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PAUMA BAND OF MISSION INDIANS

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PAUMA BAND OF LUISENO MISSION INDIANS OF THE PAUMA & YUIMA RESERVATION, a/k/a PAUMA LUISENO BAND OF MISSION INDIANS, a/k/a PAUMA BAND OF MISSION INDIANS, a federally recognized Indian Tribe,

Plaintiff,

vs.

STATE OF CALIFORNIA; **CALIFORNIA GAMBLING CONTROL COMMISSION**, an agency of the State of California; and **EDMUND G. BROWN, JR.**, as Governor of the State of California;

Defendants.

Case No.: 09CV1955 CAB MDD

PAUMA'S OPPOSITION TO THE STATE'S CROSS-MOTION FOR SUMMARY JUDGMENT

Date: November 30, 2012
Time: 1:30 PM
Dept: 2
Judge: The Honorable Cathy A. Bencivengo

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND REGULATIONS

SECONDARY TREATISES

GLOSSARY OF ABBREVIATIONS

ABBREVIATION	MEANING
Parties	
CGCC / Commission	*California Gambling Control Commission, one of the three named defendants in this action and the current trustee of the license pool under the 1999 compacts*
Pauma / Tribe	*Plaintiff, the Pauma Band of Mission Indians*
State	*Defendants, the State of California, California Gambling Control Commission, and Governor Edmund G. Brown, Jr.*
Relevant Materials	
WD1	*"Declaration of Cheryl A. Williams in Support of Pauma's Motion for Summary Judgment on Claims Five Through Ten and Thirteen Through Seventeen in the First Amended Complaint" [Doc. No. 197-4]*
WD2	*"Second Declaration of Cheryl A. Williams in Support of Pauma's Motion for Summary Judgment on Claims Five Through Ten and Thirteen Through Seventeen in the First Amended Complaint, Regarding Discovery Issues with William A. Norris" [Doc No. 197-3]*
WD3	*"Third Declaration of Cheryl A. Williams in Support of Pauma's: (1) Motion for Summary Judgment on Claims Five Through Ten and Thirteen Through Seventeen in the First Amended Complaint; (2) Concurrently Filed Reply in Support Thereof; and (3) Opposition to the State's Cross Motion for Summary Judgment"*
Relevant Lawsuits and Decisions	
Colusa	*The case in which Judge Damrell of the Eastern District of California interpreted the number of gaming device licenses available under the 1999 compacts*

Colusa I/II	*The decisions issued by the Eastern District of California and the Ninth Circuit, respectively, that calculate the appropriate size of the license pool under the 1999 compacts*
IGRA	*Indian Gaming Regulatory Act*
Rincon	*The case in which Magistrate Judge McCurine of the Southern District of California, in part, interpreted the number of gaming device licenses available under the 1999 compacts*
San Pasqual	*The case in which Judge Burns of the Southern District of California interpreted the number of gaming device licenses available under the 1999 compacts*
The 1999 Compact and its Successor	
1999 Compact	*"Tribal State Compact between the State of California and the Pauma Band of Mission Indians"*
2004 Amendment	*"Amendment to Tribal-State Compact between the State of California and Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation"*
Revenue Sharing Trust Fund / RSTF	*A trust fund set forth in Section 4.3.2.1 of the 1999 compacts that is designed to provide each non-compact tribe with $1.1 million annually using the revenue sharing fees paid on licensed machines*
Special Distribution Fund / SDF	*A fund set forth in Section 5.1(a) of the 1999 compacts that is designed to distribute money to, inter alia, State and local agencies using the revenue sharing payments from the established gaming tribes on their carried-over machines, but is subject to reduction if there is a shortfall in the RSTF from insufficient license allocations*

INTRODUCTION

The undisputed record on the motions shows that the CGCC performed a series of discrete maneuvers in the early 2000s that allowed it to take control of the license trust under the 1999 compacts, disavow any fiduciary obligations, and impose an "arbitrary" interpretation of the total number of available licenses that produced a permanent $50 million shortfall in a trust fund designed to support the non-compact tribes. When one of the gaming tribes filed suit to question the outcome of these actions, the Office of the Attorney General insulated the trustee from challenge by successfully arguing that the beneficiary tribe could only have its day in court if it joined some fifty-six other beneficiaries and forty other non-compact tribes, all of whom had sovereign immunity from suit. The fallacious argument supporting this position was that each tribe has an interest in the administration of the license pool, which would somehow be adversely effected by a judicial decision enlarging their rights. Defs.' Mem. of P. & A. in Supp. of Mot. for J. on the Pleadings at 7:14-17, *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, No. 04-2265 FCD KJM, Docket No. 11-1 (E.D. Cal. Mar. 28, 2006) ("*Colusa*"). Nevertheless, this argument became the official party line in each of the three license pool cases even though "[i]t has long been the rule that beneficiaries of a trust ordinarily need not be joined as necessary parties under Rule 19," because the trustee's fiduciary duty should protect against any potential injury to their interests. *Az. Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1521 (9th Cir. 1985); *Walsh v. Centeio*, 692 F.2d 1239, 1244 (9th Cir. 1982) ("We recognize that the weight of authority is probably against dismissal for nonjoinder of all trust beneficiaries when only the administration of the trust is at issue.").

The passage of time has done little to change the Office of the Attorney General's tactics, as it now presents an equally simple and equally flawed legal defense in the hopes that the Court will just take the easy way out and punt the case rather than address the merits of Pauma's arguments. Yet, what the Office of the Attorney General is asking the Court to do is to depart from the "fundamental rule of 'retrospective operation' that has governed 'judicial decisions… for near a thousand years,'" *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)), and hold that a misrepresentation is actually true up until the point in time that someone says otherwise. The sole foundation for this argument is a fifteen page narrative from

opposing counsel, comprised of conjecture about what prior courts really intended to say and half-truths about the history of the dispute.

A sampling of these half-truths shows just how distorted the background has become. "The Colusa Number did not exist at the time the parties negotiated and executed the 2004 Amendment." [Doc. No. 217-17, 13:3-4] Well, that is because the CGCC *misrepresented* the number of available licenses and caused Pauma to enter into the 2004 Amendment by *mistake*, which is the whole point of this lawsuit. "[T]he 1999 Compact was not guaranteed to yield a number greater, or even equal to, 32,151 – indeed, the number could have been smaller." [Doc. No. 217-14, 8:2-22] The inputs of the license pool formula and four separate federal court opinions suggest otherwise. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 618 F.3d 1066 (9th Cir. 2010) ("*Colusa II*") (40,201 licenses); *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 629 F.Supp.2d 1091 (E.D. Cal. 2009) ("*Colusa I*") (42,700 licenses); Order Den. Mot. to Strike; and Order Granting Pl.'s Mot. for Summ. J., *San Pasqual Band of Mission Indians v. California*, No. 06-0988 LAB AJB, Docket No. 97 (S.D. Cal. Mar. 29, 2010) ("*San Pasqual*") (42,700 licenses); Order: (1) Granting Pl.'s Partial Mot. for Summ. J.; and (2) Granting Request for Judicial Notice, *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, No. 04-1151 WMc, Docket No. 289 (S.D. Cal. Mar. 24, 2010) ("*Rincon*")(55,951 licenses). "To date, no court has applied a judicial enlargement of the License Pool retroactively to render any prior act or omission by State Defendants wrongful." [Doc. No. 217-14, 6:23-24] This is because they've never been asked to do so; every license pool plaintiff to date has only requested prospective declaratory relief about the total number of available licenses. *See* Compl. for Declaratory and Injunctive Relief at 18:19-20, *Colusa*, No. 04-2265 FCD KJM, Docket No. 1 (E.D. Cal. Oct. 25, 2004) [WD3, Ex. 125] (requesting the "Court declare that the Tribe's Compact authorize the issuance of a total in excess of 62,000 Gaming Device licenses, the exact number to be determined according to proof"); Compl. for Declaratory and Injunctive Relief – Impairment of Contract and Breach of Tribal/State Compact at 25:10-16, *Rincon*, No. 04-1151 WMc, Docket No. 1 (S.D. Cal. June 9, 2004) (requesting a declaration that "[t]he correct number of available licenses is either 64,293 or 58,240"); Compl. for Breach of the Tribal-State Compact, Declaratory Relief and Injunctive Relief at 20:7-13, *San Pasqual*, No. 06-0988 LAB AJB, Docket No. 1 (S.D. Cal. May 3, 2006) (asking the court to declare

"that the Compact authorizes the issuance of at least 42,700 Gaming Device licenses"). And perhaps most egregiously, "the Ninth Circuit solved [the license pool issue] in a way that, as a matter of law, precludes the retroactive application of the judicial expansion of the license pool." [Doc. No. 217-14, 2:23-3:1] Yet, how can this possibly be the case if "[t]he first court does not get to dictate to other courts the preclusion consequences of its own judgment…"? *Covanta Onondaga Ltd. P'ship v. Onondaga County Res. Recovery Agency*, 318 F.3d 392, 397-98 (2d Cir. 2003) (quoting 18 Charles A. Wright et al., *Federal Practice and Procedure: Jurisdiction* § 4405, p. 82 (2d ed. 2002) ("*Federal Practice and Procedure*")); *Midway Motor Lodge v. Innkeepers' Telemanagement & Equip. Corp.*, 54 F.3d 406, 409 (7th Cir. 1995) ("In the law of preclusion… the court rendering the first judgment does not get to determine that judgment's effect; the second court is entitled to make its own decision… ."); *Brown v. R.J. Reynolds Tobacco Co.*, 576 F.Supp.2d 1328, 1339 (M.D. Fla. 2008) ("It is the duty of the second trial court – which knows both what the earlier finding was and how it relates to a later case – to independently determine what preclusive effect a prior judgment may be given.").

Cobbling together an argument from half-truths cannot hide the actual whole truth, which is that the original subject matter conferred under a contract remains precisely the same during the course of performance despite the "it is what we say it is" stance of the breaching party. As this brief will explain, this holds true irrespective of the aspect of the consideration that has purportedly changed, whether it is the amount of payment due under a complex contract, the preexisting state of environmental degradation on a parcel of land, the true identity of purchased trees, the availability of insurance coverage for organic brain disorders, or the existence of gaming device licenses.

ARGUMENT

I. THE STATE HAS NOT SATISFIED ITS BURDEN OF SHOWING THAT PAUMA IS PRECLUDED FROM HAVING *COLUSA II* APPLY RETROACTIVELY

By reading tea leaves and divining the meaning of select extraneous dicta in the various license pool opinions, the State in essence argues that the Ninth Circuit's decision in the *Colusa* litigation "precludes [as a matter of law] retroactive application of the judicial expansion of the License Pool." [Doc. No. 217-14, 2:22-3:1] "Issue preclusion… bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting

New Hampshire v. Maine, 532 U.S. 742, 748 (2001)). Applying the doctrine against a non-party runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Id.* (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). Because of this conflict, the test for issue preclusion is a stringent one, requiring proof that "(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1041, 1050 (9th Cir. 2008) (quoting *U.S. Internal Revenue Serv. v. Palmer*, 207 F.3d 566, 568 (9th Cir. 2000)). Since all forms of *res judicata* are affirmative defenses under Federal Rule of Civil Procedure 8(c), "[t]he party asserting [issue] preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992) (citing *United States v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979)). "It is not enough that the party introduce the decision of the prior court; rather the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issue previously litigated." *Id.* (quoting *Lasky*, 600 F.2d at 769).

This all must happen in a timely manner, as a party generally has to raise the defense of issue preclusion in its first responsive pleading to avoid waiver. *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2005); *see San Luis Unit Food Producers v. United States*, 772 F.Supp.2d 1210, 1229 (E.D. Cal. 2011) (citing *Prieto v. Paul Revere Life Ins. Co.*, 354 F.3d 1005, 1012-13 (9th Cir. 2004)). While a court retains the discretion to hear an affirmative defense for the first time in a subsequent motion, it should not do so where "prejudice to the plaintiff would result." *Simmons v. Navajo County*, 609 F.3d 1011, 1023 (9th Cir. 2010). Prior to the State's cross-motion for summary judgment, there was nary a mention of issue preclusion by the State during three years of litigation, whether in either of its answers or any of its three motions to dismiss. [Doc. Nos. 11-1, 111-1, 129, 142-1, 191] Combining these five opportunities with its first two oppositions to Pauma's motion for summary judgment reveals that the State had seven prior chances to raise the affirmative defense. Yet, it arrives only now at this late hour, after the parties have invested substantial resources and the Court already found that the *Colusa* decision "entitled [Pauma] to 2000 machines from the get-go." [Doc. No. 56, 4:24-5:2 & 6:6-11] At this

juncture, reversing course on this finding and alternatively adopting the State's much-belated argument would inflict considerable prejudice on Pauma. Considering the substantial lapse of time and all the earlier points at which the State could have raised issue preclusion, the Court should hold that the State waived its right to do so.

Should the Court decide to entertain the State's issue preclusion argument, it still fails because retroactivity was never litigated in the *Colusa* suit. An issue is litigated only where it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is [in fact] determined." Restatement (Second) of Judgments § 27 cmt. d (1982). The supplemental complaint in *Colusa* does raise the issue of whether or not the CGCC should have conducted license draws that the plaintiff tribe requested in 2006 and 2007. *See* First Am. & Supplemental Compl. for Declaratory Relief at 8:6-19, *Colusa*, No. 07-1069 FCD KJM, Docket No. 22 (E.D. Cal. Feb. 8, 2008). From the point of drafting to the filing of cross-motions for summary judgment, the claim concerning missed license draws morphed into a redundant request for prospective declaratory relief about the size of the license pool under the 1999 compacts. *See* Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. and Contingent Mot. for Severance of Sixth and Seventh Claims for Relief at 32:25-26, *Colusa*, No. 04-02265 FCD KJM, Docket No. 59-1 (E.D. Cal. Jan. 20, 2009) ("Defendants' second basis for refusing to schedule a license draw – that no Gaming Device licenses remained to be drawn – fails for the reasons explained in [the declaratory relief section]."). With the claim subsumed within the overarching request for prospective relief, the issue of retroactivity was neither submitted for consideration nor a proper subject of decision. Moreover, any doubts about what the parties actually submitted to the court for determination must resolve "against… collateral estoppel" in light of the strong policy interests that weigh in favor of non-preclusion. *In re Reynoso*, 477 F.3d 1117, 1123 (9th Cir. 2007) (quoting *In re Berr*, 172 B.R. 299, 306 (9th Cir. BAP 1994)); *see* Restatement (Second) of Judgments § 27 cmt. e.

One other consequence of Colusa subsuming the failed license draw issue within the request for declaratory relief is that determining retroactivity was not essential to the judgment in that case. "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." Restatement (Second) of Judgments § 27 cmt. h. The reason for this is that the "determinations have the characteristics of dicta, and may not

ordinarily be the subject of an appeal by the party against whom they were made." *Id.* The full scope of relief requested by Colusa for the CGCC's failure to either award licenses or conduct prior draws was a declaration that the license pool contains "a total of in excess of 62,000 Gaming Device licenses" and an concomitant order instructing the Commission to make the newfound licenses immediately available following entry of judgment. Compl. for Declaratory and Injunctive Relief at 18:19-28, *Colusa*, No. 04-2265 FCD KJM, Docket No. 1 (E.D. Cal. Oct. 25, 2004).[1] With the plaintiff tribe's summary judgment motion focused exclusively upon making the additional licenses available during future draws, any commentary about the retroactivity of the decision would simply be dicta that cannot serve as the basis for issue preclusion.

Another reason a retroactivity determination will not suffice for issue preclusion is because it was not even an issue for the *Colusa* court to decide. As explained in the introduction, "[i]n the law of preclusion . . . the court rendering the first judgment does not get to determine that judgment's effect[.]" *Midway Motor Lodge*, 54 F.3d at 409. Rather, "[i]t is the duty of the second trial court – which knows both what the earlier finding was and how it relates to a later case – to independently determine what preclusive effect a prior judgment may be given." *R.J. Reynolds Tobacco*, 576 F.Supp.2d at 1328. Instead of affording any weight to the State's reading of spontaneous dicta within a case that neither concerned the reasons for the CGCC's unreasonable calculation nor discussed the issues in terms of federal contract law, the Court should stick to its initial instincts at the preliminary injunction hearing and find that the *Colusa* opinion is retroactive. At worst, the briefing on this cross-motion for summary judgment can resolve any lingering doubts the Court may have about its earlier finding.

In addition to all of these reasons, the lack of privity between Pauma and Colusa also defeats issue preclusion. "'Privity'… is a legal conclusion 'designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.'" *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1052-53 (9th Cir. 2005) (quoting *Sw. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 94 (5th Cir. 1977)). Parallel legal interests or

[1] While the supplemental complaint alternatively requests that the Court compel renegotiation of Colusa's 1999 compact, that request arose before the Ninth Circuit reversed the district court and allowed the tribe to proceed with its declaratory relief claim about the size of the license pool. With the original action reinstated, Colusa reverted back to seeking prospective declaratory relief in its motion for summary judgment.

shared motivations alone are not sufficient to satisfy the 'same right' requirement; "rather the earlier party must have had the same legal obligation to vindicate the rights of the nonparty later precluded." *Bartels Trust for Benefit of Cornell Univ. ex. rel. Bartels v. United States*, 88 Fed. Cl. 105, 113 (2009). Stated alongside the remaining considerations, "[a] nonparty can be bound by the litigation choices made by his virtual representative" only when the movant makes a satisfactory showing that there is a close relationship, substantial participation, tactical maneuvering, identity of interests, and adequate representation. *Headwaters*, 399 F.2d at 1053-54 (quoting *Irwin v. Mascott*, 370 F.3d 924, 929-30 (9th Cir. 2004)). There is nothing in the entire history of the *Colusa* suit to indicate that either plaintiff tribe participated with Pauma or in any way even acted with its interests in mind. If so, one of them would have assuredly made the argument in its summary judgment briefing that the total number of licenses under the 1999 compacts was constant throughout the years given the use of fixed variables in the underlying formula. Even without this argument, the dicta concerning excused non-performance, *see Colusa I*, 629 F.Supp.2d at 1120 (explaining that an obligation is excused if an event frustrated the existence of the subject matter), would have undoubtedly come under attack on a motion for reconsideration for abridging general principles of federal contract law, which clearly establish that a party cannot avoid his contractual obligations by staging the event that impairs the availability of the subject matter. *See* Restatement (Second) of Contracts § 261 cmt. f (1981) (explaining that discharge for impracticability is "generally due either to 'acts of God' or to acts of third parties," but not where the situation is "the fault of the obligor himself"). The failure of the plaintiff tribes to advance either of these arguments demonstrates the principle that a party seeking only a prospective right to consideration can neither adequately represent nor vindicate the same interest as someone who is attempting to show the converse. Given this, the Court should hold that the State has not met its burden to prove that Pauma and the plaintiff tribes in *Colusa* were in privity with one another, and consequently reject the argument that the Ninth Circuit's license pool determination applies only prospectively.[2]

[2] Additionally, the State never submitted any evidence to show the total number of licenses in 2003 differed from that in 2010. "[T]he important doctrine of *stare decisis*… [not only] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986), but also permits Pauma to rest assure knowing that its contract rights arise from settled precedent rather than the thrice-rejected protestations of the breaching party. *See* Sections III & IV, *infra*.

II. THE LAW OF THE CASE DOCTRINE FORECLOSES RECONSIDERATION OF THE COURT'S PRIOR FINDING THAT *COLUSA II* IS RETROACTIVE

Entertaining the State's argument also runs afoul of the law of the case doctrine, which protects the Court's prior retroactivity finding at the preliminary injunction hearing from attack. "The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (quoting *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990)). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *Id.* "For the doctrine to apply, the issue in question must have been 'decided explicitly or by necessary implication in [the] previous decision.'" *Id.* (quoting *Liberty Mut. Ins. Co. v. Equal Employment Opportunity Comm'n*, 691 F.2d 438, 441 (9th Cir. 1982)). "While courts have some discretion not to apply the doctrine of law of the case, that discretion is limited. The prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Delta Savings Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001) (quoting *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997)).

Following the issuance of the decision in *Colusa I*, Judge Burns released an identical opinion about the size of the license pool the week before he held the preliminary injunction hearing in the present matter. Order Den. Mot. to Strike; and Order Granting Pl.'s Mot. for Summ. J., *San Pasqual*, No. 06-0988 LAB AJB, Docket No. 97 (S.D. Cal. Mar. 29, 2010). When the injunction request finally came on for hearing, Judge Burns explained to the parties that he had just interpreted the license pool formula in the *San Pasqual* suit, and that:

> I believe that looking at this, that the Pauma Band of Indians was entitled to 2000 machines from the get-go pursuant to the way that I construe the compact.

[Doc. No. 56, 4:24-5:2] But the conversation about the retroactivity of the license pool decisions did not end there, as Judge Burns proceeded to make an express finding that the additional licenses should have existed under the terms of the 1999 Compact from the very start.

> I think because both sides perceived that the Paumas were entitled to fewer than 2000 machines at the time when I find that under the compact they were entitled to that all along, that there's a mutual mistake of law which under California law justifies rescission of the amendment on their part.

[Doc. No. 56, 6:6-11] After counsel for the State attempted to blunt the impact of this comment by arguing that while the licenses may be available, Pauma was not entitled to apply for them because it has never met-and-conferred on the issue, Judge Burns re-emphasized the impact the recent license pool determinations had on the Tribe's contract rights.

> Isn't [the necessity of meeting and conferring] subsumed, though, by the legal decision that the compact entitled them to 2000 all along? Why would they have to meet and confer now that they've got a court construction of the terms of the compact that say they're entitled to the 2000 machines?

[Doc. No. 56, 16:8-12] The longer counsel for the State belabored the point the more emphatic the Court became in its decision.

> Ms. Laird: Yes, your honor. I guess as long – I'm talking about the issuance of licenses as opposed to meeting and conferring on the rescission issue. And so I just want to make clear that the court is not saying that Pauma is eligible at this time to apply for licenses under the 1999 Compact.
>
> The Court: I think they've been eligible all along to apply for them.

[Doc. No. 56, 17:4-10] In fact, the Court was so confident that the additional licenses were always available under the terms of the 1999 compacts that he granted the preliminary injunction without requiring Pauma to post a bond, and encouraged the State to settle the case expeditiously, as "the handwriting's on the wall here." [Doc. No. 56, 17:18-23]

The intervening years have done nothing to undermine the accuracy of Judge Burns' finding. While tweaking his and Judge Damrell's shared interpretation, the Ninth Circuit nevertheless concluded that the license pool contains 8,050 more licenses that the CGCC maintained. *See Colusa II*, 618 F.3d at 1081. Of this number, approximately 7,079 licenses still remain within the license pool more than three years after the CGCC conducted the first post-*Colusa I* license draw. [WD1, Ex. 113] The stark difference between the total number of available licenses and those Pauma needed in order to operate at the ceiling of the 1999 Compact proves that the right to operate the full complement of 2,000 machines

always existed. Not a single piece of evidence in the State's summary judgment briefing calls this fact into question. Rather, counsel for the State merely hangs its hopes on the outlandish proposition that each controlling license pool decision magically changed the allegedly amorphous corpus of the license trust, which is ironically based on fixed variables that have had the same meanings since September 1, 1999. [Doc. No. 197, 5:1-15] As the forthcoming cases will hopefully illustrate, the original subject matter conveyed under a contract does not spontaneously shape shift during the course of performance, whether it arises out of a complex formula, ambiguous language, flawed estimate, or a promise that the obligor subsequently misrepresents for its own financial gain.

III. THE MEANING OF THE LICENSE POOL FORMULA HAS BEEN STATIC SINCE THE INCEPTION OF THE 1999 COMPACTS

The argument that consideration arising from a complex formula does not have a static meaning runs directly counter to federal contract law. In *United States v. 300 Units of Rentable Housing*, 668 F.3d 1119, 1121 (9th Cir. 2012), the United States Air Force ("Air Force") entered into a development agreement to construct three-hundred rental homes on Eielson Air Force Base. After building the homes, the developer would then lease them to the Air Force for a term of twenty years, at the end of which the government would have the option to either purchase the homes, renew the lease, or have the homes removed from the military installation. *Id.* Ultimately, the federal government chose the second option after the parties failed to agree on a purchase price far enough in advance of the expiration date of the contract to obtain Congressional approval. *Id.* at 1122. Invoking the renewal option drew the ire of the developer, who claimed that the option contract was invalid because it "did not specify the amount of rent for the renewal term." *Id.* Rather than state a fixed figure, the contract conversely contained a formula that set the maximum amount of rent during the renewal period as "ten [ ] percent of the fair market value of the improvements erected on the land as determined by a duly qualified appraiser selected with the approval of the [parties]." *Id.* The complexity of this language did not dissuade the Ninth Circuit from holding that the promise was enforceable because it "included a method the court could apply to determine the rent." *Id.* at 1123. Here, a similar method exists within Section 4.3.2.2 of the 1999 Compacts, which formulates the total number of available licenses based upon the interplay of three quantities: the number 350 three times; the number of non-compact tribes as of September 1, 1999;

and the number of Class III gaming devices operated by the gaming tribes on that same date. The final two elements are not only ascertainable, but have fixed meanings that predate the execution of the 1999 compacts. Given these facts, the promise to provide the gaming tribes with an aggregate pool of 40,201 licenses existed from the very outset of the agreements.

The precise contours of this obligation did not subsequently shift based upon the whims of the obligor or the decisions of concerned courts. This "it is what it always was" principle gains clarification from a District of Massachusetts case concerning the rescission of an agreement to purchase a bicycle manufacturing plant after the purchaser discovered hazardous waste in the soil and groundwater in violation of the warranties in the contract. *See Roadmaster Indus., Inc. v. Columbia Mfg. Co.*, 893 F.Supp. 1162, 1165 (D. Mass. 1995). Perfectly epitomizing the State's argument in the cross-motion for summary judgment, the property seller in *Roadmaster* tried to defend the agreement by arguing that the environmental contamination could not have actually existed until the subsequent point in time that a higher authority determined that it did. *Id.* at 1178. The full recitation of the argument in the opinion was that the "determination by governmental agencies that [the seller] was in fact in violation of environmental laws did not occur until after the Agreement was signed and that they cannot be held liable for representations about future events." *Id.* Rejecting out of hand the argument that the original features of the subject matter change depending upon subsequent findings by governmental authorities, the court explained that:

> Neither common sense nor the language of the Agreement requires that a clean-up order from a government environment agency be issued or an adjudicatory decision be reached to establish that defendants breached the environmental warranties in the Agreement. It is enough that defendants actually knew or could have determined that the soil and groundwater contamination was in excess of that permitted by federal regulations and that levels in excess of these standards by definition posed a threat to human health, welfare, and environment.

Id. Distilling this reasoning down into the central points, the court essentially found that the hazardous waste was present on the property at the time of the sale, and the secondary question of the seller's compliance with the warranties in the contract largely turned on whether it knew or had reason to know of the contamination. Extending these principles to the present case means that the full 40,201 licenses were available under the 1999 compacts from the very outset, and the State should have known this

considering the fact that it wrote the contract, the formula contained therein provided a "method" for calculating the number of licenses, and the prevailing condition of the RSTF could have served as a guidepost for determining whether or not a sufficient number of licenses were available for use by the gaming tribes.

A myriad of land survey cases proves that an incorrect calculation about the quantity of subject matter being conveyed is not true until someone says otherwise. A prime example of this is *Turner Falls Lumber Co. v. Burns*, wherein the plaintiff executed a contract to purchase a specific amount of timber from an adjacent landowner based on a survey conducted by an agent for the latter party. 3 George E. Palmer, *Law of Restitution* § 12.6, p. 592-93 (1978) (citing *Turner Falls Lumber Co. v. Burns*, 71 Vt. 354, 45 A. 896, 897 (1899)). After consummating the transaction, the plaintiff enlisted the assistance of a different surveyor to gauge the accuracy of the represented boundary line between the neighboring properties. *Id.* The second survey revealed that the original "line was in error, with the result that the plaintiff had paid for some timber which already belonged to him." *Id.* This mistake served as the basis for not only partial rescission of the contract, but reimbursement of the payment the plaintiff made at the outset of the deal to reacquire its own property. *Id.* (citing *Turner Falls*, 45 A. at 898). In other words, the real facts remained the same throughout the course of the events regardless of what one of the parties' initially represented. *See Petrucelli v. Palmer*, 596 F.Supp.2d 347, 378 (D. Conn. 2009) (permitting rescission and restitution where a septic tank and leaching field fell outside of the boundary line incorrectly set by the seller); *Chromo Mountain Ranch v. Gonzales*, 101 N.M. 298, 299-300 (1984) (granting reformation and restitution where the total acreage of land conveyed was approximately three percent less than that represented by the seller's survey). Simply put, the State's argument that the additional licenses did not exist until the precise point in time that a competent court said they did is no truer than the defendant in *Turner Falls* legally owning the plaintiff's property prior to judicial intervention.

Nor does the misrepresentation become true simply because it relates to a purportedly ambiguous provision. In *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 304 (7th Cir. 1993), the president of Seedboro Equipment Company had a defined benefit health insurance policy through his business that provided both he and his family members with lifetime benefits of up to $1 million, but only $25,000 in

the case of "mental illness," a term that was not defined in the plan. While covered by this health insurance, the president's dependent son developed "congenital encephalopathy," an organic brain malfunction that resulted in a number of behavioral disorders, such as psychotic tendencies, uncontrollable rocking back and forth, and extreme physical abuse to one's self and others. *Id.* at 305. Although the treating physicians believed the disorder was the manifestation of some physical root cause, the plan administrator began to deny benefits on the basis that the term "mental illness" covered any conditions where the "primary observable symptoms are behavioral." *Id.* at 308. Before reviewing the district court's decision, the Seventh Circuit noted that the "competing definitions of mental illness… have divided not only the litigants but also federal and state courts." *Id.* at 310. The reason for this was that the plan contained little in the way of definitions, commentary, or illustrations that would help clarify whether the term "mental illness" concerned itself with the root cause or the manifestation of a disorder. *Id.* at 310-11. Relying on the *contra proferentum* doctrine – which is "followed in all fifty states and the District of Columbia, and with good reason" – the Seventh Circuit concluded that the district court correctly construed "mental illness" to exclude the organic brain condition at issue. *Id.* at 311-12. In the opinion of the court, "[i]nsurers should not be permitted to exploit policy term ambiguities, which they could have avoided, to deny coverage to an unsuspecting insured." *Id.* at 314. The remand instructions prevented such exploitation by requiring the district court to determine the full "amount owed by [the plan administrator] to the [insured] pursuant to [the administrator's] obligations under the Plan." *Id.* In other words, the presence of ambiguity does not excuse a promisor from carrying out its real obligations in a contract until a court settles the matter. This rule should possess even greater force where the promisor is a trustee who has a duty to always deal with the corpus in the best interests of its contracting partner. *See* Restatement (Third) of Trusts §§ 76-78 (2007). Together, these legal principles should certainly override opposing counsel's personal narrative about the truth being what the CGCC said it was, at least until someone with more authority said otherwise.

The dicta in *Colusa I* about the retroactivity of the license pool decision does not undermine these principles. Invoking a ninety-year-old California case to excuse the CGCC's failure to conduct past license draws on the grounds of impossibility, Judge Damrell reasoned that "whenever a contract requires for its performance the existence of a specific thing… such impairment of it makes it

unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence." *Colusa I*, 629 F.Supp.2d at 1119 (quoting *Hackfeld v. Castle*, 186 Cal. 53, 57 (1921)). The Restatement (Second) of Contracts advances a virtually indistinguishable recitation of the law, explaining that "[i]f the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence,… is an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts § 263. However, like the appurtenant "assumption of risk" language in the *Hackfeld* quotation, this rule is "subject to the qualification[ ] stated in § 261," Restatement (Second) of Contracts § 263 cmt. a, that the claimed impossibility must arise "without [the person's] fault." Restatement (Second) of Contracts § 261. In other words, the doctrine of impossibility only protects against "acts of God or… third parties," not those attributable to the "obligor himself." Restatement (Second) of Contracts § 261 cmt. f. For example, while it may excuse non-performance where there is "[a] severe shortage of raw materials or of supplies due to war,… [or] local crop failure," Restatement (Second) of Contracts § 261 cmt. f, the rule would certainly not apply if the obligor creates the shortage of materials or burns down the corn field in order to duck its obligations under the contract. *Id.* "This is true even if the [self-created] defect [in performance]… is neither willful nor negligent, and even if the [obligor] is unaware of it." 2 E. Allen Farnsworth, *Farnsworth on Contracts* § 8.9, p. 535 (4th ed. 2004); *see* Restatement (Second) of Contracts § 261 cmt. f. Thus, contrary to the dicta in *Colusa I*, even a purely innocent mistake on the CGCC's part would not relieve it of its duty to make the total number of licenses available to the gaming tribes throughout the duration of the 1999 compacts.

The application of the incorrect law in *Colusa I* probably resulted from the parties' failure to brief the issue of retroactivity during the summary judgment phase. After all, the plaintiff tribe's claims relating to the CGCC's handling of the license pool simply sought a prospective declaration that the "Tribe's Compact authorizes the issuance of a total of in excess of 62,000 Gaming Device licenses, [with] the exact number to be determined according to proof." Compl. for Declaratory and Injunctive Relief at 18:19-20, *Colusa*, No. 04-2265 FCD KJM, Docket No. 1 (E.D. Cal. Oct. 25, 2004). The forward-looking nature of this remedy made raising the retroactivity of any judgment unnecessary.

While the court's natural inclination may have been to protect the State from subsequent lawsuits by inserting superfluous dicta of this nature, one should recall that Judge Damrell was faced with a

limited interpretation issue and was equipped with a rather Spartan record. The evidence before the court obviously concerned the parties' interactions during the compact negotiations, as that played a prominent role in trying to ascertain the meaning of the license pool formula. But, a significant wealth of other evidence was noticeably absent from the proceeding. With the plaintiff tribes still operating under 1999 compacts, the factual background did not include any of the conduct by the State *after* it constrained the size of the license pool, including Governor Davis' March 2003 letter; Daniel Kolkey's later admission that "[c]learly, we think the current compacts do not provide fair payment to the state for what is a monopoly on Class III (casino-style) gaming," and thus it was "an opportune time to re-examine the tribal-state relationship;" or the massively inflated financial terms of any of the 2004 amended compacts. [WD1, Exs. 75-76] Moreover, the early years of the factual history also seemed to ignore the CGCC's role as the trustee of the license pool, which only came up in passing so Judge Damrell could interpret the license pool formula without providing any deference to the Commission's position. *Colusa I,* 629 F.Supp.2d at 1108 n.15 ("The court notes that the authority to administer the draw process does not give the Commission concomitant authority to interpret the Compact. While interpretation issues may and have arisen throughout the draw process, the Commission's role as Trustee does not grant deferential review to its interpretation."). The absence of this important evidence may very well explain Judge Damrell's motivations, but it does not make his dicta any more correct. As previously mentioned, the proper application of federal contract law occurred earlier in this case when Judge Burns found that the license pool decisions "entitled [Pauma] to 2000 machines from the get-go." [Doc. No. 56, 4:24-5:2, 6:6-11, 16:6-12, 17:4-10]

IV. JUDICIAL DECISIONS HAVE OPERATED RETROACTIVELY FOR NEAR A THOUSAND YEARS

There are very few judicial doctrines that completely foreclose opposing argument, but the law of retroactivity is one of them. A fundamental rule of "retrospective operation" has governed "judicial decisions… for near a thousand years." *Harper,* 509 U.S. at 94 (quoting *Kuhn,* 215 U.S. at 372). The reason for this is "prospective decision-making is incompatible with the judicial role." *Id.* at 96 (citing *Am. Trucking Assns., Inc. v. Smith,* 496 U.S. 167, 201 (1990)). Thus, Supreme Court precedent holds that "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *In re Debbie Reynolds Hotel & Casino,*

Inc., 255 F.3d 1061, 1066 (9th Cir. 2001) (quoting *Harper*, 509 U.S. at 96). This ensures that the "substantive law [does not] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper*, 509 U.S. at 97 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991)). And yet this is precisely what the State hopes to achieve with its argument that the "law of the Ninth Circuit as to the size of the License Pool, did not come into existence for any purpose until August 20, 2010." [Doc. No. 217-14, 11:5-8]. Taking this argument to the logical extreme would mean that the license pool consisted of the number set by Sides Accountancy from May 5, 2000 till it relinquished the trusteeship on January 7, 2002; a wholly amorphous figure from that date till June 19, 2002 when the CGCC released its interpretation of the size of the license pool; 32,151 licenses from then until the release of *Colusa I* on April 22, 2009; 42,700 licenses from that point until the release of the *Rincon* license pool order on March 24, 2010; either 42,700 or 55,951 licenses from that date till the release of *Colusa II* on August 20, 2010; and 40,201 licenses from that point onward. If the Court were to permit the law to "shift" and "spring" in such a manner, similarly situated beneficiaries would conceivably face disparate injuries depending exclusively upon the point in time at which they applied for licenses. Better yet, this rule would mean that Pauma could have legally obtained the licenses it desired in either December of 2002 or 2009, just not in December of 2003. A more rational approach to applying *Colusa II* would reflect the aforementioned traditional contract law principles and conclude that the license pool contained 40,201 licenses from the very beginning.

V. JUDICIAL ESTOPPEL OR OTHER PRINCIPLES OF EQUITY SHOULD PROHIBIT THE STATE FROM REVERSING ITS POSITION ON THE NATURE OF THE CGCC'S INTERPRETATION FOR PURPOSES OF ADVANCING A MERITLESS ARGUMENT

The State's long-running contradictory position that the CGCC merely expressed its "opinion" about the size of the license pool should estop it from now arguing that "from 2002 to 2009, the License Pool, as a matter of fact and law, consisted of 32,151 licenses." [Doc. No. 217-14, 11:9-10] Judicial estoppel is an equitable doctrine designed to prevent a party who plays fast and loose with the courts from gaining an advantage from taking inconsistent positions. *Milton H. Greene Archives v. Marilyn Monroe LLC*, __ F.3d __, 2012 WL 3743100, *6 (9th Cir. 2012). "The Supreme Court has instructed that there are no 'inflexible prerequisites or an exhaustive formula for determining the applicability of

judicial estoppel." *Id.* at *8 (quoting *New Hampshire*, 532 U.S. at 751). Among the considerations a court should consider are whether a party's subsequent position is clearly inconsistent with its prior one, and whether such party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at *7 (citing *New Hampshire*, 532 U.S. at 750-51). Ultimately, "[i]f a litigant's current position is manifestly inconsistent with a prior position such as to amount to an affront to the court, judicial estoppel may apply." *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1190 (9th Cir. 2000).

In the law of contracts, there is a "wise and sound principle… deeply embedded in the common law," *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 678-79 (5th Cir. 1986), that says expressions of opinion cannot serve as the basis for either actionable misrepresentations or mistakes. Rather, the pivotal element for obtaining relief in these cases has to be a fact, whether it is an existing fact in cases of mistake or a statement of existing fact in misrepresentation. *Id.* at 679; Restatement (Second) of Contracts ch. 6 int. note ("The type of mistake dealt with in this Chapter is one that relates to existing facts that the parties regard as a basis for making an agreement."). While trying to rationalize its anti-retroactivity argument, the State finally concedes that the total number of licenses under the 1999 compacts constitutes such a fact, but that for a certain temporal period its fact was right while the Ninth Circuit's was wrong. Although Pauma is grateful the State has conceded significant ground on its mistake and misrepresentation defenses, it is worth noting that this argument runs directly counter to the position opposing counsel has taken in this lawsuit from day one. For instance, the State's original motion to dismiss classified the CGCC's calculation as nothing more than an opinion, and sought to deny relief on the basis that there was no fact supporting a mistake claim:

> Thus, at the time Pauma entered into the 2004 Compact, it was aware of the existence of differences of opinion respecting the number of Gaming Device licenses available under the 1999 Compact and it knew that the State held but one of several positions on the matter. Pauma also knew that the possibility existed that a court might find that the number of licenses available under the 1999 Compact differed from the State's calculation. Accordingly, there was no "fact" in existence concerning the number of licenses available under the 1999 Compact at the time the parties entered into the 2004 Compact and upon which Pauma may assert a claim for mistake of fact. *See United States v. Great Northern Railway Co.*, 287 U.S. 144, 151-153 (1932) (holding that discrepancies in calculations of payment due was a matter of opinion based on different methods of calculation and did not constitute a mistake of fact); *Mosher v. Mayacamas*

> *Corp.*, 215 Cal.App.3d 1, 5 (Cal. Ct. App. 1989) (no mistake of fact where no evidence presented that valuation of subject properties was erroneous in light of facts in existence at time of contract).

[Doc. No. 11-1, 3:8-13 & 6:15-7:2] The State then repeated this argument in opposition to Pauma's motion for a preliminary injunction:

> What is clearly established by these uncontested facts is that in June, 2004, when Pauma entered into the 2004 Compact, the parties were aware of the existence of differences of opinion respecting the number of Gaming Device licenses available under the 1999 Compact and Pauma had knowledge that the State Defendants held but one of several positions on the matter. Pauma also knew that, based on at least one lawsuit directly challenging the size of the license pool, the possibility existed that a court might find that the number of licenses available under the 1999 Compact differed from the State's calculation. Accordingly, there was no established "fact," past or present, concerning the number of licenses available under the 1999 Compact at the time the parties entered into the 2004 Compact and upon which Pauma may base a claim for mistake of fact. There existed only known differences of opinion about how many licenses were available. *See United States v. Great Northern Railway Co*., 287 U.S. 144, 151-53 (1932) (holding that discrepancies in calculations of payment due was a matter of opinion based on different methods of calculation and did not constitute a mistake of fact); *Mosher v. Mayacamas Corp.*, 215 Cal.App.3d 1, 5 (Ct. App. 1989) (no mistake of fact where no evidence presented that valuation of subject properties was erroneous in light of facts in existence at time of contract).

[Doc. No. 30, 7:9-23 & 8:8-11] And again in its opening brief during the interlocutory appeal of the injunction order:

> First, there was no "fact" or "thing," either past or present, in existence concerning the number of licenses available under the 1999 Compact at the time Pauma and the State entered into the 2004 Compact and upon which Pauma may base a claim for mistake of fact. There existed only known differences of opinion about how many licenses were available. *See United States v. Great Northern Railway Co.*, 287 U.S. 144, 151-53 (1932) (holding that discrepancies in calculations of payment due was a matter of opinion based on different methods of calculation and did not constitute a mistake of fact); *Mosher v. Mayacamas Corp*., 215 Cal.App.3d 1, 5 (Ct. App. 1989) (no mistake of fact where no evidence presented that valuation of subject properties was erroneous in light of fact in existence at time of contract).

Appellants' Opening Br. at 28:2-14, *Pauma Band of Luiseno Mission Indians v. California*, No. 10-55713, Docket No. 19-1 (9th Cir. June 15, 2010) ("*Pauma*"). And again in its reply brief on appeal:

> Differences of opinion based on known, differing interpretations of ambiguous contract language at the time of contract fall short of the kind of mistake that may serve to void a contract. *United States v. Great Northern Railway Co*., 287 U.S. 144 (1932).

Appellants' Reply Br. at 10:11-14, *Pauma*, No. 10-55713, Docket No. 41 (9th Cir. July 30, 2010). And again, after the Ninth Circuit's remand order, while opposing Pauma's original motion for summary judgment:

> However, discrepancies in calculations based on matters of opinion as to differing methods of calculation do not result in mistakes of fact. *United States v. Great Northern Railway Co.*, 287 U.S. 144, 151-53 (1932); *see Mosher v. Mayacamas Corp.*, 215 Cal.App.3d 1, 5 (Ct. App. 1989) (no mistake of fact where no evidence presented that valuation of subject properties at time of contract was erroneous in light of facts then in existence).

[Doc. No. 92, 11:12-17 & 12:4-6] And again when rearguing its original motion to dismiss:

> But mere discrepancies in calculations based on matters of opinion as to differing methods of calculation do not result in mistakes of fact. *United States v. Great Northern Railway Co.*, 287 U.S. 144, 151-53 (1932); *see Mosher v. Mayacamas Corp.*, 215 Cal.App.3d 1, 5 (Ct. App. 1989) (no mistake of fact where no evidence presented that valuation of subject properties at time of contract was erroneous in light of facts then in existence).

[Doc. No. 111-1, 8:4-9 & 8:18-20] And again when opposing Pauma's second motion for summary judgment:

> Discrepancies in calculations based on matters of opinion as to differing methods of calculation do not result in mistakes of fact. *United States v. Great Northern R. Co.*, 287 U.S. 144, 151-53 (1932); *see Mosher v. Mayacamas Corp.*, 215 Cal.App.3d 1, 5 (Cal. Ct. App. 1989) (no mistake of fact where no evidence presented that valuation of subject properties at time of contract was erroneous in light of facts then in existence).

[Doc. No. 168, 14:7-12 & 14:20-21] And, astonishingly, again within its third opposition to summary judgment, which it filed concurrently with the very cross-motion advancing the contrary position:

> Discrepancies in calculations based on matters of opinion as to differing methods of calculation do not result in mistakes of fact. *United States v. Great Northern R. Co.*, 287 U.S. 144, 151-53 (1932); *see Mosher v. Mayacamas Corp.*, 215 Cal.App.3d 1, 5 (Cal. Ct. App. 1989) (no mistake of fact where no evidence presented that valuation of subject properties at time of contract was erroneous in light of facts then in existence).

[Doc. No. 217, 24:23-25:2] Calling the State's most-recent argument a flip-flop would be a colossal understatement. For three years and eight motions, counsel for the State insisted one thing to defend against Pauma's mistake claims, and now argues the exact opposite in order to advance some fictitious legal technicality that they hope will make the entire case magically disappear. While the actual number

of licenses under the 1999 compacts never changed, counsel for the State's stance on the statement of fact-versus-opinion issue certainly has, to the point that the CGCC's interpretation is now one or the other depending upon what is expedient. The only conceivable way to reconcile these inconsistencies is by speaking in tortuous enigmas, like "the CGCC's formulation was really an opinion based upon a substitute fact it ascertained that was not previously in existence," or "a placeholder with indicia of a quasi-fact that arose from an unenforceable opinion." Rather than spend the remainder of the summary judgment process speaking in tongues, the Court should simply estop the State from claiming there was some interim replacement fact for purposes of its anti-retroactivity argument.

CONCLUSION

For the foregoing reasons, Pauma respectfully requests that the Court deny the State's cross-motion for summary judgment, grant *in toto* the Tribe's Motion for Summary Judgment on Claims Five through Ten and Thirteen through Seventeen in the First Amended Complaint, and enter final judgment pursuant to Federal Rule of Civil Procedure 54(b).

RESPECTFULLY SUBMITTED this 26th day of October, 2012

THE PAUMA BAND OF MISSION INDIANS

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