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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, Plaintiff and Appellant, v. CALIFORNIA GAMBLING CONTROL COMMISSION, Defendant and Respondent.	D054912 (Super. Ct. No. 37-2008-00075326-CU-CO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed.

The California Valley Miwok Tribe (the Miwok Tribe) appeals from a judgment of dismissal following an order sustaining the demurrer filed by the California Gambling Control Commission (the Commission) on the basis that the Miwok Tribe lacked capacity or standing to pursue its action against the Commission. As we will explain, we conclude that the trial court improperly concluded that the Miwok Tribe lacked capacity or

standing, and further that none of the other grounds for demurrer asserted by the Commission have merit. Accordingly, we reverse the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Miwok Tribe — located in central California — is identified in the Federal Register as a federally recognized Indian tribe. (Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed.Reg. 40218-02 (Aug. 11, 2009) [listing "California Valley Miwok Tribe, California"].)[1] According to the Miwok Tribe's appellate briefing, the enrolled membership of the Miwok Tribe is currently five persons.[2]

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1 The list appearing in the Federal Register is updated annually. It constitutes "a list of all Indian tribes which the Secretary [of the Interior] recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (25 U.S.C. § 479a-1(a).) As stated in the Federal Register, "[t]he listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." (Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218-02, *supra*.)

2 The history of the Miwok Tribe — originally identified as the "Sheep Ranch Rancheria of Me-Wuk Indians of California" — was summarized by the federal district court in *California Valley Miwok Tribe v. United States* (D.D.C. 2006) 424 F.Supp.2d 197 (*California Valley Miwok I*). "In 1915, a federal Indian Agent located a cluster of thirteen Miwok living on 160 acres in or near the city of Sheep Ranch, California. . . . The government purchased two of the 160 acres, in trust for the Miwok, in April 1916. The two-acre parcel came to be known as 'Sheep Ranch Rancheria.' The number of people living there dwindled, to the point that, when the 1934 Indian Reorganization Act, 25 U.S.C. §§ 461-479, was adopted, the government recognized only one individual as a Tribe member. . . . [¶] In 1965, the government . . . began investigating the possibility, under the federal legislation known as the Rancheria Act, of terminating the Sheep Ranch

This lawsuit challenges the Commission's decision to withhold funds from the Miwok Tribe that are payable to certain Indian tribes in California who operate less than 350 gaming devices. As a first step to understanding the instant dispute, we review the background facts concerning the disputed funds.

A. *Funds Payable to Non-Compact Tribes in California*

Pursuant to The Indian Gaming Regulatory Act of 1988 (18 U.S.C. § 1166 et seq.; 25 U.S.C. § 2701 et seq.), the State of California entered into tribal-state gaming compacts with the various tribes in California authorized to operate gambling casinos (collectively, the Compacts).[3] (See Gov. Code, §§ 12012.25-12012.53 [ratifying tribal-state gaming compacts]; see also *Cachil Dehe Band of Wintun Indians v. California* (9th Cir. 2008) 547 F.3d 962, 966-967 (*Cachil Dehe Band*) [explaining that in 1999, 63 tribes entered into gaming compacts with the State of California].)

Rancheria of Miwok Indians. . . . A December 30, 1965 list, prepared pursuant to the Rancheria Act, named Mabel Hodge Dixie as the only Indian living on Sheep Ranch. . . . In 1966, . . . the government . . . conveyed Sheep Ranch to Mabel Dixie by deed, and terminated the Tribe. . . . [¶] In 1994, Congress enacted the Federally Recognized Indian Tribe List Act of 1994, Pub. Law 103-454, and the Tribe's name was placed on the list of federally recognized tribes. . . . On September 24, 1998, the Superintendent of the Bureau of Indian Affairs Central California Agency . . . advised Yakima Dixie, as tribal chairman, that Yakima Dixie, Melvin Dixie, Silvia Burley, . . . Rashel Reznor, Anjelica Paulk, and Tristan Wallace 'possessed the right to participate in the initial organization of the Tribe.'" (*California Valley Miwok I*, at pp. 197-198, citations and fns. omitted.)

3 A generic form of the Compacts (with the heading "Generic Tribal-State — Compact 09-10-99," but dated February 2002 on the title page) is contained in the record as an exhibit to the first amended complaint. Our citations to the "Compacts" are necessarily based on the contents of the generic form contained in the record.

As relevant here, the Compacts set forth a revenue-sharing mechanism under which tribes who operate less than 350 gaming devices share in the license fees paid by the tribes entering into the Compacts. (Compacts, § 4.3.2.1; see also *Cachil Dehe Band, supra,* 547 F.3d at p. 967.) Specifically, the Compacts provide that "each Non-Compact Tribe in the State shall receive the sum of $1.1 million per year," with payments made on a quarterly basis. (Compacts, § 4.3.2.1.) "Non-Compact Tribes" are defined as "federally recognized tribes that are operating fewer than 350 Gaming Devices." (Compacts, § 4.3.2.(i)(a).) It is undisputed that the Miwok Tribe is a Non-Compact Tribe, as it operates no gaming devices and is federally recognized.

The annual payment of $1.1 million to each Non-Compact Tribe is drawn from the Revenue Sharing Trust Fund (RSTF) described in the Compacts, which is funded by license fees paid by the gaming tribes to the State.[4] The Commission administers the RSTF as a trustee. (Compacts, § 4.3.2.1(b).) According to the Compacts, "[t]he 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." (Compacts, § 4.3.2.1(b).)

The Compacts provide that if there are insufficient funds in the RSTF to cover the annual $1.1 million payment to the Non-Compact Tribes, the funds are to be drawn from

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4 According to the Compacts, gaming tribes make a one-time payment into the RSTF of $1,250 per each gaming device being licensed, and, in accordance with a predetermined fee schedule, must pay annual fees into the RSTF for each licensed gaming device. (Compacts, § 4.3.2.2(a)(2), (e).)

the Indian Gaming Special Distribution Fund (Special Distribution Fund), which the Legislature created by enacting Government Code section 12012.85.[5] According to a schedule set forth in the Compacts, gaming tribes are required to make quarterly contributions to the Special Distribution Fund based on the average net win associated with their gaming devices. (Compacts, § 5.1(a).) Although the moneys in the Special Distribution Fund are to be applied to a variety of purposes,[6] their priority use is to cover the shortfalls in the RSTF in making the annual $1.1 million payment to the Non-Compact Tribes. (Gov. Code, § 12012.85, subd. (d).) A provision in the Government Code provides for the transfer of money from the Special Distribution Fund to the RSTF to cover shortfalls (Gov. Code, § 12012.90, subd. (e)) and directs that the Commission "shall make quarterly payments from the Indian Gaming Revenue Sharing Trust Fund to each eligible recipient Indian tribe within 45 days of the end of each fiscal quarter." (Gov. Code, § 12012.90, subd. (e)(2).)

B. *The Commission Withholds Funds from the Miwok Tribe*

There is no dispute that, as a Non-Compact Tribe, the Miwok Tribe is eligible for an annual amount of $1.1 million under the terms of the Compacts. Nevertheless, in

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5 Evidence in the record shows that, at least in 2007 and 2008, the Commission has been required to draw on the Special Distribution Fund to make up a shortfall in the RSTF.

6 The purposes to which the moneys in the Special Distribution Fund may be applied include grants for programs to address gambling addiction or for the support of local and state government agencies impacted by tribal gaming. (Gov. Code, § 12012.85, subds. (a), (b); Compacts, § 5.2.)

August 2005, the Commission, acting as trustee of the RSTF, suspended its quarterly disbursements to the Miwok Tribe, and instead decided to hold the funds indefinitely for later distribution. The Commission cited "the lack of a recognized tribal government or leadership," and explained that "in situations involving tribal leadership disputes," the Commission "take[s its] lead" from the federal Bureau of Indian Affairs (BIA).[7] Citing the BIA's decision in July 2005 to suspend the Miwok Tribe's contract to receive federal benefits under the Indian Self-Determination and Education Assistance Act (Pub.L. No. 93-638, § 2 (Jan. 4, 1975) 88 Stat. 2203; see also 25 U.S.C. § 450 et seq.) (ISDEAA), on the ground that "there is no recognized tribal government with which to take action on behalf of the tribe or to sustain a government[-]to[-]government relationship with," the Commission adopted the practice of depositing the funds to which the Miwok Tribe is entitled into an interest bearing account until "the Tribe's leadership and organizational status is resolved to a degree sufficient to allow the BIA to resume government-to-government relations."

It appears from evidence in the record that the BIA at one point resumed its provision of federal benefits under the ISDEAA to the Miwok Tribe on an interim basis,

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[7] Although this appeal concerns a demurrer to the first amended complaint, there are numerous evidentiary documents in the record. Those documents consist of (1) documents that were the subject of the parties' requests for judicial notice in the trial court in connection with the demurrer, and (2) those documents that were submitted by the parties in response to the trial court's request for additional briefing on whether the Miwok Tribe should be given leave to amend the first amended complaint. Accordingly, in setting forth the factual background of the parties' dispute, we refer to certain evidence outside of those facts pled in the first amended complaint.

in connection with which it recognizes tribal member Silvia Burley as a "'person of authority'" within the Miwok Tribe for the purposes of receiving funding under the ISDEAA, but that it still does not recognize a tribal government.[8] The Commission, however, persisted in withholding the RSTF funds from the Miwok Tribe, citing the BIA's ongoing refusal to recognize a tribal government, as well as the litigation between the Miwok Tribe and the BIA in federal court (the federal litigation), which has resulted in published opinions from the federal district and appellate courts in the District of Columbia. (*California Valley Miwok I*, *supra*, 424 F.Supp.2d 197; *California Valley Miwok Tribe v. United States* (D.C. Cir. 2008) 515 F.3d 1262 (*California Valley Miwok II*).)

C. *The Federal Litigation*

Because the Commission relies on the federal litigation in support of its decision to withhold the RSTF funds from the Miwok Tribe, the details of that litigation are pertinent here. The federal litigation was filed by the Miwok Tribe as a challenge to the BIA's refusal to approve a tribal constitution that was adopted by the Miwok Tribe, with Burley acting as chairperson for the tribe. (*California Valley Miwok II*, *supra*, 515 F.3d

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8 Shortly before oral argument, the Commission submitted a request that we take judicial notice of a January 28, 2010 order, issued by the Interior Board of Indian Appeals, ruling on an appeal by the Miwok Tribe of a decision by the BIA's Pacific Regional Director. We grant the request to take judicial notice. We note that the January 28, 2010 order contains more up-to-date background information about the dispute between the BIA and the Miwok Tribe. Based on the discussion in the January 28, 2010 order, it appears that in fiscal years 2008 and 2009, the BIA did *not* enter into a contract with the Miwok Tribe to provide it funds under the ISDEAA, although it did so in prior fiscal years.

at p. 1265; *California Valley Miwok I*, *supra*, 424 F.Supp.2d at p. 199.) Specifically, the Miwok Tribe had sought approval for its constitution from the BIA under the Indian Reorganization Act of 1934 (25 U.S.C. § 461 et seq.) (the IRA).[9] Under the IRA, the Secretary of the Interior may call and hold a special election for ratification of a tribe's constitution under procedures detailed in that statute and applicable federal regulations. (25 U.S.C. § 476; 25 C.F.R. § 81 (2009); *California Valley Miwok II*, *supra*, 515 F.3d at p. 1264 [describing applicable regulations].) A tribe's constitution becomes effective under the IRA when ratified in the election by a majority vote of the adult members of the tribe and approved by the Secretary of the Interior. (25 U.S.C. § 476(a).) However, the IRA also provides that "[n]otwithstanding any other provision of this Act — (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section . . . ." (25 U.S.C. § 476(h)(1).) Here, the Miwok Tribe's constitution was indisputably not adopted pursuant to a special election called and held by the Secretary of the Interior, and the BIA accordingly informed the Miwok Tribe that it considered the tribe to be "unorganized" under the IRA.

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9 However, a tribe may chose not to organize under the IRA, and many tribes have accordingly adopted constitutions using procedures not set forth in the IRA, and several tribes exist without any written constitution. (Cohen, Handbook of Federal Indian Law (2005 ed.) § 4.04[3][b], pp. 257-258.) It is also pertinent to the background of the dispute between the Miwok Tribe and the BIA that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community . . ." (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72, fn. 32 (*Santa Clara Pueblo*)), and "[a]n Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress." (*Williams v. Gover* (9th Cir. 2007) 490 F.3d 785, 789.)

(*California Valley Miwok II*, at p. 1265.) The BIA explained that it "'has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community,'" and it had "'not seen evidence that such general involvement was attempted or occurred with the purported organization'" of the Miwok Tribe. (*Id*. at pp. 1265-1266.)

In the federal litigation, the Miwok Tribe argued that the BIA was nevertheless required to recognize the tribe as "organized" under the IRA based on the provision in the statute stating that tribes "shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section." (25 U.S.C. § 476(h)(1); see *California Valley Miwok II*, *supra*, 515 F.3d at pp. 1266-1267.) Both the district court and the appellate court concluded that the BIA was not required to recognize the Miwok Tribe as organized under the IRA. As the appellate court explained, the BIA has "the power to reject a proposed constitution that does not enjoy sufficient support from a tribe's membership." (*California Valley Miwok II*, at p. 1267.) In reaching its decision the court relied on the fact that "[a]lthough [the Miwok Tribe], by its own admission, has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting her proposed constitution." (*Ibid*.)

D. *Litigation over the Withheld Funds*

1. *The Commission's Interpleader Action*

In December 2005 the Commission filed an interpleader action in superior court concerning the proper disposition of the RSTF funds payable to the Miwok Tribe. That suit was dismissed on demurrer.

2. *The Instant Litigation*

In January 2008 the Miwok Tribe filed the instant lawsuit against the Commission. After a removal of the action to federal court by the Commission and an order remanding it back to superior court, the Miwok Tribe filed the operative first amended complaint, combined with a petition for writ of mandate (the complaint). Against the Commission, the complaint seeks (1) a writ of mandate under Code of Civil Procedure section 1085 ordering the Commission to pay the RSTF funds to the Miwok Tribe; (2) an injunction requiring the Commission to perform its duty as trustee of the RSTF by distributing the RSTF funds to the Miwok Tribe; and (3) declaratory relief concerning the Commission's duty to distribute the RSTF funds to the Miwok Tribe. The complaint was verified by Burley, who declared, "I am the selected spokesperson for [the Miwok Tribe], and I am authorized to make this verification on its behalf."

The complaint provides a brief description of the factual background that gave rise to the Commission's decision to withhold the RSTF funds from the Miwok Tribe. The complaint explains (1) that "[i]n 1998 the Miwok Tribe established a tribal council"; (2) that "[o]n June 25, 1999, the [BIA] recognized [Burley] of the Miwok Tribe as tribal chairperson"; (3) that "[i]n late 1999, a leadership dispute developed within the Miwok Tribe," but that in July 2000 "the BIA again recognized Burley as chairperson of the Miwok Tribe"; (4) that in October 2001 the BIA declined to approve the proposed new constitution sent to it by the Miwok Tribe in September 2001, but recognized the Miwok Tribe as an "'unorganized Tribe'"; (5) that in November 2003 "the BIA acknowledged the existence of a 'government-to-government relationship' with the Miwok Tribe through the

tribal council that Burley chaired"; (6) that in March 2004 the BIA advised that it still considered the Miwok Tribe to be unorganized, and although it recognized Burley as "'a person of authority'" within the tribe, "asked the Miwok Tribe to draft a constitution that identified more of its membership base;" (7) that "[i]n March 2005, the BIA met with the Miwok Tribe in an effort to resolve the tribe's ongoing leadership disputes";[10] and finally (8) that "[t]he BIA has continued to recognize the Miwok Tribe only as an 'unorganized' tribe, because it has not adopted a governing constitution that identified other putative members of the tribe" and "will only recognize Burley as a 'person of authority' for the Miwok Tribe, rather than its tribal chairperson."

The Commission demurred to the complaint on several grounds, including that "[a]bsent a federally recognized constitution, government, membership, or chairperson, there is no individual or entity with *the capacity or standing to file suit* to enforce any

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10 The nature of the "ongoing leadership dispute[]" is not explained in the complaint. However, other evidence in the record, as well as statements in the opinions in the federal litigation, provide detail. Apparently, the leadership dispute involves Yakima Dixie, who resigned as tribal chairperson in 1999 and later complained about his removal from the tribal leadership. (*California Valley Miwok I*, *supra*, 424 F.Supp.2d at p. 198.) Documents submitted by Burley in connection with the trial court's request for briefing on whether it should grant leave to amend indicate (1) that in April 2005, in an extensive written decision, the Miwok Tribe's tribal court, through an administrative hearing officer, considered and rejected Yakima Dixie's claim that he, rather than Burley, is the authorized representative of the Miwok Tribe; and (2) that in September 2005, Yakima Dixie was disenrolled from the Miwok Tribe by resolution of the tribal council on the ground that he was enrolled in another federally recognized Indian tribe and had not relinquished that enrollment. In the trial court during the instant litigation, Yakima Dixie and Melvin Dixie — both claiming to be tribal members — filed an application for leave to file an amicus brief, but stated that they did not desire to intervene at this stage of the litigation. The trial court denied the application.

rights the [Miwok Tribe] may possess as a result of that entity's placement on the list of federally recognized tribes." (Italics added.) As the basis for this argument, the Commission relied on facts set forth in the federal litigation concerning the BIA's refusal to approve the Miwok Tribe's constitution.

The trial court sustained the demurrer to each cause of action on the ground that "the Tribe, as currently represented in this lawsuit, lacks the capacity and/or standing to bring this action." In support of its decision, the trial court observed that both the federal litigation and the complaint in this action mentioned a leadership dispute within the Miwok Tribe, and that "without a recognized government and leader this action cannot proceed." According to the trial court, the Miwok Tribe "offered no persuasive authority that would support allowing this action to proceed when, as acknowledged, there clearly is an ongoing leadership dispute within the Tribe."

After receiving supplemental briefing as to whether it should grant leave to file an amended complaint, the trial court sustained the demurrer without leave to amend and entered an order of dismissal.

II

DISCUSSION

A. *Standard of Review*

"'On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.'" (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) "A judgment of

dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324 (*Carman*).) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.)

Further, "[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, citations omitted.) "[S]uch a showing can be made for the first time to the reviewing court." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

B. *Lack of Capacity or Standing*

The trial court dismissed the action on the ground that, under the circumstances described in the complaint and the opinions in the federal litigation, the Miwok Tribe lacked "capacity and/or standing" to bring this action because of a leadership dispute within the Miwok Tribe. However, in connection with the demurrer, neither the trial court nor the parties cited any authority establishing that the doctrines of standing and capacity have any application to a situation in which the entity that filed suit is

undergoing a leadership dispute and the BIA refuses to approve its constitution under the IRA. Thus, we focus on the doctrines of capacity and standing to determine whether they have any application here.

1. *Standing*

We first examine the doctrine of standing. The requirement that a party must have standing to bring an action is based on Code of Civil Procedure section 367, which requires that, in general, "[e]very action must be prosecuted in the name of the real party in interest . . . ." A party who is not the real party in interest lacks standing to bring suit. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004.) "'Generally, "the person possessing the right sued upon by reason of the substantive law is the real party in interest."'" (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566.) A party has standing if it has "'the requisite interest to support an action or the right to relief.'" (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1172, fn. 10.)

Applying these principles here, there is no basis to question to Miwok Tribe's standing to bring this lawsuit, even if it is involved in a leadership dispute. Regardless of who is the proper leader of the Miwok Tribe and whether the BIA approves of the Miwok Tribe's constitution, it is undisputed that the lawsuit was brought by the Miwok Tribe itself as the sole plaintiff. The Miwok Tribe is undoubtedly a real party in interest because of its stake in the outcome of a dispute over whether the Commission must make payments to it from the RSTF. Thus, we conclude that there is no defect in the standing in this action sufficient to support an order sustaining a demurrer.

2. *Capacity*

Next, we consider the doctrine of capacity. "The question of standing to sue is different from that of capacity. Incapacity is merely a *legal disability*, such as minority or incompetency, which deprives a party of the right to represent his or her own interests in court. (*American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559, italics added.) "In general, any person or entity has capacity to sue or defend a civil action in the California courts. This includes artificial 'persons' such as corporations, partnerships and associations. [Citation.] A partnership or other unincorporated association has capacity both to sue and be sued in the name it has assumed or by which it is known." (*Ibid.*)[11]

In certain instances, however, an entity will lack capacity to sue. Most notably, a California corporation suspended under California law lacks the capacity to sue in a California court. (Rev. & Tax. Code, § 23301 [suspension for nonpayment of corporate franchise tax]; *Palm Valley Homeowners Assn. Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 559 [suspension for failure to file the information statement required by Corp. Code, § 1502].) Further, a foreign corporation whose powers have been suspended in its home state also lacks the capacity to sue in a California court. (*CM Record Corp. v. MCA Records, Inc.* (1985) 168 Cal.App.3d 965, 968-969 ["Appellant lacked the capacity

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11 According to Code of Civil Procedure section 369.5, "[a] partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known." (*Ibid.*)

to sue, because of lack of corporate status, in Missouri. It likewise lacked the capacity to sue in California."].)[12]

The parties have cited no applicable authority suggesting that a federally recognized Indian tribe involved in an internal leadership dispute, or whose constitution is not approved under the IRA by the BIA, is the type of entity that lacks the legal capacity to bring suit in its own name in a California court. The Commission relies on federal case law dealing with unrecognized governmental regimes of foreign countries. Those cases hold that "unrecognized regimes are generally precluded from appearing as plaintiffs in an official capacity without the Executive Branch's consent." (*Klinghoffer v. S.N.C. Achille Lauro* (2d Cir. 1991) 937 F.2d 44, 48 (*Klinghoffer*), citing *Banco Nacional v. Sabbatino* (1964) 376 U.S. 398, 410-411, and *National Petrochemical Co. v. M/T Stolt Sheaf* (2d Cir. 1988) 860 F.2d 551, 554-555.) Specifically, these cases concern executive branch recognition of the governments of Cuba, Iran and the Palestinian Liberation Organization (the PLO). (*Banco Nacional*, at p. 410 [severance of diplomatic relations, commercial embargo, and freezing of Cuban assets in this country did not preclude an instrumentality of the Cuban government from bringing suit in a United States court]; *National Petrochemical,* at p. 552 [a corporation wholly owned by the government of Iran was permitted to bring suit due to position of the Executive Branch of the United

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12 In addition, a foreign corporation does not have the capacity to "maintain" an action in a California court concerning an intrastate business without obtaining a certificate of qualification from the Secretary of State. (Corp. Code, § 2203, subd. (c).)

States government that Iran should be given access to court]; *Klinghoffer*, at p. 46 [considering whether the PLO is immune from suit].)

We infer that the Commission believes these cases would apply because "tribes remain quasi-sovereign nations" (*Santa Clara Pueblo*, *supra*, 436 U.S. at p. 71) and "are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." (*Oklahoma Tax Comm'n v. Potawatomi Tribe* (1991) 498 U.S. 505, 509.) However, we need not, and do not, decide whether *Klinghoffer* and the cases it cites are in any way applicable to the situation of a federally recognized Indian tribe. That is because we find no indication that the Executive Branch of the United States government has withheld consent for the Miwok Tribe to appear as a plaintiff in a United States court. Indeed, as shown by the history of the federal litigation, the Miwok Tribe, under its current disputed leadership and while in a dispute with the BIA about its constitution, has been granted access to the federal courts as a plaintiff in a federal lawsuit with the United States as a defendant. (*California Valley Miwok I, supra*, 424 F.Supp.2d 197; *California Valley Miwok II, supra*, 515 F.3d 1262.) The Commission points to no evidence that the United States ever took the position that under the current circumstances the Miwok Tribe should be denied access to United States courts.[13]

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13 In an attempt to support its argument that the Miwok Tribe lacks the capacity to sue, the Commission also cites a federal statutory provision indicating that the federal district courts "shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." (28 U.S.C § 1362.) We find this provision inapposite because it is does not purport to define the instances in which a federally recognized Indian tribe will lack

Relying also on *Miami Nation of Indians v. U.S. Dept. of Interior* (7th Cir. 2001) 255 F.3d 342, 345-346, to support its argument, the Commission contends that "[a]bsent federal recognition of a tribal government, no one has the capacity to sue on behalf of a federally recognized tribe." According to the Commission, *Miami Nation* establishes that "[r]ecognition of a tribal government and the officials entitled to act on a tribe's behalf are matters wholly within the exclusive purview of the executive branch . . . ," and that "those questions are essentially political in nature." However, *Miami Nation* provides no support, as it dealt with initial *federal recognition* of an Indian tribe. (*Id*. at pp. 345-346 [challenging the U.S. Dept. of the Interior's decision to deny a tribe's petition for recognition].) It has no bearing on whether a tribe, such as the Miwok Tribe, *that is already federally recognized* might lack the capacity to sue in a situation where (1) the BIA fails to approve its constitution under the IRA; and (2) it is involved in an internal leadership dispute.

In sum, the Commission has identified no authority, and we are aware of none, to support a finding that the Miwok Tribe lacks the capacity to bring suit. It is undisputed that the Miwok Tribe is a federally recognized Indian tribe, and the complaint sufficiently alleges that despite the BIA's refusal to approve the tribe's constitution and despite the ongoing leadership dispute, the complaint was filed by a "'person of authority'" in the tribe who is the tribe's "selected spokesperson." Under these circumstances, we find no

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the legal capacity to bring suit, and instead defines the scope of a federal court's original jurisdiction.

basis to conclude that the Miwok Tribe is under any legal disability that would prevent it from filing suit on its behalf.

We accordingly conclude that the trial court erred in determining that the Miwok Tribe lacked "capacity and/or standing" to bring suit.

Before we leave this subject, however, it is important to point out that much of the parties' briefing, while purporting to address issues of capacity and standing, veers off into the merits of the underlying dispute of whether the Commission is entitled to withhold the RSTF funds from the Miwok Tribe. In our view, the issues of standing and capacity are separate from the issue of whether the Miwok Tribe should prevail on the merits of its lawsuit. We reject the Miwok Tribe's suggestion that if it establishes standing to bring this lawsuit, it is automatically entitled to payment of the RSTF funds. Our decision in no way touches upon whether the Commission is properly withholding funds from the Miwok Tribe. That is a separate issue that must be litigated upon remand of this action to the trial court. The Commission contends that because it has a fiduciary duty as trustee of the RSTF funds, the current uncertainties regarding the Miwok Tribe's government and membership require it to withhold the RSTF funds and hold them in trust until it can be assured that the funds, if released, will be going to the proper parties. Nothing in our decision is intended to foreclose the Commission from pursuing such an argument in the trial court. Indeed, the trial court will be better able to explore the legal impact of the tribal leadership dispute and the BIA's relationship with the Miwok Tribe when the pertinent facts are more fully developed later in the litigation, rather than in the context of the scant facts available in connection with the Commission's demurrer.

C. *The Status of the Miwok Tribe as Third Party Beneficiary of the Compacts Does Not Provide a Basis for Affirmance of the Order Sustaining the Commission's Demurrer*

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.[14] The Commission contends that the causes of action for injunctive and declaratory relief fail to state a claim for relief because they impermissibly seek an order enforcing the terms of the Compacts.

The Compacts contain the following provisions relevant to the Commission's argument. First, the Compacts state that Non-Compact Tribes "shall be deemed third party beneficiaries" of the Compacts. (Compacts, § 4.3.2(a)(i).) Second, in a section titled "Third Party Beneficiaries," the Compacts provide that "[e]xcept to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms." (Compacts, § 15.1.)

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

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14 As we have explained, in ruling on the appeal from the order sustaining the Commission's demurrer, we must consider all of the grounds raised in the demurrer, not just that ground reached by the trial court. (*Carman, supra,* 31 Cal.3d at p. 324.)

As we will explain, we conclude that the causes of action for declaratory and injunctive relief do not depend on attempts to enforce the terms of the Compacts.

As we have discussed, the parties to the Compacts are the state's gaming tribes and the State of California. By entering into the Compacts, the gaming tribes agreed that they would pay over certain of the moneys to the State, and that from those funds, the Non-Compact Tribes would be entitled to the amount of $1.1 million annually. (Compacts, §§ 4.3.2.1, 4.3.2.2(a)(2), 5.1.) The State of California agreed that the Commission would serve as trustee to the RSTF. (Compacts, § 4.3.2.1(b).) Based on our reading of the complaint, while the provisions of the Compacts are relevant, the causes of action for declaratory and injunctive relief are not dependent on the enforcement of any contractual terms. Instead, the complaint repeatedly cites the Government Code as the source of the Commission's duty to pay over the RSTF funds. Specifically, the complaint cites Government Code section 12012.90, subdivision (e)(2), which provides that the Commission "shall make quarterly payments from the Indian Gaming Revenue Sharing Trust Fund to each eligible recipient Indian tribe within 45 days of the end of each fiscal quarter." (*Ibid*.) Because the causes of action for declaratory and injunctive relief depend on a statutory provision rather than the terms of the Compacts, we 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.[15]

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15 The Commission further argues that although the Miwok Tribe relies on Government Code section 12012.90, subdivision (e) for its causes of action, that statutory provision does not create a private cause of action. However, the Commission's

D. *The Petition for Mandamus Is Not Precluded on the Ground That It Seeks to Enforce a Contractual Obligation*

The Commission raises two additional arguments in support of its demurrer to the cause of action seeking a writ of mandamus. As we will explain, both of the arguments lack merit.

First, the Commission relies on the principle that mandamus is not available to enforce contractual obligations against a public entity. (*300 DeHaro Street Investors v. Department of Housing & Community Development* (2008) 161 Cal.App.4th 1240, 1254 ["'As a general proposition, mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity.'"].) However, as we have explained, we do not view the complaint as solely an attempt to enforce contractual obligations. Instead, the complaint, including the cause of action seeking a writ of mandamus, is premised on the Commission's statutory duty under Government Code section 12012.90, subdivision (e)(2) to "make quarterly payments from the Indian Gaming Revenue Sharing

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argument is misplaced because the procedural basis for the causes of action at issue are the statutes permitting a party to seek "a declaration of his or her rights or duties with respect to another" (Code. Civ. Proc., § 1060), and to seek injunctive relief concerning a trustee (Code. Civ. Proc., § 526, subd. (a)(7)). In general, a party may rely on such generally applicable statutes to seek injunctive and declaratory relief against the State. (See *Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal.App.3d 992, 1000.) Further, because the Miwok Tribe seeks only declaratory and injunctive relief, and not damages, it is not relevant whether, as the Commission discusses, Government Code section 12012.90, subdivision (e) creates *liability* for breach of a "mandatory duty" as discussed in Government Code section 815.6.

Trust Fund to each eligible recipient Indian tribe within 45 days of the end of each fiscal quarter."[16] (Gov. Code, § 12012.90, subd. (e)(2).)

Second, the Commission argues that it has already performed its obligation under Government Code section 12012.90, subdivision (e)(2) to make quarterly payments to the Miwok Tribe by depositing the RSTF funds in a separate interest bearing account. Citing the principle that "[m]andate will . . . not lie to compel an act that has already been performed," the Commission argues that it "has in fact performed its duty under the Government Code and, therefore, mandamus is unnecessary." (See *State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 742 [if evidence demonstrates the respondent's "'willingness to perform without coercion, the writ [of mandate] may be denied as unnecessary'" and if the evidence "'shows actual compliance, the proceeding will be dismissed as moot'"].) This argument fails because the act that the Miwok Tribe seeks to compel is *not* the same act that the Commission has already performed. The Miwok Tribe does not seek an order requiring payment into an interest bearing account controlled by the Commission. On the contrary, it seeks an order requiring the Commission to *pay over* and *relinquish control of* the RSTF funds.

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16 In a related argument, the Commission contends that ordering relief in mandamus based on Government Code section 12012.90, subdivision (e)(2) would be an "illegal act or one against public policy" because it would amend the terms of the Compacts without following the proper procedures for making amendments. We disagree. An order enforcing the Commission's duties under Government Code section 12012.90, subdivision (e)(2) would not serve to amend the contractual provision at issue. Instead, it would serve to enforce an *independent statutory duty*.

E. *The Commission's Contention That Indispensible Parties Have Not Been Joined*

The Commission also demurred to the complaint on the basis in "[t]here is a defect in the parties in that [the Miwok Tribe] has failed to join necessary parties." Specifically, the Commission contends that because there are "other parties" who "claim a right to represent the Miwok [Tribe] and, hence, claim a right to distributions from the RSTF," those parties "should be joined pursuant to Code of Civil Procedure section 389, subdivision (a)." The trial court did not address this issue, as it sustained the demurrer on other grounds.

Code of Civil Procedure section 389 provides in part:

> "(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.
>
> "(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder."

Although the Commission's argument is not completely clear, it appears to contend that (1) that the trial court should have determined, pursuant to Code of Civil Procedure section 389, subdivision (a), that certain parties are necessary to the adjudication of this action; and (2) that this action should be dismissed pursuant to Code of Civil Procedure section 389, subdivision (b), because those parties cannot be joined.

We conclude that, for several reasons, the Commission has not carried its burden of establishing this ground for demurrer to the complaint.

First, the Commission has not clearly identified the parties that it claims are necessary to the action. Instead, it only vaguely refers to "other parties" who "claim a right to represent the Miwok [Tribe]." Although (based on other materials in the record) one might surmise that Yakima Dixie is one of the parties at issue, the Commission is simply not clear about who it believes should be joined in this action. Further, the identity of the parties that the Commission claims should be joined in this action is not cleared up by the complaint, which refers only vaguely to a leadership dispute. Under these circumstances, an order sustaining a demurrer for misjoinder of parties would not be proper. "It is axiomatic that a demurrer lies only for defects appearing on the face of the pleadings. More specifically, a defendant may not make allegations of defect or misjoinder of parties in the demurrer if the pleadings do not disclose the existence of the matter relied on; such objection must be taken by plea or answer." (*Harboring Villas Homeowners Assn. v. Superior Court* (1998) 63 Cal.App.4th 426, 429 (*Harboring Villas*).)

Second, a decision that an absent party is necessary to a resolution of the action is "'"a discretionary power or a rule of fairness"'" (*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1105), and we review such a decision under an abuse of discretion standard of review. (*Id*. at p. 1106.) Accordingly, the trial court, in the first instance, should be given an opportunity to exercise its discretion as to the joinder of parties. It would be improper for us to make such a determination for the first time on appeal rather than to review an exercise of the trial court's discretion.

Third, even if the Commission had identified the parties that it believed should be joined and the trial court had exercised its discretion to decide that joinder was necessary, a dismissal would nevertheless be improper because the Commission has not shown that it is impossible to join the parties at issue. Pursuant to Code of Civil Procedure section 389, subdivision (b), a court may not dismiss an action for failure to join an indispensible party unless it first determines that the person "cannot be made a party." (*Ibid*.)

For all of these reasons, we conclude that the absence of certain parties to this action is not a ground on which we may affirm the trial court's ruling sustaining the Commission's demurrer.[17]

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17 We note that our ruling does not prohibit the Commission from moving to join certain parties at a later stage in the proceedings or from seeking to dismiss the action if those parties cannot be joined; nor does it foreclose the trial court from exercising its discretion to grant any future motion to intervene by third parties. (See *Harboring Villas*, *supra*, 63 Cal.App.4th at p. 432.)

DISPOSITION

The judgment of dismissal is reversed, and the action is remanded for further proceedings consistent with this opinion.

IRION, J.

WE CONCUR:

NARES, Acting P.J.

MCINTYRE, J.