In the Supreme Court of the State of California

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff and Appellant,

v.

GAVIN C. NEWSOM, as Governor,

Defendant and Respondent.

Case No. S238544

Third Appellate District, Case No. C075126
Sacramento County Superior Court,
Case No. 34-2013-80001412CUWMGDS
Honorable Eugene Balonon, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

XAVIER BECERRA (SBN 118517)
Attorney General of California
*MICHAEL J. MONGAN (SBN 250374)
Solicitor General
JANILL L. RICHARDS (SBN 173817)
Principal Deputy Solicitor General
SARA J. DRAKE (SBN 102565)
Senior Assistant Attorney General
TIMOTHY M. MUSCAT (SBN 148944)
Deputy Attorney General
455 Golden Gate Ave.
San Francisco, CA 94102-7004
Telephone: (415) 510-3920
Fax: (415) 703-5480
Michael.Mongan@doj.ca.gov
Attorneys Respondent

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Respondent files this supplemental brief to address new authorities, new legislation, or other matters that were not available in time to be included in the merits briefing.

1. Status of respondent. Governor Gavin C. Newsom assumed office on January 7, 2019, and is substituted as respondent in this action, in place of former Governor Edmund G. Brown Jr. (Code of Civ. Proc., § 368.5; *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 936, fn. 2.)

2. Factual and legal developments regarding class III gaming at the Yuba site. As explained in the answer brief on the merits (ABM 17-19), Governor Brown negotiated and executed a compact with the Enterprise Rancheria of Maidu Indians of California (Enterprise) for class III gaming on a parcel of land in Yuba County (the Yuba site). The compact was conditioned on the Yuba site becoming Indian lands under a process governed by two federal statutory schemes, the Indian Reorganization Act and the Indian Gaming Regulatory Act (IGRA). IGRA empowers the Secretary of the Interior to authorize gaming on recently acquired Indian lands if the Secretary determines that it would be in the best interest of the tribe and not detrimental to the surrounding community, and the governor of the affected State concurs in that determination. 25 U.S.C. § 2719(b)(1)(A). Governor Brown concurred in the Secretary's interest/detriment determination for the Yuba site and executed a compact with Enterprise for class III gaming at that location in August 2012. In November 2012 the federal government took the Yuba site into trust for gaming for Enterprise. Another tribe operating a class

III gaming facility, the United Auburn Indian Community of the Auburn Rancheria (United Auburn), filed suit in state court, claiming that the Governor's concurrence violated the separation of powers doctrine of the California Constitution. Because the Legislature declined to ratify the compact, the Secretary ultimately prescribed the gaming procedures for the Yuba site (see 25 U.S.C. § 2710(d)(7)), which became effective in August 2016. (ABM 19, fn. 5; *Estom Yumeka Maidu Tribe of the Enterprise Rancheria of Cal. v. Cal.* (E.D. Cal. 2016) 163 F.Supp.3d 769, 772-775.)[1]

After briefing was complete in this case, the Ninth Circuit decided an appeal involving claims that the federal government violated various federal laws in taking the Yuba site into trust for Enterprise. The Ninth Circuit affirmed the district court's grant of summary judgment in favor of defendants. (*Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Zinke* (9th Cir. 2018) 889 F.3d 584, 593-594, 608.) That decision mentions in passing that, "[p]ursuant to 25 U.S.C. § 2719(b)(1)(A), the [federal government] sought the concurrence of California Governor Jerry Brown in its decision. Governor Brown concurred by letter dated August 30, 2012." (*Id.* at p. 593.) The Governor was not a party to that case, however, and his concurrence authority was not at issue.

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[1] See also Secretarial Procedures for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria (effective Aug. 12, 2016) at A-2, available at <http://www.cgcc.ca.gov/documents/compacts/ORIGINAL_COMPACTS/Enterprise%20Secretarial%20Procedures%202016.pdf> [as of May 21, 2020].

Enterprise opened its gaming facility at the Yuba site, known as the Hard Rock Casino at Fire Mountain, in the fall of 2019.[2] The COVID-19 pandemic has affected the operations of businesses across the State, including Enterprise's new casino. As of May 21, 2020, the casino's website stated that it is temporarily closed.[3]

3. Legal authority addressing other gubernatorial concurrences. The Governor is not aware of any post-briefing case law expressly addressing the nature or scope of governors' concurrence authority with respect to determinations under 25 U.S.C. § 2719(b)(1)(A), though that authority is mentioned in a number of cases. In *Stand Up for California! v. United States Department of the Interior* (E.D. Cal. 2018) 328 F.Supp.3d 1051, for example, the district court rejected claims that the Secretary's decision to issue secretarial procedures governing class III gaming on Indian lands held in trust for the North Fork Rancheria of Mono Indians (North Fork) violated various federal laws. (*Id*. at pp. 1060-1072, 1074-1075.)[4] Although the plaintiffs

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[2] See Hard Rock Hotel and Casino Sacramento (archived webpage) (Nov. 5, 2019) https://web.archive.org/web/20191105023954/https://www.hardrockhotels.com/sacramento> [as of May 21, 2020].

[3] See Hard Rock Hotel and Casino Sacramento (archived webpage) (May 13, 2020) <https://web.archive.org/web/20200513134224/https://hardrockhotels.com/sacramento> [as of May 21, 2020].

[4] Stand Up for California! and the North Fork Tribe filed amicus curiae briefs in this case (Case No. S238544). Both are parties in *Stand Up for California! v. State of California* (*North*

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claimed that the secretarial procedures were invalid because "'the Governor of California lacked authority to concur in the Secretary's two-part determination,'" the court granted summary judgment in favor of the defendants on that claim on the ground that they had failed to join the Governor as an indispensable party. (*Id.* at p. 1072.) The court declined to stay the federal action pending this Court's decision in Case No. S239630. (*Id.* at pp. 1072-1074; see also *Picayune Rancheria of Chukchansi Indians v. U.S. Dept. of the Interior* (E.D. Cal. Aug. 18, 2017) 2017 WL 3581735, *14 [holding that plaintiff "is issue precluded from re-litigating whether California is an indispensable party to claims challenging the validity of the Governor of California's concurrence with the Secretary's two-part determination" for the North Fork parcel].)

In *Stand Up for California! v. United States Department of Interior* (D.C. Cir. 2018) 879 F.3d 1177, another challenge involving the same North Fork parcel, the D.C. Circuit mentioned in passing that the Governor of California concurred in the federal government's determination to take the parcel into trust for North Fork. (*Id.* at p. 1181.) But that case addressed the federal government's authority and discretion under federal law, and not the scope of the Governor's authority. The court held that the federal government's "decision [to take the land into

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Fork Rancheria of Mono Indians), Case No. S239630. The Court has deferred further action in that matter pending its consideration and disposition of this case.

trust] was reasonable and consistent with applicable law." (*Id*. at p. 1192; see also *Club One Casino, Inc. v. U.S. Dept. of the Interior* (E.D. Cal. 2018) 328 F.Supp.3d 1033, 1036, 1038 [rejecting Administrative Procedure Act challenge to the secretarial procedures for the North Fork parcel, and mentioning in passing Governor Brown's concurrence].)

Similarly, in *Kalispel Tribe of Indians v. United States Department of the Interior* (E.D. Wash. July 11, 2019) 2019 WL 3037048, the district court rejected a challenge to the federal government's determination to take certain land into trust for the Kalispel Tribe of Indians for gaming purposes (*id.* at p. *5), and mentioned in passing that Washington State "Governor Jay Inslee concurred" (*id.* at p. *1).

4. Gaming on Indian lands in California acquired after 1988. Recent decisions and actions related to class III gaming in California further undermine United Auburn's claim that "California's expressed public policy" prohibits tribal casino-style gaming "except on pre-1988 reservation lands." (OBM 30; see ABM 33, 36-37.)

As of May 2020, four different California Governors have negotiated compacts for class III gaming with over 70 Indian tribes since 1999.[5] The federal government has issued additional advisory opinions to California tribes concluding that lands acquired after 1988 are (or would be) gaming eligible under

[5] See generally Ratified Tribal-State Gaming Compacts (New and Amended) <http://www.cgcc.ca.gov/?pageID=compacts> [as of May 21, 2020].

IGRA.[6] In 2018, the federal government determined that lands taken into trust in 1994 for Big Lagoon Rancheria are gaming eligible because they are within the "contiguous lands" exception. (NIGC, Big Lagoon Rancheria Opn. (Oct. 4, 2018) pp. 6, 12-13; see 25 U.S.C. § 2719(a)(1).)[7] Similarly, in 2017, the federal government determined that a parcel taken into trust in 2014 for the Coyote Valley Band of Pomo Indians is gaming eligible as "contiguous lands." (NIGC, Coyote Valley Band of Pomo Indians Opn. (Oct. 30, 2017) pp. 1, 2, 20-21.) In 2012, well before the land was taken into trust, the Governor negotiated and the Legislature ratified a compact with the Coyote Valley Band of Pomo Indians that allowed the Tribe to conduct class III gaming at up to two facilities located on existing reservation lands "or on any new lands taken into trust for gaming by the United States contiguous thereto."[8]

Similarly, the State's compact with the Wilton Rancheria permits the Tribe to operate class III gaming on lands recently

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[6] See generally Nat. Indian Gaming Com. (NIGC), Indian Lands Opns. <https://www.nigc.gov/general-counsel/indian-lands-opinions> [as of May 21, 2020].

[7] Big Lagoon Rancheria is awaiting secretarial procedures governing class III gaming for these trust lands. (See *Big Lagoon Rancheria v. Cal.* (9th Cir. 2015) 789 F.3d 947, 955-956.)

[8] Amended Tribal-State Gaming Compact Between the Coyote Valley Band of Pomo Indians and the State of California (executed July 27, 2012 and ratified Sept. 17, 2012) § 4.1 <http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Amended_Compact_for_Coyote_Valley_Reservation.pdf> [as of May 21, 2020].

taken into trust as "restored lands" as described in a January 2017 Record of Decision.[9] While those lands were taken into trust before respondent filed the answer brief on the merits, the Governor executed and the Legislature ratified the compact that permits class III gaming on the lands after that brief was filed.

The Governor has continued to negotiate and execute, and the Legislature has continued to ratify, tribal-state gaming compacts that recognize the possibility of future class III gaming on Indian lands acquired after 1988. Six recently ratified compacts each include a sentence (in section 4.2) providing that: "The Tribe retains the right to acquire additional gaming eligible Indian lands under IGRA and, subject to the provisions of section 15.0 [governing amendments and renegotiations], to request negotiation of an amendment to this Compact to authorize Class III Gaming on the subsequently acquired eligible Indian land."[10]

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[9] Tribal-State Gaming Compact Between the State of California and Wilton Rancheria (executed July 19, 2017 and ratified Oct. 3, 2017) § 4.2 and Ex. A, pp. 2-3 <http://www.cgcc.ca.gov/documents/compacts/original_compacts/Wilton_Rancheria_2017.pdf> [as of May 21, 2020]; see 25 U.S.C. § 2719(b)(1)(B)(iii).

[10] See compacts for Big Valley Band of Pomo Indians (executed Aug. 16, 2018 and ratified Sept. 27, 2018); Mechoopda Indian Tribe of Chico Rancheria (executed Aug. 8, 2018 and ratified Sept. 27, 2018); Quechan Tribe of the Fort Yuma Indian Reservation (executed Aug. 31, 2017 and ratified Oct. 3, 2017); Susanville Indian Rancheria (executed Oct. 19, 2018 and ratified Oct. 9, 2019); Torres-Martinez Band of Desert Cahuilla Indians (executed Aug. 16, 2018 and ratified Sept. 27, 2018); and the Tuolumne Band of Me-Wuk Indians (executed Aug. 18, 2017 and ratified Oct. 3, 2017), available at <http://www.cgcc.ca.gov/?pageID=compacts> [as of May 21, 2020].

Tribe-specific provisions allowing for class III gaming on after acquired lands are included in two additional, recently negotiated and ratified gaming compacts.[11] The Tule River Indian Tribe compact, for example, specifically provides that "[i]f additional land is placed in trust for the Tribe pursuant to 25 U.S.C. § 2719(b)(1)(A), the Tribe may request and the State shall agree to enter into negotiations to allow the Tribe to operate a Gaming Facility on that trust land."[12]

In addition to Enterprise, other Tribes are in the process of constructing, or have recently constructed, class III gaming facilities on Indian lands in California that were acquired after 1988. For example, in November 2019, the Agua Caliente Band of Cahuilla Indians began construction of a gaming facility in Cathedral City, Riverside County, on contiguous lands taken into trust in October 2019.[13] The Agua Caliente Tribe's compact

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[11] See section 4.2 in compacts for La Jolla Band of Luiseno Indians (executed Aug. 1, 2018 and ratified Sept. 27, 2018) and Tule River Indian Tribe (executed Aug. 31, 2017 and ratified Oct. 3, 2017), available at <http://www.cgcc.ca.gov/?pageID=compacts> [as of May 21, 2020].

[12] The Secretary has asked the Governor to concur in the federal government's interest/detriment determination for land proposed to be taken into trust for gaming for the Tule River Indian Tribe. (See Hass, *Hurdle cleared for Eagle Mountain Casino to go from reservation to Porterville*, Visalia Times-Delta (Jan. 9, 2020) <https://www.visaliatimesdelta.com/story/news/2020/01/09/hurdle-cleared-churdle-cleared-for-casino-to-go-from-res-to-portervilleasino-go-res-porterville/2844773001/> [as of May 21, 2020].) The Secretary's request is pending.

[13] See *Agua Caliente Band breaks ground on third gaming facility* (Nov. 5, 2019) <https://www.indianz.com/IndianGaming/

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allows for gaming on after-acquired land subject to certain conditions, as set out in section 4.2.[14]

5. State precedents on separation of powers. On the subject of the state separation of powers doctrine (see ABM 23-24), this Court recently reiterated that "[a]lthough the language of California Constitution article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government, California decisions long have recognized that, in reality, the separation of powers doctrine does not mean that the three departments of our government are not in many respects mutually dependent . . . , or that the actions of one branch may not significantly affect those of another branch." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 846, citations and italics omitted.) Thus, the fact that a governor's concurrence in an interest/detriment determination might involve "policy" considerations does not make that action "legislative" in a constitutional sense. (See ABM 45-52.) Only those actions of one branch that "materially impair the functioning" of another are constitutionally impermissible. (*Briggs*, *supra*, at p. 848.) The

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2019/11/05/agua-caliente-band-breaks-ground-on-thir.asp> [as of May 21, 2020]; see also Dept. of the Interior, Dec. Letter re Cathedral City Parcel 33 (Oct. 17, 2019), available at <https://tinyurl.com/y8hk4er6> [as of May 21, 2020].

[14] See Tribal-State Compact Between the State of California and the Agua Caliente Band of Cahuilla Indians (executed Aug. 4, 2016 and ratified Aug. 29, 2016) <http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Agua_Caliente_Compact_2016.pdf> [as of May 21, 2020].

Governor and the Legislature have interlocking responsibilities and prerogatives related to tribal gaming on Indian lands. The Governor's exercise of his concurrence authority is consistent with the State's decision to participate in the IGRA scheme and does not materially impair any power of the Legislature. (See ABM 52-54.)

6. Legislative developments. The Legislature introduced a bill during the pendency of briefing in this case that would have required the Governor to notify the Legislature of any request from the Secretary to the Governor for concurrence in the interest/detriment determination, and would have prohibited the Governor from concurring in that determination without the prior approval, by concurrent resolution, of the Legislature. (Assem. Bill 1377 (2017-2018 Reg. Sess.).) After briefing was completed, the Assembly failed to pass that bill before the final day of the legislative session, and the bill died by operation of article IV, section 10(c) of the California Constitution.[15]

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[15] See Cal. Leg. Info., Bill History, Assem. Bill 1377, available at <https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB1377> [as of May 21, 2020].

Dated: May 22, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California

/s/ Michael J. Mongan

MICHAEL J. MONGAN
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
SARA J. DRAKE
Senior Assistant Attorney General
TIMOTHY M. MUSCAT
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13-point Century Schoolbook font and contains 2,410 words.

Dated: May 22, 2020

XAVIER BECERRA
Attorney General of California

/s/ Michael J. Mongan

MICHAEL J. MONGAN
Solicitor General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE

Case Name: **United Auburn Indian Community v. Newsom, et al.**
No.: **S238544**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. Participants who are registered with TrueFiling will be served electronically.

On May 22, 2020, I electronically served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** by transmitting a true copy via this Court's TrueFiling system to the participants listed below:

Thomas F. Gede
Morgan, Lewis, & Bockius LLP
One Market Street, Spear Tower
San Francisco, CA 94015
Attorneys for United Auburn Indian Community of the Auburn Rancheria Plaintiff and Appellant

Frank R. Lawrence
Law Office of Frank Lawrence
578 Sutton Way, No. 246
Grass Valley, CA 95945
Attorneys for Amicus Curiae Mooretown Rancheria of Maidu Indians of California

Matthew Gordon Adams
Dentons US LLP
One Market Plaza, Spear Tower, 24th Fl.
San Francisco, CA 94105
Attorneys for Amicus Curiae Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California

Christopher Edmunds Babbitt
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, North West
Washington, DC 20006
Attorneys for Amicus Curiae North Fork Rancheria of Mono Indians

Todd Lundell
Snell & Wilmer L.L.P.
600 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626
Attorneys for Amicus Curiae Stand Up For California!

Brendan Luke Ludwick
Ludwick Law, APC
P.O. Box 226
Oakhurst, CA 93644
Attorneys for Amicus Curiae Picayune Rancheria of Chukchansi Indians

George Forman
Forman & Associates
4340 Redwood Highway, Suite E352
San Rafael, CA 94903
Attorneys for Amicus Curiae Cachil Dehe Band of Wintun Indians of the Colusa Indian Community : Amicus curiae

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 22, 2020, at Sacramento, California.

A. Cerussi	*/s/ A. Cerussi*
Declarant	Signature

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **United Auburn Indian Community v. Newsom, et al.**
No.: **S238544**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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Clerk of the Court
Third Appellate District
914 Capitol Mall, Fourth Floor
Sacramento, CA 95814

Hon. Eugene L. Balonon
Sacramento Superior Court
720 Ninth Street, Room 611
Sacramento, CA 95814

Matthew Gordon Adams
Dentons US LLP
One Market Plaza, Spear Tower,
24th Fl.
San Francisco, CA 94105
Attorneys for Amicus Curiae Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 22, 2020, at Oakland, California.

Debra Baldwin
Declarant

Debra Baldwin
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA v. BROWN**
Case Number: **S238544**
Lower Court Case Number: **C075126**

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Todd Lundell Snell & Wilmer LLP 250813	tlundell@swlaw.com	e-Serve	5/22/2020 2:53:58 PM
Colin West Morgan, Lewis & Bockius LLP	colin.west@bingham.com	e-Serve	5/22/2020 2:53:58 PM
Timothy Muscat Office of the Attorney General 148944	timothy.muscat@doj.ca.gov	e-Serve	5/22/2020 2:53:58 PM
Thomas Gede Morgan, Lewis & Bockius, LLP	tom.gede@morganlewis.com	e-Serve	5/22/2020 2:53:58 PM
Christopher Babbitt Wilmer Cutler Pickering Hale and Dorr LLP 225813	christopher.babbitt@wilmerhale.com	e-Serve	5/22/2020 2:53:58 PM
Colin West Morgan Lewis & Bockius, LLP 184095	colin.west@morganlewis.com	e-Serve	5/22/2020 2:53:58 PM
Frank Lawrence Law Office of Frank Lawrence	frank@franklawrence.come	e-Serve	5/22/2020 2:53:58 PM
George Forman Forman & Associates 47822	george@gformanlaw.com	e-Serve	5/22/2020 2:53:58 PM
Matthew Adams Denton US LLP	madams@sonnenschein.com	e-Serve	5/22/2020 2:53:58 PM
Kim Collins Snell & Wilmer L.L.P.	kcollins@swlaw.com	e-Serve	5/22/2020 2:53:58 PM

Brendan Ludwick	brendan@ludwick.com	e-Serve	5/22/2020 2:53:58 PM
Frank Lawrence	Frank@Franklawrence.com	e-Serve	5/22/2020 2:53:58 PM

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/22/2020

Date

/s/Ann Cerussi

Signature

Mongan, Michael (250374)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General, Office of the Solicitor General

Law Firm