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9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF MADERA

12 **STAND UP FOR CALIFORNIA!, a**  
13 **California non-profit public benefit**  
14 **corporation; BARBARA LEACH, an**  
15 **individual,**

16 **Plaintiffs,**

17 **v.**

18 **STATE OF CALIFORNIA, et al.,**

19 **Defendants,**

20 **NORTH FORK RANCHERIA OF MONO**  
21 **INDIANS,**

22 **Intervenor-Defendant and**  
23 **Cross-Complainant,**

24 **v.**

25 **STATE OF CALIFORNIA et al.; DOES 51-**  
26 **100,**

27 **Cross-Defendants,**

28 **CHERYL SCHMIT, an individual,**

**Real Party in Interest.**

Case No. MCV062850

**MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT OF STATE**  
**CROSS-DEFENDANTS' DEMURRER**  
**TO CROSS-COMPLAINT**

**Date: June 16, 2014**

**Time: 8:30 a.m.**

**Dept: 4**

**Judge: Honorable Michael J. Jurkovich**

**Trial Date: N/A**

**Action Filed: February 27, 2014**

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1 **INTRODUCTION**

2 The North Fork Rancheria of Mono Indians (North Fork or Tribe) has filed a cross-  
3 complaint regarding Assembly Bill No. 277 (AB 277), which ratified the class III tribal-state  
4 gaming compact between the State of California and North Fork (North Fork Compact). The  
5 cross-complaint alleges that this statutory ratification is not subject to the people’s constitutional  
6 referendum power. North Fork is wrong. California’s direct democracy, enshrined in the  
7 Constitution and jealously guarded by the courts, should determine the outcome of AB 277’s  
8 ratification.

9 To protect the people’s constitutional right to decide AB 277’s fate by referendum, cross-  
10 defendants Edmund G. Brown Jr., in his official capacity as Governor of the State of California,  
11 Kamala D. Harris, in her official capacity as the Attorney General of California, the California  
12 Gambling Control Commission, the Bureau of Gambling Control, and the State of California  
13 (collectively, State Cross-Defendants) file this demurrer. They respectfully request this Court to  
14 sustain their demurrer without leave to amend because the referendum challenging AB 277  
15 constitutes a lawful exercise of the people’s reserved power under the Constitution. Whether the  
16 voters approve or reject the North Fork Compact, they possess the authority to decide this issue  
17 under the State’s direct democracy provisions. Accordingly, North Fork’s cross-complaint fails  
18 to state facts sufficient to constitute a cause of action against the State Cross-Defendants.

19 **THE CROSS-COMPLAINT’S FACTUAL ALLEGATIONS**

20 North Fork is a federally recognized Indian tribe with approximately 1,900 members.  
21 (Verified Cross-Complaint of Intervenor-Defendant North Fork Rancheria of Mono Indians for  
22 Declaratory Relief (Cross-Complaint), p. 6, ¶ 10.) North Fork and the State of California entered  
23 into a class III tribal-state gaming compact. (*Id.* at p. 7, ¶ 11.) On August 31, 2012, Governor  
24 Brown announced the signing of the North Fork Compact that would permit class III gaming  
25 under the Indian Gaming Regulatory Act (IGRA) (18 U.S.C. §§ 1166-1168; 25 U.S.C. §§ 2701-  
26 2721). (*Id.* at p. 11, ¶ 29.)

27 The Legislature passed AB 277 on June 27, 2013. (Cross-Complaint, p. 12, ¶ 31.) This  
28 statute, which added Government Code section 12012.59, ratified both the North Fork Compact

1 and another compact between the State of California and the Wiyot Tribe. (*Ibid.*) The Governor  
2 signed AB 277 on July 3, 2013, and it was chaptered as chapter 51 of the Statutes of 2013. (*Ibid.*)

3 On or about July 8, 2013, real party in interest Cheryl Schmit submitted a title and summary  
4 request to the California Attorney General's Office for a referendum on AB 277. (Cross-  
5 Complaint, p. 12, ¶ 32.) On July 19, 2013, the California Attorney General's Office issued a  
6 referendum title and summary. (*Ibid.*) On November 20, 2013, California Secretary of State  
7 Bowen (Secretary Bowen) certified the referendum for the November 2014 general election. (*Id.*  
8 at pp. 12-13, ¶ 33.)

9 After receiving the North Fork Compact, and pursuant to Government Code section  
10 12012.25, subdivision (f), Secretary Bowen forwarded a copy of this compact to the United States  
11 Secretary of the Department of the Interior (federal Secretary) for "review and approval." (Cross-  
12 Complaint, p. 12, ¶ 31.) On October 22, 2013, the federal Secretary published notice in the  
13 Federal Register that the North Fork Compact "was considered to be approved and that it was  
14 therefore 'taking effect.'" (*Ibid.*)

15 **ARGUMENT**

16 **I. THE STATE CROSS-DEFENDANTS' DEMURRER SHOULD BE SUSTAINED WITHOUT**  
17 **LEAVE TO AMEND BECAUSE THE DECLARATORY RELIEF CLAIM REGARDING AB**  
18 **277 FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION**

19 The State Cross-Defendants demur on the ground that North Fork's Cross-Complaint fails  
20 to allege facts sufficient to state a cause of action against them. (See Code Civ. Proc., § 430.10,  
21 subd. (e).) A demurrer tests the sufficiency of the pleading by raising questions of law. (*Herman*  
22 *v. Los Angeles County Metropolitan Transp. Auth.* (1999) 71 Cal.App.4th 819, 824.) When  
23 reviewing demurrers, courts will not "assume the truth of contentions, deductions, or conclusions  
24 of fact or law and may disregard allegations that are contrary to the law or to a fact of which  
25 judicial notice may be taken." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 493; see also  
26 *Stanton v. Dumke* (1966) 64 Cal.2d 199, 201.) A demurrer does not admit contentions,  
27 deductions, or conclusions of fact or law alleged in the pleading. (*Buchanan v. Maxfield*  
28 *Enterprises* (2005) 130 Cal.App.4th 418, 420.) Courts, therefore, cannot properly assume the  
truth of allegations of legal or factual conclusions.

1           Additionally, a “demurrer may be sustained without leave to amend where the facts are not  
2 in dispute and the nature of the plaintiff’s claim is clear but, under substantive law, no liability  
3 exists.” (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655, citing *Seidler v. Municipal Court*  
4 (1993) 12 Cal.App.4th 1229, 1233.) In this case, North Fork’s Cross-Complaint alleges that the  
5 referendum petition challenging AB 277 is “invalid, void, and unenforceable,” and that the North  
6 Fork Compact is already “in full force and effect . . . .” (Cross-Complaint, p. 13, ¶ 35.) The  
7 Tribe further alleges that the North Fork Compact will remain in effect “notwithstanding the  
8 outcome of any election on the Referendum Petition” regarding AB 277. (*Ibid.*) These  
9 conclusions do not save the Cross-Complaint from dismissal because, as set forth below, North  
10 Fork is incorrect as a matter of law. As a statute, AB 277 unquestionably is subject to the people’s  
11 reserved referendum power under the California Constitution. (See Cal. Const., art. IV, § 1.)  
12 Moreover, the referendum regarding AB 277 does not conflict with federal law. Finally, the  
13 Cross-Complaint alleges no Elections Code section 9011 violation against the State Cross-  
14 Defendants. Accordingly, the State Cross-Defendants’ demurrer should be sustained without  
15 leave to amend.

16           **A. AB 277 is subject to the referendum power reserved to the people under**  
17           **the California Constitution**

18           The pending referendum challenging AB 277 represents direct democracy in action. The  
19 California Constitution permits this form of voter participation in the legislative process because  
20 “[a]ll political power is inherently in the people.” (Cal. Const., art. II, § 1.) Specifically, in  
21 article IV, section 1, the people of California reserve to themselves the powers of initiative and  
22 referendum. (Cal. Const., art. IV, § 1.) The California Constitution defines the referendum as  
23 “the power of the electors to approve or reject statutes . . . .” (Cal. Const., art. II, § 9.) These  
24 tools of direct democracy are “the sole methods by which the people may constitutionally  
25 exercise legislative power.” (*Santa Clara County Local Transp. Auth. v. Guardino* (1995) 11  
26 Cal.4th 220, 247.)

27           Because the initiative and referendum are legislative powers reserved by the people,  
28 California courts “apply a liberal construction to this power wherever it is challenged in order that



1 the right be not improperly annulled.” (*Independent Energy Producers Ass’n v. McPherson*  
2 (*McPherson*) (2006) 38 Cal.4th 1020, 1032, quoting *Associated Home Builders etc. Inc. v. City of*  
3 *Livermore (Associated Home Builders)* (1976) 18 Cal.3d 582, 591.) The California Supreme  
4 Court has emphasized the importance of protecting these reserved powers by declaring the “‘duty  
5 of the courts to jealously guard’ the people’s right of initiative and referendum.” (*American*  
6 *Federation of Labor-Congress of Industries Organizations v. Eu* (1984) 36 Cal.3d 687, 708,  
7 quoting *Martin v. Smith* (1959) 176 Cal.App.2d 115, 117.) Indeed, the California Supreme Court  
8 declared that “[i]f doubts can reasonably be resolved in favor of the use of this reserve power,  
9 courts will preserve it.” (*McPherson, supra*, 38 Cal.4th at p. 1032, quoting *Associated Home*  
10 *Builders, supra*, 18 Cal.3d at p. 591.) This rule of construction is also followed because  
11 California courts are properly reluctant “to interfere with the legislative process.” (*Collins v. City*  
12 *and County of San Francisco (Collins)* (1952) 112 Cal.App.2d 719, 729, citing *Santa Clara*  
13 *County v. Superior Court* (1949) 33 Cal.2d 552, 557.) In light of these significant judicial  
14 protections that guard the people’s direct democracy, this Court should not declare AB 277’s  
15 November, 2014 referendum void for the following three reasons.

16 **1. As a state statute, AB 277 is a legislative act subject to a referendum**  
17 **election**

18 The referendum power gives the people the right “to approve or reject statutes . . . .” (Cal.  
19 Const., art. II, § 9.) Clearly, AB 277 is a statute and thus is subject to referendum. In applying  
20 the liberal construction standard to uphold the people’s power to legislate through initiatives and  
21 referenda, California courts recognize that these “powers apply to acts which are legislative in  
22 nature.” (*Pacific Rock & Gravel Co. v. City of Upland* (1967) 67 Cal.2d 666, 668-669.) In  
23 contrast to legislative acts, “[e]xecutive or administrative acts are not subject to the power of  
24 referendum.” (*Id.* at p. 669.) The distinction between legislative and administrative power has  
25 been described as follows:

26 The power to be exercised is legislative in its nature if it  
27 prescribes a new policy or plan; whereas, it is administrative in its  
28 nature if it merely pursues a plan already adopted by the legislative  
body itself, or some power superior to it.

1 (*Southwest Diversified, Inc. v. City of Brisbane et al.* (1991) 229 Cal.App.3d 1548, 1555, quoting  
2 5 McQuillin on Municipal Corporations (3d ed. 1989) § 16.55, p. 266.)

3 In applying this “legislative in nature” test to the Legislature’s ratification of the North Fork  
4 Compact, AB 277’s enactment was clearly a legislative act. No dispute exists that AB 277 is a  
5 statute – the paradigm of a legislative act. The Assembly introduced AB 277; the Legislature  
6 passed it; the Governor signed the bill; and it was codified as Government Code section  
7 12012.59. (Cross-Complaint, p. 12, ¶ 31.) Pursuant to the facts pled in North Fork’s Cross-  
8 Complaint, AB 277 followed the Legislature’s statutory ratification process for class III gaming  
9 compacts (Gov. Code, § 12012.25, subd. (c)), under the Legislature’s constitutional ratification  
10 authority (Cal. Const., art. IV, § 19, subd. (f)).

11 In exercising the Legislature’s constitutional ratification authority, two distinct options are  
12 available. (See Gov. Code, § 12012.25, subs. (b) & (c).) While the first ratification option  
13 under Government Code section 12012.25, subdivision (b), does not require a statute, this  
14 option’s scope is limited. It only covers new compacts that are “identical in all material respects”  
15 to any of the 1999 compacts listed in Government Code section 12012.25, subdivision (a). (Gov.  
16 Code, § 12012.25, subd. (b)(1).) On the other hand, new compacts that are “materially different”  
17 from those 1999 compacts “shall be ratified by a statute approved by each house of the  
18 Legislature . . . .” (Gov. Code, § 12012.25, subd. (c).)

19 With regard to the North Fork Compact, in passing AB 277, the Legislature followed the  
20 statutory ratification process mandated for “materially different” compacts under Government  
21 Code section 12012.25, subdivision (c). As such, the Legislature’s ratification, codified in  
22 Government Code section 12012.59, constituted a “statute” under the California Constitution for  
23 referendum purposes. (Cal. Const., art. II, § 9.) And because the people retain their reserved  
24 constitutional authority to reject statutes through a referendum under article II, section 9 of the  
25 Constitution, AB 277 is subject to the referendum.

26 The Cross-Complaint alleges that even though AB 277 is a statute, it nonetheless is not a  
27 legislative act because it ratified a negotiated agreement between the State and North Fork. In  
28 support of this claim, North Fork cites to *Worthington v. City of Rohnert Park (Worthington)*

1 (2005) 130 Cal.App.4th 1132. (Cross-Complaint, p. 3, ¶ 4.) However, *Worthington* fails to  
2 support North Fork's declaratory relief action. *Worthington* involved a memorandum of  
3 understanding (MOU) between the Rohnert Park City Council (City Council) and the Federated  
4 Indians of the Graton Rancheria. (*Worthington, supra*, 130 Cal.App.4th at p. 1138.) The MOU  
5 provided for the Tribe "to make contributions and community investments to mitigate impacts of  
6 the casino project." (*Id.* at p. 1138.) *Worthington* held that such an MOU that "addresses  
7 mitigation of potential impacts of the future casino project" was not subject to a local referendum  
8 because the City Council's action was not a legislative act. (*Id.* at p. 1143.) Instead, the MOU  
9 was merely a contract that established no law or regulatory authority by the City Council. (*Ibid.*)  
10 As such, because the MOU in *Worthington* constituted only a contractual or administrative action,  
11 and not legislation, it was not subject to the local referendum. (*Ibid.*)

12         Given its limited context, *Worthington's* holding that the City Council's MOU was not a  
13 legislative act is inapplicable to AB 277. The MOU in *Worthington* is not a class III tribal-state  
14 gaming compact under IGRA. Unlike a state, which possesses some regulatory authority over  
15 class III gaming through negotiated compacts (25 U.S.C. § 2710(d)(3)(C)), a city council  
16 exercises no similar authority through an MOU. These narrow, non-statutory agreements by local  
17 governments do not "decide whether or how the casino project should proceed." (*Worthington,*  
18 *supra*, 130 Cal.App.4th at p. 1143.) Nor does an MOU contain any rules or regulatory  
19 provisions. (*Ibid.*) Thus, the City Council's approval of the MOU was not legislation.

20         In sharp contrast to *Worthington's* local MOU, AB 277's ratification of the North Fork  
21 Compact would provide the State with the regulatory authority permitted by IGRA. For example,  
22 if approved by the voters in the November election, North Fork Compact sections 4.1 and 4.2  
23 would limit North Fork to 2,000 gaming devices at the single gaming facility located on the 305-  
24 acre Madera site. (Plaintiffs' Request for Judicial Notice in Opposition to Demurrer (Plaintiffs'  
25 RJN), Exhibit 1, p. 13.)<sup>1</sup> As a result of this provision, North Fork would be limited as to the

26  
27         <sup>1</sup> Plaintiffs' RJN was filed by plaintiffs Stand Up for California! and Barbara Leach on or  
28 about July 15, 2013. Exhibit 1 to Plaintiff s' RJN is a true and correct copy of the entire North  
Fork Compact.

1 number of gaming devices that it could operate, and the Tribe could not open a gaming facility on  
2 its environmentally sensitive Indian lands near the southern entrance to Yosemite National Park.  
3 (*Id.* at p. 1.) Another significant compact regulatory restriction is contained in section 5.2(a),  
4 which would require North Fork to make designated payments to the Wiyot Tribe. (*Id.* at p. 28.)  
5 This important provision has facilitated the Wiyot Tribe to “forgo gaming on its environmentally  
6 sensitive and scenic lands adjacent to the Humboldt Bay National Wildlife Refuge . . . .” (*Id.* at p.  
7 1.) Significantly, these payments to the Wiyot Tribe would be in addition to the Revenue Sharing  
8 Trust Fund or the Tribal Nation Grant Fund payments described in compact section 5.2(b). (*Id.* at  
9 pp. 28-29.)

10 Finally, the North Fork Compact contains other regulatory provisions on numerous subjects  
11 important to the State of California. These include, among other things, requiring possible  
12 mitigation payments, under certain conditions, to the Chukchansi Indian Tribe in section 4.5  
13 (Plaintiffs’ RJN, Exhibit 1, at pp. 15-18), requiring and setting procedures for licensing of gaming  
14 employees, gaming resource suppliers, and financial sources in section 6.4 (*id.* at pp. 31-53),-  
15 establishing minimum procedures for resolving patron disputes in section 10.0 (*id.* at pp. 78-79),  
16 and setting forth various requirements regarding public and workplace health, safety, and liability  
17 in section 12.0 (*id.* at pp. 89-103). The regulatory nature of these compact provisions  
18 demonstrates that, unlike the MOU in *Worthington*, the North Fork Compact would provide for  
19 meaningful State regulatory involvement regarding the scope, location, and operation of North  
20 Fork’s gaming facility. Accordingly, the statute ratifying this worthwhile compact is a legislative  
21 act that is subject to people’s referendum power.

22 **2. Unless exempt, state statutes are legislative acts under the California**  
23 **Constitution**

24 There is another critical distinction between AB 277 and *Worthington*’s MOU. Unlike the  
25 former, the latter was not a state statute. While local government actions may or may not  
26 constitute legislative acts under California law, state statutes that are passed by both houses of the  
27 Legislature and signed by the Governor constitute legislative acts. Not surprisingly, North Fork  
28

1 cannot cite to any California appellate court cases holding that a statute passed by the Legislature  
2 is not a legislative act.<sup>2</sup>

3 In this case, AB 277 was duly passed by the Legislature and signed by the Governor  
4 pursuant to Government Code section 12012.25, subdivision (c). But for the pending  
5 referendum's qualification, AB 277 would now be an in-effect statute codified as Government  
6 Code section 12012.59. Because this state statute is clearly a legislative act subject to the  
7 people's referendum power under Constitution article IV, section 1, the State Cross-Defendants'  
8 demurrer must be sustained without leave to amend.

9 While statutes are legislative acts subject to referenda, certain statutes are constitutionally  
10 exempt from this direct democracy process. Article II, section 9, of the California Constitution  
11 specifically exempts the following three categories of statutes: "urgency statutes, statutes calling  
12 elections, and statutes providing for tax levies or appropriations for usual current expenses of the  
13 State." (Cal. Const., art. II, § 9, subd. (a).) In accordance with the judicial policy of liberally  
14 construing the people's reserved referendum power, exceptions are strictly construed. (See  
15 *Collins, supra*, 112 Cal.App.2d at p. 731.) "Under the familiar maxim of *expressio unius est*  
16 *exclusio alterius* it is well settled that, when a statute expresses certain exceptions to a general  
17 rule, other exceptions are necessarily excluded." (*Ibid.*) No constitutional exclusion exists for  
18 statutes ratifying class III tribal-state gaming compacts. This Court cannot provide North Fork  
19 with the benefit of a constitutional exemption that does not exist.

20 Interestingly, certain class III tribal-state gaming compacts have been exempted from the  
21 referendum process by the Legislature passing ratification statutes as urgency measures that went

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22 <sup>2</sup> North Fork's reliance on *Barlotti v. Lyons (Barlotti)* (1920) 182 Cal. 575 is misplaced.  
23 (Cross-Complaint, p. 2, ¶ 3.) *Barlotti* involved the Legislature's then recent ratification by joint  
24 resolution of the 18th Amendment to the United States Constitution. (*Barlotti, supra*, 182 Cal. at  
25 p. 576.) In rejecting the claim that this ratification was subject to the referendum process, the  
26 California Supreme Court correctly held that article V of the United States Constitution permitted  
27 the only method of state ratification, and that was "*solely and finally through their official*  
28 *representative legislative bodies . . .*" (*Id.* at p. 583, italics in original.) Based upon that, the  
court concluded that it need not discuss the question of whether California's referendum  
provisions were intended to apply to the joint resolution. (*Id.* at p. 584.) In contrast to the  
process for ratifying proposed amendments to the United States Constitution that was at issue in  
*Barlotti*, article V of the United States Constitution does not control the method of the State's  
ratification of the North Fork Compact.

1 into immediate effect. Examples include compact ratifications for the Shingle Springs Band of  
2 Miwok Indians (Gov. Code, § 12012.53; see Historical and Statutory Notes, 32E Pt.1 West’s  
3 Ann. Gov. Code (2011 ed.) foll. § 12012.53, p. 36 [stating in section 3 that the act was an  
4 “urgency statute”]); the Habematolel Pomo of Upper Lake (Gov. Code, § 12012.54; see  
5 Historical and Statutory Notes, 32E Pt. 1 West’s Ann. Gov. Code (2014 supp.) foll. § 12012.54,  
6 p. 8 [stating in section 4 that the act was an “urgency statute”]); and the Pinoleville Pomo Nation  
7 (Gov. Code, § 12012.551; see Historical and Statutory Notes, 32E Pt. 1 West’s Ann. Gov. Code  
8 (2014 supp.) foll. § 12012.551, p. 9 [same]). Because the Legislature ratified these three  
9 compacts as urgency statutes, they were constitutionally exempt from referenda. (Cal. Const., art.  
10 II, § 9, subd. (a).) However, when adopting AB 277, the Legislature chose *not* to ratify the North  
11 Fork Compact in this manner. Accordingly, because the Legislature followed a non-exempt  
12 process, AB 277 remains subject to the people’s reserved referendum power under article II,  
13 section 9. The separation of powers doctrine precludes this Court from judicially amending AB  
14 277 to include an urgency provision that the Legislature did not include.

15 **3. Because compact ratification statutes are legislative acts, they have**  
16 **been previously subject to referenda in California**

17 Ratification statutes for class III tribal-state gaming compacts that are not adopted as  
18 urgency measures have always been subject to possible referendum elections in California. In  
19 particular, in the last fourteen years, several gaming compacts were challenged by referenda in  
20 two different elections. The first occurred in the statewide election on March 7, 2000. (See  
21 Historical and Statutory Notes, 32E Pt. 1 West’s Ann. Gov. Code (2011 ed.) foll. § 12012.5, p. 18  
22 [stating that the compact ratification statute, S.B. 287, “was subject to a referendum (Prop. 29),  
23 which was approved by the voters at the March 7, 2000 election”].) In that election, Proposition  
24 29 was a referendum challenging Government Code section 12012.5. That compact ratification  
25 statute, which did not go into effect when Proposition 29 qualified for the ballot, ratified eleven  
26 class III tribal-state gaming compacts entered into in 1998. (Gov. Code, § 12012.5, subd. (a)(1)-  
27 (11).) After the voters approved Proposition 29, Government Code section 12012.5 became  
28 effective on March 8, 2000 – the day after the election. (See Constitutional Provisions, 32E Pt. 1

1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.5, p. 18 [noting that under article II, section 10  
2 of the California Constitution, a statute subject to a referendum "approved by a majority of votes  
3 thereon takes effect the day after the election unless the measure provides otherwise"].)

4 A second statewide referendum election regarding class III tribal-state gaming compacts  
5 took place on February 5, 2008. That election involved four referenda that challenged four  
6 specific compact ratification statutes. Proposition 97 challenged Government Code section  
7 12012.46, the ratification statute for the Agua Caliente Band of Cahuilla Indians compact. (Gov.  
8 Code, § 12012.46; see Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011  
9 ed.) foll. § 12012.46, p. 28.) Proposition 95 challenged Government Code section 12012.48, the  
10 ratification for the Morongo Band of Mission Indians compact. (Gov. Code, § 12012.48; see  
11 Historical and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.48, p.  
12 31.) Proposition 94 challenged Government Code section 12012.49, the ratification statute for  
13 the Pechanga Band of Luiseno Mission Indians compact. (Gov. Code, § 12012.49; see Historical  
14 and Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.49, p. 32.)  
15 Proposition 96 challenged Government Code section 12012.51, the ratification statute for the  
16 Sycuan Band of Kumeyaay Nation compact. (Gov. Code, § 12012.51; see Historical and  
17 Statutory Notes, 32E Pt. 1 West's Ann. Gov. Code (2011 ed.) foll. § 12012.51, p. 34.) All four  
18 compact ratification statutes were approved by the voters, and became effective on February 7,  
19 2008, the date after the election on February 6, 2008. (Gov. Code, §§ 12012.46, 12012.48,  
20 12012.49, 12012.51.)

21 This referenda history regarding class III tribal-state gaming compacts amply demonstrates  
22 that when referenda challenging non-exempt compact ratification statutes qualify for the ballot,  
23 the people make the final ratification determination. This is how direct democracy works under  
24 article II, section 9 of the California Constitution, and there is no legal basis for this Court to  
25 declare otherwise with regard to AB 277.

1           **B. AB 277's referendum does not conflict with federal law because state law**  
2           **determines when an IGRA compact is entered into with a Tribe**

3           North Fork alleges that this Court must declare the referendum on AB 277 invalid because  
4 it “would directly conflict with federal law.” (Cross-Complaint, p. 3, ¶ 5.) North Fork further  
5 alleges that the referendum is “fundamentally incompatible with the State’s ability and obligation  
6 to negotiate in good faith” under IGRA. (*Ibid.*) North Fork submits that the referendum would  
7 make state law incompatible with federal law regarding approval or disapproval of the compact  
8 under section 2710(d)(8)(C) of title 25 of the United States Code. (*Id.* at pp. 4-5, ¶ 6.) Finally,  
9 North Fork alleges that California law must be “construed to avoid conflicting with federal law  
10 and with the achievement of federal policy.” (*Id.* at p. 5, ¶ 7.) None of these allegations are  
11 sufficient to state a cause of action. As a matter of law, the referendum on AB 277 does not  
12 violate federal law because, under IGRA, state law determines a compact’s validity. A tribal-  
13 state gaming compact that is not validly entered into under state law is not valid for IGRA  
14 purposes.

15           The requirement that a state must comply with its own laws when entering into a tribal-state  
16 gaming compact was decided by the Tenth Circuit in *Pueblo of Santa Ana v. Kelley* (*Pueblo of*  
17 *Santa Ana*) (10th Cir. 1997) 104 F.3d 1546. IGRA “provides a ‘comprehensive regulatory  
18 framework for gaming activities on Indian lands’ which ‘seeks to balance the interests of tribal  
19 governments, the states, and the federal government.’ [Citation.]” (*Id.* at p. 1548.) This  
20 framework includes the requirements for when compacts are validly entered into by states and  
21 tribes. In reviewing this part of IGRA, *Pueblo of Santa Ana* held that the federal law mandates  
22 “two separate requirements” under section 2710(d)(1)(C) of title 25 of the United States Code for  
23 determining if a compact is validly formed. (*Id.* at p. 1553.) Under the first federal requirement,  
24 “the State and the Tribe must have ‘entered into’ a compact.” (*Ibid.*) Under the second federal  
25 requirement, “the compact must be ‘in effect’ pursuant to Secretarial approval . . .” (*Ibid.*) In  
26 regard to the first requirement, *Pueblo of Santa Ana* held that “state law determines the  
27 procedures by which a state may validly enter into a compact” with a tribe. (*Ibid.*) Because the  
28 governor lacked authority under New Mexico law to bind his state to the compacts, they were



1 “never validly ‘entered into’ by the state . . . .” (*Id.* at p. 1559.) As a result, the Tenth Circuit  
2 held that the compacts did “not comply with IGRA.” (*Ibid.*)

3 The Tenth Circuit’s holding in *Pueblo of Santa Ana* demonstrates why California’s direct  
4 democracy does not conflict with federal law. Pursuant to the “entered into” requirement  
5 contained in section 2710(d)(1)(C), IGRA incorporates a federal mandate that a compact must be  
6 validly entered into under state law “before it can go into effect . . . .” (*Pueblo of Santa Ana*,  
7 *supra*, 104 F.3d at p. 1555.) In this case, the ratification of the North Fork Compact under AB  
8 277 has not gone into effect under California law due to the qualified referendum. A statute  
9 enacted during a regular legislative session generally goes into effect under California law “on  
10 January 1 next following a 90-day period from the date” of the statute’s enactment. (Cal. Const.,  
11 art. IV, § 8, subd. (c)(1).) The purpose for this 90-day window is to provide the people with the  
12 opportunity to file a referendum petition. (See *Busch v. Turner* (1945) 26 Cal.2d 817, 823.) The  
13 California Supreme Court has long held that “a statute has no force whatever until it goes into  
14 effect pursuant to the law relating to legislative enactment.” (*Hersch v. The State Bar of*  
15 *California* (1972) 7 Cal.3d 241, 245, quoting *People v. Righthouse* (1937) 10 Cal.2d 86, 88.)  
16 Accordingly, while AB 277 has been enacted, the ratification statute will not validly take effect  
17 under California law until the day after the referendum election, if the voters approve of the  
18 statute. (Cal. Const., art. II, § 10, subd. (a).) Because this referendum election has not yet  
19 occurred, AB 277 and the North Fork Compact have not gone into effect under state law. This  
20 outcome does not conflict with IGRA, because California law controls the North Fork Compact’s  
21 effective date. (See *Pueblo of Santa Ana*, *supra*, 104 F.3d at p. 1553.)

22 For similar reasons, North Fork’s remaining “conflict with federal law” allegations are  
23 insufficient to state a cause of action. The referendum on AB 277 does not conflict with IGRA’s  
24 requirement that the federal Secretary, within 45 days of receiving an executed compact, either  
25 approve, disprove, or allow the compact to be deemed approved by failing to act within the  
26 designated time period. (25 U.S.C. § 2710(d)(8)(C).) As the Tenth Circuit made clear in *Pueblo*  
27 *of Santa Ana*, while this IGRA provision requires the federal Secretary to approve or disprove the  
28 compact within 45 days, it does not require him to “make extensive inquiry into state law” to

1 determine if the state validly entered into the compact with the tribe. (*Pueblo of Santa Ana, supra*,  
2 104 F.3d at p. 1557.) The federal Secretary can timely act under section 2710 (d)(8)(C) of title 25  
3 of the United States Code, and “consequences” can still arise from a latter determination that the  
4 state had not “validly bound itself to the compact.” (*Ibid.*) But in no event is the federal  
5 Secretary “expected to *resolve* state law issues regarding” a state’s authority to validly bind itself  
6 to a compact “in the 45-day period given to him to approve a compact.” (*Ibid.*)

7 Nor does California’s referendum process present North Fork with a declaratory relief  
8 claim *in this Court* regarding the State’s good faith bargaining under IGRA. No one disputes that  
9 IGRA requires the State to negotiate in “good faith” for possible class III tribal-state gaming  
10 compacts when negotiations are requested by eligible Indian tribes. (25 U.S.C. § 2710(d)(3)(A).)  
11 Litigation in *federal court* against the State can occur when the State fails to negotiate in good  
12 faith. (25 U.S.C. § 2710(d)(7)(A)(i).) But North Fork has not alleged that it has commenced an  
13 IGRA claim against the State in federal court, and such a federal claim would be outlandish,  
14 given that the Governor and North Fork have negotiated and concluded the North Fork Compact.  
15 Equally important, there simply is no controlling federal authority holding that a state’s direct  
16 democracy process violates IGRA. Given that states are never compelled to enter into a compact  
17 with a tribe (*Warren v. United States* (W.D.N.Y. 2012) 859 F.Supp.2d 522, 532-533), IGRA  
18 provides no authority for any court to order that a state must abandon its constitutionally based  
19 democratic procedures to comply with this federal statute. Accordingly, there remains no legal  
20 basis for this Court to grant North Fork’s requested declaratory relief in this state court action.

21 **C. North Fork’s cross-complaint fails to allege a claim against the state cross-**  
22 **defendants under Elections Code Section 9011**

23 In addition to alleging that AB 277 is not subject to a referendum, and that the proposed  
24 referendum conflicts with federal law, North Fork claims that the referendum petition violates  
25 Elections Code section 9011. (Cross-Complaint, pp. 5-6, ¶ 8.) According to North Fork, the  
26 short title that was used on the referendum petitions “told prospective signers that the proposal  
27 related to ‘*Amended Tribal-State Gaming Compacts*,’ when in fact the Referendum Petition  
28 actually seeks to overturn the ratification of entirely *new* compacts for tribes that have not



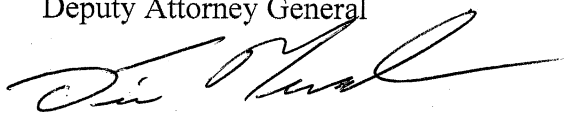
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California Constitution, the State Cross-Defendants respectfully request that this demurrer be sustained without leave to amend.

Dated: April 29, 2014

Respectfully Submitted,

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SA2013308634

**DECLARATION OF SERVICE BY E-MAIL and U.S. MAIL**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On April 29, 2014, I served the attached **STATE CROSS-DEFENDANTS' NOTICE OF HEARING OF DEMURRER TO CROSS-COMPLAINT; STATE CROSS-DEFENDANTS' DEMURRER TO CROSS-COMPLAINT; and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF STATE CROSS-DEFENDANTS' DEMURRER TO CROSS-COMPLAINT**, by transmitting a true copy via electronic mail. In addition, I served the attached by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

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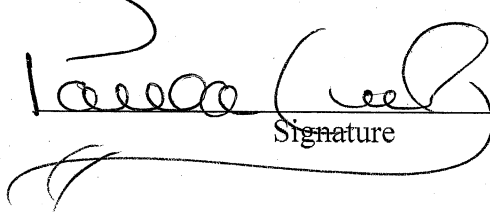
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 29, 2014, at Sacramento, California.

PAULA CORRAL  
Declarant

  
Signature