

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
RICHARD M. FREEMAN, Cal. Bar No. 61178
3 MATTHEW S. MCCONNELL, Cal. Bar No. 209672
12275 El Camino Real, Suite 200
4 San Diego, California 92130-2006
Telephone: 858-720-8900
5 Facsimile: 858-509-3691
JAMES F. RUSK, Cal. Bar. No. 253976
6 Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
7 Telephone: 415-434-9100
Facsimile: 415-434-3947

8 Attorneys for Intervenors

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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.

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

REPLY IN SUPPORT OF INTERVENORS'
MOTION FOR SUMMARY JUDGMENT
AND/OR SUMMARY ADJUDICATION

18
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.

Date: April 26, 2013
Time: 2:00 p.m.
Dept.: C-62
Judge: The Hon. Ronald L. Slyn

1 **I. INTRODUCTION**

2 In their Motion for Summary Judgment (“MSJ”), Intervenor asked this Court to grant
3 summary judgment against Plaintiff because the undisputed material facts show that the
4 Commission did not abuse its discretion by refusing to disburse the California Valley Miwok
5 Tribe’s (“Tribe”) Revenue Sharing Trust Fund (“RSTF”) monies “in care of [Silvia] Burley” so
6 long as the federal Bureau of Indian Affairs (“BIA”) does not acknowledge Burley, or anyone
7 else, as the government of the Tribe. As the Court of Appeal recognized, that limited issue
8 controls the outcome of this case.

9 Intervenor’s MSJ laid out the four key points that form the basis for summary judgment:
10 (1) the Commission has no statutory duty to disburse RSTF funds to Silvia Burley; (2) the
11 Commission has a fiduciary duty to ensure that RSTF funds go only to an eligible non-Compact
12 Tribe or its authorized representative; (3) the Commission’s performance of that duty is subject to
13 review under the deferential “abuse of discretion” standard; and (4) the Commission did not abuse
14 its discretion by deferring to the BIA to establish who is an authorized Tribal representative.
15 Plaintiff’s Opposition fails to address, much less rebut, the first three points.

16 As to the fourth point, Plaintiff does not even attempt to argue that the Commission abused
17 its discretion. Instead, the Opposition argues the Commission was “wrong” to await the BIA’s
18 recognition of a Tribal government because the Commission can resolve on its own the Tribe’s
19 leadership dispute, based on Yakima Dixie’s alleged resignation as chairman of the Tribe 14 years
20 ago. Plaintiff’s argument fails on three counts: first, because “wrong” is not the standard of
21 review; second, because only the BIA—not the Commission and not this Court—can determine
22 who should be recognized as the Tribal government; and third, because Mr. Dixie’s disputed
23 resignation as chairman in 1999 has no bearing on whether the Intervenor Tribal Council
24 represents the Tribe today.

25 In the alternative, Plaintiff argues that the BIA really does recognize Silvia Burley as the
26 Tribe’s representative, despite this Court’s prior ruling that the AS-IA’s August 31, 2011 decision
27 is stayed and cannot provide a basis to compel payment of RSTF money to Burley. This Court has
28 already rejected that argument.

Intervenors are entitled to summary judgment because the undisputed material facts show that the Commission, as trustee of the Tribe's RSTF money, did not abuse its discretion by deferring payment of those funds until the BIA acknowledges a Tribal government, following resolution of CVMT v. Salazar in the federal court. Therefore, Plaintiff cannot obtain the relief it seeks: payment of the Tribe's RSTF money "in care of Burley."

II. THE ISSUE BEFORE THE COURT IS WHETHER THE COMMISSION ABUSED ITS DISCRETION IN WITHHOLDING RSTF FUNDS PENDING THE RESOLUTION OF CVMT V. SALAZAR AND THE BIA'S RECOGNITION OF A TRIBAL GOVERNMENT

The Court of Appeal succinctly framed the limited issue to be decided by this Court upon lifting the stay:

[T]he fundamental issue presented to the trial court for resolution on the merits is whether the current uncertainty in the federal government's relationship with 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.

California Valley Miwok Tribe v. California Gambling Control Commission, No. D061811, p. 17 (4th Dist. 2012) (unpublished) ("Miwok IV"). Indeed, the Justices made it clear at oral argument that they believed that by instituting a stay on dispositive motions, this Court had already *implicitly* ruled that the Commission is legally justified to withhold the RSTF monies pending resolution of CVMT v. Salazar and the BIA's eventual acknowledgement of a Tribal government.

Justice Nares: Speaking only for myself, I thought the judge implicitly determined that the commission was correct in withholding the funds until the leadership dispute is resolved. So if we send this case back, it will probably make what was implicit explicit because otherwise he wouldn't have done what he did, at least from my interpretation of what he did.

(Ex. A, 9:4-11.)

Justice Irion: Well, isn't the question, though, given that dispute and given the pendency of the federal litigation defining who is the rightful trial -- trial -- that -- who is the rightful tribe whether or not the commission's policy of withholding payment is reasonable and authorized under the compact?

....

Mr. McConnell: And the problem is that I think this is what the trial court -- one of the justices mentioned implicitly has already made that ruling.

1 Justice Nares: If he would have made it explicit, we probably wouldn't be here on
2 that issue, but I think that's what implicitly he made in -- in staying the matter. Any
other conclusion doesn't appear to make sense to me.

3 (Ex. A, 21:1-22:7.)

4 Justice McIntyre: But if -- if the judge says -- what I think he was trying to say
5 below implicitly -- yes, the commission has a good reason not to pay the money
6 now because that -- the entitlement of that money is still being litigated in the
7 federal courts. There I'm gonna stay these proceedings. And if he would have said
8 -- and they have, let's say, a fiduciary duty to do that -- it's the trustee's duty not to
9 pay money other than to the recognized tribe -- that would have helped. I think
that's all he has to do if, in fact, that's what he believes or was thinking. We're just
saying that they're entitled to their day in court. And the trial court should do
whatever it believes it wants to do or has a reason to do. I think -- I go back to the
implicit because any other reading of his decision doesn't make any sense to me.
As you pointed out, I think that's what he was thinking.

10 (Ex. A, 24:7-25.)

11 Justice McIntyre [speaking to counsel for Intervenor]: They don't articulate it
12 quite this way, but to me, I think, in essence Judge Styn's discussion takes your
13 side of the -- takes your position, that is, that we can't do anything about this until
the federal process is over.

14 (Ex. A, 26:2-6.)

15 Justice Nares: All we're saying is rule on the affirmative defense. That's all. The
16 trustees' affirmative defense. And I think implicitly he did that, but that's reading
between the lines and speaking only for myself, we want an explicit ruling.

17 (Ex. A, 28:1-5.)

18 As these passages make clear, the Justices granted the writ to permit this Court to make
19 explicit that which was previously implicit; namely, that the Commission acted lawfully by
20 deciding to withhold payment of RSTF monies to the Tribe until the BIA acknowledges a
21 governing body of the Tribe. Should this Court confirm that the Commission has acted lawfully,
22 then Intervenor and the Commission are entitled to summary judgment as a matter of law.
Indeed, Justice Irion made this exact point:

23 Justice Irion: Presumably the trial court -- you know, just hypothetically, but
24 presumably the trial court could take a look at this, look at the fact that the
25 commission has put forth an affirmative defense saying we don't know who the
26 right Miwok Tribe is and as a fiduciary we cannot disperse these funds at the
day, that's the end of your lawsuit right there.

27 Mr. Corrales: Well, again, the trial court can make that determination, but we want
28 them -- excuse me. We want the trial court to make that determination, not put this
thing on hold.

1 (Ex. A, 12:22-13:9.)

2 **III. INTERVENORS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE**
3 **COMMISSION ACTED WELL WITHIN ITS DISCRETION**

4 As trustee of the RSTF (Compact § 4.3.2.1(b)), the Commission has a fiduciary duty to
5 ensure that it pays RSTF money only to an authorized official of an eligible non-Compact Tribe.
6 See Hearst v. Ganzi, 145 Cal.App.4th 1195 (2006); Manchester Band of Pomo Indians v. United
7 States, 363 F.Supp. 1238 (N.D. Cal. 1973). When the leadership of a tribe is disputed, as here, the
8 Commission has no authority to resolve that dispute. It cannot decide who is the authorized
9 official of the Tribe. Ackerman v. Edwards, 121 Cal.App.4th 946, 954 (2004); Lamere v.
10 Superior Court, 131 Cal.App.4th 1059, 1067 (2005). Only the BIA has that authority, subject to
11 review in the federal courts. E.g., Wheeler v. U.S. Dep't of the Interior, 811 F.2d 549, 552 (10th
12 Cir. 1987). In light of the Tribal leadership dispute, the Commission has reasonably chosen to
13 fulfill its fiduciary duty by withholding payment of the Tribe's RSTF money until the BIA
14 recognizes a Tribal government. At that time, the Commission can disburse the Tribe's RSTF
15 money with reasonable assurance that it is not acting in violation of its trustee obligations.

16 Plaintiff's Opposition does not dispute that all three of its causes of action depend on the
17 single issue framed by the Court of Appeal. Nor does it dispute that this Court must evaluate the
18 Commission's action under the deferential "abuse of discretion" standard of review, or that
19 Plaintiff bears the burden of proving an abuse of discretion. Plaintiff's Opposition offers no
20 authority to contradict the existence or contours of the Commission's fiduciary duty. Nor does
21 Plaintiff even attempt to show that, in fulfilling its duty, the Commission abused its discretion by
22 withholding the RSTF money. Instead of addressing these critical issues as framed by the Court
23 of Appeal, Plaintiff's Opposition argues that the Commission's reasons for withholding the RSTF
24 money pending BIA action are "wrong." (Opposition, 15:2.) Alternatively, the Opposition argues
25 that the BIA does currently recognize a Tribal government headed by Silvia Burley. Neither of
26 these arguments raises a material dispute of fact precluding summary judgment.¹

27 _____
28 ¹ Plaintiff's opposition is also 5 pages too long. C.R.C., Rule 3.1113(d). On this ground

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1 Ackerman v. Edwards, 121 Cal.App.4th 946, 954 (2004); Lamere v. Superior Court, 131
2 Cal.App.4th 1059, 1067 (2005).

3 Even if the Commission could choose a Tribal representative, Mr. Dixie's testimony would
4 not resolve the current dispute. Regardless of what did or did not happen in 1999, the BIA has
5 issued multiple decisions since 1999 stating that it does not recognize any Tribal government,
6 including Burley's.³ (Ex. 4, Feb. 11, 2005 Letter from AS-IA Michael Olsen to Yakima Dixie,
7 p. 2; Ex. 5, April 2, 2007 Letter from BIA Regional Director to Silvia Burley.) The AS-IA's
8 August 31 Decision (even if it were not stayed) did not rescind those determinations. Moreover,
9 Intervenors contend that the Tribe is governed by Intervenor Tribal Council, not by Mr. Dixie
10 alone (WhiteBear Decl., ¶ 4), meaning Mr. Dixie's deposition testimony is irrelevant to whether
11 the Commission abused its discretion by refusing to release the Tribe's RSTF money to Burley.

12 **2. It Is Irrelevant Whether the Compact Requires BIA Recognition, Membership**
13 **Criteria or P.L. 638 Funding**

14 Plaintiff next argues that the Commission erred because the Compact does not expressly
15 require BIA recognition, membership criteria, or P.L. 638 funding as a prerequisite to the
16 Commission's disbursement of RSTF money. (Opposition, 19:14-23:19.) At the outset,
17 Plaintiff's attempt to rely on the Compact is improper given the Court of Appeal's ruling that
18 Plaintiff cannot enforce the terms of the Compact. California Valley Miwok Tribe v. California
19 Gambling Control Commission, 2010 WL 1511744, *8-9 (4th Dist. 2010) (unpublished).

20 Regardless, Plaintiff's argument entirely misses the point. Nothing in the Government
21 Code or the Compact explains how the Commission is to identify an "authorized official or
22 agency" of a Non-Compact Tribe for purposes of making RSTF payments. This necessarily
23 leaves some room for the Commission, as trustee, to exercise its discretion in making RSTF
24 distributions, especially when a legitimate dispute exists as to the identity of a Tribe's authorized
25 officials. The Commission has reasonably chosen to rely on the BIA to identify a Tribe's

26 ³ For the same reason, Plaintiff's argument that tribal Resolution GC-98-01 established a
27 valid government in 1998 lacks any relevance to the current dispute. (Opposition, 20:16-
28 19.)

1 legitimate officials. The fact that the Compact does not explicitly direct the Commission to do so
2 does not make that decision an abuse of discretion, particularly because it is the BIA and not the
3 Commission which has the authority to recognize a Tribe's governing body.

4 Plaintiff's membership criteria argument also fails given the reality that the Commission
5 has not attempted to impose any particular membership criteria on the Tribe. Instead, the BIA has
6 questioned whether the full Tribal membership participated in creating Burley's alleged Tribal
7 government, which in turn necessarily implicates Burley's claim to be the Tribe's authorized
8 official for RSTF purposes.

9 Similarly, as to P.L. 638 funding, the Commission has merely pointed to the BIA's
10 decision to deny P.L. 638 funding to Plaintiff as an indicator of the BIA's underlying refusal to
11 recognize Plaintiff as the Tribe's government. (Ex. 20, August 4, 2005 Letter from Commission
12 to S. Burley; Ex. 21, June 27, 2006 Letter from Commission to Silvia Burley; Ex. 22, June 26,
13 2007 Letter from Commission to Karla Bell; Ex. 23, January 3, 2008 Letter from Commission to
14 Manuel Corrales.) It is BIA's refusal to recognize Plaintiff, not the denial of P.L. 638 funding,
15 which provides the basis for the Commission's withholding of RSTF money.

16 Plaintiff's Compact arguments are all unavailing. As a trustee with fiduciary obligations,
17 the Commission had the discretion to determine how to identify an "authorized official or agency"
18 of a Non-Compact Tribe for purposes of making RSTF payments. Plaintiff has entirely failed to
19 demonstrate that in making that decision the Commission abused its discretion.

20 **C. The BIA Does Not Currently Recognize Plaintiff's Tribal Government**

21 Plaintiff appears to argue that, even conceding the reasonableness of the Commission's
22 deference to BIA tribal recognition decisions, Plaintiff is entitled to the Tribe's RSTF money
23 because the BIA currently recognizes Plaintiff's "tribal council" as the governing body of the
24 Tribe. (Opposition, 5:21.) Plaintiff bases this argument on the AS-IA's August 31 Decision,
25 notwithstanding the fact that the Decision is stayed by its own terms and is the subject of ongoing
26 federal litigation in CVMT v. Salazar. Plaintiff's argument lacks any merit.

27 The August Decision states that "implementation shall be stayed pending resolution of
28 [CVMT v. Salazar]." (Ex. 13, p. 8.) This language has the effect of "suspend[ing] . . . alteration

1 of the status quo" by holding the decision in abeyance pending further review. Nken v. Holder,
2 129 S.Ct. 1749, 1754, 1758 (2009) (discussing judicial stay of deportation order). The AS-IA also
3 stipulated, through his legal counsel, to a joint status report and proposed order in the federal
4 litigation that confirms the August 31 Decision has "no force and effect" until the federal litigation
5 is resolved. (Ex. 14, joint status report in CVMT v. Salazar.) The AS-IA's decision to voluntarily
6 stay the effect of the August 31 Decision pending judicial review is specifically authorized by
7 statute and is binding on the BIA, independent of the stay language in the August 31 Decision
8 itself. 5 U.S.C. § 705. In fact, in response to Undisputed Facts 18, 42, and 66, Plaintiff responded
9 "Undisputed" to Intervenor's fact that "the AS-IA specifically stayed the implementation of his
10 decision pending resolution of Intervenor's federal lawsuit." For purposes of the present motion,
11 Plaintiff's responses to Undisputed Facts 18, 42, and 66 are dispositive on this issue.

12 The federal court acknowledged that the AS-IA had stayed the effectiveness of his decision
13 pending resolution of the federal litigation. (Ex. 15, CVMT v. Salazar, Memorandum Opinion and
14 Order, p. 5.) The Court of Appeal has also recognized that "[t]he implementation of the August
15 31, 2011 decision was stayed." California Valley Miwok Tribe v. California Gambling Control
16 Commission, No. D061811, p. 9 (4th Dist. 2012) (unpublished) ("Miwok IV"). Most important,
17 Plaintiff has twice attempted to rely on the August 31 Decision, and this Court has twice ruled that
18 the Decision is stayed and cannot provide the basis for entry of judgment against the Commission
19 while CVMT v. Salazar is pending. The Court did so first in denying Plaintiff's ex parte
20 application for entry of judgment, submitted on September 6, 2011, and again in denying
21 Plaintiff's Motion for Entry of Judgment on October 20, 2011. (Ex. C, Sept. 6, 2011 Ex Parte
22 Application for Entry of Judgment; Ex. D, Tentative Order Denying Plaintiff's Motion for Entry
23 of Judgment, pp. 1-2.)

24 Undeterred, Plaintiff repeats the argument for a third time. This time, Plaintiff argues that
25 the August 31 Decision is "analogous to a [judicial] declaration of rights and injunctive relief,"
26 and that only the portion granting injunctive relief is stayed. (Opposition, 12:21 – 13:5.) Plaintiff
27 provides no legal authority for this novel claim. Moreover, Plaintiff's argument contradicts an
28 earlier portion of the Opposition wherein Plaintiff claims that the injunctive relief portion was not

1 stayed and is the only thing preventing the BIA from attempting to organize the Tribe.
2 (Opposition 10:10-14.) Plaintiff's internal contradictions further demonstrate the fallacy of this
3 argument.

4 Plaintiff also argues that the stay of the August 31 Decision is "analogous to staying
5 execution of a judgment," which does not render the judgment void but merely means the creditor
6 "cannot enforce it . . . and collect on it." (Opposition, 12:3-8.) Again, Plaintiff provides no
7 authority to back up this bald assertion. In addition, "collect[ing] on" the August 31 Decision is
8 precisely what Plaintiff seeks to do, to the tune of more than \$9 million.

9 Finally, Plaintiff argues that the language in the August 31 Decision encouraging the
10 parties to "work within the Tribe's existing government structure" somehow proves the Decision
11 is not stayed. (Opposition, 6:9-23.) This argument makes no sense. Whether the Decision
12 recognizes a Tribal government has absolutely no bearing on whether the Decision is stayed.

13 Plaintiff's continued effort to improperly rely upon the stayed August 31 Decision should
14 once again be rejected.

15 **IV. THE COURT OF APPEAL DID NOT DIVEST INTERVENORS OF THE RIGHT TO**
16 **PARTICIPATE IN THIS LAWSUIT**

17 Plaintiff asserts that, following the remittitur from the Court of Appeal, this Court issued
18 an order that reinstated its prior Order dated March 11, 2011, granting reconsideration and denying
19 intervention by Intervenor. (Opposition, 5:4-8.) There is no basis for this claim.

20 The Court based its March 11, 2011 order entirely on the AS-IA's December 22, 2010
21 Decision. After the AS-IA rescinded that Decision, the Court stayed its March 11 order at an ex
22 parte hearing on April 6, 2011. The Court signed an order on April 20, 2011, confirming that the
23 March 11 order was stayed and that "Intervenor. are reinstated as fully participating parties to this
24 case." (Plaintiff's Ex. 27, 2:22-3:3.) The April 20 Order also stated in part:

25 Except for discovery related motions, no dispositive motions are permitted, unless
26 and until otherwise ordered by the Court.

27 (Plaintiff's Ex. 27, 3:7-9.)

28 The only issue before the Court of Appeal was this Court's order staying dispositive

1 motions. The Court of Appeal ultimately ruled as follows:

2 Let a writ of mandate issue commanding the San Diego County Superior Court to
3 vacate its March 7, 2012 order denying the Miwok Tribe's ex parte application, and
4 to lift the stay to allow the parties to file dispositive motions and, if necessary, to
5 proceed to trial.

6 California Valley Miwok Tribe v. Superior Court, Case No. D061811 (December 18, 2012), p. 19.

7 Clearly, the Court of Appeal's decision reversed the portion of the April 20 Order
8 imposing a stay on dispositive motions. But the Court of Appeal said nothing about the ruling in
9 this Court's April 20 Order that stayed the effect of the March 11, 2011 Order and reinstated
10 Intervenor as "fully participating parties." (Plaintiff's Ex. 27, 2:22-3:3.) Nor did this Court's
11 March 1, 2013 minute order lifting the stay even hint that Intervenor were to be dismissed.
12 Plaintiff's suggestion to the contrary is baseless.

13 **V. CONCLUSION**

14 The undisputed facts establish that the Commission, acting in its capacity as a trustee, has
15 not abused its discretion by withholding the Tribe's RSTF monies until after the BIA
16 acknowledges a Tribal government, following resolution of CVMT v. Salazar. As a result, all of
17 Plaintiff's claims fail as a matter of law and summary judgment should be granted in favor of
18 Intervenor.

19 Dated: April 10, 2013

20 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

21 By

22 

23 MATTHEW S. MCCONNELL

24 Attorneys for INTERVENORS