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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN DIEGO
13 CENTRAL BRANCH
14

15 **CALIFORNIA VALLEY MIWOK TRIBE,**

16 Plaintiff,

17 v.
18

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

22 Defendants.

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

**CALIFORNIA GAMBLING CONTROL
COMMISSION'S OPPOSITION TO
CALIFORNIA VALLEY MIWOK
TRIBE'S MOTION FOR JUDGMENT
ON THE PLEADINGS**

Date: April 26, 2013

Time: 2:00 p.m.

Dept: 62

Judge: The Honorable Ronald L. Styn

Trial Date: June 4, 2013

Action Filed: January 8, 2008

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INTRODUCTION

On December 18, 2012, the Fourth District Court of Appeals issued a writ of mandate (Decision) directing this Court to lift its stay in this action so that the parties could file dispositive motions on an issue that does not require this Court to adjudicate the merits of the underlying intra-tribal dispute that is evidenced by the pendency of *California Valley Miwok Tribe v. Salazar* (D.D.C. No. 1:10-CV-160 (filed Jan. 24, 2011) (*Salazar*)). The issue now before this Court is whether the California Gambling Control Commission (Commission) is justified in withholding Revenue Sharing Trust Fund (RSTF) payments from the plaintiff Burley Faction of the California Valley Miwok Tribe (Plaintiff or Burley Faction) *under the present circumstances*, which include the pendency of the *Salazar* case, and uncertainty as to the composition and leadership of the federally-recognized California Valley Miwok Tribe (CVMT). As stated by the appellate court:

Based on the gravamen of the complaint, the fundamental issue presented to the trial court for resolution on the merits is whether the current uncertainty in the federal government's relationship to the Miwok Tribe—including the pendency of the *Salazar* case—constitutes a legally sufficient basis for the Commission, as trustee of the RSTF, to withhold the RSTF funds from the Miwok Tribe.

(Decision, Def's Req. Jud. Notice' in Supp. Opp. to Mot. for Judg. on Pldgs. (Def's Exhibits), at p. 0216.¹) Elsewhere in the Decision, the appellate court phrased the issue slightly differently:

[T]he Miwok Tribe has filed this action to obtain a ruling that the commission is not fulfilling its duty as trustee with respect to the RSTF funds *under the present circumstances*, including the [Bureau of Indian Affairs'] lack of recognition of a tribal leadership body for the distribution of ISDEAA benefits.

(Decision, Def's Exhibits, at p. 0218, italics in original.) Both of these formulations focus upon the propriety of the Commission's policy of deferring to the determinations of the Department of the Interior, Bureau of Indian Affairs' (BIA) identification of the authorized leadership of a federally-recognized Indian tribe. This issue arises whenever the Commission learns of an intra-tribal leadership dispute, and withholds RSTF payments until the BIA has made that

¹ Pagination is to Bates numbering.

1 identification, most typically by entering into one or more “P.L. 638” contracts² with the tribe’s
2 identified leadership.

3 Plaintiff’s motion for judgment on the pleadings strays far beyond the subject matter
4 authorized by the Decision and into matters that lie outside the subject matter jurisdiction of this
5 Court. In effect, Plaintiff asks this Court to adjudicate the existing intra-tribal leadership dispute
6 with respect to the accrued RSTF payments that are being held by the Commission pending the
7 BIA’s determination of the CVMT’s authorized leadership. Plaintiff’s motion is based upon a
8 semantic flimflam: the assumption that the Plaintiff *is*, in fact, the CVMT, when the Plaintiff is,
9 under the BIA’s current interpretation, a group of five individuals who constitute the membership
10 of one of the two factions contending for recognition as the CVMT. The other faction, referred to
11 herein as the “*Salazar* Plaintiffs,” allegedly consists of 242 adults plus children.

12 The foundation of the flimflam is purported tribal resolution No. GC-98-01, which was
13 enacted by the five-member Burley Faction in 1998—without the participation of the many other
14 individuals the BIA may ultimately recognize as CVMT members depending on the outcome of
15 the *Salazar* case. On the basis of GC-98-01, which the Burley Faction contends established a
16 general council form of government for the tribe, Plaintiff’s argument is essentially that the
17 Plaintiff is the CVMT because Plaintiff *says* it is the CVMT, and federal Indian law precludes any
18 challenge to this assertion except from within the Plaintiff itself. This is incorrect. Much of
19 Plaintiff’s motion for judgment on the pleadings is based on this erroneous premise, and should
20 be disregarded.

21 When reduced to the permissible issue of whether the Commission may lawfully accrue but
22 withhold RSTF payments when obvious uncertainty exists as to the composition and leadership
23 of a recipient tribe, Plaintiff’s argument is that the language of the 1999 Tribal-State Gaming
24 Compacts prohibits the Commission from doing so, and instead requires the Commission to

25
26 ² P.L. 638 contracts arise under the Indian Self Determination and Education Assistance
27 Act (25 U.S.C. § 450 et seq.) (ISDEAA) and are a mechanism under which the federal
28 government funds a wide variety of activities by tribes, such as strengthening or improving tribal
government, and constructing, improving, or maintaining tribal facilities. (See 25 U.S.C. § 450h,
subd. (a).)

1 disburse the RSTF payments to the first purported tribal contingent to demand it. For the reasons
2 discussed below, this contention is nonsensical. The Commission's policy of deferring to the
3 BIA's determination as to the authorized leadership of federally-recognized Indian tribes is a
4 practical, reasonable, and permissible expression of the Commission's responsibility as RSTF
5 administrator to tender quarterly RSTF payments to tribal representatives who are authorized to
6 accept the payments on behalf of the tribe, and upon receipt, will administer the funds subject to
7 tribal laws, policies, and accountability, for the benefit of the federally-recognized tribe as a
8 whole.

9 The first amended complaint fails to establish the Burley Faction's entitlement to receive
10 RSTF payments on behalf of the federally-recognized CVMT, and therefore fails to state a cause
11 of action upon which relief may be granted. The Commission respectfully requests that this
12 Court deny Plaintiff's motion for judgment on the pleadings so that the accrued quarterly RSTF
13 payments it holds may be disbursed to the leadership the BIA ultimately determines to be
14 authorized to receive and administer them for the benefit of the federally-recognized CVMT as a
15 whole.

16 **FACTUAL BACKGROUND**

17 The appellate court has defined the scope of the issue that may permissibly be brought
18 before this Court in this dispositive motion. The issue is whether the Commission may, *under the*
19 *present circumstances*, lawfully retain and accrue quarterly RSTF payments for the CVMT until
20 the BIA has identified the CVMT's authorized leadership. (See Decision, Def's Exhibits, at p.
21 0218.) With this in mind, the relevant material facts are as follows:

22 At all relevant times prior to December 22, 2010,³ the BIA deemed the CVMT to be
23 "unorganized," lacking a tribal chairperson, and lacking a leadership body for the purposes of
24 conducting government-to-government business with the United States. (BIA Letters, Def's
25 Exhibits, at pp. 0233-0244.)

26
27 ³ This is the period during which the Commission has withheld and accrued the CVMT's
28 quarterly RSTF payments due to uncertainty as to the tribe's composition and leadership.

1 On December 22, 2010, Assistant Secretary for Indian Affairs Echo Hawk (Assistant
2 Secretary) issued a decision (December 2010 Decision) rescinding the BIA's earlier decisions
3 concerning the CVMT and declaring that the CVMT consisted of five individuals led by Silvia
4 Burley. (December 2010 Decision, Def's Exhibits, at pp. 0013-0018.)

5 On January 24, 2011, a group of different individuals claiming to constitute the CVMT
6 challenged the December 22, 2010 Decision by filing the *Salazar* case in the United States
7 District Court for the District of Columbia. (*Salazar* Cmplt., Def's Exhibits, at pp. 0022-0064.)
8 The plaintiffs in *Salazar* are alleged to consist of as many as 242 adult members and their
9 children.⁴ (*Salazar* First Amend. Cmplt. (*Salazar* FAC), Def's Exhibits, at p.0120.)

10 On April 1, 2011, as a result of the filing of the *Salazar* case, the Assistant Secretary set
11 aside the December 2010 Decision for reconsideration. (Echo Hawk Letter, Def's Exhibits, at p.
12 0066.) On August 31, 2011, the Assistant Secretary substantively reaffirmed his December 2010
13 Decision (August 2011 Decision), but expressly stayed its implementation pending the outcome
14 of the *Salazar* case. (August 2011 Decision, Def's Exhibits, at pp. 0069-0077.) The Assistant
15 Secretary later confirmed, by stipulation in the *Salazar* case, that the August 2011 Decision "will
16 have no force and effect" until the *Salazar* case was resolved. (Joint Stat. Rept., Def's Exhibits,
17 at p. 0226.) On October 17, 2011, the *Salazar* Plaintiffs filed a first amended complaint that
18 addressed the August 2011 Decision. (*Salazar* FAC, Def's Exhibits, at pp. 0119-0162.)

19 As of this date, the *Salazar* case remains pending at the dispositive motion stage in the
20 District of Columbia. (03/27/13 Docket Report, Def's Exhibits, at p. 0115-0117.) Accordingly,
21 the BIA's recognition of the CVMT's leadership has reverted to what it was prior to the
22 December 2010 Decision—the BIA does not currently recognize the Burley Faction as the
23 CVMT's authorized leadership.

24 In light of the pendency of the *Salazar* case and its potential effect on the Burley Faction's
25 claims in this action, this Court stayed all motion hearings, pending the outcome of the *Salazar*
26 case. (Minute Order, Def's Exhibits, at p. 0198.) The Plaintiff unsuccessfully moved this Court

27 _____
28 ⁴ The plaintiffs in the *Salazar* case are commonly referred to as the "Dixie faction."

1 for an order lifting the stay for the purpose of filing a dispositive motion on the Commission's
2 duty under the Compact and in light of certain admissions made by Yakima Dixie in his
3 deposition, to disburse the accrued RSTF payments to the Burley Faction.

4 Plaintiff then sought a writ of mandate to compel this Court to lift the stay. On December
5 18, 2012, the Court of Appeal issued its decision granting the writ and directing this Court to lift
6 the stay to allow the parties to file dispositive motions, and, if necessary, proceed to trial, on the
7 limited issue of whether the Commission may lawfully withhold RSTF payments from the Burley
8 Faction "*under the present circumstances*," which include the pendency of the *Salazar* case, and
9 uncertainty as to the composition and leadership of the federally-recognized CVMT. (Decision,
10 Def's Exhibits, at pp. 0200-0219.)

11 This Court dissolved the stay in compliance with the writ. (Minute Order, Def's Exhibits,
12 at p. 0221.) The parties' respective dispositive motions on the issue defined in the writ are now
13 before this Court.

14 In 1999 to 2000, approximately 60 California Indian tribes entered into substantively
15 identical Tribal-State class III gaming compacts with the State of California—these agreements
16 are known as the "1999 Compacts" (Compact). (Miwok Cmplt. ¶ 5; see also public record at
17 www.cgcc.ca.gov/?pageID=compacts.) Since that time, various tribes have entered into new or
18 amended gaming compacts that in some respects differ from the terms of the 1999 Compacts.
19 (See www.cgcc.ca.gov/?pageID=compacts.) A common characteristic of all compacts is that they
20 contain provisions under which most Compact Tribes pay revenue shares into the RSTF, which is
21 used to make quarterly payments to "Non-Compact Tribes"—small and non-gaming California
22 tribes. (See, e.g., Compact [Dry Creek Rancheria], §§ 4.3.2 and 4.3.2.1, Def's Exhibits, at pp.
23 0010-0011.) Other payment methodologies augment the RSTF as needed to provide \$1.1 million
24 per year to each eligible Non-Compact Tribe. (See Gov. Code, § 12012.90.) The Commission
25 serves as the administrator of the RSTF for the "receipt, deposit, and distribution of [the RSTF],"
26 loosely denominated as the "trustee."⁵ (*Id.*) For purposes of this action, it is undisputed that the

27 ⁵ The relationship of the Commission to the RSTF lacks some of the required elements of
28 a true trust, e.g., the Commission has no ownership interest in the corpus of the trust.

1 CVMT is a federally-recognized California Indian tribe that operates no slot machines, and,
2 accordingly, is eligible to receive quarterly RSTF payments.

3 The Plaintiff in this action consists of the five-person Burley Faction, denominated as the
4 CVMT on the basis of the Burley Faction's resolution GC-98-01 which, according to the *Salazar*
5 plaintiffs, was adopted without the participation of a very large majority of the actual CVMT.

6 ARGUMENT

7 I. THE COMMISSION HAS PROPERLY WITHHELD THE RSTF PAYMENTS FROM THE 8 PLAINTIFF BURLEY FACTION OF THE CVMT.

9 In order to prevail on any cause of action in the first amended complaint, the Burley Faction
10 must establish that it is entitled *at this time* to receive the RSTF payments that the Commission
11 has accrued and withheld while uncertainty exists as to the CVMT's composition and authorized
12 leadership. Plaintiff has two general lines of argument—one permissibly within the scope of the
13 issue defined by the Court of Appeal in its Decision directing this Court to lift the stay, and one
14 not.

15 Plaintiff's first general contention is that the Burley Faction constitutes the authorized
16 leadership of the federally-recognized CVMT and is on that basis entitled to receive the accrued
17 RSTF payments. Plaintiff attempts to establish this in several ways. As will be shown, the
18 pending *Salazar* case issues are such that a finding by this Court that the Burley Faction currently
19 constitutes the CVMT's authorized leadership would require this Court to exceed its subject
20 matter jurisdiction by adjudicating the merits of an intra-tribal dispute, something it indisputably
21 cannot do and that the Court of Appeal's Decision cannot reasonably be construed to
22 contemplate.

23 Plaintiff's second general contention is that the Commission has an obligation to disburse
24 RSTF payments to federally-recognized California Indian tribes operating fewer than 350 slot
25 machines, and that the Commission has no discretion to withhold the payments on the basis of
26 uncertainty as to a recipient tribe's authorized leadership. This contention amounts, in effect, to a
27 requirement that the Commission disburse RSTF payments to the first purported tribal claimant
28 regardless of evidence—such as exists in this case—that the claimant may not be authorized by

1 the tribe to receive and administer the payments on the tribe's behalf. As discussed below, the
2 Commission has a responsibility as the administrator of the RSTF to disburse payments only to
3 the authorized leadership of eligible recipient tribes, and when uncertainty exists as to the
4 authorized leadership's identity, it is practical, appropriate, and permissible for the Commission
5 to defer to the BIA's identification of the tribe's authorized leadership, which is often evidenced
6 by the BIA's disbursement of federal benefits under the ISDEAA.

7 Both of Plaintiff's approaches are efforts by the five-person Burley Faction to obtain the
8 now approximately \$9 million in accrued RSTF payments owing to the CVMT for itself without
9 waiting for the adjudication, and possible adverse determination, of the composition and
10 leadership of the CVMT within the federal administrative process, of which the *Salazar* case is a
11 part.

12 As the allegations of the *Salazar* first amended complaint make plain, a disbursement of the
13 accrued RSTF payments to the five-person Burley Faction in this action before the *Salazar* case
14 has been resolved may result in a large, erroneous disbursement that would deprive the *Salazar*
15 plaintiffs, who allegedly represent 242 adult members plus their children, of the benefit of the
16 accrued RSTF monies.

17 **A. The Burley Faction cannot be deemed authorized to receive and**
18 **administer the accrued RSTF monies on behalf of the CVMT unless the**
19 **Assistant Secretary's August 2011 Decision is affirmed in *Salazar*.**

20 The first amended complaint's allegations in *Salazar* (*Salazar* FAC) establish that the scope
21 of the CVMT's underlying membership, and the validity of the small Burley Faction's tribal
22 council form of government adopted in 1998 under GC-98-01, are currently uncertain and are to
be determined in the federal action. The introduction to the *Salazar* FAC states:

23 Plaintiffs ask the Court to vacate an erroneous decision of the Assistant
24 Secretary – Indian Affairs for the United States Department of the Interior
25 (“Department”) that arbitrarily limits the membership of a federally
26 recognized Indian tribe to five people and disenfranchises 242 adult members
27 of the tribe plus their children, without due process and in violation of the
28 Department's trust responsibilities to Indian tribes and their members.
Because the decision knowingly recognizes a tribal government based on a
tribal document adopted without the knowledge, participation or consent of
the vast majority of the tribe's members, it violates federal law and must be
reversed.

1 (Salazar FAC, Def's Exhibits, at p. 0120.) The *Salazar* FAC's prayer for relief requests, inter
2 alia:

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

5 [¶ . . . ¶]

6 F. Directing the [Assistant Secretary for Indian Affairs] and the BIA to
7 establish government-to-government relations only with a Tribal government
8 that reflects the participation of the entire Tribal community, including
individual Plaintiffs and all other Current members.

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

11 (*Id.* at p. 0148.)

12 The Assistant Secretary's August 2011 Decision, which superseded and affirmed the
13 December 2010 Decision and recognizes the Burley Faction as the CVMT, is not operative during
14 the pendency of the *Salazar* case. The August 2011 Decision itself states:

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

18 (August 2011 Decision, Def's Exhibits, at p. 0076.) The phrase "[t]his decision is final for the
19 Department and effective immediately" is a term of art that means the decision if not subject to
20 further appeal within the Department of the Interior, constitutes a final agency action, and is
21 therefore ripe for judicial review under the federal Administrative Procedure Act. (See 25 C.F.R.
22 § 2.20(c)(2); 5 U.S.C. § 704 [making "final agency action . . . subject to judicial review"].) In
23 addition, on September 1, 2011, the Assistant Secretary clarified the stay in *Salazar* by stipulating
24 to a joint status report and proposed order that states, in part:

25 While the August 31, 2011 decision is final for the Department for purposes
26 of judicial review, the Assistant Secretary stayed the effectiveness of the
27 August 31, 2011 decision pending resolution of this matter. As a result, the
28 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.

1 (Joint Stat. Report, Def's Exhibits, at p. 0226.) Accordingly, the BIA's prior decisions that found
2 the CVMT "unorganized," lacking a tribal chairperson, and lacking and a leadership body for the
3 purposes of conducting government-to-government business with the United States remain in
4 effect, and the BIA does not currently recognize any CVMT government or official
5 representative. (BIA Letters, Def's Exhibits, at pp. 0233-0244.)

6 **B. This Court lacks subject matter jurisdiction to independently adjudicate**
7 **the CVMT's intra-tribal leadership dispute.**

8 Although the Plaintiff's arguments invite this Court to render a decision on the CVMT
9 intra-tribal dispute's merits, it cannot reasonably be disputed that this Court lacks subject matter
10 jurisdiction to do so and must confine its inquiry to matters that do not involve a factual
11 determination of whether Burley is currently the authorized representative of the federally-
12 recognized CVMT.

13 This Court cannot determine the CVMT's membership or leadership. "An Indian tribe has
14 the power to define membership as it chooses, subject to the plenary power of Congress."
15 (*Williams v. Gover* (9th Cir. 2007) 490 F.3d 785, 789.) "[T]ribal sovereignty is dependent on,
16 and subordinate to, only the Federal Government, not the States." (*Washington v. Confederated*
17 *Tribes of Colville Indian Reservation* (1980) 447 U.S. 134, 154.) Recognition of a tribal
18 government and the officials entitled to act on the tribe's behalf are matters that are generally
19 within the exclusive purview of the federal executive branch. (*Miami Nation of Indians of*
20 *Indiana, Inc., v. U.S. Dept. of the Interior* (7th Cir. 2001) 255 F.3d 342, 346-347.)

21 Accordingly, this Court should disregard all arguments made in Plaintiff's motion for
22 judgment on the pleadings that require *any* adjudication of the merits of the CVMT's intra-tribal
23 leadership dispute. This includes all argument concerning the significance of Yakima Dixie's
24 deposition testimony. Whether or not Yakima Dixie is the CVMT's tribal chairperson is
25 immaterial to the issues that are being litigated in the *Salazar* case, which reach far beyond the
26 specifics of the chairmanship, to the composition of the membership and the CVMT's
27 organization.

1 **C. The Burdick January 2011 letter has no current meaning independent of**
2 **the Assistant Secretary's August 2011 Decision, which is stayed pending**
3 **the outcome of *Salazar*.**

4 The plaintiff makes a farfetched argument that the Burley faction is entitled to the accrued
5 RSTF payments because Troy Burdick of the BIA sent Silvia Burley a letter on January 12, 2011,
6 acknowledging Burley's report of a tribal election held on January 7, 2011. (Letter, Pltf's Req.
7 for Jud. Notice, ¶ 32.) This election occurred between the issuance of the Assistant Secretary's
8 December 2010 Decision and April 1, 2011, when the Assistant Secretary set aside the December
9 2010 Decision. Burdick's January 12, 2011 letter was clearly a ministerial act performed on the
10 basis of the Assistant Secretary's December 2010 substantive decision concerning the CVMT's
11 composition and leadership. Nothing about the Burdick letter indicates an intent to render a
12 separate substantive decision as to the CVMT's leadership, or as to the propriety of an election
13 conducted by and among the Burley Faction's five members—the Burdick letter simply
14 acknowledges the election within the context of the December 2010 Decision that recognized the
15 Burley Faction as the CVMT. As discussed above, the December 2010 Decision has been
16 superseded by the August 2011 Decision, and the latter is currently of no force and effect until the
17 *Salazar* case is resolved. Accordingly, the factual predicate for Burdick's acknowledgment of the
18 Burley Faction's tribal election does not currently exist.

19 The Burdick letter is also in no way comparable to the letter in the Timbisha Shoshone
20 matter upon which the Plaintiff relies. In the *Timbisha* case, the letter in question was not a
21 ministerial acknowledgment of an election, but was a letter from Assistant Secretary Echo Hawk
22 stating that the Timbisha Shoshone members had resolved their own leadership dispute through a
23 valid internal tribal process, conducted within a valid tribal forum. (*Timbisha Shoshone Tribe v.*
24 *Salazar* (D.C. Cir. 2012) 678 F.3d 935, 938.) While the *Timbisha* court may have found the Echo
25 Hawk letter dispositive of a standing issue in that case, that letter was substantively different from
26 the January 12, 2011 Burdick letter upon which the Plaintiff now seeks to rely, not least because
27 the facts surrounding the five-person Burley Faction's January 7, 2011 tribal election in no way
28 suggest any effort to address the CVMT's underlying leadership dispute—the election was held
29 after the Assistant Secretary had issued the December 2010 Decision recognizing the Burley

1 Faction as the entirety of the CVMT. Moreover, depending on the outcome of *Salazar*, the tribal
2 election referred to in the January 12, 2011 Burdick letter may have been conducted in an
3 illegitimate tribal forum that excluded the vast majority of tribal members. The disbursement of
4 approximately \$9 million of RSTF monies cannot reasonably be based on the January 12, 2011
5 Burdick letter, which is, at least for the time being, merely a documentary artifact.

6 **D. The Commission has a responsibility to take reasonable steps to disburse**
7 **RSTF payments only to leaders authorized to receive and administer the**
8 **funds for the benefit of the recipient tribes.**

9 Section 4.3.2 of the Compact, and analogous provisions of newer compacts, establish the
10 RSTF, which is a method of revenue sharing between certain gaming tribes (Compact Tribes),
11 and tribes operating fewer or none (Non-Compact Tribes). (See, e.g., Compact [Dry Creek
12 Rancheria], §§ 4.3.2 and 4.3.2.1, Def's Exhibits, at pp. 0010-0011; Compact [Pinoleville Pomo
13 Nation], § 5.1 et seq., Def's Exhibits, at pp. 0099-0100.) In general, Compact Tribes pay
14 licensing fees or other revenue shares that the Commission deposits into the RSTF for quarterly
15 distribution to eligible Non-Compact Tribes. Government Code section 12012.75 codifies the
16 RSTF and incorporates "the distribution plans specified in tribal-state gaming compacts." (Gov.
17 Code, § 12012.75.) Government Code section 12012.90 provides a funding mechanism that
18 guarantees that \$1.1 million per year will be available for distribution to "eligible recipient Indian
19 tribes," and provides that the Commission shall make quarterly payments from the RSTF (subject
20 to appropriation by the Legislature) to each eligible recipient Indian tribe within 45 days of the
21 end of each fiscal quarter. (Gov. Code, § 12012.90.)

22 Both the Compact and newer compacts designate the Commission as the "trustee" of the
23 RSTF "for the receipt, deposit, and distribution of monies" paid into the fund. (See, e.g.,
24 Compact [Dry Creek Rancheria], §§ 4.3.2 and 4.3.2.1, Def's Exhibits, at pp. 0010-0011; Compact
25 [Pinoleville Pomo Nation], § 5.1 et seq., Def's Exhibits, at pp. 0099-0100.)

26 Compact section 4.3.2.1, subdivision (b) provides: "The Commission shall serve as the
27 trustee of the fund. The Commission shall have no discretion with respect to the use or
28 disbursement of the trust funds. Its sole authority shall be to serve as a depository of the trust
funds and to disburse them on a quarterly basis to Non-Compact Tribes." Later compacts have

1 clarified the language of this provision to state “The Commission shall have no discretion with
2 respect to the use or disbursement *by recipient tribes* of the Revenue Sharing Trust Fund monies.”
3 (Compact [Pinoleville Pomo Nation], § 5.1, subd. (a), Def’s Exhibits, at p. 0100, italics added.)
4 The Commission’s responsibilities as trustee are limited to collecting the correct licensing fees
5 from the Compact Tribes, arranging for the safe deposit of those funds prior to disbursement, and
6 then accurately disbursing those funds on a quarterly basis to eligible recipient tribes as defined in
7 the Compact. It is the Commission’s responsibility to perform these tasks in a way that
8 accomplishes the State’s and the Compact Tribes’ objectives in executing the Compact. The
9 Compact’s underlying purpose is to “develop self-sufficiency, promote tribal economic
10 development, and generate jobs and revenues to support the Tribe’s government and
11 governmental services and programs.” (Compact, § 1.0, subd. (b).) Elementary logic dictates
12 that in order to achieve these objectives, revenues arising from the Compact must go *to the*
13 *recipient tribe*, rather than to individuals, rogue factions, or other illegitimate claimants who do
14 not represent the eligible recipient tribe as a whole.

15 Accordingly, the Commission considers it an essential part of its responsibilities as the
16 administrator, or limited-purpose trustee, of the RSTF to take reasonable steps to disburse RSTF
17 payments to tribal members who are authorized to receive the payments on behalf of the tribe
18 and, free from state oversight or involvement, administer the funds for the benefit of the tribe as a
19 whole. These limited steps are essential to fulfilling the State’s obligation to make distributions
20 to the eligible tribe, and, therefore, to achieving the Compact’s purpose. It is ordinarily not
21 difficult to do this, as uncertainty as to the identity of the leaders so authorized by a tribe is
22 relatively uncommon. However, when, as in the present case, uncertainty as to the authorized
23 leadership of a tribe clearly exists, the Commission’s RSTF responsibility requires it to take
24 reasonable steps to identify those tribal members that are authorized to receive and administer the
25 RSTF monies. Any lesser interpretation of the Commission’s responsibilities as “trustee” would
26 render that designation a near nullity and would undermine the Compact’s fundamental objective
27 to promote Indian tribes’ economic welfare.

1 **E. The Commission's policy of deferring to the BIA's identification of the**
2 **authorized leadership of federally-recognized tribes is reasonable and**
3 **permissible under the Government Code and Gaming Compacts.**

4 Only the Department of the Interior, acting through the BIA, is authorized, and has the
5 jurisdiction to resolve a tribal leadership dispute. Recognition of a tribal government and the
6 officials entitled to act on the tribe's behalf are matters that are generally within the exclusive
7 purview of the federal branch. (*Miami Nation of Indians of Indiana, Inc., v. U.S. Dept. of the*
8 *Interior* (7th Cir. 2001) 255 F.3d 342, 346-347.) "Congress has delegated to the Secretary of the
9 Interior broad authority over 'public business relating to . . . Indians.' (43 U.S.C. § 1457.) At the
10 core of this authority is a responsibility to ensure that [the] Secretary deals only with a tribal
11 government that actually represents the members of a tribe." (*California Valley Miwok Tribe v.*
12 *United States* (D.C. Cir. 2006) 424 F.Supp.2d 197, 201.) As one court observed, the Department
13 of the Interior "has the authority and responsibility to ensure that the [Indian] Nation's
14 representatives with whom it must conduct government-to-government relations, are the valid
15 representatives of the Nation as a whole." (*Seminole Nation of Oklahoma v. Norton* (D.D.C.
16 2002) 223 F.Supp.2d 123, 140, citing *Seminole Nation v. United States* (1942) 316 U.S. 286,
17 296.) "A cornerstone of [the federal government's trust obligation to Indian tribes] is to promote
18 a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted
19 by rogue leaders when it comes to decisions affecting federal benefits." (*California Valley*
20 *Miwok Tribe v. United States* (D.C. Cir. 2008) 515 F.3d 1262, 1267.)

21 In the interest of discharging its responsibilities as RSTF administrator in a prudent manner,
22 the Commission has chosen to rely upon the BIA's decisions when questions as to a tribe's
23 authorized leadership arise, thus effectively adopting the same standards as are applied by the
24 federal government in its relations with federally-recognized Indian tribes. This is an appropriate
25 standard for the Commission to apply.

26 The BIA's identification of a tribe's authorized leadership is evidenced by the BIA's
27 regulatory actions, which include conducting government-to-government business with a
28 particular individual or group acting on a tribe's behalf. A typical instance of this identification
 occurs when the BIA enters into P.L 638 contracts with tribes under the ISDEAA and disburses

1 federal benefits thereunder. Accordingly, the Commission will disburse the CVMT's accrued
2 RSTF payments to the individual or group the BIA ultimately identifies as the CVMT's
3 authorized representative by a final agency action disbursing P.L. 638 contract funding to that
4 individual or group, or as evidenced by some other definitive final BIA administrative action.

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

9 CONCLUSION

10 For the reasons stated above, the Commission submits that the dispositive issue in this case
11 is that the Plaintiff cannot establish in this forum that it constitutes, or is authorized to represent,
12 the federally-recognized CVMT. For this reason, the Commission's RSTF duties under the
13 Compact and the Government Code preclude it from disbursing the accrued RSTF payments to
14 the Plaintiff at this time. The Commission's answer to the first amended complaint adequately
15 states these defenses through many specific paragraph-by-paragraph denials of Plaintiff's
16 allegations, and, further, through the Commission's affirmative defense of "No Jurisdiction." The
17 Commission respectfully requests that this Court enter an order denying Plaintiff's motion for
18 judgment on the pleadings.

1 Dated: March 25, 2013

Respectfully Submitted,

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