

Case No. _____

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE
AUBURN RANCHERIA,

Appellant,

v.

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

Respondent.

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

PETITION FOR REVIEW

**SUPREME COURT
FILED**

NOV 22 2016

Jorge Navarrete Clerk

Deputy

Thomas F. Gede (SBN 99295)
Colin C. West (SBN 184095)
Robert A. Brundage (SBN 159890)
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, CA 94105
Telephone No. (415) 442-1000
Facsimile No. (415) 442-1001


Attorneys for Appellant
UNITED AUBURN INDIAN COMMUNITY
OF THE AUBURN RANCHERIA

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rule of Court 8.208)**

Counsel is aware of no entities or persons required to be listed under
Rule of Court 8.208(e)(1) or (2).

Dated: November 22, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: 

Thomas F. Gede

Attorneys for Appellant
UNITED AUBURN INDIAN
COMMUNITY OF THE
AUBURN RANCHERIA

TABLE OF CONTENTS

	Page
I. QUESTION PRESENTED.....	1
II. GROUNDS FOR REVIEW.....	2
III. STATEMENT OF THE CASE AND FACTS	4
IV. REASONS TO GRANT THE PETITION	10
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Carmel Valley Fire Prot. Dist. v. Cal.</i> (2001) 25 Cal.4th 287	12
<i>Confederated Tribes of Siletz Indians v. United States</i> (9th Cir. 1997)	2
<i>Confederated Tribes of Siletz Indians v. United States,</i> <i>supra</i> , 110 F.3d 688	19
<i>Keweenaw Bay Indian Community v. United States</i> (6th Cir. 1998) 136 F.3d 469	19
<i>Lac Courte Oreilles Band of Lake Superior Chippewa</i> <i>Indians v. United States</i> (7th Cir. 2004) 367 F.3d 650.....	15
<i>Marine Forests Society v. California Coastal Com.</i> (2005) 36 Cal.4th 1	12, 16
<i>Prof'l Eng'rs in California Gov't v. Schwarzenegger</i> (2010) 50 Cal. 4th 989 (<i>Prof'l Eng'rs</i>).....	17
<i>Rumsey Indian Rancheria of Wintun Indians, et al. v. Wilson,</i> <i>et al.</i> (9th Cir. 1994) 41 F.3d 421	15
<i>St. John's Well Child and Family Center v. Schwarzenegger,</i> 50 Cal.4th 960 (2010).....	15
<i>Stand Up for California, et al., v. State of California, et al.</i> (No. F069302)	4
<i>State Bd. of Education v. Honig</i> (1993) 13 Cal.App.4th 720	12
<i>Superior Court v. County of Mendocino</i> (1996) 13 Cal.4th 45	15
<i>Wisconsin Winnebago Nation v. Thompson</i> (7th Cir.1994) 22 F.3d 719	7
<i>Worthington v. City Council of the City of Rohnert Park</i> (2005) 130 Cal.App.4th 1132 [31 Cal.Rptr.3d 59]	11

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

25 U.S.C.

§ 465	5
§ 2706(b)	7
§ 2710(a)(2) & (b)	3
§ 2710(a), (b) & (c)	7
§ 2710(d)(3)(A)	17
§ 2719	5, 17, 18
§ 2719(b)(1)(A)	1, 5
§ 2719	19

Cal. Gov't Code

§§ 12012.5-12012.95	9
§ 12012.5(d)	8, 17

Indian Gaming Regulatory Act (IGRA) 1, 5, 8, 9, 16, 17, 18, 19

IRA (Indian Reorganization Act)..... 4, 5

OTHER AUTHORITIES

25 C.F.R.

§ 151.10	5
§ 151.11	5
§ 292.8	7

Cal. Const.

Art. III § 3	2, 8, 11, 12
Art. IV, § 19.....	1, 8, 10, 14, 17
Art. IV § 19(f).....	10
Art. V § 1	15

Institute of Governmental Studies, University of California,
“Indian Gaming in California” (as of June 30, 2005) 11

Sen. Rep. No. 100-446, 2d Sess. (1988), *reprinted in* 1988
U.S. Code Cong. & Admin. News, p. 3071 18

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

United Auburn Indian Community of the Auburn Indian Rancheria
(United Auburn) petitions for review following the decision of the Court of
Appeal, Third Appellate District, filed on October 13, 2016. A copy of the
Court of Appeal's decision is attached hereto as Exhibit A.

I. QUESTION PRESENTED

The federal Indian Gaming Regulatory Act prohibits off-reservation gaming on Indian lands taken into trust by the United States for the benefit of a tribe after October 1988, unless, among other exceptions, (1) the federal Secretary of the Interior determines that doing so would be in the best interest of the tribe and would not be detrimental to the surrounding community, and (2) the governor of the state in which such gaming would occur concurs with that determination. (25 U.S.C. § 2719(b)(1)(A).) If the Governor concurs, the off-reservation gaming prohibition is lifted, and the land becomes eligible for tribal gaming, including gaming that requires no further input or approval from the State. Yet, the California Constitution gives the Legislature, not the Governor, power to authorize gaming. The Constitution speaks only of "the Legislature" allowing or disallowing gaming; the provisions governing gaming fall within the "Legislative" article of the Constitution; and no California statute authorizes the Governor to concur. (Cal. Const. Art. IV, § 19.) The question presented is:

Under California Constitution Article III § 3 (separation of powers), may the Governor, without legislative authorization or ratification, concur in the Secretary's determination, and thereby authorize off-reservation gaming?

II. GROUNDS FOR REVIEW

This case tenders an urgent, unsettled question whether the California Constitution and laws empower the Governor to take an action that creates a new policy on gambling in the state – one that would legalize gambling off existing tribal reservation lands. It is central to the controversy of “reservation shopping,” where tribes from rural areas seek federal approval to acquire trust lands in densely populated urban areas to conduct casino gambling. Because California’s constitution does not explicitly authorize the Governor to legalize gaming, but instead grants that power solely to the Legislature, this case presents an important question involving the constitutional allocation of power between the Governor and the Legislature that only this Court can resolve.

The question is purely one of state law. (*Confederated Tribes of Siletz Indians v. United States* (9th Cir. 1997) 110 Fed. 3d 688, 697-698.) Everyone affected by the Governor’s concurrences needs prompt, definitive resolution, which only this Court can provide. A tribe relying on the Governor’s concurrence is entitled to engage in class II gaming with no further involvement by the state; it needs only pass a tribal ordinance and

receive approval from the National Indian Gaming Commission. (25 U.S.C. § 2710(a)(2) & (b).) Armed with the Governor's concurrence and NIGC approval, a tribe may make large investments in an off-reservation casino. After making that sizable investment, a tribe will be seriously harmed if this Court eventually holds that the Governor lacks power to concur unilaterally and the tribe cannot operate the casino because it does not have the required concurrence. The Department of Interior and National Indian Gaming Commission also have an important interest in knowing whether a California Governor's concurrence is a valid exercise of gubernatorial power, as they have to invest resources relating to the approval of class II gaming, class III gaming, and in those case where the land was newly placed in trust, the certainty of the land use. Neighboring tribes, such as United Auburn, also need to know whether the Governor has validly concurred – and hence whether a tribe's gaming has validly been approved – in order to decide on investments in their own gaming activities. Surrounding local communities, and everyone else affected by a potential casino, also need to know which branches of government make the decision so they can voice their desires or concerns to the appropriate decision-makers.

Preserving the Legislature's authority against executive encroachment is also vitally important. In 2013 the Chair of the Senate Appropriations Committee (and current President Pro Tem of the Senate)

requested the Governor not to approve any off-reservation gaming agreements, until the Legislature has “adopted a clear and coherent policy on off-reservation gaming,” including “clear and objective criteria for approving any future off-reservation gaming agreements.” Request for Judicial Notice, Exh. A. The Governor’s concurrence, without legislative authorization, is particularly troubling because the concerns of the tribe desiring to build a casino, as well as those of other neighboring (and perhaps competing) tribes, and local community members may resonate more with state legislators who represent constituents in the relevant areas than with the centralized Governor’s office.

Nor is this a one-off issue. The same important question is pending in the Court of Appeal, Fifth Appellate District, in *Stand Up for California, et al., v. State of California, et al.*, (No. F069302). There, too, the Governor’s unilateral authority to concur is challenged. As of this writing, submission of *Stand Up* for decision has been vacated pending additional briefing, and the case appears likely to be re-submitted for decision shortly. The decision in *Stand Up* may be issued while this petition for review is pending. If so, United Auburn will notify the Court. The Court may wish to extend its deadline to grant or deny review so that it can consider *Stand Up* in ruling on this petition for review.

III. STATEMENT OF THE CASE AND FACTS

The Indian Reorganization Act (IRA) authorizes the Secretary to

acquire and hold lands in trust for Indian tribes in the name of the United States. (25 U.S.C. § 465.) Aside from requirements to notify the state in which a trust land acquisition is located, and a prescribed comment period, the IRA does not require approval of a state or its Governor when the Secretary acts to place land in that state in trust. (25 C.F.R. §§ 151.10, 151.11.)

Any land acquired after October 17, 1988—the date of the passage of the Indian Gaming Regulatory Act (IGRA)—may not be used for gaming, with certain exceptions. (25 U.S.C. § 2719.) (Slip opn. at 5.) The prohibition applies to all gaming regulated by IGRA, whether under a tribal-state compact (class III) or other forms of tribal gaming with no state involvement (class II). Among the exceptions to the prohibition is when the Secretary, “after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.” (25 U.S.C. § 2719(b)(1)(A).) (Slip opn. at 5.) This is typically called the “two-part determination.”

The Oroville-based Enterprise Rancheria of Maidu Indians of California (Enterprise Tribe) has planned the development of a large, off-

reservation casino and hotel resort complex on a parcel of land located near Olivehurst, Yuba County, California (the Yuba site). (Slip opn. at 5.) (CT 00006:2-10.) It requested the Secretary (Secretary) of the United States Department of the Interior (Department) to acquire the Yuba site and take it in trust. (Slip opn. at 5.) (CT 00014:18-21.)

At the request of the Enterprise Tribe, the Secretary of the Interior made a favorable two-part determination regarding the Yuba site, concluding the gaming would not be detrimental to the surrounding community (Slip opn. at 6) (CT 00018:4-9), and on September 1, 2011, he asked the Governor to concur in his findings. (Slip opn. at 6.) (CT 00018:4-9.) On August 30, 2012, Governor Brown announced his concurrence. (Slip opn. at 6.) (CT 00018:20-23; CT00160.) In issuing the concurrence, the Governor did not seek or receive the Legislature's prior approval or subsequent ratification.

Because of the Governor's concurrence (assuming its validity), the prohibition on all forms of gaming—compacted and un-compacted—for the off-reservation parcel was lifted by operation of law. On the same day that he issued the concurrence, the Governor announced via press release that he had also negotiated, and executed, a tribal-state gaming compact for class III gaming with the Enterprise Tribe regarding the casino/resort. (Slip opn. at 2.) (CT CT 00019:8-10; CT00160.) The compact was never ratified by the Legislature, and expired of its own terms. (*Estom Yumeka Maidu Tribe*

of the Enterprise Rancheria of California v. State of California, et al.,
(USDC EDCA, No. 2:14-cv-01939-TLN-CKD) 2016 WL 632782, *1, & n.
5.) As a result, the Enterprise Tribe cannot conduct class III gaming on the
Yuba site. It can, however, conduct class II gaming on the site. (25 C.F.R. §
292.8.) (See 25 U.S.C. § 2710(a), (b) & (c); 25 U.S.C. § 2706(b);
Wisconsin Winnebago Nation v. Thompson (7th Cir.1994) 22 F.3d 719, 721
& n. 2.)

Thus as a result of the Governor's concurrence, the Enterprise Tribe
was permitted to conduct Class II gaming on the new land without any
other consent by the State of California and no authorization by the
Legislature.

Plaintiff United Auburn is a federally recognized Indian Tribe whose
members live in the Sierra Nevada foothills around Auburn, California.
(Slip opn. at 6)(CT 00007:9-10), and it owns and operates the on-
reservation Thunder Valley Resort and Casino gaming facility on its
reservation lands located approximately 20 miles from the Yuba site. (Slip
opn. at 6.)(CT 00007:11-13.) United Auburn sued Governor Brown,
claiming, inter alia, the Governor performed a legislative act when he
concurred with the Secretary, in violation of the constitutionally-mandated
separation of powers. (Slip opn. at 6-7.) (CT 00005; 00019:23-00024: 11.)
The trial court sustained the Governor's demurrer to the complaint without
leave to amend. (Slip opn. at 7.) (CT 00185-206.)

United Auburn timely appealed the trial court decision. The Court of Appeal affirmed. (Slip opn. at 22.) As relevant to this petition, the Court of Appeal held the Governor's concurrence did not violate Article III section 3 of the California Constitution, the separation-of-powers clause. The Court of Appeal held that the concurrence was not a legislative act. (Slip opn. at 5.) The court held that "[t]he standard for evaluating the separation of powers clause is whether, from a realistic and practical perspective, the action of one branch defeats or materially impairs the core zone of constitutional authority of another branch." (Slip opn. at 8). It continued that "the core constitutional function of the Legislature is to make laws by passing statutes," including "the power to weigh competing interests and determine social policy." (Slip opn. at 8) It held that "[n]othing about the Governor's concurrence in the Secretary's finding defeated or materially impaired this function." (Slip opn. at 8.)

The Court of Appeal's basic premise was the Legislature decided to "participate" in IGRA and that the Governor's concurrence merely implemented this policy. In the court's view, this decision to "participate" occurred when the electorate approved an initiative measure amending Article IV section 19 of the Constitution to empower the Governor to negotiate and conclude compacts under IGRA -- subject to ratification by the Legislature. (Slip opn. at 13-14.) The court also pointed to Government Code section 12012.5, subdivision (d), which designates the

Governor as the “state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts [under IGRA] for the purpose of authorizing class III gaming ...” (Slip opn. at 3-4.) Section 12012.5 provides no authority for the Governor’s action here, however, since the Governor’s action legalized class II gaming, which is not pursuant to a compact. The court also said California law contains numerous statutes ratifying compacts under various terms, as well as the creation of the Indian Gaming Revenue Sharing Trust Fund, the Indian Gaming Special Distribution Fund, and the Tribal Nation Grant Fund. (Slip Opn. at 19 [citing Gov. Code, §§ 12012.5-12012.95].) The court concluded that the Legislature having “made the decision to participate in IGRA,” the Governor’s concurrence was “only one part of a federal program in which the Legislature has made the policy decision to participate.” (Slip opn. at 14.) “When the Governor concurs with the Secretary’s determination, he is not enacting land use or tax law.... [H]e is implementing a legislatively-formulated gaming policy.” (Slip opn. at 17.) It similarly concluded that the “act of concurring ... is in the nature of an executive act because it involves implementation of California’s existing Indian gaming policy.” (Slip opn. at 17.)

The Court of Appeal’s analysis ignores two facts . First, none of the constitutional or statutory provisions it cites allow the Governor unilaterally to make agreements with tribes or to authorize gaming. The Governor’s

power to negotiate and enter into compacts for class III gaming, on which the court mainly relied, requires *legislative* ratification. (Cal. Const. Art. IV § 19, subd. (f).) No such ratification occurred here. Second, the core question relating to the Governor's power at issue here does not involve a compact or class III gaming. Again, the Enterprise Tribe's compact expired without ratification by the Legislature, and the Governor's concurrence legalized class II gaming, which does not require a compact. (*See* p. 6, above.) Whatever power Article IV section 19 carves out for the Governor in negotiating and entering into compacts for class III gaming, meaning whatever power the Legislature delegated to the Governor to negotiate such compacts, the concurrence here does not fall within it.

IV. REASONS TO GRANT THE PETITION

Only this Court can resolve the question of how power is allocated between the Governor and the Legislature under the California Constitution and the laws of the state, especially when, as in this case, the Governor acts without explicit authority in the Constitution and state law. Importantly, resolving whether such authority is implicit in the relevant constitutional and statutory scheme—or the absence of such a scheme—is of vital importance to the citizens of the State, state officials, California tribal governments, the Secretary of Interior and other key federal officials. The Secretary, the Governor, local communities and tribes are left with uncertainty and contention without a definitive answer to the question

before the Court. United Auburn submits the Governor's concurrence cannot be read as implicit in the constitutional and statutory scheme governing gaming in California, and violates the separation of powers under Article III, section 3.

This Petition addresses an issue of heightened controversy in the State of California, that of off-reservation tribal gaming. “[A]llowing Indian gaming in or near California cities . . . undeniably raise[s] emotional issues that have resulted in heated debate and political action throughout the state. (See, e.g., Institute of Governmental Studies, University of California, “Indian Gaming in California” [as of June 30, 2005].)” (*Worthington v. City Council of the City of Rohnert Park* (2005) 130 Cal.App.4th 1132 [31 Cal.Rptr.3d 59, 64].) The off-reservation gaming in *Worthington* was made lawful by a different exception to the general prohibition of off-reservation gaming on post-1988 lands and occurred by operation of law without any action of the Governor or any other state agency. However, where the Governor acts to trigger the legality of off-reservation tribal gaming, as happened here, it is of paramount importance to resolve the source of his authority.

A. The Separation of Powers in Article III, § 3 Bars the Governor from Exercising a Legislative Function by Legalizing Gaming

1. The Governor's Concurrence Determined a Critical State Policy for Off-reservation Tribal Gaming

“The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.” (*Carmel Valley Fire Prot. Dist. v. Cal.* (2001) 25 Cal.4th 287, 299.) “Essentials of the legislative function include the determination and formulation of legislative policy.” (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 750.) As the Court of Appeal noted, the standard for evaluating the separation of powers clause is whether, from a realistic and practical perspective, the action of one branch defeats or materially impairs the core zone of constitutional authority of another branch. (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 45.) United Auburn contends by concurring, the Governor determined a critical state policy with respect to off-reservation tribal gaming, which is the Legislature's role. Given that California lacks a policy regarding off-reservation gaming, the Governor's act is an encroachment on the Legislature's power to determine and formulate policy on off-reservation tribal gaming.

As evidence that off-reservation gaming is not the subject of an existing state policy, United Auburn presented to the trial court for judicial

notice, which notice was granted, the July 29, 2013 letter from the then-Chair of the Senate Appropriations Committee, and current President Pro Tem of the State Senate, Senator Kevin De León, to Governor Jerry Brown, requesting that the Governor refrain from submitting off-reservation gaming agreements to the Legislature for ratification until “California has adopted a clear and coherent policy on off-reservation gaming.” (AOB 5) (CT 00166.) (Request for Judicial Notice, Exh. A.) The lack of any explicit legislative or constitutional authority regarding when off-reservation gaming may occur also evidences the lack of policy regarding that issue. California’s lack of a clear off-reservation gaming policy is significant because off-reservation gaming implicates a number of different policy issues from on-reservation gaming, including “fairness to other tribes who have restricted their gaming activities on reservation property, impacts and interests of local and nearby communities, impacts to existing gaming interests and their workforce, the need to adequately address labor and environmental issues, [and] maintaining the commitment to the voters from approved propositions addressing Indian gaming.” (*Id.*)

Without a clear state policy on off-reservation tribal gaming, the exercise by the Governor of the concurrence with the secretarial determination cannot have “implemented” a “legislatively-formulated gaming policy,” as found by the Court of Appeal. The Governor’s act literally legalized off-reservation gaming, class II and class III, without any

authorization in the Constitution, laws or policies of the State.

2. Authorization of Gambling in California is a Legislative Function under Article IV, section 19

California Constitution, in Article IV, section 19 governs gambling policy in California, including tribal gaming. That section restricts gambling in the State, giving policy-making authority to the Legislature. The Constitution speaks in language that focuses on the Legislature—the Legislature “has no power” and the Legislature “may authorize.” For example: “[T]he Legislature has no power to authorize lotteries . . .” “[T]he Legislature may provide for the regulation of horse race[s] and wagering on the results.” “[T]he Legislature” may authorize bingo, “but only for charitable purposes.” “The Legislature has no power, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey.” “The Legislature” can authorize certain organizations to conduct certain kinds of raffles. (Cal. Const. Art. IV, § 19.)

In the single place where Article IV, section 19 authorizes the Governor to act, it is specifically limited to the negotiation and execution of tribal-state compacts for only one form of tribal gaming, class III gaming, and even then, it is stated as an authorization “[n]otwithstanding” the general prohibition on the legislative authority governing gambling. Further, and of critical importance, a class III compact requires a formal ratification by the Legislature. All of this suggests that the power to

authorize gaming is legislative.¹ Thus, it is within the Legislature's core province to determine and formulate policy on gaming.

3. The Governor's Legalization of Gaming is Not an Executive Act

Article V, section 1, of the California Constitution provides that "The Governor shall take care that the law is faithfully executed." While the powers of the three branches of government may not always be sharply delineated and may overlap (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53), the executive is subject to special scrutiny. "[A]s an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as ... the Constitution expressly provide[s]." (*St. John's Well Child and Family Center v. Schwarzenegger*, 50 Cal.4th 960, 986 (2010)). This Court has emphasized that in California's scheme of separation of powers, unlike the federal scheme, the Legislature

¹ The reliance by the Court of Appeal the Seventh Circuit's dicta in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States* (7th Cir. 2004) 367 F.3d 650 (Lac Courte), is misplaced. Lac Courte concluded the Wisconsin governor's power to concur was "typical of the executive's responsibility to render decisions based on existing policy," where Wisconsin had adopted a complex gaming policy, including a state-operated lottery, bingo and raffle games. (Slip opn. At 18.) *Lac Courte's* reasoning on state gaming policy was generally repudiated and not followed after the Ninth Circuit decided *Rumsey Indian Rancheria of Wintun Indians, et al. v. Wilson, et al.* (9th Cir. 1994) 41 F.3d 421. *Lac Courte* did not address the impact of a governor's concurrence as to non-compact tribal gaming on off-reservation land. Additionally, in distinction to Wisconsin, California requires a tribal-state compact be ratified by the Legislature, further restraining the power of the executive.

has plenary authority. (*Marine Forests Society v. California Coastal Com.*, *supra*, 36 Cal.4th at 31.) By the same token, this Court has recognized, in distinction to the power of the Legislature, the state's executive is not given such broad powers, for historical reasons. (*Id.*, at 33.) This case presents the instance where the Governor acts without any constitutional authorization. Indeed, where the Constitution does in fact authorize certain actions on the part of the Governor, none of those actions include authorizing the lawfulness of gaming – class II or class III – particularly on off-reservation tribal lands.

The Court of Appeal rested its decision on the notion that the Governor's concurrence, triggering the eligibility of tribal gaming on off-reservation parcels, was an executive act, not a legislative one. The Court of Appeal reasoned that the concurrence was only one part of a federal program in which the "Legislature has made the policy decision to participate," and the Governor simply "performed" "his role in the federal program." (Slip opn. at 14.) United Auburn submits, to the contrary, the concurrence of the Governor was not a mere performance of his role in a federal program embraced by the Legislature.

Firstly, in "deciding to participate" in IGRA, the Legislature did not embrace a policy of off-reservation tribal gaming; indeed, as noted, there is no reference to legalizing off-reservation tribal gaming anywhere in Article IV, section 19. Secondly, and critically important here, the one, single

power given to the Governor in section 19, subdivision (f),² is to negotiate and execute tribal state compacts for class III gaming, the subject of a specific provision of IGRA, 25 U.S.C. § 2710(d)(3)(A). As stated, section 19 does not include the power of the Governor to make tribal gaming—in all its forms—lawful on off-reservation parcels, which is the subject of a separate section of IGRA, 25 U.S.C. § 2719. Thirdly, the Governor’s “performance” was not the execution of an existing state law. There is no state law here to execute.

The Court of Appeal dismissed the applicability of this Court’s holding in *Prof’l Eng’rs in California Gov’t v. Schwarzenegger* (2010) 50 Cal. 4th 989 (*Prof’l Eng’rs*), to this case. (Slip opn. at 12.) United Auburn reads *Prof’l Eng’rs* to stand for the proposition that any authority that the Governor is entitled to exercise in a particular area emanates from the Legislature’s delegation of a portion of its (plenary) legislative authority to the Governor through statutory enactments. *Prof’l Eng’rs*, 50 Cal. 4th at 1201. However, the Court of Appeal opined that *Prof’l Eng’rs* did not hold that a Governor “has no inherent authority without express statutory or constitutional authority.” Thus, it concluded, the Governor can act to

² California Constitution, Article IV, section 19, was amended by Proposition 1A, passed in 2000, to provide the tribal exception to the prohibition on casino gaming, found in subdivision (f). Additionally, the Legislature enacted Government Code section 12012.5, subdivision (d), to provide for the negotiation and execution of tribal-state compacts for class III gaming.

legalize off-reservation gambling through the exercise of the concurrence through his inherent executive authority, derived, apparently, from state policy and his “participation” in the federal tribal gaming “scheme.” United Auburn believes there is no such inherent authority for the Governor to act in a vacuum, as there is no “scheme” governing off-reservation tribal gaming in California, and federal law cannot grant the state executive this power.

B. The Concurrence Power Is Not Part of the Negotiation and Execution of the Compact Power

It was for good reason that Congress expressly provided for the prohibition on gaming on post-1988 trust lands in a *separate* section of Title 25 of the United States Code, as it reflects a separate concern by Congress for off-reservation gaming. In section 2719, Congress prohibits such gaming, with limited exceptions. In the congressional debate over the passage of IGRA, Congress by and large deferred to the sovereign interests of Indian tribes, while recognizing competing federal and state interests. Contending with these interests, Congress passed IGRA with the intent to “expressly preempt the field in the governance of gaming activities on Indian lands.” (See Sen. Rep. No. 100-446, 2d Sess. (1988), reprinted in 1988 U.S. Code Cong. & Admin. News, pp. 3071, 3076.)

In giving greater deference to tribal sovereign interests and federal interests, Congress limited the participation of state governments to only

two distinct and separate provisions of the law: (1) the tribal-state compacting process for class III gaming, and (2) the concurrence of the state Governor in the determination of the Secretary to make lawful all forms of tribal gaming on lands acquired in trust after the passage of IGRA in 1988. The two provisions reflect different congressional concerns and operate independently. (*Confederated Tribes of Siletz Indians v. United States, supra*, 110 F.3d 688, at 694 [“By adopting 25 U.S.C. § 2719, Congress has placed limitations on that delegation with regard to land acquired for gaming purposes without local approval.”].)

Additionally, the compacting power is distinct from the concurrence power because the Governor is authorized to negotiate and execute tribal-state compacts with tribes on *on-reservation* land without any need for the concurrence power, and the concurrence works to legalize *non-compact* class II gaming on off-reservation land. The two exercises of power do not derive one from the other. (*See also, Keweenaw Bay Indian Community v. United States* (6th Cir. 1998) 136 F.3d 469, 474.) Thus, the concurrence power is not an implied power derived from or arising in the compacting power.

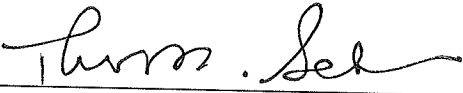
V. CONCLUSION

Here, the Governor effected a major change in the state’s law by triggering the lawfulness of gaming under federal law on an off-reservation parcel, allowing both un-compact class II gaming and compacted class III

casino gaming. In this case, it is the province of the Legislature to make a law that the Governor in turn should faithfully execute. With no state law governing the lawfulness of tribal gaming on off-reservation lands, nor any state policy directing the Governor to act, his act of concurring with the Secretary is *ultra vires*, and the concurrence void. This Court should grant review to resolve the important question of how the power to legalize off-reservation gambling is allocated between the Governor and the Legislature.

Dated: November 22, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: 
Thomas F. Gede

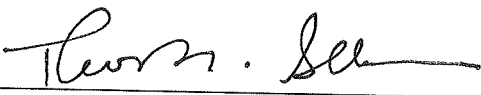
Attorneys for Appellant
UNITED AUBURN INDIAN
COMMUNITY OF THE
AUBURN RANCHERIA

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned certified that Respondent's brief is proportionately spaced, has type face of 13 points or more, and contains 4,546 words as calculated using the word count of the computer program used to prepare the brief, not including the cover, title page, table of contents, table of authorities, certificate of interested entities or person, or this certificate of compliance.

Dated: November 22, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: 
Thomas F. Gede

Attorneys for Appellant
UNITED AUBURN INDIAN
COMMUNITY OF THE
AUBURN RANCHERIA

EXHIBIT A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

UNITED AUBURN INDIAN COMMUNITY OF
THE AUBURN RANCHERIA,

Plaintiff and Appellant,

v.

EDMUND G. BROWN, JR., as Governor, etc.,

Defendant and Respondent.

C075126

(Super. Ct. No. 34-2013-
80001412CUWMGDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Eugene L. Balonon, Judge. Affirmed.

Bingham McCutchen, Morgan, Lewis & Bockius, Thomas F. Gede and Colin C. West for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Sara J. Drake, Senior Assistant Attorney General, William P. Torngren and Timothy M. Muscat, Deputy Attorneys General for Defendant and Respondent.

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of part II.

The federal Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.; hereafter IGRA) permits gaming on Indian lands taken into trust for the benefit of a tribe after October 17, 1988, if the Secretary of the Interior (Secretary) inter alia determines it would be in the best interest of the tribe and would not be detrimental to the surrounding community, and the governor of the state in which the land is located concurs with the determination. (25 U.S.C. § 2719(b)(1)(A).) IGRA requires a tribal-state compact for the conduct of class III gaming (casino-style gaming), and California law designates the Governor as the state officer authorized to negotiate and execute the compact. (25 U.S.C. § 2710(d)(3)(A); Cal. Const., art. IV, § 19, subd. (f).)

A competing Indian tribe challenges the validity of the Governor's concurrence on the ground it constituted an illegal exercise of legislative power, which was neither delegated to the Governor, nor ancillary and incidental to his power to enter into gaming compacts with Indian tribes. We disagree on the ground the exercise of the power of concurrence is not legislative. Because we conclude concurrence is not a legislative power, we need not determine whether it is ancillary and incidental to the Governor's power to enter into gaming compacts.

The land in question is in Yuba County. The Governor gave his concurrence and simultaneously executed a tribal-state gaming compact for the Yuba County site. The competing gaming establishment, the plaintiff and appellant, is owned by the United Auburn Indian Community of the Auburn Rancheria (Auburn Tribe). The Auburn Tribe also argues the Governor's concurrence was a project subject to the California Environmental Quality Act (CEQA). The concurrence was not a project under CEQA because the Governor is not a public agency.

This case involves the interplay of three separate statutory schemes--two federal and one state. First, section 465 of title 25 of the United States Code, which is now cited as section 5108, is part of the Indian Reorganization Act of 1934 (25 U.S.C. § 5101 et seq.; hereafter IRA). This section provides that the Secretary "is . . . authorized . . . to

acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.” (25 U.S.C. § 5108.)

The second statutory scheme is IGRA. (25 U.S.C. § 2701 et seq.) IGRA was enacted for the express purpose of regulating gaming on Indian lands. (25 U.S.C. § 2702.) Two IGRA statutes are pertinent here. Section 2719 provides that gaming shall not be conducted on lands acquired by the Secretary for the benefit of a tribe after October 17, 1988, *unless* the Secretary makes a determination that gaming on such newly acquired lands would be in the best interest of the tribe and would not be detrimental to the surrounding community and “*the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.*” (25 U.S.C. § 2719(b)(1)(A), italics added; *id.* § 2719(a).) Section 2710(d)(1)(B) & (C) provides that class III gaming (casino-style gaming) is lawful only if: (1) it is “located in a State that permits such gaming for any purpose by any person, organization, or entity” and (2) is “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.” The aforesaid paragraph (3) provides in pertinent part: “Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.” (25 U.S.C. § 2710(d)(3)(A).)

The third statutory scheme is California’s, and includes the California Constitution. Article IV, section 19, subdivision (f) of the California Constitution provides in part that notwithstanding any other provision of state law, “the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of [class III gaming] by federally recognized Indian tribes on Indian lands in California in accordance with federal law.” Likewise, Government Code section

12012.5, subdivision (d) designates the Governor as the “state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes in the State of California pursuant to the Federal Indian Gaming Regulatory Act of 1988 . . . for the purpose of authorizing class III gaming, as defined in that act, on Indian lands.”

The Auburn Tribe argues that even though federal law singles out the Governor as the arm of the state that must concur in the Secretary’s determination under IGRA that land acquired after 1988 is suitable for Indian gaming, no state law authorizes the Governor to so act. The Auburn Tribe maintains that such action is a legislative act that must be performed by the Legislature unless delegated to the Governor. The Auburn Tribe argues that the Governor’s power to concur with the Secretary’s determination that land acquired after 1988 is suitable for gaming, is not necessary to the Governor’s authority to negotiate and conclude class III gaming compacts. Therefore, it argues the power to concur cannot be said to be ancillary or incidental to the Governor’s legislative authorization to enter into class III gaming compacts with Indian tribes. It claims that since the power to concur was a legislative act that was not expressly given to the Governor and which cannot be said to be ancillary and incidental to the compacting power, the Governor violated the separation of powers clause of the state Constitution when he concurred in the Secretary’s determination that the land was suitable for Indian gaming. (Cal. Const., art. III, § 3.)

We take issue with the Auburn Tribe’s underlying premise that the power to concur in the Secretary’s determination is clearly a legislative power. “The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.” (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 (*Carmel Valley*.) The Legislature’s core function is to pass statutes. (Cal. Const., art. IV, § 8; *Perez v. Roe I* (2006) 146 Cal.App.4th 171, 177.) Nothing about the Governor’s concurrence defeated

or materially impaired this function. As we will explain, the lines between the three branches of government are not always clearly defined, and some powers may not strictly belong to any one branch. (*People ex rel. Attorney Gen. v. Provines* (1868) 34 Cal. 520, 540-541 (conc. opn. of Sawyer, C.J.)) The Governor's power to concur has the characteristics of an executive, rather than a legislative act, thus the Governor's power does not depend on legislative delegation.

We shall conclude the Governor's concurrence did not violate the separation of powers clause. We also conclude that the concurrence is not a project under CEQA because the Governor is not a public agency. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2002 the Enterprise Rancheria of Maidu Indians of California (Enterprise Tribe) submitted a request to the United States Department of the Interior (Department) to acquire a site in Yuba County for the purpose of establishing a casino/hotel resort complex. Pursuant to the IRA, the Secretary is authorized to acquire land, within or without an existing reservation, for the purpose of providing land for Indians. (25 U.S.C. § 5108.) Title to such land is taken in the name of the United States in trust for the tribe for which the land is acquired, and the land is thereafter exempt from state and local taxation. (*Ibid.*) Land so acquired after October 17, 1988, may not, with some exceptions, be used for gaming. (25 U.S.C. § 2719.) The exception at issue here is where the Secretary "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." (25 U.S.C. § 2719(b)(1)(A).) We shall refer to such land as post-1988 tribal land.

In 2005, after the Enterprise Tribe submitted its request to the Department, the Department commenced its environmental review of the project under the National Environmental Policy Act (NEPA). The federal environmental review was completed in 2010. The final environmental impact statement (FEIS) identified a number of significant environmental impacts that might result from the project. Nevertheless, in 2011 the Assistant Secretary for Indian Affairs (Assistant Secretary) at the Department notified the Governor that he had made a favorable determination as required by section 2719(b)(1)(A) of IGRA. (25 U.S.C. § 2719(b)(1)(A).) In other words, he had determined that a gaming establishment on newly acquired lands would be in the best interest of the tribe and its members, and would not be detrimental to the surrounding community. (*Ibid.*)

The Governor indicated his official concurrence with the Assistant Secretary's determination by letter dated August 30, 2012. The same day, the Governor executed a tribal-state gaming compact between the state and the Enterprise Tribe with regard to the Yuba County site. The Governor is designated by the California Constitution and by statute as the "state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes . . . pursuant to [IGRA] for the purpose of authorizing class III gaming . . . on Indian lands." (Gov. Code, § 12012.5, subd. (d); Cal. Const., art. IV, §19, subd. (f).)

Plaintiff Auburn Tribe owns and operates the Thunder Valley Resort and Casino, which is approximately 20 miles from the Yuba County site. The Auburn Tribe filed a petition for writ of mandate and complaint for declaratory relief. The petition and complaint contained two causes of action. The first alleged that the Governor was required to comply with CEQA before concurring in the Secretary's decision to take lands into trust for the Enterprise Tribe. The second alleged the Governor performed a legislative act when he concurred with the Secretary and when he negotiated and

executed the compact with the Enterprise Tribe, in violation of the constitutional mandate of separation of powers.

The Governor demurred to the complaint, and the trial court sustained the demurrer without leave to amend. The trial court found that neither the Governor's concurrence, nor his negotiation and execution of the compact violated the separation of powers doctrine. The court found that the power to concur with the Secretary's determination was "ancillary and incidental" to the power granted to him by the state Constitution and by statute to negotiate and execute tribal-state gaming compacts. The trial court found the Governor's concurrence was not subject to CEQA because it was not a project pursuant to CEQA, and because the Governor is not a public agency. The trial court entered a judgment of dismissal, and the Auburn Tribe appealed.

DISCUSSION

I

Separation of Powers

Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*Carmel Valley, supra*, 25 Cal.4th at p. 297.)

Although the Constitution places limits on each branch of government with respect to the other branches, "the separation of powers principle does not command 'a hermetic sealing off of the three branches of Government from one another.' [Citation.]" (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338.) "The doctrine . . . recognizes that the three branches of government are interdependent, and it permits actions of one branch that may 'significantly affect those of another branch.' [Citation.]" (*Carmel Valley, supra*, 25 Cal.4th at p. 298.) "The purpose of the doctrine is to prevent

one branch of government from exercising the *complete* power constitutionally vested in another [citation]; it is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch. [Citation.]” (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 117.) The standard for evaluating the separation of powers clause is whether, from a realistic and practical perspective, the action of one branch defeats or materially impairs the core zone of constitutional authority of another branch. (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 45.)

The core constitutional function of the Legislature is to make laws by passing statutes. (Cal. Const., art. IV, § 8; *Perez v. Roe 1, supra*, 146 Cal.App.4th at p. 177.) Included in the core legislative function of making statutory law, is the power to weigh competing interests and determine social policy. (*Perez v. Roe 1*, at p. 177.) Nothing about the Governor’s concurrence in the Secretary’s finding defeated or materially impaired this function. As we shall explain, the act of concurrence is not clearly a legislative function.

A. The Governor’s Authority Regarding Indian Gaming

Congress has the sole power to acquire land for the federal government, and it is constitutionally empowered to acquire land in trust for Indian tribes. (*Confederated Tribes of Siletz Indians v. United States* (9th Cir. 1997) 110 F.3d 688, 694.) Congress has delegated its power to acquire land in trust for Indian tribes to the Secretary, who “is . . . authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.” (25 U.S.C. § 5108.)

However, Congress conditioned the ability of the Secretary to take land into trust for Indian tribes for the purpose of gaming after October 17, 1988, upon the concurrence

of the Governor. Acquisition of land after that date is prohibited except, inter alia, where the Secretary makes a determination “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 the Governor concurs in this determination. (25 U.S.C. § 2719(b)(1)(A).) This provision is part of IGRA, which Congress adopted expressly for the purpose of regulating the conduct of gaming on Indian lands. (25 U.S.C. § 2701.)

Additionally, Congress required as part of IGRA that class III gaming be conducted in conformance with a compact entered into between the tribe and the state in which the gaming is to be conducted. (25 U.S.C. § 2710(d)(1)(C).) In California, the authority to enter into such gaming compacts has been delegated by the legislative body to the Governor, with the power to ratify the compact reserved to the Legislature. Accordingly, “the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.” (Cal. Const., art. IV, § 19, subd. (f).) The Governor is also designated by statute as the “state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes . . . pursuant to [IGRA] for the purpose of authorizing class III gaming . . . on Indian lands.” (Gov. Code, § 12012.5, subd. (d).)

Federal law nominates the Governor as the state representative with the power to concur in the Secretary’s determination to take land in trust for gaming. (25 U.S.C. § 2719(b).) Even though federal law controls the acquisition of land for Indian tribes and regulates the conduct of gaming--both on pre- and post-1988 tribal land--the Ninth Circuit has held that the Governor’s power to concur emanates from state, rather than federal law. (*Confederated Tribes of Siletz Indians v. United States, supra*, 110 F.3d at pp. 697-698.) In response to an argument that the Governor’s power to concur violated

the appointments clause of the federal Constitution,¹ the court stated: “When 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. The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law. . . . No doubt, federal law provides the Governor with an opportunity to participate in the determination of whether gaming will be allowed on newly acquired trust land. But when the Governor responds to the Secretary’s request for a concurrence, the Governor acts under state law, as a state executive, pursuant to state interests. The Governor does not act with ‘significant authority’ under federal law.” (*Ibid.*)

The Auburn Tribe prefaces its separation of powers argument by claiming that while the Legislature violates the separation of powers clause only when it materially impairs the executive branch’s constitutional functions, the Governor’s power is much more restricted. The Governor, it claims, violates the separation of powers clause whenever he or she acts in excess of powers expressly delegated by the Constitution or by statute. Apparently, the Auburn Tribe would have us believe that the Governor possesses no power other than that expressly given to him by the Legislature. The Auburn Tribe cites two cases, neither of which supports this argument.

¹ “The Constitution provides that the President shall appoint ‘all . . . Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law. . . .’ U.S. Const. art. II, § 2, cl. 2. Persons ‘who are not appointed . . . and who therefore can not be considered “Officers of the United States” may not discharge functions that are properly discharged only by officers.’ [*United States ex rel. Kelly v. Boeing [Co. (9th Cir. 1993)] 9 F.3d [743,] 757.* The Appointments Clause serves as a guard against one branch aggrandizing its power at the expense of another branch, and preserves constitutional integrity by preventing the diffusion of appointment power. *Freytag v. Commissioner of Internal Revenue [(1991)] 501 U.S. 868, 878 [115 L.Ed.2d. 764].*” (*Confederated Tribes of Siletz Indians v. United States, supra*, 110 F.3d at p. 696.)

Harbor v. Deukmejian (1987) 43 Cal.3d 1078 (*Harbor*), involved the Governor's constitutional power to veto bills and to veto "items of appropriation while approving other portions of a bill" (Cal. Const., art. IV, § 10, subd. (e); *id.*, subd. (a).) The Supreme Court recognized that since the time of George Washington, it has been understood that an executive must either approve a bill in its entirety, or veto it. (*Harbor*, at p. 1086.) An executive's power to veto legislation is so limited because the ability to selectively choose some, but not all parts of a bill to veto is inherently legislative, because it would permit the executive to affirmatively legislate. (*Ibid.*) In California, the Constitution expands the Governor's power to veto parts of a bill, but only if such part is an item of appropriation. (*Ibid.*)

Thus, when the court indicated the Governor could "act only as the Constitution allows," (*Harbor, supra*, 43 Cal.3d at p. 1087) it was because the partial veto power is legislative, and the California Constitution authorized only a narrow expansion of the veto power, i.e., the power to veto a portion of legislation only if it is an item of appropriation. As the court stated, when the Governor exercises the veto power, he acts as a " 'legislative instrumentality.' " (*Ibid.*) Any further expansion of a partial veto power without constitutional authority would have infringed on the legislative power, and was for this reason outside the Governor's power. Thus, the case supports an argument that the Governor has no power to perform a legislative function absent express authority, but it does not support an argument that the Governor has no power at all unless the power is expressly given by the Constitution or by statute.

Likewise, in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989 (*Professional Engineers*), the issue was whether the Governor could, as a result of a fiscal emergency, impose mandatory furloughs on represented state employees. The court stated that it was "well established" that the Legislature, not the Governor, possesses the ultimate authority to establish and revise the terms and conditions of state employment through legislative enactment, although the Legislature

may delegate its authority to the executive. (*Id.* at p. 1015.) The power is legislative because the Constitution gives the power to establish and revise the terms and conditions of state employment to the Legislature. (*Ibid.*)

Accordingly, the scope of the Governor's authority over represented employees was governed by the Dills Act, which provided that the terms and conditions of employment for such employees were governed by the provisions of the applicable Memorandums of Understanding (MOU). (*Professional Engineers, supra*, 50 Cal.4th at pp. 1038-1040.) The Governor could not unilaterally change the terms and conditions of employment covered by an MOU. (*Id.* at p. 1040.) The case did not stand for the proposition that the Governor has no power other than the power expressly given him or her by the Constitution or by statute. Instead, it held the particular power claimed by the Governor, the unilateral decision to furlough represented state employees, was a legislative power that was circumscribed by statute and ultimately limited by the applicable MOU terms.

These cases stand for the unremarkable proposition that the Governor may not exercise a legislative power without express authority from the Legislature. They do not hold that a Governor has no inherent authority without express statutory or constitutional authority. Thus, in determining whether the Governor violated the separation of powers clause, our task is to determine whether the power was legislative or executive in nature.

B. Concurrence Is Not Clearly Legislative

“The characteristics of many powers and duties are so marked that there can be no difficulty in determining whether they belong to the Legislative, Executive or Judicial Departments of the Government. But the lines between the several departments are not defined with precision, and there are other powers and duties that partake of the nature of duties pertaining to more than one of these departments, and may as properly be referred to one as the other, or may not strictly belong to either.” (*People ex rel. Attorney Gen. v.*

Provines, supra, 34 Cal. at pp. 540-541 (conc. opn. of Sawyer, C.J.).) The power to concur in the Secretary's determination is such a power.

The Auburn Tribe argues the Governor's act of concurring with the Secretary's determination to take land into trust for the Enterprise Tribe was a legislative act because it set state policy. It argues the Governor's concurrence made land use policy, made tax policy, and made the policy decision to participate in IGRA. The Auburn Tribe argues the Governor's concurrence effectively made land use policy when it determined gaming could be conducted on the land. It argues the concurrence made tax policy by removing the land from the tax base. It claims the decision to participate in a federal program is a legislative act, and that the decision to participate in IGRA may only be authorized by the Legislature.

1. Participation in IGRA

Addressing the last argument first, the Auburn Tribe cites two published Attorney General opinions for the proposition that the decision to participate in a federal program is a legislative act over which the Legislature has exclusive power. (62 Ops.Cal.Atty.Gen. 781, 784 (1979); 65 Ops.Cal.Atty.Gen. 467, 469 (1982).) It claims the federal program in which the Governor decided to participate was IGRA. However, the Governor did not make the decision to participate in IGRA, because the Legislature had already decided to participate in IGRA.

IGRA provides in part that in order for an Indian tribe to conduct class III gaming activities on its lands, the state in which the lands are located must permit such gaming, and such gaming must be conducted in conformance with a tribal-state compact entered into with the state.² (25 U.S.C. § 2710(d)(1)(B) & (C).) The electorate, acting as the

² Class III gaming "includes such things as slot machines, casino games, banking card games, dog racing, and lotteries." (*Seminole Tribe v. Florida* (1996) 517 U.S. 44, 48 [134 L.Ed.2d 252, 261], fn. omitted.)

legislative body approved an initiative measure amending article IV, section 19 of the California Constitution to provide that “the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.” Additionally, the Legislature enacted Government Code section 12012.5, subdivision (d) which states: “The Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes in the State of California pursuant to the federal Indian Gaming Regulatory Act of 1988 (18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) for the purpose of authorizing class III gaming, as defined in that act, on Indian lands.”

Thus, the Legislature has made the decision to participate in IGRA. The Governor’s concurrence in the Secretary’s decision to take the land into trust for the purpose of gaming pursuant to section 2719(b)(1)(A) of title 25 of the United States Code is only one part of a federal program in which the Legislature has made the policy decision to participate. The Governor did not create state policy by performing his role in the federal program.

2. Land Use Policy

The Auburn Tribe argues that in concurring with the Secretary’s determination, the Governor was setting land use policy by allowing land to be used for gaming that had not previously been used for gaming. However, the mere fact that the Governor’s concurrence had some land use consequences and involved a policymaking component, does not make the action a legislative function. The Auburn Tribe cites two cases to support this argument, neither of which is on point.

Arnel Dev. Co. v. Costa Mesa (1980) 28 Cal. 3d 511, 522-523, held that *zoning ordinances* make land use policy and are therefore legislative in nature. *Arnel* concerned

an initiative ordinance that rezoned a 67.6-acre piece of property to single-family residential, after the city had approved a plan rezoning the property to a higher density, and approved a plan that would allow 127 single family residences and 539 apartment units on the property. (*Id.* at p. 515.) In response to the development company's argument that the initiative ordinance was invalid because it was adjudicative in nature since the size and number of parcels affected were small, the Supreme Court held that regardless of size, a zoning ordinance is a legislative act. (*Id.* at pp. 515, 523-525.) The court distinguished zoning ordinances, which make land use policy, from such decisions as variances and subdivision map approvals, which apply land use policy and are adjudicative in character. (*Id.* at pp. 523-524.)

Mira Development Corp. v. City of San Diego (1988) 205 Cal.App.3d 1201, 1213-1217, also cited by the Auburn Tribe, held that the city's denial of an application to rezone property was a legislative act that could be overturned only if it had no reasonable relation to the public welfare.

These cases stand for the proposition that zoning ordinances are legislative in nature because they make land use law. Ordinances passed by local bodies are legislative in the sense that they are the equivalent of statutes passed by the state legislature. The cited cases do not hold that *any* decision by a governmental entity that involves land use or considers policy is legislative. "There are three general types of actions that local government agencies take in land use matters: legislative, adjudicative and ministerial. [Citations.] Legislative actions involve the enactment of general laws, standards or policies, such as general plans or zoning ordinances. [Citation.] Adjudicative actions—sometimes called quasi-judicial, quasi-adjudicative or administrative actions—involve discretionary decisions in which legislative laws are applied to specific development projects; examples include approvals for zoning permits and tentative subdivision maps. [Citation.] Ministerial actions involve nondiscretionary decisions based only on fixed and objective standards, not subjective judgment; an example is the issuance of a typical,

small-scale building permit. [Citations.]” (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 622.)

The act contemplated here is not a zoning ordinance. It concerns land use, and takes policy matters into consideration, but so do such adjudicative matters as subdivision map approvals and variances. Such factors do not make the Governor’s concurrence a legislative act any more than they make it an adjudicative act.

3. Tax Policy

The Auburn Tribe also argues the Governor’s concurrence changed the tax base for the property, that this amounted to setting tax policy, and that as such it was a solely legislative act. In support of this argument, the Auburn Tribe cites *Jackson & Perkins Co. v. Stanislaus County Board of Supervisors* (1959) 168 Cal.App.2d 559, which held that rose plants cultivated for sale were not exempt from ad valorem tax pursuant to a constitutional exemption for growing crops. In so holding, the court noted that what is and is not to be taxed is a matter of legislative policy. (*Id.* at p. 564.)

The Auburn Tribe also cites *Cullinan v. McColgan* (1947) 80 Cal.App.2d 976, which involved the construction of an income tax statute. The California Personal Income Tax Act was passed and first became effective in 1935. (*Id.* at p. 978.) The act provided that income be computed on the basis of the taxpayer’s annual accounting period. (*Id.* at p. 977.) The tax commissioner promulgated a regulation stating that income accrued prior to January 1, 1935, was not taxable and need not be reported. (*Id.* at pp. 977-978.) The court found no justification in the statute for this interpretation. For this reason, the court held that the commissioner’s rule amounted to legislative action by the commissioner. (*Id.* at p. 981.)

The Governor’s concurrence does not broadly set tax policy for the state. The concurrence is unlike a tax statute that determines on a statewide basis what property is and is not to be taxed. Moreover, as the Governor points out, the Secretary has the authority to take the land into trust for an Indian tribe, which would remove the property

from the tax base, whether or not the Governor concurs. “The Secretary of the Interior is . . . authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians. [¶] . . . [¶] Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.” (25 U.S.C. § 5108.)

We also take issue with the Auburn Tribe’s premise that policy decisions are inherently legislative. “The Legislature is charged, among other things, with ‘mak[ing] law . . . by statute.’ (Cal. Const., art. IV, § 8, subd. (b).) This essential function embraces the far-reaching power to weigh competing interests and determine social policy.” (*People v. Bunn* (2002) 27 Cal.4th 1, 14-15.) But it is much too simplistic to say that every policy decision must be a legislative act. Every governmental decision that involves a weighing of policy is not a legislative act. “Executive action that has utterly no policymaking component is rare” (*Printz v. United States* (1997) 521 U.S. 898, 927 [138 L.Ed.2d 914, 939].) Making a policy determination is a core legislative function only insofar as it is part of the process of enacting law. When the Governor concurs with the Secretary’s determination, he is not enacting land use or tax law. As we explain, he is implementing a legislatively-formulated gaming policy.

4. Concurrence Has Executive Characteristics

The act of concurring, the act at issue here, is in the nature of an executive act because it involves the implementation of California’s existing Indian gaming policy. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States* (7th Cir. 2004) 367 F.3d 650, 664-665 (*Lac Courte*), cited by the trial court, makes this point, and is persuasive authority. There, in the face of the Wisconsin governor’s refusal to concur with the Secretary’s finding that taking the property into trust for gaming would not be detrimental to the surrounding community, the tribes claimed the gubernatorial concurrence provision of section 2719(b)(1)(A) of title 25 of the United States Code was

an unconstitutional violation of Wisconsin's separation of powers principle because it allowed the governor to enact public policy regarding gaming, which was legislative in character. (*Lac Courte*, at p. 664.) The court disagreed.

Lac Courte held that the Wisconsin constitution and statutes had already implemented a "fairly complex gaming policy." (*Lac Courte, supra*, 367 F.3d at p. 664.) The gaming policy noted by the court was the state-operated lottery, and "bingo and raffle games operated by 'religious, charitable, service, fraternal or veterans' organizations,' and pari-mutuel wagering and on-track betting." (*Ibid.*) Thus, when the governor considered the Secretary's request for concurrence, he was "informed by the public policy represented by the Wisconsin Constitution and relevant statutes." (*Ibid.*) The court stated that "the Governor's decision regarding any particular proposal is not analogous to creating Wisconsin's gaming policy wholesale—a legislative function—but rather is typical of the executive's responsibility to render decisions based on existing policy." (*Ibid.*) The governor's decision was consistent with the Wisconsin Constitution, which vested executive functions in the governor. (*Id.* at pp. 664-665.)

Likewise here, the Governor's concurrence did not create California's tax, land use, or gaming policy. Instead, the Governor was informed by these policies when he made his decision.

The Auburn Tribe attempts to distinguish *Lac Courte* because it relied on Wisconsin's existing gaming policy, whereas California has no existing policy with respect to gaming on post-1988 tribal land. We see no such limitation in *Lac Courte*. It, too, involved the governor's authority to concur with a decision on post-1988 tribal land gaming, but the opinion discussed no prior post-1988 tribal land gaming policy, only Wisconsin's policy to allow bingo games and track races. In fact, the court noted that casino gambling was not permitted in Wisconsin. (*Lac Courte, supra*, 367 F.3d at p. 664.)

California, like Wisconsin, has a fairly detailed statutory scheme governing Indian gaming. In addition to article IV, section 19 of the state Constitution and Government Code section 12012.5, subdivision (d), California law contains numerous statutes ratifying compacts under various terms, as well as the creation of the Indian Gaming Revenue Sharing Trust Fund, the Indian Gaming Special Distribution Fund, and the Tribal Nation Grant Fund. (Gov. Code, §§ 12012.5-12012.95.) Accordingly, by concurring, the Governor is merely implementing the gaming policy already legislatively formulated, and this is an executive function.³

³ The Auburn Tribe argues the trial court was wrong when it found that the Governor's power to concur was "ancillary and incidental to his power to negotiate and execute compacts." Specifically, the trial court found: "the Governor simultaneously issued the concurrence and executed a compact for Class III gaming. The Governor's concurrence was necessary and incidental to compact negotiations, as Class III gaming could not occur on the Yuba Site without the Governor's concurrence, and without a compact. . . . [¶] Thus, the Court finds that the Governor's concurrence was necessary and incidental to his powers to negotiate and execute a Class III gaming compact, as permitted by the California Constitution. The Governor did not violate California's separations of powers doctrine by issuing his concurrence."

We need not reach this issue since we have concluded that the power to concur was executive, rather than strictly legislative, and that by exercising the power the Governor did not violate the separation of powers clause of the state Constitution.

Just prior to oral argument, the Auburn Tribe requested we take judicial notice of several documents that were not in existence at the time of briefing, and which the Auburn Tribe claims support its argument that the Governor's authority to concur is not incidental to, but rather is separate and apart from his authority to negotiate and execute compacts with Indian tribes. The documents consist of letters from the office of the Secretary to the tribal chairpersons attaching "Secretarial Procedures" for the conduct of class III gaming on post-1988 tribal lands, both on the land at issue here and on land where another gaming facility is proposed. The Auburn Tribe submitted this material to show that the Governor's authority to concur is not a power that is incidental to his authority to conclude compacts, since concurrence may occur without compacting. Since we do not reach the issue of whether the authority to concur is incidental to the authority to compact, the documents are not material to our determination, and we deny the

C. Negotiating Before Land was Taken Into Trust

Section 19, subdivision (f) of article IV of the California Constitution provides:

“Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.” The Auburn Tribe argues the Governor exceeded his authority because he negotiated the compact with the Enterprise Tribe *before* the land became Indian land.

The Auburn Tribe’s reading of the provision is too narrow. The Governor did not negotiate a compact for the conduct of gaming on non-Indian land. The gaming would occur, and could only occur, if the land became Indian land. Thus, the gaming would be conducted on Indian land, just as the state Constitution provides. The Constitution does not specify when the negotiations may occur, only that whatever gaming is permitted must be conducted on Indian lands. The timing of the negotiations did not exceed the Governor’s power.

II CEQA

CEQA applies “to discretionary projects proposed to be carried out or approved by public agencies” (Pub. Res. Code, § 21080, subd. (a).) A project for CEQA purposes is defined as an activity that is: (1) directly undertaken by a public agency, (2) “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,”

requests for judicial notice. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2.)

or (3) “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.) As is apparent from these statutes, CEQA does not apply to a project unless it is undertaken by, supported by, or approved by a public agency. A public agency is defined in the code as including “any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision.” (Pub. Res. Code, § 21063.)

The Auburn Tribe argues the Governor’s concurrence was a project, and the Governor is a public agency. The Auburn Tribe recognizes that unless a public agency issues the permit or entitlement, the action is not considered a project for CEQA purposes. We considered and rejected the Auburn Tribe’s claim that the Governor is a public agency in *Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416. We concluded that even though the definition of a public agency in section 21063 of the Public Resources Code is not exclusive, “[t]he specific examples included in *CEQA section 21063* are all, in common parlance, governmental *bodies*, rather than governmental *officials* like the Governor. . . . Thus, despite the statute’s inclusive nature, there is nothing in the explicit language of *CEQA section 21063* that suggests the Legislature intended to encompass the Governor within the term ‘public agency’ as defined in that statute.” (*Picayune*, at p. 1423.)

For the reasons stated in *Picayune*, we conclude the Governor’s concurrence was not a project for CEQA purposes because the Governor is not a public agency.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

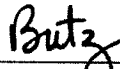


Blease, Acting P. J.

We concur:



Hull, J.



Butz, J.

IN THE
Court of Appeal of the State of California
IN AND FOR THE
THIRD APPELLATE DISTRICT

MAILING LIST

Re: United Auburn Indian Community of the Auburn Rancheria v. Brown
C075126
Sacramento County
No. 34201380001412CUWMGDS

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

Thomas F. Gede
Morgan, Lewis & Bockius LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Timothy M. Muscat
Office of the Attorney General
P.O. Box 944255
1300 I Street, Suite 125
Sacramento, CA 94244-2550

✓ Honorable Eugene L. Balonon
Judge of the
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

CERTIFICATE OF SERVICE

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

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

PETITION FOR REVIEW


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

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

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

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

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


Linda F. Nelson