

Robert A. Rosette, Esq. SBN 224437

**ROSETTE & ASSOCIATES**

193 Blue Ravine Road, Suite 255

Folsom, California 95630

Tel: (916) 353-1084

Fax: (916) 353-1085

Email: rosette@rosettela.com

Manuel Corrales, Jr., Esq. SBN 117647

17140 Bernardo Center Drive, Suite 370

San Diego, California 92128

Tel: (858) 521-0634

Fax: (858) 521-0633

Email: mannycorrales@yahoo.com

Terry Singleton, Esq. SBN 58316

**SINGLETON & ASSOCIATES**

1950 Fifth Avenue, Suite 200

San Diego, California 92101

Tel: (619) 239-3225

Fax: (619) 702-5592

Email: terry@terrysingleton.com

Attorneys for Plaintiff

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/SUMMARY  
ADJUDICATION MOTION BY  
INTERVENORS**

Date: April 26, 2013

Time: 2:00 p.m.

Dept: 62

Judge: Hon. Ronald Styn

Trial Date: May 13, 2011

**TABLE OF CONTENTS**

|   |       |
|---|-------|
| Table of Authorities.....   | (iii) |
| I. <b><u>INTRODUCTION</u></b> .....   | 1     |
| II. <b><u>ARGUMENT</u></b> .....  | 4     |
| A. THE COURT OF APPEAL DECISION DIRECTING THAT<br>THE STAY BE LIFTED HAD THE EFFECT OF<br>REINSTATING THE MARCH 11, 2011 ORDER<br>DISMISSING THE INTERVENORS.....   | 4     |
| B. THE TRIBAL COUNCIL UNDER BURLEY'S<br>LEADERSHIP IS IN FACT <u>CURRENTLY</u><br>RECOGNIZED.....   | 5     |
| C. THE ASSISTANT SECRETARY OF THE INTERIOR<br><u>NEVER "STIPULATED"</u> TO CHANGE THE STAY<br>LANGUAGE OF HIS DECISION.....   | 11    |
| D. THE TERM "STAYING IMPLEMENTATION" IN THE<br>ASI'S AUGUST 31, 2011 DECISION IS MERELY<br>ANALOGOUS TO " <u>STAYING EXECUTION</u> " OF A<br>JUDGMENT OR ORDER..... | 11    |
| E. THE ASI'S AUGUST 31, 2011 DECISION IS<br>ANALOGOUS TO A JUDICIAL DECISION FOR A<br>DECLARATION OF RIGHTS AND INJUNCTIVE<br>RELIEF.....                           | 12    |
| F. THE UNDISPUTED FACTS SHOW THAT THE<br>COMMISSION HAS NO LEGAL BASIS TO CONTINUE<br>TO WITHHOLD THE TRIBE'S RSTF PAYMENTS.....                                    | 13    |
| 1. The undisputed facts show that the<br>Tribe is entitled to receive the<br>subject RSTF money <u>now</u> .....  | 13    |
| 2. The Commission's reasons for<br>withholding the subject RSTF money<br>are wrong.....   | 15    |

|    |      |   |    |
|----|------|---|----|
| 1  | G.   | THE COMMISSION IS NO LONGER JUSTIFIED           |    |
| 2  |      | IN WITHHOLDING RSTF MONEY FROM THE              |    |
| 3  |      | MIWOK TRIBE.....                                | 16 |
| 4  | 1.   | Dixie's deposition testimony refutes            |    |
| 5  |      | The Commission's defense that a Tribal          |    |
| 6  |      | Leadership dispute prevents it from             |    |
| 7  |      | distributing RSTF money to the Tribe.....       | 16 |
| 8  | 2.   | The Compacts do not require that the            |    |
| 9  |      | BIA <u>recognize</u> a Non-Compact tribe's      |    |
| 10 |      | Governing body as a condition of                |    |
| 11 |      | RSTF payments.....                              | 19 |
| 12 | 3.   | The Compacts do not require that a              |    |
| 13 |      | Non-Compact tribe satisfy any <u>membership</u> |    |
| 14 |      | <u>criteria</u> in order to be eligible for     |    |
| 15 |      | RSTF payments.....                              | 21 |
| 16 | 4.   | The Compacts do not provide that a              |    |
| 17 |      | Non-Compact tribe must qualify for P.L.         |    |
| 18 |      | 638 federal contract funding through            |    |
| 19 |      | the BIA as a condition for receipt of           |    |
| 20 |      | RSTF payments.....                              | 22 |
| 21 | 5.   | The Commission's policy decision to             |    |
| 22 |      | withhold the subject RSTF money pending         |    |
| 23 |      | resolution of the federal litigation            |    |
| 24 |      | is likewise erroneous.....                      | 23 |
| 25 | H.   | THE COURT OF APPEAL HAS UPHELD THE VALIDITY     |    |
| 26 |      | OF PLAINTIFF'S CLAIMS FOR DECLARATORY,          |    |
| 27 |      | INJUNCTIVE AND MANDAMUS RELIEF.....             | 24 |
| 28 | III. | <u>CONCLUSION</u> .....                         | 25 |

**TABLE OF AUTHORITIES**

**Cases**

**Pages**

**State Cases**

Morohishi v. Pacific Home

(2004) 34 Cal.4<sup>th</sup> 482, 491.....24

**Federal Cases**

Pueblo of Santa Rosa v. Fall

(1927) U.S. 315.....20

Santa Clara Pueblo v. Martinez

(1978) 436 U.S. 49, 62.....17, 19, 20, 22

Timbisha Shoshone Tribe v. Salazar

(D.C. Cir. 2012) 678 F.3d 935, 938.....19

Williams v. Gover

(9<sup>th</sup> Cir. 2007) 490 F.3d 785, 789.....8, 9, 22

**Statutes**

**State Statutes**

CCP Section 1060.....15

Gov. Code Section 12012.90(e)(2).....14

**TRIBAL ORDINANCE**

Miwok Resolution #GC-98-0.....8, 9, 19, 20

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 Motion/Summary Adjudication filed by the  
6 Intervenors.

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. This did not  
14 include the Intervenors, since the lifting of the stay also  
15 reinstated the dismissal of the Intervenors.

16 On March 11, 2011, the trial court granted the  
17 Plaintiff's motion for reconsideration of the court's  
18 previous order granting intervention and denied  
19 intervention. The ruling was based in part on a December  
20 22, 2010 decision from the Assistant Secretary of Interior  
21 ("ASI"), which had concluded that the Miwok Tribe is a  
22 federally-recognized tribe consisting of five members with  
23 a recognized governing body established under a 1998 Tribal  
24 Resolution. The ASI further ruled that the U.S. Bureau of  
25 Indian Affairs ("BIA") could not require the Tribe to  
26 expand its membership against its will.

1        After the March 11, 2011 order denying intervention,  
2 the ASI set aside its decision to allow for further  
3 briefing on the issues, which prompted the trial court in  
4 this case to enter an April 20, 2011 ex parte order staying  
5 the "effect" of the court's March 11, 2011 order denying  
6 intervention. When the ASI issued its final decision on  
7 August 31, 2011, affirming its December 22, 2010, decision,  
8 this court stayed all further proceedings in this case,  
9 except for discovery, pending resolution of a challenge to  
10 the ASI's August 31, 2011 decision by the Intervenor in  
11 this case, Yakima Dixie ("Dixie") and his followers.

12        The Court of Appeal decision granting Plaintiff's  
13 petition directing the trial court to lift its stay applies  
14 with equal force to the trial court's April 20, 2011 ex  
15 parte order staying the effect of its March 11, 2011 order.  
16 Thus, the Intervenor have been dismissed. Their only  
17 recourse per the April 20, 2011 order is to seek  
18 reconsideration or appeal. And since their time has  
19 expired to seek reconsideration, which ran from the date of  
20 the remittitur, the Intervenor's only recourse is to file  
21 an appeal of the March 11, 2011 order. Moreover, the legal  
22 basis for the order denying intervention has not changed.  
23 The individual Intervenor do not have standing to assert a  
24 claim to RSTF money as a matter of law. Indeed, the  
25 factual basis for denying intervention on March 11, 2011  
26 was correct at the time, and it is still correct.

1  
2 In granting the Plaintiff's petition, the Court of  
3 Appeal ordered that the trial court need only *acknowledge*  
4 that the federal dispute is ongoing, but is to decide  
5 independently whether the Commission is justified in  
6 withholding the subject Revenue Sharing Trust Fund ("RSTF")  
7 payments from the Miwok Tribe for all of the reasons stated  
8 by the Commission, which includes: (1) There is a Tribal  
9 leadership dispute calling into question who is authorized  
10 to receive the RSTF for the Tribe; (2) The Tribe's  
11 governing body is not recognized by the BIA for purposes of  
12 receiving federal contract funding; (3) The Tribe's  
13 membership does not consist of Indians in the surrounding  
14 area; (4) The Tribe must first qualify for federal contact  
15 funding to be eligible to receive RSTF payments; and (4)  
16 the Tribe must wait until the pending federal litigation is  
17 concluded.

18 Undisputed facts establish that the Commission has no  
19 legal basis to continue to withhold the subject RSTF money  
20 from the Tribe. This is based on the recent deposition  
21 testimony of Dixie admitting that he resigned from the  
22 Tribe in 1999 and that he acknowledged Burley as the Tribal  
23 leader, as well as the language of the 1999 tribal-state  
24 gaming compacts ("Compacts") limiting the Commission's  
25 discretion on RSTF distributions to Non-Compact tribes.  
26 Dixie's deposition testimony that he resigned nullifies his  
27 challenge to Burley as the Tribal leader.

1 Contrary to the Intervenor's contention, the Tribal  
2 Council under Burley's leadership is in fact currently  
3 recognized by the federal government. The ASI's August 31,  
4 2011 decision is analogous to a judgment for declaratory  
5 and injunctive relief. To this end the implementing stay  
6 language only applies to the injunctive relief portion of  
7 the decision directing the BIA to refrain from further  
8 efforts to reorganize the Tribe against its wishes. It  
9 does not apply to the declaratory relief portion of the  
10 decision declaring that the Tribal Council is currently  
11 recognized, and that the Tribe consists of only five  
12 members.

13 Plaintiff's claims of declaratory and injunctive  
14 relief, as well as a writ of mandate, were properly  
15 approved by the Court of Appeal in this case, thus making  
16 that ruling the law of the case.

## 17 II.

### 18 ARGUMENT

#### 19 A. THE COURT OF APPEAL DECISION DIRECTING THAT THE STAY BE 20 LIFTED HAD THE EFFECT OF REINSTATING THE MARCH 11, 21 2011 ORDER DISMISSING THE INTERVENORS

22 The March 11, 2011 order of this court denying  
23 intervention was never vacated or set aside. Instead, on  
24 April 20, 2011, this court merely stayed the "effect" of  
25 that order with respect to the Intervenor as follows:

26 \* \* \*

27 The effect of the Court's prior rulings shall likewise  
28 be stayed pending further order of this Court. These



1 rulings include: (1) Order of March 11, 2011, granting  
2 reconsideration and denying intervention..."

3 (April 20, 2011 Order, page 2, lines 22-25, Plain. Req. for  
4 Judicial Notice ("pRJN"), Ex. "34"). On March 1, 2013,  
5 this Court, following the remittitur from the Court of  
6 Appeal, lifted the stay. Thus, by lifting its stay, this  
7 Court reinstated its March 11, 2011 order denying  
8 intervention.

9 At the time of the April 20, 2011 order, the  
10 Intervenors had on calendar a motion for reconsideration,  
11 which the Court took "off calendar, without prejudice."  
12 (RJN, Ex. "34", page 3, line 14). Instead of filing a  
13 motion for reconsideration, as they were required to do,  
14 the Intervenors chose to file a motion for summary  
15 judgment. However, because they are dismissed parties,  
16 they have no right to file any dispositive motions in this  
17 case. The Court, therefore, has no jurisdiction to either  
18 entertain or grant a summary judgment motion by or in favor  
19 of a dismissed party. For this reason alone, the  
20 Intervenors' purported motion for summary judgment should  
21 be denied without more.

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

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

1 2011 decision is concluded. This contention is without  
2 merit and 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  
20 contentious period in the tribe's history to a  
21 close." (Emphasis added).

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

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

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

19 D. 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 who 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 **E. 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 **F. 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. CCP§1060.

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 **G. 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 Intervenor's' 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 (9<sup>th</sup> 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 **H. THE COURT OF APPEAL HAS UPHELD THE VALIDITY OF**  
20 **PLAINTIFF'S CLAIMS FOR DECLARATORY, INJUNCTIVE AND**  
21 **MANDAMUS RELIEF**

22 In its April 16, 2010 decision, the Court of Appeal  
23 rejected the Commission's challenge to the Plaintiff's  
24 claims for declaratory, injunctive and mandamus relief.  
25 (pRJN, Ex. "24", pages 20-23 of Ct. App. Dec., 2010). This  
26 is the law of the case, and thus the Intervenor's challenge  
27 on the same grounds must be rejected. Morohishi v. Pacific  
28 Home (2004) 34 Cal.4<sup>th</sup> 482, 491.

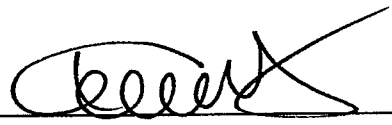
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

III.

CONCLUSION

For the foregoing reasons, the Intervenor's motion for summary judgment should be denied. Before even reaching the merits of the Intervenor's motion, however, the court should conclude that the lifting of the trial court's April 20, 2011 stay, as directed by the Court of Appeal, reinstated the trial court's prior March 11, 2011 order denying intervention. As a result, the Intervenor, as dismissed parties, have no right to file any dispositive motions in this action.

Dated: March 11, 2013

  
Manuel Corrales, Jr., Esq.  
Attorney for Plaintiff  
CALIFORNIA VALLEY MIWOK  
TRIBE