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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA,

Plaintiff,

vs.

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS OF CALIFORNIA, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Defendant.

Case No.: 1:14-CV-01593 LJO SAB

DEFENDANT'S RESPONSE TO MOTION FOR ORDER TO SHOW CAUSE AS TO WHY LEWIS/AYALA FACTION SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING COURT ORDERS; REQUEST FOR ACCOUNTING; AND REQUEST FOR RECEIVERSHIP

Date: February 11, 2015
Time: 8:30 a.m.
Courtroom: 4, 7th Fl.

Honorable Lawrence J. O'Neill

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I. INTRODUCTION

Through its pending motion, the Reid Faction purports to seek enforcement of the modified temporary restraining order and the preliminary injunction issued by this Court on October 15, 2014 and October 29, 2014 (the "Modified TRO" and the "Preliminary Injunction" or "PI," respectively). In actuality, however, the Reid Faction presents "evidence" that is inadmissible under any reasonable interpretation of the applicable standards, engages in blatant character assassination, and raises very serious allegations of contempt, virtually all of which rely upon implausible claims based on nothing more than "information and belief" without any foundation. In its effort, the Reid Faction also attempts to involve this Court in intra-tribal matters by seeking an expansion of the Court's current jurisdiction over revenues from the Chukchansi Gold Resort and Casino ("Casino") into all revenues and assets held by the Picayune Rancheria of Chukchansi Indians, a federally recognized Indian tribe ("Tribe").

Notwithstanding the above, the actual evidence and applicable law establishes several points that are significant for purposes of disposition of the Reid Faction's motion. First, it is clear that the Tribe (through the Unification Council), Casino Management, and the Picayune Rancheria Tribal Gaming Commission ("PRTGC") have all complied with the Modified TRO and the Preliminary Injunction. Second, though there presently exists a conflict between the Court's orders in the matter and applicable Tribal and federal law, the Tribe has identified and implemented an interim solution that allows for the compliance with all applicable laws and orders. Third, there is no basis to assign a receiver in this matter, and doing so would likely violate the Indian Gaming Regulatory Act, 25 U.S.C. Section 2701 *et seq*. ("IGRA").

II. ARGUMENT

A. THE REID FACTION MISCHARACTERIZES THE PRELIMINARY INJUNCTION IN A TRANSPARENT EFFORT TO EXPAND IT AND INVOLVE THIS COURT IN INTRA-TRIBAL MATTERS

This Court has repeatedly, and properly, acknowledged that it is without jurisdiction to adjudicate the underlying Tribal governance dispute. *See, e.g.*, Preliminary Injunction, Dkt. No. 48, at 8:7-8. At the same time, this Court has repeatedly, and again properly, explicitly limited its

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involvement to actions aimed at enforcing the public safety terms of the Compact as related ***strictly to the Casino***. *See, id.*, 8:8-12. Accordingly, this Court was very careful in crafting injunctive relief related only ***Casino*** revenues, not all ***Tribal*** revenues. For example, the language of the Preliminary Injunction ***focused expressly on the narrow scope of the Casino***, not the Tribe as a whole, in prohibiting the Tribe and others from:

> 1. Attempting to disturb, modify, or otherwise change the circumstances that were in effect ***at the Casino*** as of the afternoon of October 8, 2014. . . Payment [by the Casino] in the ordinary course of business, including mandatory fees to the gaming commission actually supervising ***the Casino*** operations on October 8, 2014, and per capita tribal distributions based upon the Tribe's membership list as of December 1, 2010, that are made in equal amounts, are not violative of this Injunction. No discretionary payments shall be made [by the Casino] to any group claiming to be the duly constituted tribal council or claiming control over tribal matters.

Id., 9:8-15 (emphasis added). The language of the Temporary Restraining Order, the Modified Temporary Restraining Order, and the hearings in this matter to date are also consistent with the plain reality that the Court has only focused its attention and exercised its jurisdiction over *Casino* revenues. *See* Temporary Restraining Order, Dkt No. 5, at 2:1-5 and 12-14; 3:7-17; Modified Temporary Restraining Order Issued in the Course of the October 15, 2014 Hearing on the Temporary Restraining Order, Transcript of October 15, 2014 Proceedings, *State of California v. Picayune Rancheria of Chukchansi Indians of California*, Case No. 14-cv-01593 LJO ("October 15 TRO Transcript"), at 5:20-6:1; 67:23-68:3; Transcript of October 29, 2014 Proceedings, *State of California v. Picayune Rancheria of Chukchansi Indians of California*, No. 14-cv-01593 LJO ("October 29 PI Transcript"), at 13:25-14:22; 15:5-16; 19:7-24; and the resulting Preliminary Injunction, Dkt. No. 48 at 4:15-22, and 4:23-5:3, 5:14-19, 8:5-8; and 9:5-10:7.

Quite simply, this Court has ***never*** addressed either: (1) what the Tribe may do with any funds that come from sources other than the Casino; or (2) what the Tribe may do with any funds that came from the Casino at any time before October 15, 2014.[1] And, there is very good reason

[1] The October 10, 2014 Temporary Restraining Order did not address this issue. Instead, the issue was first addressed and subject to an order of this Court at the October 15, 2014, "Hearing

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for these facts: the Court does not have jurisdiction over such matters.

Despite these relatively simple facts and jurisdictional limitations, the Reid Faction now attempts to expand the Preliminary Injunction by turning what is a narrowly tailored Preliminary Injunction order, focused exclusively on ***Casino*** revenues after October 15, 2014, into a jurisdictional dragnet aimed at capturing ***all*** "Tribal Monies." Indeed, the Reid Faction contorts and mischaracterized the Preliminary Injunction from the very first page of its motion, referring to "Tribal Monies" instead of "Casino Monies" as if they are one in the same, when they are far from that as a matter of fact, law, and jurisdiction. The Reid Faction continues its efforts in this vein throughout its moving and supporting papers, using the term "Tribal Monies" and similar terms[2] ***on at least 40 separate occasions*** in discussing what should instead be limited to "Casino Monies," "Casino Assets," "Casino funds," etc.[3] Tellingly, the Reid Faction does not use ***any*** of these Casino-specific terms on even one single occasion.

The following excerpts are just a few of the Reid Faction's gross misstatements of this Court's orders as part of its (the Reid Faction's) transparent attempts to expand the scope of the Preliminary Injunction:

- The "Reid Group respectfully request the Court to appoint a receiver to manage ***all Tribal property and assets*** . . ." (Dkt. No. 58, at 13:15-16, emphasis added).
- The Reid Faction "will, and hereby does, move the Court for the following orders: (3) an Order for a full accounting of all distributions of ***Tribal monies*** . . . (4) an Order appointing a receiver to manage and control the ***Tribe's financial matters*** . . ." (Dkt. No. 58-1 at 1:24-2:9; see also Dkt. No. 58 at 1:20-23, emphasis added).

Re Temporary Injunction Issues," a fact acknowledged by the Reid Faction. *See* Dkt. 58, at 2:25-27.

[2] For example, "Tribal assets," "Tribal funds," "Tribal cash," "Tribal resources," "Tribal property," and "Tribe's financial matters."

[3] The Reid Faction also baits this Court with a red herring and attempts to involve the Court in the underlying leadership issue by making inflammatory arguments that are wholly irrelevant to the matters over which this Court has jurisdiction. For example, the Reid Faction states "distribution of Tribal funds by any Tribal faction made since the dispute arose in December 2011, is potentially unlawful and fraudulent because any, or even all, of the various Tribal factions may be found to have never been legitimate." Dkt. No. 58 at 11:24-27. However, in light of this Court's acknowledged jurisdictional limits and the plain language of its orders, anything that may have occurred prior to October 15, 2014, is irrelevant and cannot constitute a violation of the Modified Temporary Restraining Order or the Preliminary Injunction.

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- "At the October 15, 2014 hearing, the Court amended the Temporary Restraining Order to prohibit distributions of ***Tribal monies*** . . ." (Dkt. No. 58 at 2:25-26, emphasis added);
- "Accordingly, the Preliminary Injunction also prohibits ***any distributions of Tribal monies*** . . ." (*Id*., at 3:6-7, emphasis added).
- "As set forth above, the [Unification Council] improperly disbursed ***Tribal monies*** in violation of this Court's October 15th and October 29th Orders." (*Id*., at 7:13-14, emphasis added).
- ". . . the Reid Group respectfully requests that this Court order a full accounting of ***all distributions of Tribal monies*** . . ." (*Id*., at 7:22-23, emphasis added).
- "As this and other Courts have observed, there is no adequate legal remedy to protect Tribal resources . . ." (Id., at 12:26-27).
- "Further, such a receiver will ensure that all distributions of Tribal monies will comply with this Court's order . . ." (Id., at 13:3-5).

Through this mischaracterization, the Reid Faction attempts to involve this Court in what is perhaps the most fundamental aspect of sovereignty and tribal self-governance - tribal membership – by seeking to use the authority of this Court to order payment to persons who are not Eligible Members,[4] all in violation of Tribal and federal law. Quite simply, the Reid Faction would have this Court ignore its own orders, as well as the multiple jurisdictional road blocks, many of which this Court has already acknowledged, and others of which are based on the established precedent addressed below in more detail.

B. THE UNIFICATION COUNCIL HAS COMPLIED WITH THIS COURT'S PRELIMINARY INJUNCTION TO THE MAXIMUM EXTENT POSSIBLE

Notwithstanding the below-described jurisdictional and practical challenges in light of conflicting law and non-cooperation by other factions, the Unification Council has complied with this Court's PI to the maximum extent possible.

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[4] This is a term defined under Tribal Law (which has been approved by federal agencies in accordance with federal law) and discussed in detail below.

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1. To Date, The Casino Has Paid The Tribe $1,300,000 for Purposes of Per Capita Distributions, While Withholding at least $2,700,000 From The Tribe Pursuant to the Preliminary Injunction[5]

Since issuance of the Modified TRO on October 15, 2014, the Tribe has received four payments from the Casino for per capita distributions, totaling $1,300,000 and allocated as follows: $325,000 on approximately October 22, 2014, November 15, 2014, December 15, 2014, and January 10, 2015. *See* Declaration of Michael Wynn In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Wynn Decl"), ¶ 6. These funds have been used by the Tribe exclusively for the purpose of issuing per capita payments based upon the Tribe's membership list as of December 1, 2010, in equal amounts pursuant to this Court's PI and applicable Tribal and federal law, described below. *See, id.*, ¶ 8.

Further, during this time and pursuant to the PI, the Casino has refused to make the otherwise routine distribution of Casino revenues under the "Excluded Asset" payment to the Tribe, in the full monthly amount of $1,000,000 ($325,000 of which is for per capita distributions and was received as described above), which would have amounted to an additional $2,700,000 for the Tribe had the Casino made the full Excluded Asset payments to the Tribe pursuant to the Tribe's Revenue Allocation Plan in the months of October, November and December, 2014, and January, 2015. *See* Wynn Decl., ¶ 7; *see also* Declaration of Giffen Tan In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Tan Decl."), ¶ 8.

Finally, with one limited exception, the Tribe has not received any other payments from the Casino. *See* Wynn Decl., ¶¶ 6 and 17; Tan Decl., ¶¶ 7, and 10; Declaration of Nancy Ayala In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala

[5] This figure actually does not include an additional $1,700,000 that was owed to the Tribal government from the Casino for Tribal distributions prior to October 15, 2014, such that there is actually $4,400,000 now owed by the Casino to the Tribe.

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Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Ayala Decl."), ¶ 17; Declaration of Reginald Lewis In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Lewis Decl."), ¶ 20.[6]

2. The Tribe Has Issued The $1,300,000 Received From the Casino In Equal Amounts Based on the 2010 Membership List

In an effort to navigate the conflict between the Court's PI on the one hand and Federal law (IGRA) and Tribal law on the other hand as set forth below in Section II(C), the Unification Council determined it would: (i) include persons who may have been on the Tribe's December 1, 2010 membership list but who had subsequently been disenrolled or are otherwise presently not eligible to receive such distributions under Tribal law and Federal law ("Post 2010 Ineligible Persons) in the calculation of per capita payments, thereby ***issuing*** per capita payments to them; and (ii) withhold ***distribution***, by reserving the funds in a Tribal bank account, of all per capita payments for the Post 2010 Ineligible Persons ("Escrow Funds") until such time as either the conflict between the PI, IGRA, and Tribal law can be resolved or individuals among the Post 2010 Ineligible Persons become active members of the Tribe in good standing through the existing due process provisions afforded to them under Tribal law and IGRA.[7] *See, id.*, ¶ 11.

[6] As described in the referenced materials, in January, 2015, the Casino provided funds necessary to conduct the January 24, 2015 Quarterly General Council Meeting as an essential payment in the ordinary course of business. This General Council Meeting was held at the repeated and express urging of the National Indian Gaming Commission, in an effort to work toward reopening the Casino. *See* Declaration of Geoffrey M. Hash In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Lewis Decl."), ¶ 2, and **Exhibit A** attached thereto. On this occasion, and consistent with past Quarterly General Council meetings wherein a quorum was attained, the General Council awarded a tribal travel stipend to attending members in equal amounts, here $1,000. This amount was made available to all in attendance, regardless of their political affiliation, and processed according to the New York Court Order in place regarding withdrawals from the Casino's operating account for payments made in the ordinary course of business.

[7] There are provisions, under Tribal law, providing due process for persons who claim they are entitled to receive, but did not receive, per capita distributions. *See* Wynn Decl., ¶ 12. Such due process includes the opportunity for the individual to present evidence at a hearing, through legal counsel if he or she so desires, as well as an appellate process. *See, id*. Examples of the same are found at Section 8 of the November 2011 Revenue Allocation Plan, Section 7.10 of the Tribe's

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Accordingly, the Tribe handled the per capita payments as follows.

For the month of November, 2014, there were 808 Eligible Tribal Members and 151 Post 2010 Ineligible Persons[8] for a total of 959 individuals that had a claim to per capita funds that month under applicable Tribal law, federal law, and this Court's PI. *See, id.*, ¶ 14. Thus, the Tribe allocated $338.89 in per capita funds for each of those 959 individuals. The Tribe then issued and distributed those payments, totaling approximately $273,823, to the 808 Eligible Tribal Members in equal amounts. The Tribe also then issued but did not distribute and instead held as Escrow Funds approximately $51,172 in a dedicated account for the 151 Post 2010 Ineligible Persons in equal amounts. *See id.*; *see also* Declaration of Donna Howard In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Howard Decl."), ¶¶ 4-6.

In December, 2014, there were 817 Eligible Tribal Members that month, given that one had passed away after November, along with 151 Post 2010 Ineligible Persons for a total of 958 individuals that had a claim to per capita funds that month under applicable Tribal law, federal law, and this Court's PI. *See* Wynn Decl., ¶ 15. Thus, the Tribe allocated $339.25 in per capita funds for each of those 958 individuals. The Tribe then issued and distributed those payments, totaling approximately $273,775, to the 807 Eligible Tribal Members in equal amounts. The Tribe also then issued but did not distribute and instead held as Escrow Funds approximately $51,227 in the dedicated account for the 151 Post 2010 Ineligible Persons in equal amounts. *See id*; *see also* Howard Decl., ¶¶ 4-6.

September 2012 Amended Per Capita Ordinance, and Section 11 of the Tribe's September 2012 Amended Enrollment Ordinance. *See, id*., and **Exhibits C, D,** and **E**, respectively, attached thereto.

[8] As set forth below in Section II(B)(3), the Tribe has had difficulty in identifying the individuals who may have been on the membership list as of December, 2010 in light of the McDonald Faction's ongoing and illegal occupation of the buildings that house such records and in light of its refusal to produce the list despite repeated requests. The number of 151 is thought to be the largest number of members that may have been on the roll in December, 2010. However, without the Enrollment Specialist providing access to enrollment records, there is no accurate way to determine this actual number.

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The Tribe again used this methodology in January, 2015. For this period, there were 812 Eligible Tribal Members, six otherwise Eligible Tribal members who did not receive distributions,[9] 146 Post 2010 Ineligible Persons, and 5 individuals who had not been properly enrolled, for a total of 969 individuals that had a claim to per capita funds that month under applicable Tribal law, federal law, and this Court's PI. *See* Wynn Decl., ¶ 16. Thus, the Tribe allocated $335.40 in per capita funds for each of those 969 individuals. The Tribe then issued and distributed those payments, totaling approximately $272,345, to the 812 Eligible Tribal Members in equal amounts. The Tribe also then issued but did not distribute and instead held as Escrow Funds approximately $52,657 in the dedicated account for the remaining 157 persons, including the 146 Post 2010 Ineligible Persons in equal amounts. *See* Wynn Decl., ¶ 16; *see also* Howard Decl., ¶¶ 4-6.

Finally, the Tribe – through the Unification Council – did make a per capita distribution in October, 2014, and that distribution did not include the Post 2010 Ineligible Persons. However, this distribution was prepared prior to the Court's October 15, 2014 hearing and related Modified TRO. *See* Wynn Decl., ¶ 13. In summary, the amounts paid by the Casino to the Tribe under the Revenue Allocation Plan, including the $325,000 monthly funds for per capita distributions, are paid to the Tribe by the Casino 45 days in arrears. Accordingly, the per capita distribution made in October, 2014, was actually for the September, 2014, Per Capita distribution, not October. October's Per Capita distribution was made in November, November's was made in December, December's was made in January, and January's will be made in February, etc. *See id*., and **Exhibit C** attached thereto (specifically section 4.2 of the Revenue Allocation Plan).

3. Despite Substantial Practical Challenges Stemming from the McDonald Faction's Non-Cooperation, the Tribe Equally Allocated the Per Capita Funds Using the 2010 Membership List

Finally, the Unification Council undertook these efforts despite the fact that it lacked a certified copy of the Tribe's December 1, 2010 membership list and received no cooperation from the McDonald Faction, the party that currently possesses this list given its ongoing and illegal

[9] These persons were incarcerated and therefore not entitled to a distribution pursuant to Section 5.6 of the Tribe's November 2011 Gaming Revenue Allocation Plan, attached to the Wynn Decl. as **Exhibit C** ; or were not accepting per capita distributions for reasons unknown by the Tribe.

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occupation of the Tribal Government compound and related buildings. In summary, on approximately November 10, 2014, the Tribe sent a letter to Patricia Eames, Enrollment Specialist for the Tribe and an affiliate of the McDonald Faction. *See*, Wynn Decl., ¶ 9. The Tribe reached out to her to request that she provide a certified copy of the Tribe's December 1, 2010 membership list as soon as possible, given that: (i) she is the individual responsible for maintaining that list under tribal law; (ii) the Unification Council did not have a copy or access to a copy given the McDonald Faction's ongoing occupation of the Tribe's governmental compound; and (iii) the Unification Council needed this list so that it could in-turn make per capita payments as ordered by this Court and in compliance with applicable federal and Tribal law detailed below. *See, id.* The Tribe sent this letter via U.S. Mail, certified return receipt requested, and personally served it. See, *id*, and **Exhibits A** and **B** attached thereto. The Unification Council never received a copy of the requested materials. *See, id.*

C. ESCROW FOR THE PER CAPITA FUNDS ISSUED TO POST 2010 INELIGIBLE PERSONS WAS NECESSARY TO AVOID VIOLATION OF APPLICABLE FEDERAL AND TRIBAL LAW

Distributions to persons who are not "Eligible Tribal Members" (as defined within the below authorities) constitutes a violation of both federal law as well as long-standing Tribal law that predates the recent Casino closure and this Court's PI. Specifically, the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et. seq., the Tribe's Constitution, as reviewed and approved by the United States Department of Interior (attached as **Exhibit A** to Dkt. No. 30-1), the Tribe's November, 2011 Gaming Revenue Allocation Plan as reviewed and approved by the United States Department of the Interior pursuant to IGRA (relevant portions of the same are attached to the Wynn Decl. as **Exhibit C**), the Tribe's September 2012 Amended Per Capita Ordinance (relevant portions of the same are attached to the Wynn Decl. as **Exhibit D**), and the Tribe's September 2012 Amended Enrollment Ordinance (relevant portions of the same are attached to the Wynn Decl. as **Exhibit E**) are all implicated as set forth below.

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1. IGRA Prohibits Per Capita Distributions to Persons Who Are Not Eligible Tribal Members, As Determined By the Tribe and Reviewed By The Secretary of Interior Alone

As a threshold matter, IGRA permits a tribe to make gaming per capita payments to individuals only if: (i) the tribe has prepared a plan to allocate revenues to authorized uses[10]; (ii) the plan is approved by the Secretary of the Interior and provides for the interests of minors and incompetents; and (ii) the payments are subject to federal taxation with notification to tribal members of such tax liability. *See* 25 U.S.C. § 2710(b)(3). The regulations accompanying IGRA provide that a tribe is in violation of IGRA if it makes gaming per capita payments without an approved revenue allocation plan ("RAP"). 25 C.F.R. §§ 290.10, 290.11 & 290.13. The regulations also require a tribe's RAP to "authorize the distribution of per capita payments to members ***according to specific eligibility requirements*** . . ." 25 C.F.R. § 290.12(b)(5) (emphasis added). Thus, under this body of federal law and regulation, only eligible tribal members can receive gaming per capita payments with the tribe retaining the right to determine eligibility, subject only to review and approval by the Secretary of the Interior.

Here, the Tribe has defined who is an "Eligible Tribal Member," thereby entitled to receive per capita distributions under the Tribe's revenue allocation plan. Significantly, this definition does not include persons who have never been enrolled members of the Tribe or persons who have been disenrolled pursuant to the Tribe's established laws and the related procedures. *See* Wynn Decl., ¶ 10 and **Exhibit C** (at Sections 3.1, 3.10, and 5.2), Exhibit D (at Sections 3.1, 5.2, and 7), and **Exhibit E** (at Sections 5.1, 10, and 11) attached thereto. In addition, the Secretary of the Interior has approved the Tribe's Gaming Revenue Allocation Ordinance pursuant to the IGRA. *See, id.,* ¶ 10 and **Exhibit C** attached thereto.

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[10] *See* 25 U.S.C. § 2710(2)(b) regarding funding tribal government, general welfare, tribal economic development, donation to charitable organizations and funding local government.

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2. IGRA Creates A Comprehensive Regulatory Scheme, Which Addresses Resolution of Disputes Over Per Capita Distributions, And It Is A Scheme That Respects Long-Settled Principles of Sovereignty and Self-Determination

As sovereign entities, federally recognized Indian tribes retain the inherent right to determine eligibility for tribal benefits, *i.e.*, tribal membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) ("*Santa Clara Pueblo*"). "[A] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 (1978). *See also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996) (recognizing that among the foremost powers retained by the Indian tribes in the exercise of their quasi-sovereign status is the right, "absent limitation by treaty or federal statute . . . to determine questions of membership"), cert. denied, 519 U.S. 1041 (1996). The IGRA regulations also establish that a tribe's RAP, in addition to setting forth eligibility criteria, "must utilize or establish a tribal court system, forum or administrative process for resolution of disputes concerning the allocation of net gaming revenues and the distribution of per capita payments." 25 CFR § 290.12 (b)(5). Similarly, 25 C.F.R. § 290.23 requires that disputes involving gaming per capita payments ***must*** be resolved through a tribal court system, form or administrative process. *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005). Significantly, IGRA creates no private right of action for claims of unequal gaming per capita distributions. Instead, IGRA establishes that the tribal court is the proper venue for claims that tribal officials violated their fiduciary duties under tribal law. *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F.Supp. 740 (D. S.D. 1995). Moreover, the existence of explicit provisions authorizing suits under IGRA means that individuals cannot sue for every violation of IGRA by direct action; where a statute creates a comprehensive regulatory scheme and provides for particular remedies, courts should not expand coverage of the statute. *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000) ("*Hein*").

Here, as evidenced by the fact that the Secretary of the Interior has approved it, the Tribe's RAP provides a very specific dispute resolution system. *See* Wynn Decl., ¶ 10, and **Exhibit C** attached thereto (specifically Section 8, entitled "Dispute Resolution"). The other key

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sources of Tribal law now at issue, including the Tribe's September 2012 Amended Per Capita Ordinance and the Tribe's September 2012 Amended Enrollment Ordinance, also included specific dispute resolution mechanisms that ensure due process pursuant to applicable Tribal and federal law. *See* Wynn Decl., ¶ 10 and **Exhibit D** (specifically Section 7.10) and **Exhibit E** (specifically Sections 9, 10, and 11) attached thereto. Finally, the Tribe created a Tribal Court in March, 2012, in the context of the refinancing that occurred at that time.

In light of the above, and with all due respect to this Court, the Court has no jurisdictional authority over the Reid Faction's grievances, given the framework of IGRA and the Secretarial approval provided for the Tribe's RAP. Thus, the Court cannot order per capita distributions that violate the Tribe's RAP, without also violating federal law. To the extent there is any dispute, it must be resolved internally, pursuant to the procedures set forth in the Tribe's RAP and as approved by the Secretary under IGRA.

D. LIKE THE MCDONALD FACTION, THE REID FACTION RELIES UPON A "TWISTED STATEMENT OF FACTS" THAT "BELIES ANY SEMBLANCE OF TRUTH OR REASONABLENESS"

1. Virtually Every Portion of Every Declaration Submitted By The Reid Faction – i.e., The Universe of "Evidence" In Support of the Motion – Is Inadmissible

Notwithstanding the foregoing, even a cursory review of the declarations submitted by the Reid Faction illustrates that they are not, in any part, based on admissible evidence. Instead, they are almost entirely based on "information and belief," with absolutely no foundation establishing any rational or reasonable basis for the same. These "declarations" are also full of inadmissible hearsay and blatant character assassination involving issues that are wholly irrelevant to the matters before this court.

For example, the declaration submitted by Morris Reid, Dkt. No. 58-3, contains accusations against PRTGC member Joseph Ayala that – on their face – are equally inadmissible, wholly implausible as a practical matter, and simply false as a factual matter. Specifically, Reid alleges that the unnamed wife of an unnamed Tribal member contacted the Reid Faction to report that she saw a person – ***whom she could not identify herself*** –deposit two checks at Golden 1 Credit Union in Madera on November 25 or 26, 2014, into "personal bank accounts of his aunt's

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account and his own bank account" in the amounts of $37,000 and $47,000 respectively. *See id*., ¶¶ 10-11. The Reid Faction, based on her description, determined this person must have been Joseph Ayala. There is only one explanation as to how an unidentified wife of an unidentified Tribal member could be unable to identify Mr. Ayala, yet at the same time, is able to allege that he was depositing funds into his own and another's bank account: ***it never happened***. Notwithstanding this, the Reid faction bases its ***entire*** allegation of wrongdoing involving the PRTGC on this one account. *See* Dkt. No. 58, at 9:10-15 (referring to a non-existent paragraph in the Reid Declaration, but clearly relating to the above-recited allegations).

In fact, as set forth in the admissible evidence that is before this Court: (1) Mr. Ayala has only received his normal and customary salary as a member of the PRTGC and for services he provided in that capacity, as permitted under this Court's PI; (2) Mr. Ayala has not received any other payments from the PRTGC or Casino; (3) Mr. Ayala has not, at any time since October 15, 2014 and to the present, deposited separate checks or any combination of checks drawn on any account related to the PRTGC or the Casino in the amounts of $37,000 and $47,000 into his bank account or any other bank account, personal or otherwise; (4) Mr. Ayala has never deposited any checks from the Casino or the PRTGC into any accounts other than those checks issued to him as paychecks for services rendered to the PRTGC; (5) Mr. Ayala does not bank at Golden 1 Credit Union; and (6) Mr. Ayala was not in the area of Madera on or about November 26, 2014. *See* Declaration of Joseph Ayala In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("J. Ayala Decl."), ¶¶ 7-12.

2. The Declarations And Motion Contain Numerous Blatant Misstatements of Actual "Fact"

Frankly, the Reid Faction's motion and related papers contain too many blatant misstatements of actual facts to list here. Its attempt to re-characterize this Court's order as applying to "Tribal monies" instead of "Casino monies" is a good example of just one of the misstatements that are so numerous they cannot be excused as simply careless errors. Other examples include its assertion that "the Reid Group has never attempted an armed takeover of the

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Tribe's Casino or other buildings, preferring instead to seek legal or negotiated solutions." Dkt. No. 58, at 2:16-17. First, this statement implies that the Unification Council has attempted an armed takeover, when in fact the Unification Council has never engaged in any such effort, and there is no evidence establishing otherwise. Second, and more significantly, this claim is plainly false. While the Reid Faction would have this Court believe that is consists of a group of pacifists, the Reid Faction has no commitment to non-violence or any pacifist ideals, and its actions plainly demonstrate the same. For example, the Reid Faction engaged in violent conduct during a short-lived takeover that it instigated on or about February 27, 2012. At that time, the Reid Faction broke into and entered the Tribal Administration building, causing over $100,000 in property damage and leading to sanctions, under Tribal law, of the Reid Faction members who participated in the same as evidenced by video surveillance footage that can be produced to this Court if it so desires.

Another example is the Reid Faction's baseless and incorrect assertions regarding current Casino operations and the need, or lack thereof, for PRTGC regulation. Specifically, the Reid Faction alleges that "there are no operations currently occurring at the Casino due to the NIGC's closure order, and thus no Casino operations to supervise." Dkt. No. 58, at 10:1-3. As set forth in various declarations submitted in opposition to the Reid Faction's pending motion, there are ongoing Casino operations that require PRTGC oversight pursuant to applicable law. *See, e.g.*, Declaration of Khamphila "Khammy" Chhom In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Chhom Decl."), ¶¶ 7, 9 and 10; Declaration of Dyann Eckstein In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Eckstein Decl."), ¶¶ 7 and 9; Declaration of Josh Atkins In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Atkins Decl."),

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¶¶ 7 and 9; Declaration of Mike Ramirez In Support of Defendant's Opposition to Motion for Order to Show Cause as to Why Lewis/Ayala Faction Should Not Be Held in Contempt for Violating Court Orders; Request for Accounting; and Request for Receivership ("Ramirez Decl."), ¶¶ 7 and 9; J. Ayala Decl., ¶¶ 7 and 9.

3. The Reid Faction Makes Allegations of Material "Fact" Without Any Support, Let Alone Any Admissible Evidentiary Basis

As with its misstatements, the Reid Faction makes too many allegations of material fact without any basis to list in this Opposition. What these all have in common, however, is that each is based on nothing more than "information and belief" without any foundation to establish a reasonable basis for the same. For example, it claims that "[t]he Reid Group has received reports that the Lewis/Ayala Faction is funneling large amounts of Tribal Funds into personal bank accounts of its members and supporters," citing to the "report" by the unidentified person as described above in Section II(D)(1). Dkt. No. 58, at 8:7-8

In contrast, the actual facts, based upon admissible evidence are: (1) since the issuance of the Modified TRO on October 15, 2014, and to the present, the Casino has refused to make the otherwise routine distribution of Casino revenues under the "Excluded Asset" payment to the Tribe, in the full monthly amount of $1,000,000 ($325,000 of which is for per capita distributions and was received as described above), which would have amounted to an additional $2,700,000 for the Tribe had the Casino made the full Excluded Asset payments to the Tribe pursuant to the Tribe's Revenue Allocation Plan (attached hereto as **Exhibit C**) in the months of October, November and December, 2014, and January, 2015; and (2) there is no evidence that any individual or entity has received funds derived from the Casino, directly or indirectly, since October 15, 2014, outside of the mechanisms approved by this Court. *See* J. Ayala Decl, ¶¶ 7-12; Chhom Decl., ¶¶ 7-10; Eckstein Decl., ¶¶ 7-9; Ramirez Decl. ¶¶ 7-9; Atkins Decl., ¶¶ 7-9; Wynn Decl., ¶¶ 6-8 and 13-17; Tan Decl., ¶¶ 7-10; Ayala Decl., ¶; and Lewis Decl., ¶.

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E. A RECEIVER FOR THE PROTECTION OF ALL "TRIBAL ASSETS" IS IMPROPER

Appointment of a receiver in the present context is improper for at least three independent reasons, each addressed below.

1. Appointment of a Receiver In This Context Would Violate IGRA

The use of a receiver in a context involving a tribe or its casino is not as simple or risk-free as the Reid Faction would have this Court believe. Indeed, in making this argument and basing the same on cases that are nearly a century old, the Reid Faction ignores modern case law that is both much more on point and based upon IGRA, *i.e.* the statutory basis for operating and regulating Indian gaming. *See Turn Key Gaming., Inc. v. Oglala Sioux Tribe*, 164 F.3d 1092, 1094 (8th Cir.1999). IGRA serves to promote "tribal economic development, self-sufficiency, and strong tribal governments and shield tribes from the influence of organized crime to ensure that the tribes are the primary beneficiaries of tribal gaming." *First Am. Kickapoo Operations. L.L.C. v. Multimedia Games, Inc*., 412 F.3d 1166, 1167 (10th Cir.2005) (quoting 25 U.S.C. § 2702); *see also Wells Fargo Bank. Nat. Ass'n. v. Lake of the Torches Econ. Dev. Corp* ., 658 F.3d 684, 700 (7th Cir.2011) ("One of IGRA's principal purposes is to ensure that the tribes retain control of gaming facilities set up under the protection of IGRA and of the revenue from these facilities."). IGRA "created the National Indian Gaming Commission (NIGC), 25 U.S.C. § 2704, and assigned responsibility for reviewing all management contracts to the Chairman of NIGC." *Gaming World Int'l. Ltd. v. White Earth Band of Chippewa Indians*. 317 F.3d 840, 842 (8th Cir.2003); *see also Turn Key Gaming*, 164 F.3d at 1094 (citing 25 U.S.C. § 2711) ("[T]he Act permits tribes to enter into management contracts for the operation and management of gaming facilities, subject to the approval of such contracts by the Chairman of the NIGC"). However, "[A]ny management contract that does not receive approval is void, and [ ] any attempted modification of an approved [management] contract that does ... not receive approval, is also void." *Turn Key Gaming*. 164 F.3d at 1094 (citing 25 C.F.R. § 533.7, 535.1(f)); *see also* 25 C.F.R. § 533.7 ("Management contracts ... that have not been approved by the Chairman in accordance with the requirements of part 531 of this chapter and this part, are void."); 25 C.F.R. §

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535.1 ("Amendments that have not been approved by the Chairman ... are void."); *Mo. River Servs., Inc. v. Omaha Tribe of Neb*., 267 F.3d 848, 853–54 (8th Cir.2001) (holding that an attempted modification to an approved management contract is not enforceable); *United States ex. rel. Bernard v. Casino Magic Corp*., 293 F.3d 419, 424–25 (8th Cir.2002) (noting that management contracts that are not approved by the Chairman are "unenforceable" and "invalid").

Ultimately, there is a significant risk that appointment of a receiver constitutes a unapproved management contract in violation of IGRA, as it interferes with the tribe's right to be the primary beneficiary of the gaming operation as required by IGRA. For example, in *Wells Fargo Bank v. Lake of the Torches Economic Development Corporation*, *supra*, the Court ultimately refused to appoint a receiver, citing the fact that such an action would violate IGRA given that it would interfere with IGRA's principal purpose, *i.e*., to ensure that tribes retain control of revenues from gaming facilities such that they are the primary beneficiaries of the same. *Lake of the Torches*, *supra*, 658 F.3d at 699. In that case, the tribe issued $50 million in bonds that were secured by the casino revenues and assets, which named Wells Fargo as Trustee in a Trust Indenture. *Id.*, at 689. The Trust Indenture terms required the casino revenues be placed into a deposit account controlled by the Trustee the Trustee would therein make payments to bondholders. *Id.* In addition, the Trustee was authorized to certify the tribe's stated needs for operating expenses in order for the tribe to withdraw funds from the account. *Id.* Wells Fargo also required the tribe to a waiver of its sovereign immunity and represented that none of the bond documents constitute a "management agreement" or that it was a "collateral agreement" to a management contract under IGRA at 25 U.S.C. § 2711. *Id.* In 2009, the tribe requested a transfer and received $4.75 million for operating expenses, which the Trustee later determined was a misrepresentation. *Id.*, at 690. Then the tribe stopped all deposits to the trust account to make bond payments. *Id.*

In response, Wells Fargo filed an action in the federal courts for breach of Trust Indenture and requested the court to appoint a receiver over the casino revenues and other assets pledged as security for the bonds. *Id.* The lower court dismissed the case for lack of jurisdiction and held

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that the Trust Indenture was a management contract within the meaning of IGRA, thus requiring approval by the Chairman of the NIGC. *See Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d 1056, 1057 (W.D. Wis. 2010). The lower court found that several significant bondholder approval provisions[11] created significant control over the casino management operations to therein create a management contract in violation of IGRA. *Lake of the Torches*, *supra*, 658 F.3d at 690-691. Agreeing with the lower court, the Seventh Circuit found that at least five provisions of the Trust Indenture created a management contract given the control provided to entities other than the tribe and casino. *Id.*,at 698-699. Based on the same, the Seventh Circuit ultimately refused to appoint a receiver, finding that a receiver would interfere with IGRA's principal purpose of ensuring that tribes remain the primary beneficiaries of gaming by retaining control of revenues from the same. *Id*, at 699

2. The NIGC Has Already Challenged the Use of A Quasi-Receiver for the Casino in Light of IGRA's prohibitions

Here, a court has already appointed what is arguably a receiver, and the NIGC has already challenged this appointment. Specifically, on approximately June 18, 2013, Wells Fargo Bank, N.A. the Trustee on behalf of the noteholders to the Indenture related to the Casino's 2012 refinancing, filed suit against the Tribe and various parties in the Supreme Court of New York, New York County, Case No. 652140/2013. *See* Lewis Decl., ¶ 15. Thereafter, on approximately September 27, 2013, the New York Court issued an order directing the appointment of a "referee" to oversee and approve certain expenditures related to the Casino. *See id*., ¶ 16 and **Exhibit A** attached thereto. In response, the NIGC, through its Acting General Counsel Eric Shepard, ultimately challenged this "referee" appointment in a letter addressed to Joseph Fusco, Referee, Khammy Chhom, Executive Director Picayune Rancheria Tribal Gaming Commission and Giffen

[11] "The Indenture grants a security interest in the Casino's gross revenues; prohibits Lake of the Torches from making capital expenditures beyond a certain limit without bondholder approval; provides for the appointment of a management consultant if Lake of the Torches fails to meet a specified debt-service ratio and requires Lake of the Torches to use its best efforts to implement the consultant's recommendations; limits Lake of the Torches' ability to replace or remove certain key management personnel without bondholder consent; gives bondholders the right upon default to require that Lake of the Torches replace management personnel; and permits Wells Fargo to seek the appointment of a receiver of the trust estate upon default."

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Tan, the Casino's General Manager. *See, id*., ¶ 17 and **Exhibit B** attached thereto. Specifically, the NIGC informed the parties that the process set forth by order of the Supreme Court of the State of New York, establishing a referee process for reviewing and recommending casino vendor payments and providing for the authority of the New York Court to order a payment, may violate IGRA's prohibition of "any party other than an Indian tribe from managing a tribal gaming facility without a management contract approved by the NIGC Chairman. 25 U.S.C. § 2711". *Id*.

Indeed, this already-existing scrutiny by the NIGC in this respect and involving this Casino is the very reason that the Reid Faction has so grossly overreached and mischaracterized the Court's existing order as calling for control over "Tribal assets," instead of "Casino assets." The Reid Faction is well aware of the above-cited facts and authority. If this Court only exercises jurisdiction over the Casino and appoints a receiver in that context, there is a significant risk of an IGRA violation. Thus, in an effort to avoid any issues vis-à-vis IGRA and management contracts, the Reid Faction seeks to go beyond the realm of the Casino and into the Tribe as a whole. Ironically, the Reid Faction seeks this route despite the significant jurisdictional limitations cited above and already acknowledged by this Court.

3. There Is No Valid Claim For a Receiver Presently Before This Court

Finally, under the Reid Faction's own authorities, there is no valid claim for a receiver presently before this Court. Admittedly, in determining whether a receiver is appropriate – setting aside the context and limitations of IGRA – a court is to consider a variety of factors including whether the party seeking appointment of a receiver has a "valid claim," whether there is "fraudulent conduct or the probability of fraudulent conduct by the defendant," and whether the property is in "imminent danger of being lost, concealed, injured, diminished in value, or squandered." *Canada Life Assur. Co., v. LaPeter*, 563 F.3d 837, 845 (9th Cir. 2009).

Here, there can be no "valid claim" for a receiver given that the Reid Factions entire claim rests upon inadmissible declarations that are nothing more than gross attempts at character assassination and speculative statements lacking foundation or basis in reality. In contrast, the Unification Council, the PRTGC members, and Casino Management have submitted independent

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accounts establishing refuting each of the incredible allegations raised by the Reid Faction and demonstrating, in a transparent manner, the actions taken by the Tribe through the Unification Council, including the use of a separate bank account for transactions involving the per capita distributions and holding of the Escrow Funds. *See, e.g.,* Howard Decl, ¶¶ 4-6. Indeed, those Escrow Funds remain in that account, in full, pending resolution of the above-described conflict in law. *See, id.*, ¶ 7. In light of the same, there is no admissible evidence establishing that Defendant has engaged in "fraudulent conduct," or that the property at issue – the Casino revenues – are in "imminent danger of being lost, concealed, injured, diminished in value, or squandered." Instead, the Tribe, through the Unification Council, has taken specific steps to protect all assets, including the Casino revenues that are properly under this Court's jurisdiction.

F. AS AFFIRMED ON JANUARY 24, 2015, THE UNIFICATION COUNCIL IS THE DEMOCRATICALLY ELECTED LEADERSHIP OF THE TRIBE

Finally, the Unification Council does not simply self-declare that it is the legitimate leadership of the Tribe. Instead, it is the citizens of the Tribe that have determined this fact, pursuant to Tribal law, and refer to it with this name. And, they do so for very good reason: the citizens of the Tribe convened, with a quorum present, in an open and democratic meeting on January 24, 2015, pursuant to the Tribe's Constitution, and through the same resoundingly affirmed that it is this group alone – the Unification Council as comprised of representatives from various Tribal Groups – that represents the Tribe in all government-to-government relations. *See, e.g.,* Ayala Decl., ¶¶ 15-16 and **Exhibit C** attached thereto; *see also*, Lewis Decl., ¶¶ 18-19.

III. CONCLUSION

Ultimately, the admissible evidence that is now before this Court through the numerous declarations and documents provided by the Tribe through the Unification Council far overshadows the baseless and incredible allegations raised by the Reid Faction in support of its pending motion. Thus, the Tribe – through the Unification Council – respectfully submits that there is ample basis to deny the Reid Faction's motion, and every part of it.

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Respectfully submitted,

DATED: January 28, 2015.

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