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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

**REPLY TO OPPOSITION TO  
DEFENDANT CALIFORNIA  
GAMBLING CONTROL  
COMMISSION'S MOTION FOR  
SUMMARY JUDGMENT**

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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24 Defendant California Gambling Control Commission (Commission) submits the following  
25 reply to plaintiff California Valley Miwok Tribe's (Burley Faction) opposition to the  
26 Commission's motion for summary judgment.  
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## INTRODUCTION

The Plaintiff Burley Faction's opposition to the Commission's motion for summary judgment (Pl.'s Opp'n.) has two primary prongs that are reflected in its response to the Commission's separate statement of undisputed material facts. First, the Burley Faction contends that the Tribal Council established in 1998 by the Burley Faction through tribal resolution #GC 98-01, is currently recognized by the Bureau of Indian Affairs (BIA) as the authorized governing body of the California Valley Miwok Tribe that is listed in the Federal Register (referred to herein as the CVMT), and is thus entitled to receive quarterly Revenue Sharing Trust (RSTF) payments on behalf of the tribe. Second, the Burley Faction contends that the Commission's reason(s) for withholding RSTF payments from the Burley Faction are impermissible under the terms of the 1999 Tribal-State class III gaming compacts (Compact), which are incorporated into Government Code section 12012.75. Fundamental common sense and reason refute both of the Burley Faction's lines of argument.

The Burley Faction's contention that it is currently recognized by the BIA as the authorized leadership of the CVMT springs, in substance, from "we are the tribe because we proclaimed that we are the tribe, and, under principles of Indian law, only a tribe may determine its membership." While this formulation is superficially consistent with the general idea of tribal sovereignty, it is absurd in the context of a case that involves a profound dispute over both the membership and leadership of the CVMT that arises from the way in which the Burley Faction assumed the identity of the Tribe. This prong of the Burley Faction's argument forms the basis for the Burley Faction's disputation of the undisputed material facts in support of defendant's motion for summary judgment (UMF) 7, 8, 9, 10, 11, and 16.

The Burley Faction's argument that the Commission lacks the authority to withhold RSTF payments is fundamentally based on the notion that the Compact requires the Commission to disburse RSTF payments to any self-proclaimed representative of an eligible recipient Indian tribe. This argument rejects the idea that the Commission has any obligation as administrator of the RSTF to make an effort to disburse RSTF payments only to those who are properly authorized by the recipient tribe to receive them on its behalf. When phrased so as not to constitute merely a

1 “first come, first served” argument, the Burley Faction’s claim of entitlement to the RSTF monies  
2 under the Compact becomes merely a restatement of its first argument: that the Burley Faction  
3 constitutes the CVMT because it says it does. The second prong of the Burley Faction’s  
4 argument forms the basis of the Burley Faction’s disputation of UMF 14 and 15. The Burley  
5 Faction’s disputation of UMF 18 involves both prongs.

6 The “present circumstances” referred to by the Fourth District Court of Appeals in its  
7 December 18, 2012 decision granting the writ (Decision) that has allowed the parties’ dispositive  
8 motions to go forward, include the profound uncertainty as to the identity and leadership of the  
9 CVMT that will be resolved through the federal administrative process that is currently underway  
10 and pending in *California Valley Miwok Tribe v. Salazar* (D.D.C. No. 1:10-CV-160 (filed Jan.  
11 24, 2011)) (*Salazar*). This Court indisputably lacks jurisdiction to decide any aspect of the merits  
12 of that dispute. While *Salazar* is pending, this Court must take as a given that the identity of the  
13 authorized leadership of the CVMT is uncertain. The issue put before this Court by the Decision  
14 is whether the Commission has a legal obligation to disburse the accrued RSTF monies to the  
15 Burley Faction at this time despite that uncertainty.

16 The Commission very much wishes to disburse the accrued RSTF monies to the properly  
17 authorized representatives of the CVMT, and looks forward to the day that the prevailing  
18 uncertainty as to the identity of those representatives has been resolved, and the Commission and  
19 CVMT may resume normal and cooperative relations. Until that uncertainty is authoritatively  
20 resolved in *Salazar*, the Commission argues, both in its motion for summary judgment and in its  
21 opposition to the Burley Faction’s (cross) motion for judgment on the pleadings, that the  
22 Commission has a responsibility to disburse RSTF monies only to proper recipients, and this  
23 Court cannot reasonably order the Commission to distribute nearly \$9,000,000 in accrued RSTF  
24 payments to the plaintiff five-member Burley Faction simply because the Burley Faction has  
25 proclaimed itself to be the CVMT.

## ARGUMENT

### I. THE BURLEY FACTION IS NOT CURRENTLY RECOGNIZED AS THE AUTHORIZED LEADERSHIP OF THE CVMT.

Although then Assistant Secretary for Indian Affairs Echo Hawk issued a letter decision on December 22, 2010 (December 22 Decision), and again on August 31, 2011 (August 31 Decision), recognizing the CVMT to consist exclusively of the Burley Faction, the plaintiffs in *Salazar* (*Salazar* Plaintiffs) have challenged those decisions and contend that the five-member Burley Faction established its own tribal council form of government in 1998 without the knowledge or participation of “the vast majority of” the other 242 adult members of the CVMT. (See UMF No. 6-7; Def’s Exh<sup>1</sup> at pp. 0022-0064; 0120.) The December 22 and August 31 Decisions are substantially based on the Burley Faction’s formation of a tribal council form of government in 1998. The *Salazar* Plaintiffs seek to “[vacate] and set aside the [entire] August 31 Decision as arbitrary, capricious, unsupported by substantial evidence in the record, an abuse of discretion and otherwise not in accordance with law.” (*Salazar* FAC at p. 30, Def’s Exh at p. 0148.) “If the plaintiffs prevail in [*Salazar*], the Assistant Secretary’s August 31 decision will be vacated, the Bureau [of Indian Affairs] will be ordered to cease government-to-government relationships with the Tribe as organized in the form of the General Council, and the defendants will be enjoined from awarding any federal funds to Burley.” (*Cal. Valley Miwok Tribe v. Salazar* (2012) 281 F.R.D. 43, 47.)

Knowledge of the pendency of *Salazar* is sufficient, by itself, to reasonably cause the Commission to withhold the accrued RSTF monies from the Burley Faction until the claims in *Salazar* have been adjudicated. The Commission, as administrator and “trustee” of the RSTF, has a responsibility to the CVMT to take reasonable steps to disburse RSTF monies only to those properly authorized by the full and actual membership of the CVMT to receive and administer the

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<sup>1</sup> See Defendant’s Exhibits (Def’s Exh) attached to Request for Judicial Notice (RJN) in Support of Reply to Opposition to Motion for Summary Judgment. The pagination of Def’s Exh is the same here as in the RJN previously filed in support of Defendant’s opposition to Plaintiff’s motion for judgment on the pleadings.

monies on its behalf. Under the present circumstances, it is obvious that the identity of the CVMT's authorized leadership is currently uncertain, and will remain so until *Salazar* is resolved. Assistant Secretary Echo Hawk evidently recognized and acknowledged the import of the uncertainty created by *Salazar* when he set aside his December 22 Decision in response to the filing of the *Salazar* case (Echo Hawk April 1, 2011 letter, Def's Exh at p. 0066), and later expressly stayed the effect of his August 31, 2011 Decision pending the outcome of *Salazar* (Def's Exh 0076). The Burley Faction now seeks to overcome this overarching circumstance with several far-fetched arguments that are discussed below.

**A. The August 31 Decision recognizing the Burley Faction is stayed for all purposes.**

Plaintiff seizes upon the word "implementation" in the stay language of the August 31 Decision to argue that the Assistant Secretary intended only a partial stay—one that, conveniently, continues the operational effect of his recognition of the Burley Faction self-proclaimed Tribal Council as the authorized leadership of the CVMT. Since the *Salazar* Plaintiffs seek to vacate and set aside the entire August 31 Decision, and, especially, its recognition of the Burley Faction as the CVMT, Plaintiff's interpretation makes no conceptual sense. It is unfortunate that the former Assistant Secretary is not before the court to clarify the intended meaning of the word "implementation." He has, however, endorsed the more inclusive, and logical, meaning of that term by stipulating that the August 31 Decision "will have no force and effect" until *Salazar* is resolved.<sup>2</sup> (Joint. Stat. Rept., Def's Exhibits<sup>3</sup> at p. 0226.)

Nonetheless, the Burley Faction implausibly argues that then Assistant Secretary Echo Hawk intended to separate the operational effect of his decision from the "declaration of rights" embodied within it, and that the Assistant Secretary's recognition of the Burley Faction as the

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<sup>2</sup> The Assistant Secretary has never amended or disavowed the stipulation made in the Joint Status Report filed in *Salazar*.

<sup>3</sup> See Request for Judicial Notice in Support of Reply to Opposition to Defendant's Motion for Summary Judgment, filed concurrently herewith and incorporating by reference Defendant's Exhibits (Def's Exh) filed on March 27, 2013 with Request for Judicial Notice in Support of Defendant California Gambling Control Commission's Opposition to Plaintiff's Motion for Judgment on the Pleadings.

1 entirety of the CVMT survives the stay while *Salazar* is pending. The Plaintiff then avers that the  
2 stay prohibits the BIA from “tak[ing] any other actions . . . toward the Tribe’s benefit.” (Pl.’s  
3 Opp’n., at p. 5.) In the context of this case, the Plaintiff apparently means that the August 31  
4 Decision is stayed sufficiently to restrain the BIA from acting in reliance upon the August 31  
5 Decision’s recognition of the Burley Faction, but remains sufficiently in force to serve as a basis  
6 for this Court to order the Commission to disburse the accrued RSTF monies to the Plaintiff.

7 The Burley Faction also argues that the Assistant Secretary’s closing, precatory and  
8 fundamentally philosophical, advice that “the parties . . . work within the Tribe’s existing  
9 government structure to resolve [their dispute]” evidences the partial nature of the stay. This, and  
10 Plaintiff’s other arguments concerning the August 31 Decision, cannot reasonably be construed to  
11 be a sound basis for ordering the Commission to disburse nearly nine million dollars of RSTF  
12 monies to the Burley Faction, when, depending upon the outcome of *Salazar*, the Burley Faction  
13 may be the wrong recipient. The Commission urges this Court to disregard Plaintiff’s  
14 conjectures, to construe the stay as a stay, and to give the August 31 Decision no effect in this  
15 case unless *Salazar* achieves a final resolution in favor of the Assistant Secretary before the  
16 parties’ cross-motions are heard. The real issue in this case is whether the Commission is  
17 obligated to disburse the RSTF monies to the Burley Faction in the face of the uncertainty that  
18 exists as to whether the Burley Faction constitutes or represents the eligible recipient tribe.

19 In further support of its effort to revive the August 31 Decision, the Burley Faction offers  
20 various speculations as to what the BIA “would have” done, in the meantime, if the stay language  
21 actually meant that the August 31 Decision had no force and effect. (See Pl.’s Opp’n., at pp. 7-  
22 8.) The Burley Faction cites no evidence, but rather puts forth only self-serving conjecture, to  
23 support these arguments, and it disregards the far more likely explanation for the BIA’s alleged  
24 inactivity—that the BIA is simply waiting for the outcome of *Salazar* before taking further action  
25 with regard to the CVMT.

26 The Burley Faction’s argument that an order directing the Commission to disburse the  
27 RSTF monies to it “cannot be viewed as implementing” the August 31 Decision, and thus would  
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1 not violate the stay, is a nonsensical convolution of the actual issue in this case which is whether  
2 the Commission must disburse the RSTF monies to the Burley Faction despite the fact that the  
3 August 31 Decision is stayed and uncertainty exists as to whether the Burley Faction constitutes  
4 or represents the CVMT. This Court should disregard this specious reasoning as well as the  
5 equally specious analogy between the stay of the August 31 Decision and “staying execution of a  
6 judgment.” The latter also begs the fundamental issue of the case.

7 Finally, with respect to the first prong of the Burley Faction’s argument that it remains  
8 recognized as the CVMT notwithstanding the facts, the Burley Faction argues that the August 31  
9 Decision is “analogous to a judicial decision” and should be treated accordingly, with a  
10 distinction drawn between the declaratory and injunctive portions of it. It is obvious that the  
11 August 31 Decision is not a judicial decision, nor did it furnish declaratory or injunctive relief.  
12 The August 31 Decision is an administrative decision subject to the judicial review that is now  
13 occurring in *Salazar*. Furthermore, is an administrative decision that is stayed by its own terms.

14 The Commission urges the Court to look past the Burley Faction’s far-fetched arguments,  
15 and to abide by the definition of the question provided by the appellate court—must the  
16 Commission disburse the RSTF monies to the Burley Faction notwithstanding the current  
17 uncertainty as to the Burley Faction’s entitlement to it?

18 **II. UNCERTAINTY AS TO THE LEADERSHIP OF THE CVMT REQUIRES THE COMMISSION**  
19 **TO WITHHOLD RSTF PAYMENTS.**

20 It is undisputed that the Commission administers the RSTF in the nominal capacity of  
21 “trustee,” for the purpose of receiving, depositing, and disbursing the RSTF funds. (UMF No. 3.)  
22 Aside from its duties as administrator of the RSTF, the Commission has no discretion “with  
23 respect to the use or disbursement of [RSTF] funds.” (UMF No. 4.) This phrase has been  
24 clarified in later compacts. (*Id.*) For example, the Tribal-State Compact Between the State of  
25 California and the Pinoleville Pomo Nation states “[t]he Commission shall have no discretion  
26 with respect to the use or disbursement *by recipient Tribes* of the Revenue Sharing Trust Fund  
27 monies.” (*Id.*, Pinoleville Compact, § 5.1 (a), Exh. F to RJN in Supp. MSJ, at p. 15 [italics  
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1 added].) Neither form of this language should be construed to nullify the Commission's  
2 responsibility, as administrator of the RSTF, to disburse payments only to proper recipients.  
3 Logic and common sense dictate that the Compact does not require the Commission to disburse  
4 RSTF monies to improper recipients.

5 The Commission long ago stated that it was withholding and accruing quarterly RSTF  
6 payments for the benefit of the CVMT because of a lack of a recognized tribal government or  
7 leadership (see Pl.'s Opp'n, at p. 12). The Commission has more specifically stated that the  
8 CVMT lacks a recognized tribal government because the BIA does not recognize one, and that  
9 when uncertainty exists as to the identity of the authorized leadership of a tribe, the Commission  
10 follows the determinations of the BIA. The Burley Faction has attributed to the Commission a  
11 variety of reasons for withholding the RSTF payments, e.g., "the Tribe fails to include or protect  
12 the interests of a significant number of potential members; and "there is an ongoing leadership  
13 dispute." (Pltf. Opp., at p. 13.) These, and other alleged reasons for withholding RSTF  
14 payments, have never been independent determinations by the Commission, but have instead  
15 been recitations of the reasons expressed by the BIA for concluding that the CVMT was  
16 unorganized and lacking a governing body for purposes of conducting government-to-  
17 government business with the United States. (See BIA Letters, Def's Exh, at pp. 0233-0244.)  
18 For the Commission, the dispositive fact has been that the BIA does not recognize an authorized  
19 leader or leadership group for the CVMT. From January 24, 2011, to the present, that issue has  
20 effectively been pending in *Salazar*.

21 It is undisputed that this Court lacks subject matter jurisdiction to determine the merits of  
22 any of the "reasons," why the BIA has not, and currently does not, recognize a leader or  
23 leadership group for the CVMT. Accordingly, the Commission will not belabor them one-by-one  
24 here, but will instead affirm that it has withheld quarterly RSTF payments from the CVMT  
25 because the BIA recognizes no leader or leadership group, and that the absence of this recognition  
26 was first evidenced in this case by the BIA's cessation of P.L. 638 contract funding to the CVMT.  
27 The Commission further affirms that the *resumption* of P.L. 638 contract funding to the CVMT  
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1 would inherently include the BIA's recognition of an authorized leader or leadership group for  
2 the CVMT. The Commission will also affirm that there are potentially other ways besides the  
3 resumption of P.L. 638 funding in which the BIA may manifest its acknowledgement of a leader  
4 or leadership group for the CVMT. This Court also lacks the subject matter jurisdiction to  
5 adjudicate the meaning, if any, with respect to the leadership of the CVMT, of the admission(s)  
6 purportedly made by Yakima Dixie at his deposition in this case. Doing so would constitute  
7 adjudicating an intra-tribal leadership dispute—a thing this court cannot do. Because jurisdiction  
8 to resolve intra-tribal leadership disputes lies with the federal government, the Commission also  
9 lacks the authority to make any determination as to the leadership of the CVMT on the basis of  
10 Dixie's deposition testimony. Moreover, the issues in *Salazar* go well beyond whether Dixie is  
11 the Tribal chairperson.

12       Near the end of its opposition, the Burley Faction finally arrives at the crux of this case:  
13 “the trial court has jurisdiction to determine whether the language of the Compact permits the  
14 Commission to withhold RSTF money from a Non-Compact tribe because it purportedly has no  
15 recognized governing body” (Pl.'s Opp'n., at p. 17, citing 12/18/2012 Ct. App. Dec, p.RJN, Ex.  
16 23, at p. 16.) But the Burley Faction then retreats again into the fundamental semantic  
17 misrepresentation of its case—that the Burley Faction is the CVMT.

18       It is undisputed that the CVMT that is listed in the Federal Register is an eligible recipient  
19 Indian tribe and a Non-Compact Tribe for purposes of the Government Code and Compact,  
20 respectively. The Burley Faction's argument that it is entitled to receive the accrued RSTF  
21 monies now, notwithstanding the pendency of *Salazar*, is primarily based on the premise that the  
22 Burley Faction is the CVMT despite the fact that this is the primary disputed issue in *Salazar*.  
23 (See *Salazar* FAC, Def's Exh, at pp. 0120, 0148.) In fact, the make-up of the Tribe and its lawful  
24 governing body was in dispute five years before the Assistant Secretary issued the December 22  
25 and August 31 Decisions. (See BIA Letters, Def's Exh, at pp. 0233-0244.) Until *Salazar* has  
26 been resolved, the Burley Faction cannot establish that constitutes or represents the CVMT.

## CONCLUSION

The Burley Faction would have this Court interpret the appellate court's decision to merely require this Court to "acknowledge that the federal dispute is ongoing" (Pl.'s Opp'n., at p. 22), and then ignore it, ignore the implications and potential consequences of that dispute, and ignore the fact that the outcome of *Salazar* may result in vacating and setting aside the August 31 Decision, followed by the BIA's recognition of a membership and leadership different than the Burley Faction.

The language of the Compact cannot reasonably be construed to preclude the administrator of the RSTF from taking reasonable steps to disburse RSTF monies only to persons properly authorized to receive and administer them according to the will of the eligible recipient tribe as a whole. The Commission's responsibility cannot be discharged by simply disbursing RSTF monies to the first person or group to demand them, nor can the Commission's responsibility be discharged by disbursing RSTF monies to an individual or group that the Commission knows may not represent the tribe as a whole, i.e., when an intra-Tribal leadership dispute exists. The undisputed material facts of this case establish that the Commission has rightfully and appropriately withheld and accrued RSTF payments for the benefit of the CVMT, to be disbursed to the CVMT once the BIA has identified the CVMT's authorized leadership. While *Salazar* is pending and the August 31 Decision is stayed, the Burley Faction cannot establish that it is the CVMT, and therefore cannot establish its entitlement to receive the accrued RSTF monies. For this reason, each and every cause of action of the first amended complaint in this action fails. The Commission respectfully requests that this Court enter an order dismissing the first amended complaint.

1 Dated: April 10, 2013

Respectfully Submitted,

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DECLARATION OF SERVICE

Case Name: California Valley Miwok Tribe v. California Gambling Control Commission

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On April 10, 2013, I served the attached **REPLY TO OPPOSITION TO DEFENDANT CALIFORNIA GAMBLING CONTROL COMMISSION'S MOTION FOR SUMMARY JUDGMENT** by placing a true copy thereof enclosed in a sealed envelope and forwarding to Golden State Overnight for overnight delivery, addressed as follows and by e-mail transmission to the addresses listed below:

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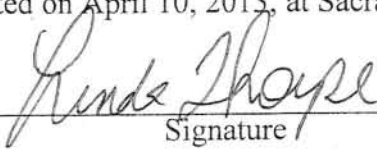
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 10, 2013, at Sacramento, California.

Linda Thorpe  
Declarant

  
Signature