

January 4, 2011

DELIVERED VIA U.S. MAIL AND EMAIL

Thomas W. Wolfrum
1333 North California Blvd., Suite 150
Walnut Creek, California 94596

RE: *California Valley Miwok Tribe v. California Gambling Control Commission*

Dear Mr. Wolfrum:

On behalf of the California Valley Miwok Tribe ("Tribe"), the purpose of this correspondence is to provide you and your clients an opportunity to dismiss your improperly filed motion for intervention and thereby avoid the consequences to you and them of continuing to prosecute the action. I will outline for you the implications of the Assistant Secretary – Indian Affairs' decision, dated December 22, 2010, in relation to the Tribe's pending litigation, *California Valley Miwok Tribe v. California Gambling Control Commission*, Case No.37-2008-00075326-CU-CO-CTL. As elaborated in the Tribe's recently filed Motion for Reconsideration, the Assistant Secretary's decision reaffirms the authority of the Tribe's previously recognized governing body and reestablishes the government-to-government relationship between the Tribe and the United States. Most importantly, the decision explicitly recognized the members of the Tribe as being Silvia Burley, Yakima Dixie, Rachel Reznor, Anjelica Paulk and Tristian Wallace, and states that that "[o]nly those citizens of the Tribe are entitled to participate in its government."

The explicit language of the letter now refutes any attenuated claims your clients may have had in the pending litigation; therefore, none of your clients have standing to intervene in the pending litigation. With the exception of Yakima Dixie, none of your clients are tribal members. However, even Yakima Dixie, as a tribal member, does not have standing to assert any claims on behalf of the Tribe. The Revenue Sharing Trust Fund monies at issue in this case are held in the name of the **Tribe**. The Compact recognizes only Tribes as recipients for those funds. Therefore, the only entity with standing to assert a claim to such monies is the Tribe, whose governing body has been reaffirmed by the Assistant Secretary's decision, and not its individual members. *See O'Shea v. Littleton*, 404 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (holding that an individual plaintiff who lacks standing cannot seek relief on behalf of himself or on behalf of the class he purports to representing). Similarly, cases brought by individual tribal members involving claims to tribal land have been consistently dismissed by courts for lack of standing. *See Canadian St. Regis Band of Mohawk Indians v. State of N.Y.*, 573 F.Supp. 1530, 1537 (1983) (finding that "the legal rights and interests are those of the tribe, and must be asserted by it . . . the individual plaintiffs are not a tribe and do not represent a tribe;



[therefore]; they lack standing to assert the claims that tribal land was alienated.”); *United States v. Oregon*, 787 F.Supp. 1557, 1566 (D.Or.1992), *affd.* 29 F.3d 481 (9th Cir.1994).

In light of the indisputable findings made by the Assistant Secretary, which disavow any previously made claims by your clients and explicitly rescind all correspondence from the BIA to which your clients cite as the primary basis for their claims, California law requires that you and your clients dismiss your current action in intervention. Failure to do so, especially in light of the unequivocal language in the Assistant Secretary’s decision, would constitute pursuit of a frivolous action, providing grounds for sanctions as well as a claim for malicious prosecution, pursuant to Cal. Civ. Proc. Code §§ 128.5 and 128.7.

As you are aware, Cal. Civ. Proc. Code § 128.7 provides that in presenting the papers to the court, the attorney makes an implied certification as to its legal and factual merit. The certification is designed to create an affirmative duty of investigation as to both law and fact, and thus to deter frivolous actions and costly meritless maneuvers. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* 498 U.S. 533, 550 (1991). Further, the use of the term “presenting” a pleading or paper imposes a continuing obligation on a party and counsel to insure that claims, defenses and arguments are factually and legally sound. CCP Section 128.7(b). Thus, a pleader risks sanctions if he or she continues to advocate claims or defenses that he or she knows (or should know) are lacking in evidentiary support. *Childs v. State Farm Mut. Auto. Ins. Co.* 29 F3d 1018, 1026 (5th Cir. 1994).

The Assistant Secretary’s recent decision has unambiguously demonstrated that your clients are simply not members of the Tribe and have no authority whatsoever to intervene in a matter involving tribal assets. Continuing your action in intervention of the pending litigation with full knowledge of the Assistant Secretary’s decision and its implications demonstrates that you are continuing to advocate claims that you know are “lacking in evidentiary support.” Plainly stated, any claims your clients may have had in the pending litigation are now moot and pursuit of your intervention action would provide strong grounds for the court to impose sanctions against you.

As you are now quite familiar with the sanctions process in light of those imposed against you in October 2009 by the United States District Court for the Eastern District of California, in addition to others that may previously have been imposed, California Business & Professions Code Section 6068(o), requires that attorneys report to the State Bar of California the imposition of judicial sanctions in excess of \$1,000.00. We assume that you prefer to not have to undergo this process again and that you would seek to avoid potential exposure to disciplinary action from the State Bar of California.

Further, continued prosecution of a lawsuit discovered to lack probable cause constitutes malicious prosecution and would expose not only you but also your clients and any financial sponsors to all damages proximately caused. *Zamos v. Stroud*, 32 Cal 4th 958, 970 (2004); Cal. Civ. Code § 3333. If the Tribe is forced to file a malicious prosecution action, it will seek consequential damages incurred as a result of the delayed release in Tribal funds as well as additional attorneys’ fees and punitive damages. Further, the Tribe will pursue such action to a final judgment and your errors and omissions related to the suit cannot, as a matter of law, indemnify you from such damages as your action would be, by definition, an intentional tort.

Please be advised that should your clients not dismiss its intervention action in the pending litigation within ten (10) business days, our firm will file a Motion for Sanctions with the Court for all attorneys’ fees incurred in relation to your intervention action. At the conclusion of the matter we will also file a lawsuit for malicious prosecution, in which the Tribe shall seek consequential and punitive damages in addition to attorneys’ fees. We will name you,



the clients you have named in your motion, and upon identification in discovery, any financial sponsors for your ill-advised action.

We believe it to be in your and your clients' best interests to dismiss your intervention action in order to avoid the aforementioned legal actions, as well as possible disciplinary action from the State Bar of California.

Please contact me if you have any questions regarding the foregoing.

Sincerely,

ROSETTE & ASSOCIATES

Robert A. Rosette, Esq.

RAR/mh

c: Pete Melnicoe
Elizabeth Walker
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