Case No. S238544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Appellant,

vs.

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

Respondent.

Third Appellate District, Case No. C075126
Sacramento County Superior Court, Case No. 34-2013-800001412CUWMGDS
Honorable Eugene Balonon, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND PROPOSED BRIEF OF AMICUS CURIAE PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS IN SUPPORT OF PLAINTIFF/APPELLANT UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA

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APPLICATION FOR LEAVE TO FILE AS AMICUS CURIAE

Pursuant to Rule of Court 8.520(f), the Picayune Rancheria of Chukchansi Indians ("Picayune Tribe") hereby requests that it be granted leave to file the attached amicus brief in the above-captioned matter.

Rule 8.520 requires that an application for amicus contain certain information and disclosures. As required by Rule 8.520, subsection (f)(4), the Picayune Tribe hereby certifies that no party or counsel for a party in the pending appeal authored any part of this brief, nor did any such person(s), or any other person(s), contribute funding for the preparation or submission of this brief.

As further required by Rule 8.520, the Tribe states its interest in this appeal and an explanation of "how the amicus curiae brief will assist the court in deciding th[is] matter." C.R.C. 8.520(f)(3).

I. The Picayune Tribe has an interest in the Outcome of the Litigation Because it will be Directly Impacted by a Decision in Favor of the Governor's Power to Concur.

The case challenges the Governor's authority under California law to issue a concurrence in a decision of the Secretary of Interior ("Secretary") that certain "off-reservation" lands in Yuba County are suitable for "class II" and "class III" gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. As the Court is aware, this case is directly related to and could determine the case of *Stand Up for California! v. State* (2016) 6

Cal.App.5th 686 ("*Stand Up v. State*"), as to which this Court has granted review but has determined to defer pending the outcome of this action. (*Stand Up for California! v. State* (2017) 215 Cal.Rptr.3d 2.)

The Picayune Tribe has a strong interest in the outcome of this litigation because if the Court recognizes a unilateral power on the part of the Governor to grant a concurrence in a gaming eligibility determination made pursuant to 25 U.S.C. § 2719(b)(1)(A), Picayune will be significantly impacted by the "off-reservation" gaming facility proposed by the North Fork Tribe of Mono Indians ("North Fork Tribe") and which is at issue in *Stand Up v. State.*

The North Fork Tribe proposes to build a massive class III – Las Vegas-style – casino and hotel complex immediately adjacent to Highway 99 in Madera County. The site of the North Fork Tribe's proposed casino is nearly forty miles from the North Fork Tribes reservation, but a mere 26 miles from the Picayune Tribe's existing class III casino, which the Picayune Tribe operates from within boundaries of its federally recognized reservation.

Like practically all Indian tribe's, the Picayune Tribe has extremely limited resources available to pay for its governmental functions and educational and social services to its members. The Picayune Tribe funds these services almost exclusively from the revenues of its existing "on-

reservation" casino. The services the Picayune Tribe provides include, among other things, social services to tribal children and elders, financial aid to its students, housing for its members and their families, employment for its members, revenue contributions to surrounding communities, and a small quarterly financial distribution to its adult members. However, the Picayune Tribe's ability to continue to provide for its governmental and social services will very likely be eliminated if the North Fork Tribe's proposed casino is allowed to go forward.

Not only is the proposed site for the North Fork Tribe's casino in very close proximity to the Picayune Tribe's casino, the North Fork Tribe's proposed site was strategically selected to capture a vast majority of the gaming market in, and traveling to, California's Central Valley. The location of North Fork's proposed "off-reservation" casino is such that it will essentially isolate the Picayune Tribe's existing "on-reservation" casino and make it unprofitable. Projections are such that it is anticipated that if the North Fork Tribe's proposed casino becomes operational, the Picayune Tribe will no longer be able to meet its obligations to the lenders who financed the Picayune Tribe's casino and will the Picayune Tribe to default on millions of dollars in outstanding bonds. The Picayune Tribe will be forced to close it's casino and will lose any ability to fund its government or pay for critical services to its members.

Importantly, the only way the North Fork Tribe's proposed "off-reservation could be approved is if the Governor, acting alone, had the authority to concur in the Secretary's determination that the site the North Fork Tribe proposed for its "off-reservation" casino was appropriate for class III gaming. Because, this case involves, and will necessarily decide the scope the Governor's authority concerning the issuance a concurrence, the Picayune Tribe, which will suffer great harm if the authority is recognized has a significant, compelling, and pressing interest in the outcome of this action.

II. The Picayune Tribe Amicus Brief Will Assist this Court in Resolving The Instant Case By Presenting an analytical approach to the question of the Governor's Power to Concur not addressed by the Parties and By Addressing Aspects of the Indian Gaming Regulatory Act and California law That the Parties did not Discuss or Explore in Their Briefing.

It is important that in resolving the thorny issues presented by this appeal that this Court have at its disposal the broadest spectrum of input from those directly impacted by this sensitive and novel issue.

The Picayune Tribe's amicus brief will also assist the court by providing a unique analysis of the legal questions at bar. The Picayune Tribe's amicus brief focuses on aspects of the Indian Gaming Regulatory Act that were largely ignored, or at times misunderstood by the Partiers in their briefing. This includes a more thorough analysis of the process by

which lands are converted from gaming *in*eligible to gaming eligible under the IGRA. It also includes a substantive discussion of how and why a Governor's concurrence constitutes a final and irrevocable decision far more substantial than the negotiation of a temporal gaming compact.

Additionally, the Picayune Tribe's amicus brief provides an analysis of California's gaming laws not addressed by either party. In particular, the Picayune Tribe's amicus brief explores and provides clarification on a critical point of discussion by both parties—the Governor's power to compact from which the Governor claims a power to concur. The Picayune Tribe's amicus brief adds a layer to the analysis not considered by either party, which is that under a straightforward reading of California law, the Governor does not have the "power to compact" because he has no authority to bind the state to a compact, and not compact that the Governor unilaterally sent to the Secretary could be put into effect.

Finally, the Picayune Tribe's amicus brief offers suggestions concerning the scope and proper exercise of the Governor's authority in relation the process of converting land that is ineligible for gaming to gaming eligible under the IGRA that not only respects and abides by California law but protects both Indian tribes and the People of California.

For these reasons, the Picayune Tribe respectfully requests that the Court grant the Picayune Tribe leave to participate in this action as amicus and to accept and receive the attached amicus brief.

Dated: September 26, 2017

By: _____

Michael A. Robinson
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BRIEF OF AMICUS CURIAE

This case represents a pivotal moment in California gaming law that will dictate the course of future Indian gaming in the state. Specifically, this case will determine whether it the California Legislature, or a combination of both that determine when and where "off-reservation" gaming can occur in California or whether that critical decision will be made pursuant to the individual whims and ideologies of a single California official.

It is the position of this Amicus that the Court should not establish, or enshrine, a course that allows the California Governor to singlehandedly determine how or where Indian gaming can occur in California. Setting such a course is not only inconsistent with the California Constitution and the structure of California's gaming laws, but also puts both Indian tribe's operating existing on-reservation Indian casinos and the will of the People of California in jeopardy by allowing a single official to make gaming decisions based on his or her singular philosophical views without any legislative check. Setting such a course can only lead the State and California Indian tribes down a path of confusion and inconsistency regarding nearly every potential Indian gaming project that may be proposed in California in the future.

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ARGUMENT

Petitioners correctly argue that California law does not authorize the Governor to grant a concurrence concerning a Secretarial determination made pursuant to 25 U.S.C. § 2719(b)(1) and that by purporting to grant a concurrence under any circumstances the Governor violated California's Separations of Powers doctrine. The Court should hold that the Governor's concurrence in the Secretary of Interior's section 2719 determinations that form the basis of this action and the related action of *Stand Up for California! v. State* are invalid for both reasons. However, this brief focuses chiefly on the interplay between the Indian Gaming Regulatory Act ("IGRA") and California's overall statutory scheme regarding gaming. These briefs address arguments and matters of both federal and state law not directly or fully addressed by the parties and provides a more detailed explanation of how and why a concurrence in a Secretarial 2719 determination is perhaps the most pivotal Indian gaming policy decision left to be made in California.

I. A Gubernatorial Concurrence Is a Major Gaming Decision Under the IGRA and California Law.

A. General Principals Concerning Gaming on Land Acquired After October 17, 1988.

As the Parties have addressed, the IGRA generally prohibits gaming of any sort on Indian lands that were acquired and taken into trust after October 17, 1988 ("after-acquired lands.") (Appellant's Opening Brief on

the Merits ("AOB") at 3; Respondent's Answer Brief on the Merits ("RAB") at 15.) However, the prohibition against gaming on after-acquired lands is not absolute. Rather, Congress provided four narrow exceptions to the general prohibition against gaming on after-acquired lands. (25 U.S.C. §2719(b).)

a. The "Equal Footing" Exceptions to the IGRA's Prohibition Against Gaming on After-Acquired Lands.

Three of the exceptions are, at their core, based on fairness and equal treatment. These exceptions, which are not at issue here, include: (i) lands taken into trust as part of the settlement of a land claim brought by an Indian tribe; (ii) the creation of the first reservation for an Indian tribe which was given federal recognition after October 17, 1988; and (iii) lands that are restored to an Indian tribe that previously had its federal recognition terminated by the federal government. (25 U.S.C. § 2719(b)(1)(B)(i)-(iii).) The primary purpose of these "equal footing" exceptions is to provide all newly recognized and re-recognized, and tribes which had land taken from the unlawfully an equal basis to develop their tribal economies through gaming and related activities. (See *Citizens Exposing Truth About Casinos v. Kempthorne* (D.C. Cir. 2007) 492 F.3d 460, 469 [purpose of equal footing exceptions was designed to ensure newly recognized Indian tribes are not disadvantaged relative to long-established tribes].) Importantly, due at least in part to their remedial

nature, state approval or consent is not necessary for land taken into trust pursuant to any of these exceptions to qualify as gaming-eligible Indian lands under the IGRA. The federal government's trust acquisition alone authorizes gaming.

b. The Two-Part Process Exception to the IGRA's Prohibition Against Gaming on After-Acquired Lands.

The fourth exception to the IGRA's prohibition against gaming on after-acquired lands, the exception, commonly known as the "Two-Part Process," is fundamentally different from the first three exceptions. This is the exception to the IGRA's general prohibition against gaming on after-acquired at issue here.

Lands subject to the Two-Part Process bear no relation to the re-recognition, restoration, or return of lands to an Indian tribe. Lands subject to the Two-Part Process does not need to be within, or even near an Indian tribe's reservation or within any area to which an Indian tribe has any historical connection. Rather, lands subject to the Two-Part Process can be located anywhere in any state where an Indian tribe is geographically located. (25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.21.) Lands subject to the Two-Part process provide the only opportunity for an Indian tribe to conduct truly "off-reservation" gaming at a location chosen for that specific purpose. (25 U.S.C. § 2719(a)-(b).)

"Off-reservation" gaming raises numerous general policy concerns for the state in which the "off-reservation" gaming is proposed and under certain circumstances has the potential to cause significant detriment to communities surrounding the proposed gaming site. (*215 Cal.* (2016) 6 Cal.App.5th 686, 723 [review granted 215 Cal.Rptr.3d 2, March 22, 2017].) Therefore, Congress established the "Two-Part Process," which imposed more stringent conditions, or pre-requisites, to an Indian tribe's ability to "off-reservation" and conduct gaming anywhere it wanted. (25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. §§ 292.13-292.23.)

First, under the Two-Part Process the Secretary of the Interior, after consulting with State and local officials and nearby Indian tribes must make a final determination that the proposed "off-reservation" casino will be beneficial to the Indian tribe and its members and will not be detrimental to the surrounding community and other nearby Indian tribes. (25 U.S.C. § 2719(b)(1)(A).) Second, the IGRA provides that even after the Secretary has made his final determination, gaming cannot occur at the proposed "off-reservation" site unless "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).) Thus, the Two-Part Process is the only exception to the IGRA's general prohibition against gaming on "after-acquired lands" that requires consent from the State in which the gaming will occur. (25 U.S.C. § 2719(b)(A)-(B).)

Without getting into all of the finite details the "Two-Part Process" works as follows:

First, the Indian tribe seeking to conduct "off-reservation" gaming submits an application to the Secretary of the Interior, which includes among other things: (i) information concerning the location and legal description of land on which gaming is proposed; (ii) the scope of gaming and the proposed size of the casino, (iii) information necessary to assist the Secretary in determining whether a casino at the proposed "off-reservation" will be beneficial to the Indian tribe and its members; and (iv) information to assist the Secretary in determining whether a casino at the proposed "off-reservation" site would be detrimental to the surrounding community. (25 C.F.R. § 292.16.)

Next, after the Secretary receives the Indian tribes application the IGRA requires the Secretary to consult with State officials, local officials and other members of the surrounding community by soliciting comments on areas including: (i) the anticipated environmental impacts of the proposed Casino; (ii) the anticipated social impacts on the surrounding community; (iii) the anticipated economic impacts of proposed casino; (iv) the anticipated costs of the impacts to the surrounding community; (v) the anticipated costs to the local community for treatment programs for problem gambling; and (vi) a catchall addressing "any other information" that would inform the Secretary determination of whether the proposed

casino would, or would not, be detrimental to the surrounding community. (25 C.F.R. § 292.20.)

Finally, after allowing the Indian tribe that is proposing to conduct "off-reservation" gaming an opportunity to respond to the comments submitted during the consultation process, the Secretary must consider all of the information submitted and make a final decision to either deny the Indian tribe's application or grant a favorable "Gaming Eligibility Determination.[1]" (25 C.F.R. § 292.21.) If the Secretary denies the application, that matter is closed, and the proposed "off-reservation" casino may not go forward. (25 U.S.C. § 2719(b)(1)(A).)

Even when, the Secretary makes a favorable "Gaming Eligibility Determination" the matter is not done, and the lands are still not eligible to be used for gaming purposes. Rather, as noted above, the "off-reservation" site will only be considered eligible for gaming if the Governor of the State in which the proposed gaming would occur concurs with the Secretary's

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[1] The Determination required under 25 U.S.C. § 2719(b)(1)(A) and 25 C.F.R. § 292, Subpart C is often interchangeably call a Secretarial Determination, a Two-Part Determination and the Gaming Eligibility Determination. (See "Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes," June 13, 2011, United States Department of Interior, Assistant Secretary – Indian Affairs. At p. 7.) For purposes of this brief, Amicus will utilize Gaming the Assistant Secretary's nomenclature – Gaming Eligibility Determination -- for the Secretary's determination required by the IGRA and the regulations implementing the IGRA.

Gaming Eligibility Determination. (25 U.S.C. § 2719(b)(1)(A).) The relevant federal regulations provide:

> **§ 292.23 What happens if the Governor does not affirmatively concur with the Secretarial Determination?**
>
> (a) If the Governor provides a written non-concurrence with the Secretarial Determination
>
> (1) The applicant tribe may use the newly acquired lands only for non-gaming purposes; and
>
> (2) If a notice of intent to take the land into trust has been issued, then the Secretary will withdraw that notice pending a revised application for a non-gaming purpose.
>
> (b) If the Governor does not affirmatively concur in the Secretarial Determination within one-year of the date of the request, the Secretary may, at the request of the applicant tribe or the Governor, grant an extension of up to 180 days.
>
> (c) If no extension is granted or if the Governor does not respond during the extension period, the Secretarial Determination will no longer be valid.

(25 C.F.R. § 292.23.) Thus, under federal regulations, the effectiveness of any favorable Gaming Eligibility Determination is entirely dependent on

the Governor's concurrence. Without the concurrence, the "Gaming Eligibility Determination" is meaningless and has no effect.

However, once a concurrence is granted the Gaming Eligibility Determination is given immediate effect, and the "off-reservation" lands are from that time gaming eligible so long as they are held in trust by the United States. (25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.23.) Moreover, as there is no provision in either the IGRA or the implementing regulations to delay or condition the effectiveness or validity of the Gaming Eligibility Determination after a concurrence.

B. A Gaming Eligibility Determination is Final Even for Land not in Trust at the Time of the Determination.

Despite the immediate effectiveness of the Gaming Eligibility Determination in making the "off-reservation" lands eligible to be used for gaming, whether the Indian tribe can immediately initiate gaming operations depends on the trust status of the land at the time of the concurrence.

For "after-acquired land" that is in trust at the time of a concurrence, a Gaming Eligibility Determination no further state or federal action is necessary after the concurrence for the Indian tribe to begin class I or class II gaming operations, if the Indian tribe has an approved gaming ordinance. (25 U.S.C. § 2710(a)-(b).) Similarly, if an Indian tribe already has an approved gaming ordinance and a gaming compact with the state, the

Indian can immediately begin class III gaming on "after-acquired" "off-reservation" land the moment a concurrence is issued.[2] (25 U.S.C. § 2710(d);); see also *North Fork Rancheria of Mono Indians of California v. California* (E.D. Cal. 2015) 2015 WL 11438206, *10-*11.) [noting that once lands are taken into trust after a Gaming Eligibility Determination and a related concurrence a state's refusal to negotiate a compact for gaming on that land constitutes "bad-faith" negotiations under the IGRA].)

As this case illustrates the Two-Part Process is not limited to land that is in trust at the time, the Indian tribe applies for a Gaming Eligibility Determination. Rather, the implementing regulations allow Indian tribes to request a Gaming Eligibility Determination for land that is not in trust at the time of the application and may not be in trust until long after a Gaming Eligibility Determination is issued. (25 C.F.R. § 292.15.)[3]

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[2] The immediate discussion is intended to point out that in certain circumstances even class III gaming could begin the moment a concurrence with a Gaming Eligibility Determination is issued. Importantly, as will discussed in detail below, even if the concurrence does have the effect of immediately authorizing the conduct of class III gaming because the Indian tribe does not have a gaming compact, the concurrence effectively ensures that class II and class III gaming will occur at the "off-reservation" site at some point. Once there is a concurrence the issue is not if gaming will occur, but when it will occur and what role will the state play in regulating gaming when it does.

[3] The Yuba Site, at issue in this case, and the Madera Site at issue in the related case of *Stand Up v. State*, *supra*, 6 Cal.App.4th 686, fall into this category.

For non-trust lands, even though the concurrence solidifies the designation of the land as eligible for gaming, gaming cannot occur until that federal government takes the land into trust pursuant to 25 U.S.C. § 5108 and 25 C.F.R. § 151 et seq.[4] (25 U.S.C. § 2710(b)-(d).) However, as discussed in more detail below, the trust acquisition has no impact on the Gaming Eligibility Determination as that process is final. (25 C.F.R. § 292.13.) There are no provisions of federal law or regulations that allow the Secretary to restrict gaming on land when Gaming Eligibility Determination concerning that land has been made, and a concurrence has been issued.[5]

Finally, it is important to emphasize that there also are no provisions in the IGRA or the implementing regulations that allow a state to withdraw, modify or condition a concurrence. Moreover, there are no provisions in the IGRA or the implementing regulations that allow for a Gaming Eligibility Determination made effective by a valid concurrence to expire or

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[4] As United Auburn alludes to, but does not fully discuss in its Opening Brief, although the Two-Part process and the trust acquisition process are distinct processes, when an Indian proposes to conduct gaming on non-trust off-reservation lands the Secretary conducts the analysis of the trust acquisition in conjunction with the Two-Process. (AOB at 10-11; 25 C.F.R. § 151.11.)

[5] In this sense, section 2719(b)(1)(A) is simply a typical form of conditional legislation in which Congress drafts a statute such that the effectiveness of its provisions can only be triggered by the actions of a third party or parties. However, once the third party acts the provision is automatically and irrevocably triggered. (See *Currin v. Wallace* (1939) 306 U.S. 1, 15-16.)

be rescinded. Once a valid concurrence the state has made a final and irrevocable decision to allow even non-trust lands to forever be considered gaming eligible. As discussed in more substance below, at that point the only guaranteed way a state could ever stop gaming on the "off-reservation" site would be to ban all forms of gaming for all purposes. (see 25 U.S.C. §§ 2710(b); 2710(d).)

a. The Concurrence is the Last act Necessary to Lift the Restriction on the Secretary to Take Land Into Trust for Gaming Purposes.

The Governor attempted to diminish the effect and significance of the concurrence by claiming that the concurrence does not lift the prohibition against gaming on "after-acquired lands." (ARB at 30.) Rather, the Governor asserts that the federal government lifts the prohibition when it completes the trust acquisition. (*Id.*). The concurrence the Governor argued is merely one precondition to the Secretary of Interior's authority to allow gaming on an "off-reservation" site. (*Id.*)

The Governor's argument misses the point. While it may be true that the Secretary should complete the trust acquisition of a proposed "off-reservation" casino site before gaming can commence, the Two-Part Process is final and given effect by the Governor's concurrence. There are no additional requirements that must be satisfied for the land to be used for gaming as soon as the Secretary makes the trust acquisition. (25 U.S.C. § 2719(b)(1)(A).) And again it is important to emphasize that there are

provisions of federal law that allow the Secretary to restrict or prohibit gaming on land he acquires in trust when there has been a Gaming Eligibility Determination for that land. Thus, the Governor's argument that one last act must occur before gaming can commence does not diminish the substantial effect of the issuance of a concurrence.

Contrary to the Governor's suggestion is not the combination of the Gaming Eligibility Determination and concurrence that is dependent upon the trust acquisition for gaming purposes. Rather it is the trust acquisition for gaming purposes that is ultimately dependent upon the concurrence.

b. The Secretary's Determination to Take Land Into Trust for Gaming Purposes is Typically Made Before the Gaming Eligibility Determination or Concurrence.

Another thing that the Governor fails to grasp is that for all practical purposes the decision to take the Yuba Site into trust was made before the Secretary made his Gaming Eligibility Determination. As United Auburn indirectly alluded to in its briefing, before the Secretary can take any parcel of land into trust, he must complete an extensive evaluation of the environmental, economic, and social impacts of that action. (25 C.F.R. § 151.11.) In particular, under the applicable regulations, before the Secretary takes "off-reservation" land into trust he must fully consider "[t]he purposes for which the land will be used." (25 C.F.R. §§ 151.11(a); 151.10(c).) Thus, for lands such as the Yuba Site, the Secretary must, as

part of the trust acquisition process, conduct his evaluation under the assumption that the land will be used for gaming purposes.

As a legal requirement, therefore, as United Auburn suggested: "the Secretary considers the land's potential post-acquisition use for gaming *before* the Secretary decides to acquire the land in trust." (AOB at 10.) What's more, however, in most instances – and certainly in relation to the Yuba Site and the Madera Site – the Secretary completes his consideration of an Indian tribe's request to have land taken into trust to be used for gaming purposes before the Secretary issues the Gaming Eligibility Determination. (See, e.g., *St. Croix Chippewa Indians of Wisconsin v. Kempthorne* (D.D.C. 2008) 535 F.Supp.2d 33, 35 [acknowledging that it is not unusual for the Secretary to undertake and complete review of the fee-to-trust application before considering whether to issue a positive Gaming Eligibility Determination].) This is exactly what happened in relation to the Yuba Site and the Madera Site.

Conducting the review this way makes good sense. The analysis for the trust decision and the Gaming Eligibility Determination requires review of nearly identical factors. Therefore, if the review was not conducted jointly, it would require the Secretary and the applicant Indian tribe to duplicate efforts and incur otherwise unnecessary expenses. Moreover, waiting to conduct the analysis and review for the trust acquisition until after the Gaming Eligibility Determination would require the Secretary to

sit on a fee-to-trust application for years and cause a substantial delay even after a Gaming Eligibility Determination has been given effect by a concurrence.

Concerning the Yuba Site, the record, in this case, reflects that the Secretary conducted the review and analysis of the trust acquisition before the Secretary made a decision on the Gaming Eligibility determination. Thus, on August 6, 2010, the Secretary issued a Notice of Availability for the "Final Environmental Impact Statement for the Proposed Enterprise Rancheria Gaming Facility and Hotel Fee-to-Trust Acquisition Project, Yuba County ("FEIS"). (151 Fed.Reg. 47618, August 6, 2010.) The FEIS indicated that the proposed project and "Alternative A" in the FEIS, was a 207,760 square foot gaming facility, a 107,125 square foot hotel, and 2,750 parking spaces to be located on the Yuba Site. (*Id.*) The FEIS further indicated that Alternative A – the proposed project – was the Secretary's "Preferred Alternative." (*Id.*).

On September 1, 2011, just over one year after the Secretary published the Notice of Availability of the FEIS for the trust acquisition, the Secretary issued the Record of Decision concerning the Gaming Eligibility Determination for the Yuba Site. (Assistant Secretary-Indian Affairs Larry Echo-Hawk, Record of Decision, Secretarial Determination Pursuant to the Indian Gaming Regulatory Act for the 40-acre Yuba County site in Yuba County, California, for the Enterprise Rancheria, September 1,

2011 [available at https://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/enterprise-rancheria/ENTERPRISE%20ROD%202012.pdf/view, last accessed on Sept. 22, 2017].) On the same day, the Secretary sent a letter to Governor Brown explaining the Gaming Eligibility Determination and requesting that the Governor concur in the determination.[6] (Assistant Secretary-Indian Affairs Larry Echo Hawk letter to Governor Jerry Brown, September 1, 2011 [available at https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc015015.pdf, last accessed on Sept. 22, 2017].) On August 31, 2012, the Governor responded to the Secretary's request indicating that he concurred with the Gaming Eligibility Determination. (https://www.gov.ca.gov/news.php?id=17699) On November 21, 2012, less than three months after the Governor stated his concurrence, but over two (2) years after the environmental review for the trust acquisition for the Yuba Site was completed, the Secretary issued a Record of Decision announcing his decision to acquire the Yube Site into to trust for gaming purposes. (Assistant Secretary-Indian Affairs Kevin K. Washburn, Record of Decision, Trust Acquisition of the 40-acre Yuba County site in Yuba

[6] Notably, both the Record of Decision and the Secretary's September 1, 2011, letter to Governor Brown each rely on the FEIS for the Secretary's decision to issue the Gaming Eligibility Determination (https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc015015.pdf)

County, California, for the Enterprise Rancheria of Maidu Indians of California [available at http://www.enterpriseeis.com/documents/rod/ROD.pdf , last accessed Sept. 22, 2017].) Notably, in the Record of Decision for the Fee-to-Trust Acquisition, the Secretary specifically acknowledged that his decision was dependant upon the Governor's concurrence stating:

> The IGRA requires that the Governor concur in the [Gaming Eligibility Determination], which he did by letter dated August 30, 2012. The land can, therefore, be acquired in trust for the Tribe for the purpose of gaming pursuant to Section 5 of the IRA, as amended by the Indian Land Consolidation Act of 1983. 25 U.S.C. § 2202.

(*Id.* at 1.)

As the previous argument should indicate the Governor's attempt to diminish the importance or impact of his concurrence because the Yuba Site still had to be taken into trust is without merit. As the time, the decisions concerning the Yuba Site show, before the Governor issued his concurrence the Secretary had already determined that he intended to acquire the Yuba Site into trust for gaming purposes. The only thing the Secretary was waiting for was the Governor's concurrence. To be sure, as the Secretary acknowledged in his Record of Decision for the Fee-to-Trust Acquisition, it was the Governor's concurrence that authorized the Secretary to take the action he did. (*Id.*)

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C. The Concurrence provides irrevocable ability to conduct class II gaming effectively ensures class III gaming will occur as soon as the lands are taken into trust.

The fact that the Governor's concurrence is the last act necessary to give effect to the Gaming Eligibility Determination and triggers the Secretary's authority to take the land into trust for gaming purposes is important. As United Auburn accurately explained, once the land is in trust it can immediately be used for class II gaming. (Appellant's Reply Brief on the Merits ("ARP") at 13.)

However, it is even more important because the concurrence also practically guarantees that class III gaming will occur, even if the California Legislature never ratifies a gaming compact, as happened regarding the Yuba Site, or if the California voters expressly reject a ratified compact through the power of referendum, as happened regarding the Madera Site.[7] (See *Estom Yumeka Maidu Tribe of the Enterprise Rancheria of California v. California* (E.D.Cal. 2016) 163 F.Supp.3d 769 ("*Estom Yumeka Tribe*"); *North Fork Rancheria of Mono Indians of California v. State of California* (E.D. Cal. 2015) 2015 WL 11438206.)

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[7] United Auburn argues at various places that a tribal-state gaming compact is an absolute prerequisite to class III gaming on after-acquired off-reservation land. (AOB at 3, 9.) As discussed below that assertion is not accurate.

Despite arguments to the Court by the parties, the existence of a tribal-state compact is not determinative of an Indian tribe's ability to conduct class III gaming. Rather, under the IGRA class III, gaming can occur under "Secretarial Procedures" issues under what is commonly known an IGRA's remedial process. (25 U.S.C. § 2710(d)(7)(A)-(B).)

To initiate the IGRA's "remedial process," a tribe need only request compact negotiations to authorize gaming on "Indian lands," which includes lands taken into trust after a Gaming Eligibility Determination and a concurrence. (25 U.S.C. § 2710(d)(7)(B)(i); *Estom Yumeka Tribe*, *supra*, 163 F.Supp.3d 769, 782; *North Fork v. California*, *supra*, 2015 WL 11438206, *7-*10.) If, after one-hundred eighty (180) days after the Indian tribe made the request, the state has not negotiated a tribal-state compact, or has negotiated in "bad-faith" the IGRA authorizes an Indian tribe to bring an action in the federal district court for a declaration that the State did not negotiate in good faith regarding a tribal-state gaming compact. (25 U.S.C. § 2710(d)(7)(A).)

In such an action, the scales tip against the state in that the state has the burden of showing that it negotiated in good faith. (25 U.S.C. § 2710(d)(7)(B)(ii).) If a federal district court determines that a state failed to negotiate in good faith the IGRA requires the court to enter an order requiring the state and the Indian tribe to conclude a compact within 60 days. (25 U.S.C. § 2710(d)(7)(B)(iii).) If the state and Indian tribe fail to

conclude a compact within the 60 days, the IGRA requires the district court to appoint a mediator. (25 U.S.C. § 2710(d)(7)(B)(iv).) The state and the Indian tribe then submit their "last best offer of a compact" to the mediator, who is to choose the proposed compact that "best comports" with the IGRA, other federal law and the findings of the district court during the bad faith litigation. *(Id.)*

After the mediator has selected a compact the state has 60-days to consent to the proposed compact. (25 U.S.C. § 2710(d)(7)(B)(vi) If the state does not consent to the proposed compact the proposed compact is forwarded to the Secretary of Interior who is then required to prescribe procedures – consistent with the proposed compact – that authorize the conduct of class III gaming on the Indian tribes existing Indian lands. (25 U.S.C. § 2710(d)(7)(B)(vii).) Once an Indian tribe begins conducting class III gaming pursuant to Secretarial Procedures, the state no longer has any input concerning how the gaming is conducted or regulated.

II. The Governor's Authority to Concur Under Existing California Law.

Although, the IGRA speaks in terms of a state Governor issuing a concurrence federal courts hold that state law, not the IGRA, determines whether the Governor has any authority to issue a concurrence in Secretarial Gaming Eligibility Determination. (*Confederated Tribes of Siletz Indians v. United States* (9th Cir. 1997) 110 F.3d 688, 697-698.)

Whether California law authorizes the Governor to unilaterally issue a concurrence is the issue of this case.

Auburn argues that the Governor has no such power under California law. Contrarily, the Governor asserts that he has authority to issue a concurrence either by implication under Section 19(f) of the California Constitutions, or alternatively as pursuant to the powers inherent in the Office of the Governor.[8]

Initially, and in reverse of the Governor's argument, there is no rational argument that the Governor has inherent, unchecked, authority to make such a pivotal gaming decision as granting a concurrence in a Secretarial Gaming Eligibility Determination. This is so for several reasons.

A. The Governor Does not Have Inherent Authority Under California's Gaming Laws to Unilateral Issue a Concurrence

First, as United Auburn argued concerning a related point, the California Constitution places all matters concerning gaming in article IV of the Constitution which addresses Legislative Powers. (ARB at 35-36.) As United Auburn pointed out, Section 19, of article IV, is dedicated

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[8] The Governor asserts that he has express authority to concur in a Gaming Eligibility Determination under Article IV, Section 19(f) of the Constitution. CITE. However, the plain language of that provision – which does not mention the term concurrence – rightfully disposes of that argument.

exclusively to the issue of gaming. (Ca. Const., art. IV, § 19.). Section 19 details types of gaming authorized in California and specifies the scope of the Legislature's authority to authorize and regulate gaming within California. (Ca. Const., art. IV, § 19(f).) Importantly, Section 19(e) specifies that the Legislature is expressly required to prohibit casino gambling in California. (Cal. Const., art. IV, § 19(e).)

Additionally, Section 19(f) authorizes the Governor to act as the state's agent in negotiating and concluding tribal-state gaming compacts. (*Id.*)[9] However, section 19(f) does not give the Governor any power to make any final decision about whether a compact he negotiated goes into effect. Rather, Section 19(f) specifically reserves that power to the Legislature by requiring legislative ratification of all compacts the Governor negotiates with an Indian tribe. (*Id.*)

Moreover, in addition to the provisions of Section 19(f) and the general structure of California's statues related to gaming indicate that the Governor has no "inherent" authority in this area. Outside of the Constitution and the Penal Code, the primary sources of law concerning

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[9] Both the Governor and United Auburn routinely assert that Section 19(f) grants the Governor the "power to compact" or "the compacting power." (See, e.g, AOB at 18 ["Article IV, Section 19(f) gives the Governor the power to compact with Indian tribes for class III gaming on reservations, then subjects those compacts to legislative ratification."]; RAB at 27 ["When the People granted the Governor compacting power regarding class III gaming on Indian lands 'in accordance with federal law' (Cal. Const., art. IV, § 19(f) ....."].)

gaming in California are the California Gambling Control Act, Business, and Professions Code section 19800, et seq., and Government Code sections 12012.25-12012.70.

Just as is section 19(f) of the Constitution, the structure of the California Gambling Control Act is such that it is dominated by the Legislature. The Act is a comprehensive and excruciatingly detailed law governing nearly every conceivable aspect of gaming in California. Without getting into the finite details of the Act, what is important here is that under the Act the Governor has no authority to take any individual action concerning authorizing, approving, or regulating any aspect of lawful gaming in California. Moreover, the power the Governor does exercise under the California Gambling Control Act does derive from powers inherent in his Office, but rather are delegated to him by the Legislature. (See Bus. & Prof. Code, §§ 19811; 19183(b)-(c).)

Under the California Gambling Control Act, the Governor's only role concerning gaming is that the Legislature has delegated to the Governor responsibility for appointing and potentially removing members of the California Gambling Control Commission ("CGCC") and designating one member to serve as Chairperson of the CGCC. (Bus. & Prof. Code, §§ 19811; 19813(b)-(c).) However, even with regard to these, the Governor does not exercise unilateral or unconstrained. Rather, in the Gambling Control Act, the Legislature specifically required Senate

confirmation of all Gubernatorial appointments. (Bus. & Prof. Code § 19813(b).) Additionally, in the Act, the Legislature also dictated the grounds on which the Governor may remove a member of CGCC. (Bus. & Prof. Code § 19813(c).)

As the previous discussion shows, the Governor has no inherent authority concerning any form of gaming in California. Rather, all inherent authority concerning the subject lies with the Legislature. Consequently, if the Governor has any power to concur in a Secretarial Gaming Eligibility Determination, he must identify some express provision of California law that grants him such power.

B. The Governor's Role as the "Sole Organ of Communication" With the Federal Government Does not Grant him Power to Concur in a Gaming Eligibility Determination.

The Governor attempts to sidestep the issue of his lack of any inherent authority around gaming generally, and Indian gaming specifically, by seeking to diminish the nature and importance of a concurrence in Secretarial Gaming Eligibility Determination. Thus, the Governor characterizes his concurrence as merely responding to an inquiry from the Federal Government and communicating his agreement with the Secretary's determination regarding off-reservation gaming sites. (AB at 38-42.) The Governor argues that "considerations of practice, history, and function, establish the Governor's inherent power to communicate his

concurrence to the federal government, and the Legislature has adopted a statute recognizing that the 'Governor is the sole official organ of communication' with the federal government." (AB at 38-39.)

There are numerous problems with the Governor's claims. First among these problems is that when the Governor issues a concurrence with a Secretarial Gaming Eligibility Determination, he does far more than respond to an "inquiry" and "convey" his agreement with the Secretary's findings. Much to the contrary, as explained above, when a Governor issues a concurrence in a Secretarial Gaming Eligibility Determination he is taking the last act necessary for a parcel of California land to be deemed gaming eligible from that day forward. The act is pivotal in that it is binding on California and once the concurrence is issued it cannot be withdrawn or reconsidered. (25 U.S.C. § 2719; 25 C.F.R. §§ 292.13; 292.23)

A primary fact that the Governor ignores when making this argument, and United Auburn does not directly address, is that the effectiveness of the Secretarial Gaming Eligibility Determination is completely dependent upon the concurrence. (25 C.F.R. §292.23). As the IGRA provides, if the Governor conveyed a non-concurrence then the land remains ineligible for gaming. (25 C.F.R. § 292.23(a)(1).) Similarly, if the Governor does not grant an affirmative concurrence within one-year from the date of the Secretary's request the Gaming Eligibility Determination

expires and is longer valid. (25 C.F.R. § 292.23(b).) Put simply, without a concurrence any Gaming Eligibility Determination is meaningless.

Moreover, not only does the concurrence clear the Federal Governments only hurdle for putting the Gaming Eligibility Determination into effect, but it also creates affirmative obligations on the state to negotiate a compact and, effectively guarantees that class III will occur in some form or another on the land subject to the Gaming Eligibility Determination. (25 U.S.C. § 2710(d)(7); see also *Estom Yumeka Tribe*, *supra*, 163 F.Supp.3d 769; *North Fork v. California*, *supra*, 2015 WL 11438206.) As discussed in above, this is so because once land as to which a concurrence has been given is taken into trust, the state cannot refuse to negotiate a compact concerning that land. (*Estom Yumeka Tribe*, *supra*, 163 F.Supp.3d 769; *North Fork v. California*, *supra*, 2015 WL 11438206.) If it does refuse, it subjects itself to a judgment of "bad faith" negotiations under the IGRA, which then opens the door to IGRA's remedial provisions and ultimately class III gaming pursuant to the Secretarial Procedures. (*Estom Yumeka Tribe*, *supra*, 163 F.Supp.3d 769; *North Fork v. California*, *supra*, 2015 WL 11438206.)

Given the real-world impacts of a gubernatorial concurrence any suggestion that by granting a concurrence the Governor is merely responding to a federal inquiry and conveying an unimpactful agreement with the Secretary's analysis of the respective benefits and harms arising

from the proposed off-reservation casino is incongruent with reality and reason.

Second, as the Governor himself recognizes (AB at 43)[10] the fact that the Legislature has provided that the Governor is "the sole official organ of communication between the government of this State and the government of any other State or the United States" does not give the Governor carte blanche power to communicate anything he desires. Rather, the Governor's interactions with the federal government must be "informed by, and consistent with state law and policy." (AB at 43-44.) The Governor suggests that his concurrence was "entirely consistent with state law and policy allowing for casino-style gaming[.]" (AB at 44, fn. 24.) However, the Governor does not explain how exactly his decision fit within the state's law policy regarding "casino-style gaming."

The argument also ignores one very important aspect of California law and policy concerning Indian-gaming, which is that under California law, and pursuant to California's gaming policy, the Governor has no

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[10] The Governor describes his authority to communicate with the federal government on behalf of California as an "inherent" gubernatorial power and that Government Code section 12012 merely "confirms" that inherent power. (AB at 43.) This like many of the Governor's statutory and constitutional arguments defies elementary rules of statutory construction. To be sure, if such the power to act as the sole conduit of communication with the federal government is an inherent power, there is no need for legislation confirming that power and section 12012 would be rendered superfluous.

authority to take any action that binds the State of California in any way concerning gaming. Rather California law and policy is such that all final decisions concerning gaming generally, and Indian gaming in particular rest with the Legislature.

C. The Governor Does not Have Unilateral "Compacting Power" Under California Law from Which to Imply a Unilateral Power to Concur

The Governor's primary argument in favor his power to concur is that the concurrence power is implied from, and necessary to, his compacting power. (RAB at 27- 30.) In the Governor's view, his power to compact must necessarily carry with it the implied power to concur because without the concurrence power he could not "take the steps needed to 'negotiate,' 'conclude,' and 'execute' a compact consistent with federal law." (RAB at 27.)

This of course is purely circular reasoning based on two assumptions: (1) that Article IV, Section 19(f) of the Constitution requires the Governor to take every step necessary to create a duty to enter compact negotiations even where no duty existed before; and (2) that the Governor has the actual power to compact from which the power to concur can be implied. However, neither is true.

a. The Power to Concur is not Necessary to the Governor's Authority to Negotiate Compacts to be Ratified by the Legislature.

United Auburn fairly addressed the issue of whether the power to concur is necessary to the power to compact. (ARB at 8-24.) Accordingly, Amicus will not repeat those arguments or delve deeply into the "necessity" argument.

The only additional point Amicus makes that the Governor's argument misses one critical point: that under the IGRA a state has absolutely no obligation, ever, to negotiate a compact concerning lands that are not Indian land qualified for gaming. Under the IGRA doing so, just like issuing a concurrence, is completely voluntary. A state cannot be held accountable for refusing to discuss the terms of gaming on non-gaming lands.

The thrust of the Governor's argument regarding the power to concur is akin to an argument that because the Governor has the power to declare a state of emergency in California he must take every step necessary to create such a state of emergency, otherwise he cannot utilize his power of declaration. While this is an admittedly extreme example, it illustrates the logical fallacy that underpins the Governor's position as well as the absurdity of that position.

b. Article IV, Section 19(f) of the Constitution Does not Grant the Governor the Power to Compact.

The second assumption the Governor makes is that Article IV, Section 19(f) actually grants him the "power to compact." (RAB at 27-29.)[11] However, it does not.

A compact is a form of a contract, therefore "[g]eneral principles of federal contract law govern the Compacts, which were entered pursuant to the IGRA." (*Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. California* (9th Cir. 2010) 618 F.3d 1066, 1073 (citing *Kennewick Irrigation Dist. v. United States* (9th Cir. 1989) 880 F.2d 1018, 1032).) It is a basic principle that a government or government official must have the legal authority to enter a contract, otherwise the contract is void and unenforceable. (*G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1092; see also *Pueblo of Santa Ana v. Kelly* (10th Cir. 1997) 104 F.3d 1546, 1559 ("*Pueblo of Santa Ana*") [acknowledging that compact executed by a Governor without legal authority under state law is void and unenforceable and cannot be put into effect by the Secretary of the Interior].)

In California, and therefore under the IGRA, the Governor does not have the legal authority to bind the State of California to any tribal-gaming

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[11] United Auburn seems to concede that the Governor has the "power to compact." (AOB at 33-35; ARB at 29-31.) However, United Auburn argues, the Governor's "power to compact" is limited to lands already in trust and eligible for gaming under the IGRA. (AOB at 33-35; ARB at 29-31.) As discussed here, United Auburn allows the Governor too much authority under Article IV, Section 19(f).

compact. Section 19(f) and section 12012.25(d) of the Government Code are crystal clear on this point.

Section 19(f) provides that the governor "is authorized to negotiate and conclude compacts, subject to ratification by the Legislature ..." (Ca. Const., Art. IV, § 19(f).) Under the plain language of Section 19(f) therefore, California voters did not grant the Governor any power or authority to bind the State of California to gaming compacts. Rather, California voters reserved the power to bind California to the California Legislature by expressly requiring legislative ratification of every gaming compact the Governor negotiates. Thus, under Section 19(f), it is the Legislature, not the Governor that has the "power to compact."

In accordance with Section 19(f) of the Constitution, section 12012.25 of the Government Code designates the Governor as "the state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes located within the State of California ...." (Gov't. Code § 12012.25(d). Then section 12012.25 sets forth the procedure the Governor must follow in relation to the negotiation of gaming compacts. In particular, concern tribal-gaming compacts the Legislature required that:

> Following completion of negotiations conducted pursuant to subdivision (b) or (c), the Governor shall submit a copy of any executed tribal-state compact to both houses of the Legislature for ratification, and shall submit a copy of the

> executed compact to the Secretary of State for purposes of subdivision (f).

(Gov't Code § 12012.25(e).) Subdivision (f) provides that:

> Upon receipt of a statute ratifying a tribal-state compact negotiated and executed pursuant to subdivision (c), or upon the expiration of the review period described in subdivision (b), the Secretary of State shall forward a copy of the executed compact and the ratifying statute, if applicable, to the Secretary of the Interior for his or her review and approval, in accordance with paragraph (8) of subsection (d) of Section 2710 of Title 25 of the United States Code.[12]

(Gov't Code § 12012.25(f).) Again, like section 19(f) of the Constitution, section 12012.25 of the Government Code makes clear that it is the Legislature and not the Governor that has the power to bind the state to a gaming compact. In other words, it is the Legislature, not the Governor, that holds the "compacting power."

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[12] Section 12012.25(f) significantly undermines the Governor's claim that section12012 of the Government Code establishes his inherent authority to concur by designating the Governor as the "sole official organ of communication" with the United States. (RAB at 39.) As section 12012.25(f) indicates that in the area of Indian gaming the Legislature has designated the Secretary of State as the state officer responsible for transmitting IGRA related decisions to the United States. Under the statutory cannon of construction that specific statutes trump general statutes it would seem that in the area of Indian gaming the Legislature overrode the Governor's role as the "sole official organ of communication" with the United States. (*Warne v. Harkness* (1963) 60 Cal.2d 579, 588 [a special statute constitutes an exception to the general statute and govern whether enacted before or after general statute.].)

The fact that the Governor does not have "compacting power" in terms of lacking power to bind California to any decision concerning Indian gaming completely deflates his claims that section 19(f) grants him any implied authority to issue a binding concurrence by virtue of granting him the power to compact.

D. The Governor's Proper Role Concerning a Gaming Eligibility Determination and Request for a Concurrence.

Keeping in mind that neither Article IV, Section 19(f) of the Constitution, nor section 12012.25(d) of the Government Code ever mentions the power to concur, any authority these provisions of law give the Governor concerning a concurrence must be informed by and consistent with the actual authority he has concerning compacts. The implied power cannot reasonably exceed the power and cannot be freed from restrictions on the express power. In other words, if Article IV, Section 19(f) of the Constitution and section 12012.25(d) imply any authority concerning a concurrence that authority is limited and can only be given binding effect after the legislative ratification.

a. The Governor is the Proper State Official to Communicate with the Secretary During the Consultation Phases of the Gaming Eligibility Determination.

Importantly, even under the proper theory of implied power, the Governor can and should play an important preliminary role in the process

relating to a Gaming Eligibility Determination. For instance, before issuing a two-part determination, federal regulations require the Secretary of the Interior "consult" with the "appropriate State ... officials." (25 C.F.R. § 292.13(b).) As part of the "consultation" process the Secretary must send the State officials a letter setting forth the following:

> (1) the location of the proposed gaming establishment;
>
> (2) information regarding the proposed scope of gaming; and
>
> (3) information relevant to the specific proposal such the overall size of the proposed gaming facility.

(25 C.F.R § 292.20(a)(1)-(3).)

Additionally, in consulting with the appropriate State official, the Secretary of Interior must request the submittal of comments within 60 days, on the following topics:

> (1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;
>
> (2) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;
>
> (3) Anticipated impact on the economic development, income, and employment of the surrounding community;

(4) Anticipated costs, if any, to the surrounding community and identification of sources of revenue to mitigate them;

(5) Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and

(6) Any other information that may assist the Secretary in determining whether the proposed gaming establishment would or would not be detrimental to the surrounding community.

(25 C.F.R. § 292.20(b)(1)-(6).)

The Secretary of Interior is then required to consider all of the information submitted by the Tribe proposing the gaming establishment and the appropriate State and local officials Based on this information, the Secretary determines whether she will issue a favorable two-part determination. (25 C.F.R. § 292.21(a).) Importantly, the Department of Interior's "Checklist for Gaming Acquisitions, Gaming Related Acquisitions, and Two-Part Determination Under Section 20(b)(1)(A) of the Indian Gaming Regulatory Act, identifies "appropriate state and local officials" for consultation purposes as "the governor of the state in which the land is located and state and appropriate local officials of units of local governments located within ten (10) miles of the site of the proposed gaming establishment." (Request for Judicial Notice, Exhibit A, p. 7.)

This "consultation" role is entirely appropriate for the Governor. It is entirely in-line with Government Code, section 12012, which provides that "[t]he Governor is the sole official organ of communication between the government of this State and the government of any other State or the United States. Likewise, it is entirely in-line with the express authority given to the Governor under Section 19(f)—to negotiate and conclude compacts.

Under the appropriate approach, the Governor should act as the voice of California with regard to receiving information from the Secretary of Interior regarding a proposed Gaming Eligibility Determination and, pursuant to 25 C.F.R. § 292.20, providing his views and opinions regarding the social, economic and environmental impacts that will result from the proposed off-reservation casino. Through the consultation phase, the Governor is arguably appropriately charged with raising any issues concerning the location of the gaming establishment or scope of gaming to influence the Secretary's decision or perhaps negotiate concessions from the Tribe.

b. After Consulting Concerning A Gaming Eligibility Determination, the Governor Must Defer to the Legislature Regarding the Decision of Whether to Grant a Concurrence.

The power to consult with the Secretary regarding a Gaming Eligibility Determination almost perfectly tracks the express authority the

Governor has been delegated to negotiate and conclude compacts. Just as the Governor must provide any final compact he negotiates and concludes to the Legislature for ratification; he accordingly must submit any request for a final concurrence in a Gaming Eligibility Determination to the Legislature for ratification. That is the overall scheme of California law, and it is responsive to the express limitations on the gubernatorial power outlined in Section 19(f).

In terms of submitting a request for a concurrence to the Legislature, there are at least a couple of reasonable approaches the Governor could take. The first, and arguably most reasonable approach, would be for the Governor to immediately notify the Legislature of the Secretary's request for a concurrence. The Legislature could then consider the matter, vote on whether to concur, and then instruct the Governor, or in accordance with section 12012.25(f) the Secretary of State, to communicate the concurrence to the Secretary.

Alternatively, but more problematic due to the lack of transparency, the could possible do what he claims to have done with regard to the Yuba Site concurrence and the Madera Site concurrence. That is to tie his proposed concurrence to directly to the proposed compact and submit them to the Legislature as part of a "package deal." The Legislature then would vote on the concurrence and the compact at the same time. If there is an

affirmative vote both are ratified. And alternatively, if the vote is against, then both are rejected.

In either of these scenarios, the intention of Article IV, Section 19(f) that the Legislature, and not the Governor acting alone, make final, and binding gaming decisions is properly respected. Moreover, and more importantly, keeping the decision within the legislative process protects the People of California's right to voice their own opinion on the important issue of "off-reservation" gaming as they did concerning the Madera Site.

The bottom line, however, is that it is unreasonable to imply any power from Article IV, Section 19(f) or section 12012.25(d) of the Government Code that is significantly greater in terms of impact and finality than the limited and restricted authority that was delegated to the Governor.

E. Denying The Governor An Implied Power To Concur In A Gaming Eligibility Determination Has No Impact On His Ability to Communicate With The Federal Government On Other Matters.

The Governor suggests that denying him the power to concur in a Gaming Eligibility Determination, the Court would effectively make him unable "to interact with the federal government on matters of policy." (ARB at 39.) He would, he claims, be denied the ability to provide information or express views or opinions concerning matters of state policy in which the federal government may have an interest. (ARB at 40.) And,

ultimately, the Governor argues that denying him the power to concur in a Gaming Eligibility Determination, would "require him to stand mute in the face of [a] federal inquiry" concerning not only gaming related matters but a host of other matters, including:

- Responding to inquiries concerning the federal acquisition of land for the purpose of disposing radioactive materials. (ARB at 41.)
- Responding to inquiries concerning the acquisition of land to establish an airport in or near a national part. (*Id.*)
- Responding to inquiries concerning the development of a comprehensive management plan for estuaries of national significance. (*Id.*)
- Responding to proposals relating to the transfer of contaminated real property at a federal facility. (*Id.*)

The Governor's suggestion that restricting his ability to unilaterally issue a concurrence in a Gaming Eligibility Determination without Legislative approval relates to any of the scenarios above is without merit. First, as United Auburn pointed out, none of the situations above involve a subject matter – like casino gaming – that the Constitution generally prohibits. (ARB at 14-15.) Nor do any of these limited examples involve a subject matter over which the Constitution has expressly requires legislative ratification of relevant binding agreements.

Not only is the Governor's reliance on these examples without substantive merit, the argument also misses an important point – that just an in the case of the IGRA, Congress cannot through federal legislation dictate which state official or body has authority to act on behalf of a state in a nature that binds the state to a final an irrevocable action. The commentary from *Siletz*, *supra*, acknowledging that whether a Governor has authority to concur is a matter of state law, does not only apply in the context of IGRA. (*Confederated Tribes of Siletz Indians v. United States* (9th Cir. 1997) 110 F.3d 688, 697.) It is a basic principle that states necessarily have the final say in who can make decisions for a state on any given matter.[13]

Moreover, in relation to the examples of federal law that contemplate a gubernatorial concurrence or gubernatorial consent that the Governor raises, he does not identify a single instance in which the Governor of California unilaterally granted a concurrence or consent. Nor, does the Governor identify a single case arising in relation to those examples where a gubernatorial concurrence or consent was challenged as violating California law. However, if there were a challenge to such an action, the job of any court considering the dispute would be to determine –

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[13] It is arguable that any attempt by Congress to dictate who in state government has the authority to grant consent to a federal proposal would violate the Guarantee Clause of the United States Constitution in that it would arguably deny the people of the state the right to a republican form of government in which the people exercise their power to determine how state government functions.

just as this Court must do here – whether the Governor was authorized by California law to take the particular action, he or she took.

It may be that under California's statutory scheme a unilateral action on the part of the Governor in relation to one of the examples he identified may very well be upheld. However, here, in this instance which relates only to a decision concerning a gaming proposal in California both the Article IV, section 19(f) of the Constitution and section 12012.25(d) of the Government Code establish a legal scheme under which the Governor's actions must be approved by the Legislature before those actions are binding and operative.

III. Policy Considerations Dictate That the Power to Concur Must be Reserved to the Legislature.

A. Reserving the Power to Concur to the Legislature is Consistent With California law and Also Protects Indian Tribes.

That a Governor's concurrence makes rather than implements public policy cannot reasonably be denied. This is perhaps best illustrated by way of example.

As the record in this case reflects, the Governor took an entire year after the Secretary requested a concurrence to concur. Clearly, considering that he issued two concurrences in two very controversial Gaming Eligibility Determination on the same day, Governor Brown's philosophy is one that is open to the issue of "off-reservation" gaming. And, considering that during

the year he delayed in terms of granting the concurrence, he was negotiating compacts to authorize gaming on the "off-reservation" sites at issue, Governor Brown clearly indicated his willingness to concur to the tribes that would be impacted by the concurrence and their financial backers.

The expression of the Governor's willingness to concur necessarily played an important role in terms of guiding the tribes and their backers. Certainly, had he indicated an unwillingness to concur, the tribes and their financial backers would have been put in a much different position. And perhaps they would have pursued gaming on their existing gaming eligible lands just like all other gaming tribes in California. However, it was the Governor's communication of his willingness to concur that breathed life into the possibility of an "off-reservation" and considerably more lucrative casino.

However, had the timing been different the Tribes and their financial backers could have been put in a situation where they were effectively whipsawed. Had the request for the concurrence come at the point just after a change of gubernatorial administrations all of the tribe's work, including the millions of dollars it spent on pushing the project forward would be at risk. In that situation, all of the previous Governor's assurances or hints that he would concur would be meaningless. If the new Governor was fundamentally opposed to "off-reservation" gaming, that new Governor could unilaterally kill the project.

In reality, if Governor has the sole power to determine whether to concur in a Gaming Eligibility Determination, the Governor has the sole authority to determine California's policy concerning "off-reservation" gaming. This is highlighted by the scenario set forth above. That scenario, which could very easily occur, illustrates the California's policy on "off-reservation" gaming could change practically overnight and solely because of the individual views and philosophies of the Governor.

Allowing such an approach to the issue of "off-reservation" gaming puts even Indian tribes at risk. All California Indian tribes would greatly benefit a more rational, and consistent and predictable legislative process rather than being subjected to the individual whims, biases, and predilections of a single government official who is subject to strict term limits.[14]

B. Reserving the Power to Concur Protects the People of California.

Importantly, by reserving the power to concur to the Legislature, the Court also protects the People of California. Requiring legislative ratification of concurrences, just as is the case with compacts, reserves and protects the People's right to referendum and thus gives them the final voice

[14] The importance of this point is only enhanced by the amount of time it takes to push any proposed "off-reservation" gaming project forward. In this case, for example, the process began in 2002. (RAB at 17). However, the Secretary did not issue a Gaming Eligibility Determination until 2011. (RAB at 18.) During that span there were gubernatorial elections (2002, 2006, 2010) and therefore the possibility of three different Governor's with three different views concerning the issue of "off-reservation" gaming.

on an issue of substantial importance. It allows the People, if they choose, to make the final decision on gaming at any particular "off-reservation" site.

That is exactly what happened regarding the Madera Site in the related case of *Stand Up v. State*, *supra*. There, as the Court is aware, the People voiced their opinion, and 61 percent of the California voters specifically rejected gaming at the Madera Site in 2014 when the voted No on Proposition 48.

Proposition 48, as the Court is likely aware, was a referendum on AB 277, which was legislation proposing to approve a gaming compact with the North Fork Band of Mono Indians authorizing "off-reservation" gaming on the Madera Site. As noted, in a state-wide vote, California voters overwhelmingly rejected AB 277 by a margin of 22 percent. (Debra Bowen, Secretary of State, *Statement of Vote*, p. 93, http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf [last accessed September 22, 2017].)

Importantly, if there is doubt or ambiguity in the language of a proposition, the Court can look to "indicia of the voter's intent other than the language of the provision itself, including the "analysis and arguments contained in the official ballot pamphlet. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 504-505.)

In relation to Proposition 48, the official ballot shows that the focus of the measure was whether gaming should occur at all at the Madera Site. Key passages from the ballot pamphlet include:

> VOTE NO ON PROP. 48. It would allow the North Fork Tribe to build a massive off-reservation, Vegas-style casino in Madera County.
> ...
>
> North Fork's reservation land is over an hour's drive from the proposed location, but they want to build a casino with 2,000 slot machines here because it is closer to major freeways and Central Valley communities.
> ...
>
> Years ago when Californians approved Indian gaming, we were told there would be a limited number of casinos built on original reservation land.
> Prop. 48 breaks that Promise.
>
> ...
>
> VOTE NO ON PROP. 48 to STOP off-reservation Vegas-style casinos in all of our neighborhoods."

(Debra Bowen, Secretary of State, *California General Election, Official Voter Guide*, p. 46 (Nov. 4, 2014) http://vig.cdn.sos.ca.gov/2014/general/en/pdf/proposition-48-arguments-rebuttals.pdf.)

Similarly, in the Argument Against Proposition 48, opponents argued:

> VOTE NO ON PROP. 48. Keep Indian gaming on tribal reservation land only.
>
> Years ago, California Indian Tribes asked voters to approve limited gaming on Indian reservation land. They promised

> Indian casinos would ONLY be located on the tribe's original reservation land. PROP.48 BREAKS THAT PROMISE.
>
> While most tribes played by the rules, building on their original reservation land and respecting the voters' wishes, other tribes are looking to break these rules and build casino projects in urban areas across California. VOTE NO ON PROP. 48 TO STOP RESERVATION SHOPPING. Prop.48 would approve a controversial tribal gaming compact that would allow the North Fork Tribe to build an off-reservation, Vegas-style 2,000 slot machine casino more than hour's drive from the tribe's established reservation land, closer to major freeways and Central Valley communities.
> ....

(Debra Bowen, Secretary of State, *California General Election, Official Voter Guide*, p. 47 (Nov. 4, 2014) <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/proposition-48-arguments-rebuttals.pdf.)

These statements, show that the purpose of Proposition 48 was intended to do much more than merely reject a compact for gaming at the Madera Site. Rather, the purpose was to reject gaming at the Madera Site. As noted, that purpose prevailed by a massive margin of 22 percent. Determining that the Governor has unilateral and unchecked authority to issue a concurrence effectively renders the voice of the People mute. Despite their plain statement that gaming should not occur on that "off-reservation" land, it will.

CONCLUSION

As noted at the outset of this brief, this case represents a pivotal moment in the history of Indian gaming in California. If "off-reservation"

gaming projects can be approved in California, the decision, in this case, will dictate whether those projects will be approved by the Legislature through a rational and reliable process consistent with the process in place concerning gaming compact. Or, whether, this critical policy decision will be subject to the whims, and biases of an individual temporarily occupying the Office of the Governor.

It is this Amicus' view that California law and the importance of the issue to both Californian's and Indian tribes in California demand that the power to make such an important and irrevocably binding decision must be reserved to the Legislature. Accordingly, Amicus supports the Respondent in requesting that the Court overrule the Third District Court of Appeals ruling in *United Auburn Indian Community of the Auburn Rancheria v. Brown, Jr.* (2016) 4 Cal.App.5th 36.

However, if the Court is inclined to uphold the decision, in that case, Amicus respectfully requests to the Court do so on the narrowest of terms and such as to leave the issue in *Stand Up v. State*, supra, concerning the impact of the referendum on Proposition 48 on the gaming eligibility of the Madera Site open for further consideration.

Dated: September 26, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that the Amicus Curiae Brief of the Picayune Rancheria of Chukchansi Indians contains 11,803 words, excluding tables and this certificate, according to Microsoft Word 2010, the computer program used to create this brief.

Date: September 26, 2017

Michael A. Robinson
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PROOF OF SERVICE

I declare that I am employed with the law firm of Fredericks Peebles & Morgan LLP, whose address is 2020 L Street, Suite 250 Sacramento, California 95811. I am employed in Sacramento County, California. I am over the age of 18 and am not a party to this case.

On **September 26, 2017,** I caused the following documents(s) to be served:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND PROPOSED BRIEF OF AMICUS CURIAE PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS IN SUPPORT OF PLAINTIFF/APPELLANT UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA

on the interested party(ices) in this action as addressed as follows:

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XX **By First Class Mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at Sacramento, California.

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

Executed on **September 26, 2017** at Sacramento, California.

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