

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
A Limited Liability Partnership  
Including Professional Corporations  
RICHARD M. FREEMAN, Cal. Bar No. 61178  
MATTHEW S. MCCONNELL, Cal. Bar No. 209672  
12275 El Camino Real, Suite 200  
San Diego, California 92130-2006  
Telephone: 858-720-8900  
Facsimile: 858-509-3691  
JAMES F. RUSK, Cal. Bar. No. 253976  
Four Embarcadero Center, 17th Floor  
San Francisco, CA 94111-4109  
Telephone: 415-434-9100  
Facsimile: 415-434-3947

Attorneys for Intervenors

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO

CALIFORNIA VALLEY MIWOK TRIBE,  
Plaintiff,  
v.  
CALIFORNIA GAMBLING CONTROL  
COMMISSION, et al.,  
Defendants.

No: 37-2008-00075326-CU-CO-CTL

INTERVENORS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
OF ITS MOTION FOR SUMMARY  
JUDGMENT AND/OR SUMMARY  
ADJUDICATION

—  
CALIFORNIA VALLEY MIWOK TRIBE,  
CALIFORNIA (a.k.a. SHEEP RANCH  
RANCHERIA OF ME-WUK INDIANS,  
CALIFORNIA), YAKIMA K. DIXIE,  
VELMA WHITEBEAR, ANTONIA LOPEZ,  
ANTONE AZEVEDO, MICHAEL  
MENDIBLES, AND EVELYN WILSON,

Intervenors.

Date: April 26, 2013  
Time: 2:00 p.m.  
Dept.: C-62  
Judge: The Hon. Ronald L. Styn

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. FACTS .....	2
A. Plaintiff's First Amended Complaint .....	2
B. Commission's Role and Duties .....	2
C. The Ongoing Dispute Over the Membership and Governance of the Tribe .....	3
1. The United States Declined to Recognize Plaintiff's Purported Tribal Government .....	3
2. The AS-IA's Disputed Decisions Regarding the Tribe and the Ongoing Federal Litigation .....	5
D. Commission Decision to Withhold Payment to the Tribe .....	8
III. ANALYSIS .....	9
A. Standard of Review .....	9
1. Summary Judgment Standard .....	9
2. The Standard for Ordinary Mandamus Is Abuse of Discretion .....	9
B. Plaintiff's Claims Must be Dismissed Because the Commission's Decision to Await the BIA's Recognition of a Tribal Government Is Legally Permissible .....	10
1. All Three of Plaintiff's Causes of Action Depend on the Reasonableness of the Commission's Decision .....	10
2. The Commission Has No Mandatory Duty to Pay RSTF Money to Burley .....	11
3. As the RSTF Trustee, the Commission Must Exercise Its Discretion to Ensure that RSTF Money Actually Goes to Eligible Tribes .....	12
4. The Commission's Exercise of Its Discretion Is Not Arbitrary, Capricious or an Abuse of Discretion .....	14
5. Plaintiff's Claims for Injunctive and Declaratory Relief Are Derivative of Her Claim for Mandamus and Must Fail .....	15
IV. CONCLUSION .....	16

**TABLE OF AUTHORITIES**

Page(s)

**FEDERAL CASES**

<u>California Valley Miwok Tribe v. USA</u>	
424 F.Supp.2d 197 (D.D.C. 2006) (“ <u>Miwok I</u> ”) .....	4, 5
<u>California Valley Miwok Tribe v. United States</u>	
515 F.3d 1262 (D.C. Cir. 2008) (“ <u>Miwok II</u> ”) .....	4, 5, 13
<u>California Valley Miwok Tribe v. Salazar</u>	
No. 1:11-cv-00160-RWR (Jan. 24, 2011) (“ <u>CVMT v. Salazar</u> ”) .....	6, 7, 9
<u>Consol. Grain &amp; Barge v. Archway Fleeting</u>	
712 F.2d 1287 (8th Cir. 1983) .....	7
<u>Guam Sasaki Corp. v. Diana's Inc.</u>	
881 F.2d 713 (9th Cir. 1989) .....	7
<u>Liesegang v. Secretary of Veterans Affairs</u>	
312 F.3d 1368 (Fed. Cir. 2002) .....	6
<u>Manchester Band of Pomo Indians, v. United States</u>	
363 F.Supp. 1238 (N.D.Cal. 1973) .....	12
<u>Nken v. Holder</u>	
129 S.Ct. 1749 (2009) .....	7
<u>Ransom v. Babbitt</u>	
69 F.Supp.2d 141 (D.D.C. 1999) .....	14
<u>Seminole Nation v. Norton</u>	
223 F.Supp.2d 122 (D.D.C. 2002) .....	14
<u>United States v. Mason</u>	
412 U.S. 391 (1973) .....	12
<u>Wheeler v. U.S. Dep't of the Interior</u>	
811 F.2d 549 (10th Cir. 1987) .....	14

**STATE CASES**

<u>Ackerman v. Edwards</u>	
121 Cal.App.4th 946 (2004) .....	14
<u>Art Movers, Inc. v. NI West, Inc.</u>	
3 Cal.App.4th 640 (1992) .....	16

1	<u>Binder v. Aetna Life Ins. Co.</u>	
2	75 Cal.App.4th 832 (1999).....	9
3	<u>Briggs v. Rolling Hills Estates</u>	
4	40 Cal.App.4th 637 (1995).....	10
5	<u>Brown v. Wells Fargo Bank</u>	
6	168 Cal.App.4th 938 (2008).....	12
7	<u>CA Correctional v. CA Dept. of Corrections</u>	
8	96 Cal.App.4th 824 (2002).....	9, 10
9	<u>California Valley Miwok Tribe v. California Gambling Control Commission</u>	
10	2010 WL 1511744 (4th Dist. 2010) (unpublished) (“ <u>Miwok III</u> ”) .....	2, 3, 8, 11
11	<u>California Valley Miwok Tribe v. California Gambling Control Commission</u>	
12	No. D061811, p. 9 (4th Dist. 2012) (unpublished) (“ <u>Miwok IV</u> ”) .....	7
13	<u>Cates v. Chiang</u>	
14	154 Cal.App.4th 1302 (2007).....	2
15	<u>City of Sacramento v. Drew</u>	
16	207 Cal.App.3d 1287 (1989).....	13
17	<u>DeCuir v. Los Angeles</u>	
18	64 Cal.App.4th 75 (1998).....	10
19	<u>Dougherty v. Cal. Kettleman Oil R., Inc.</u>	
20	13 Cal.2d 174 (1939).....	13
21	<u>Gilb v. Chiang</u>	
22	186 Cal.App.4th 444 (2010).....	16
23	<u>Hearst v. Ganzi</u>	
24	145 Cal.App.4th 1195 (2006).....	12
25	<u>Klajic v. Castaic Lake Water Agency</u>	
26	90 Cal.App.4th 987 (2001).....	10
27	<u>Lamere v. Superior Court</u>	
28	131 Cal.App.4th 1059 (2005).....	14
	<u>Marvin Lieblin, Inc. v. Shewry</u>	
	137 Cal. App. 4th 700 (2006).....	10
	<u>McGill v. Regents of University of California</u>	
	44 Cal. App. 4th 1776 (1996).....	9
	<u>People ex rel. Younger v. County of El Dorado</u>	
	5 Cal.3d 480 (1971).....	9

1	<u>Redevelopment Agency of City of Chula Vista v. Rados Bros.</u>	
2	95 Cal. App. 4th 309 (2001).....	10
3	<u>Uzyel v. Kadisha</u>	
4	188 Cal.App.4th 866 (2010).....	12
5	<b><u>FEDERAL STATUTES AND REGULATIONS</u></b>	
6	25 C.F.R. pt. 2 .....	4
7	25 C.F.R. § 2.6(b).....	6
8	25 C.F.R. § 2.20(c)(2) .....	6
9	5 U.S.C. § 704 .....	6
10	5 U.S.C. § 705 .....	7
11	25 U.S.C. § 2 .....	4
12	25 U.S.C. § 450 <i>et seq.</i> .....	4
13	<b><u>STATE STATUTES</u></b>	
14	Cal. Bus. & Prof Code § 19811 .....	2, 14
15	Cal. Gov. Code § 12012.75 .....	11
16	Cal. Gov. Code § 12012.95(e)(2) .....	11
17	Cal. Prob. Code § 16006 .....	12
18	Cal. Pro. Code §§ 16400, 16440 .....	12
19	Code Civ. Proc. § 437c(a), (c).....	9
20	Code of Civil Procedure § 526(a)(7) .....	16
21	Code of Civil Procedure § 1085 .....	2, 9
22	Code of Civil Procedure § 1086 .....	12
23	<b><u>OTHER AUTHORITIES</u></b>	
24	<u>California Valley Miwok Tribe v. Central California Superintendent</u>	
25	47 IBIA 91 (2008) .....	5
26	<u>Yakama Nation v. Northwest Regional Director Bureau of Indian Affairs</u>	
27	47 IBIA 117 (2008) .....	6
28		

1 **I. INTRODUCTION**

2 Plaintiff contends that the California Gambling Control Commission ("Commission") has  
3 a ministerial duty to pay Indian Gaming Revenue Sharing Trust Fund ("RSTF") money, currently  
4 held in trust for the California Valley Miwok Tribe ("Tribe"), to Silvia Burley. Plaintiff asks the  
5 Court to compel the immediate performance of that duty by issuing a writ of mandamus. Because  
6 the Commission has no such duty, the Commission and Intervenor are entitled to judgment as a  
7 matter of law, and the Court should enter summary judgment against Plaintiff.

8 All parties agree that the Commission has a duty to pay RSTF money to the Tribe.  
9 Plaintiff's First Amended Complaint (Ex. 1, "FAC") asks the Court to equate "the Tribe" with  
10 Silvia Burley, but the truth is that Intervenor and Plaintiff disagree one hundred percent about  
11 who is entitled to membership in the Tribe and who is authorized to represent the Tribe. The only  
12 independent arbiter empowered to resolve that dispute—the federal Bureau of Indian Affairs  
13 ("BIA")—currently does not acknowledge any Tribal government, pending the outcome of  
14 ongoing federal litigation.

15 As the trustee of the RSTF, the Commission has a fiduciary obligation to ensure the  
16 Tribe's RSTF money goes only to an authorized official of the Tribe. No provision of state law,  
17 or of the tribal-state compacts that provide for distribution of RSTF money, provides any guidance  
18 as to how the Commission should fulfill that obligation when an unresolved dispute exists as to  
19 who rightfully represents a tribe. The Commission, unable to decide Tribal disputes on its own  
20 authority, has reasonably decided that the best way to fulfill its fiduciary duty is to await the BIA's  
21 acknowledgment of a valid Tribal government. In the interim, the Commission has placed the  
22 Tribe's RSTF money in an escrow account, which now contains more than \$9 million. Because  
23 the Commission's actions fulfill its fiduciary duty to safeguard the Tribe's funds, while abstaining  
24 from unauthorized intrusion into Tribal sovereignty, the Commission's decision is not arbitrary,  
25 capricious or an abuse of discretion. Therefore, Plaintiff's challenge to the Commission's decision  
26 must fail.

## II. FACTS

### A. Plaintiff's First Amended Complaint

Plaintiff, through Silvia Burley, filed its FAC in the name of the Tribe on July 28, 2008. At that time, there was, and there still is, an ongoing dispute over the membership and government of the Tribe, as detailed in section II.C below. The FAC alleges three causes of action against the Commission: a claim for injunctive relief, a claim for declaratory relief, and a claim for ordinary mandamus under Code of Civil Procedure section 1085. All three causes of action seek the same thing: an order requiring the Commission to immediately disburse millions of dollars of RSTF money, currently held in trust for the Tribe, "in care of [Silvia] Burley." (FAC, ¶¶ 30, 36, 44.)

### B. Commission's Role and Duties

The California Legislature created the Commission in 1997 under the Gambling Control Act, Business & Professions Code § 19800 *et seq.* The Commission has jurisdiction over "all persons or things having to do with the operations of gambling establishments" in California. Cal. Bus. & Prof Code § 19811. It is governed by five members who are appointed by the Governor and confirmed by the State Senate. *Id.*

In 1999, California entered into a Tribal-State Gaming Compact (Ex. 2, "Compact") with various Indian tribes authorized to conduct gaming in California. (FAC, ¶ 5.) *See Cates v. Chiang*, 154 Cal.App.4th 1302, 1305 (2007). Under the Compact, gaming tribes contribute a portion of their earnings to the RSTF, which is shared with "Non-Compact" tribes. (FAC, ¶ 6.) *California Valley Miwok Tribe v. California Gambling Control Commission*, 2010 WL 1511744, \*2 (4th Dist. 2010) (unpublished) ("*Miwok III*"). A Non-Compact tribe is a federally recognized Indian tribe in California that operates fewer than 350 gaming devices. (Compact § 4.3.2(a)(i).) *Miwok III* at \*2. Each eligible Non-Compact tribe is entitled to \$1.1 million per year. (FAC, ¶ 6; Compact § 4.3.2.1.) *Miwok III* at \*2.

The Commission serves as the trustee of the RSTF. (FAC, ¶¶ 6, 22, 29, 34; Compact § 4.3.2.1(b).) *Miwok III* at \*3. As a trustee, the Commission owes a fiduciary duty to the Non-Compact tribes. (FAC, ¶¶ 6, 25, 30, 34.) *See Miwok III* at \*9-10. The Tribe is a Non-Compact tribe. (FAC 6-7.) *Miwok III* at \*2.



1 **C. The Ongoing Dispute Over the Membership and Governance of the Tribe**

2 Plaintiff contends that the Tribe includes just four adult members:<sup>1</sup> Silvia Burley, her two  
3 daughters Rashel Reznor and Anjelica Paulk, and Intervenor Yakima Dixie. (Ex. 3, Burley  
4 Declaration at ¶ 3.) Plaintiff contends that the Tribe is governed by a “General Council” that was  
5 established by Tribal resolution in 1998. (FAC, ¶ 8; Ex. 3, Burley Declaration at ¶ 3.) Plaintiff  
6 contends that Silvia Burley is the “selected spokesperson” for the tribe. (FAC, ¶¶ 8-9, Verification  
7 at p. 14 of FAC.)

8 Intervenor contend that the Tribe consists of more than 200 adult members, and their  
9 children. (WhiteBear Decl., ¶ 3.) Intervenor contend that the Tribe is governed by a tribal  
10 council consisting of seven members, including the individual Intervenor in this case.  
11 (WhiteBear Decl., ¶ 4.) Intervenor do not recognize Silvia Burley as any kind of Tribal official,  
12 Tribal representative or member of the Tribal government. (WhiteBear Decl., ¶ 8; Complaint in  
13 Intervention, ¶¶ 4, 8, 13, 15, 22.)

14 In 2005, the dispute over the membership and governance of the Tribe led the federal  
15 government, acting through the BIA, to refuse acknowledgment of any Tribal government until  
16 the dispute was resolved with the participation of the entire Tribal community. It also has  
17 triggered federal litigation over the BIA’s obligation to uphold majoritarian values in its dealings  
18 with the Tribe, which litigation continues to this day.

19 **1. The United States Declined to Recognize Plaintiff’s Purported Tribal**  
20 **Government**

21 a. BIA Did Not Recognize Any Tribal Government When Plaintiff Filed the  
22 FAC

23 The United States Secretary of the Interior is charged with managing “all Indian affairs and  
24 [] all matters arising out of Indian relations.” 25 U.S.C. § 2. The Secretary has delegated  
25 authority over Indian relations to the BIA within the Department of the Interior, which is overseen  
26

27 <sup>1</sup> Plaintiff also recognizes Burley’s granddaughter Tristian Wallace as the fifth and final  
28 Tribal member, but she apparently is not yet an adult.



1 by the Assistant Secretary of the Interior – Indian Affairs (“AS-IA”). See generally 25 C.F.R.  
2 Part 2 (BIA regulations).

3 In 1999, the BIA recognized Silvia Burley as the chairperson of an interim Tribal  
4 government.<sup>2</sup> California Valley Miwok Tribe v. USA, 424 F.Supp.2d 197, 198 (D.D.C. 2006)  
5 (“Miwok I”); California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1265 n.6 (D.C. Cir.  
6 2008) (“Miwok II”). But in 2000, 2001 and 2004, the BIA rejected Tribal constitutions submitted  
7 by Burley, on the ground that they did not reflect the “involvement of the whole tribal  
8 community.” Miwok II at 1265. At least as early as February 2005, the AS-IA formally withdrew  
9 any recognition of Ms. Burley’s Tribal government, stating that “the BIA does not recognize any  
10 Tribal government” and that it could not recognize any government that was not formed with the  
11 consent of the whole Tribal community. (Exhibit 4, Feb. 11, 2005 Letter from AS-IA Michael  
12 Olsen to Yakima Dixie, p. 2 (“2005 Decision”).) The BIA reiterated that position in deciding an  
13 administrative appeal in 2007, stating that “in this situation, where the BIA does not recognize a  
14 tribal government,” the BIA would assist the Tribe in identifying its full membership and forming  
15 a valid Tribal government. (Exhibit 5, April 2, 2007 Letter from BIA Regional Director to Silvia  
16 Burley (“2007 Decision”).)

17 As a result of its decision not to acknowledge any Tribal government, the BIA also in 2005  
18 denied funding to Ms. Burley under Public Law 93-638 (“PL-638”), the Indian Self-Determination  
19 and Education Assistance Act, through which the BIA supports recognized tribal governments in  
20 providing services to their members. See 25 U.S.C. § 450 et seq. (Ex. 6, July 19, 2005 Letter  
21 from BIA Awarding Official Janice Whipple-DePina to Silvia Burley.) The BIA stated, “Whereas  
22 there is no recognized tribal government . . . we must take appropriate action to safeguard federal  
23 funds . . .” (Ex. 6, p. 1.) The BIA again denied PL-638 funding to Ms. Burley in December of  
24 2007, stating:

25 Consideration to contract federal funds to operate Bureau of Indian authorized  
26 programs will only be given to an application submitted by [a] federally recognized

27 <sup>2</sup> Intervenor contend that recognition was erroneous, but that is immaterial to the issues  
28 before the Court in light of the BIA’s subsequent repudiation of Ms. Burley’s tribal  
government.

1 tribe with a recognized governing body. The Department of the Interior does not  
2 recognize that the California Valley Miwok Tribe has a governing body. The  
3 District Court for the District of Columbia has upheld that determination, [citing  
Miwok I]. . . . We are hereby returning [your funding] proposal.

4 (Ex. 7, Dec. 14, 2007 Letter from BIA Superintendent Troy Burdick to Silvia Burley.) Ms. Burley  
5 appealed that decision to the Interior Board of Indian Appeals, which denied her appeal and  
6 upheld the BIA's decision. California Valley Miwok Tribe v. Central California Superintendent,  
7 47 IBIA 91 (June 10, 2008).

8 b. The Federal Courts Upheld the BIA's Decision to Reject Plaintiff's Tribal  
9 Government

10 Ms. Burley filed a federal lawsuit in 2005, challenging the BIA's refusal to recognize her  
11 Tribal government. Miwok I at 197. The district court dismissed her complaint in 2006, finding  
12 that the Burley government was not entitled to recognition because it did not "reflect the will of a  
13 majority of the tribal community." Id. at 202. The Court of Appeals for the District of Columbia  
14 Circuit affirmed in 2008, holding that Burley's "antimajoritarian gambit deserves no stamp of  
15 approval from the Secretary." Miwok II at 1267.

16 **2. The AS-IA's Disputed Decisions Regarding the Tribe and the Ongoing Federal**  
17 **Litigation**

18 On December 22, 2010, the AS-IA issued a decision in response to a federal administrative  
19 appeal that Ms. Burley had filed before the Interior Board of Indian Appeals. (Exhibit 8, Dec. 22,  
20 2010 AS-IA letter ("December 22 Decision").) The December 22 Decision recognized a general  
21 council as the governing body of the Tribe, consisting of Silvia Burley, her two daughters, her  
22 granddaughter, and Yakima Dixie. (Exhibit 8.) Relying on the December 22 Decision, Ms.  
23 Burley held a "tribal election" on January 7, 2011, in which she was purportedly elected  
24 chairperson of the Tribe. (Exhibit 9, Dec. 23, 2010 Public Notice .)

25 The local BIA superintendent wrote to Ms. Burley on January 12, 2011, acknowledging  
26 the results of the election. (Exhibit 10, January 12, 2011 Letter from BIA Superintendent Troy  
27 Burdick to Silvia Burley.) Intervenors filed an administrative appeal of that decision with the BIA  
28 on February 9, 2011, which triggered an automatic stay of the decision during the pendency of the

1 appeal. (Exhibit 11.) See 25 C.F.R. §2.6(b); Yakama Nation v. Northwest Regional Director  
2 Bureau of Indian Affairs, 47 IBIA 117, 119 (2008). Because the BIA's Regional Director has  
3 never responded to Intervenor's appeal (Declaration of Robert J. Uram, ¶ 3), the appeal remains  
4 pending, and the Superintendent's decision remains stayed and has no effect. 25 C.F.R. § 2.6(b).<sup>3</sup>

5 Intervenor's filed suit in federal district court for the District of Columbia, challenging the  
6 December 22 Decision. (Uram Decl. ¶ 4.) California Valley Miwok Tribe v. Salazar,  
7 No. 1:11-cv-00160-RWR (Jan. 24, 2011) ("CVMT v. Salazar"). In response, the AS-IA  
8 rescinded the December 22 Decision and announced that he would issue a new decision after  
9 briefing by both parties. (Exhibit 12, April 1, 2011 Letter from AS-IA Larry Echo Hawk.) On  
10 August 31, 2011, the AS-IA issued that new decision (Exhibit 13, Aug. 31, 2011 Letter from Larry  
11 Echo Hawk ("August 31 Decision").)

12 In the August 31 Decision, the AS-IA again found that the Tribe is governed by a general  
13 council consisting of Ms. Burley, her two daughters, her granddaughter and Yakima Dixie.  
14 (Ex. 13, pp.1-2.) However, the AS-IA stayed the implementation of his decision pending  
15 resolution of Intervenor's federal lawsuit. (Ex. 13, pp.1-2.) The August 31 Decision reads in  
16 relevant part:

17 This decision is final for the Department and effective immediately, but  
18 implementation shall be stayed pending resolution of the litigation in the District  
19 Court for the District of Columbia, California Valley Miwok Tribe v. Salazar, C.A.  
20 No. 1:11-cv-00160-RWR (filed 03/16/11).

21 (Ex. 13, p. 8.)

22 The AS-IA's statement that the August 31 Decision is "final for the department and  
23 effective immediately" merely indicates that the Decision is not subject to further appeal or  
24 consideration within the Department and is subject to judicial review under the Administrative  
25 Procedure Act. See 25 C.F.R. §2.20(c)(2) (stating that a decision signed by the AS-IA shall be  
26 "final for the Department and effective immediately" unless the decision provides otherwise;

27 <sup>3</sup> The January 12, 2011 decision also has no effect because the AS-IA has rescinded the  
28 December 22 Decision on which the Superintendent's acknowledgment relied. Liesegang  
v. Secretary of Veterans Affairs, 312 F.3d 1368, 1371-1372 (Fed. Cir. 2002).

1 5 U.S.C. § 704 (making "final agency action . . . subject to judicial review"). However, the AS-  
2 IA's statement that "implementation shall be stayed" has the effect of "suspend[ing] . . . alteration  
3 of the status quo" by holding the decision in abeyance pending further review. Nken v. Holder,  
4 129 S.Ct. 1749, 1754, 1758 (2009) (discussing judicial stay of deportation order).

5 After being informed of Plaintiff's efforts to obtain entry of judgment in this case based on  
6 the stayed August 31 Decision, the AS-IA also stipulated to a joint status report and proposed  
7 order in the federal litigation that confirms the August 31 Decision has "no force and effect" until  
8 the federal litigation is resolved. (Ex. 14, joint status report in CVMT v. Salazar.) The joint status  
9 report states in relevant part:

10 While the August 31, 2011 decision is final for the Department for purpose of judicial  
11 review, the Assistant Secretary stayed the effectiveness of the August 31, 2011 decision  
12 pending resolution of this matter. As a result, **the August 31, 2011 decision will have no  
force and effect until such time as this court renders a decision on the merits of  
plaintiffs' claims or grants a dispositive motion of the Federal Defendants.**

13 (Ex. 14, p. 3; emphasis added.) The AS-IA's decision to voluntarily stay the effect of the August  
14 31 Decision pending judicial review is specifically authorized by statute and is binding on the  
15 BIA, independent of the stay language in the August 31 Decision itself. 5 U.S.C. § 705 ("When  
16 an agency finds that justice so requires, it may postpone the effective date of action taken by it,  
17 pending judicial review"). See also Consol. Grain & Barge v. Archway Fleeting, 712 F.2d 1287,  
18 1289-1290 (8th Cir. 1983) (recognizing binding effect of stipulation between parties in federal  
19 court and finding that district court erred in not giving effect to parties' stipulation) (citations  
20 omitted); Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713, 719 (9th Cir. 1989) (court properly  
21 gave effect to parties' stipulation that plaintiff could file an amended complaint, by dismissing  
22 defendant's appeals which were intended to prevent plaintiff from doing so).

23 The federal court acknowledged that the AS-IA had stayed the effectiveness of his decision  
24 pending resolution of the federal litigation. (Ex. 15, CVMT v. Salazar, Memorandum Opinion and  
25 Order, p. 5.) This Court also recognized that the August 31 Decision was stayed and could not  
26 provide the basis for entry of judgment. (Ex. 16, Tentative Order Denying Plaintiff's Motion for  
27 Entry of Judgment, pp. 1-2.) The Court of Appeal has also recognized that "[t]he implementation  
28

1 of the August 31, 2011 decision was stayed.” California Valley Miwok Tribe v. California  
2 Gambling Control Commission, No. D061811, p. 9 (4th Dist. 2012) (unpublished) (“Miwok IV”).

3 Intervenor subsequently filed an amended complaint in the federal litigation, and Ms.  
4 Burley intervened. (Ex. 17, CVMT v. Salazar, docket report.) Intervenor’s federal suit directly  
5 challenges the AS-IA’s findings regarding the membership and leadership of the Tribe, including  
6 the validity of Ms. Burley’s general council and the governing documents it is based on. (Ex. 18,  
7 CVMT v. Salazar, Plaintiffs’ motion for summary judgment.) Intervenor, Ms. Burley and the  
8 BIA each have filed dispositive motions and await the district court’s ruling. (Ex. 17, CVMT v.  
9 Salazar, docket report.) If the federal court grants Intervenor’s motion for summary judgment, it  
10 will invalidate the August 31 Decision, and the prior BIA decisions denying recognition of any  
11 Tribal government would remain in effect. (Ex. 19, CVMT v. Salazar, Plaintiffs’ First Amended  
12 Complaint.)

13 **D. Commission Decision to Withhold Payment to the Tribe**

14 In 2005, in response to the ongoing Tribal dispute and the BIA’s determination that the  
15 Tribe did not have a recognized Tribal government, the Commission suspended RSTF payments  
16 to the Tribe. The Commission stated that “our trustee status under the Compact demands that we  
17 ensure the RSTF distributions go to the Tribe for the benefit of the Tribe and not merely to an  
18 individual member,” and therefore it could no longer release RSTF money to Ms. Burley. The  
19 Commission informed Ms. Burley and Mr. Dixie that the withheld funds would be forwarded to  
20 the Tribe, with interest, when the BIA acknowledged a Tribal government and reestablished  
21 government-to-government relations with the Tribe. (Ex. 20, August 4, 2005 Letter from  
22 Commission to S. Burley; FAC, ¶¶ 12-16.) The Commission consistently repeated this  
23 explanation in subsequent letters to Plaintiff. (E.g., Ex. 21, June 27, 2006 Letter from  
24 Commission to Silvia Burley; Ex. 22, June 26, 2007 Letter from Commission to Karla Bell; Ex.  
25 23, January 3, 2008 Letter from Commission to Manuel Corrales; FAC, ¶¶ 12-17.) See also  
26 Miwok III at \*2, \*8 (“The Commission contends that because it has a fiduciary duty as trustee of  
27 the RSTF, the current uncertainties regarding the Miwok Tribe’s government and membership  
28



1 require it to withhold the RSTF funds and hold them in trust until it can be assured that the funds,  
2 if released, will be going to the proper parties.”).

3 Because the membership and leadership of the Tribe remain in dispute pending the  
4 outcome of CVMT v. Salazar, the Commission continues to hold the Tribe’s RSTF money in trust  
5 and refuse payment to Plaintiff. For the reasons set forth below, the Commission’s decision is  
6 entirely reasonable and is not arbitrary, capricious or an abuse of discretion.

### 7 **III. ANALYSIS**

#### 8 **A. Standard of Review**

##### 9 **1. Summary Judgment Standard**

10 Summary judgment is appropriate where “all the papers submitted show that there is no  
11 triable issue as to any material fact and that the moving party is entitled to a judgment as a matter  
12 of law.” Code Civ. Proc. § 437c(a), (c); Binder v. Aetna Life Ins. Co., 75 Cal.App.4th 832, 839  
13 (1999). The requirement that there be “no triable issue of material fact” means that summary  
14 judgment may be granted only if the material facts are either conceded or beyond dispute. Id. In  
15 this case, it is beyond dispute that the BIA does not currently recognize a government of the Tribe;  
16 the only issue is whether that represents an adequate legal basis for the Commission to deny  
17 immediate payment of the Tribe’s RSTF money to Plaintiff “in care of Burley.”

##### 18 **2. The Standard for Ordinary Mandamus Is Abuse of Discretion**

19 An ordinary writ of mandate is available to “compel the performance of an act which the  
20 law specifically enjoins, as a duty resulting from an office, trust, or station,” Cal. Code Civ. Proc.  
21 § 1085, “upon the verified petition of the party beneficially interested,” CCP § 1086. Thus, there  
22 are two essential requirements for the issuance of a writ of mandamus: “(1) A clear, present and  
23 usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial  
24 right in the petitioner to the performance of that duty[.]” CA Correctional v. CA Dept. of  
25 Corrections, 96 Cal.App.4th 824, 827 (2002) (emphasis added) (citing People ex rel. Younger v.  
26 County of El Dorado, 5 Cal.3d 480, 490-491 (1971)).

27 In a challenge to agency action under CCP 1085, the petitioner bears the burden of proving  
28 that the challenged decision was arbitrary, capricious, entirely lacking in evidentiary support, or



contrary to required legal procedures. See McGill v. Regents of University of California, 44 Cal. App. 4th 1776, 1786 (1996); Marvin Lieblin, Inc. v. Shewry, 137 Cal. App. 4th 700, 713 (2006). This very deferential standard of review is also characterized as an "abuse of discretion" standard. See Klajic v. Castaic Lake Water Agency, 90 Cal.App.4th 987, 995 (2001). Under this standard, "the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." Klajic, 90 Cal.App.4th at 995. The court can compel the agency to act only where the statute "leaves [no] room for discretion," or where "only one choice can be a reasonable exercise of discretion." CA Correctional, 96 Cal.App.4th at 827. This "very limited" power of judicial review reflects "deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." Redevelopment Agency of City of Chula Vista v. Rados Bros., 95 Cal. App. 4th 309, 316 (2001).

**B. Plaintiff's Claims Must be Dismissed Because the Commission's Decision to Await the BIA's Recognition of a Tribal Government Is Legally Permissible**

**1. All Three of Plaintiff's Causes of Action Depend on the Reasonableness of the Commission's Decision**

The FAC attempts to state three causes of action against the Commission,<sup>4</sup> but all three claims depend on a single issue: whether Plaintiff can show that the Commission's decision to defer payment of RSTF money to the Tribe is arbitrary, capricious or unlawful. See Miwok IV at 5. Therefore, this Court only needs to answer a single question in order to grant Intervenors'

<sup>4</sup> The only proper challenge to the Commission's decision is through a petition for writ of mandamus. Plaintiff's claims for injunctive and declaratory relief against the Commission are improper. See DeCuir v. Los Angeles, 64 Cal.App.4th 75, 81 (1998) ("plaintiff failed to pursue the only form of judicial review available to him: a petition for writ of mandate wherein he could attempt to demonstrate to the court that the defendant county had abused its discretion"); Briggs v. Rolling Hills Estates, 40 Cal.App.4th 637, 645 (1995) (court held that plaintiffs were precluded from suing the city for injunctive relief and damages because they had not pursued administrative mandamus).

1 motion for summary judgment. As the Court of Appeal stated in granting Plaintiff's petition to lift  
2 the stay in this case:

3 [T]he fundamental issue presented to the trial court for resolution on the merits is  
4 whether the current uncertainty in the federal government's relationship with the  
5 Miwok Tribe – including the pendency of the Salazar case – constitutes a legally  
6 sufficient basis for the Commission, as trustee of the RSTF, to withhold the RSTF  
7 funds from the Miwok Tribe.

8 Miwok IV at 17.

9 As the RSTF trustee, the Commission has a fiduciary duty to distribute RSTF money only  
10 to an eligible Non-Compact tribe or its authorized officials. In the absence of a federally  
11 acknowledged Tribal government, the Commission cannot know whether a claimant is properly  
12 authorized to receive the Tribe's RSTF money. Thus, the Commission's decision to defer  
13 payment to the Tribe until the BIA acknowledges a Tribal government is consistent with the  
14 Commission's legal duties and must be upheld.

15 **2. The Commission Has No Mandatory Duty to Pay RSTF Money to Burley**

16 Plaintiff argues that the Commission has a mandatory, non-discretionary duty to pay the  
17 Tribe's RSTF money to Silvia Burley. (FAC, ¶¶ 22, 30.) Plaintiff is mistaken about both the  
18 nature of the Commission's duty and the beneficiary to whom the duty is owed. The  
19 Commission's duty arises under the Government Code—not under the Compact, which Plaintiff  
20 has no right to enforce in this Court. Miwok III at \*8-9. (Compact § 15.1.) The Government  
21 Code provides that “[t]he [Commission] shall make quarterly payments from the [RSTF] to each  
22 eligible recipient Indian tribe within 45 days of the end of each fiscal quarter.” Cal. Gov. Code  
23 § 12012.95(e)(2). The Code also states that money in the RSTF “shall be available to the  
24 [Commission] . . . for the purpose of making distributions to noncompact tribes, in accordance  
25 with distribution plans specified in tribal-state gaming compacts.” Cal. Gov. Code § 12012.75.

26 Although there is nothing in the Compact explicitly called a “distribution plan,” section  
27 12012.75 is reasonably understood as referring to the provisions of the Compact that direct the  
28 Commission to pay \$1.1 million annually to each eligible Non-Compact Tribe, in quarterly  
payments, and to the provisions defining the relevant terms. (See Compact § 4.3.2.1.) The  
Compact defines Non-Compact Tribes as those “federally recognized tribes operating fewer than

350 gaming devices.” (Compact § 4.3.2.1(a).) A “tribe,” in turn, is defined as a “federally-recognized Indian tribe, or an authorized official or agency thereof.” (Compact § 2.21.)

All parties agree that these Code provisions create a statutory duty for the Commission to pay RSTF money to the Non-Compact Tribes, including this Tribe. But they do not, on their face, create a nondiscretionary duty to pay the Tribe’s RSTF money “in care of Burley,” as Plaintiff seeks.<sup>5</sup> (FAC, ¶ 30.) The Compact’s “distribution plan,” likewise, makes no mention of Silvia Burley. Plaintiff’s claims thus depend on its attempt to equate “Silvia Burley” with the “authorized official” of the Tribe. The Commission, however, is not required to accept that claim at face value.

**3. As the RSTF Trustee, the Commission Must Exercise Its Discretion to Ensure that RSTF Money Actually Goes to Eligible Tribes**

The Compact states that the Commission “shall serve as the trustee of the [RSTF],” and that it shall have “no discretion as to the use or disbursement of the [RSTF] funds” other than the authority to disburse the funds on a quarterly basis. (Compact § 4.3.2.1(b).) As a trustee, the Commission has fiduciary duties to beneficiaries of the trust, which include the Tribe. This relationship carries with it an “obligation of the highest good faith,” Brown v. Wells Fargo Bank, 168 Cal.App.4th 938, 961 (2008) (citation omitted), as well as specific duties imposed by statute that include the duty to control and preserve trust property, Hearst v. Ganzi, 145 Cal.App.4th 1195 (2006) (citing Cal. Prob. Code § 16006). See also Manchester Band of Pomo Indians, v. United States, 363 F.Supp. 1238, 1245 (N.D.Cal. 1973) (the conduct of the government as a trustee is measured by the same standards applicable to private trustees) (citing United States v. Mason, 412 U.S. 391, 398 (1973)). Violation of these fiduciary duties would be a breach of trust, and would make the Commission liable for any resulting loss in the value of the trust property. Uzyel v. Kadisha, 188 Cal.App.4th 866, 888-889 (2010) (citing Prob. Code §§ 16400, 16440). Specifically, it would be a fraud upon the Tribe, as a beneficiary, for the Commission to fail to

<sup>5</sup> Put another way, the Commission has a duty to pay RSTF money to the Tribe, but it is far from clear that Plaintiff is the party with the “clear, present and beneficial right . . . to the performance of that duty.” CCP § 1086.

1 protect the Tribe's interests by releasing RSTF funds to someone other than the Tribe's authorized  
2 official or agency. See Dougherty v. Cal. Kettleman Oil R., Inc., 13 Cal.2d 174 (1939).

3 A large body of case law confirms the application of these fiduciary duties where the  
4 government provides benefits to Indian tribes. As the federal Court of Appeals said in a case  
5 rejecting Burley's claim to federal recognition, the government's obligations include "ensuring  
6 that the will of tribal members is not thwarted by rogue leaders when it comes to decisions  
7 affecting federal benefits." Miwok II at 1267 (citing Seminole Nation v. United States, 316 U.S.  
8 286, 297 (1942)). The Court of Appeals stated:

9 Payment of funds at the request of a tribal council which, to the knowledge of the  
10 Government officers charged with the administration of Indian affairs . . . , was  
11 composed of representatives faithless to their own people and without integrity  
12 would be a clear breach of the Government's fiduciary obligation.

13 Id. (quotation marks and citation omitted). Although these cases involved the federal  
14 government's relations with Indian tribes, the Commission also serves as a trustee to federally  
15 recognized tribes and has the same obligations in disbursing state benefits to tribes.

16 Nothing in the Code or the Compact explains how the Commission is to identify an  
17 "authorized official or agency" of a Non-Compact Tribe for purposes of making RSTF payments.  
18 This necessarily leaves some room for the Commission to exercise its discretion in making RSTF  
19 distributions, especially when a legitimate dispute exists as to the identity of a Tribe's authorized  
20 officials. For purposes of a mandamus action, "[t]he scope of discretion always resides in the  
21 particular law being applied, i.e., in the legal principles governing the subject of [the] action. . . ."  
22 City of Sacramento v. Drew, 207 Cal.App.3d 1287 (1989) (quotation marks and citation omitted).

23 In this case, the legal principles that govern the Commission's distribution of RSTF money are its  
24 fiduciary duties as a trustee. (Compact § 4.3.2.1(b).) In light of those duties, the statement in the  
25 Compact that the Commission "shall have no discretion as to the use or disbursement of the  
26 [RSTF] funds" must be read as a statement that the Commission can only use the funds for  
27 disbursements to eligible tribes, and that it cannot alter the timing or amount of disbursements  
28 specified in the Compact. It cannot reasonably be read as a statement that the Commission must

1 pay the funds to any party that claims to represent the Tribe, regardless of the veracity of that  
2 claim.

3       **4. The Commission's Exercise of Its Discretion Is Not Arbitrary, Capricious or**  
4       **an Abuse of Discretion**

5       Outside of a tribe itself, the United States government acting through the BIA has the  
6 exclusive authority to acknowledge a tribal government, and those decisions are subject to review  
7 only in the federal courts. See, e.g., Wheeler v. U.S. Dep't of the Interior, 811 F.2d 549, 552 (10th  
8 Cir. 1987) ("since the Department is sometimes required to interact with tribal governments, it  
9 may need to determine which tribal government to recognize"); Ransom v. Babbitt, 69 F.Supp.2d  
10 141, 151 (D.D.C. 1999) (BIA acted arbitrarily and capriciously by recognizing a tribal government  
11 based on a constitution it should have realized was not validly adopted); Seminole Nation v.  
12 Norton, 223 F.Supp.2d 122, 138-140 (D.D.C. 2002) (DOI upheld its trust obligation by refusing to  
13 recognize tribal government based on tribal elections from which members were excluded).

14       Neither the Commission nor the state courts have jurisdiction to resolve a tribal dispute or  
15 to decide who is an authorized tribal official. See Ackerman v. Edwards, 121 Cal.App.4th 946,  
16 954 (2004); Lamere v. Superior Court, 131 Cal.App.4th 1059, 1067 (2005). The Commission also  
17 has no expertise in the area of tribal membership or governance; it was created to oversee casino  
18 gambling, not to make determinations about the makeup of Indian tribes. Cal. Bus. & Prof Code  
19 § 19811. In light of those limitations, the Commission has chosen to rely on the BIA's  
20 determinations in deciding whether a claimant is an "authorized official" of a tribe for purposes of  
21 disbursing RSTF money. (See Ex. 20, Aug 2005 Commission letter to Burley.) This is a  
22 reasonable exercise of discretion that allows the Commission to fulfill its fiduciary duties as the  
23 RSTF trustee while acting within its authority and respecting tribal sovereignty.

24       Here, in deciding to suspend payment of the Tribe's RSTF money to Burley, the  
25 Commission explicitly relied on the BIA's decision to withdraw acknowledgement of any Tribal  
26 government due to an ongoing Tribal dispute. (Ex. 20, Aug 2005 Commission letter to Burley;  
27 Ex. 4, 2005 Decision.) As a trustee, the Commission had a duty to act on that information,  
28 because it called into question whether payments of RSTF money to Burley would actually go to



1 the Tribe. In continuing to withhold the RSTF funds, the Commission has relied on a number of  
2 other BIA determinations including: (1) the BIA's decisions to deny funding to the Tribe under  
3 PL-638 (Ex. 6, July 19, 2005 Letter from BIA Awarding Official Janice Whipple-DePina to Silvia  
4 Burley; Ex. 7, Dec. 14, 2007 Letter from BIA Superintendent Troy Burdick to Silvia Burley), (2)  
5 the BIA's resolution of an administrative appeal, confirming that the BIA does not recognize  
6 Burley's Tribal government (Ex. 5, April 2007 BIA Regional Director Decision), (3) letters from  
7 the BIA to the Commission in 2008 and 2009 confirming that the Tribe has "no government" (Ex.  
8 24, Dec. 12, 2008 Letter from Solicitor of the Interior to Cal. Atty Gen.; Ex. 25, Jan. 14, 2009  
9 Letter from Solicitor of the Interior to Cal. Atty Gen.), and (4) two federal court opinions  
10 affirming the BIA's determination that the Tribe can only establish a valid government through the  
11 participation and consent of the entire Tribal community, Miwok I; Miwok II.

12 The Commission's decision is reasonable under the circumstances. If this Court were to  
13 find otherwise, and order immediate disbursement of the Tribe's RSTF money, it would be forced  
14 to specify to whom the money should be paid, without waiting for the BIA to acknowledge a  
15 Tribal government. The Court lacks the jurisdiction to make that determination. Ackerman, 121  
16 Cal.App.4th 946; Lamere, 131 Cal.App.4th 1059. In 2005, after suspending RSTF payments to the  
17 Tribe, the Commission filed an interpleader action in state court, asking the court to determine to  
18 whom the Commission should release the Tribe's RSTF money. (Ex. 26, Complaint.) Silvia  
19 Burley successfully opposed that action, arguing that neither the court nor the Commission had  
20 any authority to determine the proper representative of the Tribe for purposes of RSTF  
21 distribution. (Ex. 27, Burley Demurrer; Ex. 28, Order sustaining demurrer.) Burley's argument  
22 was correct then, and it is correct now. It necessarily follows that the Commission's decision to  
23 await acknowledgment of a Tribal government by the BIA is not arbitrary, capricious or an abuse  
24 of discretion, and Plaintiff is not entitled to a writ of mandamus.

25 **5. Plaintiff's Claims for Injunctive and Declaratory Relief Are Derivative of Her**  
26 **Claim for Mandamus and Must Fail**

27 For the same reason that a writ of mandamus may not issue, Plaintiff's claims for  
28 declaratory and injunctive relief must fail, even if those claims were proper against the



Commission (see note 4, supra). “A declaratory judgment merely declares the legal relationship between the parties.” Gilb v. Chiang, 186 Cal.App.4th 444 (2010). Here, Plaintiff seeks a declaration that the Commission has no discretion to withhold payment of the Tribe’s RSTF money from Plaintiff, and that Plaintiff is entitled to immediate payment of the Tribe’s RSTF money. (FAC, ¶¶ 35-36.) As explained above, both those arguments are incorrect as a matter of law because the Commission’s withholding of RSTF payment is a reasonable exercise of its discretion as the trustee of the RSTF, and Plaintiff has no right to the Tribe’s RSTF money in the absence of a federally recognized Tribal government.

Plaintiff also seeks an injunction compelling the Commission to pay the Tribe’s RSTF money “in care of Burley.” (FAC, ¶ 30.) Plaintiff alleges that injunctive relief is authorized by Code of Civil Procedure section 526(a)(7), which allows relief “[w]here the obligation arises from a trust.” (FAC, ¶ 29.) Because the Commission has no present “obligation” to pay the RSTF money to Burley, Plaintiff cannot obtain the relief it seeks. Moreover, an injunction cannot be granted to “prevent the exercise of a public or private office, in a lawful manner, by the person in possession.” CCP § 526(b)(6). Because the Commission’s withholding of the Tribe’s RSTF money from Plaintiff is a lawful exercise of its duties, injunctive relief is not available. More generally, “[a] permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate.” Art Movers, Inc. v. NI West, Inc., 3 Cal.App.4th 640, 646 (1992). In this case Plaintiff simply cannot show that the Commission committed a wrongful act by refusing to pay the Tribe’s RSTF money “in care of Burley,” and therefore Plaintiff is not entitled to relief.

#### IV. CONCLUSION

The Commission’s decision to withhold distribution of the Tribe’s RSTF money until the BIA acknowledges a Tribal government is not arbitrary, capricious or an abuse of discretion. It represents a reasonable exercise of the Commission’s inherent discretion as the trustee of the RSTF to ensure that RSTF money is paid only to a Non-Compact Tribe or an authorized official or agency thereof. It is beyond dispute that the BIA does not currently acknowledge any Tribal government, including Plaintiff’s purported government. Therefore,

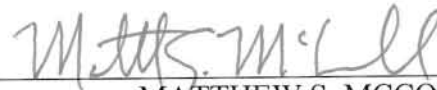
1 Plaintiff is not entitled to a writ of mandamus ordering the Commission immediately to pay the  
2 Tribe's RSTF money "in care of Burley." Nor is Plaintiff entitled to declaratory or injunctive  
3 relief.

4 For the reasons set forth above, Intervenor request that the Court grant  
5 Intervenor's motion for summary judgment, or in the alternative summary adjudication.

6  
7 Dated: March 6, 2013

8 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

9  
10 By



MATTHEW S. MCCONNELL

11 Attorneys for INTERVENORS  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28