

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@rosettelaw.com](mailto:rosette@rosettelaw.com)

Manuel Corrales, Jr., Esq. SBN 117647

**Attorney at Law**

17140 Bernardo Center Drive, Suite 370

San Diego, California 92128

Tel: (858) 521-0634

Fax: (858) 521-0633

Email: [mannycorrales@yahoo.com](mailto: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@terrysingletton.com](mailto:terry@terrysingletton.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.

**PLAINTIFF'S REPLY TO  
INTERVENORS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
JUDGMENT ON THE PLEADINGS  
AGAINST DEFENDANT CALIFORNIA  
GAMBLING CONTROL COMMISSION**

**CALIFORNIA GAMBLING CONTROL  
COMMISSION,**

Defendant.

Date: April 26, 2013

Time: 2:00 p.m.

Dept: 62

Judge: Hon. Ronald Styn

Trial Date: June 4, 2013

TABLE OF CONTENTS

Table of Authorities.....	(ii)
I. ARGUMENTS INCORPORATED BY REFERENCE.....	1
II. PLAINTIFF'S MOTION IS TIMELY.....	1
III. PLAINTIFF'S RELIANCE ON JUDICIALLY NOTICABLE DOCUMENTARY EVIDENCE IS PROPER.....	4
IV. THE RELEVANT, SUBMITTED FACTS ARE UNDISPUTED.....	6
V. PLAINTIFF IS NOT SEEKING TO ENFORCE THE TERMS OF THE COMPACT.....	7
VII. THE COMMISSION IS NOT A TRUE TRUSTEE AND HAS NO AUTHORITY TO MAKE A DISCRETIONARY DECISION AS A FIDUCIARY TO WITHHOLD THE SUBJECT RSTF MONEY.....	12
VIII. THE BIA'S JANUARY 12, 2011 ACKNOWLEDGMENT LETTER IS DISPOSITIVE OF THE ISSUES IN THIS CASE.....	13
IX. DIXIE'S DEPOSITION TESTIMONY IS HIGHLY RELEVANT.....	13
X. CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Cases

### Pages

<u>Bockrath v. Aldrich Chem. Co.</u>	
(1999) 21 Cal.4 <sup>th</sup> 71, 83.....	5
<u>Cloud v. Northrop Grumman Corp.</u>	
(1998) 67 CA4th 995, 999.....	5
<u>Gunn v. Mariners Church, Inc.</u>	
(2008) 167 CA4th 206, 213.....	7
<u>Morohoshi v. Pacific Home</u>	
(2004) 34 Cal.4 <sup>th</sup> 482, 491.....	7
<u>Sofias v. Bank of America</u>	
(1985) 172 CA3d 583, 585.....	2
<u>Tehachapi-Cummings County Water Dist. V. Armstrong</u>	
(1975) 49 Cal.App.3d 992, 1000.....	11

### Statutes

CCP §438(e) .....	2
CCP §526(a)(7) .....	10, 11
CCP §1060.....	10, 11
CCP §1085.....	9
Evidence Code §451.....	5
Evidence Code §452.....	5
Gov. Code § 12012.90(e)(2) .....	8, 9, 11

1 Plaintiff CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or  
2 "the Miwok Tribe" or "Plaintiff") submits the following  
3 Reply to the Intervenor's Opposition to Plaintiff's Motion  
4 for Judgment on the Pleadings as against the California  
5 Gambling Control Commission ("the Commission").

6 I.

7 ARGUMENTS INCORPORATED BY REFERENCE

8 Plaintiff incorporates by reference its arguments set  
9 forth in the following pleadings:

10 1. PLAINTIFF'S REPLY TO INTERVENORS' OPPOSITION TO  
11 MOTION FOR ORDER LIFTING STAY OF THE EFFECT OF THE MARCH  
12 11, 2011 ORDER GRANTING RECONSIDERATION AND DENYING  
13 INTERVENTION.

14 2. PLAINTIFF'S REPLY TO DEFENDANT CALIFORNIA GAMBLING  
15 CONTROL COMMISSION'S OPPOSITION TO MOTION FOR JUDGMENT ON  
16 THE PLEADINGS.

17 3. PLAINTIFF'S MOTION FOR ORDER LIFTING STAY OF THE  
18 EFFECT OF THE MARCH 11, 2011 ORDER GRANTING RECONSIDERATION  
19 AND DENYING INTERVENTION.

20 II.

21 PLAINTIFF'S MOTION IS TIMELY

22 The Intervenor's argue that Plaintiff's motion for  
23 judgment on the pleadings against the Commission is  
24 untimely because it was not filed within 30 days of the  
25 October 1, 2010 Case Management Conference and the May 13,  
26 2011 initial trial date, relying exclusively on CCP  
27 §438(e). This contention is without merit.

1 The Intervenor's ignore the specific language of the  
2 Notice of Hearing and Motion for Judgment on the Pleadings  
3 which states that the motion is brought "pursuant to CCP  
4 §438 and under non-statutory case law." (Page 2, lines 9-10  
5 of notice/motion). Unlike a statutory motion for judgment  
6 on the pleadings, a non-statutory motion for judgment on  
7 the pleadings can be made at any time during the lawsuit,  
8 even during trial, since the grounds for general demurrer  
9 are never waived. See Sofias v. Bank of America (1985) 172  
10 CA3d 583, 586 (motion made shortly before trial). Thus,  
11 the motion is timely.

12 The motion is also timely under CCP §438(e) which the  
13 Intervenor's only partially quote, conveniently leaving out  
14 the following highlighted key language:

15 No motion may be made pursuant to this section if a  
16 pretrial conference order has been entered pursuant to  
17 Section 575, or within 30 days of the date the action  
18 is initially set for trial, whichever is later, unless  
the court otherwise permits. (Emphasis added).

19 After the Court of Appeal decision came down granting  
20 Plaintiff's writ of mandate, the parties appeared at a  
21 Status Conference on January 25, 2013. At that time, the  
22 trial court permitted the Plaintiff to file a motion for  
23 judgment on the pleadings against the Commission. The  
24 transcript confirms this as follows:

25 **THE CLERK:** And in regard to the dispositive  
26 motions...are they going to clarify now as to which  
27 type?  
28

1       **THE COURT:** Put down "summary judgment" because the  
2       state's going to be filing a summary judgment. Okay.  
3       At least one of the motions will be a summary judgment.  
4       And the plaintiffs are not sure what they're going to  
5       call it.

6       **MR. CORRALES:** We will file a motion for judgment on  
7       the pleadings, and we don't know yet if we're also  
8       going to file a cross motion for summary judgment. So  
9       we're going to have—

10      **THE COURT:** Why would you do both?

11      **MR. CORRALES:** Judgment on the Pleadings.

12      **THE COURT:** And a summary judgment?

13      **MR. CORRALES:** Okay. We'll just—

14      **THE COURT:** Think about that.

15      **MR. CORRALES:** Motion for judgment.

16      **THE COURT:** Think about your audience here. I think  
17      one motion will be enough.

18      **MR. CORRALES:** We will have one motion, motion for  
19      judgment on the pleadings, and we'll respond to their  
20      motion.

21      **THE COURT:** Of course.

22      (Transcript of hearing 1/25/2013, pages 19-20). Based on  
23      this exchange between the court and counsel, the court  
24      clearly permitted Plaintiff's counsel to file a motion for  
25      judgment on the pleadings.

26      In addition, a Case Management Conference is not  
27      tantamount to a Pre-trial Conference (Trial Readiness  
28      Conference), as the Intervenors argue. (See pRJN, Ex. "34",

1 4/20/2011 Stay Order ["The Court sets a Case Management  
2 Conference for...The present trial date of May 13, 2011,  
3 and the pre-trial conference, along with other previously  
4 set dates, are all vacated."]). Since a Trial Readiness  
5 Conference Order, i.e., a pre-trial conference order, was  
6 never entered, and the court clearly permitted the motion  
7 to be made, Plaintiff's motion for judgment on the  
8 pleadings is still timely as a statutory motion.

### 9 III.

#### 10 PLAINTIFF'S RELIANCE ON JUDICIALLY NOTICABLE DOCUMENTARY 11 EVIDENCE IS PROPER

12 The Intervenor next argue that Plaintiff's motion for  
13 judgment on the pleadings cannot be based on the requested,  
14 judicially noticeable documents, because the issue of  
15 whether Silvia Burley ("Burley") is the authorized Tribal  
16 leader and whether the Tribe is organized "are hotly  
17 disputed issues which this Court has no jurisdiction to  
18 decide." (Intervenors P/As, page 3, lines 17-18). This  
19 contention misses the point.

20 As stated in Plaintiff's motion papers, the judicially  
21 noticeable documents are not being offered for the purpose  
22 of the truth of the matter asserted, or to prove the merits  
23 of one side of a leadership dispute. Rather, they are  
24 being offered solely for the purpose of showing that there  
25 exists sufficient information for the Commission to  
26 reasonably conclude that Burley, and not Yakima Dixie  
27 ("Dixie"), is the authorized representative of the Tribe  
28 for purposes of receiving for the Tribe Revenue Sharing



1 Trust Fund ("RSTF") distributions. This is what the Court  
2 of Appeal has directed this court to decide. The trial  
3 court is not to decide the same issues pending before the  
4 federal court, and the court is not to decide any Tribal  
5 leadership dispute.

6 A motion for judgment on the pleadings has the same  
7 function as a general demurrer, and thus the rules  
8 governing demurrers apply. Cloud v. Northrop Grumman Corp.  
9 (1998) 67 CA4th 995, 999. Thus, with respect to a  
10 demurrer, the Code specifically authorizes the court to  
11 consider any matter which the court *must* or *may* judicially  
12 notice under Evidence Code §§ 451 or 452. To this end, a  
13 court may take judicial notice of plaintiff's own  
14 affidavits, deposition answers and verified discovery  
15 responses to the extent they contradict the complaint. See  
16 Bockrath v. Aldrich Chem. Co. (1999) 21 Cal.4<sup>th</sup> 71, 83.

17 Here, Dixie alleges in his Complaint-In-Intervention and in  
18 his supporting declaration that his resignation as Tribal  
19 Chairman was a product of forgery, and that "the essence of  
20 this action is the tribal dispute regarding the leadership  
21 of the tribe." (pRJN, Ex. "20", page 13, lines 10-11). His  
22 deposition is relevant to contradict his claim that his  
23 resignation was a product of forgery and that he is the  
24 Tribal leader entitled to receive the subject RSTF money on  
25 behalf of the Tribe. During his deposition, Dixie  
26 admitted, under examination by his own counsel, signing  
27 documents that stated he in fact resigned as Tribal  
28 Chairman and that Burley was the newly elected Tribal



1 Chairperson. Indeed, Dixie's deposition transcript was  
2 filed with the Court of Appeal, and relevant portions were  
3 filed with this court, making it further judicially  
4 noticeable as a court record. In fact, all of Plaintiff's  
5 requested judicially noticeable documents were filed with  
6 the Court of Appeal in connection with Plaintiff's petition  
7 for a writ of mandate.

8 As stated, this evidence is relevant to whether there  
9 exists sufficient information for the Commission to  
10 conclude that Burley is the one authorized to receive the  
11 subject RSTF money. The other judicially noticeable  
12 documents, including various public records from the BIA,  
13 public letters from the Commission, Tribal resolutions, and  
14 various court records, all bear on this same issue.

#### 15 IV.

#### 16 THE RELEVANT, SUBMITTED FACTS ARE UNDISPUTED

17 The Intervenors argue that Plaintiff's motion for  
18 judgment on the pleadings must be denied, because the facts  
19 are disputed. This contention belies both the Intervenors'  
20 and the Commission's motions for summary judgment in which  
21 they both claim they are entitled to summary judgment based  
22 on undisputed material facts set out in their separate  
23 statements and requested judicially noticeable documents,  
24 most of which are the same documents submitted by the  
25 Plaintiff in connection with Plaintiff's motion for  
26 judgment on the pleadings.

27 The only difference is the type of motion Plaintiff  
28 chose over the type of motion the Intervenors and the

Commission chose. In both instances, the court is being asked to decide the issues delineated by the Court of Appeal based on undisputed facts. If what the Intervenor assert is true, i.e., that there are hotly disputed facts preventing judgment on the pleadings, then it follows that the summary judgment motions should be denied as well.

V.

**PLAINTIFF IS NOT SEEKING TO ENFORCE THE TERMS OF THE COMPACT**

The Intervenor also argue that Plaintiff's motion for judgment on the pleadings against the Commission is purportedly an improper attempt to "enforce the terms of the Compact." This contention is without merit, and ignores the Court of Appeal's prior April 16, 2010 decision rejecting this same argument made by the Commission, which is the law of the case, and therefore binding on this court. Morohoshi v. Pacific Home (2004) 34 Cal.4<sup>th</sup> 482, 491. Under the doctrine of "law of the case," any principle or rule of law stated in an appellate court opinion that is "necessary" to the court's decision must be followed in all subsequent proceedings in the action, whether in the trial court or on a later appeal. Gunn v. Mariners Church, Inc. (2008) 167 CA4th 206, 213.

The April 16, 2010 Court of Appeal decision states in relevant part as follows:

As another basis for demurrer, the Commission argues that the Miwok Tribe, as a third party beneficiary of the Compacts, is prevented by the terms of the Compacts, from bringing suit to enforce obligations created under the Compacts. The Commission contends

1 that the causes of action for injunctive and  
2 declaratory relief fail to state a claim for relief  
3 because they impermissibly seek an order enforcing the  
4 terms of the Compacts...

5 We agree with the Commission that the [provisions of  
6 the Compacts] unambiguously prevent a third party  
7 beneficiary from bringing suit to enforce the terms of  
8 the Compacts. The issue presented, therefore, is  
9 whether the Miwok Tribe's claims for declaratory and  
10 injunctive relief are properly classified as attempts  
11 to enforce the terms of the Compacts...

12 \* \* \*

13 ...Based on our reading of the complaint, while the  
14 provisions of the Compacts are relevant, the causes of  
15 action for declaratory and injunctive relief are not  
16 dependent on the enforcement of any contractual terms.  
17 Instead, the complaint repeatedly cites the Government  
18 Code as the source of the Commission's duty to pay over  
19 the RSTF funds. Specifically, the complaint cites  
20 Government Code section 12012.90, subdivision (e) (2),  
21 which provides that the Commission "shall make  
22 quarterly payments from the Indian Gaming Revenue  
23 Sharing Trust Fund to each eligible recipient Indian  
24 tribe within 45 days of the end of each fiscal  
25 quarter." (*Ibid.*) **Because the causes of action for  
26 declaratory and injunctive relief depend on a statutory  
27 provision rather than the terms of the Compacts, we  
28 conclude that those causes of action are not precluded  
by the contractual provision precluding suits brought  
by third party beneficiaries to enforce the terms of  
the Compacts.** (Emphasis added).

(pRJN, Ex. "24", pages 20-21, 4/16/2010 Ct. App. Decision).

The foregoing principles and rules of law concluding  
that Plaintiff's claims are not attempts to enforce the  
terms of the Compact are the law of the case, and therefore  
must be followed by this court in these proceedings.

1 Morohoshi, supra. Accordingly, there is no basis for the  
2 Intervenor to assert that Plaintiff is barred from seeking  
3 release of the subject RSTF from the Commission on the  
4 purported grounds that such attempts impermissibly seek to  
5 enforce the terms of the Compact. That issue has already  
6 been decided against the Commission by the Court of Appeal.

7 VI.

8 **THE THRUST OF PLAINTIFF'S CLAIMS ARE FOR DECLARATORY AND**  
9 **INJUNCTIVE RELIEF**

10 The Intervenor argues that Plaintiff must prove the  
11 Commission abused its discretion in order to prevail in  
12 this action, since Plaintiff seeks a writ of mandate under  
13 CCP §1085. This contention misconstrues the Plaintiff's  
14 claims and ignores the Court of Appeal decision on this  
15 issue.

16 Plaintiff's First Amended Complaint ("FAC") seeks  
17 declaratory and injunctive relief and a traditional writ of  
18 mandate. Plaintiff's writ of mandate, as are Plaintiff's  
19 claims for declaratory and injunctive relief, are grounded  
20 on Gov. Code §12012.90(e)(2) requiring the Commission to  
21 pay the Tribe within 45 days of the end of each fiscal  
22 quarter. The Court of Appeal in this case rejected the  
23 Commission's argument that it has complied with that  
24 requirement when it deposited the Tribe's quarterly shares  
25 in a separate interest bearing account. (Page 23 of  
26 4/16/2010 Ct. App. Decision, pRJN, Ex. "24"). It stated:

27 This argument fails because the act that the Miwok  
28 Tribe seeks to compel is not the same act that the  
Commission has already performed. The Miwok Tribe does

1 not seek an order requiring payment into an interest  
2 bearing account controlled by the Commission. On the  
3 contrary, it seeks an order requiring the Commission to  
4 pay over and *relinquish control* of the RSTF funds.

5 (Ibid). Based on this failure to comply with its mandatory  
6 duty to pay the Tribe its quarterly payments, Plaintiff  
7 seeks declaratory relief with respect to the Commission's  
8 duties and the Tribe's rights under CCP §1060, and  
9 injunctive relief under CCP §526(a)(7) concerning the  
10 Commission's obligations as a trustee. Specifically, the  
11 Plaintiff seeks a declaration that Burley is the Tribe's  
12 authorized representative for purposes of receiving on  
13 behalf of the Tribe payment of the subject RSTF money, and  
14 injunctive relief directing the Commission to release and  
15 resume payment of those funds to Burley, as it did prior to  
16 August 2005. This does not require the Court to resolve a  
17 Tribal leadership dispute.

18 In order to determine this ultimate requested relief,  
19 the Court must decide, based on the evidence submitted,  
20 including judicially noticeable facts, whether the  
21 Commission has enough information for it to reasonably  
22 conclude that Burley is that authorized representative for  
23 purposes of receiving on behalf of the Tribe the subject  
24 RSTF payments. This includes Dixie's deposition testimony  
25 that he resigned as Tribal Chairman and that he  
26 acknowledged Burley as the Tribal Chairperson who replaced  
27 him. It also includes the BIA's January 12, 2011 letter  
28 from the BIA acknowledging the Tribe's January 6, 2011  
election results re-electing Burley as Tribal Chairperson.



1 At the same time, the court must determine, under CCP  
2 §1060, whether all of the reasons the Commission has given  
3 for suspending payment are proper. If the Court determines  
4 those reasons are not proper, and the Court has determined  
5 that the Commission has no legitimate basis to refuse to  
6 acknowledge Burley as the person authorized to receive the  
7 subject RSTF payments for the Tribe, then the Court can  
8 grant Plaintiffs' injunctive relief directing the  
9 Commission to release the subject RSTF money and resume  
10 quarterly payments to the Tribe in care of Burley.

11 In acknowledging that Plaintiff's requested relief  
12 includes the combination of all of these three remedies,  
13 and that Plaintiff may seek declaratory and injunctive  
14 relief against the State of California, i.e., the  
15 Commission, the Court of Appeal stated:

16 The Commission further argues that although the Miwok  
17 Tribe relies on Government Code section 12012.90,  
18 subdivision (e) for its causes of action, that  
19 statutory provision does not create a private cause of  
20 action. However, the Commission's argument is  
21 misplaced because the procedural basis for the causes  
22 of action at issue are the statutes permitting a party  
23 to seek "a declaration of his or her rights or duties  
24 with respect to another" (Code.Civ.Proc., §1060), and  
25 to seek injunctive relief concerning a trustee  
26 (Code.Civ.Proc., §526, subd. (a)(7)). In general, a  
27 party may rely on such generally applicable statutes to  
28 seek injunctive and declaratory relief against the  
State. (See *Tehachapi-Cummings County Water Dist. V.*  
*Armstrong* (1975) 49 Cal.App.3d 992, 1000)....

(Ibid. at 21-22, footnote 15.

VII.

THE COMMISSION IS NOT A TRUE TRUSTEE AND HAS NO AUTHORITY  
TO MAKE A DISCRETIONARY DECISION AS A FIDUCIARY TO WITHHOLD  
THE SUBJECT RSTF MONEY

Contrary to the Intervenor's assertion, the Commission's status is not that of a true fiduciary, at least according to the Commission. (Commission's P/As in Opposition to Motion for Judgment on the Pleadings, page 5, lines 24-26 ("loosely denominated as 'trustee'"), and fn. 5, and page 12, line 16 ("limited-purpose trustee")). The Commission refers to its status as a "limited trustee," since the Compact does not permit it to exercise any discretion. The Compact specifically provides:

"The Commission shall have no discretion with respect to the use or 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." (Emphasis added).

(Compact, §4.3.2.1(b), pRJN, Ex. "5"). Accordingly, the Intervenor's assertion that the Commission would be breaching its fiduciary obligation to "preserve trust property" by releasing the subject RSTF funds to Burley because Dixie still disputes her authority to act for the Tribe (despite his deposition to the contrary) is misplaced. Moreover, the Intervenor has no basis to claim the Commission has a fiduciary obligation to "exercise its discretion" and withhold the subject RSTF money from the Tribe because it questions the composition of the Tribe's membership and questions the validity of the Tribal Council.



1 Plaintiff is not contending that the Commission must  
2 pay the RSTF money to "any party that claims to represent  
3 the Tribe." (Intervenors' P/As, page 10, line 6). To the  
4 contrary, the facts show that the Commission had previously  
5 paid the Tribe RSTF payments through Burley, who the  
6 Commission had determined to be the Tribe's authorized  
7 representative to receive those payments. Plaintiff is  
8 merely seeking an order compelling the Commission to resume  
9 those payments, and contends that the Commission's reasons  
10 for suspending those payments are wrong and improper.

#### 11 VIII.

#### 12 THE BIA'S JANUARY 12, 2011 ACKNOWLEDGMENT LETTER IS 13 DISPOSITIVE OF THE ISSUES IN THIS CASE

14 Plaintiff incorporates by reference its arguments  
15 concerning the BIA's January 12, 2011 acknowledgment letter  
16 in Plaintiff's replies to the Intervenors' opposition to  
17 Plaintiff's motion to lift stay of the March 11, 2011 order  
18 and the Commission opposition to Plaintiff's motion for  
19 judgment on the pleadings.

#### 20 IX.

#### 21 DIXIE'S DEPOSITION TESTIMONY IS HIGHLY RELEVANT

22 Contrary to the Intervenors' argument, Dixie's  
23 deposition testimony that he resigned as Tribal Chairman  
24 and acknowledging that Burley took his place are highly  
25 relevant to the issues here. Plaintiff incorporates by  
26 reference its arguments concerning the relevancy of Dixie's  
27  
28

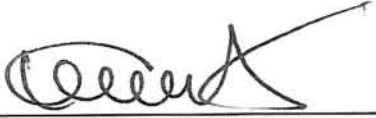
1 deposition testimony, as set out in Plaintiff's other  
2 opposition reply papers filed concurrently with this reply.

3 X.

4 **CONCLUSION**

5 For the foregoing reasons, and for the reasons  
6 expressed in Plaintiff's motion papers, judgment on the  
7 pleadings against the Commission should be granted.

8  
9 Dated: April 8, 2013

10   
11 Manuel Corrales, Jr., Esq.  
12 Attorney for Plaintiff  
13 CALIFORNIA VALLEY MIWOK  
14 TRIBE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28