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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SAN DIEGO  
13 CENTRAL BRANCH  
14

15 **CALIFORNIA VALLEY MIWOK TRIBE,**

16 Plaintiff,

17 v.  
18

19 **THE CALIFORNIA GAMBLING**  
20 **CONTROL COMMISSION; and DOES 1**  
21 **THROUGH 50, Inclusive,**

22 Defendants.  
23  
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25  
26  
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Case No. 37-2008-00075326-CU-CO-CTL

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT CALIFORNIA  
GAMBLING CONTROL  
COMMISSION'S MOTION FOR  
SUMMARY JUDGMENT**

Date: April 26, 2013  
Time: 2:00 p.m.  
Dept: 62  
Judge: The Honorable Ronald L. Styn  
Trial Date: June 4, 2013  
Action Filed: January 8, 2008

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## INTRODUCTION

This Court now has before it a far simpler issue than the plaintiff “Burley Faction” of the California Valley Miwok Tribe (Miwok Tribe<sup>1</sup>) would have the Court believe. The Court of Appeal for the Fourth Appellate District (Appellate Court) has issued a writ of mandate (Decision) directing the Court to permit the parties to file dispositive motions, and if necessary go to trial, on the limited issue of whether, *under the current circumstances*, the California Gambling Control Commission (Commission) must disburse accrued Revenue Sharing Trust Fund (RSTF) payments to the plaintiff Burley Faction of the Miwok Tribe.

The operative current circumstance identified by the Appellate Court is the pendency of *California Valley Miwok Tribe v. Salazar*<sup>2</sup> (*Salazar*) in the United States District Court for the District of Columbia. *Salazar* is an ongoing part of the federal administrative process that will ultimately determine the individual or group that is recognized by the Bureau of Indian Affairs (BIA) as the authorized leadership of the Miwok Tribe. The instant case turns upon the uncertainty evidenced by the *Salazar* case because that uncertainty, expressed in part through the final agency actions of the BIA suspending the disbursement of federal PL 638 contract benefits<sup>3</sup> to the Miwok Tribe, is the reason the Commission has declined to disburse RSTF payments to the Burley Faction.

The Commission asserts no interest in the accrued RSTF payments, and takes no position with regard to the merits of the claims of the competing factions that both contend to constitute the Miwok Tribe. The Commission will disburse the accrued RSTF payments to whichever individual or group is eventually recognized by the BIA as authorized to conduct government-to-

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<sup>1</sup> As used herein, the term “Miwok Tribe” refers to the federally-recognized Indian tribe, the name of which appears in the Federal Register. Plaintiff in this action, though self-styled as the California Valley Miwok Tribe, is referred to herein as the “Burley Faction.”

<sup>2</sup> *California Valley Miwok Tribe v. Salazar* (D.D.C. No. 1:10-CV-160 (filed Jan. 24, 2010)). The Burley Faction has intervened as a defendant in the *Salazar* case, also under the name “California Valley Miwok Tribe.”

<sup>3</sup> PL (public law) 638 contracts arise under the Indian Self-Determination and Educational Assistance Act, 25 United States Code § 450, et seq. (ISDEAA), and are a common conduit of federal financial assistance to Indian tribes.

1 government business, as manifested by the BIA's resumption of the disbursement of federal  
2 benefits to the Miwok Tribe or by some other final BIA action. The Commission's only interest  
3 in this action is to defend the propriety of the way in which it discharges its duty to disburse  
4 RSTF payments to the authorized representatives of a recipient Indian tribe when an intra-tribal  
5 leadership dispute has arisen within the tribe.

6 The Commission contends that, as a matter of law, it is proper and lawful for the  
7 Commission to hold and accrue quarterly RSTF payments otherwise payable to tribes undergoing  
8 disputes that make the identity of the authorized leadership of the tribe sufficiently uncertain as to  
9 cause the BIA to suspend government-to-government business with the tribe. The suspension of  
10 RSTF payments in such a situation is required by the Commission's responsibilities as  
11 administrator of the RSTF in order to ensure that trust funds are only paid to the beneficiaries  
12 designated in the tribal-state gaming compacts (Compacts), i.e., to Non-Compact *Tribes*, rather  
13 than to potentially unauthorized subsets, or factions, of such tribes.

14 The *Salazar* case evidences a profound dispute over the Miwok Tribe's composition which,  
15 on the one hand, may consist only of the Burley Faction's five members, or, on the other hand,  
16 may consist of up to 242 adult members, who may or may not concur in Silvia Burley's  
17 designation as the Tribal Chairperson. These current circumstances have caused the BIA to stay  
18 agency actions that depend upon the identification of the tribal leadership of the Miwok Tribe,  
19 e.g., the disbursement of federal PL 638 contract benefits, until the *Salazar* case's outcome is  
20 known. Until the BIA's administrative process and avenues of review have reached a conclusion,  
21 the Commission has no individual or group to which RSTF payments may be disbursed with any  
22 assurance that the funds will be administered and used for the benefit of, and pursuant to the  
23 directives of, the actual Miwok Tribe. The Commission contends that disbursing the accrued  
24 RSTF payments to the Burley Faction under the current circumstances would constitute a breach  
25 of the Commission's duties as administrator of the RSTF.

26 The Commission respectfully requests that the Court issue an order granting summary  
27 judgment in its favor as to all causes of action of the First Amended Complaint on the ground that  
28 the undisputed facts establish that the Commission's retention and accrual of the Miwok Tribe's

1 quarterly RSTF payments, under the current circumstances, is either permitted or required under  
2 the Compacts, and that the Burley Faction's claims therefore fail as a matter of law.

### 3 **PROCEDURAL BACKGROUND**

4 On December 18, 2012, the Appellate Court issued the Decision granting the Burley  
5 Faction's petition for a writ of mandate directing this Court to dissolve the stay in this action to  
6 allow the parties to file dispositive motions on the issue described in the Decision. This Court  
7 conducted a case management conference on January 25, 2013, at which the parties and the Court  
8 agreed that the parties' respective dispositive motions would be due on March 6, 2013, opposition  
9 briefs would be due on March 27, 2013, reply briefs would be due on April 10, 2013, and the  
10 motions would be heard on April 19, 2013. The Court reset the hearing for April 26, 2013. This  
11 matter is set for trial, if necessary, starting on June 4, 2013. The Decision became final, and the  
12 Court of Appeal issued its remittitur in this matter on February 22, 2013.

### 13 **STANDARD FOR GRANTING SUMMARY JUDGMENT**

14 Code of Civil Procedure section 437c provides that a trial court must grant a motion for  
15 summary judgment if the moving papers establish that no triable issue of material fact exists and  
16 the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c);  
17 *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Under Code of Civil Procedure  
18 section 437c, subdivision (o), a plaintiff's cause of action is considered to have no merit if: "(1)  
19 one or more elements of that cause of action cannot separately be established; or (2) a defendant  
20 establishes an affirmative defense to that cause of action." (*Smith v. Wells Fargo Bank, N.A.*,  
21 (2005) 135 Cal.App.4th 1463, 1472, citing Code Civ. Proc., § 437c, subd. (c).)

22 The pleadings control the claims at issue, and the papers in opposition to the motion may  
23 not create issues outside the pleadings. (*County of Santa Clara v. Atlantic Richfield Co.* (2006)  
24 137 Cal.App.4th 292, 332-333.) The court must determine whether the moving party has shown  
25 that the opposing party cannot prevail on the theories raised in the pleadings. (*Hawkins v. Wilton*  
26 (2006) 144 Cal.App.4th 936, 940.) "The moving party bears the burden of establishing, by  
27 declarations and evidence, a complete defense to plaintiff's action or the absence of an essential  
28 element of plaintiff's case." (*Rosenblum v. Safeco Ins. Co.* (2005) 126 Cal.App.4th 847, 856.) In

1 moving for summary judgment, a defendant is not required to conclusively disprove an element  
2 of the plaintiff's case. Instead, the defendant need only establish, through affidavits, declarations,  
3 admissions, and judicially-noticeable matters, that the plaintiff cannot prove one or more  
4 elements of his cause of action. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 853-  
5 855.) A defendant moving for summary judgment can also rely on plaintiff's allegations in the  
6 complaint, which constitute binding judicial admissions. (*Miller v. Lakeside Village*  
7 *Condominium Assn.* (1991) 1 Cal.App.4th 1611, 1623.) Once the moving party makes this  
8 showing, the burden of proof shifts to the opposing party to demonstrate, through a responsive  
9 statement and supporting evidence, that there remain triable issues of material fact. (*Ibid.*; Code  
10 Civ. Proc., § 437c, subd. (p)(2).) "There is a triable issue of material fact if, and only if, the  
11 evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party  
12 opposing the motion in accordance with the applicable standard of proof." (*Block v. Golden*  
13 *Eagle Ins. Co.* (2004) 121 Cal.App.4th 186, 191, quoting *Aguilar v. Atlantic Richfield Co.*, *supra*,  
14 25 Cal.4th at p. 850.) Stated another way, "[a]n issue of fact becomes one of law and loses its  
15 'triable' character if the undisputed facts leave no room for a reasonable difference of opinion."  
16 (*Rosenblum v. Safeco Ins. Co.*, *supra*, 126 Cal.App.4th at pp. 856-857.)

#### 17 **UNDISPUTED MATERIAL FACTS**

18 Under the Compacts, the Commission is required to collect license fees from gaming tribes,  
19 deposit them in the RSTF, and, under the Compacts and Government Code sections 12012.75 and  
20 12012.90, make quarterly payments of those funds according to the Compact's specified  
21 distribution plans. (Defs. Undisputed Material Fact (UMF) No. 1.) The Compacts and  
22 Government Code provide that quarterly payments shall be made to Non-Compact Tribes,  
23 noncompact tribes, and eligible recipient Indian tribes, respectively—these are alternative and  
24 functionally equivalent designations of federally-recognized California Indian tribes that operate  
25 fewer than 350 slot machines. (UMF No. 2.) For simplicity, tribes eligible to receive quarterly  
26 RSTF payments are referred to herein as Non-Compact Tribes.

27 The Commission administers the RSTF in the nominal capacity of "trustee," for the purpose  
28 of receiving, depositing, and disbursing the funds on a quarterly basis to Non-Compact Tribes.



1 (UMF No. 3.) Aside from its duties as administrator of the RSTF, the Commission has no  
2 discretion “with respect to the use or disbursement of the [RSTF] funds.”<sup>4</sup> (UMF No. 4.)

3 The Miwok Tribe is a federally-recognized Indian tribe that operates fewer than 350 slot  
4 machines, and thus qualifies as a Non-Compact Tribe under the Compacts and Government Code.  
5 (UMF No. 5.)

6 The *Salazar* case was filed on January 24, 2011, by the California Valley Miwok Tribe  
7 (consisting of individuals different from those comprising the Burley Faction that is the plaintiff  
8 in this action), the Tribal Council, Yakima Dixie, Velma Whitebear, Antonia Lopez, Michael  
9 Mendibles, Evelyn Wilson, and Antone Azevedo (collectively referred to herein as the “D.C.  
10 Plaintiffs”). The *Salazar* case challenges Assistant Secretary of the Interior (ASI) (Indian  
11 Affairs) Larry Echo Hawk’s December 10, 2010 decision recognizing the Burley Faction as the  
12 Miwok Tribe. (UMF No. 6.) As a result of *Salazar*’s filing, ASI Echo Hawk withdrew his  
13 December 2010 decision for reconsideration, and then reissued it with modifications that are not  
14 material to this motion on August 31, 2011 (August 31 Decision). On October 17, 2011, the D.C.  
15 Plaintiffs filed a first amended complaint that challenges ASI Echo Hawk’s August 31 decision.  
16 (UMF No. 7.) By its express terms, the August 31 Decision is stayed pending the outcome of  
17 *Salazar*. (UMF No. 8.)

18 At the present time, as evidenced by the *Salazar* case, a dispute exists as to the composition  
19 and leadership of the Miwok Tribe. (UMF No. 9.) On the one hand, the Miwok Tribe may  
20 consist only of the Burley Faction, consisting of five members, or, on the other hand, it may  
21 consist of a much larger group of Indians, possibly including up to 242 adult members. (UMF  
22 No. 10.) Depending upon the outcome of the *Salazar* case, the BIA may, or may not, take final  
23 action recognizing the Miwok Tribe to consist of the Burley Faction and recognizing Silvia  
24 Burley as the Tribal Chairperson. (UMF No. 11.)

25  
26 <sup>4</sup> The more recent class III gaming compacts have been clarified to provide that the  
27 Commission “shall have no discretion with respects to the use or disbursement by recipient tribes  
28 of the Revenue Sharing Trust Fund monies.” (See e.g., Tribal-State Compact between the State  
of California and the Pinoleville Pomo Nation, § 5.1(a).)

1 The Commission makes no independent determinations on the merits of intra-tribal  
2 leadership disputes. (UMF No. 12.) The Commission takes no position on the merits of intra-  
3 tribal leadership disputes. (UMF No. 13.) When uncertainty exists as to a Non-Compact Tribe's  
4 authorized leadership, the Commission, as administrator of the RSTF, defers to the BIA's  
5 determinations. (UMF No. 14.)

6 Because the BIA deemed it unorganized and lacking a Tribal Chairperson and, for that  
7 reason, suspended PL 638 contract funding disbursement to the Miwok Tribe in 2005, the  
8 Commission suspended its disbursement of quarterly RSTF payments, pending BIA's recognition  
9 of an authorized Miwok Tribe leader or leadership group with which to conduct its government-  
10 to-government business—as evidenced either by BIA's resumption of PL 638 funding, or other  
11 BIA action. (UMF No. 15.) As of this date, the BIA has not recognized an authorized leader or  
12 leadership group for the Miwok Tribe, nor has the BIA resumed disbursing PL 638 funds to the  
13 Miwok Tribe. (UMF No. 16.) As of this date, the Commission is holding accrued quarterly  
14 RSTF payments totaling \$8,763,001.99, plus interest in the amount of \$420,246.17, for eventual  
15 disbursement to the Miwok Tribe. (UMF No. 17.) The Commission will promptly disburse the  
16 accrued RSTF payments to the Miwok Tribe once the BIA has identified the Miwok Tribe's  
17 authorized leader or leadership group. (UMF No. 18.)

18 The Legislature has provided that shortfalls in the RSTF (which would otherwise preclude  
19 disbursing a total of \$1.1M per year to each Non-Compact Tribe) are backfilled from the Special  
20 Distribution Fund, which, to the extent not used for that purpose are used for the public benefit to  
21 mitigate the off-reservation impacts and costs of tribal gaming. (UMF No. 19.)

## 22 ARGUMENT

### 23 I. THE COMMISSION MUST DISBURSE QUARTERLY RSTF PAYMENTS ONLY TO THE 24 RECIPIENTS DESIGNATED BY THE COMPACTS.

25 The Compacts designate the Commission as the administrator of the RSTF “for the receipt,  
26 deposit, and distribution of monies paid pursuant to this Section 4.3.2.” (UMF No. 3.) Though  
27 the RSTF is referred to as a trust fund, and the Commission as the trustee, the mere fact that the  
28 terms “trustee” and “trust” are used does not, in and of itself, establish that the RSTF is a “trust”

1 subject to California or federal trust law. The relationship among the Commission, Compact  
2 Tribes, and Non-Compact Tribes created by the Compacts differs from that of a true trust  
3 relationship in a variety of ways that are not material to this motion. Rather than arising from the  
4 fiduciary duties of a trustee, the Commission's duties with regard to disbursing quarterly RSTF  
5 payments arise directly from the Compacts and Government Code sections 12012.75 and  
6 12012.90, which specify that the Commission shall disburse the RSTF to the Non-Compact  
7 Tribes (eligible recipient Indian tribes) on a quarterly basis. (UMF No. 1.)

8 The Commission's duty to disburse quarterly RSTF payments to the Non-Compact Tribes  
9 must be interpreted in light of the purpose of the RSTF within the Compacts. The purpose of the  
10 RSTF is to implement revenue sharing between the gaming and non-gaming tribes. (UMF No.  
11 1.) Federally-recognized California Indian tribes operating fewer than 350 slot machines are  
12 defined as Non-Compact Tribes, and are eligible to receive quarterly RSTF payments. (UMF No.  
13 2.)

14 In order to discharge its duty under the Compacts, the Commission must convey quarterly  
15 RSTF payments to the Non-Compact Tribes. To do this, the Commission must ascertain the  
16 identity of representatives authorized by their respective tribes to receive and administer the  
17 tribe's payments. The Commission cannot reasonably be deemed to discharge its responsibility  
18 to make a payment to a tribe simply by making the payment to any person or group other than one  
19 properly authorized to receive and administer the payment pursuant to the tribe's directives.

20 Most of the tribal-state gaming compacts provide that the Commission "shall have no  
21 discretion with respect to the use or disbursement of the trust funds"<sup>5</sup> (UMF No. 4), this limitation  
22 cannot reasonably be construed to relieve the Commission of the obligation to take reasonable  
23 steps to convey quarterly RSTF payments to Non-Compact Tribes' authorized representatives.  
24 Where a statute or instrument contains several provisions or particulars, "such a construction is, if  
25 possible, to be adopted as will give effect to all." (Code Civ. Proc., § 1858.) Similarly, under the  
26 Restatements, where the whole can be read to give significance to each part, that reading is

27 <sup>5</sup> The language of this provision has changed in more recently executed compacts. (See  
28 UMF No. 4.)

1 preferred. (Rest.2d Contracts, § 202, com. d, p. 88.) Here, the Compacts' provision limiting the  
2 Commission's discretion with regard to the "use or disbursement" of RSTF monies can be  
3 harmonized with the Commission's express obligation to disburse payments to Non-Compact  
4 Tribes by construing that limitation to apply to matters other than ascertaining the identity of a  
5 tribe's authorized representatives to whom payments may properly be made. This interpretation  
6 is consistent with the principle that in the absence of a contrary indication, it will be assumed that  
7 each term of an agreement has a reasonable rather than an unreasonable meaning. (Rest.2d  
8 Contracts, § 203, subd. (a), com. c, p. 94. ) Here, it is patently unreasonable to require the  
9 Commission to make payments to Non-Compact Tribes while precluding the Commission from  
10 taking reasonable steps to ensure that the payments are made to those tribes' authorized  
11 representatives, rather than to potentially unauthorized and unrepresentative subsets of those  
12 tribes. Furthermore, "[t]he construction of an act by the agency charged with its enforcement is  
13 entitled to considerable deference from the courts, 'and will be followed if not clearly erroneous.  
14 [Citations.]'" (*League of Women Voters v. Countywide Crim. Justice Committee* (1988) 203  
15 Cal.App.3d 529, 557.)

16 Finally, the Legislature has provided that shortfalls in the RSTF (which would otherwise  
17 preclude disbursing a total of \$1.1M per year to each Non-Compact Tribe) are backfilled from the  
18 Special Distribution Fund, which, to the extent not used for that purpose are used for the public  
19 benefit to mitigate the off-reservation impacts and costs of tribal gaming. (UMF No. 19.) It thus  
20 is in the public interest for the Commission to avoid making improper disbursements of the RSTF  
21 to unauthorized recipients that may result in duplicative liability and necessitate remedial  
22 payment to the proper claimants. Even if the Compact provision limiting the Commission's  
23 discretion with regard to the use and disbursement of the RSTF is deemed reasonable, when  
24 choosing among the reasonable meanings of an agreement or a term thereof, a meaning that  
25 serves the public interest is generally preferred. (Rest.2d Contracts, § 207, p. 106.)

26 In summary, the Commission's express obligations under the Compacts require it to take  
27 reasonable and prudent steps to ensure that it disburses the RSTF only to the recipients identified  
28 in the Compacts. These recipients are certain federally-recognized Indian tribes, to which

1 payment may be directed through the individuals or groups properly authorized to receive and  
2 administer the trust funds on behalf of the tribe, and do not include unauthorized subsets or  
3 factions of such tribes. The BIA has not taken any final agency action recognizing the authorized  
4 leadership of the Miwok Tribe. (UMF No. 16.) Due to the uncertainty that exists as to the  
5 identity of the authorized leadership of the Miwok Tribe (see *infra*, Part II), the Commission has  
6 properly withheld and accrued the Miwok Tribe's quarterly RSTF payments, pending resolution  
7 of the existing uncertainty as to the composition and leadership of the Miwok Tribe.

8 **II. UNCERTAINTY EXISTS AS TO THE IDENTITY OF THE INDIVIDUAL OR GROUP**  
9 **PROPERLY AUTHORIZED TO RECEIVE AND ADMINISTER RSTF PAYMENTS ON**  
10 **BEHALF OF THE MIWOK TRIBE.**

11 The merits of the dispute between the two factions of the Miwok Tribe in the *Salazar* case  
12 lie outside the scope of the writ of mandate under which this motion has been brought, and are not  
13 before this Court. This Court lacks subject matter jurisdiction to adjudicate the intra-tribal  
14 leadership dispute between the two tribal factions. Jurisdiction over that dispute lies exclusively  
15 with the federal executive branch, and within its applicable administrative procedures and  
16 avenues of review, which include the *Salazar* case.<sup>6</sup>

17 An intra-tribal dispute exists as to the composition and leadership of the Miwok Tribe.  
18 (UMF No. 9.) The introductory paragraph and portions of the prayer of the first amended  
19 complaint in *Salazar* identify what is at stake in that case (UMF Nos. 6-8) and how its outcome  
20 may affect the Burley Faction's entitlement to the relief it seeks in this action:

21 Plaintiffs ask the Court to vacate an erroneous decision of the Assistant  
22 Secretary -- Indian Affairs for the United States Department of the Interior  
23 ("Department") that arbitrarily limits the membership of a federally  
24 recognized Indian tribe to five people and disenfranchises 242 adult  
members of the tribe plus their children, without due process and in violation  
of the Department [of the Interior's] trust responsibilities to Indian tribes and  
their members. Because the decision knowingly recognizes a tribal

25 <sup>6</sup> This is one among a number of internal tribal disputes in California that have occurred  
26 regarding the make up of tribal government and related entitlements of tribal members, and for  
27 which the BIA is recognized as the authoritative non-tribal arbiter. (See *Hardwick v. United*  
28 *States of America* (2012) 2012 Lexis U.S. Dist. LEXIS 176996, \*4 ["A challenge to the BIA's  
recognition of a tribe's governing body is subject to the provisions of the [federal] Administrative  
Procedures Act ("APA"), 5 U.S.C. § 701 et seq."].)

1 government based on a tribal document adopted without the knowledge,  
2 participation or consent of the vast majority of the tribe's members, it  
3 violates federal law and must be reversed.

4 (*Salazar* FAC, at p. 2.) The D.C. Plaintiffs seek a variety of relief including:

5 A. Vacating and setting aside the August 31 Decision as arbitrary,  
6 capricious, unsupported by substantial evidence in the record, an  
7 abuse of discretion and otherwise not in accordance with law;

8 [ . . . . ]

9 F. Directing the AS-IA [Assistant Secretary – Indian Affairs] and the  
10 BIA to establish government-to-government relations only with a  
11 Tribal government that reflects the participation of the entire Tribal  
community, including individual Plaintiffs and all other Current  
Members;

12 G. Preliminarily and permanently enjoining the Secretary, AS-IA and  
13 BIA from taking any action to implement the August 31 Decision,  
14 including any award of federal funds to the Burleys under PL 638 or  
any other federal law or program.

15 (*Id.*, at p. 30.)

16 The Commission notes in passing that in a previous case in the District of Columbia Court  
17 of Appeals, in which the Burley Faction, suing, as here, under the name of the Miwok Tribe,  
18 challenged the Secretary of the Interior's refusal to approve a tribal constitution the Burley  
19 Faction had submitted, the court, affirming the Secretary's action, observed:

20 This case involves an attempt by a small cluster of people within the  
21 California Valley Miwok tribe ("CVM") to organize a tribal government  
22 under the Act. CVM's chairwoman, Silvia Burley, and a group of her  
23 supporters adopted a constitution to govern the tribe without so much as  
24 consulting its membership. The Secretary declined to approve the  
constitution because it was not ratified by anything close to a majority of the  
tribe.

25 (*California Valley Miwok Tribe v. United States* (D.C. Cir. 2008) 515 F.3d 1262, 1263.)

26 It is clear from the foregoing that the *Salazar* case may result either in affirming the August  
27 31 Decision, with the effect of establishing the five-person Burley Faction as the Miwok Tribe  
28

1 and Silvia Burley as its Tribal Chairperson, or in setting aside the August 31 Decision, with the  
2 effect of allowing a new tribal political process to occur (UMF No. 10) that would likely result in  
3 the formation of a Tribal Council not controlled by the Burley Faction, that the BIA would then  
4 recognize for the purpose of conducting government-to-government business with the Miwok  
5 Tribe. (UMF No. 11.)

6 In the event the August 31 Decision is affirmed in *Salazar*, the Commission will promptly  
7 disburse the accrued RSTF payments to the Miwok Tribe through Silvia Burley when the  
8 decision becomes final. (UMF No. 18.) In the event the August 31 Decision is set aside, and the  
9 BIA recognizes a leader or leadership group other than Silvia Burley or the Burley Faction by  
10 taking a final agency action such as disbursing PL 638 contract funding to that newly identified  
11 leader or leadership group, the Commission will promptly disburse the accrued RSTF payments  
12 to the Miwok Tribe through that newly identified leader or leadership group. (UMF Nos. 14, 18.)

13 **III. THE COMMISSION'S RELIANCE UPON THE BIA'S FINAL AGENCY ACTIONS TO**  
14 **IDENTIFY THE AUTHORIZED REPRESENTATIVE OR REPRESENTATIVES OF**  
**FEDERALLY-RECOGNIZED TRIBES IS REASONABLE.**

15 Only the Department of the Interior, acting through the BIA, is authorized, and has the  
16 jurisdiction to resolve a tribal leadership dispute. Recognition of a tribal government and the  
17 officials entitled to act on the tribe's behalf are matters that are generally within the exclusive  
18 purview of the federal executive branch. (*Miami Nation of Indians of Indiana, Inc., v. U.S. Dept.*  
19 *of the Interior* (7th Cir. 2001) 255 F.3d 342, 346-347.) "Congress has delegated to the Secretary  
20 of the Interior broad authority over 'public business relating to . . . Indians.' (43 U.S.C. § 1457.)  
21 At the core of this authority is a responsibility to ensure that [the] Secretary deals only with a  
22 tribal government that actually represents the members of a tribe." (*California Valley Miwok*  
23 *Tribe v. United States* (D.C. Cir. 2006) 424 F.Supp.2d 197, 201.) "Although the sovereign nature  
24 of Indian tribes cautions the Secretary not to exercise freestanding authority to interfere with a  
25 tribe's internal governance, the Secretary has the power to manage 'all Indian affairs and . . . all  
26 matters arising out of Indian relations.'" (*Timbisha Shoshone Tribe v. Salazar* (D.C. Cir. 2012)  
27 768 F.3d 935, 938, quoting *California Valley Miwok Tribe v. United States*, *supra*, 515 F.3d at p.  
28 1267, italics in original.) As one court observed, "the [Department of the Interior] has the

1 authority and responsibility to ensure that the [Indian] Nation's representatives, with whom it  
2 must conduct government-to-government relations, are the valid representatives of the Nation as a  
3 whole." (*Seminole Nation of Oklahoma v. Norton* (D.D.C. 2002) 223 F.Supp.2d 122, 140, citing  
4 *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).) "A cornerstone of [the federal  
5 government's trust obligation to Indian tribes] is to promote a tribe's political integrity, which  
6 includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes  
7 to decisions affecting federal benefits." (*California Valley Miwok Tribe v. United States*, *supra*,  
8 515 F.3d at p. 1267.) Highly germane to the present case, the Second Circuit has noted that "[t]he  
9 [Government's] determination that [a certain member] does not represent . . . [a tribe] may well  
10 moot plaintiffs' claims." (*Shenendoah v. U.S. Dept. of Interior* (2nd Cir. 1998) 159 F.3d 708,  
11 713.)

12 Neither the Compacts, nor the Government Code, confers upon the Commission the  
13 authority or discretion to independently determine the identity of the authorized representatives of  
14 a California Indian tribe when there is an intra-tribal dispute, including those of the Non-Compact  
15 Tribes that are RSTF beneficiaries.

16 In the interest of discharging its duties as the administrator of the RSTF in a prudent  
17 manner, the Commission has chosen to rely upon the BIA's decisions when questions as to a  
18 tribe's authorized leadership arise, effectively adopting the same standards. (UMF No. 14.) No  
19 better or more appropriate standard is available to the Commission. Moreover, as the BIA does  
20 not have a separate or "free-standing" procedure, the BIA's identification of a tribe's authorized  
21 representatives is evidenced by the BIA's regulatory actions, which include conducting  
22 government-to-government business with a particular individual or group acting on behalf of a  
23 tribe, or taking other actions such as certifying a tribal election. The most typical instance of this  
24 identification occurs when the BIA enters into PL 638 contracts with tribes and disburses federal  
25 benefits thereunder. Accordingly, the Commission will disburse the Miwok Tribe's accrued  
26 quarterly RSTF payments to the individual or group that the BIA ultimately identifies as the  
27 Miwok Tribe's authorized representative by a final agency action disbursing PL 638 contract  
28



1 funding to that individual or group, or as evidenced by some other definitive final BIA action.  
2 (UMF No. 18.)

3 The Commission has withheld and accrued quarterly RSTF payments during intra-tribal  
4 leadership disputes before. By way of example, in or about early 2010, a leadership dispute arose  
5 within the Alturas Indian Rancheria, which is a small tribe located in Modoc County. As a result  
6 of the dispute, the BIA declined to renew a then-pending PL 638 contract. On the basis of that  
7 authorized federal action, the Commission prospectively withheld and accrued the tribe's  
8 quarterly RSTF payments. Litigation by the tribe followed against both the federal government  
9 and the Commission in the United States District Court for the Eastern District of California.  
10 Chief Judge Emeritus Lawrence K. Karlton determined that he lacked jurisdiction to adjudicate  
11 the intra-tribal leadership dispute, and stayed proceedings to await a decision and final agency  
12 action by the BIA. Ultimately, the tribal factions reached a settlement and the BIA entered into a  
13 renewed PL 638 contract with the prevailing faction. As part of a global settlement, the  
14 Commission promptly released the accrued RSTF payments to the prevailing faction once the  
15 BIA's action became final. (Decl. of Neil D. Houston, ¶ 4.) The *Alturas* case was simpler, and  
16 shorter, than the present case, but nonetheless analogous.

17 The Commission's reliance upon the BIA to identify a tribe's authorized representatives  
18 constitutes a reasonable, and practical, expression of the Commission's duty as the administrator  
19 of the RSTF to protect and take reasonable and prudent steps to distribute the RSTF only to a  
20 Non-Compact Tribe's properly authorized representatives, acting on behalf of the tribe as a  
21 whole.

## 22 CONCLUSION

23 Under the current circumstances referred to by the Appellate Court, which include  
24 substantial uncertainty as to whether the Burley Faction is the Miwok Tribe's authorized  
25 representative, the Commission, as RSTF administrator, is required to withhold and accrue the  
26 Miwok Tribe's quarterly RSTF payments for disbursement until the BIA determines its  
27 authorized leadership. That determination is underway in the *Salazar* case pending in the D.C.  
28 District. Until such time, if any, as the BIA recognizes the Burley Faction as the Miwok Tribe's

1 authorized representative, the FAC in this action fails to state a claim upon which relief may be  
2 granted. As the Burley Faction cannot make the required showing at this time, the FAC should be  
3 dismissed and judgment entered in the Commission's favor. The Commission respectfully  
4 requests that the Court enter an order consistent herewith.  
5

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Respectfully Submitted,

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