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CALIFORNIA VALLEY MIWOK TRIBE

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

CALIFORNIA VALLEY MIWOK TRIBE

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

Plaintiff,

vs.

**CALIFORNIA GAMBLING CONTROL
COMMISSION,**

Defendant.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
SUMMARY JUDGMENT MOTION BY
DEFENDANT CALIFORNIA GAMBLING
CONTROL COMMISSION**

Date: April 26, 2013

Time: 2:00 p.m.

Dept: 62

Judge: Hon. Ronald Styn

Trial Date: May 13, 2011

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1
2 Plaintiff CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or
3 "Miwok Tribe" or "Plaintiff") submits the following
4 Memorandum of Points and Authorities in Opposition to the
5 Summary Judgment filed by Defendant CALIFORNIA GAMBLING
6 CONTROL COMMISSIONN ("the Commission").

7 I.

8 **INTRODUCTION**

9 The Court of Appeal granted Plaintiff California Valley
10 Miwok Tribe's ("Miwok Tribe") petition for a writ of
11 mandate directing the trial court to lift its stay of these
12 proceedings, so as to allow the parties to file dispositive
13 motions and, if necessary, proceed to trial.

14 The trial court previously granted the Plaintiff's
15 motion for judgment on the pleadings against the California
16 Gambling Control Commission ("the Commission") which was
17 based exclusively on a December 22, 2010 decision from the
18 Assistant Secretary of Interior ("ASI"), which concluded
19 that the Miwok Tribe is a federally-recognized tribe
20 consisting of five members with a recognized governing body
21 established under a 1998 Tribal Resolution. The ASI
22 further ruled that the U.S. Bureau of Indian Affairs
23 ("BIA") could not require the Tribe to expand its
24 membership against its will.

25 Prior to entry of judgment on that order, the ASI set
26 aside its decision to allow for further briefing on the
27 issues, which caused the trial court in this case to hold
28

1 off on entering judgment. When the ASI issued its final
2 decision on August 31, 2011, affirming its December 22,
3 2010, decision, this court stayed all further proceedings
4 in this case, except for discovery, pending resolution of a
5 challenge to the ASI's August 31, 2011 decision by the
6 Intervenor in this case, Yakima Dixie ("Dixie") and his
7 followers.

8 In granting the Plaintiff's petition, the Court of
9 Appeal ordered that the trial court need only *acknowledge*
10 that the federal dispute is ongoing, but is to decide
11 independently whether the Commission is justified in
12 withholding the subject Revenue Sharing Trust Fund ("RSTF")
13 payments from the Miwok Tribe for all of the reasons stated
14 by the Commission, which includes: (1) There is a Tribal
15 leadership dispute calling into question who is authorized
16 to receive the RSTF for the Tribe; (2) The Tribe's
17 governing body is not recognized by the BIA for purposes of
18 receiving federal contract funding; (3) The Tribe's
19 membership does not consist of Indians in the surrounding
20 area; (4) The Tribe must first qualify for federal contract
21 funding to be eligible to receive RSTF payments; and (4)
22 the Tribe must wait until the pending federal litigation is
23 concluded. Undisputed facts establish that the Commission
24 has no legal basis to continue to withhold the subject RSTF
25 money from the Tribe. This is based on the recent
26 deposition testimony of Dixie admitting that he resigned
27 from the Tribe in 1999 and that he acknowledged Burley as
28

1 the Tribal leader, as well as the language of the 1999
2 tribal-state gaming compacts ("Compacts") limiting the
3 Commission's discretion on RSTF distributions to Non-
4 Compact tribes. Dixie's deposition testimony that he
5 resigned nullifies his challenge to Burley as the Tribal
6 leader.

7 Contrary to the Commission's contention, the Tribal
8 Council under Burley's leadership is in fact currently
9 recognized by the federal government. The ASI's August 31,
10 2011 decision is analogous to a judgment for declaratory
11 and injunctive relief. To this end the implementing stay
12 language only applies to the injunctive relief portion of
13 the decision directing the BIA to refrain from further
14 efforts to reorganize the Tribe against its wishes. It
15 does not apply to the declaratory relief portion of the
16 decision declaring that the Tribal Council is currently
17 recognized, and that the Tribe consists of only five
18 members.

19 II.

20 ARGUMENT

21 A. **THE TRIBAL COUNCIL UNDER BURLEY'S LEADERSHIP IS IN FACT** 22 **CURRENTLY RECOGNIZED**

23 The thrust of the Commission's argument against an
24 order releasing the RSTF money to the Tribe under Burley's
25 leadership is that the BIA does not currently acknowledge
26 any Tribal government until the pending federal litigation
27 challenging the ASI's August 31, 2011 decision is
28

1 concluded. This contention is without merit and
2 misleading.

3 The premise of this argument is based on the erroneous
4 interpretation of the implementing stay language of the
5 ASI's August 31, 2011 decision, which was to merely stay
6 the implementation of that decision, not to void the
7 effective nature of the decision itself, especially with
8 respect to the decision's declaration of rights that the
9 Tribal Council is currently recognized.

10 Immediately after stating that "implementation" of his
11 decision was "stayed" pending resolution of the federal
12 litigation, the ASI in his August 31, 2011 decision
13 requested that the parties, i.e., Burley and Dixie, attempt
14 to resolve their long-standing Tribal leadership dispute
15 within the Tribe's "existing government structure." He
16 stated:

17 "Finally, I strongly encourage the parties to work
18 within the Tribe's existing government structure to
19 resolve this longstanding dispute and bring this
contentious period in the tribe's history to a
close." (Emphasis added).

20 (pRJN, Ex. "3", page 8). Obviously, the parties cannot do
21 this, if the implementing stay language is erroneously
22 interpreted to mean that the Tribe has no present,
23 recognized governing body. Had the ASI intended that his
24 decision be completely ineffective pending the resolution
25 of the federal case, he would have either left this
26 language out or modified it by saying that in light of his
27 implementing stay, the Tribe has no governing body, and
28

1 therefore, once the federal litigation is concluded the
2 parties can resume to work out their Tribal leadership
3 dispute within the Tribe's governing body. But he did not
4 say that. Clearly, the ASI concluded that despite the
5 implementing stay language in his decision, the Tribe still
6 had an "existing government structure" to which they can
7 resort to address internal Tribal matters.

8 Significantly, this key provision comes immediately
9 after the ASI's implementing stay paragraph, and is the
10 last provision of the decision, thus emphasizing the fact
11 that the Tribe continues to have a recognized governing
12 body despite the fact that implementation of the decision
13 with respect to any BIA actions is stayed.

14 This language also cuts against the Intervenor's (and
15 Commission's) argument that because the ASI's decision
16 applies "prospectively," the prior erroneous BIA actions
17 against the Tribe have somehow been "resurrected,"
18 including the prior erroneous statements that the Tribe has
19 no recognized governing body and no recognized leader.
20 This statement further supports the Tribe's position that
21 the phrase "implementation shall be stayed" only means that
22 the decision cannot be carried out by the BIA to, for
23 example, award federal contract funding to the Tribe, or
24 take any other actions by the BIA toward the Tribe's
25 benefit. **It does not, and from this statement cannot mean,**
26 **that the ASI's substantive decision with respect to a**
27 **"declaration of rights" is of "no force and effect."**
28 Clearly, the ASI has stated ("declared") here that the

1 Tribe's "existing government structure," i.e., the
2 resolution form of government established under Resolution
3 #GC-98-01, must continue to be recognized and function for
4 purposes of resolving internal Tribal matters despite the
5 pending federal litigation brought by Dixie.

6 This key provision also explains the following ruling
7 in the ASI's August 31, 2011 decision, repeated several
8 times throughout his decision:

9 "...The five acknowledged citizens are the only current
10 citizens of the Tribe, and the Tribe's General
11 Council is authorized to exercise the Tribe's
12 governmental authority. In this case, again, the
13 factual record is clear: there are only five citizens
14 of CVMT. The Federal government is under no duty or
15 obligation to 'potential citizens' of the CVMT.

16 **Those potential citizens, if they so desire, should**
17 **take up their cause with the CVMT general Council**
18 **directly.**" (Emphasis added).

19 (pRJN, Ex. "3", page 7). Thus, because the ASI's
20 implementing stay does not affect the existing governing
21 body of the Tribe, the individual Intervenor, as well as
22 any other "potential" citizens, can apply for tribal
23 membership with the currently recognized Tribal Council,
24 without having to wait for the resolution of the pending
25 federal action. This is because, as recognized by this
26 Court in its prior decision, "[a]n Indian tribe has the
27 power to define membership as it chooses, subject to the
28 plenary power of Congress." (Bates 0197, page 8, footnote
9 of the Opinion, citing Williams v. Gover (9th Cir. 2007)
490 F.3d 785, 789. That is not to say that the Tribe will

1 accept them as members, since that decision is the Tribe's
2 alone to make. Williams v. Gover, supra.

3 In fact, the federal District Court has acknowledged
4 that the Tribe is currently recognized despite the
5 Intervenor's' present challenge to the ASI's August 31, 2011
6 decision in federal court. In granting the Tribe's motion
7 to intervene in that federal action, the U.S. District
8 Court stated:

9 "Third, plaintiffs' [Dixie's group] 'threaten[s] to
10 impair,' (citation omitted) the proposed intervenor's
11 legally protected interest because resolution of the
12 matter in the plaintiffs' favor would directly
13 interfere with **the governance of the Tribe as currently**
14 **recognized** and preclude access to federal funds."
15 (Emphasis added)

16 (Intervenors' Ex. "15", page 10).

17 If the Intervenor's' (and the Commission's)
18 interpretation concerning the meaning of the phrase
19 "implementation shall be stayed" in the ASI's August 31,
20 2011 decision were to be accepted, then the BIA would have
21 resumed its efforts to organize the Tribe against the
22 Tribe's will. The BIA had previously published notice in a
23 newspaper of a general council meeting to be sponsored by
24 the BIA, and sought to initiate the "reorganization" of the
25 Tribe itself. (Page 3 of December 22, 2010 ASI letter). In
26 response, the August 31, 2011 decision expressly stated:

27 "Accordingly, unless asked by the CVMT General Council,
28 **the Department will make no further efforts to assist**
the Tribe to organize and define its citizenship. I
accept the Resolution #GC-98-01 as the interim
governing document of the Tribe, and as the basis for

1 resuming government-to-government relations between the
2 United State and the Tribe." (Emphasis added).

3 (pRJN, Ex. "3", page 7). The fact that the BIA has not
4 resumed its efforts to reorganize the tribe against the
5 Tribe's will confirms that the BIA itself respects and is
6 abiding by the August 31, 2011 decision. If in fact the
7 implementing stay language means that the decision has no
8 force and effect, and that the prior BIA decisions stating
9 that the Tribe has no recognized government have been
10 reinstated as the Intervenor and the Commission argue,
11 then the BIA would have resumed its efforts to reorganize
12 the Tribe, as if the ASI's August 31, 2011 decision did not
13 exist. Clearly, the BIA has not done so, because the
14 August 31, 2011 decision prohibits it from doing so. Thus,
15 the only kind of things the implementing stay language
16 prohibits the BIA from doing is conduct that amount to
17 carrying out the decision's terms, as, for example, in
18 taking steps to enter into contracts with the Tribe for 638
19 federal contract funding. Resuming its efforts in
20 reorganizing the Tribe would not be implementing the
21 decision, because nowhere in the decision does it provide
22 that the BIA is permitted to do so.

23 The same would be true with the ASI's "declaration of
24 rights" that the Tribal Council under Burley's leadership
25 is recognized. While the implementation of that
26 declaratory ruling has been stayed, that declaration of
27 rights is still valid and effective.

1 **B. THE ASSISTANT SECRETARY OF THE INTERIOR NEVER**
2 **"STIPULATED" TO CHANGE THE STAY LANGUAGE OF HIS**
3 **DECISION**

4 Contrary to the Intervenor's assertion (a point
5 apparently adopted by the Commission), there is no evidence
6 that the ASI ever stipulated that his August 31, 2011
7 decision would have "no force and effect" in a joint status
8 report filed in the federal action before the Tribe was
9 allowed to intervene. (Intervenor's P/As, page 7).
10 Nowhere in this joint status report do the words
11 "stipulate," "stipulation," or "agree" appear. In fact,
12 the federal court never adopted the language "of no force
13 and effect" in any order he signed. The "proposed order"
14 the Intervenor's point to was never signed. Instead, the
15 federal court simply issued a minute order on September 9,
16 2011, directing the parties to propose a schedule, but said
17 nothing about the ASI's decision having "no force and
18 effect."

18 Indeed, a joint status report is not a stipulation.

19 **C. THE TERM "STAYING IMPLEMENTATION" IN THE ASI'S**
20 **AUGUST 31, 2011 DECISION IS MERELY ANALOGOUS TO**
21 **"STAYING EXECUTION" OF A JUDGMENT OR ORDER**

22 Because the Commission can do nothing to "implement"
23 the ASI's August 31, 2011 decision, releasing the RSTF
24 money to the Tribe, or an order directing the Commission to
25 do so, cannot be viewed as implementing that decision.
26 This is because the Commission is not subject to the
27 jurisdiction of the BIA, DOI or the ASI with respect to the
28 RSTF money, and there is nothing in the August 31, 2011

1 decision that ruled on the Commission's actions in
2 withholding the Tribe's RSTF money.

3 Staying implementation of the August 31, 2011 decision
4 is analogous to staying execution of a judgment after it is
5 rendered. The stay of execution does not render the
6 judgment or order void, or "of no force and effect." It
7 merely means the judgment creditor cannot enforce it (i.e.,
8 implement it) and collect on it by garnishing a judgment
9 debtor's wages, bank accounts, etc. For the same reason,
10 staying implementation of the August 31, 2011 decision does
11 not render the decision of "no force and effect." It only
12 means that the persons and entities whom are subject to the
13 jurisdiction of the BIA and DOI cannot make decisions or
14 take actions in accordance with that decision, i.e., put
15 the decision into effect. And since the Commission is not
16 subject to the jurisdiction of the BIA or DOI, it can do
17 nothing to implement that decision in any way. The
18 Commission does not award tribes federal grants.

19 **D. THE ASI'S AUGUST 31, 2011 DECISION IS ANALOGOUS TO A**
20 **JUDICIAL DECISION FOR A DECLARATION OF RIGHTS AND**
21 **INJUNCTIVE RELIEF**

22 Significantly, the ASI's August 31, 2011 decision made
23 certain rulings analogous to a declaration of rights and
24 injunctive relief. He declared the Tribe's existing Tribal
25 Council to be one the DOI would recognize and that Tribal
26 membership was only five in number. Analogous to
27 injunctive relief, he directed the BIA to refrain from
28 attempting to "reorganize" the Tribe against the Tribe's
wishes. Thus, analogous to a stay of execution of a

1 judgment containing separate declaratory and injunctive
2 relief, the implementing stay language in the ASI's
3 decision only affects the "injunctive relief" portion of
4 that decision. It can have no effect on the "declaration"
5 that the Tribe's governing body is currently recognized.

6 **E. THE UNDISPUTED FACTS SHOW THAT THE COMMISSION HAS NO**
7 **LEGAL BASIS TO CONTINUE TO WITHHOLD THE TRIBE'S RSTF**
8 **PAYMENTS**

9 **1. The undisputed facts show that the Tribe is**
10 **entitled to receive the subject RSTF money now.**

11 The undisputed facts relative to the Tribe's
12 entitlement to the RSTF money and the Commission's wrongful
13 withholding of those funds are as follows:

14 1. Plaintiff Miwok Tribe is a federally-recognized
15 tribe. (Para 8 FAC, as verified by Silvia Burley).

16 2. Under the Compacts, Non-Compact tribes are
17 entitled to receive \$1.1 million a year paid on a quarterly
18 basis. These payments are from license fees paid to the
19 Commission by Compact tribes for distribution to qualifying
20 Non-Compact tribes. However, the only requirement for
21 eligibility for receipt of RSTF payments is that the Non-
22 Compact tribe be a federally-recognized tribe and operate
23 less than 350 gaming devices. (pRJN, Ex. "5", §4.3.2 of
24 Compacts)

25 3. Plaintiff Miwok Tribe is a Non-Compact tribe under
26 the Compacts. It operates no gaming devices. (Undisputed)

27 4. While not a requirement, Plaintiff Miwok Tribe
28 operates under a resolution form of government which was

1 established tribal Resolution No. GC-98-01. (pRJN, Ex. "3",
2 page 2)

3 5. In 2005, the Commission suspended its quarterly
4 payments to the Miwok Tribe and decided to hold the funds
5 indefinitely for later distribution, citing "the lack of a
6 recognized tribal government or leadership," and because
7 the Miwok Tribe is not "organized" under the Indian
8 Reorganization Act of 1934 ("IRA"). The Commission further
9 pointed to a Tribal leadership dispute between Burley and
10 Dixie, where Dixie claimed he, not Burley, is the rightful
11 Tribal leader. (pRJN, Ex. "6").

12 6. The Commission has explained that "in situations
13 involving tribal leadership disputes," it takes its lead"
14 from the BIA, and because the BIA has suspended the Miwok
15 Tribe's federal contract funding, the Commission has
16 decided to do likewise with respect to the Tribe's RSTF
17 payments. (pRJN, Ex. "6" and "7").

18 7. These reasons are not supported by the language of
19 the Compacts and are contrary to the express provisions in
20 the Compacts limiting the Commission's discretion to
21 serving as a mere depository of the RSTF.

22 (\$4.3.2.1(b)) ("no discretion with respect to the use or
23 disbursement of the trust funds"). (pRJN, Ex. "5").

24 8. Because the Commission has been withholding the
25 Miwok Tribe's RSTF payments since 2005, it is not in
26 compliance with Gov. Code § 12012.90(e)(2) directing that
27 the Commission "make quarterly payment...to each eligible
28 recipient Indian Tribe within 45 days of the end of each

1 fiscal quarter," thereby entitling Plaintiff to declaratory
2 and injunctive relief. CCPS1060.

3 **2. The Commission's reasons for withholding the**
4 **subject RSTF money are wrong.**

5 The Commission has denied that it "violated its legal
6 duties by withholding Plaintiff's entitled share to RSTF
7 money and by refusing to distribute such funds to
8 Plaintiff, for the reasons alleged [in the FAC], and until
9 Plaintiff settles its ongoing leadership dispute..." (pRJN,
10 Ex. "7" and "8"). The grounds for these denials are
11 summarized in judicially noticeable letters the Commission
12 wrote to the Tribe, which clarify that it suspended RSTF
13 payments because: (1) the Tribe has no recognized governing
14 body; (2) the Tribe has no recognized leader; (3) the Tribe
15 fails to include or protect the interests of a significant
16 number of potential members; and (4) there is an ongoing
17 leadership dispute. (pRJN, Ex. "6", letter from
18 Commissioner Shelton, dated June 26, 2007

19 In addition, the Commission explained its affirmative
20 defenses in its recent answers to interrogatories as
21 follows: "The California Valley Miwok Tribe is unorganized
22 and its membership, i.e., the body politic which comprises
23 the California Valley Miwok Tribe and which may select its
24 government, is currently unknown. Thus, no one has
25 authority to represent the California Valley Miwok Tribe,
26 and there is no authorized tribal government." (pRJN No.
27 "8", Response to Interrogatory No. 12).
28

1 For the reasons set forth below, each of the reasons
2 given by the Commission are contrary to the language in the
3 Compacts, contrary to the law, and therefore constitutes a
4 wrongful withholding of RSTF money belonging to the Tribe.

5 **F. THE COMMISSION IS NO LONGER JUSTIFIED IN WITHHOLDING**
6 **RSTF MONEY FROM THE MIWOK TRIBE**

7 **1. Dixie's deposition testimony refutes the**
8 **commission's defense that a tribal leadership**
9 **dispute prevents it from distributing RSTF**
10 **money to the tribe**

11 Significantly, neither the Intervenor nor the
12 Commission ever mentions Dixie's damning deposition
13 testimony in their respective motion papers. Dixie
14 admitted in his deposition that he had resigned as Tribal
15 Chairman in 1999 and that his signature on his notice of
16 resignation was not a forgery as he had previously claimed.
17 (pRJN, Ex. "21" and "22"). This admission opens the door
18 for the Commission to release the RSTF money to an
19 **authorized** representative for the Tribe, and removes any
20 claim of a competing tribe or a competing Tribal
21 representative vying for the same funds. Indeed, the
22 Complaint-in-Intervention specifically alleges that, "the
23 essence of this action is the tribal dispute regarding the
24 leadership of the Tribe." (RJN, Ex. "20", Page 13, lines
25 10-11).

26 Both the Intervenor and the Commission concede that
27 the Compact requires the Commission to release the RSTF
28 money to the Tribe "or an **authorized official** or agency
thereof." Contrary to the Intervenor's and the

1 Commission's contention, however, the Tribe, not the BIA,
2 determines who the authorized official will be for purposes
3 of receiving the RSTF payments on behalf of the Tribe.

4 This is because of the well-settled doctrine of a Tribe's
5 right to govern their own affairs, meaning that "Indian
6 tribes are 'distinct, independent political communities,
7 retaining their original natural rights' in matters of
8 local self-government." Santa Clara Pueblo v. Martinez
9 (1978) 436 U.S. 49, 55 ("Indian tribes further remain a
10 separate people, with power of regulating their internal
11 and social relations").

12 In October 2010, Dixie signed a declaration under
13 penalty of perjury in support of his motion for leave to
14 intervene, stating:

15 "In 1999, I allowed Ms. Burley into the Tribe. Shortly
16 thereafter, Ms. Burley alleged that I resigned as
17 Tribal Chairman, that she represented that she spoke
18 for the Sheep Ranch Miwok people and that she was the
19 leader and chairperson of the Tribe. I have never
20 consented to her claim of leadership. The document
21 allegedly showing my resignation as Tribal Chairman
22 is a forgery." (Emphasis added). (pRJN, Ex. "19", page
23 2, lines 20-25).

24 This declaration was proven to be false. Dixie testified
25 in a subsequent deposition, under the examination of his
26 own counsel, that he in fact resigned as Tribal Chairman,
27 and that the signature appearing on a document notifying of
28 his resignation he had earlier claimed to be a forgery was
genuinely his. (pRJN, Ex. "21"). He further testified
that his signature appeared on a document confirming Burley
as the new Tribal Chairperson. (pRJN, Ex. "21").

1 In fact, in 2004 the Commission had previously taken
2 the position that Burley was the authorized representative
3 for the Tribe for purposes of receiving the Tribe's RSTF
4 payments, against Dixie's claim that he was the rightful
5 Chairman, since the BIA had at that time recognized Burley
6 as a "person of authority." It stated:

7 "The Commission has been faced on more than one
8 occasion with the prospect of making a RSTF
9 disbursement to a tribe in the midst of a leadership
10 dispute. In the past, it has been the practice of
11 the Commission to refrain from disbursing the RSTF
12 funds until the resolution of the tribal leadership
13 dispute, in order to ensure that the funds were
14 submitted to the proper party and address. [citation
15 omitted]. However, the Commission has recently
16 determined that it should change this practice, in
17 conformity with the practice of the Bureau of Indian
18 Affairs, by disbursing funds to the tribal
19 representative with which the federal government
20 carries on its government-to-government relationship
21 with the tribe. [citation omitted]. It appears to the
22 State that the tribe's representative for such purposes
23 remains Silvia Burley ("Burley"), notwithstanding what
24 may or may not be a meritorious challenge to her
25 leadership." (Emphasis added).

26 (pRJN, Ex. "9"). While such a policy set a bad precedent,
27 since nothing in the Compact requires that the Commission
28 condition RSTF payments on actions taken by the BIA, the
point is that the Commission asserted in court documents
that the existence of a leadership dispute should not
prevent it from distributing RSTF to a Non-Compact tribe,
so long as the Commission is able to identify an
appropriate Tribal representative. Accordingly, Dixie's
deposition testimony has paved the way for the Commission

1 to make that determination and disburse the subject RSTF
2 payments to Burley, the rightful representative of the
3 Tribe.

4 The Intervenors' and the Commission's contention that
5 the BIA or the ASI must decide the Tribal leadership
6 dispute is ill-conceived and misleading. It is a "bedrock
7 principle of federal Indian law that every tribe is
8 'capable of managing its own affairs and governing
9 itself.'" Timbisha Shoshone Tribe v. Salazar (D.C. Cir.
10 2012) 678 F.3d 935, 938; see also Santa Clara Pueblo v.
11 Martinez (1978) 436 U.S. 49, 62. To this end, resolutions
12 of tribal leadership disputes are internal tribal matters
13 that must be decided by the tribe, not the BIA, the federal
14 government or any court. Timbisha Shoshone Tribe, *supra*.

15 **2. The Compacts do not require that the BIA recognize**
16 **a Non-Compact Tribe's governing body as a**
17 **condition of RSTF payments.**

18 The Commission claims it is further prevented from
19 releasing the RSTF money to the Tribe, because the BIA does
20 not recognize the Tribe's governing body. Aside from the
21 ASI's decision that it does, i.e., that it is (and always
22 has been since 1998) governed by a resolution form of
23 government established under Resolution #GC-98-01, the
24 trial court has jurisdiction to determine whether the
25 language of the Compact permits the Commission to withhold
26 RSTF money from a Non-Compact tribe because it purportedly
27 has no recognized governing body. (12/18/2012 Ct. App.
28 Dec., pRJN, Ex. "23," page 16). A review of the Compact
shows that no such requirement exists, most likely because,

1 under Indian law, an Indian tribe pursuant to its inherent
2 power of self-government, may establish any form of
3 government that best suits its own practical, cultural, or
4 religious needs, outside the IRA framework, and without any
5 written constitution at all. Santa Clara Pueblo v.
6 Martinez (1978) 436 U.S. 49, 62-63; Pueblo of Santa Rosa v.
7 Fall (1927) 273 U.S. 315. Thus, whether Dixie is
8 purportedly challenging #GC-98-01 in federal court is
9 irrelevant, since the Tribe may operate under no written
10 constitution at all.

11 In order for a Non-Compact tribe to be eligible to
12 receive RSTF payments, all that the Compact requires is
13 that the Non-Compact tribe be a federally-recognized tribe,
14 i.e., that it be on the list of federally-recognized tribes
15 in the FEDERAL REGISTER. It is undisputed that the Tribe
16 meets this minimum requirement. (pRJN, Ex. "12" and "28")

17 Moreover, as observed by the ASI's August 31, 2011
18 decision, the Tribe has since 1998 had a resolution form of
19 government, under Resolution #GC-98-01. (pRJN, Ex. "3,"
20 "13" and "14"). Since then, the Tribe, under Burley's
21 leadership, has passed and adopted numerous resolutions in
22 connection with the operation of the Tribe, including the
23 resolution changing the name of the Tribe to the present
24 name of the California Valley Miwok Tribe, which the BIA
25 accepted and then made the change in the Federal Register.
26 (pRJN, Ex. "16" and "17"). Even the Commission itself has
27 issued checks to the California Valley Miwok Tribe, and has
28 purportedly "set aside" RSTF payments on behalf of the

1 California Valley Miwok Tribe, and thus by its own actions
2 has recognized the very same Tribal Council that changed
3 the Tribe's name. (pRJN, Ex. "12"). Significantly, the
4 Commission refused to answer written interrogatories asking
5 if it contends that the Tribe had no authority to make that
6 name change. (pRJN, Ex. "8," Spec. Interrogatory No. 20).

7 As the Court of Appeal in this case observed:

8 "[A] tribe may choose not to organize under the IRA,
9 and many tribes have accordingly adopted constitutions
10 using procedures not set forth in the IRA, and
11 several tribes exist without any written constitution.
12 (citations omitted)." (Emphasis added).

13 (pRJN, Ex. "24," Ct. of App. Dec., 4/16/2010, page 8).

14 Thus, for purposes of being eligible for receipt of RSTF
15 payments, it is irrelevant whether the Tribe's current
16 resolution form of government is "recognized" by the BIA,
17 since, under well-settled Indian law, an Indian tribe may
18 function and operate without a written constitution at all.
19 Indeed, the Compact by its own terms recognizes this
20 fundamental point of law in its definition of the term
21 "Tribal Chairperson" as follows:

22 "Tribal Chairperson" means the person duly elected or
23 selected under the Tribe's organic documents, customs,
24 or traditions to serve as the primary spokesperson for
25 the Tribe." (Emphasis added).

26 (pRJN, Ex. "5", Compact §2.19).

27 **3. The Compacts do not require that a Non-Compact**
28 **Tribe satisfy any membership criteria in order to**
be eligible for RSTF payments.

1 The trial court also has jurisdiction to decide whether
2 the Compacts require that a Non-Compact tribe demonstrate
3 certain membership criteria in order to qualify for RSTF
4 distribution payments. Contrary to the Commission's
5 assertions, there is no such requirement. In fact, the
6 Compacts specify that RSTF payments are to be made only to
7 a Non-Compact tribe, not to any of its individual members.
8 Thus, the Commission has no duty to "potential" members of
9 a Non-Compact tribe, and the Compacts do not require that
10 the Commission withhold RSTF payments for the benefit of
11 any "potential" members of a Non-Compact tribe.

12 Membership enrollment is to be decided solely by an
13 Indian tribe under well-settled Indian law, as recognized
14 by the Court of Appeal in this case. (pRJN, Ex. "24", Ct.
15 of App. Dec. 4/16/2010, footnote 9, page 8, citing Santa
16 Clara Pueblo v. Martinez (1978) 436 U.S. 49, 72, fn. 32,
17 for the proposition that "[a] tribe's right to define its
18 own membership for tribal purposes has long been recognized
19 as central to its existence as an independent political
20 community...", and Williams v. Gover (9th Cir. 2007) 490
21 F.3d 785, 789, for the proposition that "[a]n Indian tribe
22 has the power to define membership as it chooses, subject
23 to the plenary power of Congress").

24 **4. The Compacts do not provide that a Non-Compact**
25 **tribe must qualify for P.L. 638 federal contract**
26 **funding through the BIA as a condition for receipt**
27 **of RSTF payments.**

28 Lastly, the Commission argues that the Tribe's right to
receive RSTF payments is contingent upon it qualifying for

1 federal contract funding with the BIA. However, there is
2 no such language in the Compacts making this a condition of
3 receipt of RSTF payments. There could be a number of
4 reasons why federal contract funding would not be available
5 to a particular Non-Compact tribe that would have nothing
6 to do with eligibility to receive RSTF payments. There is
7 no relationship between the two sources of revenue
8 payments, and the Commission's position that it is required
9 to withhold RSTF from the tribe on this ground is wrong.

10 Accordingly, each of the reasons given by the
11 Commission for withholding the Miwok Tribe's RSTF payments
12 since 2005 are erroneous and find no support in the
13 language of the Compacts. Indeed, they are contrary to the
14 express provisions in the Compacts limiting the
15 Commission's discretion to serving as a mere depository.
16 (§4.3.2.1(b)). It has no discretion on how the funds are
17 to be used or whether it should withhold those funds for
18 any reasons not set out in the Compacts. (§4.3.2.1
19 (b)) ("no discretion with respect to the use or disbursement
20 of the trust funds").

21 **5. The Commission's policy decision to withhold the**
22 **subject RSTF money pending resolution the federal**
23 **litigation is likewise erroneous.**

24 As the Court of Appeal recently ruled: "[T]he
25 fundamental issue presented to the trial court for
26 resolution on the merits is whether the current uncertainty
27 in the federal government's relationship to the Miwok
28 Tribe—including the pendency of the *Salazar* case—
constitutes a legally sufficient basis for the Commission,

1 as trustee of the RSTF, to withhold the RSTF funds from the
2 Miwok Tribe...**The trial court need only acknowledge that**
3 **the federal dispute is ongoing**, and based on that factual
4 predicate, determine whether the Commission has a legally
5 sufficient basis for withholding the RSTF funds." (pRJN,
6 Ex. "23", page 17 of Ct. App. Dec., 12/18/12). There is
7 nothing in the pending federal litigation that would
8 justify withholding these funds from the Tribe, largely
9 because the Commission's duties and responsibilities with
10 respect to disbursement of RSTF payments to the Tribe, and
11 the Miwok Tribe's entitlement to RSTF payments, are not
12 being litigated in the federal action. Neither is the
13 Commission subject to the jurisdiction of the BIA or the
14 Department of Interior ("DOI") with respect to the RSTF
15 funds at issue here.

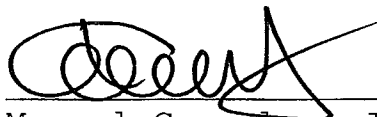
16 Accordingly, the Commission's final reason of
17 withholding the RSTF money from the Miwok Tribe, because of
18 the pending federal litigation is erroneous.

19 **III.**

20 **CONCLUSION**

21 For the foregoing reasons, the Commission's motion for
22 summary judgment should be denied.

23
24 Dated: March 11, 2013.

25 
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28 CALIFORNIA VALLEY MIWOK
TRIBE