SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
RICHARD M. FREEMAN, Cal. Bar No. 61178
MATTHEW S. MCCONNELL, Cal. Bar No. 209672
12275 El Camino Real, Suite 200
San Diego, California 92130-2006
Telephone: 858-720-8900
Facsimile: 858-509-3691
JAMES F. RUSK, Cal. Bar. No. 253976
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
Telephone: 415-434-9100
Facsimile: 415-434-3947

Attorneys for Intervenors

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CALIFORNIA VALLEY MIWOK TRIBE,

Plaintiff,

v.

CALIFORNIA GAMBLING CONTROL COMMISSION, et al.,

Defendants.

CALIFORNIA VALLEY MIWOK TRIBE, CALIFORNIA (a.k.a. SHEEP RANCH RANCHERIA OF ME-WUK INDIANS, CALIFORNIA), YAKIMA K. DIXIE, VELMA WHITEBEAR, ANTONIA LOPEZ, ANTONE AZEVEDO, MICHAEL MENDIBLES, AND EVELYN WILSON,

Intervenors.

No: 37-2008-00075326-CU-CO-CTL

INTERVENORS' OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER LIFTING EFFECT OF MARCH 11, 2011 ORDER GRANTING RECONSIDERATION AND DENYING INTERVENTION

Date: April 26, 2013
Time: 2:00 p.m.
Dept.: C-62
Judge: The Hon. Ronald L. Styn

I. INTRODUCTION

Plaintiff asks this Court for "an order lifting the 'effect' of its March 11, 2011 order granting reconsideration and denying intervention." (Notice of Motion, 2:14-16.) This request is nonsensical, given the fact that Plaintiff prevailed in the March 11 Order. Instead, it appears that Plaintiff seeks to have the Court reverse its April 20, 2011 Order wherein the Court stayed the effect of its March 11, 2011 Order granting reconsideration and denying intervention. Plaintiff's motion is in effect a motion for reconsideration of the April 20, 2011 Order. Because it fails to meet the requirements of Code of Civil Procedure section 1008(a), the motion is jurisdictionally barred.

In addition to being jurisdictionally barred, Plaintiff's motion has no merit. Plaintiff's claim that Intervenors lack standing to protect the Tribe's interests in this litigation essentially asks the Court to determine that Silvia Burley, and not the Intervenor Tribal Council, represents the Tribe. For all the reasons presented in Intervenors' motion for summary judgment, the Court cannot and should not make that determination.

Furthermore, Plaintiff relies on arguments that this Court has twice considered and rejected. As the Court previously found, the AS-IA's August 31, 2011 decision, which is stayed pending the outcome of federal litigation, did not somehow resuscitate the now-rescinded December 22, 2010 letter on which the Court's March 11 Order depended. Nor can a letter from BIA field staff, acknowledging Plaintiff's purported tribal election in January 2011, somehow establish Silvia Burley's bona fides as a Tribal representative in light of the AS-IA's subsequent rescission.

Plaintiff's claim that the Court of Appeal's recent decision to permit dispositive motions somehow ordered dismissal of Intervenors is also baseless.

Finally, Yakima Dixie's disputed deposition testimony regarding his purported resignation as chairman of the Tribe in 1999 has no bearing on this litigation. Intervenors' standing to participate in this action depends not on whether Yakima Dixie was chairman in 1999, but on the Intervenor Tribal Council's claim that it represents the Tribe's membership today. In light of the AS-IA's decision to stay recognition of any Tribal government pending the outcome of CVMT v. Salazar, Intervenors have at least as much standing as Plaintiff to assert the Tribe's interests in this case.

II. ANALYSIS

A. Plaintiff's Motion Is Jurisdictionally Barred

By Order dated March 11, 2011, this Court granted Plaintiff's motion for reconsideration and denied Intervenors' motion for intervention ("March 11 Order"). (Ex. 1.)[1] The Court based the March 11 Order entirely on the AS-IA's December 22, 2010 decision finding that the Tribe was governed by Plaintiff's "General Council." (Id.) On April 1, 2011, the AS-IA set aside his December 22, 2010 decision. (Ex. 2.)

On April 6, 2011, an ex parte hearing was held before this Court. Defendant California Gambling Control Commission (the "Commission") and Intervenors each sought an order staying entry of judgment. (Ex. 3.) On April 20, 2011, the Court signed a written order documenting its rulings at the April 6 ex parte hearing ("April 20 Order"). (Id.) The April 20 Order states in part:

> 3. The effect of the Court's prior rulings shall likewise be stayed pending further order of this Court. These rulings include: (1) Order of March 11, 2011, granting reconsideration and denying intervention; (2) Order of March 11, 2011, granting judgment on the pleadings as against the Commission; and (3) Order ruling Plaintiff's demurrer to the Complaint in

[1] All exhibits are attached to the joint Notice of Lodgment filed in support of Intervenors' Oppositions to Plaintiff's Motion for Judgment on the Pleadings and Plaintiff's Motion for Order Lifting the Effect of March 11, 2011 Order.

> Intervention is moot, in light of the Court's ruling denying intervention. As a result of these rulings being stayed, Intervenors are reinstated as fully participating parties to this case.

(Ex. 3, 2:22-3:3.)

Plaintiff's present motion seeks to reverse the April 20 Order, thereby reinstating the March 11 Order. In other words, Plaintiff's motion is a motion to reconsider the Court's April 20 Order.

California Code of Civil Procedure section 1008 establishes the exclusive procedure through which a party may seek reconsideration of a court order. See Le Francois v. Goel, 35 Cal. 4th 1094, 1108 (2005); Gilberd v. AC Transit, 32 Cal.App.4th 1494, 1499 (1995). Section 1008 requires that a motion for reconsideration be "based upon new or different facts, circumstances, or law." C.C.P. § 1008(a). This requirement is jurisdictional, meaning that if a litigant fails to provide new facts or law to support its motion for reconsideration, the court is without jurisdiction to reconsider its order. Le Francois, 35 Cal.4th at 1108; Gilberd, 32 Cal.App.4th. at 1500 ("According to the plain language of the statute, a court acts in excess of jurisdiction when it grants a motion to reconsider that is not based upon 'new or different facts, circumstances, or law'"). To satisfy the requirements of Section 1008, the purported "new or different facts, circumstances or law" must relate to the underlying motion and must not have been available at the time of the original hearing. Gilberd, 32 Cal.App.4th at 1500. Moreover, a motion for reconsideration must be made within 10 days of notice of the order or within 10 days of the occurrence of new or different facts, circumstances or law. C.C.P. § 1008(a).

Plaintiff has entirely failed to satisfy C.C.P. § 1008. First, the motion is nearly two years late. Second, no new facts, circumstances, or law justify reconsideration. Third, Plaintiff did not include the required declaration setting forth "what application was

made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." C.C.P. § 1008(a). Because Plaintiff has not and cannot meet the requirements for a motion for reconsideration, Plaintiff's challenge to the stay issued in the April 20 Order is jurisdictionally barred and the present motion must be denied.

B. Plaintiff's Arguments About the August 31 Decision and the Purported January 2011 Tribal Election Have Been Litigated and Rejected

Plaintiff argues that Intervenors lack standing to assert the Tribe's interests in this litigation, based on the AS-IA's now-rescinded December 22, 2010 decision, as well as a January 2011 letter from BIA field staff that depended on the December 22 decision. (Motion, 6:9-7:10.) Because the Court has already twice rejected the notion that the AS-IA's August 31, 2011 decision somehow revived those letters, Plaintiff's argument must fail once again.

Plaintiff argues that the AS-IA's August 31, 2011 decision "affirmed" his December 22, 2010 decision. (Motion, 6:23-26.) Plaintiff also argues that the January 12, 2011 letter from BIA Superintendent Troy Burdick acknowledging a purported Tribal election held on January 6, 2011, was issued while the December 22 decision was still in effect and was never specifically "recalled or set aside." (Motion, 6:15-22, 6:26-7:3.) Based on these events, Plaintiff asserts that the January 2011 Burdick letter was a final agency action depriving Intervenors of any standing to challenge internal Tribal matters. (Motion, 6:9-7:10.)

Plaintiff made these arguments in a Motion for Entry of Judgment against the Commission, which the Court heard and denied on October 20, 2011. (Ex. 6.) (The Court had already denied Plaintiff's ex parte application for the same relief. (Ex. 28, Sept. 6, 2011 Ex Parte Application for Entry of Judgment.)) In its motion, Plaintiff argued that the

AS-IA's August 31, 2011 decision "reaffirmed" the December 22, 2010 decision. (Ex. 4, 9:1-10:23; Ex.5, 3:18-7:16.) Plaintiff further argued that the purported January 6, 2011 election, and Troy Burdick's January 12, 2011 letter acknowledging the election, constituted independent grounds for entering judgment against the Commission. (Ex. 4, 6:8-26; Ex. 5, 8:4-9:20.)

This Court considered and rejected Plaintiff's arguments. The Court explained that its March 11, 2011 Order granting judgment on the pleadings was exclusively based upon the AS-IA's December 22, 2010 decision. (Ex. 6, p. 1.) The Court further explained that based upon the AS-IA's April 1, 2011 decision rescinding his December 22 decision, this Court issued a stay of its March 11, 2011 Order. (Ex. 6, p. 2.) According to this Court, although the AS-IA's August 31, 2011 decision reaffirmed certain portions of the December 22 decision, the August 31 decision was expressly stayed pending resolution of the federal action brought by Intervenors. (Ex. 6, p. 2.) As a result, this Court denied Plaintiff's motion. In so ruling, this Court held: "The court rejects Plaintiff's standing argument with respect to Intervenors. This court's April 20, 2011, order clearly provides that 'Intervenors are reinstated as fully participating parties to this case.'" (Ex. 6, p. 2 (emphasis added).) Thus, Plaintiff has already litigated these same arguments and this Court has previously rejected them.

Regardless, Plaintiff's arguments are without merit. The AS-IA expressly set aside the December 22, 2010 decision on April 1, 2011. As a result, the December 22 decision is gone. It was entirely replaced by a new decision on August 31, 2011. The August 31 decision, however, is stayed by its own terms and therefore has no current force or effect.[2] (Ex. 7, p. 8; Ex. 6, p. 2.) As a result, there is zero legal merit to Plaintiff's

[2] The fact that the force and effect of the August 31, 2011 decision has been stayed has been acknowledged by the AS-IA through his counsel of record (Ex. 8), the federal district court overseeing the *Salazar* litigation (Ex. 9), and the Court of Appeal. See California Valley

continued efforts to utilize the rescinded December 22 decision or the stayed August 31 decision. [3]

As for Mr. Burdick's letter, it too is entirely unavailing. Mr. Burdick's letter purports to recognize the results of an election that was expressly premised upon the December 22 decision, which recognized the "general council" that held the election. (Plaintiff's Ex. 32.) Once the December 22 decision was rescinded, Mr. Burdick's letter automatically lost any legal effect it might have had. See Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1368, 1371-1372 (Fed. Cir. 2002) (where an agency letter "merely implements" a challenged regulation, "its validity stands or falls with the underlying regulation"). Even if the letter did not rest on the rescinded December 22 Decision, it would not have any legal effect because Intervenors filed an administrative appeal of the letter on February 9, 2011 (Ex. 10), which triggered an automatic stay under the BIA's regulations so long as the appeal remains pending. See 25 C.F.R. §2.6(b); Yakama Nation v. Northwest Regional Director Bureau of Indian Affairs, 47 IBIA 117, 119 (2008).

Timbisha Shoshone Tribe v. Salazar, 678 F.3d 935 (D.C. Cir. 2012), the sole authority cited by Plaintiff, does not support Plaintiff's position. In Timbisha, the BIA issued a decision recognizing one faction in a tribal leadership dispute, for the limited purpose of electing a tribal council. Id. at 937. There was no challenge to the BIA's decision, and the BIA did not rescind the decision. Id. After the election, the AS-IA issued a decision recognizing the winning faction as the tribal government. Id. There is no

---

Miwok Tribe v. Superior Court, Case No. D061811 (December 18, 2012), p. 9 ("The implementation of the August 31, 2011 decision was stayed ....").

[3] As this Court is well aware, unlike the December 22 decision, the August 31 decision did not attempt to rescind prior BIA decisions including those in 2004, 2005, 2006, and 2007, each of which found that the Tribe had no recognized government and thus no recognized governing body. (Exs. 11-13.) Each of these decisions currently remain in full force and effect.

indication that the AS-IA stayed that decision as he has done in this case. Id. The losing faction challenged the AS-IA's recognition decision in federal court. Id. at 938. Despite the pending challenge, the Court of Appeals held that the AS-IA's recognition decision had deprived the losing faction of standing to sue on behalf of the Tribe in another, unrelated case. Id. at 939.

This case differs from Timbisha in two critical respects. First, the BIA decision upon which Plaintiff relies to legitimize its tribal election—i.e., the December 22, 2011 decision—was rescinded by the AS-IA. Second, and more important, the AS-IA has stayed his August 31, 2011 decision recognizing Plaintiff's general council as the Tribal government. Because the August 31, 2011 decision currently has no force or effect, it cannot deprive Intervenors of standing.

Because The Court's March 11, 2011 Order was premised exclusively on the AS-IA's December 22, 2010 decision. The August 31, 2011 decision did not "reactivate" the rescinded December 22 decision. With the December 22 decision gone, there is no basis to reinstate the March 11, 2011 Order.

C. Yakima Dixie's Testimony Is Irrelevant

Plaintiff argues that Yakima Dixie's testimony that he resigned as Chairperson in 1999 "opens the door for the Commission to release the RSTF money to an authorized representative for the Tribe, and removes any claim of a competing tribe or a competing Tribal representative vying for the same funds." (Motion, 7:17-21.)

Plaintiff fails to explain how Mr. Dixie's purported testimony could play any role in reinstating the March 11 Order when that Order was premised exclusively on the now vacated December 22, 2010 decision. As the Court made clear, the decision to grant reconsideration and deny intervention was entirely based on the Court's belief that the AS-

IA's December 22 decision "definitively establishes the Tribe's membership, governing body and leadership." (Ex. 1, p. 2.) Mr. Dixie's purported testimony has nothing at all to do with whether or not BIA has recognized a government of the Tribe.

The claim that Mr. Dixie resigned is disputed. During the deposition, Mr. Dixie repeatedly testified that he did not resign as Tribal chairperson. (Ex. 14, 166:17-20, 202:20-203:7; Ex. 15, 33:15-16, 44:3-4, 44:16-18, 45:8-49:20.) He testified that he believed his resignation had been forged. (Ex. 14, 166:7-11, 178:15-19, 183:4-11; Ex. 15, 31:24-32:9, 34:4-7.) He testified that he did not believe he signed the purported resignation. (Ex. 14, 200:10-22, 202:7-11.)

Mr. Dixie's testimony is also totally irrelevant to establish who currently represents the Tribe, because the BIA has issued a number of decisions since 1999 in which it stated that it did not recognize any Tribal government. (Ex. 11, 2004 decision, Ex. 11, 2005 decision, Ex. 13, 2007 decision.) The AS-IA's August 31, 2011 decision did not rescind those prior determinations, and they remain in effect. They took place years after Mr. Dixie's purported resignation. As a result, whether or not Mr. Dixie resigned in 1999 has long ago been rendered moot.

Moreover, this Court has absolutely no jurisdiction to decide who is or is not the Chairperson of the Tribe. That is a matter which can only be determined by the BIA and the federal courts. See Ackerman v. Edwards, 121 Cal.App.4th 946, 954 (2004); Lamere v. Superior Court, 131 Cal.App.4th 1059, 1067 (2005). The determination of who is the Tribe and who are its leaders is at the very heart of the pending federal litigation. Plaintiff's attempt to get this Court to wade into these issues is entirely improper and must be rejected.

D. The Court of Appeal's Decision Has Nothing to do with Intervention

Plaintiff asserts that the Court of Appeal's decision directing the trial court to lift its stay "applies with equal force to the trial court's April 20, 2011 ex parte order staying the effect of its March 11, 2011 order." (Motion, 3:7-10.) No further explanation is provided. This argument is entirely baseless.

The only issue before the Court of Appeal was this Court's order staying dispositive motions. The Court of Appeal ultimately ruled as follows:

> Let a writ of mandate issue commanding the San Diego County Superior Court to vacate its March 7, 2012 order denying the Miwok Tribe's ex parte application, and to lift the stay to allow the parties to file dispositive motions and, if necessary, to proceed to trial.

California Valley Miwok Tribe v. Superior Court, Case No. D061811 (December 18, 2012), p. 19.

The stay of dispositive motions was originally imposed by this Court at the April 6, 2011 ex parte hearing. This ruling was confirmed in the April 20 Order. More specifically, that Order stated in part:

> 5. Except for discovery related motions, no dispositive motions are permitted, unless and until otherwise ordered by the Court.

(Ex. 3, 3:7-9.) Clearly, the Court of Appeal's decision had the effect of reversing this portion of the April 20 Order. However, the April 20 Order contained at least eight other rulings which had nothing at all to do with Plaintiff's writ or the Court of Appeal's decision. One of those other rulings stayed the effect of the Court's March 11, 2011 Order granting reconsideration and denying intervention. (Ex. 3, 2:22-3:3.) For Plaintiff to

argue that this entirely separate ruling was reversed by the Court of Appeal is completely unfounded and disingenuous. There is not even a hint in the Court of Appeal's opinion suggesting that Intervenors should be denied the right to participate in this lawsuit.

III. CONCLUSION

Plaintiff's motion should be denied. It is jurisdictionally barred under Code of Civil Procedure section 1008(a) and it is otherwise entirely lacking in merit.

Dated: March 27, 2013

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
MATTHEW S. MCCONNELL

Attorneys for INTERVENORS