

1
2
3
4
5
6
7
8
9
10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
12

13 -----00000-----

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

18 Plaintiff,

19 PICAYUNE RANCHERIA OF THE
20 CHUKCHANSI INDIANS, a
21 a federally recognized Indian
22 Tribe,

23 Plaintiff
24 in Intervention,

25 v.

NO. CIV. S-04-2265 FCD KJM
(Consolidated Cases)

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

Defendants.

_____/

-----00000-----

1 This matter is before the court on defendants State of
2 California, California Gambling Control Commission (the
3 "Commission" or "CGCC"), and Governor Arnold Schwarzenegger's
4 (collectively, the "defendants") motion for reconsideration,
5 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,¹
6 of the court's April 22, 2009 Memorandum and Order (the "April 22
7 Order"), granting in part and denying in part the parties'
8 motions for summary judgment and motion for judgment on the
9 pleadings as to six of the seven claims at issue in this
10 litigation. Specifically, defendants seek reconsideration of the
11 court's determination of plaintiffs' claims regarding the size of
12 the Gaming Device license pool under the 1999 Compact. Plaintiff
13 Cachil Dehe Band of Wintun Indians of the Colusa Indian Community
14 ("Colusa") and plaintiff-intervenor Picayune Rancheria of the
15 Chukchansi Indians' ("Picayune") (collectively, "plaintiffs")
16 oppose the motions. For the reasons set forth herein,²
17 defendants' motion is DENIED.

18 /////

19 /////

23 ¹ In their reply, defendants argue that this motion is,
24 in effect, a motion under Rule 56(f)(2) for a continuance to
25 conduct further discovery. However, Rule 56(f)(2) allows for a
26 party to move for a continuance *prior* to filing an opposition for
27 summary judgment. As the record reflects, the dispositive
28 motions in this case have been extensively briefed by the parties
and an order has been issued. Thus, this is decidedly not a Rule
56(f)(2) motion.

² Because oral argument will not be of material
assistance, the court orders this matter submitted on the briefs.
E.D. Cal. Local Rule 78-230(h).

BACKGROUND³

Plaintiff Colusa is an American Indian Tribe with a governing body duly recognized by the Secretary of the Interior. Plaintiff-intervenor Picayune is also a federally recognized Indian tribe. Colusa and Picayune entered into similar Class III Gaming Compacts (the "Compacts" or "Compact") with the State of California (the "State") in 1999, which were ratified by the Legislature on September 10, 1999; both Colusa and Picayune's Compacts have been in effect since May 16, 2000. 55 other tribes (the "Compact Tribes") also executed virtually identical compacts with the State. At their core, these compacts authorize Class III gaming pursuant to certain restrictions.

The Compact sets a statewide maximum on the number of Gaming Devices that all Compact Tribes may license in the aggregate. (*Id.*) This statewide maximum is determined by a formula set forth in the Compact. (*Id.*; PUF ¶ 3.) Specifically, the Compact provides:

The maximum number of machines that all Compact Tribes in the aggregate may license pursuant to this Section shall be a sum equal to 350 multiplied by the Number of Non-Compact tribes as of September 1, 1999, plus the difference between 350 and the lesser number authorized under Section 4.3.1.

(Compact § 4.3.2.2(a)(1)). The parties disagreed over the total number of Gaming Device licenses authorized by this equation.

In the April 22 Memorandum and Order, the court set forth the following facts that were relevant to plaintiffs' claims regarding the license pool:

³ The facts of this case are set forth fully in the court's April 22 Order. (April 22 Order [Docket # 102], filed Apr. 22, 2009).

1 After the April 1999 meeting between Davis and the
2 federally recognized tribes, three main groups of
3 tribes coalesced for the purpose of conducting compact
4 negotiations with the State. (Supp. Decl. of George
5 Forman ("Supp. Forman Decl." [Docket #98], filed Apr.
6 8, 2009, ¶ 5). Colusa and Picayune were part of the
7 largest group, the United Tribes Compact Steering
8 Committee (the "UTCSC"), which consisted of more than
9 60 tribes located throughout California. (*Id.*)
10 Colusa's counsel, George Forman, was one of the tribal
11 attorneys designated to participate in negotiations as
12 a spokesperson for the UTCSC tribes. (*Id.* ¶ 6). Judge
13 William A. Norris ("Norris"), then Special Counsel to
14 Governor Davis for Tribal Affairs, acted as the lead
15 negotiator for California. (Decl. of William A. Norris
16 ("Norris Decl.") [Docket #95-3], filed Mar. 19, 2009, ¶
17 2). Judge Shelleyanne W.L. Chang ("Chang"), then
18 Senior Deputy Legal Affairs Secretary for the Office of
19 Governor Gray Davis, assisted with negotiations. (PUF
20 ¶ 1).

21 Negotiations began in April 1999. (*Id.* ¶ 7). On
22 May 26, 1999, Norris negotiated with the USTSC
23 regarding a discussion document prepared by the state
24 and submitted to the tribes on May 21, 1999. (*Id.* ¶¶
25 8-9). During this negotiation, Norris conveyed the
26 Governor's concern about limiting growth. (Ex. A to
27 Supp. Forman Decl. at 37:17-38:12). However, Norris
28 agreed that he, on behalf of the Governor, had "grave
reservations, if not opposition, to a cap in the
aggregate." (*Id.* at 37:1-2). Negotiations continued
throughout the summer of 1999. (Norris Decl. ¶¶ 9-10).
Norris asserts that during the compact negotiations in
August and September 1999, the State's negotiations
team made itself available to meet with every tribal
representative who wanted to participate in the ongoing
negotiations. (*Id.* ¶ 10).

29 During the negotiating process, Norris asserts
30 that he repeatedly advised the tribes and their
31 attorneys that a statewide cap of 44,798 Gaming
32 Devices, including those already in operation by
33 tribes, could not be exceeded. (*Id.* ¶ 15). Wayne R.
34 Mitchum, Chairman of the Colusa Indian Community
35 Council at all relevant times, concedes that the
36 State's negotiating team represented that the Governor
37 was committed to imposing reasonable limits on the
38 expansion of gaming in California; however, per-tribe
and statewide limits on Gaming Devices was not proposed
until early September 1999. (Decl. of Wayne R. Mitcum
("Mitchum Decl") [Docket #59-6], filed Jan. 20, 2009,
¶¶ 1, 10). In order to address objections that the
Compact inequitably benefitted tribes who had
unlawfully operated substantially more than 350 Gaming
Devices prior to entering into a compact, Norris and
Chang drafted § 4.3.2.2(a)(1), which sets forth an

1 aggregate pool of available licenses. (Norris Decl. ¶¶
2 15-16). Meanwhile, the USTSC held extensive internal
3 discussions about fair and appropriate minimum
4 allocations of gaming devices, how to set per-tribe
5 maximum limits, and how to allocate a limited number of
6 gaming devices. (Mitchum Decl. ¶ 12).

7 On September 9, 1999, Norris and Chang presented
8 the draft of § 4.3.2.2 to a group of tribal attorneys
9 who had played key roles in the negotiating process.
10 (Id. ¶ 17). While one of these attorneys, Jerome
11 Levine, was a tribal representative for the USTSC, (Ex.
12 A to Supp. Forman Decl. at 2), there is no evidence
13 that he was acting on behalf of the USTSC. Later that
14 evening, Norris presented the entire draft compact to
15 the assembled representatives of the California Indian
16 tribes for approval. (Norris Decl. ¶ 18). He asserts
17 that no questions were asked concerning the number of
18 Gaming Devices authorized under the compact. (Id.)
19 Mitchum asserts that he heard tribal leaders and other
20 representatives ask the State's negotiators to explain
21 the meaning, but the State's negotiators refused to
22 explain it. (Mitchum Decl. ¶ 16). The State's
23 negotiating team announced that tribal representatives
24 had until approximately 10:00 p.m. that evening to
25 accept the proposal. (Mitchum Decl. ¶ 13). This
26 deadline was later extended until midnight. (Id.)

27 Once the State's negotiators left the room,
28 Mitchum participated in an extensive discussion with
the other tribal leaders and attorneys about how many
Gaming Devices the proposed compact allowed. (Id. ¶
17). Mitchum understood the compact to authorize
approximately 56,000 Gaming Device licenses in addition
to those already being operated by tribes. (Id.)
Mitchum signed the required letter of intent on
Colusa's behalf before expiration of the deadline.
(Id. ¶ 13).

On or about September 10, 1999, at the request of
the Governor's Press Office, Chang prepared an
information sheet entitled, "Total Possible Number of
Slot Machines Statewide Under the Model Tribal-State
Gaming Compact Negotiated by Governor Davis and
California Indian Tribes." (PUF ¶ 5). The Information
Sheet was made available to the news media and
described the purported intent of § 4.3.2.2(a)(1) of
the Compact to authorize a total of 44,448 slot
machines statewide, including those already in
operation. (See PUF ¶ 6). As such, the Compact
allowed for 23,450 additional licenses. (PUF ¶ 6).
Chang asserts that the Governor's Office received no
complaints or comments concerning the accuracy of the
press release. (PUF ¶ 8).

1 By letter dated November 9, 1999, Elizabeth G.
2 Hill ("Hill"), writing for the Legislative Analyst,
3 determined that § 4.3.2.2(a)(1) authorized 60,000
4 machines in addition to those already in operation, for
5 a total in excess of 113,000 machines. (Stip. R. at
6 60-62). Hill, however, cautioned that "different
7 interpretations of the language in the compact could
8 result in significantly different totals." (Stip. R.
9 at 61). Subsequently, by letter dated December 6,
10 1999, Hill determined that the total amount of machines
11 authorized statewide was 61,700, including those
12 authorized under the Compact and those in operation,
13 based upon the proposed assumption that § 4.3.2.2(a)(1)
14 applies only to [16] tribes. (Stip. R. at 64).

15 By a letter to Sides dated May 10, 2000, Norris
16 and Peter Siggins ("Siggins"), the Chief Deputy
17 Attorney General, stated that the total number of
18 devices authorized statewide was 45,206, and that
19 15,400 licenses were available under the Compact for
20 the draw. (Stip. R. at 65-67). However, between May
21 15, 2000 and February 28, 2001, Sides issued 29,398
22 Gaming Device Licenses to 38 Compact tribes. (Stip. R.
23 at 80).

24 By letter to Governor Davis, the Chairman of the
25 Commission, and the Attorney General, dated July 31,
26 2001, Picayune and other Compact tribes addressed the
27 "need for confirmation that the maximum number of
28 machines that all Compact Tribes in the aggregate may
operate pursuant to the licenses issued per the Tribal-
State Compact § 4.3.2.2, is in excess of 113,000." In
the alternative, the letter stated that the parties
needed to otherwise determine the number of licenses
available in the pool. (Ex. 0 to Decl. of John Peebles
("Peebles Decl.") [Docket #70], filed Jan. 28, 2009).

1 In June 2002, after reviewing various formulations
2 including those advanced by the Legislative Analyst,
3 the Commission determined that the license pool
4 authorized by the Compact authorizes 32,151 Gaming
5 Devices. (Stip. R. at 87). The Commission's report
6 relies upon the same formulation relied upon by
7 defendants in this litigation. (Stip. R. at 86-87).
8 However, the Commission noted that a different
9 formulation, advanced by the Legislative Analyst,
10 yielded a total pool of 55,951 Gaming Devices and that
11 yet another formulation, advanced by the Tribal
12 Alliance of Sovereign Indian Nations, yielded a total
13 pool of 64,283 Gaming Devices. (Stip. R. at 87). In
14 2003, Colusa sought to negotiate with the state
15 regarding its interpretation of § 4.3.2.2. (Stip. R.
16 at 92-94).

17 (April 22 Order.)

1 After reviewing the submissions and arguments of the
2 parties, the court held that Colusa and Picayune's alternative
3 formulation,⁴ which yielded a total statewide pool of 42,700, was
4 supported by the contract language and the principles of contract
5 interpretation. First, the court noted that the circumstances
6 under which the Compact was entered into did not aid in
7 discerning the parties' intent; the submissions of the parties
8 revealed that there was no clear consensus between the parties
9 regarding the maximum number of Gaming Devices allowed under the
10 Compact at the time the agreements were executed. Specifically,
11 defendants presented evidence, including the Norris declaration,
12 that the State's intention was to limit the aggregate number of
13 devices at approximately 45,000, including those already in
14 operation at the time the compacts were signed. As such, only
15 approximately 23,000 devices would be authorized under the
16 Compact. The court noted though that, significantly, no party,
17 including defendants, proffered an interpretation of the Compact
18 that substantiated this number. Rather, defendant Commission
19 rejected Norris' interpretation of the Compact, which assumed
20 "that uncompacted tribes have permanently waived their right
21 under Compact § 4.3.1 to deploy up to 350 gaming devices
22 following entry into a Compact with the State," and the
23 Commission noted that such an interpretation contradicted the
24 express language of § 4.3.1. As such, the court was not
25 persuaded that defendants' formulation was most reflective of the

26
27 ⁴ The "alternative formulation" was mentioned in a
28 footnote in Colusa's moving papers and was further expounded upon
by plaintiffs in their reply papers and at oral argument. The
court allowed the parties to submit supplemental briefing on this
issue after the hearing.

1 parties' intent based upon piecemeal reliance on Norris'
2 interpretations.

3 The evidence also demonstrated that there was no consistent
4 course of conduct between the parties and that there continued to
5 be debate about the number of devices authorized under the
6 Compact after it was signed. Hill, on behalf of the Legislative
7 Analyst, noted that the language could be interpreted to
8 authorize up to an additional 60,000 Gaming Devices or
9 approximately 60,000 Gaming Devices total. Norris and Siggins
10 informed Sides that only approximately 15,000 licenses were
11 available to be drawn as of May 10, 2000. However, almost 30,000
12 licenses were ultimately distributed to the tribes through the
13 Sides process. Picayune, among other tribes, sought
14 clarification of the license pool almost two years after entering
15 into the Compact. Defendant Commission only clarified the
16 State's current position with respect to the license pool in June
17 2002, after considering two other potential formulations that had
18 been advocated by different entities or individuals.

19 Accordingly, the court found that the extrinsic evidence did not
20 reveal a plain intent or meaning that was either understood by
21 the parties at the time the Compact was executed or followed by
22 the parties in their subsequent dealings with one another.

23 Second, the court found that plaintiffs' alternative
24 formulation provided a lawful, operative, definite, and
25 reasonable interpretation of the Compact.

26 Third, the court found that among the three calculations
27 proffered by the parties, the alternative formulation most
28 accurately followed the language of § 4.3.2.2(a)(1), giving the

1 words their ordinary meaning. While both defendants' and
2 plaintiffs' other formulations forced a more strained reading of
3 the Compact language, and, read out essential terms of the
4 relevant Compact section, the interpretation adopted by the court
5 gave each term its plain meaning. Moreover, the alternative
6 formulation was supported by the purpose of the latter half of
7 the equation as clarified by defendants' counsel at oral
8 argument. Defendants' counsel stated that the second part of the
9 equation relates to the "unused entitlement," referring to the
10 devices that were authorized that were currently not being used
11 by those tribes operating less than 350 devices as of September
12 1, 1999. Defendants' counsel explained that the second part of
13 the equation was meant to add those unused authorized devices
14 into the available pool. In order to fully account for these
15 unused authorized devices, the equation should take into account
16 those tribes who signed a compact but were not operating any
17 licenses; the alternative formulation did.

18 Finally, the court found that the alternative formulation
19 was consistent with the principle that ambiguities in the Compact
20 are to be construed against the drafter. While the parties
21 disputed and continue to dispute the level of negotiation and
22 input that Colusa and Picayune had in the formation of the
23 Compact, it was undisputed that the State's negotiation team
24 actually drafted the language in the Compact.

25 Therefore, for all of these reasons, the court concluded
26 that the statewide license pool authorized 42,700 Gaming Devices.

27 /////

28 /////

STANDARD

An order that resolves fewer than all of the claims among the parties "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b); E.D. Cal. L.R. 78-230(k) (authorizing motions for reconsideration of "any motion [that] has been granted or denied in whole or in part"). Where reconsideration of a non-final order is sought, the court has "inherent jurisdiction to modify, alter or revoke it." United States v. Martin, 226 F.3d 1042, 1048-49 (9th Cir. 2000). Generally stated, reconsideration is appropriate where there has been an intervening change in controlling law, new evidence has become available, or it is necessary to correct clear error or prevent manifest injustice. See Sch. Dist. No. 1J Multnomah County, Oregon v. ACANDS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

In the absence of new evidence or a change in the law, a party may not use a motion for reconsideration to raise arguments or present new evidence for the first time when it could reasonably have been raised earlier in the litigation. Caroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003); see 389 Orange Street Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). Motions to reconsider are also "not vehicles permitting the unsuccessful party to 'rehash' arguments previously presented." United States v. Navarro, 972 F. Supp. 1296, 1299 (E.D. Cal. 1997), *rev'd on other grounds*, 160 F.3d 1254 (9th Cir. 1998). Ultimately, a party seeking reconsideration must show "more than a disagreement with the Court's decision, and recapitulation of

1 the cases and arguments considered by the court before rendering
 2 its original decision fails to carry the moving party's burden."
 3 United States v. Westlands Water Dist., 134 F. Supp. 2d 1111,
 4 1131 (E.D. Cal. 2001).

5 ANALYSIS

6 Defendants move for reconsideration of the court's April 22
 7 Order based upon a letter, dated September 8, 1999, concerning a
 8 meeting that purportedly took place between 58 tribes for the
 9 purpose of discussing and voting upon "a pooling concept for
 10 dealing with the allocation of machines." (Sept. 8 Letter, Ex. A
 11 to Decl. of Peter H. Kaufman in Supp. of Mot. for Reconsideration
 12 ("Kaufman Decl"), filed June 19, 2009). Defendants also move for
 13 the court to vacate its ruling to allow for limited discovery
 14 concerning Colusa and Picayune's participation in the September
 15 8, 1999 meeting referenced in the letter. Colusa and Picayune
 16 contend that reconsideration and further discovery are
 17 unwarranted because (1) the September 8, 1999 letter is not newly
 18 discovered evidence; and (2) the information referenced in the
 19 September 8, 1999 letter is irrelevant.⁵

20 A. Newly Discovered Evidence

21 Defendants contend that they received the previously unknown
 22 September 8, 1999 letter that is the basis for their motion on
 23 June 12, 2009 as part of documents supporting Rincon Band of
 24 Luiseno Mission Indian's ("Rincon") motion for summary judgment.
 25 (Kaufman Decl. ¶ 3). Colusa and Picayune, however, present
 26

27 ⁵ Plaintiffs also contend that the letter is
 28 inadmissible. However, the court will not address the merits of
 this argument because, as set forth *infra*, defendants' motion
 would fail even if the letter was admissible.

1 evidence that defendants and their counsel possessed a copy of
2 the letter since at least January 23, 2006 and that in any event,
3 with due diligence, further discovery could have been sought by
4 defendants prior to the filing and hearing of the dispositive
5 motions.

6 The party moving for reconsideration based on allegations of
7 newly-discovered evidence bears the burden of demonstrating that
8 the evidence: "(1) is truly newly-discovered; (2) could not have
9 been discovered through due diligence; and (3) is of such
10 material and controlling nature that it demands a probable change
11 in the outcome." Westlands, 134 F. Supp. 2d at 1131 n.45
12 (internal citations omitted). For purposes of a motion for
13 reconsideration, evidence is not "new" if it was in the moving
14 party's possession or could have been discovered prior to the
15 court's ruling. Coastal Transfer Co. v. Toyota Motor Sales, 833
16 F.2d 208, 212 (9th Cir. 1098); see Westlands, 134 F. Supp. 2d at
17 1130. Further, it is well established that "the failure to file
18 documents in an original motion or opposition does not turn the
19 late filed documents in 'newly discovered evidence.'" Shalit v.
20 Coppe, 182 F.3d 1124, 1132 (9th Cir. 1999) (quoting Sch. Dist.
21 No. 1J, Multnomah County v. AcandS, Inc., 5 F.3d 1255, 1263 (9th
22 Cir. 1993)); see Hopkins v. Andaya, 958 F.2d 881, 887 n.5 (9th
23 Cir. 1992) ("A defeated litigant cannot set aside a judgment
24 because he failed to present on a motion for summary judgment all
25 the facts known to him that might have been useful to the
26 court.").

27 Defendants have failed to meet their burden of demonstrating
28 that the September 8, 1999 letter is newly discovered evidence or

1 evidence that could not have been previously discovered through
2 due diligence.⁶ Colusa presents evidence that defendants and
3 their counsel received this document on January 23, 2006, as part
4 of disclosures in similar litigation over the size of the Gaming
5 Device license pool brought by Rincon. Specifically, plaintiffs
6 present evidence that the existence of the letter was disclosed
7 in Rincon's "Notice of Service of Plaintiff's Initial Disclosure
8 Statement" and served on California Deputy Attorney General Peter
9 Kaufman ("Kaufman") on January 23, 2006. (Decl. of Marjori J.
10 Haberman ("Haberman Decl."), filed July 10, 2009, ¶ 2.) Hard
11 copies of all the documents listed in the disclosure statement
12 were sent to Kaufman. (Id.) Subsequently, on March 16, 2007,
13 the September 8, 1999 letter was listed in a filing with the
14 United States District Court for the Southern District of
15 California by Rincon as part of the "Proposed Documents for
16 Administrative Record"; this filing was electronically served on
17 Kaufman. (Id. ¶¶ 4-5.) Neither the January 23, 2006 documents
18 nor the March 16, 2007 documents were returned to Rincon as
19 undelivered or undeliverable. (Id. ¶ 6.) Rather, defendants
20 admit that the September 8, 1999 letter was present in these two
21 document productions. (Defs.' Reply, filed July 31, 2009, at
22 12.) Accordingly, the evidence demonstrates that defendant had
23
24

25 ⁶ As an initial matter, the letter itself sets forth
26 that it was delivered "BY HAND DELIVERY" to Governor Gray Davis
27 and Norris. *Assuming arguendo* that this letter was actually
28 received by the intended recipients, the state would have had
knowledge of this letter since the time of its delivery in
September 1999. However, because there is no dispute that
defendants had possession of this letter since 2006, the court
need not speculate about such knowledge to reach its result.

1 possession of these documents over two years before the court
2 heard the parties' dispositive motions in this litigation.

3 Defendants argue that Kaufman's failure to look at the
4 documents in this related lawsuit should be excused because it
5 was part of "two very large document productions." (Defs.' Reply
6 at 12.) Defendants' argument is without merit. Throughout this
7 litigation, all parties have acknowledged the similar litigation
8 pending in other California district courts, including the
9 litigation brought by Rincon, and the overlap in issues raised by
10 the multiple suits. Indeed, on January 16, 2009, prior to the
11 filing of the parties' dispositive motions in this case,
12 defendants filed a motion to sever and transfer to this court
13 Rincon's claim regarding the number of available Gaming Device
14 licences under the 1999 Compact. (See Defs.' Mot. to Sever and
15 Transfer to the E.D. Cal., Rincon Band of Luiseno Mission Indians
16 v. Schwarzenegger, 04-CV-1151, [Docket # 243], filed Jan. 16,
17 2009.) Defendants argued that severance and transfer was
18 warranted because Rincon presented "an identical claim regarding
19 the license pool size" and consolidation with plaintiffs' action
20 "would avoid parallel proceedings on the same claim before
21 different district judges." (Id. at 4, 10-11 ("Indeed the
22 factual and legal issues in the Colusa[] Tribe's challenge to the
23 size of the license pool are similar, if not identical, to
24 Rincon's - the claims involve identical Compact terms, similar
25 Tribal-State negotiations, the same Compact negotiators . . . ,
26 and the same state agency . . .). As such, failure by
27 defendants' counsel to examine evidence that was in his
28 possession for over two years from a case, presenting "similar,

1 if not identical" claims to those brought by plaintiffs in this
2 action cannot be considered due diligence.

3 Moreover, the further discovery sought by defendants could
4 have been completed through the exercise of due diligence.
5 Defendants assert that they conducted only minimal and general
6 discovery in pursuing a defense under Rule 19, which was
7 ultimately rejected by the Ninth Circuit. Defendants also assert
8 that they did not have any opportunity to conduct discovery
9 concerning the claims prior to the hearing on the dispositive
10 motions filed in this case. However, at no point following the
11 Ninth Circuit's Mandate on November 14, 2008, did defendants
12 request discovery. Rather, defendants sought consolidation of
13 the Gaming Device license pool issue with later filed litigation
14 in which motions for summary judgment had already been filed.
15 Defendants voiced no objection nor filed any motion with respect
16 to the dispositive motion deadline set in the consolidated cases.
17 That defendants wished they had sought more discovery in
18 hindsight is neither diligence nor grounds to reopen issues
19 already extensively briefed and litigated by the parties.

20 Therefore, defendants have failed to meet their burden of
21 establishing that the September 8, 1999 letter was newly
22 discovered.

23 **B. Materiality**

24 The crux of defendant's argument relating to the September
25 8, 1999 letter is that "[b]y indicating that greater negotiation
26 of the license pool concept occurred between the State and tribes
27 than the parties' earlier evidence indicated, the Crowell letter
28 . . . calls into question the Court's reliance on the doctrine of

1 *contra proferentum.*" (Defs.' Mot. for Reconsideration, filed
2 June 19, 2009, at 3.) Assuming that defendants demonstrated that
3 the September 8, 1999 letter was "newly discovered" evidence and
4 that the letter is either admissible or would lead to admissible
5 evidence regarding the referenced September 8, 1999 meeting,⁷
6 such evidence is not of a material and controlling nature that
7 would demand a probable change in the outcome.

8 First, the April 22 Order acknowledged that there was some
9 level of negotiation between the parties. Plaintiffs presented
10 evidence that per-tribe and statewide limits on Gaming Devices
11 were proposed in early September 1999; plaintiffs also presented
12 evidence that there were extensive internal discussions among the
13 prospective Compact tribes regarding fair and appropriate limits
14 and distribution of the licenses. However, the evidence
15 submitted by plaintiffs and defendants did not demonstrate that
16 there was any clear consensus regarding the maximum number of
17 Gaming Devices authorized by the equation provided in the
18 Compact.

19 The September 8, 1999 letter does not further clarify any
20 mutual understanding between plaintiffs and defendants. At its
21 core, the letter sets forth five tribes' opposition to a "pooling
22 concept for dealing with the allocation of machines." (Sept. 8
23 Letter at 1.) It does not mention any numerical limits on the
24 total number of Gaming Devices to be provided under the Compact,
25
26

27 ⁷ The letter is most likely unauthenticated hearsay that
28 does not fit into any exception. Defendants' argument that the
letter should be admissible under Federal Rule of Evidence 807,
the residual hearsay exception, is unpersuasive.

1 nor does it mention the equation at issue in the Compact.⁸
2 Moreover, the letter makes no mention of whether Colusa or
3 Picayune were even in attendance at the meeting referenced. Nor
4 does the letter reference any further negotiations between the
5 prospective Compact tribes themselves or between the prospective
6 Compact tribes and the State. As such, the letter does not shed
7 any additional light on the mutual intention of the parties
8 regarding the total number of licenses available under the
9 Compact nor does it give rise to a reasonable belief that further
10 discovery could lead to relevant evidence on the issue.

11 Second, in their motion for summary judgment, defendants did
12 not dispute that the meaning of § 4.3.2.2(a) was unclear and
13 susceptible to varying interpretations. (April 22 Order at 38.)
14 Nothing in the September 8, 1999 letter changes the undisputed
15 fact that defendants drafted the compact.

16 Third, application of the doctrine of *contra proferentum* was
17 not the only basis for the court's decision. Indeed, as set
18 forth above, the court held that the alternative formulation most
19 accurately followed the language of § 4.3.2.2(a)(1) and gave
20 words their ordinary meaning. This construction was also
21 consistent with the underlying purpose as set forth by
22 defendants' counsel at oral argument.

23 Therefore, the court concludes that neither the letter nor
24 any discovery relating to the letter is material and controlling.

25 /////

26 /////

27
28 ⁸ Indeed, as set forth above, plaintiffs' evidence demonstrated that they were not presented with a draft of the relevant Compact language until September 9, 1999.

CONCLUSION

For the reasons stated above, defendants' motion for reconsideration and for further discovery is DENIED.

IT IS SO ORDERED.

DATED: August 11, 2009.

A handwritten signature in black ink, appearing to read "Frank C. Damrell, Jr.", written over a horizontal line.

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE