S238544

Case No. _____

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE
AUBURN RANCHERIA,

Appellant,

v.

EDMUND G. BROWN, JR., in his official capacity as
Governor of the State of California, and DOES 1 through 50 inclusive,

Respondent.

On Review of a Decision of the Court of Appeal
Third Appellate District
Affirming the Judgment Dismissing the Action

REQUEST FOR JUDICIAL NOTICE, MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF THOMAS F. GEDE IN SUPPORT THEREOF

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Attorneys for Appellant UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA

I. REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.252 of the California Rules of Court, and to Evidence Code section 452, appellant, United Auburn Indian Community of the Auburn Indian Rancheria (United Auburn) through its counsel, requests this Court to take judicial notice of (1) a letter from Senator Kevin De Leon to Governor Edmund G. Brown, Jr. dated July 29, 2013, (2) the August 5, 2013 Supplemental Request for Judicial Notice in Support of United Auburn Indian Community of the Auburn Rancheria's Memorandum of Points and Authorities in Opposition to Defendants' Demurrer, attached as Exhibit B, filed in the trial court in the above-captioned matter, and (3) the trial court's August 19, 2013 Ruling on Submitted Matter and Order in the above-captioned matter which, in relevant part, granted United Auburn's Supplemental Request for Judicial Notice.

This request for judicial notice is based on the following points and authorities and Declaration of Thomas F. Gede.

Dated: November 22, 2016 MORGAN, LEWIS & BOCKIUS LLP

By _____
Thomas F. Gede
Attorneys for Appellant

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. The Court May Take Judicial Notice of a Letter From the California State Senate Under Section 452(c) Because It Is An Official Act of the Legislative Department of this State

Evidence Code Section 452(c) allows a Court to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of . . . any state of the United States." As the Comments of the Assembly Committee on Judiciary note, this section should be interpreted broadly and "California courts have taken judicial notice of a wide variety of [official] acts." Cal. Evid. Code § 452, Assembly Committee on Judiciary Comments, *Official acts of the legislative, executive, and judicial departments*.

A letter from the California State Senate to the Governor of California is the proper subject of judicial notice under Section 452(c) as an official act of the legislative branch of this state. *See, e.g., California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 516 n. 8 (2003) (appellate court took judicial notice of a public agency's "All County Letter" which provided counties with current information, including new policies, regarding one of its public programs under both Section 452(c) and 452(h)); *In re Soc. Servs. Payment Cases*, 166 Cal. App. 4th 1249, 1271-72 (2008) (judicial notice proper under Section 452(c) for "All County Letters" issued by the State Department of Social Services, even though the letters were not rendered in accordance with the

Administrative Procedure Act, because the letters were "official acts of the state's executive department"); *Stevens v. Super. Ct.*, 75 Cal. App. 4th 594, 608 (1999) (two letters issued by the Department of Insurance in approving insurance program were subject to judicial notice under Section 452(c) as official acts); *City of Brentwood v. Cent. Valley Reg'l Water Quality Control Bd.*, 123 Cal. App. 4th 714, 728 (2004) (appellate court upheld judicial notice under Section 452(h) of letter sent by legislators to State Water Resources Control Board to protest Board's interpretation of a statute because it exhibited the context in which the Legislature enacted a definition within the statute).

This letter is relevant to show that, as the letter states, California off-reservation gaming is not the subject of an existing state policy.

The letter is authenticated by the Declaration of Thomas F. Gede below.

Accordingly, under Section 452(c), judicial notice is proper and warranted for the following document, and United Auburn requests the Court to take judicial notice of the July 29, 2013 Letter from Senator Kevin De Leon to Governor Edmund G. Brown, Jr., attached as Exhibit A.

B. The Court May Take Judicial Notice of United Auburn's Request for Judicial Notice in the Trial Court, and the Trial Court's Order Granting That Request

Evidence Code Section 452(c) allows the Court to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of . . . any state of the United States."

Both United Auburn's Supplemental Request for Judicial Notice, and the trial court's order granting that request, are judicially-noticeable because both were part of the court's file in the above captioned matter, which in turn were part of the record on appeal in this case.

Both are relevant because they show that the trial court, and the Court of Appeal, had Senator De Leon's letter before them when they considered and ruled on this case.

Both documents are authenticated by the Declaration of Thomas F. Gede below.

Accordingly, under Section 452(c), judicial notice is proper and warranted for the following documents, and United Auburn requests the Court to take judicial notice thereof:

1. The August 5, 2013 Supplemental Request for Judicial Notice in Support of United Auburn Indian Community of the Auburn Rancheria's Memorandum of Points and Authorities in Opposition to Defendants' Demurrer, attached as Exhibit B.

2. August 19, 2013 Ruling on Submitted Matter and Order, attached as Exhibit C.

Dated: November 22, 2016

MORGAN, LEWIS & BOCKIUS LLP

By _____
Thomas F. Gede

Attorneys for Appellant

III. DECLARATION OF THOMAS F. GEDE

I, Thomas F. Gede, declare as follows:

1. I am Of Counsel at the law firm of Morgan, Lewis & Bockius LLP, counsel for United Auburn, and am licensed to practice law in the State of California and admitted to practice before this Court. I have personal knowledge of the facts stated herein and, if called as a witness, I could and would competently testify thereto.

2. Attached hereto as Exhibit A is a true and correct copy of Letter from Senator Kevin De Leon to Governor Edmund G. Brown, Jr., July 29, 2013. I obtained this letter from the public website of Stand Up for California, a statewide organization that focuses on gambling issues, and co-plaintiff in this matter before the trial court, available at file:///C:/Users/mp019052/Downloads/7_29_13%20Letter%20to%20Gov%20Off%20Reservation%20Indian%20Gaming%20Compacts.pdf.

3. Attached hereto as Exhibit B is a true and correct copy of an August 5, 2013 Supplemental Request for Judicial Notice in Support of United Auburn Indian Community of the Auburn Rancheria's Memorandum of Points and Authorities in Opposition to Defendants' Demurrer. I caused this Request to be filed in the trial court in the above-captioned matter.

4. Attached hereto as Exhibit C is a true and correct copy of August 19, 2013 Ruling on Submitted Matter and Order, which was served

on my client United Auburn in the trial court proceedings in the above-captioned matter.

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

Dated: November 22, 2016

Thomas F. Gede

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California State Senate

SENATOR
KEVIN DE LEÓN
CHAIR
SENATE APPROPRIATIONS COMMITTEE
TWENTY-SECOND SENATE DISTRICT

COMMITTEES
APPROPRIATIONS
ENERGY UTILITIES & COMMUNICATIONS
GOVERNMENTAL ORGANIZATION
HEALTH
PUBLIC SAFETY

JOINT COMMITTEE
LEGISLATIVE BUDGET

July 29, 2013

The Honorable Edmund G. Brown, Jr.
Governor, State of California
State Capitol, Suite 1173
Sacramento, CA 95814

Re: Off-Reservation Indian Gaming Compacts

Dear Governor Brown:

I am writing to inform you that the Senate is creating a working group to examine policy and procedural implications associated with off-reservation gaming agreements in light of the concerns raised during the June 27th Senate vote on AB 277 (Hall), the North Fork Rancheria Compact, a first of its kind agreement allowing for Indian gaming off reservation property in California. Out of respect for the efforts of the working group, I urge your commitment to not approve, nor submit for ratification, any off-reservation gaming agreements until the working group has completed its examination and California has adopted a clear and coherent policy on off-reservation gaming.

The agreement between your Administration and the North Fork Rancheria of Mono Indians, embodied in AB 277 (Hall), represents a significant policy departure from previous agreements in California by allowing the North Fork tribe to build a casino off reservation property, near Highway 99 in Madera County, over 30 miles from their federally recognized and casino-eligible tribal land. As such the State Senate vote for the North Fork Compact was particularly contentious since all seventy of California's previous Indian gaming agreements have allowed Indian gaming strictly *on* reservation property. As we learned in the legislative debate over the North Fork Compact, there are many important issues to the State of California that arise from off-reservation gaming, including: issues related to the fairness to other tribes who have restricted their gaming activities on reservation property, impacts and interests of local and nearby communities, impacts to existing gaming interests and their workforce, the need to adequately address labor and environmental issues, maintaining the commitment to the voters from approved propositions addressing Indian gaming, among others.

The vote for the North Fork Compact was especially difficult for members of the Senate due to the lack of consistent, objective and clear policy criteria for approving off-reservation gaming agreements. While the federal approval process allows for off-reservation Indian gaming via a two-part determination established in Section 20 of the Indian Gaming Regulatory Act of 1988,

however, as exemplified in the case of the North Fork Compact, it is evident there are many issues of interest to California that need to be adequately addressed. As I mentioned during my comments on the Senate floor regarding the vote for the ratification of the North Fork agreement, I am deeply concerned by the current ad hoc process of approving off-reservation gaming projects which does not sufficiently protect state interests and our residents. Although the Senate ultimately approved AB 277, it was not without concern on the part of myself and many of my colleagues about how off-reservation gaming compacts ought to be handled in the future.

In collaboration with Senate Pro Tem Steinberg, I plan to lead a Senate effort to convene a working group with the goal to establish a coherent policy with clear and objective criteria for approving any future off-reservation gaming agreements. The working group will be convened in the coming weeks with the expectation it will complete its work by January 31, 2014. The working group will engage the participation of all relevant stakeholders in their effort. In addition to inviting members of the Assembly to join me, I specifically request the participation of your senior adviser, Jacob Appelsmith, director of the California Department of Alcoholic Beverage Control to represent the views of your Administration in this endeavor, along with any other staff you deem appropriate.

I look forward to working with your Administration. Please don't hesitate to contact my office should you like to discuss this matter further.

Sincerely,

Kevin de León

KEVIN DE LEÓN
Twenty-Second Senate District

cc: The Honorable Darrell Steinberg, Senate President Pro Tem
The Honorable Rod Wright, Chair, Senate Governmental Organization Committee
Jacob Appelsmith, Director of the California Department of Alcoholic Beverage Control

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of the Auburn Rancheria

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Petitioner and Plaintiff,

v.

EDMUND G. BROWN, JR., in his capacity as Governor of the State of California, and DOES 1 through 50, inclusive,

Respondents and Defendants.

DEPARTMENT OF THE INTERIOR; KEN SALAZAR, in his capacity as Secretary of the Interior; ENTERPRISE RANCHERIA OF MAIDU INDIANS OF CALIFORNIA, YUBA COUNTY ENTERTAINMENT LLC,

Real Parties in Interest.

Case No. 34-2013-80001412

SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER

Date: August 2, 2013
Time: 11:00 a.m.
Dept: 14
Judge: Hon. Eugene Balonon
Trial Date: N/A
Action Filed: February 19, 2013

BY FAX

REQUEST FOR JUDICIAL NOTICE

Pursuant to California Evidence Code Section 452, Petitioner and Plaintiff United Auburn Indian Community of the Auburn Rancheria ("UAIC") respectfully requests that the Court take judicial notice of the document identified below, which bears on the issue of whether California has an existing policy on off-reservation gaming. The document is attached hereto as an exhibit in support of UAIC's opposition to the Governor's demurrer.

I. The Court May Take Judicial Notice of a Letter From the California State Senate Under Section 452(c) and/or Section 452(h) Because It Is An Official Act and Contains Facts Not Subject to Dispute.

Section 452(c) allows the Court to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of . . . any state of the United States." As the Comments of the Assembly Committee on Judiciary note, this section should be interpreted broadly and "California courts have taken judicial notice of a wide variety of [official] acts." Cal. Evid. Code § 452, Assembly Committee on Judiciary Comments, *Official acts of the legislative, executive, and judicial departments.*

Judicial notice is also proper where the facts and propositions in question are "not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Cal. Evid. Code § 452(h).

A letter from the California State Senate to the Governor of California is the proper subject of judicial notice under Section 452(c) and Section 452(h). *See, e.g., California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 516 n. 8 (2003) (appellate court took judicial notice of a public agency's "All County Letter" which provided counties with current information, including new policies, regarding one of its public programs under both Section 452(c) and 452(h)); *In re Soc. Servs. Payment Cases*, 166 Cal. App. 4th 1249, 1271-72 (2008) (judicial notice proper under Section 452(c) for "All County Letters" issued by the State Department of Social Services, even though the letters were not rendered in accordance with the Administrative Procedure Act, because the letters were "official acts of the state's executive department"); *Stevens v. Super. Ct.*, 75 Cal. App. 4th 594, 608 (1999) (two letters issued by the Department of Insurance in approving insurance program were subject to judicial notice under

Section 452(c) as official acts); *City of Brentwood v. Cent. Valley Reg'l Water Quality Control Bd.*, 123 Cal. App. 4th 714, 728 (2004) (appellate court upheld judicial notice under Section 452(h) of letter sent by legislators to State Water Resources Control Board to protest Board's interpretation of a statute because it exhibited the context in which the Legislature enacted a definition within the statute).

Accordingly, under Section 452(c) and/or Section 452(h), judicial notice is proper and warranted for the following document, and UAIC requests the Court to take judicial notice thereof:

1. Letter from Senator Kevin De Leon to Governor Edmund G. Brown, Jr., July 29, 2013. A true and correct copy of this document is attached to this request as **Exhibit A.**

BINGHAM MCCUTCHEN LLP

Dated: August 5, 2013

By: Thomas Gede / by JSR
Thomas F. Gede
Attorneys for Petitioner and Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE: **JUDGE:**	**August 19, 2013** **HON. EUGENE L. BALONON**	**DEPT. NO.:** **CLERK:**	**14** **P. MERCADO**
UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA, **Petitioner and Plaintiff,** **v.** **EDMUND G. BROWN, JR., in his capacity as Governor of the State of California, and Does 1 through 50, inclusive,** **Respondents and Defendants.**		**Case No.: 34-2013-80001412** **RULING ON SUBMITTED MATTER & ORDER**	
DEPARTMENT OF THE INTERIOR; KEN SALAZAR, in his capacity as Secretary of the Interior; ENTERPRISE RANCHERIA OF MAIDU INDIANS OF CALIFORNIA, **Real Parties in Interest.**			

The Court issued its tentative ruling on the demurrers to the First Amended Petition in advance of the scheduled August 2, 2013 hearing. Counsel for Petitioner requested to be heard and on August 2, 2013 the Court heard oral argument by Petitioner's counsel as well as by counsel for Respondent. At the conclusion of the arguments, the Court took the matter under submission.

On August 5, 2013, a Supplemental Request for Judicial Notice (Supplemental RJN) was filed by counsel for Petitioner. The Supplemental RJN is a letter dated July 29, 2013 from California State Senator Kevin DeLeón to Respondent, Governor Brown. The Court grants the Supplemental RJN over Respondent's opposition filed August 12, 2013.

At issue in this case is the Governor's (Governor or Respondent) "concurrence" with a decision of the United States Secretary of the Department of Interior (Secretary) pursuant to the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. §§ 2701 *et seq.*). In particular, the Governor concurred with the Secretary's determination that off-reservation land in Yuba County (Yuba Site) could be taken into trust for an Indian tribe identified as Enterprise Rancheria of Maidu Indians of California (Enterprise) for the purposes of allowing gaming activity. The Governor concurred in the Secretary's determination that allowing gaming activity on the Yuba Site would be (1) in the best interest of Enterprise, and (2) not detrimental to the surrounding community.

Two nearly identical petitions challenging the Governor's concurrence determination have been filed by (1) Petitioners United Auburn Indian Community of the Auburn Rancheria (UAIC) (Sacramento Superior Court Case No. 34-2013-80001412) and Petitioners Citizens for a Better Way, Stand Up for California!, and Grass Valley Neighbors (collectively, Citizens) (Sacramento Superior Court Case No. 34-2013-80001419).

Both petitions seek (1) a writ of mandate ordering the Governor to set aside his concurrence and mandating that the he comply with the California Environmental Quality Act (CEQA) before making further decisions regarding Enterprise's proposed casino and resort complex, and related injunctive relief, and (2) a declaration that the concurrence violated the California Constitution's separation of powers doctrine and is void. UAIC also seeks a declaration that the Governor's negotiation and execution of the gaming compact violated the separation of powers doctrine and is thus void.

UAIC and Citizens have each filed First Amended Petitions (Petitions or FAPs). Respondent demurred to each FAP on the basis that each failed to state facts sufficient to state a cause of action.

After considering the briefs and oral arguments of counsel, the Court adopts its tentative ruling, which has been incorporated into this ruling, sustaining the demurrers without leave to amend.

ORDER RELATING CASES

UAIC and Citizens have filed notices of related cases in each action.

Each case was assigned to Judge Balonon in Department 14. Judge Balonon has reviewed each case, pursuant to California Rule of Court, rule 3.300(h), and concluded that the cases are related. These cases are related because they involve the same or similar claims against the same respondent, and arise from the same incidents or events, requiring the determination of the same or substantially identical questions of law or fact.

The Court hereby **ORDERS** that Sacramento Superior Court Case No. 34-2013-80001412 and Sacramento Superior Court Case No. 34-2013-80001419 are related.

Although it is not necessary to order that both cases be assigned to a single judge, the Court will address the demurrer to each FAP in this tentative ruling, as set forth below. The FAPs assert nearly identical causes of action; Respondent's demurrers to each FAP are nearly identical, with the exception of one argument; and Respondent and all Petitioners have also agreed to have the Court hear the demurrers to each FAP at the same time.

DISCUSSION

Ruling on Requests for Judicial Notice

The Court **GRANTS** the unopposed requests for judicial notice filed by UAIC, Citizens, and Respondent, in support of the demurrers, oppositions to the demurrers, and replies.

Standard of Review for Demurrers

A demurrer tests the sufficiency of a pleading by raising questions of law. (*Herman v Los Angeles Met. Transp. Authority* (1999) 71 Cal.App.4th 819, 824.) A court should not sustain a demurrer unless the complaint, liberally construed, fails to state a cause of action on any theory. Doubt in the complaint may be resolved against plaintiff and facts not alleged are presumed not to exist. (*Kramer v. Intuit, Inc.* (2004) 121 Cal.App.4th 574, 578.) In reviewing a demurrer, the Court will not "assume the truth of contentions, deductions or conclusions of fact or law and may disregard allegations that are contrary to the law or to a fact of which judicial notice may be taken." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 483.) A demurrer may be sustained without leave to amend when the facts are not in dispute and the nature of the plaintiff's claim is clear, but under substantive law, no liability exists. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 645,)

Mootness

Respondent suggests that the case is now moot, because after the Governor issued his concurrence, the Secretary took the Yuba Site into trust for Enterprise. According to Respondent, there is no longer a controversy before the Court, because the Court cannot order the Secretary to take action, and the Governor cannot withdraw his concurrence. The Court disagrees. The Court has the power to review the validity of the Governor's concurrence, which would affect gaming at the Yuba Site. (*See, Pueblo of Santa Ana v. Kelly* (D.N.M. 1996) 932 F. Supp. 1284 (court can invalidate actions by governor necessary for Class III gaming under IGRA, precluding such gaming under IGRA), *aff'd* 104 F.3d 1546.) Thus, the case is not moot.

Background Law

Two federal statutory schemes regulate how land may be taken into trust for Indian tribes: the Indian Reorganization Act (IRA) (25 U.S.C. §§ 461-479) and IGRA.

The IRA provides the Secretary discretion to acquire lands in trust "for the purpose of providing land for Indians." (25 U.S.C. § 465.) The IRA does not require a state to consent to or approve the Secretary's decision to take land into trust under the IRA. (*Carcieri v. Kempthorne* (1st Cir. 2007) 497 F.3d 15, 20, 39-40 (*rev'd on other grounds in Carcieri v. Salazar* (2009) 555 U.S. 379).)

IGRA limits the Secretary's broad discretion to acquire lands in trust by prohibiting various types of gaming on such lands. (*Lac Courte Oreilles Band of Lake Superior*

Chippewa Indians of Wisconsin v. United States (*Lac Courte*) (7th Cir. 2004) 367 F.3d 650, 653.) IGRA generally prohibits gaming on land acquired in trust for an Indian tribe after 1988, unless one of several exceptions applies. (*Ibid.*) One exception requires the Secretary to make a "two-part determination" and provides that the general prohibition against gaming shall not apply when:

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

(25 U.S.C. § 2719(b)(1)(A).) Under IGRA, a governor may concur, not concur, or take no action at all in response to the Secretary's request.

Here, Larry Echo Hawk, Assistant Secretary for Indian Affairs, on behalf of the Secretary, made this two-part determination and requested the Governor's concurrence. On August 30, 2012, the Governor concurred. (UAIC FAP, ¶¶ 59, 62; Citizens FAP, ¶¶ 32, 35.)

The Governor's Concurrence Did Not Violate the California Constitution's Separation of Powers Doctrine

UAIC and Citizens both argue that the Governor's concurrence violated California's separation of powers doctrine. UAIC also contends that the Governor's negotiation and execution of the gaming compact violated California's separation of powers doctrine.

Petitioners argue that the Governor acted in excess of the powers specifically reserved to him by the California Constitution or statutes, that he exercised legislative and not executive power, and that he intruded on the Legislature's role of setting policy by, among other things, relinquishing state land to the federal government and participating in a federal program.

California Constitution, article III, section 3 sets forth the State's separation of powers doctrine: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Although the California Constitution may suggest a "sharp demarcation" in operations between the three governmental branches, the three branches are substantially interrelated, and may perform functions associated with another governmental branch. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53.) California's separation of powers doctrine limits the authority of one of the three branches of government to arrogate itself to the "core functions" of another branch. (*Carmel Valley*

Fire Protection District v. State of California (2001) 25 Cal.4th 287, 297.) "The purpose of the doctrine is to prevent one branch of government from exercising the *complete* power constitutionally vested in another [citation]; it is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch." (*Id.* at 298 (citing *Younger v. Superior Court* (1978) 21 Cal.3d 102, 117.)

The Court concludes that the Governor's concurrence under IGRA did not violate California's separation of powers doctrine. Although it is not binding, the case of *Lac Courte*, 367 F.3d 650, is instructive.[1]

In *Lac Courte*, three tribes applied to the Secretary under IGRA to have off-reservation land taken into trust for the purposes of operating a gaming facility. (*Id.* at 653.) The Secretary made the two-part determination that the proposal was in the best interest of the tribes and would not be detrimental to the surrounding community. The Wisconsin governor did not concur.

The tribes sued, seeking declaratory relief that the gubernatorial concurrence provision of 25 U.S.C. § 2719(b)(1)(A) was unconstitutional. (*Id.* at 653-564.) The tribes argued that the governor's concurrence under IGRA constituted a legislative function that violated the Wisconsin constitution, because legislative power was reserved for the legislature. (*Id.* at 664.) The Seventh Circuit Court of Appeals disagreed.

The court reasoned that the gubernatorial concurrence provision did not require the governor to legislate the state's gaming policy in violation of the Wisconsin state constitution. The court noted that Wisconsin had already established through legislation and amendments to its state constitution a "fairly complex gaming policy." "Thus, the Governor's decision regarding any particular proposal is not analogous to creating Wisconsin's gaming policy wholesale--a legislative function--but rather is typical of the executive's responsibility to render decisions based on existing policy. The governor's role is not inconsistent with the Wisconsin Constitution, which vests 'the executive power . . . in a governor.' [Citation.] Further, it is not problematic that the Governor of Wisconsin enjoys discretion within the limitations of Wisconsin's existing gaming policy to render an opinion regarding any particular application under § 2719(b)(1)(A)." (*Id.* at 664-655.) The court also observed that the Wisconsin constitution allowed a mechanism for the Legislature to override the governor's concurrence, and the people could render the governor's concurrence a nullity by repealing the state constitutional amendments allowing gaming in Wisconsin. (*Id.* at 665.) Thus, the governor had the discretion to render a concurrence "based on existing policy" and did not violate the Wisconsin constitution. (*Id.* at 664.)

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[1] Petitioners argue that *Lac Courte* is distinguishable, among other reasons, because it does not interpret the California constitution. However, courts may look to federal decisions for assistance in interpreting state constitutional separation of powers claims, keeping in mind the potential structural differences between constitutions. (*See, Marine Forests Soc'y v. California Coastal Comm'n* (2005) 36 Cal.4th 1, 29.)

Like Wisconsin, the California Constitution and statutes allow a variety of gaming activities, which are regulated by the executive branch. The California Constitution expressly permits Indian gaming and delegates responsibilities to the Governor and Legislature regarding tribal-state gaming compacts. Article IV, section 19 provides:

> (f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

(Cal. Const., art. IV, § 19(f).) The Legislature has also designated the Governor as the State's negotiator of tribal-state gaming compacts:

> (d) The Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes in the State of California pursuant to the federal [IGRA] for the purpose of authorizing class III gaming, as defined in that act, on Indian lands.

(Gov. Code, § 12012.5(d); *see id.*, § 12012.25(d).) As in *Lac Courte*, by concurring with the Secretary's determination to take the land into trust for purposes of gaming, the Governor is not performing the legislative function of creating a wholesale gaming policy. Rather, the Governor is making an executive decision, based on existing policy allowing Indian gaming and allowing the Governor to negotiate and execute gaming compacts with Indian tribes. The Governor's actions are not inconsistent with the California Constitution.

Petitioners argue that the Governor acted in excess of his executive power, because his power to concur is separate from his power to negotiate and execute gaming compacts, and is not specifically set forth in the California Constitution or statutes. Thus, the Governor's concurrence exceeded his core powers permitted by the California Constitution—negotiating and executing Indian gaming compacts. Petitioners also argue that the Governor's concurrence intruded upon the core powers of the Legislature.

To illustrate the distinction between the power to compact and the power to concur, UAIC notes that the Governor's concurrence effectively removes the land from the State's jurisdiction and will allow at least Class II gaming to occur, even if he does *not* execute a gaming compact. (25 U.S.C §§ 2719(a), (b) 2710(d)(1)(c).)

The Governor responds that his power to concur under IGRA is ancillary and incidental to his power to negotiate and execute compacts. The Court agrees.

It is undisputed that the Governor simultaneously issued the concurrence and executed a compact for Class III gaming.[2] The Governor's concurrence was necessary and incidental to compact negotiations, as Class III gaming could not occur on the Yuba Site without the Governor's concurrence, and without a compact. (25 U.S.C. §§ 2719(b), 2710(d).) The California Constitution and statutory law permit the Governor to negotiate and execute this compact, which must be approved by the Legislature. (*See*, Cal. Const. art. VI, 19(f); Gov. Code, § 12012.5(d).)

Thus, the Court finds that the Governor's concurrence was necessary and incidental to his powers to negotiate and execute a Class III gaming compact, as permitted by the California Constitution. The Governor did not violate California's separation of powers doctrine by issuing his concurrence.

UAIC also argues that the Governor violated California's separation of powers doctrine by negotiating and executing the gaming compact for the Yuba Site, before the Yuba Site became "Indian lands." In this case, the Secretary took the land into trust after the Governor issued a concurrence and executed the compact for the Yuba Site.

The California Constitution provides that "the Governor is authorized to negotiate and conclude compacts... for [gaming] by federally recognized Indian tribes on Indian lands in California in accordance with federal law."[3] (Cal. Const., art IV, § 19(f).) UAIC contends that this provision requires that gaming negotiations cannot take place before the land becomes "Indian land."

The Court disagrees. The California Constitution requires that the Governor negotiate and conclude compacts "in accordance with federal law." Federal law prohibits Class III gaming from occurring on non-Indian lands prior to compact formation. (25 U.S.C. § 2710(d)(1) (setting forth requirements for Class III gaming to take place).) However, it does not forbid compact negotiations regarding land that is not Indian land at the time of negotiation.

The Court finds that the Governor did not violate California's separation of powers doctrine by negotiating and executing the compact before the Secretary took the Yuba Site into trust.

Accordingly, the FAPs of UAIC and Citizens do not state a cause of action against the Governor for violation of California's separation of powers doctrine, as it relates to (1) the Governor's concurrence and (2) negotiation and execution of the compact.

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[2] The Court finds it unnecessary to resolve whether a gubernatorial concurrence, made without the intent to negotiate and execute a gaming compact would exceed the Governor's powers under the California Constitution and statutory law, and would violate the separation of powers doctrine, as these facts are not before the Court.

[3] The Yuba Site is now "Indian lands," as the Secretary has taken the land into trust. (25 U.S.C. § 2703(4).)

The Governor's Concurrence Was Not Subject to CEQA

UAIC and Citizens assert that the Governor violated CEQA (Pub. Resources Code, §§ 21000 *et seq.*), because before he issued the concurrence, he failed to perform an environmental review of the effect of his concurrence under CEQA.[4] Both petitioners seek a writ of mandate ordering the Governor to set aside his concurrence and comply with CEQA before making further related decisions, and injunctive relief.

The Court concludes that the FAPs fail to state a cause of action for issuance of a writ of mandate or injunctive relief based on the Governor's failure to comply with CEQA prior to issuing his concurrence.

CEQA only applies to activities meeting the definition of a "project" under CEQA and its implementing regulations. (*Sunset Sky Ranch Pilots Association v. County of Sacramento* (2009) 47 Cal.4th 902, 907.)

Public Resources Code section 21065 defines a CEQA "project" as: "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

(a) An activity directly undertaken by any public agency.

(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

Citizens and UAIC define the "project" as the Secretary's trust acquisition of the Yuba Site for a proposed casino and resort, which petitioners assert will result in direct and indirect changes to the physical environment. Here, subdivisions (a) or (b) are inapplicable, in that the Governor will not directly undertake or support the casino and resort through funding or other assistance.

Both Petitioners argue that the Governor's concurrence amounted to an "entitlement" under subdivision (c) that allowed Enterprise to use the Yuba Site for gaming purposes, which was a necessary first step that would result in construction of a casino and resort. (UAIC Opposition to Demurrer, pp. 5-6; Citizens Opposition to Demurrer, p. 12.)

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[4] The Secretary prepared a Final Environmental Impact Statement under the federal National Environmental Policy Act (42 U.S.C. §§ 4321, *et seq.*), which found that acquiring the Yuba Site for establishing a hotel/gambling complex may create numerous potentially significant environmental effects. (*See*, UAIC FAP, ¶¶ 48, 57; Citizens FAP ¶ 31.) The Governor did not perform any environmental review under CEQA before issuing his concurrence.

However, federal law interpreting and applying IGRA makes it clear that a state governor is not the ultimate decision maker on an application to take land into trust for an Indian tribe for gaming purposes. The Secretary is.

"[T]he Governors of the 50 States do not enjoy power under [25 U.S.C.] § 2719(b)(1)(A) to enforce or administer federal law. The power to execute [25 U.S.C.] § 2719(b)(1)(A) is entrusted exclusively to the Secretary of the Interior, as only he or she may lift IGRA's general prohibition of gaming on after acquired land. A governor's role under [25 U.S.C.] § 2719(b)(1)(A) is limited to satisfying one precondition to the Secretary of the Interior's authority under [25 U.S.C.] § 2719(b)(1)(A) to permit gaming on after-acquired trust land." (*Lac Courte, supra*, 367 F.3d at 661.) Although the Governor may "veto" the Secretary's decision, the Secretary makes the ultimate decision about whether to take the land in trust. Indeed, after a governor concurred under section 2719(b)(1)(A), the Secretary could exercise his discretion and *not* take the land into trust. Thus, any "entitlement" would come from the Secretary, not the Governor.

Moreover, the Governor's concurrence was issued to the Secretary to use in the IGRA determination, not the Tribe. Therefore, any "entitlement" was not issued to a "person" under CEQA. The Secretary is not a "person" under Public Resources Code section 21065(c). CEQA includes federal agencies in its definition of a "person," but only "to the extent permitted under federal law." (Pub. Resources Code, § 21066 (defining a "person" to include the United States or its agencies, to the extent permitted by federal law).) The parties have cited to no federal law specifying whether or not a federal agency is a "person" under CEQA. However, the Court notes that IGRA has no specific waiver of sovereign immunity, which would make an agency of the United States subject to suit. (*See, Cheyenne-Arapaho Gaming Com's v. National Indian Gaming Comm'n* (N.D. Okla. 2002) 214 F. Supp. 2d 1155, 1172.) In light of these facts, the Court concludes that federal law does not permit the Secretary to be considered a CEQA "person."

Accordingly, the Governor's concurrence with the Secretary's two-part determination under IGRA was not a "project" within the meaning of CEQA, and CEQA review was not required. (*Sunset Sky Ranch Pilots Association v. County of Sacramento, supra*, 47 Cal.4th at 907.)

Respondent also argues that the Governor is not subject to CEQA because he is not a "public agency." CEQA applies only to certain actions taken by "public agencies." (*Lee v. City of Lompoc* (1993) 14 Cal.App.4th 1515, 1520; Pub. Resources Code, § 21080(a); Cal. Code Regs., Tit 14, § 15002(b).)

Neither CEQA nor its implementing regulations include the Governor as a "public agency." CEQA defines a "public agency" as including "any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." (Pub. Resources Code, § 21063.) The CEQA Guidelines similarly define "public agency" and define "a state agency" as "a governmental agency in the executive branch of the State Government or an entity which operates under the direction and control of an agency in the executive branch of State

Government and is funded primarily by the State Treasury." (Cal. Code Regs., Tit. 14, § 15383.) Petitioners have cited to no case authority holding that the Governor, who acts independently of any state agency, is a "public entity" for purposes of CEQA.

UAIC cites to Government Code sections 12012.25(g) and 12012.5(f), which address the Governor's responsibility for negotiating and executing tribal gaming compacts. These statutes provide that: "In deference to tribal sovereignty, neither the execution of a tribal-state gaming compact nor the on-reservation impacts of compliance with the terms of a tribal-state gaming compact shall be deemed to constitute a project for purposes of [CEQA]." (Gov. Code, § 12012.25(g); *see also id.* at § 12012.5(f)) (containing similar provision).) UAIC argues that because the Legislature enacted this specific CEQA exemption, the Legislature must have concluded that the Governor's actions are otherwise subject to CEQA. UAIC argues that the Legislature knew that Indian tribes were not subject to CEQA, and this exception is meant to address only the Governor. The Court disagrees.

The statutes, and many others involving ratification of or amendments to Indian gaming compacts, contain similar provisions that "in deference to tribal sovereignty" certain activities, including "on-reservation impacts" of complying with compacts, are not projects for CEQA purposes. (*See*, Gov. Code, §§ 12012.40, 12012.45, 12012.46, 12012.47, 12012.48, 12012.49, 12012.51, 12012.52, 12012.53, 12012.54, 12012.551, 12012.56, and 12012.57.) The statutes appear to exempt matters related to Indian gaming on tribal land from CEQA, and not merely to exempt the Governor's actions from CEQA. They do not suggest that the Legislature otherwise intended that every action of the Governor be subject to CEQA.

Because the Legislature has not defined the Governor as a "public agency" subject to CEQA, and Petitioners have shown no case law where courts have reached this conclusion, there is no explicitly stated requirement that the Governor must comply with CEQA as a "public agency." Accordingly, the Court finds that the Governor is not a "public agency" subject to CEQA.

Each FAP fails to state a cause of action for a writ of mandate or other related relief, based on the Governor's failure to comply with CEQA. The Governor was not required to comply with CEQA prior to issuing a concurrence, because the Governor's concurrence is not a CEQA "project," and the Governor is not a CEQA "public agency."

CONCLUSION

The FAPs of Citizens and UAIC fail to state a cause of action against the Governor for a violation of California's separation of powers doctrine, and for failure to comply with CEQA before issuing the concurrence.

When a court sustains a demurrer, leave to amend should be granted where it is reasonably possible that the defects can be cured by amendment. (*Grinzl v. San Diego Hospice Corporation* (2004) 120 Cal.App.4th 72, 78.) Petitioners bear the burden of

demonstrating how the pleading could be amended. (*Ibid.*; *Association of Community Organizations for Reform Now v. Department of Industrial Relations* (1995) 41 Cal.App.4th 298, 302.) Petitioners have not requested leave to amend or demonstrated how they can allege additional facts in support of the causes of action, nor is it clear how they could do so. Under substantive law, no liability exists for the Governor under the alleged causes of action.

DISPOSITION

Respondent's demurrers to each FAP are **SUSTAINED WITHOUT LEAVE TO AMEND**. The Court orders the FAPs to be dismissed.

Respondent's counsel is directed to prepare as to each action: (1) a formal order sustaining the demurrer without leave to amend and dismissing the action, incorporating the Court's ruling as an exhibit; and (2) a separate judgment of dismissal.

Respondent's counsel shall submit the orders and judgments to opposing counsel for approval as to form, and thereafter submit them to the Court for signature and entry of judgment, in accordance with California Rules of Court, Rule 3.1312.

IT IS SO ORDERED.

Dated: August 19, 2013

Hon. Eugene L. Balonon
Superior Court Judge

United Auburn Indian Community of the Auburn Rancheria vs. Edmund G. Brown Jr.
CASE NO.: 34-2013-80001412

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(3))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **Ruling on Submitted Matter & Order dated August 29, 2013** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

William P. Torngren
Timothy M. Muscat
1300 I Street, Suite 125
PO Box 944255
Sacramento, CA 94244-2550

Colin C. West
Three Embarcadero Center
San Francisco, CA 94111

Marc R. Bruner
Four Embarcadero Center, Suite 2400
San Francisco, CA 94111-4131

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 2013

Superior Court of California, County of Sacramento

By: P. MERCADO,
Deputy Clerk

CERTIFICATE OF SERVICE

I, Linda F. Nelson, hereby declare I am a resident of the State of California and am over the age of eighteen years and not a party to the within action; my business address is Morgan Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On November 22, 2016, I served on the interested parties in this action the within document entitled:

REQUEST FOR JUDICIAL NOTICE, MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF THOMAS F. GEDE IN SUPPORT THEREOF

via U.S. Postal Service – by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

Timothy M. Muscat
California Department of Justice
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814

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

Hon. Eugene L. Balonon
Sacramento Superior Court, Dept. 14
720 Ninth Street, Room 611
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on November 22, 2016, at San Francisco, California.

Linda F. Nelson