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STAND UP FOR CALIFORNIA! and
BARBARA LEACH

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MADERA

STAND UP FOR CALIFORNIA!, a California non-profit public benefit corporation; BARBARA LEACH, an individual,

Plaintiffs,

v.

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

Defendants.

Case No. MCV062850

Dept: 4
Judge: Hon. Michael J. Jurkovich

Supplemental Brief in Opposition to Demurrer

Date: October 25, 2013
Time: 1:30 p.m.
Place: Dept. 4

Complaint filed: March 27, 2013

TABLE OF CONTENTS

Page

SNELL & WILMER L.L.P.
600 ANTON BLVD, SUITE 1400
COSTA MESA, CALIFORNIA 92626-7689

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

SNELL & WILMER L.L.P.
600 ANTON BLVD, SUITE 1400
COSTA MESA, CALIFORNIA 92626-7689

TABLE OF CONTENTS
(continued)

Page

Federal Statutes

State Statutes

SNELL & WILMER L.L.P.
600 ANTON BLVD, SUITE 1400
COSTA MESA, CALIFORNIA 92626-7689

INTRODUCTION

The purpose of this litigation is to determine the legal status under state law of the Governor's decision to concur in the Secretary of the Interior's ("Secretary") two-part determination, which would allow off-reservation gaming to occur on the 305-acre parcel in Madera County ("Madera Site"). On June 27, 2013, after plaintiffs filed their initial complaint and the Governor demurred, the Legislature passed Assembly Bill No. 277 ("AB 277") ratifying the tribal-state gaming compact between the State and the North Fork Rancheria of Mono Indians ("Tribe"). This Court has invited the parties to file supplemental briefs addressing whether AB 277 ratified the concurrence. Plaintiffs herein argue that not only did the Legislature fail to ratify the concurrence through AB 277, but a finding of ratification would be premature at this point in the litigation because it is necessarily intertwined with the broader constitutional challenges to AB 277 that are the subject of plaintiffs' First Amended Complaint.

The Governor and the Tribe essentially claim that the Legislature knew it was approving an off-reservation casino at the Madera Site, and for the gaming authorized by the compact to occur, of course, the Governor had to concur. Moreover, as the Tribe contends, "the Legislature was perfectly capable of defending its own privileges, if it felt they had been invaded, simply by refusing to ratify the Compact." [Tribe's Brief, p. 11.] But there's the rub. The Legislature was not free to do that. The Governor by his concurrence had already determined that off-reservation gaming would occur at the Madera Site. The only question left for the Legislature to decide was whether that gaming would be class II or class III. Refusing to ratify would not have prevented off-reservation gaming. Stuck with a choice between class II or class III gaming and trapped by policy decisions already made by the Governor and beyond the control of the Legislature, the Legislature chose class III gaming, ratified the compact, and ratified the compact only.

For the following reasons, the Court should find that AB 277 did not ratify the concurrence and overrule the Governor's demurrer. In the alternative, if the Court is inclined to find that AB 277 did ratify the concurrence, the Court should postpone ruling on the ratification issue pending plaintiffs' constitutional challenges in the next phase of this litigation.

1. AB 277 did not ratify the Governor's concurrence expressly, explicitly, or even

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600 ANTON BLVD, SUITE 1400
COSTA MESA, CALIFORNIA 92626-7689

impliedly. Mere references to the concurrence in the compact are not ratification by statute. Furthermore, the Legislature's ultimate control over the decision to authorize off-reservation gaming had been usurped by the Governor, and the Legislature had no way of regaining the authority it had lost.

2. The Governor's and the Tribe's arguments regarding section 14.2(d) of the compact are improper at the demurrer stage because they ask the court to consider the "intent of the parties," which requires the Court to hear evidence beyond the allegations of the complaint. Even if the Court finds such arguments proper, however, the compact itself in section 14.2(d) makes clear that the compact and the concurrence are independent of each other.

3. The Legislature lacked the constitutional authority to ratify the concurrence, and this issue must be fully addressed in regard to the new causes of action in plaintiffs' proposed First Amended Complaint. This next phase of litigation will necessarily overlap and possibly conflict with a finding that AB 277 ratified the concurrence.

I. AB 277 DID NOT RATIFY THE CONCURRENCE

AB 277 makes no mention of the concurrence nor offers any ambiguous statements that could be interpreted as referencing the concurrence. Neither the Governor nor the Tribe, however, offers any legal argument as to why this does not matter

A. The Legislature Did Not Explicitly Ratify The Concurrence

The Governor argues that the passing of AB 277 and enactment Government Code section 12012.59 provided an "explicit statutory ratification by the Legislature [that] contains no limitations, qualifications, or conditions." [Governor's Brief, p. 3.] To support this assertion, the Governor points to language in the statute stating that the "Legislature 'hereby ratified' the compact between the North Fork Tribe the State of California." [*Ibid.*] The Governor offers no argument as to why this is anything more than an explicit ratification of the compact only. Instead, the Governor invents the concept of "partial ratification," which the California Constitution purportedly does not allow, and cites Article IV, section 19(f) of the Constitution, the provision allowing the Legislature to ratify compacts. [*Ibid.*] This argument is circular and nothing more than a restatement of the Governor's "incidental and ancillary" argument.

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600 ANTON BLVD, SUITE 1400
COSTA MESA, CALIFORNIA 92626-7689

The Legislature was very clear about what AB 277 would ratify and any additional legal effect the bill would have: "This bill would ratify the tribal-state gaming compact entered into between the State of California and the North Fork Rancheria Band of Mono Indians, executed on August 31, 2012. The bill would also ratify the tribal-gaming compact entered into between the State of California and the Wiyot Tribe, executed on March 20, 2013. The bill would provide that, in deference to tribal sovereignty, certain actions are not projects for purposes of CEQA." Assembly Bill No. 277. Nowhere did the Legislature mention anything about the concurrence. The Governor, however, simply cites *Professional Engineers* without explaining how that case is applicable to this circumstance, claiming only that since ratification occurred there, it necessarily occurred here. [Governor's Brief, p. 3.]

To avoid the Governor's circular reasoning and the fact that AB 277 does not refer to the concurrence explicitly or impliedly, the Tribe ignores the text of AB 277 and Government Code section 12012.59 completely and instead focuses on language referencing the concurrence in the compact's preamble.[1] [Tribe's Brief, pp. 8-9.] This language, however, merely memorializes the Governor's unauthorized policy decisions resulting in his unilateral decision to allow off-reservation gaming.[2] The Tribe has offered no authority for its argument other than a blind

[1] This is no doubt because, without exception, every case the Tribe cites in support of the proposition that the Legislature can cure ultra vires action by subsequent act actually shows the legislature does so expressly and explicitly. See *Hoffman v. Red Bluff* (1965) 63 Cal.2d 584, 592 fn. 6 (Improvement Act of 1911 validated previously unauthorized actions stating, "All acts and proceedings heretofore taken by or on behalf of any public body under any law, or under color of any law, for the authorization, issuance, sale, or exchange of bonds of any such public body for any public purpose *are hereby confirmed, validated, and declared legally effective*"(emphasis added)); *Chuoco Tiaco v. Forbes* (1913) 228 U.S. 549, 556. (act passed by the Philippine legislature to ratify the governor general's actions "recit[ed] that the governor general had authorized the deportation 'in the exercise of authority vested in him by law,'[and] enacted that his action was '*approved* and *ratified* and *confirmed*, and in all respects *declared legal*, and not subject to question or review'"(emphasis added)); *United States. v. Heinszen* (1907) 205 U.S. 370, 381 (Congress passed act stating that the President's unauthorized order "is *hereby legalized* and *ratified* and *confirmed* as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized as directed" (emphasis added)); *National Civil Service League v. City of Santa Fe* (D.N.M. 1973) 370 F.Supp. 1128, 1133 (City Council passed unanimous resolution allocating $21,000 to "Consultants and Contract Services," an exact restatement of an allocation in an unauthorized agreement by the City Manager); *Fairbanks North Star Borough v. State* (Alaska 1988) 753 P.2d 1158, 1160 ("In this case, the state legislature passed H.B. 132 with the express intention of validating the governor's impoundment orders"); *De Muro v. Martini* (N.J. 1949) 64 A.2d 351, 354 (local board cured contract that was not executed according to statutory requirements by enacting an ordinance that made "special reference . . . to the plans and specifications prepared by [the improperly executed contract] and the same were specifically approved").

[2] In its brief, the Tribe expresses confusion as to why this is a state law issue at all. [Tribe's Brief, pp. 2-3]. To address this confusion, it is true that under IGRA gaming could only occur at the Madera Site if the Governor concurred in the Secretary's two-part determination. 25 U.S.C. § 2719(b)(1)(A). But this is quite another matter from the requirement that the Governor be authorized under state law to issue the concurrence. *Confederated Tribes of*

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COSTA MESA, CALIFORNIA 92626-7689

citation to *Professional Engineers* and citations to cases where the legislature *expressly* ratified ultra vires actions. [See fn. 1, *supra*, p. 3.]

B. Both the Governor and the Tribe Apply *Professional Engineers* Incorrectly

Contrary to the Governor's and the Tribe's mere assertion of ratification, referencing the Governor's ultra vires action in a statute does not ratify such an action. *Brown v. Superior Court* (2011) Cal. App. 4th 971, 990 ("[F]urloughing state employees could not be validated solely by reference to unilateral action by the Governor"). As the Court in *Brown v. Superior Court* pointed out, ratification in *Professional Engineers* occurred because the Legislature not only expressed the clear intent to ratify the Governor's actions, but also because the Legislature kept ultimate control over appropriations – an area over which the Legislature as plenary power. *Id.* at 985. This is not the case here.

In *Professional Engineers*, the Supreme Court held that the Governor lacked authority under the Constitution or any applicable statute to unilaterally order a two-day-a-month furlough for executive branch employees. Despite this ultra vires action, the Court further held that the subsequent passing of a revised budget act ratified the Governor's actions. *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal. 4th 989, 1043-1052. At issue was a provision *in* the revised budget act that stated, "each *item of appropriation* in this act . . . shall be reduced . . . to reflect a reduction in employee compensation achieved through . . . *existing administration authority*." *Id.* at 1044 (emphasis added). The Court stated that the provision, though ambiguous on its face, explicitly reflected the Legislature's intent to reduce employee salaries by the amount provided for in the Governor's furlough plan, thereby ratifying the Governor's unilateral action. *Id.* at 1045-1047. According to the Court, "the legislative history of the provision in question clearly and explicitly establishes that the reductions in appropriations for employee compensation that were included in the bill reflected the two-day-a-month furloughs." *Id.* at 1046. Furthermore, there was no other, "existing administration authority," to which the Legislature could have been referring. *Id.* at 1047.

Siletz Indians of Oregon v. U.S. (1997) 110 F.3d 688, 696 ("If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law").

SNELL & WILMER L.L.P. 600 ANTON BLVD, SUITE 1400 COSTA MESA, CALIFORNIA 92626-7689

The Governor and the Tribe read *Professional Engineers* to hold that Legislative references to the Governor's actions necessarily ratify the Governor's actions. Ignoring the fact that AB 277 makes no reference, expressly or impliedly, to the Governor's concurrence or any action taken by the Governor, this argument was rejected in *Service Employees International Union, Local 1000 (SEIU) v. Brown* (2011) 197 Cal. App. 4th 252 (holding that the revised budget act ratified the Governor's furlough plan only to the extent that employees' salaries were funded through appropriations). In *Brown v. Superior Court* (2011) Cal. App. 4th 971, 990, the court of appeal further clarified this understanding of the holding in *Professional Engineers*. According to the *Brown* Court, the key point emphasized in *Professional Engineers* was the Legislature's supreme and ultimate control over the salary and wages of state employees and how in passing a revised budget the Legislature at all times maintained ultimate control over those wages and salary through its power of appropriations. *Id.* at 985. Thus under *Professional Engineers* the proper inquiry is to determine whether the Legislature maintained ultimate control over its plenary powers.

The Tribe attempts to argue that the Legislature, in fact, maintained such ultimate control in ratifying the compact: "[T]he Legislature was perfectly capable of defending its own privileges, if it felt they had been invaded, simply by refusing to ratify the Compact." [Tribe's Brief, p. 11]. But this claim is patently false. Under IGRA, the decision to authorize off-reservation gaming applies to both class II and class III gaming. 25 U.S.C. § 2719(b)(1)(A); see also Opposition to Demurrer, p. 3. The Legislature's refusal to ratify the compact would have had no effect on whether off-reservation gaming could occur at the Madera Site, because class II gaming would have been permitted even if the Legislature rejected the compact. Thus the Legislature's ratification of the compact did not and could not involve the Legislature's exercising ultimate control of "its own legislative prerogative" in regard to the concurrence. See *Professional Engineers*, *supra*, 50 Cal.4th at 1047. Even under the standard the Governor urges this Court to adopt for applying the separation of powers doctrine, the Governor's decision to concur in the Secretary's two-part determination, unilaterally allowing off-reservation gaming at the Madera Site, "operate[d] to materially impair" the Legislature's "exercise of its own

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constitutional functions." *Marine Forests Society v. California Coastal Commission* (2005) 36 Cal.4th 1, 45.

C. The Legislature Ratified the Compact and Not the Concurrence

The inability of the Legislature to exercise its own legislative prerogative permeated the floor discussion prior to the vote in the Senate to ratify the compact. Senator Wright, speaking in support of ratifying the compact, made this point clearly:

> We are not voting today to determine whether or not there will or won't be gambling on the site. *That decision was made by the Department of the Interior, and there is nothing that we are able to do about that.* The decision that we are making today is whether or not there is a compact that allows us to partake of the revenues, so that Madera County, so that the Chukchansi, so that all of the other *benefits that will accrue from the compact* take place... So members, you can vote "no" and then there's no revenue for you and no benefit, because they will go Class II and walk away, or you can vote "aye" and the state and the community as a whole can benefit from a gaming exercise that will take place. I ask for an "aye" vote. [Request for Judicial Notice in Support of Supplemental Brief (RFJN), Ex. 1, pp. 9-10 (emphasis added).]

Senator Wright was only mistaken in that the decision that gaming would be allowed at the Madera Site was made by the Governor when he concurred with the Secretary's two-part determination. [See Opposition to Demurrer, p. 4.] While there were no mentions of the Governor's concurrence in the floor discussion, each speaker in support of the compact lamented the lack of an off-reservation gaming policy and the fact that the Legislature had been placed in a situation that had deprived it of making those policy choices:[3]

- Senator Yee: "[L]et's go ahead and support this particular compact. But I think, moving forward, we cannot do that anymore unless we come up with some kind of understanding as to where can the legislature weigh in about where some of these tribes are going to locate their particular casinos and what input we can have in moderating that particular siting . . . ." [RFJN, Ex. 1, p. 7.]
- Senator Lara: "I, too, am concerned about the process or lack of process and policy

[3] Senator Steinberg acknowledged the need for the working group on off-reservation gaming policy but based his vote on the history of the Tribe's connection with the land. Senator Evans, the only other Senator to speak on the floor in support of the bill, focused her comments solely on voting for the compact to prevent the Wiyot Tribe from building a casino in Humboldt Bay. [RFJN, Ex. 1, pp. 4,9 .]

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COSTA MESA, CALIFORNIA 92626-7689

parameters that have put us all in this place, to support or oppose a compact . . . . [W]e have to get to the point where we reach some sort of policy consensus where we address this important issue to make sure we don't get jammed like this again." [*Id.*, p 7-8.]

- Senator Berryhill: "[N]o matter what there is going to be gaming in Madera. Whether it's going to be Class II or class III remains to be seen, but if it's Class II, nobody's going to get anything out of this thing." [*Id.*, p. 8.]

Senator Yee's comments cut to the heart of this case. Not only can the Legislature "weigh in" regarding off-reservation gaming, but it must "weigh in." Here, however, it could not do so because its power had been usurped by the Governor's unilateral actions.

Following the passage of AB 277, on July 29, 2013, Senator De Leon, Chair of the Senate Appropriations Committee, sent the Governor a letter informing him that a working group has been established in the Senate to develop needed and nonexistent policy on off-reservation gaming. [RFJN, Ex. 2.] The letter pleaded with the Governor not to issue any other concurrences: "I urge your commitment to not approve, nor submit for ratification, any off-reservation gaming agreements until the working group has completed its examination and California has adopted a clear and coherent policy on off-reservation gaming." [*Ibid.*] The fact that the Senate has established a working group to address off-reservation gaming policy combined with Senator De Leon's plea makes clear that the Senate did not view AB 277 as ratification of the concurrence or as an exercise of the Legislature's ultimate control over gaming policy: "The *Agreement between your Administration and the [Tribe] represents a significant policy departure from previous agreements in California* by allowing the [Tribe] to build a casino off reservation property." [*Ibid.* (emphasis added).] Such a departure the Legislature had no choice but to accept.

In contrast to the ratification in *Professional Engineers*, the text of AB 277 does not refer to the concurrence, nor does the legislative history "clearly and explicitly establish[]" that the Legislature intended to ratify the Governor's unilateral decision to authorize off-reservation gaming. *Professional Engineers*, *supra*, 50 Cal.4th at 1046. Here, the Legislature ratified the compact only, choosing class III gaming over class II gaming at the Madera Site. Yet both the Governor and the Tribe persist in failing to acknowledge that the ratification of the compact and

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the decision to concur are two separate and distinct legislative powers. See *Keweenaw Bay Indian Community v. U.S.* (6th Cir. 1998) 136 F.3d 469, 476. One of these powers, the Governor usurped.

II. SECTION 14.2(D) OF COMPACT PROVIDES THAT THE COMPACT CAN BE RATIFIED SUBJECT TO A SUBSEQUENT DETERMINATION BY THIS COURT THAT THE CONCURRENCE WAS INVALID

In response to the Governor's contention that the ratification of the compact necessarily ratified the concurrence [Defendant Governor Edmund G. Brown Jr.'s Second Request for Judicial Notice, pp. 2-3], plaintiffs pointed to section 14.2(d) of the compact to show that the compact itself considers ratification of the compact a separate issue from the concurrence and expressly states the compact's ratification can be invalidated if the concurrence is deemed invalid. Section 14.2(d) of the compact provides,

> If the Governor's concurrence with the Secretary's September 1, 2011 determination, pursuant to Section 20(b)(1)(A) of IGRA (25 U.S.C. § 2719(b)(1)(A)), that the federal government should acquire the 305-acre Parcel in trust for the Tribe's benefit is determined by the Secretary or a court of competent jurisdiction to be void or voidable, or invalid in whole or in part for any reason, then this Compact shall be deemed null and void.

[Plaintiffs' Request for Judicial Notice in Opp. to Demurrer, Ex. A (North Fork Compact), § 14.2(d), p. 107.] In their supplemental briefing trying to contradict plaintiffs' reading of section 14.2(d), both the Governor and the Tribe have gone well beyond the boundaries of a demurrer. Even so, neither has presented a cogent argument that the compact necessarily ratified the concurrence in light of section 14.2(d).

A. The Governor's and Tribe's Arguments Are Improper on Demurrer

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicially noticeable. *Blank v. Kirwwan* (1985) 39 Cal.3d 311, 318. While a document may be subject to judicial notice, the interpretation or meaning of that document is not judicially noticeable. *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal. App. 4th 97, 113, 114-115 ("For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without

SNELL & WILMER L.L.P. 600 ANTON BLVD, SUITE 1400 COSTA MESA, CALIFORNIA 92626-7689

allowing the parties any opportunity to present extrinsic evidence of the meaning of the document, would be improper"). While plaintiffs requested the Court take judicial notice of the compact, the Governor and the Tribe are now asking the Court to interpret the compact on demurrer, based on the intent of the parties and asserted purposes of provisions, such that AB 277 ratified the concurrence.

The Governor's argument that the court should apply standard rules of contract interpretation to the compact is misplaced. [Governor's Brief, p. 4.] The question is not whether the compact allows class III gaming at the Madera Site or what the parties agreed to regarding such gaming, but whether it can be interpreted to show that its ratification simultaneously ratified the concurrence. There is no such provision in the compact that states this. Plaintiffs have pointed to section 14.2(d) in the compact, which states that the concurrence is separate from the compact. In response, neither the Governor nor the Tribe points to any other provision in the compact that contradicts or clarifies section 14.2(d). Rather, they point to general language in the preamble referring to the Governor's actions and to the intent of the parties and the purpose of the provision. The Tribe, for example, claims that this was an important protection negotiated for the tribe.[4] [Tribe's Brief, p. 10, fn. 5.]

This is not a proper use of the compact on demurrer. *Fremont Indem. Co.*, *supra*, 148 Cal. App. 4th at 115 ("[A] court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which a demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show"). Thus it would be

[4] In footnote 5 of the Tribe's brief, the Tribe asserts that section 14.2(d) is an important protection for the tribe, an escape hatch to allow the tribe out of a compact it legally cannot comply with. The example used by the tribe, however is moot. While the Tribe is obligated under the compact to make payments on behalf of the Chukchansi Tribe "upon the date the Tribe secures financing," and therefore prior to actually making money from the casino, the compact also contains a provision stating that the Tribe is exempt from such payment in the event the Chukchansi Tribe "(i) pursues in any way, or finances, in whole or in part, directly or indirectly, any lobbying, administrative, legal, judicial or other challenge to the Secretary's decision to accept the 305-Acre Parcel in trust for the Tribe, the California legislature's ratification of this Compact, or the Secretary's approval of this Compact." [North Fork Compact, § 4.5(f)] The Chukchansi Tribe swallowed this pill long before the compact was ratified by challenging all phases of the approval process. [RFJN, Ex. 4, p. 101-102 (statement by Tribe's attorney that he believes Tribe no longer has obligations under this provision).] Clearly the Tribe pointed to this provision because it showed a financial obligation under the compact that accrued prior to the casino's opening and making money. All other payment obligations in the compact begin when the casino is operating and only to the extent it makes money. [North Fork Compact 4.6-4.8.] Furthermore, the poison pill provision regarding the Chukchansi Tribe is the very escape hatch the tribe claims 14.2(d) provides.

SNELL & WILMER L.L.P. 600 ANTON BLVD, SUITE 1400 COSTA MESA, CALIFORNIA 92626-7689

improper for this Court on demurrer to accept the Governor's and the Tribe's interpretation of the parties' intent in regards to ratification of the concurrence without allowing the plaintiffs the opportunity to engage in discovery to counter these arguments. *Ibid.*

B. Section 14.2(d) of the Compact States That the Compact and the Concurrence Are Independent of Each Other

Unable to find any provisions or specific language in the compact to contradict or clarify section 14.2(d), the Governor instead offers what essentially amounts to the assertion that "it just must be so." The Governor argues that "Legislative ratification of the compact without the concurrence would constitute a meaningless act." [Governor's Brief, p. 7] This is not, however, true. Pursuant to its constitutional authority, the Legislature ratified the compact to allow class III gaming at the Madera Site, nothing more. Again, the Governor's theory of "partial ratification" appears invented solely for the purpose of this argument since the only authority offered is Article IV, section 19(f) itself. This argument also entirely ignores that the ratification of the compact is conditional anyway. The Secretary must approve the compact before it can go into effect. 25 U.S.C. § 2710(d)(8). Thus, the compact is ratified only to the extent that the Secretary approves it. Further, section 14.2(d) of the compact states that if the Secretary determines that concurrence is invalid, the compact will be deemed null and void.

There is nothing abnormal, partial, or meaningless about the ratification of the compact being so limited. Legislative ratification of a compact, while necessary for class III gaming to occur at the Madera Site, is not sufficient for class III gaming to occur at the Madera Site. See *Keweenaw Bay Indian Community v. U.S.* (6th Cir. 1998) 136 F.3d 469, 476. In ultimately authorizing class III gaming at the Madera Site, each entity has its role to play. The Governor must concur with the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A). Then the Governor must negotiate and conclude a compact. Cal. Const. art. IV, § 19(f). Then the Legislature must ratify the compact. Cal. Const. art. IV, § 19(f). Finally, the Secretary must approve the compact. 25 U.S.C. § 2710(d)(8)(A)-(B). Each piece of the puzzle must be complete in its own right. But each piece is conditional on the Secretary's approval of the compact. The Secretary cannot approve a compact or a concurrence that violates state law. *Pueblo of Santa Ana v. Kelly* (10th

SNELL & WILMER L.L.P. 600 ANTON BLVD, SUITE 1400 COSTA MESA, CALIFORNIA 92626-7689

Cir. 1997) 104 F.3d 1546, 1548.

Regarding the factual and interpretative arguments now introduced to the demurrer, plaintiffs agree with the Governor that section 14.2(d) "shows that the parties anticipated challenges to the Governor's concurrence." [Governor's Brief, p. 6.] According to the Tribe, one such challenge could involve the Governor's violation of the California Environmental Quality Act ("CEQA") [Tribe's Brief, p. 11.] In the text of AB 277, however, the Legislature, in contrast to its failure to even mention the concurrence, expressly stated that "certain actions are not projects for the purposes of CEQA." Assembly Bill No. 277. Furthermore, "this subdivision does not exempt a city, county, or city and county, or the Department of Transportation, from the requirements of [CEQA]." [*Ibid.*] While not at issue in this case, a fair reading of AB 277 suggests that should a party seek to challenge the concurrence on the grounds that the Governor violated CEQA, such a challenge would fail because AB 277 ratifies the Governor's determination that CEQA does not apply to his actions.

Thus after the passage of AB 277, section 14.2(d) of the compact would not appear to apply to the Governor's violation of CEQA as a reason for the compact's being found invalid. Further the Tribe offers no authority that the parties had CEQA in mind. This requires extrinsic evidence beyond the scope of the demurrer. Rather, the Tribe's reference to CEQA emphasizes that the Legislature knew how to prevent against post-ratification challenges and chose not to do so with respect to the Governor's authority to concur. As to other state law challenges that could prevent the development of the Casino project, the Legislature was perfectly capable of and, in fact, did address at least one of them—CEQA— in AB 277. Finally, it is not the most creative of theories to suggest that, given the legislative histories of AB 277 and Proposition 1A, as well as the Governor's reluctance to authorize gaming on land that doesn't qualify [Opposition to Demurrer, p. 12.], the provision likely serves to void the compact if a court or the Secretary determines California law does not allow for off-reservation gaming. But such an interpretation is not a matter for demurrer.

To escape the necessarily conditional status of the compact's ratification and the lack of an explicit ratification of the concurrence, both the Governor and Tribe protest that section

SNELL & WILMER L.L.P. 600 ANTON BLVD, SUITE 1400 COSTA MESA, CALIFORNIA 92626-7689

14.2(d) does not "purport to alter the legal analysis a court must undertake in making a [a determination of invalidity]." [Tribe's Brief, p. 10.] Nor does the provision "empower a court deem invalid the Legislature's constitutional power to ratify the Governor's act of concurrence." [Governor's Brief, p. 6] These hyperbolic claims appear nothing but attempts to obscure that analysis.

Plaintiffs do contend, as discussed below, that the Legislature lacks the authority to ratify the concurrence. This, however, has nothing to do with section 14.2(d). Even if the Legislature has the authority to ratify the concurrence, they did not. Neither AB 277 nor Government Code § 12012.59 makes any reference to the concurrence. Absent such language, *Professional Engineers* is inapplicable. Further, even if the Court should apply *Professional Engineers* to the case, the Court must determine whether the Legislature indeed had the power to authorize the concurrence under Article IV, sections 19(e) and (f), of the California Constitution. Thus any claim that the court would violate the separation of powers clause by preventing the Legislature from ratifying the concurrence is incorrect. See *Hotel Employees and Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 610 (stating that the court properly interprets the Constitution without deference to the Legislature).

III. FINDING THAT AB 277 RATIFIED THE CONCURRENCE IS PREMATURE IN THE BRIEFING ON THIS DEMURRER

While the passage of AB 277 has raised the issue of whether the Legislature subsequently ratified the concurrence, it has been raised by the Governor and the Tribe to obscure a decision "that has already been made"—that off-reservation gaming, class II or class III, can occur at the Madera Site. In the next phase of this litigation, pursuant to plaintiffs' First Amended Complaint, the Court will have to decide whether the California Constitution authorizes off-reservation class III gaming.[5] Only if the answer to this question is affirmative can the Court ultimately determine whether the Legislature ratified the concurrence.

[5] Plaintiffs made clear at the July 16, 2013, hearing on the demurrer their contention that the Constitution forbids off-reservation gaming and, therefore, concurrences necessary for class III gaming compacts. [Reporter's Transcript of Demurrer Motion Hearing (Transcript), Case No. MCV062850 (July 16, 2010), p. 23] Thus, the Legislature violated the Constitution by ratifying the compact. Plaintiffs have amended their complaint to add this cause of action.

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The Governor's and the Legislature's role in the compacting process must be understood from the perspective of the powers of each branch. The powers of the Legislature are plenary, and the Legislature may exercise any legislative power as long it is not expressly prohibited by the Constitution. *Howard Jarvis Taxpayers' Assn. v. Fresno Metro. Projects Auth.* (1995) 40 Cal. App. 4th 1359, 1374 (emphasis added). The Governor's powers, however, are limited to those granted to him by the Constitution or statute. *Professional Engineers*, *supra*, 50 Cal.4th at 1041. In regard to casino gambling, the "Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art IV, § 19, subd. (e) (emphasis added); see also *Hotel Employees and Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585, 605 (holding that class III tribal gaming is gaming of the type prohibited by section 19(e)). The prohibition of section 19(e) expressly forbids the Legislature from taking any action that authorizes the proscribed gaming and requires that it prohibit any action that purports to do so.

The California Supreme Court addressed the reach of section 19(e)'s general prohibition of casino gaming in *Hotel Employees*. In *Hotel Employees*, plaintiffs brought a challenge against Proposition 5, an initiative statute passed by the California electorate, which purported to authorize class III gaming on tribal land. The Supreme Court held the statute unconstitutional because it violated the general prohibition of section 19(e). *Hotel Employees*, *supra*, 21 Cal.4th at 589 ("Because Proposition 5, a purely statutory measure, did not amend section 19(e) or any other part of the Constitution, and because in a conflict between statutory and constitutional law the Constitution must prevail, we conclude Proposition 5's authorization of casino gambling is invalid and inoperative" (emphasis added)). Proponents of Proposition 5 argued that the Court should defer to the Legislature's findings that the gaming authorized by Proposition 5 did not amount to the type of gaming "currently operating in Nevada and New Jersey." *Id.* at 609. The Court disagreed. The Court stated that the legislative finding that such gaming was not of the type operating in Nevada and New Jersey was "not a 'finding' of 'legislative fact' or indeed any other kind of 'fact.' Rather, it is a construction of the anti-casino provision of section 19(e). As such, it commands no deference on our part, because we construe the provisions of the California

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Constitution independently." *Id.* at 610.

Following the Supreme Court's ruling in *Hotel Employees*, California voters approved Proposition 1A, a measure to amend the Constitution to allow class III gaming on tribal lands. Thus the California Constitution itself in section 19(f), not the Legislature, authorizes class III gaming on tribal land. In doing so, the Constitution expressly limits the powers of both the Legislature and the Governor in the compacting process. The Constitution only allows the Governor "to negotiate and conclude compacts, subject to the ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking percentage games by federally recognized Indian tribes on Indian lands in California in accordance with federal law." Cal. Const., art. IV, § 19, subd. (f) (emphasis added). These limited powers are the powers both necessary and sufficient to negotiate, conclude, and ratify compacts on existing tribal lands. And such powers have been employed to approve approximately 70 compacts with Indian tribes for class III gaming facilities on their existing tribal lands.[6]

The facility of section 19(f), however, breaks down here, because the Governor and the Legislature have attempted to approve off-reservation gaming under 25 U.S.C. § 2719(b)(1)(A). Section 19(f) does not mention the power to concur or the power to ratify a concurrence. The Governor and the Tribe, however, ignore this fact and attempt to augment the constitutional powers of the Legislature by referring to general legal principles of ratification. [See Tribe's Brief, p. 7, quoting *Hoffman v. City of Red Bluff* (1965) ("If the thing wanting or omitted which constitutes the defect is something, the necessity of which the [L]egislature might have dispensed with by prior statutes, or if something has been done, or done in a particular way, which the [L]egislature might have made immaterial, the omission or irregular act may be cured by subsequent statute").] But this citation begs a question that neither the Governor nor the Tribe

[6] There are 70 valid compacts in California. See Cal. Govt. Code § 12012.5-12012.60; see also California Gambling Control Commission, Ratified Tribal State-Gaming Compacts, available at http://www.cgcc.ca.gov/?pageID=compacts (last visited Sept. 3, 2013). Plaintiffs acknowledge that off-reservation, class III gaming has been approved for the Fort Mojave Indian Tribe, but no legal challenge was brought against the illegal concurrence in that instance. While Senator De Leon was technically incorrect when he stated in his letter to the Governor that all 70 compacts ratified in the past were for gaming on existing tribal lands [See RFJN, Ex. 2], his mistake as to the single previous exception emphasizes the confusion in the Legislature regarding off-reservation gaming.

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addresses: Given the prohibition stated in section 19(e) and the narrowly defined power granted in section 19(f), does the Legislature have the power to pass a statute ratifying the concurrence?

As plaintiffs discussed in their Opposition to Demurrer, the ballot arguments for Proposition 1A, which became section 19(f), indicate that the intent of Proposition 1A was to authorize class III gaming on existing tribal lands and prohibit off-reservation gaming. [Opposition to Demurrer, p. 11.] Thus, the Legislature had a constitutional duty to prohibit the Governor's authorizing of off-reservation class III gaming by refusing to ratify the compact. As *Hotel Employees*, as well *Professional Engineers*, makes clear, the ratification of the concurrence is a constitutional question that the court must address without deference to the actions of the Legislature. Until the Court has addressed the constitutional dimensions of this case, a finding that AB 277 ratified the concurrence, or even whether it could have ratified the concurrence, is premature.[7]

CONCLUSION

For the foregoing reasons, this court should find that AB 277 did not ratify the concurrence, and overrule the Governor's demurrer. If the Court is finds that AB 277 expressly and explicitly ratified the concurrence, the Court should postpone ruling on that issue pending the constitutional challenges raised by plaintiffs' First Amended Complaint.

Dated: September 6, 2013

SNELL & WILMER L.L.P.

By: _____

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STAND UP FOR CALIFORNIA! and
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[7] A finding that AB 277 ratified the concurrence is also premature at this time because AB 277 will not be effective until January 1, 2014. Cal. Const., art. IV, § 8, subd. (c)(1). But this effective date may get pushed back even further. Stand Up for California! and other groups are currently petitioning to put AB 277 to a referendum. [RFJN, Ex. 3.] If the proponents of the referendum succeed, the referendum allowing the voters to veto AB 277 will appear on the ballot in November, 2014. Once the referendum is on the ballot, the effective date AB 277 will automatically be stayed until the day after the election. *Assembly of State of Cal. v. Deukmejian* (1982) 30 Cal. 3d 638, 656-57.

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Stand Up for California!, etc, et al. vs. Edmund G. Brown, Jr., etc., et al.
Madera Superior Court, Case No. MCV062850

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On September 6, 2013, I served, in the manner indicated below, the foregoing document described as **Supplemental Brief in Opposition to Demurrer** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

See the attached Service List

☐ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).

☐ BY FACSIMILE: (C.C.P. § 1013(e)(f)).

☒ BY ELECTRONIC MAIL: My office caused such document(s) to be delivered electronically to the email address(es) on the attached service list.

☒ BY OVERNIGHT DELIVERY: I caused such envelope to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)).

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

Executed on September 6, 2013, at Costa Mesa, California.

Rosemary McKay

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SERVICE LIST
Stand Up for California!, etc, al. vs. Edmund G. Brown, Jr., etc., et al.
Madera Superior Court, Case No. MCV062850

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