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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO
12

13 CALIFORNIA VALLEY MIWOK TRIBE,

14 Plaintiff,

15 v.

16 CALIFORNIA GAMBLING CONTROL
COMMISSION, et al.,

17 Defendants.
18

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

INTERVENORS' OPPOSITION TO
PLAINTIFF'S MOTION FOR JUDGMENT
ON THE PLEADINGS

Date: April 26, 2013

Time: 2:00 p.m.

Dept.: C-62

Judge: The Hon. Ronald L. Styn

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

23 Intervenors.
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I. INTRODUCTION

Under the guise of a motion for judgment on the pleadings, Plaintiff seeks to have this Court decide disputed facts through the improper use of a 32 document request for judicial notice. Plaintiff asserts that even if the California Valley Miwok Tribe (the "Tribe") has no recognized governing body, no recognized leader, and no established membership, the California Gambling Control Commission (the "Commission") must immediately disburse millions of dollars of RSTF monies held in trust for the Tribe to Silvia Burley because she says she is the Tribe. Plaintiff argues that despite the Commission being a trustee with fiduciary obligations, the Commission has no discretion to take any measures to make sure that the RSTF monies are in fact being paid to the Tribe. In other words, Plaintiff asks this Court to find that the Commission must always automatically disburse RSTF monies to the first person who claims to represent a non-compact tribe. Plaintiff's theory turns the concept of a trustee on its head. Plaintiff's motion amounts to nothing more than a desperate attempt by Silvia Burley to grab the Tribe's monies before the resolution of the pending federal litigation that will address the question of who is the legitimate government of the Tribe. Plaintiff's motion should be denied.

Plaintiff's motion should also be denied because it is untimely. Under Code of Civil Procedure section 438(e), the deadline for a motion for judgment on the pleadings was April 12, 2011, meaning this motion is nearly two years late. In addition, Plaintiff's motion attempts to (1) take judicial notice of the truth of matters within documents, (3) lure this Court into resolving disputed factual issues outside this Court's jurisdiction relating to the membership, government, and leadership of the Tribe, (3) enforce the terms of the Compact despite the Court of Appeal's express ruling that Plaintiff is barred from doing so, and (4) rely on allegations in the operative complaint which were disputed in the Commission's answer. All of these tactics are improper and each provides additional grounds for the denial of this motion.

The reality is that there is a bona fide dispute as to who is the Tribe and who are its authorized leaders, and thus who is the rightful recipient of the millions of dollars of RSTF monies currently held in trust for the Tribe. These underlying membership and leadership disputes are currently the subject of a federal lawsuit in the United States District Court for the District of

1 Columbia. The Commission, acting as a trustee, has withheld disbursement of the RSTF monies
2 belonging to the Tribe pending resolution of this ongoing dispute. Given the circumstances, the
3 Commission's decision is sound, as it reflects a reasonable attempt to ensure that the monies held
4 in trust by the Commission actually go to the legitimate representatives of the Tribe. More
5 importantly for purposes of this motion and this lawsuit, there is no possible basis for finding that
6 the Commission's decision is arbitrary, capricious, entirely lacking in evidentiary support, or
7 contrary to required legal procedures. As a result, not only must Plaintiff's motion be denied, but
8 Intervenor's concurrently filed motion for summary judgment must be granted.

9 **II. LEGAL STANDARD**

10 The standard for a motion for judgment on the pleadings is essentially the same as that
11 applicable to a general demurrer. See Schabarum v. Cal. Legislature, 60 Cal.App.4th 1205, 1216
12 (1998). A motion by a plaintiff for judgment on the pleadings is the equivalent of a demurrer to
13 an answer. The court must assume the truth of all facts properly pleaded in the answer and must
14 disregard the controverted allegations in the complaint. See MacIsaac v. Pozzo, 26 Cal.2d 809,
15 812-813 (1945); Kapsimallis v. Allstate Ins. Co., 104 Cal.App.4th 667, 672 (2002). Grounds for a
16 motion for judgment on the pleadings must appear **on the face of the challenged pleading** or be
17 based on facts which the court may judicially notice. See Cal. Civ. Proc. § 438(d) (emphasis
18 added). While the court may consider matters which are properly judicially noticed, the court may
19 not look beyond the pleadings to any extrinsic evidence. Judgment on the pleadings does not
20 depend upon a resolution of questions of witness credibility or evidentiary conflicts; where there
21 are material factual issues that require evidentiary resolution, judgment on the pleadings must be
22 denied. Schabarum, at 1216. As on a demurrer, where a motion for judgment on the pleadings is
23 granted, leave to amend is routinely granted. See People v. \$20,000 U.S. Currency, 235 Cal. App.
24 3d 682 (1991).

25 **III. PLAINTIFF'S MOTION IS UNTIMELY**

26 Absent court order, a motion for judgment on the pleadings may not be made "if a pretrial
27 conference order has been entered pursuant to Section 575, or within 30 days of the date the action
28 is initially set for trial, whichever is later...." Code Civ. Proc. § 438(e). "The statutory reference

1 to a 'pretrial conference order' should be interpreted to mean the 'case management order' (CRC
2 3.278; see ¶ 12:84). Therefore, in most cases, 30 days before the initial trial date will be the
3 operative deadline." Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2013) § 7:280.

4 Here, a civil case management conference was held on October 1, 2010. At that time, the
5 Court issued a case management order. (Ex. 26.)¹ As part of that order, trial was set for May 13,
6 2011. (Ex. 26.) Accordingly, the deadline for any motion for judgment on the pleadings was
7 April 12, 2011, making Plaintiff's motion nearly two years late.

8 **IV. PLAINTIFF IMPROPERLY ATTEMPTS TO RELY UPON EXTRINSIC EVIDENCE**

9 Despite filing a motion for judgment on the pleadings, Plaintiff attempts to rely on a wide
10 range of extrinsic evidence under the guise of judicial notice. More specifically, Plaintiff requests
11 that this Court take judicial notice of 32 separate documents. Plaintiff then attempts to use the
12 "facts" within many of these documents to prove that Silvia Burley and her family are entitled to
13 all of the RSTF funds. For example, Plaintiff attempts to take judicial notice of Yakima Dixie's
14 deposition transcript, various letters from BIA and the Commission, declarations previously filed
15 in other lawsuits as well as this case, and purported resolutions by Plaintiff. Plaintiff argues that
16 Dixie resigned, that the Tribe was organized in 1998, and that Silvia Burley is the chairperson of
17 the Tribe. These are all hotly disputed issues which this Court has no jurisdiction to decide and
18 which cannot be decided on a motion for judgment on the pleadings. Moreover, Plaintiff's
19 attempt to utilize judicially noticed documents for the purported truth of facts within those
20 documents is entirely improper. While the existence of documents may be judicially noticed, the
21 truth of the matters asserted therein may not be judicially noticed. See, e.g., Steed v. Department
22 of Consumer Affairs, 204 Cal.App.4th 112, 121 (2012) ("a court may take judicial notice that a
23 prior order was entered, but it may not take judicial notice of the truth of the factual findings made
24 therein"); Fremont Indem. Co. v. Fremont Gen. Corp., 148 Cal.App.4th 97, 113 (2007) ("Taking
25 judicial notice of a document is not the same as accepting the truth of its contents or accepting a

26
27 ¹ All exhibits are attached to the joint Notice of Lodgment filed in support of Intervenor's
28 Oppositions to Plaintiff's Motion for Judgment on the Pleadings and Plaintiff's Motion for
Order Lifting the Effect of March 11, 2011 Order.

1 particular interpretation of its meaning.”) (internal quotes omitted); Sosinsky v. Grant, 6
2 Cal.App.4th 1548, 1564-1569 (1992) (not all matters contained in court records are indisputably
3 true, and, thus, while the existence of any document in a court file may be judicial noticed, the
4 truth of matters asserted in such documents is not necessarily subject to judicial notice); Velazquez
5 v. GMAC Mortg. Corp., 605 F.Supp.2d 1049, 1057 (C.D. Cal. 2008) (“a court may take judicial
6 notice of the undisputed matters of public record, e.g., the fact that a hearing took place, but it may
7 not take judicial notice of disputed facts stated in public records”); Bryant v. Carleson, 444 F.2d
8 353, 357-58 (9th Cir. 1971) (the court properly took judicial notice of the fact that the defendant
9 had filed an affidavit on November 24, 1970 but refused to take judicial notice of the contents of
10 the Defendant's November 24, 1970 affidavit as being true). Indeed, Plaintiff is well aware of this
11 rule having made the identical objection in this case previously. (Ex. 27, pp. 2-3.)

12 All of Plaintiff's extrinsic evidence should be disregarded, and the Court should ignore any
13 arguments in the Motion premised upon such impermissible extrinsic evidence.² See Silguero v.
14 Creteguard, Inc., 187 Cal.App.4th 60, (2010) (“The hearing on demurrer may not be turned into a
15 contested evidentiary hearing through the guise of having the court take judicial notice of
16 documents whose truthfulness or proper interpretation are disputable. We thus ignore
17 Creteguard's arguments premised on facts allegedly obtained through discovery but not reflected
18 in the complaint.”).

19 **V. PLAINTIFF'S MOTION FAILS ON ITS MERITS**

20 **A. Plaintiff's Motion Must Be Denied Because The Facts Are Disputed**

21 At the core of Plaintiff's motion is the continued argument that Silvia Burley and her
22 family are the Tribe, that the Tribe was organized in 1998, and that Silvia Burley is an authorized
23 representative of the Tribe. These contentions are 100% disputed by Intervenor. Who is the
24 Tribe, whether it has been organized, and who are its leaders are at the very core of the ongoing
25 federal court proceedings. This dispute is the basis for the Commission to withhold payment of
26 funds until the appropriate authorities resolve the dispute. Not only does this Court lack

27 ² Intervenor have separately filed an Objection to Plaintiff's Request for Judicial Notice.
28

1 jurisdiction to decide these issues, but these factual disputes cannot be decided on a motion for
2 judgment on the pleadings. Instead, the Court must assume the truth of all facts properly pleaded
3 in the answer and must disregard the controverted allegations in the complaint. See MacIsaac, 26
4 Cal.2d at 812-813. Yet Plaintiff's Motion is in large part dependent on "facts" in the FAC which
5 were denied by the Commission in its Answer. (Answer, ¶¶ 1, 6, 7, 8, 15, 22, 44; see also Answer,
6 ¶¶ 18, 20, 23, 24, 25, 26, 30, 32, 34, 35, 43, 44.) These controverted "facts" cannot be relied upon
7 on a motion for judgment on the pleadings. On this basis alone, the motion must be denied.³

8 **B. Plaintiff Improperly Attempts To Enforce The Terms Of The Compact**

9 Plaintiff argues that the Commission has refused to release the RSTF monies to the Burley
10 faction of the Tribe because: (1) the Tribe has no recognized governing body; (2) the Tribe has no
11 recognized leader; (3) the tribe fails to include or protect the interests of a significant number of
12 potential members; (4) there is an ongoing leadership dispute; and (5) the membership of the Tribe
13 is unknown.⁴ (Motion, 6:4-23.) Plaintiff argues that these reasons are "erroneous" and "find no
14 support in the language of the Compacts." (Motion, 14:7-10.) Plaintiff further argues that the
15 Commission has no discretion to withhold the RSTF monies for reasons not set out in the
16 Compacts. (Motion, 14:13-15.)

17 As detailed below in section V.C., Plaintiff is wrong. The Commission, acting as a trustee
18 with a fiduciary obligation, has acted well within its discretion in deciding to withhold

19
20 ³ Equally improper is Plaintiff's attempt to rely upon events which are not within the FAC
21 because those events did not occur until years after the filing of the FAC. For example,
22 Plaintiff relies on the AS-IA's rescinded December 22, 2010 decision and a purported
23 election in January 2011. This is further grounds for denying the motion.

24 ⁴ Plaintiff mischaracterizes the Commission's reasons for withholding the Tribe's RSTF
25 money. The Commission's letters to Silvia Burley make it clear that the Commission
26 suspended payments to the Tribe because the lack of a federally recognized Tribal
27 governing body made it impossible for the Commission to know that the funds, if paid to
28 Burley, would actually go to the Tribe. The other reasons cited by Burley are either
reasons for the BIA's refusal to recognize a Tribal government (e.g., Burley's
underinclusive membership criteria), or effects flowing from the BIA's refusal (e.g., the
federal government's termination of PL-638 funding to Burley). They are not the
Commission's basis for withholding payment of RSTF money to the Tribe. (See Ex. 18,
August 4, 2005 Letter from Commission to S. Burley; Ex. 29, June 27, 2006 Letter from
Commission to Silvia Burley; Ex. 30, June 26, 2007 Letter from Commission to Karla
Bell; Ex. 31, January 3, 2008 Letter from Commission to Manuel Corrales.)

1 disbursement of the RSTF monies until the federal government recognizes a governing body of
2 the Tribe. More importantly, Plaintiff's entire argument is premised on the argument that it is
3 entitled to judgment based on its interpretation of the Compact. However, the Court of Appeal
4 has already held that Plaintiff is barred from seeking to enforce the terms of the Compact
5 because.... See California Valley Miwok Tribe v. California Gambling Control Commission,
6 2010 WL 1511744, *8-9 (4th Dist. 2010) (unpublished) ("Miwok III"); see also Compact § 15.1.
7 This is yet another reason why Plaintiff's motion must be denied.

8 **C. The Commission Has Acted Well Within Its Discretion**

9 **1. The Standard for Ordinary Mandamus Is Abuse of Discretion**

10 In order to prevail on its motion, Plaintiff must show it is entitled to issuance of a writ of
11 mandate against the Commission. An ordinary writ of mandate is available to "compel the
12 performance of an act which the law specifically enjoins, as a duty resulting from an office, trust,
13 or station," Cal. Code Civ. Proc. § 1085, "upon the verified petition of the party beneficially
14 interested," CCP § 1086. Thus, there are two essential requirements for the issuance of a writ of
15 mandamus: "(1) A clear, present and usually ministerial duty upon the part of the respondent; and
16 (2) a clear, present and beneficial right in the petitioner to the performance of that duty[.]" CA
17 Correctional v. CA Dept. of Corrections, 96 Cal.App.4th 824, 827 (2002) (emphasis added) (citing
18 People ex rel. Younger v. County of El Dorado, 5 Cal.3d 480, 490-491 (1971)).

19 In a challenge to agency action under CCP 1085, the petitioner bears the burden of proving
20 that the challenged decision was arbitrary, capricious, entirely lacking in evidentiary support, or
21 contrary to required legal procedures. See McGill v. Regents of University of California, 44 Cal.
22 App. 4th 1776, 1786 (1996); Marvin Lieblin, Inc. v. Shewry, 137 Cal. App. 4th 700, 713 (2006).
23 This very deferential standard of review is also characterized as an "abuse of discretion" standard.
24 See Klajic v. Castaic Lake Water Agency, 90 Cal.App.4th 987, 995 (2001). Under this standard,
25 "the court may not substitute its judgment for that of the agency, and if reasonable minds may
26 disagree as to the wisdom of the agency's action, its determination must be upheld." Klajic, 90
27 Cal.App.4th at 995. The court can compel the agency to act only where the statute "leaves [no]
28 room for discretion," or where "only one choice can be a reasonable exercise of discretion." CA

1 Correctional, 96 Cal.App.4th at 827. This "very limited" power of judicial review reflects
2 "deference to the separation of powers between the Legislature and the judiciary, to the legislative
3 delegation of administrative authority to the agency, and to the presumed expertise of the agency
4 within its scope of authority." Redevelopment Agency of City of Chula Vista v. Rados Bros., 95
5 Cal. App. 4th 309, 316 (2001).

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

7 Plaintiff argues that the Commission has a mandatory, non-discretionary duty to pay the
8 Tribe's RSTF money to Silvia Burley. Plaintiff asserts that this duty would arise even if the Tribe
9 has no recognized governing body, no recognized leader, and no established membership. They
10 argue that the Commission must immediately disburse millions of dollars of RSTF monies held in
11 trust for the Tribe to Silvia Burley because she says she is the Tribe. Plaintiff is mistaken about
12 both the nature of the Commission's duty and the beneficiary to whom the duty is owed. The
13 Commission's duty arises under the Government Code—not under the Compact, which Plaintiff
14 has no right to enforce in this Court. Miwok III at *8-9. (Compact § 15.1.) The Government
15 Code provides that "[t]he [Commission] shall make quarterly payments from the [RSTF] to each
16 eligible recipient Indian tribe within 45 days of the end of each fiscal quarter." Cal. Gov. Code
17 § 12012.95(e)(2). The Code also states that money in the RSTF "shall be available to the
18 [Commission] . . . for the purpose of making distributions to noncompact tribes, in accordance
19 with distribution plans specified in tribal-state gaming compacts." Cal. Gov. Code § 12012.75.

20 Although there is nothing in the Compact explicitly called a "distribution plan," section
21 12012.75 is reasonably understood as referring to the provisions of the Compact that direct the
22 Commission to pay \$1.1 million annually to each eligible Non-Compact Tribe, in quarterly
23 payments, and to the provisions defining the relevant terms. (See Compact § 4.3.2.1.) The
24 Compact defines Non-Compact Tribes as those "federally recognized tribes operating fewer than
25 350 gaming devices." (Compact § 4.3.2.1(a).) A "tribe," in turn, is defined as a "federally-
26 recognized Indian tribe, or an authorized official or agency thereof." (Compact § 2.21.)

27 All parties agree that these Code provisions create a statutory duty for the Commission to
28 pay RSTF money to the Non-Compact Tribes, including this Tribe. But they do not, on their face,

1 create a nondiscretionary duty to pay the Tribe's RSTF money "in care of Burley," as Plaintiff
2 seeks.⁵ (FAC, ¶ 30.) The Compact's "distribution plan," likewise, makes no mention of Silvia
3 Burley. Plaintiff's claims thus depend on its attempt to equate "Silvia Burley" with the
4 "authorized official" of the Tribe. The Commission, however, is not required to accept that claim
5 at face value. Moreover, whether Silvia Burley is the authorized representative of the Tribe is
6 highly disputed and cannot be decided on a motion for judgment on the pleadings. In fact, this
7 Court is entirely without jurisdiction to ever make this determination. Instead, only the
8 Department of the Interior whose actions are subject to review in federal court, is authorized to
9 make this decision.

10 **3. The Commission Has the Obligation to Ensure that RSTF Money Only Goes**
11 **to Eligible Tribes**

12 Nothing in the Code or the Compact expressly explains how the Commission is to identify
13 an "authorized official or agency" of a Non-Compact Tribe for purposes of making RSTF
14 payments. This necessarily leaves room for the Commission to exercise its discretion in making
15 RSTF distributions, especially when a legitimate dispute exists as to the identity of a Tribe's
16 authorized officials. Here, the Commission has made it clear that it suspended payments to the
17 Tribe because the lack of a federally recognized Tribal governing body made it impossible for the
18 Commission to know that the funds, if paid to Burley, would actually go to the Tribe. The
19 Commission's position is well-supported by ongoing federal litigation between Intervenors and the
20 Department of the Interior on this very issue of who is the federally recognized Tribal governing
21 body. For purposes of a mandamus action, "[t]he scope of discretion always resides in the
22 particular law being applied, i.e., in the legal principles governing the subject of [the] action. . . ."
23 City of Sacramento v. Drew, 207 Cal.App.3d 1287 (1989) (quotation marks and citation omitted).
24 In this case, the legal principles that govern the Commission's distribution of RSTF money are its
25 fiduciary duties as a trustee. (Compact § 4.3.2.1(b).)

26 ⁵ Put another way, the Commission has a duty to pay RSTF money to the Tribe, but it is far
27 from clear that Plaintiff is the party with the "clear, present and beneficial right . . . to the
28 performance of that duty." CCP § 1086.

1 As a trustee, the Commission has fiduciary duties to beneficiaries of the trust, which
2 include the Tribe. This relationship carries with it an "obligation of the highest good faith,"
3 Brown v. Wells Fargo Bank, 168 Cal.App.4th 938, 961 (2008) (citation omitted), as well as
4 specific duties imposed by statute that include the duty to control and preserve trust property,
5 Hearst v. Ganzi, 145 Cal.App.4th 1195 (2006) (citing Cal. Prob. Code § 16006). See also
6 Manchester Band of Pomo Indians. v. United States, 363 F.Supp. 1238, 1245 (N.D.Cal. 1973) (the
7 conduct of the government as a trustee is measured by the same standards applicable to private
8 trustees) (citing United States v. Mason, 412 U.S. 391, 398 (1973)). Violation of these fiduciary
9 duties would be a breach of trust, and would make the Commission liable for any resulting loss in
10 the value of the trust property. Uzyel v. Kadisha, 188 Cal.App.4th 866, 888-889 (2010) (citing
11 Prob. Code §§ 16400, 16440). Specifically, it would be a fraud upon the Tribe, as a beneficiary,
12 for the Commission to fail to protect the Tribe's interests by releasing RSTF funds to someone
13 other than the Tribe's authorized official or agency. See Dougherty v. Cal. Kettleman Oil R., Inc.,
14 13 Cal.2d 174 (1939).

15 A large body of case law confirms the application of these fiduciary duties where the
16 government provides benefits to Indian tribes. As the federal Court of Appeals said in a case
17 rejecting Burley's claim to federal recognition, the government's obligations include "ensuring
18 that the will of tribal members is not thwarted by rogue leaders when it comes to decisions
19 affecting federal benefits." California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1267
20 (D.C. Cir. 2008) ("Miwok II") (citing Seminole Nation v. United States, 316 U.S. 286, 297
21 (1942)). The Court of Appeals stated:

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

25 Id. (quotation marks and citation omitted). Although these cases involved the federal
26 government's relations with Indian tribes, the Commission also serves as a trustee to federally
27 recognized tribes and has the same obligations in disbursing state benefits to tribes.
28

1 In light of the Commission's duties, Plaintiff's argument that Burley is entitled to
2 mandamus because the Compact says that the Commission "shall have no discretion as to the use
3 or disbursement of the [RSTF] funds" is incorrect. That statement must be read as a statement that
4 the Commission can only use the funds for disbursements to eligible tribes, and that it cannot alter
5 the timing or amount of disbursements specified in the Compact. It cannot reasonably be read as a
6 statement that the Commission must pay the funds to any party that claims to represent the Tribe,
7 regardless of the veracity of that claim. The Commission's actions in withholding payment here is
8 within its statutory discretion and is not subject to mandamus.

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

11 Outside of a tribe itself, the United States government acting through the BIA has the
12 exclusive authority to acknowledge a tribal government, and those decisions are subject to review
13 only in the federal courts. See, e.g., Wheeler v. U.S. Dep't of the Interior, 811 F.2d 549, 552 (10th
14 Cir. 1987) ("since the Department is sometimes required to interact with tribal governments, it
15 may need to determine which tribal government to recognize"); Ransom v. Babbitt, 69 F.Supp.2d
16 141, 151 (D.D.C. 1999) (BIA acted arbitrarily and capriciously by recognizing a tribal government
17 based on a constitution it should have realized was not validly adopted); Seminole Nation v.
18 Norton, 223 F.Supp.2d 122, 138-140 (D.D.C. 2002) (DOI upheld its trust obligation by refusing to
19 recognize tribal government based on tribal elections from which members were excluded).

20 Neither the Commission nor the state courts have jurisdiction to resolve a tribal dispute or
21 to decide who is an authorized tribal official. See Ackerman v. Edwards, 121 Cal.App.4th 946,
22 954 (2004); Lamere v. Superior Court, 131 Cal.App.4th 1059, 1067 (2005). The Commission also
23 has no expertise in the area of tribal membership or governance; it was created to oversee casino
24 gambling, not to make determinations about the makeup of Indian tribes. Cal. Bus. & Prof Code
25 § 19811. In light of those limitations, the Commission has chosen to rely on the BIA's
26 determinations in deciding whether a claimant is an "authorized official" of a tribe for purposes of
27 disbursing RSTF money. (See Ex. 18, Aug 2005 Commission letter to Burley.) This is a
28

1 reasonable exercise of discretion that allows the Commission to fulfill its fiduciary duties as the
2 RSTF trustee while acting within its authority and respecting tribal sovereignty.

3 Here, in deciding to suspend payment of the Tribe's RSTF money to Burley, the
4 Commission explicitly relied on the BIA's decision to withdraw acknowledgement of any Tribal
5 government due to an ongoing Tribal dispute. (Ex. 18, Aug 2005 Commission letter to Burley;
6 Ex. 11, 2005 Decision.) As a trustee, the Commission had a duty to act on that information,
7 because it called into question whether payments of RSTF money to Burley would actually go to
8 the Tribe. In continuing to withhold the RSTF funds, the Commission has relied on a number of
9 other BIA determinations including: (1) the BIA's decisions to deny funding to the Tribe under
10 PL-638 (Ex. 19, July 19, 2005 Letter from BIA Awarding Official Janice Whipple-DePina to
11 Silvia Burley; Ex. 20, Dec. 14, 2007 Letter from BIA Superintendent Troy Burdick to Silvia
12 Burley), (2) the BIA's resolution of an administrative appeal, confirming that the BIA does not
13 recognize Burley's Tribal government (Ex. 13, April 2007 BIA Regional Director Decision), (3)
14 letters from the BIA to the Commission in 2008 and 2009 confirming that the Tribe has "no
15 government" (Ex. 21, Dec. 12, 2008 Letter from Solicitor of the Interior to Cal. Atty Gen.; Ex. 22,
16 Jan. 14, 2009 Letter from Solicitor of the Interior to Cal. Atty Gen.), and (4) two federal court
17 opinions affirming the BIA's determination that the Tribe can only establish a valid government
18 through the participation and consent of the entire Tribal community (California Valley Miwok
19 Tribe v. USA, 424 F.Supp.2d 197 (D.D.C. 2006) ("Miwok I"; Miwok II).

20 The Commission's decision is reasonable under the circumstances. If this Court were to
21 find otherwise, and order immediate disbursement of the Tribe's RSTF money, it would be forced
22 to specify to whom the money should be paid, without waiting for the BIA to acknowledge a
23 Tribal government. The Court lacks the jurisdiction to make that determination. Ackerman, 121
24 Cal.App.4th 946; Lamere, 131 Cal.App.4th 1059. In 2005, after suspending RSTF payments to
25 the Tribe, the Commission filed an interpleader action in state court, asking the court to determine
26 to whom the Commission should release the Tribe's RSTF money. (Ex. 23, Complaint.) Silvia
27 Burley successfully opposed that action, arguing that neither the court nor the Commission had
28 any authority to determine the proper representative of the Tribe for purposes of RSTF

1 distribution. (Ex. 24, Burley Demurrer; Ex. 25, Order sustaining demurrer.) Burley's argument in
2 support of the holding in that case was correct then. It is correct now and provides a bar to the
3 Plaintiffs request for mandamus.

4 In the end, the Commission's decision to await acknowledgment of a Tribal government
5 by the BIA is not arbitrary, capricious or an abuse of discretion. As a result, Plaintiff's Motion
6 must be denied.

7 **D. Plaintiff's Argument Concerning The Purported January 2011 Tribal Election Has**
8 **Been Litigated And Rejected**

9 Plaintiff argues that BIA, via a January 12, 2011 letter from Troy Burdick, acknowledged a
10 purported Tribal election held on January 6, 2011 in which Silvia Burley was elected Chairperson.
11 (Motion, 10:1-4.) Plaintiff argues that Mr. Burdick's letter itself was never specifically "recalled
12 or set aside." (Motion, 10:10-12.) Based on these events, Plaintiff appears to assert that the BIA's
13 acknowledgment of the January 2011 "election" was final agency action recognizing a Tribal
14 government headed by Silvia Burley and that this Court is bound by that result. (Motion, 10:13-
15 17.) Plaintiff is incorrect.

16 These arguments have previously been made by Plaintiff and rejected by this Court. In a
17 Motion for Entry of Judgment against the Commission, which the Court heard and denied on
18 October 20, 2011,, Plaintiff argued that the purported January 6, 2011 election, and Troy
19 Burdick's January 12, 2011 letter acknowledging the election, constituted independent grounds for
20 entering judgment against the Commission. (Ex. 4, 6:8-26; Ex. 5, 8:4-9:20.) This Court
21 considered and rejected Plaintiff's arguments, (Ex. 6.) and it should reject them again, because
22 they are entirely without merit.

23 Mr. Burdick's January 2011 letter purports to recognize the results of an election that was
24 expressly premised upon the December 22 decision, which recognized the "general council" of
25 five people that held the election. (Plaintiff's Ex. 32.) The AS-IA rescinded the December 22
26 decision on April 1, 2011. Once that happened, Mr. Burdick's letter automatically lost any legal
27 effect it might have had. See Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1368, 1371-
28 1372 (Fed. Cir. 2002) (where an agency letter "merely implements" a challenged regulation, "its

1 validity stands or falls with the underlying regulation"). Put another way, a BIA field
2 superintendent has no authority to countermand a decision by the BIA's top official, the AS-IA.
3 See generally 25 C.F.R. Part 2 (BIA regulations). Even assuming that the BIA's Central
4 California office temporarily recognized Silvia Burley's tribal government following the issuance
5 of the December 22 decision, it necessarily ceased to do so when the AS-IA rescinded that
6 decision.

7 Plaintiff appears to argue that the AS-IA's August 31, 2011 decision "ultimately affirmed"
8 the December 22 decision, somehow reinstating both the December 22 decision and the Burdick
9 acknowledgment implementing that decision. That is simply not true. The December 22, 2010
10 decision was expressly rescinded by the AS-IA on April 1, 2011, and entirely replaced by a new
11 decision on August 31, 2011. The August 31 decision, in turn, is stayed by its own terms and
12 therefore has no current force or effect.⁶ (Ex. 7, p. 8; Ex. 6, p. 2.) As a result, there is zero legal
13 merit to Plaintiff's claim that Burdick's January 2011 letter constitutes a valid "final agency
14 action" recognizing Burley's tribal council.⁷

15 Even if the Burdick letter did not rest on the rescinded December 22 Decision, it would not
16 have any legal effect because Intervenors filed an administrative appeal of the letter on February 9,
17 2011 (Ex. 10), which triggered an automatic stay under the BIA's regulations so long as the appeal
18 remains pending. See 25 C.F.R. §2.6(b); Yakama Nation v. Northwest Regional Director Bureau
19 of Indian Affairs, 47 IBIA 117, 119 (2008).

20 Finally, Plaintiff again attempts to use judicial notice for the truth of the matters asserted in
21 the underlying documents. As detailed previously, this is improper and must be rejected.

22
23 ⁶ The fact that the force and effect of the August 31, 2011 decision has been stayed has been
24 acknowledged by the AS-IA through his counsel of record (Ex. 18), the federal district
25 court overseeing the *Salazar* litigation (Ex. 9), and the Court of Appeal. See California
Valley Miwok Tribe v. Superior Court, Case No. D061811 (December 18, 2012), p. 9
26 ("The implementation of the August 31, 2011 decision was stayed").

27 ⁷ As this Court is well aware, unlike the December 22 decision, the August 31 decision did
28 not attempt to rescind prior BIA decisions including those in 2004, 2005, 2006, and 2007,
each of which found that the Tribe had no recognized government and thus no recognized
governing body. (Exs. 11-13.) Each of these decisions currently remain in full force and
effect.

1 **E. Yakima Dixie's Testimony Is Irrelevant**

2 Plaintiff argues that Yakima Dixie's testimony that he resigned as Chairperson in 1999
3 "opens the door for the Commission to release the RSTF money to an authorized representative
4 for the Tribe, and removes any claim of a competing tribe or a competing Tribal representative
5 vying for the same funds." (Motion, 7:17-20.)

6 It is entirely improper for Plaintiff to attempt to use deposition testimony in a motion for
7 judgment on the pleadings. Courts addressing demurrers will not take judicial notice of the truth
8 of statements contained in deposition transcripts or declarations included in court records. Bach v.
9 McNelis, 207 Cal.App.3d 852, 864-865 (1989); Garcia v. Sterling, 176 Cal.App.3d 17, 21-22
10 (1985). As the court explained in Garcia, "[a]lthough the existence of statements contained in a
11 deposition transcript filed as part of the court record can be judicially noticed, their truth is not
12 subject to judicial notice." Garcia at 22.

13 The claim that Mr. Dixie resigned is disputed. During the deposition, Mr. Dixie repeatedly
14 testified that he did not resign as Tribal chairperson. (Ex. 14, 166:17-20, 202:20-203:7; Ex. 15,
15 33:15-16, 44:3-4, 44:16-18, 45:8-49:20.) He testified that he believed his resignation had been
16 forged. (Ex. 14, 166:7-11, 178:15-19, 183:4-11; Ex. 15, 31:24-32:9, 34:4-7.) He testified that he
17 did not believe he signed the purported resignation. (Ex. 14, 200:10-22, 202:7-11.)

18 Not only is Mr. Dixie's testimony internally inconsistent, it is totally irrelevant to establish
19 who is currently the authorized representative of the Tribe. The BIA has issued a number of
20 decisions since 1999 in which it stated that it did not recognize any authorized representative for
21 the Tribe. In fact, the AS-IA's August 31, 2011 decision (even if it were not stayed) did not
22 rescind the BIA's 2004 and 2005 determinations stating that the BIA did not recognize any Tribal
23 government, including Silvia Burley. These decisions are currently in effect. They took place
24 years after Mr. Dixie's purported resignation. As a result, whether or not Mr. Dixie resigned in
25 1999 has long ago been rendered moot by the BIA's decisions in 2004 and 2005.⁸

26
27 ⁸ As detailed in Intervenor's motion for summary judgment in the federal litigation, whether
28 or not Mr. Dixie resigned in 1999 is a non-issue. (See Ex. 16, Intervenor's Motion for
Summary Judgment.) Moreover, in order to avoid the stress and inconvenience of a

Moreover, this Court has absolutely no jurisdiction to decide who is or is not the Chairperson of the Tribe. That is a matter which can only be determined by BIA and the federal courts. See Ackerman v. Edwards, 121 Cal.App.4th 946, 954 (2004); Lamere v. Superior Court, 131 Cal.App.4th 1059, 1067 (2005). The determination of who is the Tribe and who are its leaders is at the very heart of the pending federal litigation. Plaintiff's attempt to get this Court to wade into these issues is entirely improper and must be rejected.⁹

VI. CONCLUSION

Plaintiff's motion for judgment on the pleadings should be denied for both procedural and substantive reasons. Plaintiff has not demonstrated that it is entitled to issuance of a writ of mandamus. To the contrary, the Commission's decision to await acknowledgment of a Tribal government by the BIA is a proper exercise of its discretion to ensure that trust funds are paid only to the proper party. Plaintiff's motion should be denied.

Dated: March 27, 2013

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second deposition of Mr. Dixie, Intervenor offered to stipulate for purposes of this case not to challenge the validity of the Dixie resignation in 1999. (Ex. 17.) Clearly, if this issue had any bearing on the outcome of this case, Intervenor never would have offered such a stipulation.

⁹ In the Motion, Plaintiff attempts to rely on a 1998 Resolution which purportedly established a General Council form of government. The 1998 Resolution is entirely disputed. (See Ex. 16, Intervenor's Motion for Summary Judgment.) It's purported validity is outside this Court's jurisdiction to decide. Even if it was not, this "fact" was expressly denied in the Commission's Answer (Answer, ¶ 8.), meaning it cannot be used for purposes of a motion for judgment on the pleadings. Finally, the purported 1998 resolution is entirely irrelevant given BIA's decisions in 2004, 2005, 2006, and 2007, wherein BIA found no recognized government. These decisions are all currently in effect.