as the law of the case." (*Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 474, 304 P.2d 7, 9.) "It is fundamental that the point relied upon as law of the case must have been necessarily involved in the case." (Witkin, *supra*, § 647, p. 4564, original italics.)

(*Id.* at p. 498; see also *Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 917; *Tomaier v. Tomaier* (1944) 23 Cal.2d 754, 757.)

In this case, the decision by Judge Shubb of the United States District Court for the Eastern District of California only determined that the federal courts lacked subject matter jurisdiction over Burley's claim that the

Commission should be required to distribute RSTF funds to the Miwok. (C.T. Vol. 2 at p. 293.) The court ruled:

> Accordingly, because plaintiff's Complaint does not plead any claims giving rise to federal question jurisdiction, this court lacks subject matter jurisdiction and must remand the case to state court, thereby rendering defendant's motion to dismiss and the motion to intervene moot.

(C.T. Vol. 2 at p. 293.)

On the subject of Burley's ability to proceed in mandamus, Judge Shubb's order further states, in pertinent part, the following: (a) "Although plaintiff fails to raise the claim, it could potentially seek relief via a writ of mandamus pursuant to California Code of Civil Procedure section 1085." (C.T. Vol. 2 at p. 289); (b) "Nonetheless, even if plaintiff could successfully assert a mandamus claim against defendant in state court, plaintiff could not have brought that claim in federal court." (C.T. Vol. 2 at p. 290); (c) "While the Compacts, and defendant's duties created therein, are lurking in the background of any state law claim regarding RSTF funds, the federal component (IGRA) is too far removed to create federal question jurisdiction." (C.T. Vol. 2 at p. 291.)

Simply put, Judge Shubb's remarks regarding Burley's ability to bring a mandamus suit are dicta. First, a claim for mandamus relief had neither been made, nor argued and briefed, by the parties. Second, the issue was not essential to his order because that order concluded that even if Burley had alleged a mandamus claim, the court would not have had jurisdiction to rule upon it because it was an issue that should be addressed by the California courts. Finally, Judge Shubb did not actually rule that Burley could bring a mandamus claim. His order only stated that she might "potentially" bring such a claim.

As a result, because dicta cannot constitute law of the case, Judge Shubb's remarks regarding a potential mandamus remedy are not binding on the Commission or this Court.

VI. THE OTHER PARTIES TO THE MIWOK LEADERSHIP DISPUTE ARE NECESSARY PARTIES THAT HAVE NOT BEEN JOINED

In this case, the FAC alleges that there is a leadership dispute within the Miwok and that other parties claim a right to represent the Miwok and, hence, claim a right to distributions from the RSTF. (C.T. Vol. 1 at pp. 170, 178.) 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, subdivision (a). In this regard, the disposition of this action unquestionably impairs those individuals' ability to protect that interest. If Burley were to prevail in this suit and obtain the monies held for the Miwok by the Commission, those funds could be lost to them. As demonstrated by a website attacking Burley's use of past Miwok RSTF disbursements, this intra-tribal dispute raises serious questions about how RSTF funds previously distributed to Ms. Burley have actually been utilized and whether those funds have been utilized for the benefit of the Miwok. (C.T. Vol. 4 at pp. 669-721.)

Further, the Commission cannot protect the individuals' interest because it has taken the position that the Miwok are not entitled to file suit to compel distribution of RSTF funds. Finally, the failure to join these individuals in this action could subject the Commission to multiple or inconsistent obligations because the Commission could be faced with both tribal factions seeking payment to them of more than $5 million.

VII. A DECISION SUSTAINING THE COMMISSION'S DEMURRER WITHOUT LEAVE TO AMEND WILL NOT HARM THE MIWOK'S POSITION WITH RESPECT TO RECEIPT OF RSTF FUNDS

Burley argues that a decision affirming the trial court's decision would mean that "the Tribe will never receive its RSTF money." (Opening Br. at p. 3.) Contrary to Burley's belief, an order affirming the trial court's decision will not jeopardize the Miwok's ability to obtain RSTF funds at such time as the BIA determines to recognize a Miwok government and an individual or entity authorized to receive funds on behalf of the Miwok on the basis of that tribe's status as a federally-recognized tribe. As Burley notes without dispute (Opening Br. at p. 2), the Commission has approved the disbursement of RSTF funds to the Miwok pending satisfactory resolution of the tribe's internal disputes. Thus, when and if the current dispute is resolved through BIA 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 Commission. The only impact an order sustaining the Commission's demurrer without leave to amend will have is to preclude further litigation of any claims on behalf of the Miwok to RSTF funds until such time as the BIA has acted to recognize such an individual or entity.

The BIA currently is seeking to establish a tribal membership and then to assist the Miwok in establishing a governmental structure to serve that membership. That effort, however, has been stymied by Burley's administrative appeal of the BIA's decision. (C.T. Vol. 4 at pp. 733-747.) Thus, while there is a possible resolution of the tribal dispute now ongoing, unfortunately, it will take some time to be effectuated.

CONCLUSION

For all the foregoing reasons, the Commission respectfully requests that this Court affirm the judgment of the trial court.

Dated: October 20, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 12,791 words.

Dated: October 20, 2009

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **California Valley Miwok Tribe v. California Gambling Control Commission**
Court: **Court of Appeal, Fourth Appellate District, Division One, Case No. D054912**

I declare:

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

On **October 21, 2009**, I served the attached:

RESPONDENT'S BRIEF

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

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The Honorable Joan M. Lewis
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 21, 2009**, at San Diego, California.

Roberta L. Matson
Declarant

Signature

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