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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELEM INDIAN COLONY OF POMO  
INDIANS,  
Plaintiff,  
  
v.  
  
PACIFIC DEVELOPMENT PARTNERS X,  
LLC, et al.,  
  
Defendants.

No. C 09-1044 CRB

**ORDER DENYING MOTION TO  
VACATE OR MODIFY ARBITRAL  
AWARD**

Claimants bring this action to vacate or modify an arbitral award made in favor of Respondent Indian Tribe. The arbitrator found that a purported contract for casino development was void for two independent reasons: (1) lack of regulatory approval, and (2) lack of approval under the Tribe’s constitution. The arbitrator’s holding is affirmed based on the lack of regulatory authority, and so the issue regarding the Tribe’s Constitution need not be reached.

The award of costs and attorney’s fees to the Tribe is similarly affirmed, as it was authorized by the contract in question, and is permissible under California law. The Tribe is also entitled to recover attorney’s fees stemming from litigating this motion.

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United States District Court  
For the Northern District of California

**BACKGROUND**

1  
2 Respondent Elem Indian Colony of Pomo Indians (the “Tribe” or “Respondent”) is a  
3 federally recognized Indian tribe located in Clearlake Oaks, Lake County, California.  
4 Compl. ¶ 6. The Tribe has a Constitution and Bylaws (“Elem Const.”) that establish the  
5 Tribe’s government. Id. ¶ 11. The Tribe’s General Council is made up of all voting  
6 members of the Tribe. Elem Const. art. III § 1. The Constitution also provides for an  
7 executive committee, consisting of a Chairman, a Vice-Chairman, a Secretary-Treasurer, and  
8 two committee members. Elem Const. art. III § 3.

9 The Tribe’s Constitution grants the General Council the power to “manage, lease,  
10 contract, or otherwise deal with tribally owned assets.” Elem Const. art. VII § 1(e). The  
11 Constitution specifically states that the Executive Committee “shall not commit the Elem  
12 Indian Colony to any contract, lease, or other transaction unless it is so authorized in advance  
13 by a duly enacted ordinance or resolution of the General Council.” Elem Const. art. VII § 2.

14 In early 2007, Claimant Daniel Kerrigan began discussing a proposed casino project  
15 on the Tribe’s lands with Tribe Chairman Raymond Brown. Compl. ¶ 14. At that time,  
16 Kerrigan was associated with an entity named First Nations Capital, but was transitioning out  
17 of his position with First Nations, and developing his own companies: Pacific Development  
18 Partners X, LLC (“PDP”) and Pacific Tribal Partners, LLC (“PTP”) (Kerrigan, PDP, and  
19 PTP are, collectively, “Claimants”). Id. Kerrigan Decl., ¶¶ 1, 5.

20 At a meeting on July 22, 2007, the Executive Committee authorized Brown “to sign  
21 either a letter of intent, MOU/MOA [Memorandum of Understanding / Memorandum of  
22 Agreement] with First Nations Capital to exclusively work towards the development of a  
23 casino contract.” Compl. ¶ 17. At the August 4, 2007 meeting of the General Council, the  
24 Executive Committee sought the necessary approval to authorize Brown to sign a contract  
25 with First Nations Capital. Id. ¶ 19.

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1 On September 4, 2007, former Chairman Brown and Kerrigan executed a  
2 Memorandum of Agreement (“MOA”) between the Tribe and PDP.<sup>1</sup> Id. ¶¶ 2, 21. At the  
3 time, the Tribe was not represented by an attorney in connection with the MOA. Id. ¶ 23.  
4 Pursuant to the agreement, PDP then issued a check to the Tribe in the amount of \$10,000.  
5 Motion, p. 3:12-13. PDP also began preliminary environmental work and hired several Tribe  
6 members for the project. Motion, p. 3:14-16.

7 Over the next six months, the Tribe faced internal power struggles. Id. ¶ 16. On  
8 March 22, 2008, the Executive Committee voted to recall Raymond Brown as chairman. Id.  
9 ¶ 14. The Executive Committee also voted to terminate the MOA. Id. ¶ 15.

10 On June 26, 2008, after the contract had been terminated, the Tribe sent a letter to the  
11 National Indian Gaming Commission (“NIGC”) asking for review of the MOA. Bergin  
12 Decl. attach. 11. About nine months later, on April 2, 2009, the NIGC sent a letter with the  
13 opinion that the MOA is a management contract which is void without the NIGC Chairman’s  
14 approval. Bergin Decl., attach. 12; 25 C.F.R. § 533.7. Such approval was never sought nor  
15 granted.

16 The case came before this Court when PDP/PTP sought arbitration to recoup losses;  
17 the Tribe sought injunctive and declaratory relief from this Court on grounds that the MOA  
18 was void under the Indian Gaming Regulatory Act (“IGRA”; 25 U.S.C. §§ 2701-2721)  
19 making the arbitration clause similarly void. Compl. ¶ 53. This Court ordered the parties to  
20 submit to arbitration to determine the validity of the MOA. Order Compelling Arbitration,  
21 6/23/09.

22 The Arbitrator held for the Tribe. Award, p. 11. The MOA was found void and the  
23 Claimants were held responsible for the costs of arbitration including attorney’s fees. Id.  
24 The Tribe was ordered to return the \$10,000 previously paid to the Tribe by Claimants. Id.  
25 The award was entered “in full settlement of all claims.” Id.

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27 <sup>1</sup>The disparity between the authorization (for an agreement with First Nations) and the execution  
28 (with PDP/PTP) was ruled out as grounds for voiding the contract by the arbitrator under the theory of  
misnomer because at all times the tribe was working directly with Kerrigan, whether through First  
Nations or PTP. Award, p. 5.

1 On December 24, 2009, the Tribe submitted a Request for Modification of the Arbitral  
2 Award, in order to assign a specific dollar value to the award of attorney’s fees. Bergin  
3 Supp. Decl., attach. 1, p.1. After objections from Claimant, the Arbitrator issued a Post-  
4 Award Ruling on January 26, 2010 establishing parameters and conditions for the recovery  
5 of attorney’s fees. Bergin Decl., attach. 18. Before the Arbitrator made any rulings vis à vis  
6 the actual value of attorney’s fees, he resigned due to nonpayment of his retainer. See Bergin  
7 Supp. Decl. ¶ 4 and attach. 2. Claimants have now brought this action to vacate or modify  
8 the Arbitral award.

### 9 STANDARD OF REVIEW

10 The Federal Arbitration Act, 9 U.S.C. §§ 9-11, provides the exclusive grounds for  
11 vacatur and modification of arbitration awards. Hall Street Associates, LLC v. Mattel, Inc.,  
12 552 U.S. 576, 578 (2008). Review of arbitration awards is “both limited and highly  
13 deferential;” an award may be vacated only if it is “‘completely irrational’ or ‘constitutes  
14 manifest disregard of the law.’” Comedy Club, Inc. v. Improv West Associates, 553 F.3d  
15 1277, 1288 (9th Cir. 2009). “Manifest disregard of the law” means that the arbitrator  
16 “recognized the applicable law and then ignored it,” Comedy Club, 553 F.3d at 1290; the law  
17 ignored “must be well defined, explicit, and clearly applicable.” Collins v. D.R. Horton, Inc.,  
18 505 F.3d 874, 879-880 (9th Cir. 2007) (quoting Carter v. Health Net of Cal., Inc., 374 F.3d  
19 830, 838 (9th Cir. 2004) (emphasis removed)). “[T]he ‘completely irrational’ standard is  
20 extremely narrow and is satisfied only ‘where [the arbitration decision] fails to draw its  
21 essence from the agreement.’” Comedy Club, 553 F.3d at 1288. Clearly erroneous findings  
22 of fact or contradictory findings of fact do not render a decision completely irrational.  
23 Bosack v. Soward, 586 F.3d 1096, 1106 (9th Cir. 2009).

24 Neither factual nor legal error are among the enumerated grounds for vacatur. 9  
25 U.S.C. § 10. This stems from well-developed Ninth Circuit case law: “confirmation is  
26 required even in the face of erroneous findings of fact or misinterpretations of law.” Kyocera  
27 Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 997 (9th Cir. 2003) (en banc).  
28 See also Coutee v. Barrington Capital Group, LP, 336 F.3d 1128, 1133 (9th Cir. 2003). The

1 Ninth Circuit recognized, though, that federal courts “will not confirm an arbitration award  
2 that is legally irreconcilable with the undisputed facts” and that “an arbitrator’s failure to  
3 recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard  
4 for the law.” Coutee, 336 F.3d at 1133.

### 5 DISCUSSION

6 Claimants attack the arbitrator’s award on three grounds. First, they claim that the  
7 arbitrator exceeded his authority by disregarding one of the stipulated facts, an action  
8 Claimants argue is “manifest disregard for the law” under Coutee. Second, Claimants posit  
9 that the arbitrator manifestly disregarded the law by not applying estoppel or retroactive  
10 ratification here. Finally, Claimants hold that even if the other parts of the award stand, the  
11 attorney’s fees should be thrown out because the Tribe failed to request them in the  
12 arbitration proceedings.

13 The Tribe counters on several fronts. First, the Tribe contends that the motion was  
14 untimely. Next, the Tribe claims that the MOA was found to be void for two independent  
15 reasons: first, the MOA was never received regulatory approval as required under the IGRA;  
16 second, the MOA was never approved by the Tribe’s General Council and thus is void under  
17 tribal law. Claimants only counter the second of these two independent arguments, and  
18 largely ignore the first. Finally, the Tribe asserts that the award of attorney’s fees was not  
19 only appropriate, but mandatory under California law.

20 As noted above, Claimants fail to account for the arbitrator’s second independent  
21 justification for ruling against them: the contract was void because it did not receive the  
22 required regulatory approval. Claimants may be correct that the majority of the arbitrator’s  
23 opinion focused on the issue of tribal approval, it is not the case that the arbitrator “mentions  
24 such issue only in passing.” Mot. at 6. The arbitrator wrote that the MOA “should have  
25 received NIGC approval before it became operative.” Award at 10. There is no getting  
26 around this statement. Therefore, the question of whether the arbitrator improperly ignored  
27 stipulated facts is immaterial. The arbitrator’s ruling on the merits must stand because his  
28 determination regarding regulatory approval was not in manifest disregard of the law.

1           The final question is whether the arbitrator's award of attorney's fees to the tribe  
2 should stand. This Court concludes that the arbitrator's award of fees and costs to the Tribe  
3 was proper because the MOA was governed by California law, which permitted such an  
4 award, and further concludes that the Tribe is entitled to recoup attorney's fees and costs  
5 incurred in defending against this motion in Federal Court for the same reason.

6 I.       Timeliness of the Motion

7           Claimants admittedly filed this motion late, apparently due to the attorney's slow  
8 wristwatch. Bergin Supp. Decl., p.3:7-10. He thought he had filed it before midnight March  
9 8, 2010, when in fact he filed it at 1:33 AM, March 9. Id. The Tribe now claims that the  
10 motion was untimely, exceeding the three month deadline for filing a motion to vacate or  
11 modify an award. 9 U.S.C. § 12. The award was emailed to all parties December 7, 2009.  
12 The three month deadline was on March 7, 2010, which was a Sunday, thus the deadline was  
13 extended to Monday March 8, 2010. It seems that counsel worked feverishly to submit the  
14 motion on March 8, but failed.

15           Claimants now bring several arguments supporting a deadline later than March 8.  
16 First, they claim that the statute of limitations was tolled pending resolution of the Tribe's  
17 December 24 Request for Modification of Arbitration Award. Second, they claim the statute  
18 should be equitably tolled. Third, they argue that the statute did not begin to run until they  
19 received mail service, which was sent December 23.

20           Claimants first cite well-developed caselaw holding that courts should refrain from  
21 reviewing an arbitration award until it is final and binding. See, e.g., Kenner v. Dist. Council  
22 of Painting and Allied Trades No. 36, 768 F.2d 1115, 1118 (9th Cir. 1985); Reply, p. 7:6-18.  
23 The Ninth Circuit in Millmen held that the award was not final when the arbitrator retained  
24 jurisdiction over matters undecided on which the parties might not agree. Millmen Local 550  
25 v. Wells Exterior Trim, 828 F.2d 1373, 1376-77 (9th Cir. 1987). Here, the arbitrator, after  
26 the Tribe's Request for Modification, similarly claimed jurisdiction to oversee the  
27 calculations of attorney's fees and Claimants' objections to them. Therefore, because the  
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1 arbitration was not truly final as of December 7, the statutory period did not begin until later.  
2 Therefore, the motion was timely.

3 Because this Court finds this first argument persuasive, it does not reach the latter two  
4 arguments.

5 II. The MOA was Void Under IGRA

6 The MOA was null and void because it was in fact a management contract and the  
7 Chairman of the NIGC never approved of the agreement. See Award, p. 10. Because of this,  
8 we need not reach the independent question of whether the Arbitrator overstepped his  
9 authority in also voiding the agreement based on the Tribe's General Council's purported  
10 failure to approve of the document before it was executed, as required by the Tribe's  
11 Constitution. Id. Because the arbitrator's conclusion that MOA required regulatory approval  
12 is not "completely irrational," his decision cannot be set aside.

13 A. Legal Background

14 Pursuant to authority granted in 25 U.S.C. § 2702(b)(1), the NIGC has promulgated  
15 regulations to implement the provisions of the IGRA. One of these regulations, found at 25  
16 C.F.R. § 533.7 states that "[m]anagement contracts . . . that have not been approved by the  
17 Chairman in accordance with the requirements of part 531 of this chapter and this part, are  
18 void."

19 The NIGC has also issued bulletins to provide guidance on issues that may come  
20 within the purview of the IGRA.<sup>2</sup> NIGC Bulletin 93-3 states that "if a tribe or contractor is  
21 uncertain whether a gaming-related agreement requires the approval of either the NIGC or  
22 the BIA, they should submit those agreements to the NIGC." NIGC Bulletin 94-5 gives  
23 guidance to Indian tribes and entities that may deal with them regarding what constitutes a  
24 management contract, stating:

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27 <sup>2</sup>While these bulletins and the later-cited informal opinion letter from the NIGC are not entitled  
28 Chevron deference, they may be accepted by the court as persuasive. See First American Kickapoo v.  
Multimedia Games, 412 F.3d 1166, 1174 (10th Cir. 2005) (citing SUWA v. Dabney, 222 F.3d 819, 828  
(10th Cir. 2000); Skidmore v. Swift, 323 U.S. 134, 140 (1944)).

1 Management encompasses many activities (e.g., planning, organizing, directing,  
2 coordinating, and controlling). The performance of any one of such activities with  
3 respect to all or part of a gaming operation constitutes management for the  
4 purpose of determining whether any contract or agreement for the performance of  
5 such activities is a management contract that requires approval.

6 NIGC Bulletin 94-5 provides further guidance regarding the potential risk of acting  
7 pursuant to a management contract that has not been approved by the NIGC Chairman:

8 A management contract that has not been approved by the Chairman is void.  
9 Furthermore, the management of a gaming operation under a “management”  
10 contract or agreement that has not been approved could result in the gaming  
11 operation being closed. The consequences to the parties are:

- 12 • The tribe would have to close down the operation or operate it on  
13 its own, and
- 14 • The management contractor would have to vacate the operation and  
15 could be subjected to legal action to return to the tribe any funds it  
16 received under the contract.

17 B. The Terms of the MOA

18 The MOA, which refers to PDP as the “Company,” states that:

19 the Parties unequivocally agree by entering into this MOA to enter into the  
20 definitive and legally binding agreements (“definitive agreements”) that shall  
21 provide the governing details for the relationship between the Tribe and the  
22 Company with respect to the planning, financing, development and management  
23 of a Casino(s) and related facilities . . . .

24 See MOA Cl. 5.

25 The MOA further requires that the Tribe enter into an exclusive management  
26 agreement with PDP, which would give PDP the right to manage day-to-day operations at the  
27 casino. See MOA Cl. 7; art II §§ 1-2. In exchange for management services over five years,  
28 the MOA specifies that the management company shall be paid twenty-five percent of the  
casino’s net gaming revenues. See MOA art. II §§ 3-4. The MOA provides that the Tribe  
must approve PDP as the manager of the casino prior to execution of a subsequent

1 Development Agreement, but that such approval shall be subject to the finalization of the  
2 Management Agreement required by MOA art. II § 1, “and its approval by the NIGC.” The  
3 MOA also specifies that the agreement shall terminate “[i]n the event that the Company or its  
4 designee is not so approved as the manager by the NIGC.” See MOA art. III § 4.

5 C. Discussion

6 The arbitrator’s conclusion that the MOA is a “management contract,” and is therefore  
7 void without approval by the NIGC Chairman, is perfectly reasonable. The Tribe cites in the  
8 Complaint to three similar cases where other courts found a contract was null and void  
9 because it was not approved by the NIGC Chairman. See First American Kickapoo  
10 Operations, LLC v. Multimedia Games, Inc., 412 F.3d 1166 (10th Cir. 2005); United States  
11 v. Casino Magic Corp., 293 F.3d 419 (8th Cir. 2002); Machal, Inc. v. Jena Band of Choctaw  
12 Indians, 387 F. Supp. 2d 659 (W.D. La. 2005).

13 Like those contracts, the Tribe’s MOA includes many characteristics of a  
14 “management contract.” The MOA states that PDP “shall exclusively manage the day-to-day  
15 operations of the Casino(s)” on the Tribe’s lands. The MOA binds the Tribe to entering into  
16 a management contract with PDP to manage all such casinos, and forbids the Tribe from  
17 operating a gaming operation on its own. The MOA also contains provisions relating to  
18 accounting and reporting, the length of the envisioned management relationship, and the  
19 compensation based on a percentage of net gaming revenues. The MOA contemplates that  
20 the parties will enter into a subsequent agreement to solidify some of the management terms,  
21 but the MOA itself binds the Tribe to the management services of PDP. Accordingly, it is a  
22 contract that cannot be enforced without approval of the NIGC Chairman.

23 Although not binding, the NIGC’s Acting General Counsel arrived at the same  
24 conclusion.<sup>3</sup> See Bergin Decl., attach.12. In response to an inquiry from the Tribe, Ms.  
25 Coleman reviewed the MOA. She concluded that “[i]t is clear that the purpose of the  
26 Agreement is to bind [PDP] to develop and manage a casino for the Tribe. Moreover, the  
27 exclusive right to manage the day-to-day operations of the casino, the compensation under

28 \_\_\_\_\_  
<sup>3</sup>See n.4, *supra*.

1 the Agreements, the term of years, and hiring of employees are all factors that indicate a  
2 management relationship.” Id. In closing, Coleman stated: “It is my opinion that the  
3 Agreement constitutes a management agreement requiring the approval of the NIGC  
4 Chairman.” Id.

5 Claimants do not attempt to refute the Tribe’s characterization of the MOA. Rather,  
6 they put all of their effort into proving that the Tribe’s General Council properly authorized  
7 Chairman Brown to execute the MOA. Because the MOA is clearly void for lack of NIGC  
8 approval, we need not reach the second issue of whether the General Council authorized  
9 execution of the MOA. Lack of NIGC approval is a completely independent ground for  
10 voiding the MOA, and the arbitrator’s award must therefore be affirmed.

11 III. Attorney’s Fees

12 A. Attorney’s Fees in Arbitration

13 A federal court may modify or correct an award “[w]here the arbitrators have awarded  
14 upon a matter not submitted to them.” 9 U.S.C. § 11(b). A court may “strike all or a portion  
15 of an award pertaining to an issue not at all subject to arbitration.” Schoenduve Corp. v.  
16 Lucent Techs., Inc., 442 F.3d 727, 732 (9th Cir. 2006) (quoting Kyocera Corp., 341 F.3d at  
17 997-98). In this matter, the MOA authorized an award of attorney’s fees to the prevailing  
18 party in arbitration. MOA §§ VI ¶ 6e. Throughout the proceedings, Claimants maintained  
19 that if they prevailed, they were entitled to attorney’s fees and arbitration costs. Claimants’  
20 Statement of Demand ¶ 13; Claimants’ Closing Arguments. Respondent Tribe did not make  
21 that assertion in the arbitration proceedings. Post-Award Ruling, p. 2. Claimants now ask  
22 this Court to modify the arbitral award pursuant to 9 U.S.C. § 11(b) so as to remove the  
23 award of attorney’s fees to the Tribe because they were not an issue submitted to the  
24 arbitrator.

25 Under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, an arbitrator has no inherent  
26 authority, aside from contractual or statutory authority, to award attorney’s fees. Similarly,  
27 under AAA Commercial Arbitration Rule R-43(d)(ii), an arbitrator may not (barring statutory  
28 or contractual authority) award attorney fees unless all parties have requested them. The

1 FAA and the Arbitration Rule have identical caveats: the arbitrator is barred from awarding  
2 attorney’s fees if the issue was not submitted, *unless* he has statutory or contractual authority.  
3 The MOA itself gives the arbitrator the necessary contractual authority to grant attorney’s  
4 fees to the prevailing party, and California law confers on the arbitrator statutory authority to  
5 award fees even in the face of a finding that the contract is void.<sup>4</sup> Therefore, the award must  
6 stand.

7 California Civil Code § 1717 authorizes the award of contractual attorneys’ fees even  
8 where that contract has been held to be void. The California Supreme Court explained in  
9 Hsu held that “a party is entitled to attorney fees under section 1717 ‘even when the party  
10 prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the  
11 other party would have been entitled to attorney's fees had it prevailed.’” Hsu v. Abbara, 9  
12 Cal. 4th 863, 870 (1995) (citing Bovard v. American Horse Enterprises, Inc., 201  
13 Cal.App.3d 832, 842 (1988)). The underlying policy is to establish parity of remedies in a  
14 situation where attorney’s fees would otherwise be available to only one party. Hsu, 9 Cal.  
15 4th at 870. The Court further explained that such a grant of fees in a dispute over a contract  
16 with a fee provision is mandatory, not discretionary. Hsu 9 Cal. 4th at 872, 877. The Ninth  
17 Circuit, before Hsu, reached the same conclusion interpreting section 1717. Diamond v.  
18 John Martin Co., 753 F.2d 1465, 1467 (9th Cir. 1985) (“Where, as here, a party sued under  
19 an alleged contract containing an attorney’s fee clause prevails by establishing that there was  
20 no such contract, that party is entitled to a section 1717 fee award.”).

21 Claimants argue, citing Roy Allen, that the California Civil Code does not apply here  
22 because this is not a diversity action. See Roy Allen Slurry Seal v. Laborers Int’l Union, 241  
23 F.3d 1142, 1146 (9th Cir. 2001). On the contrary, although this case is not a diversity action,

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25 <sup>4</sup> The arbitrator expressly noted that the award of attorney’s fees did not stem from the MOA,  
26 but “on merit for work performed” “because of their failure to prove their case.” Post-Award Ruling,  
27 Bergin Decl. attach. 18. Based upon the above-cited authorities, the arbitrator did not have discretion  
28 to award fees for that reason. However, the question before this Court is not whether the arbitrator  
identified the proper legal justification for the award, but rather whether “*any* rational basis exists for  
the award.” Lifecare Intern., Inc. v. CD Med., Inc., 68 F.3d 429 (11th Cir. 1995) (emphasis in original).

The parties agreed that the MOA was to be governed by the laws of California. MOA, § VII,  
¶ 3.

1 it is an action “on the contract” and the contract in question (the MOA) has a choice of law  
2 provision naming California law. MOA, § VII, ¶ 3. As in Resolution Trust, where a contract  
3 contains an attorney’s fees clause and that contract is explicitly governed by California law, a  
4 federal court must apply the state law governing attorney’s fees. Resolution Trust Corp. v.  
5 Midwest Federal Savings, 36 F.3d 785, 800 (9th Cir. 1993). Thus, Roy Allen’s restriction  
6 against using state attorney’s fee law does not apply because this is a contract action  
7 explicitly governed by California law. Like Resolution Trust, the contract at issue here, the  
8 MOA, contains an attorney’s fee provision and is explicitly governed by California law. See  
9 also Lafarge v. Kaiser Cement, 791 F.2d 1334, 1339, 1341 (9th Cir. 1986) (“The  
10 Kaiser-Foley contract provides that Kaiser is entitled to attorney fees in any action to enforce  
11 the contract. The contract also provides that it is to be interpreted in accordance with  
12 California law. California Civil Code, section 1717 makes the contract provision for attorney  
13 fees applicable to Foley also, if Kaiser’s motion constitutes an action ‘on the contract’.”).

14 So, regardless of how the arbitrator characterized his grant of the fee award, the Tribe  
15 was and is entitled to attorney’s fees under the Hsu and Diamond interpretations of section  
16 1717. The arbitrator did not manifestly disregard any law here. Claimant stresses that  
17 attorney’s fees were not an issue submitted by both parties for arbitration, but it cannot  
18 escape the fact that if it had prevailed, Claimant would have a contractual right to attorney’s  
19 fees through the MOA. This is just the situation section 1717 was meant to address and both  
20 California and the Ninth Circuit are clear that in this type of situation, the Tribe is entitled to  
21 recover attorney’s fees even though the MOA is void. The exact value of the fees is an issue  
22 for arbitration, not this Court, so the issue of the exact value of attorney’s fees for the  
23 arbitration must be remanded to arbitration for calculation.

24 B. Attorney’s Fees Stemming from This Motion

25 The Tribe contends that Claimants are also liable for fees incurred in defending  
26 against this motion to vacate, in addition to fees from the arbitration.<sup>5</sup> See, e.g., LaFarge,

27  
28 <sup>5</sup>The arbitrator held in the Post-Award Ruling (Bergin Decl., attach. 18, p.2) that he had no jurisdiction to make an award of attorney’s fees for this district court action.

1 791 F.2d at 1340-41. The Arbitration Clause of the MOA states that the prevailing party in  
2 arbitration is entitled to attorney's fees not only for the arbitration, but also for "the  
3 enforcement of its judgment." MOA, § VI, ¶ 6e. Because the controlling law of the MOA is  
4 California law, attorney's fees for this action should be governed by section 1717, as they  
5 were in Lafarge. 791 F.2d at 1341. Under Lafarge, the prevailing party in a federal action to  
6 enforce an arbitration agreement is entitled to attorney's fees under section 1717. 791 F.2d at  
7 1340-41. Therefore, the Tribe is entitled to fees.

8 To conclude, the Court finds that the Tribe is entitled to attorney's fees and other costs  
9 stemming from the arbitration proceedings. The valuation of those fees are REMANDED to  
10 arbitration for assessment, as it is the province of the arbitrator to assess the value of the  
11 awards granted in arbitration.<sup>6</sup> Further, the Tribe is entitled to attorney's fees stemming from  
12 defending the motion in this Court, pursuant to California Civil Code section 1717 as  
13 interpreted in Lafarge.

#### 14 CONCLUSION

15 For the abovementioned reasons, the motion to vacate or modify the arbitral award is  
16 DENIED. The issue of assessment of fees and costs stemming from the arbitration is  
17 REMANDED to arbitration. Further, the Tribe is entitled to recover attorney's fees and costs  
18 stemming from this federal action. The Tribe should therefore submit a proposed order as to  
19 that issue in addition to a declaration setting forth sufficient evidence regarding the fees to  
20 which it is entitled for opposing this motion.<sup>7</sup>

21 **IT IS SO ORDERED.**



22  
23 May , 2010

24 **CHARLES R. BREYER**  
25 **UNITED STATES DISTRICT JUDGE**

26 <sup>6</sup> The Tribe has represented to this Court that funds now exist to pay the arbitrator, so  
27 presumably there will be no problem securing the services of an arbitrator.

28 <sup>7</sup> This Court is also in receipt of Defendants' Motion for Leave to File Motion for  
Reconsideration. That motion is moot in light of this written order, and Defendants are advised to  
resubmit such a motion if it remains appropriate.