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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CITIZENS FOR A BETTER WAY, a California non-profit public benefit corporation; STAND UP FOR CALIFORNIA!, a California non-profit public benefit corporation; and GRASS VALLEY NEIGHBORS, a community environmental organization,

Petitioners and Plaintiffs,

v.

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

Respondents and Defendants.

YUBA COUNTY ENTERTAINMENT, LLC, a Delaware limited liability Company; DEPARTMENT OF THE INTERIOR; KENNETH SALAZAR, in his official capacity as Secretary of the Interior; ENTERPRISE RANCHERIA OF MAIDU INDIANS OF CALIFORNIA,

Real Parties in Interest

Case No. 34-2013-80001419

PETITIONERS AND PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT AND DEFENDANT'S DEMURRER

[Signature by Facsimile]

[Assigned to the Honorable Eugene L. Balonon for All Purposes]

Demurrer Hearing Date: August 2, 2013
Demurrer Hearing Time: 11:00 am
Department: 14
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BY FAX

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INTRODUCTION

This case involves a challenge to the Governor's decision to allow the Secretary of the Interior to take title to land in trust for the Enterprise Rancheria of Maidu Indians of California in order to develop a large casino and resort complex. The Governor's action exceeds his constitutional and statutory powers, and it was made in violation of the California Environmental Quality Act. The decision should therefore be set aside.

The California Constitution divides the legislative power from the executive power, and it grants the Governor only executive power. The executive power granted by the Constitution does not include inherent authority; it includes only the authority to execute those powers granted by the Constitution or statutes. Here, the Governor's concurrence in the Secretary's decision has resulted in the cession of California's jurisdiction over the land at issue, as well as the permanent removal of that land from the State's tax rolls. Nothing in the Constitution or any statute authorizes that action.

In his demurrer, the Governor suggests that his action is justified by provisions of the State Constitution and statutes authorizing him to negotiate gaming compacts with Indian tribes. But the Governor can negotiate compacts with respect to gaming on "Indian lands" only, and the authority to enter into such compacts does not include the authority to consent to the creation of new Indian lands by the Secretary of the Interior. Nor does anything in the federal Indian Gaming Regulatory Act authorize such action. To the contrary, while that statute prohibits the Secretary from acting without gubernatorial concurrence, it does not affirmatively confer any power on the Governor.

The Governor's decision was also made in violation of the California Environmental Quality Act ("CEQA"). That statute is designed to promote informed decision-making and public participation in assessing actions that require state or local governmental approval and that could affect the quality of our environment. CEQA's fundamental requirement is that governmental decision-makers, at all levels, evaluate the environmental impacts of their decisions on such actions, so that they—and the public—can meaningfully weigh those effects against the benefits of allowing the action to proceed. CEQA requires a thorough and open process to assess impacts,

alternatives and mitigation measures. The Supreme Court has repeatedly declared that the Legislature intended CEQA to be interpreted so as "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *See, e.g., Bozung v. Local Agency Formation Comm'n of Ventura County*, 13 Cal. 3d 263, 274 (1975); *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8 Cal. 3d 247, 259 (1972).

Here, the Governor abrogated his duties by allowing a trust acquisition and casino-resort development project to go forward without conducting any environmental evaluation under CEQA. The Governor's demurrer insists on a narrow reading of CEQA that seeks to thwart the law's core goals and basic requirements. In a claim that defies common sense, the Governor contends that the construction and operation of a casino-resort complex on currently undeveloped land is not a "project" under CEQA. He likewise argues that the issuance of a formal, affirmative concurrence is not an "approval" under CEQA—even though the concurrence is a legal prerequisite for the casino-resort complex to go forward and even though the Governor had the discretion to stop the trust acquisition and casino project by refusing to concur. And he claims that he is not subject to CEQA at all, even though a commonsense reading of CEQA's definition of "public agency," which broadly includes "*any* state agency," encompasses the Office of the Governor just as it encompasses other parts of the Executive Branch.

Finally, the Governor's suggestion that this case is moot is incorrect. This case presents an actual controversy about the validity of the Governor's concurrence decision, and the Court can grant Petitioners effective relief invalidating the concurrence. Moreover, a federal court considering related litigation has held that it has the power to strip the federal government's title to the land at issue if the court were to determine that the process leading to the land's acquisition was unlawful. A holding by this Court that the Governor's concurrence was invalid would mean that the Secretary's action was also unlawful, because the Secretary cannot acquire land in trust for an illegal purpose. And without gubernatorial concurrence, gaming is illegal on the land at issue. This Court's declaration would therefore also contribute to effective relief in the federal proceeding.

SUMMARY OF ALLEGATIONS

The Enterprise Rancheria of Maidu Indians of California ("Enterprise") seeks to develop a large casino and hotel resort complex ("Project") on approximately 40 acres of land in unincorporated Yuba County ("Project Site"). First Am. Pet. for Writ of Mandate & Compl. (executed Feb. 28, 2013) ("Petition") ¶ 22. The Project includes a 207,000-square foot gaming and entertainment facility—open 24 hours a day and 7 days a week—with a 250-seat buffet, a 90-seat restaurant, a 175-seat coffee shop, a multi-story hotel with 170 guest rooms, a multi-level parking structure with 2,750 parking spaces, and retail shops. *Id.* The Project would be located on land that currently is undeveloped and would result in numerous adverse impacts on the environment, including impacts to traffic and transportation, air quality, and water quality. *Id.* ¶¶ 23, 52.

Under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, an Indian tribe generally is prohibited from engaging in any gaming activities on land acquired by the federal government in trust for the tribe after October 17, 1988. Petition ¶ 27. This prohibition does not apply if the Secretary of the Interior makes a favorable "two-part determination" that (1) it would be in the tribe's best interest to establish gaming on the land, and (2) the gaming would not be detrimental to the surrounding community. *Id.* (citing 25 U.S.C. § 2719(b)(1)(A)). For such a determination to be effective, the Governor of the State where the land is located must concur in the determination; without this concurrence, the gaming cannot occur, and the Secretary cannot acquire land in trust for the purpose of casino development. *Id.* ¶ 28.

Here, pursuant to Enterprise's request, the Department of Interior made a favorable two-part determination regarding the Project Site, and on September 1, 2011, requested the Governor to concur in that determination. *Id.* ¶ 32. On August 30, 2012, the Governor issued a one-page concurrence. *Id.* ¶ 35. In issuing the concurrence, the Governor did not seek the Legislature's prior approval or conduct any environmental review under CEQA. *Id.* ¶¶ 36–37, 45. Relying on the Governor's concurrence, the Secretary issued a notice of decision to acquire the Project Site in trust for casino development on December 3, 2012. Land Acquisitions; Enterprise Rancheria of Maidu Indians of California, 77 Fed. Reg. 71,612-01 (Dec. 3, 2012).

ARGUMENT

I. THE GOVERNOR LACKED AUTHORITY TO CONCUR IN THE SECRETARY'S DECISION TO ALLOW GAMING

A. Under the California Constitution, the Governor possesses only executive powers, not legislative powers

The California Constitution provides for the separation of powers by vesting "legislative, executive, and judicial" powers in separate branches of government and specifying that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Cal. Const. art. III, § 3. The Constitution declares that "[t]he legislative power of this State is vested in the California Legislature," Cal. Const. art. IV, § 1, while "[t]he supreme executive power of this State is vested in the Governor," who "shall see that the law is faithfully executed," Cal. Const. art. V, § 1. Those provisions "preclude[] any branch from usurping or improperly interfering with the essential operations of either of the other two branches." *Butt v. State*, 4 Cal. 4th 668, 700 n.26 (1992).

The Legislature is primarily charged with "mak[ing] law . . . by statute." Cal. Const. art. IV, § 8(b). Unlike Congress, which possesses only the specific powers delegated to it in Article I, Section 8 of the federal Constitution, "the California Legislature possesses *plenary* legislative authority except as specifically limited by the California Constitution." *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 31 (2005). That "essential function embraces the far-reaching power to weigh competing interests and determine social policy." *People v. Bunn*, 27 Cal. 4th 1, 14–15 (2002) (citing *Carmel Valley Fire Prot. Dist. v. State*, 25 Cal. 4th 287, 299 (2001)). The core functions of the Legislature thus include passing laws, levying taxes, making appropriations, and determining and formulating legislative policy. *Carmel Valley Fire Prot. Dist.*, 25 Cal. 4th at 299. The Legislature has complete power to determine the best method for resolving state fiscal issues, including by imposing taxes and regulating their collection. *White v. State*, 88 Cal. App. 4th 298, 307 (2001); *Vacu-Dry Co. v. Cnty. of Sonoma*, 190 Cal. App. 3d 947, 951 (1987). Indeed, "the power to collect and appropriate the revenue of the State is one peculiarly within the discretion of the Legislature." *Carmel Valley Fire Prot. Dist.*, 25 Cal. 4th at 299 (quotation marks omitted). The Legislature also controls the establishment and operation of

political subdivisions, *Jensen v. McCullough*, 94 Cal. App. 382, 394 (1928), the declaration of public purposes and ways and means for the accomplishment thereof, *Spencer v. City of Alhambra*, 44 Cal. App. 2d 75 (1941), the granting of state lands, *Boone v. Kingsbury*, 206 Cal. 148 (1928), and the examination, licensing, and regulation of businesses and professions, among other things.

While the Legislature has plenary authority, the Governor's authority is more narrowly circumscribed. The Governor has the powers of appointment, removal, supervision, and management, and the responsibility to faithfully execute the law. *Cal. Ass'n of Retail Tobacconists v. State*, 109 Cal. App. 4th 792, 817 (2003). But he does not have "inherent" powers; to the contrary, all of his powers come from the Constitution or from a statute. The Supreme Court recently applied that principle in *Professional Eng'rs in Cal. Gov't v. Schwarzenegger*, in which the Governor argued that "the power to furlough state employees in the face of a fiscal emergency is an inherent part of [the Governor's] constitutional authority as the state's chief executive." 50 Cal. 4th 989, 1015 (2010). The Court rejected that argument, concluding that the Governor lacked such power because the Constitution did not confer it, *id.* ("[I]t is *the Legislature*, rather than the Governor, that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment . . . ."), and neither did any statute, *id.* at 1041. *Professional Engineers* thus makes clear that the Governor has only those powers conferred by the Constitution or by a statute.

B. Approving gaming is an exercise of legislative power

The gubernatorial action at issue in this case—concurrence in the Secretary's determination that class III gaming may take place on the Yuba site—has significant policy consequences, including altering the taxing and regulatory authority of the Legislature. It is therefore a legislative act, not an executive one.

Under IGRA, class III gaming may not occur on Indian trust lands acquired after 1988 unless a statutory exemption applies. 25 U.S.C. § 2719(a). Because no other exemption applies to the Yuba site, the only legal means for Enterprise to conduct class III gaming at the site is through a "two-part determination," *id.* § 2719(b)(1)(A); 25 C.F.R. §§ 292.13–292.24, which

requires that the Secretary of the Interior "determine[] 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," and that "the Governor of the State in which the gaming activity is to be conducted concur[] in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

Crucially, the two-part determination does not just make the land eligible for gaming; it is also an essential part of the process by which the Secretary acquires title to the land in trust for the tribe. As the United States Supreme Court has observed, "when the Secretary obtains land for Indians . . . , she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2211 (2012). The Secretary's regulations expressly state that the Secretary must consider, in evaluating a possible trust acquisition, "[t]he purposes for which the land will be used." 25 C.F.R. § 151.10(c); *see also id.* § 151.11(a). When, as in this case, an applicant identifies gaming as the purpose of the acquisition, determining whether the land will be eligible for gaming is a necessary part of that process. The trust regulations "show that the statute's implementation centrally depends on the projected use of a given property." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. at 2211. Thus, as the Office of the Governor recognized in addressing the requested concurrence at issue here, the IGRA concurrence process must precede the fee-to-trust decision. *See* Request for Judicial Notice ("RJN"), Ex. A at AR22246–AR22247; *see also* RJN, Ex. B at AR22545 (Enterprise responded in agreement).

Taking land into trust has significant consequences for the State's regulatory and taxing authority. Under 25 U.S.C. § 465, land taken into trust for a tribe by the United States "shall be exempt from State and local taxation." In addition, federal land held in trust for Indians is "Indian country" for purposes of federal statutes and regulations. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 529–31 (1998). Thus, "[b]y taking land in trust for Indians, the Secretary removes it from the jurisdiction of the State in which it sits and places it under the authority of a tribe." *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 39 (D.C. Cir.

2008) (Brown, J., dissenting); *see id.* ("[T]he trust acquisition authority is a power to determine who writes the law, and thus indirectly what the law will be, for particular plots of land.").

Because the Governor's concurrence is part of the process of taking land into trust for Enterprise, it is an action that allows land to be permanently removed from state jurisdiction and from taxing authority. That is an intrinsically legislative act: if levying taxes is a solely legislative function—and it surely is, *see Carmel Valley Fire Prot. Dist.*, 25 Cal. 4th at 299—so too must be a decision to forever remove an area from state tax rolls. As explained below, nothing in the Constitution or the laws of the State authorizes the Governor to take such an action.

C. The Governor's concurrence in the Secretary's determination is not authorized by the State Constitution or any California statute

The Governor identifies various constitutional and statutory provisions that, he says, authorized him to concur in the Secretary's determination. Demurrer at 17–18. His reliance on those provisions is unavailing.

1. The Governor emphasizes constitutional and statutory provisions authorizing him to negotiate gaming compacts with Indian tribes on Indian lands. *See* Cal. Const. art. IV, § 19(f); Gov't Code § 12012.5(d). In his view, those provisions "establish a California gaming policy that authorizes the Governor to make discretionary concurrence determinations under IGRA." Demurrer at 18. To the extent the Governor suggests that concurring in the Secretary's two-part determination is ancillary to the negotiation of compacts, the suggestion is incorrect.

The authority to concur in a two-part determination is not a necessary adjunct to the negotiation of a compact because gaming almost always occurs on lands not subject to the requirement of a two-part determination. For lands that were already within a tribe's reservation in 1988, or for later-acquired lands that are within or contiguous to a pre-existing reservation, gaming may occur under a compact without the need for the Secretary and the Governor to complete the two-part determination process. *See* 25 U.S.C. § 2719(a). And when later-acquired lands fall within one of three exceptions intended to place newly-recognized tribes on equal footing with other tribes, *id.* § 2719(b)(1)(B)(i)-(iii), gaming under a compact is again permissible without application of the two-part determination process. The two-part determination is invoked

only in the exceptional case when a tribe seeks to conduct gaming outside of its permissible area and no other possible exception applies. In fact, in the 25 years since Congress enacted IGRA, only *three* of the nation's 460 tribal casinos have been authorized by two-part determination.[1] The authority to negotiate compacts is therefore a meaningful power without the authority to concur in a secretarial determination, and the former authority does not imply the latter.

To the contrary, the most logical inference from the Governor's compact authority is just the opposite. That the People believed it necessary to amend the State Constitution to give the Governor the authority to negotiate compacts—and even then, only "subject to ratification by the Legislature," Cal. Const. art. IV, § 19(f)—is strong evidence that he did not already have the far greater power to permanently cede jurisdiction over tracts of land within the State without any legislative involvement at all. And the Constitution's specific grant of a power to negotiate IGRA compacts suggests that the Governor does not have the power to take other actions under that statute. *See Quarry v. Doe I*, 53 Cal. 4th 945, 970 (2012) ("[W]here exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (quotation marks omitted)).

That interpretation is reinforced by the history of Article IV, Section 19, which was adopted by Proposition 1A in 2000. *See Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.*, 104 Cal. App. 4th 438, 445–48 (2002) (examining ballot arguments as an interpretive guide). The analysis by the Legislative Analyst that appeared in the official ballot pamphlet noted that compacts could permit gaming only on "Indian land." RJN, Ex. D (http://primary2000.sos.ca.gov /VoterGuide/Propositions/1Aanalysis.htm). The supporters of the measure emphasized the same point. *See* RJN, Ex. E (http://primary2000.sos.ca.gov/VoterGuide/Propositions/1Anorbt.htm) ("Proposition 1A and federal law strictly limit Indian gaming to tribal land."). But the arguments

[1] The three operating casinos authorized by the two-part determination process are the Forest County Potawatomi gaming establishment in Milwaukee, Wisconsin; the Keweenaw Bay Indian Community gaming establishment near Marquette, Michigan; and the Kalispel Tribe gaming establishment in Airway Heights, Washington. Two others received approval under the two-part determination process, but were never constructed. *See* RJN, Ex. C (http://www.doi.gov/ocl/hearings/110/IndianTribeLand_022708.cfm, Testimony of Carl J. Artman, Assistant Secretary of Indian Affairs, before the House Natural Resources Committee, noting that as of 2008, "[in] the 20 years since the passage of IGRA, only 4 times has a governor concurred in a positive two-part Secretarial determination made pursuant to section 20(b)(1)(A) of IGRA").

around Proposition 1A focused on *existing* tribal lands. *See* RJN, Ex. F. (http://primary2000.sos.ca.gov / VoterGuide/ Propositions/1Ayesarg.htm) ("We are asking you to vote YES on Proposition 1A so we can keep the gaming we have on our reservations."). There was no suggestion that the measure would allow the Governor to permit the acquisition of *new* land for gaming.

2. The Governor also relies on Section 12012 of the Government Code. Demurrer at 18. That provision states 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 of the United States." But the Governor cites no authority for the proposition that that statute gives him the authority to make substantive decisions about whether to cede the State's regulatory and taxing power, simply because those decisions will be expressed in a "communication" to the federal government. For example, the Governor presumably could not take it upon himself to sell state property without statutory authorization simply by agreeing to the sale in a communication with the government of another State or the United States. *The Honorable Gloria V. Becerra*, 65 Op. Cal. Att'y Gen. 467 (1982) (stating that notwithstanding the fact that "[t]he Governor is the sole official organ of communication between the government of this state and of any other state or of the United States [under] Gov. Code, § 12012 . . . [if] the Governor would bind the state in any manner to its prejudice or contract a pecuniary obligation, specific constitutional or statutory authority must be found for him, or for a subordinate executive officer, to do so"). In fact, the statute has never been cited in any published decision by a California court—something that would be difficult to understand if the statute had the broad meaning the Governor suggests. The better reading of Section 12012 is that it simply confers the ministerial authority to transmit and receive communications, an authority that cannot justify the Governor's action here.

D. IGRA does not authorize the Governor's action

The Governor suggests—but does not quite say expressly—that IGRA itself authorized his action. But while IGRA provides that the Secretary may not permit class III gaming in the circumstances of this case without the Governor's concurrence, it does not itself create statutory or constitutional authority for the Governor to issue a concurrence allowing land to be stripped

from state jurisdiction and approving class III gaming. 25 U.S.C. § 2719(b)(1)(A) (gaming may be authorized "only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination"); *Confederated Tribes of Siletz Indians of Or. v. United States*, 110 F.3d 688, 697–98 (9th Cir. 1997) ("[W]hen the Governor exercises authority under IGRA, the Governor is exercising state authority."); *cf. Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548, 1557 (10th Cir. 1997) (holding that the Secretary of the Interior's approval pursuant to IGRA of a compact could not cure an *ultra vires* act by a governor, and ruling that the question of "whether a state has validly bound itself to a compact" must be decided under state law); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 821–23 (2003) (concluding that the "[d]ecisions involving licensing, taxation and criminal and civil jurisdiction [implicated by IGRA] require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under our constitutional structure").

The Governor's IGRA argument (Demurrer at 15–16) rests on the Seventh Circuit's decision in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650 (7th Cir. 2004), but that case does not support his position. The plaintiffs in *Lac Courte* argued that IGRA's gubernatorial-concurrence provision "compels state governors to administer federal law," in violation of the federalism principles recognized in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), which held that the federal government may not compel state officials "to enact or administer a federal regulatory program," *id.* at 188. *Lac Courte*, 367 F.3d at 662. The Seventh Circuit rejected that argument, explaining that IGRA does not compel any state action because it "does not require a governor to respond" to the Secretary's request for concurrence. *Id.* at 663. Far from supporting the Governor's argument, that observation reinforces the conclusion that IGRA itself is not an independent source of authority for the Governor to act; the Governor's authority must come from the state constitution or statutes.

While the court in *Lac Courte* did consider a state-law argument, the argument was not that the governor lacked authority to concur in the Secretary's determination. Rather, it was that the governor's concurrence would entail "legislat[ing] Wisconsin's gaming policy in violation of

the Wisconsin Constitution," causing the governor to "act outside of the strictures of the gaming policy that Wisconsin has already established." *Id.* at 664. Even setting aside the obvious fact that the Wisconsin Constitution is not the same as the California Constitution, the problem with the Governor's action in this case is different: it is not that the Governor's concurrence contravened state gaming policy, but rather that he is not authorized to make the decision by the sstate constitution or statutes. The decision in *Lac Courte* has no bearing on that issue.

II. THE GOVERNOR'S CONCURRENCE VIOLATED CEQA

A. The "project" under CEQA is the "whole of the action" and includes the proposed casino-resort complex

The key California Supreme Court cases interpreting CEQA's definition of a "project" confirm the commonsense proposition that the trust acquisition and the Enterprise's casino resort complex is a "project" triggering the requirement to conduct an environmental review.

CEQA defines "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; [or] (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.

Pub. Res. Code § 21065. The CEQA Guidelines further explain that the term "project" means "the whole" of the action and "refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies." Cal. Code Regs. tit. 14, § 15378(a), (c).

In the seminal case of *Bozung v. Local Agency Formation Commission of Ventura County*, 13 Cal. 3d 263 (1975), the Supreme Court held that the approval by a Local Agency Formation Commission of the annexation of 677 acres of land into the City of Camarillo was a project under CEQA, even though the annexation itself would not directly impact the environment and the Commission had no authority to impose any conditions on the development of the land that was being annexed. The court reasoned that the impetus for requesting the annexation was a desire to

subdivide and develop the land, which was "destined to go nowhere" if the annexation was not approved. *Id.* at 281. The court also reasoned that the Commission's approval of the annexation constituted a "project" under both Section 21065(a) and 20165(c) of CEQA, holding that the approval was "an irrevocable step" as far as the Commission was concerned and that it granted an entitlement for use by paving the way for the ultimate development of the land. *See id.* at 278, 281. The court therefore faulted the Commission for proceeding "as if CEQA did not exist." *Id.* at 281–82.

Similarly here, the impetus for requesting the Governor's concurrence was Enterprise's desire to have the Secretary acquire the land in trust and authorize gaming so that it could build its casino-resort Project, a proposal that would "go nowhere" without the concurrence. Similarly here, the Governor's issuance of the concurrence is an entitlement for use, as it paves the way for the land to be acquired in trust (or "annexed") and this Project to be developed. And similarly here, the Governor issued the concurrence as if CEQA did not exist.

In *Fullerton Joint Union High School Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779 (1982), the Supreme Court relied on its prior decision in *Bozung* in holding that the State Board of Education's approval of a plan to transfer responsibility for high school education in Yorba Linda to a new school district was a CEQA "project." The Supreme Court explained that the approval of the plan, while having no impacts in and of itself, was—like the action in *Bozung*—"a necessary step in a chain of events which would culminate in physical impact on the environment." *Id.* at 795. The Supreme Court reasoned that the plan likely would result in the construction of a new high school, which would have environmental impacts requiring CEQA study.

Similarly here, the Governor's concurrence is a "necessary step in a chain of events" that includes trust acquisition and the eventual development of Enterprise's casino-resort Project, which will cause physical impacts on the environment that were never studied under CEQA.

The Governor does not contest that the casino-resort Project would cause direct and reasonably foreseeable indirect physical changes in the environment. Rather, he contends that there is no "project" here because "[t]he Secretary, and not the Governor, possessed the discretion

[] to bring the land into trust. Any entitlement to use the land, which was 'issued' to the Enterprise Tribe, came from the Secretary . . . and only the Secretary . . . ." Demurrer at 6.

In his May 29 ruling sustaining the demurrers in another case challenging the Governor's concurrence under CEQA with respect to a different casino project in Madera County, Judge Kenny similarly concluded that the Governor "is not the ultimate decision-maker" and "it is the Secretary of the Interior who makes the determination and thus approves the proposed gaming and its associated effects." *Picayune Rancheria of Chukchansi Indians v. Brown*, Sacramento County Superior Court Case No. 34-201-80001326, Ruling on Submitted Matter (May 29, 2013) at 7.

This line of reasoning, however, ignores the key fact that the State's concurrence is a "necessary step in a chain of events" for the casino-resort Project to move forward—without the concurrence, the Project simply could not be built and, without the concurrence, the Secretary would not have acquired the land in trust for Enterprise for the purpose of a casino development. *See* 25 C.F.R. §§ 151.10(c), 151.11(a) (requiring applicants to state the purpose of a trust acquisition); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians*, 132 S. Ct. at 2211. In fact, even if "a notice of intent to take the land into trust has been issued, [] the Secretary will withdraw that notice pending a revised application for a nongaming purpose." 25 C.F.R. § 292.23(a)(2); *see also id.* § 292.23(a)(1) (prohibiting gaming on existing trust land without gubernatorial concurrence). And as the Seventh Circuit similarly explained in *Lac Courte*:

> A governor's concurrence is no less a precondition to the Executive Branch's authority to waive the IGRA's general prohibition of gaming on after-acquired lands than are the factual circumstances that give rise to the Secretary of the Interior's conclusion that gaming on the proposed trust land would be in the Indian tribe's best interests and would not be detrimental to the surrounding community. Unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under § 2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the operation of a gaming establishment.

367 F.3d at 656. Thus, neither gaming, the fee-to-trust transfer, nor the construction or the casino-resort project on this undeveloped land and ecologically important wetland habitat may proceed absent gubernatorial concurrence.

Further, as the CEQA Guidelines make clear, the term "project" includes the whole of the activity that is being approved, which may be subject to several discretionary approvals by governmental agencies. Cal. Code Regs. tit. 14, § 15378(a), (c). Thus, the fact that the Secretary *also* has approval authority over Enterprise's casino-resort Project does not negate the fact that the Governor's concurrence is a necessary part of the *whole* of the Project and consequently triggers CEQA.[2]

The Governor next contends that there is no "project" on the ground because a project is an activity that involves issuance to a person of an entitlement for use. Demurrer at 6. Accordingly to the Governor, the Secretary is not a "person" because the United States has not waived sovereign immunity in this case. *Id.* But the United States' sovereign immunity is not an issue here, since no relief is being sought in this Court from the Secretary. The relief sought in this case is for the Court to order the Governor to set aside the concurrence until a valid CEQA analysis is conducted. *See* Petition, Prayer for Relief. Moreover, the United States has waived its sovereign immunity for its trust decision and no-detriment finding under the Administrative Procedure Act, and plaintiffs here have requested relief in federal district court from the Secretary's decisions. *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Salazar*, No. 2:12–CV–3021–JAM–AC, 2013 WL 417813 (E.D. Cal. Jan. 30, 2013). Additionally, the Governor's concurrence entitled Enterprise, not the Secretary, to use the land for gaming.

[2] Moreover, any suggestion that CEQA does not apply to state decision-making that is part of a federal approval process is misplaced. Under the federal Clean Water Act, for example, every applicant for a federal permit or license for an activity that may result in a discharge to waters of the United States must obtain a state Water Quality Certification that the proposed activity will comply with water quality standards. 33 U.S.C. § 1341. Despite the fact that the certification is issued pursuant to federal law, and despite the fact that the primary authority for approving the activity that may result in the discharge lies with the federal and not the state government, CEQA compliance is still required. *See* Cal. Code Regs. tit. 23, § 3856(f).

The weakness of the Governor's claims is illustrated by the cases cited in the demurrer, none of which applies here. *See Gentry v. City of Murrieta,* 36 Cal. App. 4th 1359, 1389 (1995) (case did not discuss whether there was a "project" and instead addressed whether a city was required to provide a copy of its proposed CEQA document to a federal agency that had jurisdiction); *Sunset Sky Ranch Pilots Ass'n v. Cnty. of Sacramento*, 47 Cal. 4th 902, 909 n.5 (2009) (CEQA did not apply based on explicit statutory exemption in Pub. Res. Code § 21080(b)(5) for "[p]rojects which a public agency rejects or disapproves"); *Parchester Village Neighborhood Council v. City of Richmond*, 182 Cal. App. 4th 305, 312–15 (2010) (no CEQA project where a city had no legal authority to stop casino project from going forward and its decisions were not binding on the Board of Indian Affairs or the Governor); *Citizens to Enforce CEQA v. City of Rohnert Park*, 131 Cal. App. 4th 1594, 1600–01 (2005) (city had no power to stop gaming project and challenged agreement was covered by explicit exemption for creation of funding mechanisms under Cal. Code Regs. tit. 14, § 15378(b)(4)); *Cnty. of Amador v. City of Plymouth*, 149 Cal. App. 4th 1089, 1100 (2007) (gaming development was not part of the city's CEQA project, since no city approval was required for the development to occur).

The court should reject the Governor's claims that Enterprise's casino-resort complex is not a "project" under CEQA, especially in light of the Supreme Court's direction that that statute be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Bozung,* 13 Cal. 3d at 274 (quotation marks and emphasis omitted).

B. The Governor's concurrence is an "approval" under CEQA

The concurrence issued by the Office of the Governor constituted an "approval" of the proposed casino-resort Project because the concurrence committed the State of California to a definite course of action on that Project. Specifically, by issuing the concurrence, the Governor made a final decision that allowed the Project Site to be acquired in trust for gaming purposes so that the Project could proceed and the land could be taken out of State and local jurisdiction and into trust for Enterprise.

Under the CEQA Guidelines, "approval" is defined as "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." Cal. Code Regs. tit. 14, § 15352(a). As the Supreme Court made clear in *Save Tara v. City of West Hollywood*, CEQA requires that state and local governmental decision-makers must not, before conducting an environmental review, take any action that would "effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, *including the alternative of not going forward with the project*." 45 Cal. 4th 116, 138–39 (2008) (emphasis added) (citing Cal. Code Regs. tit. 14, § 15126.6(e), which requires consideration under CEQA of the "no project" alternative).

Here, the Governor could have decided, based on an environmental review under CEQA, to implement this alternative by refusing to issue a concurrence. In that case, Enterprise's casino and Project would have been legally prohibited from going forward. *See* 25 C.F.R. § 292.23 (if Governor refuses to concur, lands in question may be used "only for non-gaming purposes" and the Secretary's favorable two-part determination "will no longer be valid"); *see also Lac Courte*, 367 F.3d at 656 (concurrence is "precondition" to the authority to waive IGRA's prohibition against gaming uses, and "[u]nless and until the appropriate governor issues a concurrence," gaming establishment may not be built on the land at issue and the land may not be taken into trust). Instead, the Governor decided, without any CEQA review, to reject the alternative of saying no to Enterprise's gaming Project. Under the Supreme Court's test in *Save Tara*, the Governor's concurrence was therefore an "approval" that violated CEQA.

The Governor cites *Parchester Village Neighborhood Council v. City of Richmond*, 182 Cal. App. 4th 305, 313 (2010), for the irrelevant proposition that an agency "does not commit itself to a project simply by being a proponent or advocate of the project." Demurrer at 8 (quotation marks omitted). In *Parchester*, the city had no legal authority over the project and thus had no power to stop the project from going forward. Here, the Governor was not merely a "proponent" or an "advocate" of Enterprise's casino-resort Project; rather, the Governor had the clear legal authority to stop the Project so that it could not be built. The demurrer glosses over this critical distinction, which makes *Parchester* wholly inapposite here.

Equally irrelevant is the Governor's suggestion that some *other, different* development might have been able to go forward on the Project Site without the Governor's concurrence. The key point is that *this particular gaming Project* depended on the concurrence and could not be built without it. The Governor committed to a definite course of action *on that Project* by making a final decision that authorized it to proceed, when the Governor could have exercised the legal authority to prevent it. And as discussed above, in the absence of the Governor's concurrence the fee-to-trust application in this case could not have proceeded.

The Governor also relies on *Cedar Fair, L.P. v. City of Santa Clara*, 194 Cal. App. 4th 1150 (2011), but that case actually shows why there is an "approval" here. In *Cedar Fair*, the city approved a term sheet for a proposed stadium that expressly stated that the city retained "'the absolute and sole discretion' to make decisions under CEQA, including deciding 'not to proceed with the Stadium project.'" *Id.* at 1170. The court therefore found that the term sheet merely memorialized "preliminary terms" in advance of any final decision by the city on whether or not to approve the stadium. *Id.* The court noted, however, that the determination of "which side of the *Save Tara* line the term sheet falls is not an easy judgment call." *Id.* at 1168.

There is no such difficulty here. The Governor made a final concurrence decision that allowed the casino resort Project and fee-to-trust transfer to move forward; unlike in *Cedar Fair*, the Governor did not preserve the State's authority to make some decision at a later date, based on a CEQA analysis, to stop the Project from moving forward. This is a clear example of crossing the *Save Tara* line.

The Governor tries to deflect the importance of the final concurrence decision, claiming that it was a "mere concurrence, at the Secretary's request" and that the State has not made any "commitment" to the proposed casino resort Project. Demurrer at 9. These assertions miss the point, which is that Governor had the clear legal authority to say no to the Project, but he foreclosed that option by issuing a concurrence—and he took this critical fork in the road without any CEQA review. That is precisely the type of commitment that violates the principles set forth by the Supreme Court in *Save Tara*, which are meant to ensure that governmental decision-makers with the power to stop a project do not relinquish that power until they first fulfill their

environmental obligations under CEQA. *See* 45 Cal. 4th at 138–39 (agency must complete a CEQA review before taking any action that forecloses the alternative of not allowing a project to go forward).

Further, as the Ninth Circuit has observed, the Governor's authority in making a concurrence decision illustrates the State's important role in allowing off-reservation gaming development. Through the concurrence requirement in IGRA, "Congress recognized the federal and state concerns and provided that both had to be satisfied by requiring action by the appropriate federal and state officials." *Confederated Tribes of Siletz Indians of Or.*, 110 F.3d at 693 (citing 25 U.S.C. § 2719(b)(1)(A)). The Ninth Circuit explained that "[w]hen the Governor exercises authority under IGRA, the Governor is exercising state authority. If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law" and "pursuant to state interests." *Id.* at 697–98. Thus, with a concurrence, the gaming project under consideration is approved by the State under the authority of State law, and without the concurrence, the project is disapproved by the State under the authority of State law. The Governor's concurrence is none other than an "approval."

In sum, the Governor's concurrence constituted an "approval" under CEQA that required a full environmental review before a final decision was made on whether to issue the concurrence.

C. The Governor's Office is a "public agency" subject to CEQA

Under CEQA's definition, "'[p]ublic agency' includes *any state agency*, board, or commission . . . ." Pub. Res. Code § 21063 (emphasis added). The Office of the Governor is a "state agency" and thus falls within the statutory definition of "public agency." Indeed, California's own official website specifically lists the "Office of the Governor (GO)" as a "state agency." RJN, Ex. G (http://www.ca.gov/Apps/Agencies.aspx). The Office of the Governor is listed on the State's official agency directory immediately after the "Governor's Office of Planning & Research (OPR)," *see id.*, which the Governor concedes is a public agency subject to CEQA. Demurrer at 11.

The Governor relies on various definitions in *Black's Law Dictionary*, emphasizing that courts may refer to dictionary definitions in determining a word's ordinary and usual meaning. Demurrer at 10. But the definitions in *Black*'s actually cut against the Governor's position. As the demurrer notes, *Black*'s defines "state agency" as "[a]n executive or regulatory body of a state." *Id.* at 10–11 (quoting *Black's Law Dictionary* 72 (9th ed. 2009)). But the Governor omits the very next line of this important definition, which provides that "State agencies include *state offices*, departments, divisions, bureaus, boards, and commissions." *Black*'s at 72 (emphasis added). This commonsense definition demonstrates that the "*Office* of the Governor" is a state agency.

Another helpful resource in interpreting CEQA's definition of "public agency" is the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* As the California Supreme Court has recognized, CEQA was "modeled on" NEPA, and the court "ha[s] consistently treated judicial and administrative interpretation of the latter enactment as persuasive authority in interpreting CEQA." *See Citizens of Goleta Valley v. Bd. of Supervisors of Santa Barbara County*, 52 Cal. 3d 553, 565 & n.4 (1990) (quotation marks omitted). Under the regulations implementing NEPA, "federal agency" is defined as "all agencies of the Federal Government," but there are express exclusions for the Congress, the Judiciary, and the President." 40 C.F.R. § 1508.12. The definition of "public agency" in the CEQA Guidelines is equally as broad as the NEPA definition in that it includes "*any* state agency"—and while the CEQA definition expressly excludes "the courts of the state," there is no exclusion for the Governor's Office. *See* Cal. Code Regs. tit. 14, § 15379 (emphasis added).[3] Just as the NEPA definition was specifically crafted to exclude the President, the CEQA definition could easily have been written to exclude the Governor's Office, but it was not.

The Governor also contends that the Office of the Governor is not a public agency on the ground that it is not listed in Appendix B of the CEQA Guidelines. Demurrer at 11. This argument misapprehends the scope and purpose of Appendix B. Appendix B is not—and does

[3] Note that the definition of "project" also excludes "[p]roposals for legislation to be enacted by the State Legislature." Cal. Code Regs. tit. 14, § 15378(b)(1).

not purport to be—a list of state agencies that are subject to CEQA. Instead, as made clear by Section 15205(c) of the CEQA Guidelines, Appendix B is designed to assist agencies that are preparing CEQA documents, by providing a list of state agencies that may be appropriate to review those documents because of their "special expertise with regard to the environmental impacts involved." Cal. Code Regs. tit. 14, § 15205(c). This is confirmed by the "Note" to Appendix B, which cites various provisions of CEQA addressing the review of environmental documents by agencies other than the lead agency that prepared the document. *See* Pub. Res. Code §§ 21080.3 (requiring lead agency preparing a CEQA document to consult with "all responsible agencies and trustee agencies"),[4] 21080.4, (requiring lead agency to send notices to such other agencies), 21104 (requiring state lead agencies to obtain comments on their environmental impact reports from such other agencies), 21153 (requiring local lead agencies to obtain comments from such other agencies).

Appendix B, therefore, is meant to assist lead agencies by providing guidance regarding the other public agencies they should consider consulting with when they prepare their environmental documents. Nothing in CEQA, the CEQA Guidelines, or Appendix B suggests that the appendix is meant to provide any kind of list (exhaustive or not) of the state agencies that are subject to CEQA's requirements. Indeed, if that were the case, then any state agency that is not on the list in Appendix B (such as the Department of Alcoholic Beverage Control, the California Building Standards Commission, the California Emergency Management Agency, etc.—and there are many more as evidenced in Ex. C to the Request for Judicial Notice) could assert that they have been exempted from CEQA. Clearly, this is not the purpose of Appendix B.

The definition of "state agency" in the CEQA Guidelines also fails to support the claim that the Governor's Office is not a "public agency." This definition, which is not part of the CEQA statute, merely recites that the term "state agency" includes "a governmental agency in the

[4] "Lead agency" means "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." Pub. Res. Code § 21067. "Responsible agency" means "a public agency, other than the lead agency which has responsibility for carrying out or approving a project." *Id.* § 21069. "Trustee agency" means "a state agency that has jurisdiction by law over natural resources affected by a project, that are held in trust for the people of the State of California." *Id.* § 21070.

executive branch of the State Government." Cal. Code Regs. tit. 14, § 15383. As demonstrated above, the term "governmental agency" is sufficiently broad to encompass a "state office" such as the "Office of the Governor," which is clearly within the executive branch of the State Government.

CEQA's broad purposes and reach further support the conclusion that the Office of the Governor is subject to CEQA. As the Supreme Court has recognized, the Legislature intended CEQA to be interpreted so as "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Bozung*, 13 Cal. 3d at 274; *Friends of Mammoth*, 8 Cal. 3d at 259. The Supreme Court also has made clear that CEQA's purpose is "to compel *government at all levels* to make decisions with environmental consequences in mind." *Bozung*, 13 Cal. 3d at 283 (emphasis added). CEQA's definition of "public agency" should be construed with reference to the entire scheme of law of which it is part so that the entire law can be harmonized and retain effectiveness. *See People v. Pieters*, 52 Cal. 3d 894, 899 (1991). Under the reasonable scope of the statutory language, as construed with reference to CEQA's broad goals and applicability, "public agency" includes the Office of the Governor.

Finally, the Governor cites an assortment of California statutory provisions, none of which pertain to CEQA or apply in this case, in an effort to advance an overly narrow reading of when CEQA applies. This line of argument ignores the plain, commonsense meaning of "public agency" as set forth above, and it also ignores the Supreme Court's express directives on how CEQA is to be interpreted.

The Governor's Office is a public agency and is thus subject to CEQA. The concurrence therefore violated CEQA because it was issued without any environmental review.

III. THIS CASE IS NOT MOOT

The Governor incorrectly claims that the relief Petitioners request is "useless and unenforceable" and that the case is moot. Demurrer at 21–22. To the contrary, a declaration that the Governor's concurrence decision was *ultra vires*, unconstitutional, and in violation of CEQA, and thus void for all purposes, *see* Petition, Prayer for Relief ¶ 1, would provide the relief that Petitioners seek.

For gaming to be legal on the Site, the Governor must validly concur in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A) (the gaming prohibition will not apply "only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination"). If the Governor's concurrence is invalid because it was *ultra vires*, or for any other reason, gaming "shall not be conducted." *See id.* § 2719(a). The harms that Petitioners complain of relate to the conduct of gaming itself—such as traffic, crime, noise, and pollution, *see* Petition ¶ 6—and will not occur if the Court declares the Governor's concurrence unconstitutional. Such a declaration would give Petitioners the relief that they seek from this Court.[5]

The Governor attempts to confuse the issue by arguing that the Petition seeks no relief against the Secretary and that the Court has no power over the Secretary. Demurrer at 20. But the Court does not need power over the *Secretary* to conclude that the *Governor* violated the California Constitution. Petitioners have not asked the Court to provide them relief from any action taken by the Secretary—for that, they have sought relief from a federal court. *See Cachil Dehe Band of Wintun Indians*, 2013 WL 417813. Armed with the Court's declaration that the Governor's concurrence was *ultra vires*, Petitioners will ask the federal court to reverse the Secretary's trust decision, which was predicated on the eligibility of land for gaming purposes.[6] That federal court has already concluded that it has the power to unwind this particular trust acquisition, if it concludes that the Secretary violated the Administrative Procedure Act, the

[5] There is no basis for assuming that Enterprise will flout federal law by building a casino and conducting gaming that it cannot legally offer, but even if there were, that would not be a reasonable basis for denying Petitioners the declaration they seek. Courts do not refuse to grant relief because their orders might be ignored. Federal law prohibits gaming on land that does not qualify for gaming under IGRA, and the federal government has ample authority to ensure compliance with its laws. *See, e.g.*, 18 U.S.C. § 1955 ("Prohibition of Illegal Gambling Businesses"); 18 U.S.C. § 1166 ("Gambling in Indian Country"); 15 U.S.C. § 1172 ("Transportation of Gambling Devices as Unlawful").

[6] Contrary to the Governor's argument, the Secretary is not entitled to rely on an illegal state action, whether or not such action initially appeared valid. *See* Demurrer at 20. A federal decision that is predicated on an illegal state action is contrary to law under the Administrative Procedure Act. 5 U.S.C. § 706. Thus, federal courts have held on multiple occasions that gaming compacts that the Secretary has approved but that otherwise violated state law have no force or legal effect. *Pueblo of Santa Ana*, 104 F.3d at 1548, 1557 (holding that the Secretary's approval could not validate otherwise invalid compacts); *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535 (10th Cir. 1997) (same).

National Environmental Policy Act, the Clean Air Act, IGRA, or the Indian Reorganization Act. *Id.* at *4 (finding that the court retains the authority "to strip[] the government's title from the Proposed Site" if it finds a legal violation); *see also Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2203–04 (holding that, even after the Secretary has taken land into trust, a court may review the Secretary's decision and may strip title from the government if appropriate).

Thus, the federal court is fully empowered to provide Petitioners relief from the trust decision, based on this Court's resolution of Petitioners' claims against the Governor or any of Petitioners' other federal causes of action.[7] Indeed, it is hardly unusual for a state court to issue an order that is further effectuated elsewhere. *See Pueblo of Santa Ana*, 104 F.3d at 1548, 1559 ("[W]e accept as determinative in this case the state court's decision on the question of whether the Governor of New Mexico had the authority, under the New Mexico constitution or statutory law, to bind the state to the compacts."). In accordance with comity and federalism principles, federal courts often defer complex questions of state law and policy to state court under abstention doctrines. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710, 720 (4th Cir. 1999) ("Given that state policy concerns are paramount, the district court contravened *Burford* principles by attempting to answer disputed questions of state gaming law that so powerfully impact the welfare of South Carolina citizens."). In arguing to the contrary, the Governor misunderstands the legal import under IGRA of a declaration here and the availability of a separate remedy for the trust decision in federal court, and he would put complex policy questions regarding the California State Constitution and the expansion of off-reservation tribal gaming out of the reach of state officials and into the hands of the federal courts. Respectfully, this Court is better equipped to address complex issues of state law.

[7] Even if this Court were to accept the Governor's argument that an order declaring the Governor's concurrence unlawful under state law and directing the Governor to act would be without consequence in this dispute, the case should not be found moot. The constitutional and environmental issues raised by the Governor's concurrence decision are likely to recur in the future under similar circumstances, are of general public interest, and would similarly evade review by California courts. *See, e.g., Farron v. City & County of San Francisco*, 216 Cal. App. 3d 1071, 1074 (1989) (holding that a case was not moot even though the challenged meetings of a city task force had concluded before the trial court heard a summary judgment motion).

Finally, the Governor attempts to obfuscate the issue by claiming that he cannot "withdraw" a concurrence, citing a number of retrocession cases that have no application here. Demurrer at 20–21. Those cases are inapposite, having involved the resumption of civil or criminal jurisdiction over Indian country pursuant to federal statute after the federal government had spent large sums of money and manpower in reassuming jurisdiction over the reservations in reliance on the state's action. *See Pueblo of Santa Ana*, 104 F.3d at 1555 & n.12; *see also Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1296–97 (D.N.M. 1996), *aff'd*, 104 F.3d 1546. Whereas retrocession is a one-time event between the United States and a state, IGRA grants "states a more specific and vital role than that given states pursuant to the retrocession statute," thus requiring that state action to have been validly executed. *Pueblo of Santa Ana*, 932 F. Supp. at 1296. Just as "Congress did not intend that the Secretary's approval override deficiencies in the compact under state law," *id.*, here too, Congress did not intend the Secretary's reliance on an illegal concurrence in authorizing gaming to insulate that concurrence from review.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court overrule the Governor's demurrer. An administrative record will further demonstrate that the Governor's concurrence is *ultra vires*, unconstitutional, and in violation of CEQA.

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