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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff,

- and -

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe,

Plaintiff in Intervention,

vs.

STATE OF CALIFORNIA; and CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; and ARNOLD SCHWARZENEGGER, Governor of the State of California,

Defendants.

CASE NO. 2:04-cv-2265 FCD KJM

PLAINTIFF COLUSA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

Date: August 7, 2009
Time: 10:00 a.m.
Courtroom No. 2
Judge: Hon. Frank C. Damrell, Jr.

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INTRODUCTION

In its Memorandum and Order dated April 21, 2009 ("April 21, 2009 Order"), this Court granted in part and denied in part plaintiff Colusa's motion for summary judgment on all but one of Colusa's claims in these consolidated actions, and granted plaintiff Picayune Rancheria's motion for summary judgment on that tribe's only claim for relief. Specifically, and most relevant to defendants' pending motion for reconsideration, the Court ruled that the Compacts signed by Colusa and Picayune in September, 1999 ("1999 Compacts") authorize the issuance of 42,700 Gaming Device licenses, rather than the 32,151 licenses that defendants have allowed to be issued, and that a tribe such as Colusa, which operated 523 Gaming Devices on September 1, 1999 and is not authorized to operate 2,000 Gaming Devices, is entitled to continue drawing licenses in its original draw priority until it has drawn the maximum number of licenses allowed to be drawn in that priority tier, rather than being demoted to a lower draw priority simply by having drawn even a single license in a given round of draws. Based on the Court's April 21, 2009 Order, Colusa and Picayune have moved the Court for an order directing entry of a partial final judgment in accordance with the Court's determination that their 1999 Compacts authorize the issuance of 42,700 Gaming Device licenses, and directing that defendants promptly schedule and conduct a round of draws for the additional 10,549 licenses available under the Compacts, with draw priorities to be assigned in accordance with the Court's April 21, 2009 Order.

Now, nearly five years after Colusa first filed the action known as *Colusa I* (October 25, 2004); nearly five years after service on defendants of interrogatories, requests for production of documents and requests for admissions; more than four years after defendants responded to Colusa's discovery requests in *Colusa I*; more than three years after the close of discovery in *Colusa I* (March 31, 2006); more than three years after Colusa filed its motion for summary judgment in *Colusa I*; two years after Colusa filed *Colusa II* (June 4, 2007); nearly a year after discovery closed in *Colusa II* (July 11, 2008); and two months after the Court issued its April 21, 2009 Order, defendants have moved for reconsideration of that order and to reopen discovery.

Defendants' assertion that reconsideration is warranted is based upon a letter purportedly dated September 8, 1999 and written by attorney Scott Crowell to Governor Gray Davis and William

Norris ("the Crowell letter").[1] Defendants contend that the letter shows, or at least strongly suggests, that Colusa and Picayune actually were well aware of the State's intent to impose a quantified statewide cap on the number of Gaming Device licenses long before the State's negotiating team presented the negotiating tribes with the State's final draft of the proposed compact on the evening of September 9, 1999, and also that the letter constitutes evidence that the parties had negotiated about existence and size of the finite statewide license pool prior to the evening of September 9, 1999.

The only excuse offered by defendants for their failure to produce the Crowell letter earlier in this litigation is the claim by one of their attorneys, Deputy Attorney General Peter Kaufman, that neither defendants nor their counsel[2] had been aware of the letter's existence until about June 15, 2009, the date upon which Mr. Kaufman was served with a copy of the letter in connection with the plaintiff's motion for summary judgment in *Rincon Band of Luiseño Mission Indians, et al., v. Schwarzenegger, et al.*, No. 04 CV 1151 (Wmc), currently pending in the Southern District of California ("*Rincon*").

As will be demonstrated in the following sections of this Memorandum, the purported Crowell letter is inadmissible for a variety of reasons, and in any event cannot be considered "newly discovered evidence" when, if it ever was delivered to Gov. Davis and Mr. Norris, it has been in defendants' possession for the past ten years, and also this same document was served on defendants in this action, and Deputy Attorney General Kaufman in particular, first in January, 2006, and again in March, 2007 in the *Rincon* litigation, and thus the existence and contents of the Crowell letter was known to defendants and their counsel for more than two years prior to the Court's April 21, 2009 Order. Therefore, the Court should deny defendants' motion for reconsideration, and to spare plaintiffs further irreparable economic prejudice by reason of any additional delay in entry of partial final judgment, the Court should consolidate the hearing of plaintiffs' motion for entry of partial final judgment with the hearing on defendants' motion for reconsideration on August 7, 2009, rather than delaying the hearing on plaintiffs' motion until August 21, 2009.

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[1] And thus, presumably, in the State's possession for nearly ten years.

[2] Including, presumably, other members of the Attorney General's current staff who assisted Norris and Chang during the 1999 compact negotiations.

ARGUMENT

I. STANDARD FOR GRANTING MOTION FOR RECONSIDERATION.

F.R.Civ.P. 60 permits the Court to relieve a party of a final judgment, order or proceeding based on mistake, inadvertence, surprise or excusable neglect; newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); fraud, misrepresentation or misconduct by an opposing party; voidness; satisfaction, release or discharge; or any other reason that justifies relief. The motion must be filed within a reasonable time. "To reopen an action based on newly discovered evidence the moving party must show that: (1) the evidence was discovered after trial, (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage, and (3) the newly discovered evidence is of such magnitude that production of it earlier would likely have changed the outcome of the case. Evidence is not considered newly discovered if it was in the party's possession at the time of summary judgment or could have been discovered with reasonable diligence." *United States v. Uptergrove*, 2009 WL 840607, *6 (E.D. Cal. March 26, 2009).

Eastern District Rule 78-230(k) requires that a party filing a motion for reconsideration must show "(3) what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion, and (4) why the facts or circumstances were not shown at the time of the prior motion." *See Benyamini v. Johnson*, 2009 WL 1702295, *2 (E.D. Cal. June 17, 2009). Motions for reconsideration are disfavored, however, and are not the place for parties to make new arguments not raised in their original briefs. *Zimmerman v. City of Oakland,* 255 F.3d 734, 740 (9th Cir.2001); *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.,* 841 F.2d 918, 925-26 (9th Cir.1988). Nor is reconsideration to be used to ask the court to rethink what it has already thought. *Walker v. Giurbino*, 2008 WL 1767040, *2 (E.D.Cal.2008); *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D.Ariz.1998). Motions to reconsider are committed to the discretion of the trial court. *Combs v. Nick Garin Trucking,* 825 F.2d 437, 441 (D.C.Cir.1987); *Rodgers v. Watt,* 722 F.2d 456, 460 (9th Cir.1983) (en banc). Such motions are "disfavored;" "to succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Benyamini v. Johnson, supra*, at *1 & *2.

Defendants have utterly failed to – and cannot – satisfy any of these criteria, whether under F.R.Civ.P. 60 or Local Rule 78-230(k).

II. DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE THE LETTER UPON WHICH DEFENDANTS' MOTION IS BASED IS NOT ADMISSIBLE IN EVIDENCE.

A. The Purported Letter Is Inadmissible Because it Lacks Proper Foundation.

Federal Rule of Evidence 901 requires that a document offered in evidence be properly authenticated (unless it is self-authenticating under F.R.Evid. 902). Defendants have not provided any authentication for the Crowell letter, other than Mr. Kaufman's declaration that it was served on him in connection with a motion for summary judgment in *Rincon*, a matter pending in another district to which neither Colusa nor Picayune is a party. (Kaufman Decl. ¶3). However, contrary to the requirement in E.D. Rule 230-i) that factual contentions involved in pretrial motions shall be initially presented and heard upon affidavits, Mr. Kaufman's declaration says nothing from which the Court can determine that he has personal knowledge of the letter's authenticity, whether it ever was delivered to or received by the purported addressees or whether it was authorized by, refers to or even was known about by Colusa, Picayune or any other tribal participant in the 1999 compact negotiations.

That Mr. Kaufman may have received a copy of the letter in the course of litigating *Rincon* does not show that the letter actually was written by Crowell, accurately represents the position of any tribe that was engaged in the 1999 compact negotiations, accurately sets forth any facts, or even that the letter ever was delivered to the addressees on behalf of the State in September, 1999.[3] Absent proper authentication by someone with personal knowledge of its authenticity, the letter is inadmissible and an improper basis for reconsidering the Court's April 21, 2009 Order.

B. The Letter Is Inadmissible Because it Is Hearsay and Does Not Qualify for Any of the Exceptions to the Rule That Hearsay Is Inadmissible.

Hearsay, an out of court statement offered into evidence to prove the truth of the matter

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[3] If the letter actually was delivered in September, 1999, defendants have possessed the letter for nearly ten years, and either William Norris or Shelleyanne W.L. Chang would have mentioned it in their respective declarations filed in this action.

asserted, is inadmissible unless subject to an exception to that prohibition. Fed. R. Evid. 801 & 802. The Crowell letter makes a number of assertions of both purported fact and opinion, and thus clearly is a "statement" within the meaning of F.R.Evid. 801(a). Indeed, the Crowell letter contains multiple levels of hearsay, as it purports to describe opinions other than Crowell's, and events that Crowell does not claim to have personally witnessed. (*e.g.*, on page 1 it purports to state the views of five tribes regarding an undescribed concept "floated" by CNIGA; on page 2 it purports to describe the outcome of a vote on the undescribed concept, and expresses the purported desire of five tribes to "return to the basics of IGRA and to negotiate government-to-government in good faith.")

Defendants clearly are offering the letter not merely to show that Crowell wrote a letter to Davis and Norris, but because its content,

> contradicts assertions of fact made by Colusa in support of its motion for summary judgment, supports assertions of fact made by State Defendants in opposition to Colusa's motion and in support of State Defendants' cross-motion for summary judgment, and may materially affect the Court's ruling on the license pool claim.

Defendants' Notice of Motion and Motion (Doc. #117), at p. 2:10-14.

Defendants' Memorandum of Points and Authorities (Doc. #117-2), in addition to inaccurately characterizing a portion of the contents of the letter,[4] contends that the letter "casts the extrinsic evidence so far offered by the State Defendants and Colusa in a new light by indicating that back and forth discussions between the State and tribes concerning the license pool were more extensive and inclusive than the earlier evidence would suggest, and that Judge Norris's assertion that 'everybody' at the time was aware of the State's intention with regard to the size of the license pool is correct."[5]

By so characterizing the Crowell letter, defendants concede that it is being offered not for the purpose of proving that Crowell wrote a letter to Davis and Norris, but for the truth of the matter

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[4] At page 3:5-6, defendants state that the letter "indicates that a number of tribes, including Crowell's clients, felt that the proposed license pool was inadequate." In fact, the purported letter says no such thing; rather, the purported letter expresses five tribes' opposition to the "concept" – whatever it might have been – because it "has tremendous workability problems" and might result in inequities and conflicts among tribes.

[5] Colusa objected to Norris's unsubstantiated assumption as to what "everybody" understood as itself inadmissible hearsay and speculation beyond Norris's personal knowledge; Colusa still objects to the Court's consideration of Norris's speculative and retroactive exercise in mind-reading.

stated in the letter. Therefore, unless the Crowell letter comes within one of the recognized exceptions to the rule that hearsay is inadmissible, the letter may not be received in evidence, and may not serve as the basis for a motion for reconsideration – or anything else.

C. The Crowell Letter Does Not Qualify as an Exception to the Rule Against Admission of Hearsay.

F.R.Civ.P. 803 recognizes 23 enumerated exceptions to the rule that otherwise precludes the admission in evidence of hearsay. The Crowell letter does not come within any of those exceptions, and thus may not be received by the Court.

1. Rule 803(1): The Crowell letter asserts that an undescribed "pooling concept" was discussed at a meeting of "CNIGA," and that at least some tribes attending that meeting voted on the concept, but does not state that Crowell attended the meeting, identify the tribes that did attend, describe the concept that the tribes purportedly voted on or even say whether more tribes voted for it than against it. Thus, the letter, which already is hearsay, is based upon and contains multiple levels of hearsay. Therefore, the Crowell letter does not qualify as a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

2. Rule 803(2): The Crowell letter may recite that time "is so short," but the letter does not purport to relate to a startling event or condition, nor does it appear to have been written while Crowell was under the stress of excitement caused by the event or condition. Therefore, the letter cannot qualify for the "excited utterance" exception to the rule against admitting hearsay in evidence.

3. Rule 803(3): The Crowell letter purports to state that five tribes oppose an undescribed "pooling concept," but does not purport to convey Crowell's state of mind, emotion, sensation, or physical condition. Thus, it does not qualify as an exception to the hearsay rule under Rule 803(3).

4. Rule 803(4): The Crowell letter doesn't pertain to medical diagnosis or treatment, and thus does not come within the exception to the hearsay rule created by Rule 803(4).

5. Rule 803(5): The letter is not a memorandum or record concerning a matter

about which Crowell once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately. Even if it were, it could not be received as an exhibit unless offered by one of the plaintiffs. Thus, it is not admissible under Rule 803(5).

6. Rule 803(6): The Crowell letter was not prepared as a record of regularly conducted activity. Rather, assuming -- without conceding -- that it is authentic, it was a one-time expression of opposition to something that is not described in the letter, and an account of events that the author did not witness. Thus, it is not within the business-records exception to the hearsay rule.

7. Rule 803(7): The Crowell letter obviously is not evidence of the absence of an entry in records kept in accordance with the provisions of Rule 803(6).

8. Rule 803(8): The Crowell letter is not a record, report, statement or data compilation of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report, and thus does not qualify under the public records exception of Rule 803(8).

9. Rule 803(9): The Crowell letter is not a record or data compilation of vital statistics made to a public office pursuant to requirements of law, and thus does not qualify as an exception under Rule 803(9).

10. Rule 803(10): The Crowell letter is not offered to prove the absence of a record, report, statement, or data compilation, or the non-occurrence or non-existence of a matter of which a record, report, statement or data compilation in any form was regularly made and preserved by a public office or agency.

11. Rule 803(11): The Crowell letter is not the record of a religious organization pertaining to births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

12. Rule 803(12): The Crowell letter is not a marriage, baptismal or similar certificate.

13. Rule 803(13): The Crowell letter is not a family record.

14. Rule 803(14): The Crowell letter is not a record of documents affecting an

interest in property.

15. Rule 803(15): The Crowell letter is not a statement in a document affecting an interest in property.

16. Rule 803(16): The Crowell letter, being dated September 8, 1999, is not a statement in a document in existence twenty years or more and the authenticity of which has been established.

17. Rule 803(17): The Crowell letter is not a market report or commercial publication containing market quotations, tabulations, lists, directories or other published compilations generally used and relied on by the public or by persons in particular occupations.

18. Rule 803(18): The Crowell letter is not a learned treatise called to the attention of an expert witness on cross-examination or relied upon by an expert witness in direct testimony, or similar document established as a reliable authority by the testimony or admission of a witness or by other expert testimony, or by judicial notice.

19. Rule 803(19): The Crowell letter is not offered as evidence of anyone's reputation.

20. Rule 803(20): The Crowell letter is not offered to show reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in a community, or reputation as to events of general history important to a community, state or nation in which located.

21. Rule 803(21): The Crowell letter is not offered to show the reputation of anyone's character among associates or in a community.

22. Rule 803(22): The Crowell letter is not offered as evidence of a previous final judgment (whether after trial or entry of a plea of guilty) adjudging a person guilty of a crime punishable by death or imprisonment for more than one year.

23. Rule 803(23): The Crowell letter is not a judgment offered to prove matters of personal, family or general history, or boundaries essential to the judgment, if the same were provable by evidence of reputation.

Because the Crowell letter does not qualify under any of the foregoing exceptions to the rule

prohibiting admission of hearsay into evidence, the Court may not consider it. Because the Crowell letter constitutes the sole and entire basis for defendants' motion for reconsideration, the inadmissibility of the Crowell letter compels the denial of defendants' motion.

III. THE CROWELL LETTER IS INADMISSIBLE BECAUSE IT IS IRRELEVANT.

Assuming, without conceding, that the Crowell letter somehow could qualify for admission into evidence even though it is not properly authenticated, contains multiple levels of hearsay and is being offered for the truth of the matter asserted, the Crowell letter still is inadmissible because it is irrelevant within the meaning of F.R.Evid. 401. That Rule defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

According to defendants, the Crowell letter casts doubt on the accuracy of the extrinsic evidence offered thus far by both Colusa and defendants, because it suggests that the question of a "pooling concept for dealing with the allocation of machines" was discussed and voted on at a "CNIGA" meeting purportedly held at some point on the morning of September 9, 1999, thus proving that Norris's purported proposal of a statewide cap of some 44,000[6] slot machines was the subject of extensive negotiation between the State and Colusa prior to the State's presentation of its complete compact draft on the evening of September 9, 1999. A sentence-by-sentence analysis of the letter shows that it does nothing of the kind, that it does not contradict anything contained in the declarations of tribal Chairpersons Mitchum, Bowman or Balderama concerning how and when those and other negotiating tribes first learned of the language now contained in §4.3.2.2(a)(1), and thus that it has no probative value. Therefore, the Crowell letter is utterly irrelevant to the Court's interpretation of the ambiguous language of the Compact's formula for determining how many slot machine licenses are authorized to be issued, and cannot serve as the basis for reconsidering the Court's April 21, 2009 Order.

In its first sentence, the letter requested that its crude brevity be excused, because time was so short. The "time" in question obviously was the looming deadline of the Legislature's scheduled

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[6] Norris's exact figure has varied from time to time and declaration to declaration.

adjournment the next day; failure to conclude an agreement on a compact would mean that nothing, including putting the necessary constitutional amendment on the March 7, 2000 ballot, could be finalized until the next session of the Legislature that would convene in January, 2000, which might have placed tribes already operating casinos in jeopardy of federal enforcement actions.

The letter's first sentence went on to assert that five tribes allegedly represented by Crowell – not including either Colusa or Picayune – did not support what Crowell called a "proposal floated by CNIGA to engage in a pooling concept for dealing with the allocation of machines." Without a description of the proposal to which reference was made, the Court has no way of knowing what it was to which the five tribes were objecting, or why.

The second sentence of the Crowell letter asserted that the five named tribes had not delegated any authority to "CNIGA" to negotiate tribal-state compacts. There is no evidence in the record that something called "CNIGA" was a party to the compact negotiations, or that "CNIGA" had any standing even to participate in such negotiations. Therefore, even if a "pooling concept" of some sort had been "floated," discussed or even voted upon by "CNIGA," or if Norris had discussed the concept with selected tribes or tribal attorneys, neither of these purported facts would have any relevance at all to the actual compact negotiations between the State and Colusa (or Picayune), because there is no evidence – or even any indication – that either Colusa or Picayune were parties to such discussions; indeed, all of the admissible evidence in the record shows that they were not.

The third sentence of the Crowell letter purported to express the five tribes' belief that the "pooling concept" – whatever it may or may not have been – had "tremendous workability problems and that it is unfair for your office to encourage the development of a scheme that is sure to pit tribe versus tribe." This sentence not only does not define the scheme, but also doesn't give any indication of the size of the pool that would have been created by the scheme or how the scheme was proposed to work. The same problems of workability and unfairness could just as easily apply to a pool of any finite size over the life of the compacts if, for example, tribes with more financial resources might be able to buy up available licenses to keep them from being acquired by competitors.

The fourth sentence of the Crowell letter asserted that if any limits were to be imposed on Tribes, they must ensure parity for any one Tribe to expand to the size of any other Tribe's facility.

This sentence could as easily apply to per-tribe limits as to a single statewide limit, if machines at existing facilities were to be grandfathered under any such limits. The sentence also could have referred to minimum allocations of machines for which tribes would not have to pay the State any fees.

The fifth sentence of the Crowell letter purported to describe results of a vote allegedly taken at a "CNIGA" meeting. However, the sentence did not describe the question being voted on, did not identify the tribes that voted, did not identify the tribes that attended the meeting, and did not even say whether more tribes voted to endorse than to oppose the "pooling concept." There also is no way to know, from the letter or otherwise, how the author obtained the information reported in this sentence.

The Crowell letter's sixth sentence simply restated the objection to any sort of pooling scheme. The final sentences had even less to do with any proposal to impose or quantify a statewide limit on the number of Gaming Devices or Gaming Device licenses.

Even if the question before the Court were whether the Compact created a finite statewide pool of licenses, and Colusa and Picayune were claiming that it didn't purport to do so, the letter still would not be relevant, because it does absolutely nothing to clarify the ambiguity in the Compact's language – language that the State admits that it drafted and that the State has not shown and cannot show was known to Colusa and Picayune prior to its presentation on a take-it-or-leave-it basis on the evening of September 9, 1999. Being irrelevant, the letter is inadmissible and cannot serve as the basis for a motion for reconsideration.

IV. DEFENDANTS AND THEIR COUNSEL HAVE POSSESSED A COPY OF THE CROWELL LETTER SINCE AT LEAST JANUARY 23, 2006, AND THUS CANNOT CREDIBLY CLAIM THAT THEIR MOTION FOR RECONSIDERATION IS BASED ON NEWLY-DISCOVERED EVIDENCE THAT, WITH DUE DILIGENCE, COULD NOT HAVE BEEN PRESENTED SOONER.

As explained in detail in the preceding sections of this memorandum, there are multiple irrefutable reasons why the Crowell letter cannot be admitted in evidence in this action. Nonetheless, should the Court be inclined to overlook these fatal evidentiary defects, the Court should not be misled into accepting defendants' representation that the Crowell letter is newly discovered evidence "that was unknown to State Defendants until June 15, 2009," because that

representation either is false or, if true, is evidence of unexcused and inexcusable neglect for which Colusa should not be penalized by further delaying entry of partial final judgment on the Court's April 21, 2009 Order.

If the Crowell letter in fact is authentic, and if in fact it was hand-delivered to the addressees (Gov. Davis and William Norris) on September 8, 1999, then defendants have possessed the letter for nearly ten years. Rather than questioning Colusa's veracity for not having mentioned an alleged "CNIGA" meeting at which an undefined "pooling concept" purportedly was "floated,"[7] defendants should explain why their own declarants, Chang and Norris, who were the State's principal compact negotiators, and who certainly would have been aware of the letter had it been delivered to Norris and Gov. Davis on September 8, 1999,[8] failed to mention the letter in their own declarations in this action dated, respectively, January 15, 2009 (Chang, Doc. No. 61-3) and March 19, 2009 (Norris, Doc. No. 95-3).

Second, and perhaps more importantly, although Mr. Kaufman has sworn under oath that defendants could not have offered the Crowell letter before June 15, 2009, because their counsel were unaware of the letter's existence until it was served on Mr. Kaufman on or about that date in the *Rincon* case, the Declaration of Marjorie Haberman submitted herewith as Exhibit 3 demonstrates beyond any dispute that copies of the Crowell letter were served on Mr. Kaufman in the *Rincon* case not once, but *twice* prior to June 15, 2009. According to Ms. Haberman, a copy of the Crowell letter was served on Mr. Kaufman on January 23, **2006** along with the Rincon Band's Initial Disclosure Statement in that action, and again on March 16, **2007** as one of the documents that the Rincon Band proposed for inclusion in the Administrative Record in the *Rincon* lawsuit. The Crowell letter was identified in both instances as RIN002126-2127. The chronology of the previous service of two copies of the Crowell letter on Mr. Kaufman in the *Rincon* litigation is amply – and irrefutably – documented in the exhibits to Ms. Haberman's declaration.

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[7] There is no evidence or indication that Colusa attended or even was aware of any such meeting.

[8] As explained by the Declarations of George Forman and Wayne Mitchum submitted herewith, neither Colusa nor its legal counsel had ever seen or even heard about the Crowell letter until receiving defendants' pending motion for reconsideration in this action.

Having had the Crowell letter in their possession for nearly ten years, and having been served with copies of the Crowell letter in the *Rincon* litigation in January, 2006 and again in March, 2007, defendants simply have no credible or legitimate excuse or explanation for why they waited until two months after the Court entered its April 21, 2009 Memorandum and Order to move for reconsideration based on an inadmissible document about which they have – or reasonably should have – known for years. If, in fact, defendants' counsel simply didn't read or didn't realize what had been served in *Rincon*, the consequences of that lack of diligence should not be imposed on Colusa, which would be the result if the Court were to grant defendants' belated motion for reconsideration – particularly given that defendants will suffer absolutely no adverse consequences if the Court were to grant Colusa's motion for entry of partial final judgment and order the immediate scheduling of a round of draws for the 10,549 licenses that defendants erroneously have withheld from tribes with 1999 Compacts for more than five years.

CONCLUSION

For all of the reasons set forth above, the Court should deny defendants' motion for reconsideration as unsubstantiated, unjustified and unjustifiable in any event. Moreover, in order to mitigate the prejudice to Colusa and other tribes from the delay in entry of partial final judgment caused by defendants' motion, the Court should advance the hearing on Colusa's motion for entry of partial final judgment, now set for August 21, 2009, to August 7, 2009.

Dated: July 10, 2009

Respectfully submitted,

By: _____

George Forman
FORMAN & ASSOCIATES
Attorneys for Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community