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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRIENDS OF AMADOR COUNTY, BEA CRABTREE, JUNE GEARY, Plaintiffs, vs. KENNETH SALAZAR, SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR, United States Department of Interior, THE NATIONAL INDIAN GAMING COMMISSION, GEORGE SKIBINE, Acting Chairman of the National Indian Gaming Commission, THE STATE OF CALIFORNIA, Arnold Schwarzenegger Governor of the State of California, Defendants	No. 2:10-CV-00348-WBS-KJM OPPOSITION TO THE STATE DEFENDANT'S MOTION TO DISMISS DATE: September 13, 2010 TIME: 2:00 p.m. COURTROOM: 5 JUDGE: The Honorable William B. Shubb TRIAL DATE: None Set ACTION FILED: February 10, 2010

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I. INTRODUCTION

On 3 March 2000 California citizens voted to adopt Proposition 1A intended to amend the State's Constitution to allow the Governor to negotiate compacts with Indian tribes to allow some categories of class III casino style gambling to be operated by Indian tribes ***on Indian lands***. At the time and prior to then there were several illegal uncompacted Indian tribes operating class III type gambling casinos largely in more remote rural areas of the State. These illegal casinos and outside non-Indian gambling investors contributed heavily to the passage of Proposition 5 the first initiative that preceded Proposition 1A and also contributed heavily to the election of former governor Gray Davis who had negotiated nearly all the tribal-state compacts in 1999 and which are still in effect to this day. [See the historical discussion in In Re Indian Gaming Related Cases [9th Circ. CA 2003] 331 F 3d 1034. And also the California Supreme Court case of Hotel Employees and

Restaurant Workers Union International v. Gray Davis [1999] 21 Cal.4th 585 88 Cal.Rptr.2d 56, 981 P.2d 990.

The Proposition 1A Amendment to Art. 4 section 19 of the Constitution, unwittingly opened a virtual floodgate by small groups and bands of Indian tribal descendants and claimants seeking to construct and operate gambling casinos all over California. In addition to the efforts of these sometimes highly questionable "tribes", often financed by outside non-Indian gambling investors, concerted efforts were also made to either acquire land near larger gambling markets or bring existing fee owned lands into trust.[1] Eligible "Indian Lands" were required for Indian gaming under the Indian Gaming and Regulatory Act. 25 USC 2701 et.seq. [hereinafter simply the I.G.R.A.]. Indian casinos, whether offering class II or class III gaming had to be located by law on ***eligible Indian lands*** of the tribe or band of Indians as those bands existed on October 1988 when the I.G.R.A. was enacted.

[1] A practice that came to be called "reservation shopping."

This is an excerpt from a letter sent from N.I.G.C. general counsel to tribal chief Jim Henson of the United Keetowah Band of Cherokee Indians of Oklahoma explaining the I.G.R.A. and eligible Indian Lands. Here is what he said. [PRJN #44]

Overview of Applicable Provisions of the Indian Gaming Regulatory Act

An Indian tribe may engage in gaming under IGRA only on "Indian lands within such tribe's jurisdiction," 25 U.S.C. § 2710(b). Moreover, if the proposed lands are trust or restricted lands, rather than land with the limits of an Indian reservation, the tribe may conduct gaming on such lands only if it exercises "governmental power" over those lands. 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). IGRA explicitly defines "Indian lands" as follows:

> (A) all lands within the limits of any Indian reservation; and
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4).

NIGC regulations have further clarified the Indian lands definition, providing that:

> Indian lands means:
> (a) Land within the limits of an Indian reservation; or
> (b) Land over which an Indian tribe exercises governmental power and that is either -
> (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or
> (2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.
>
> 25 C.F.R. § 502.12. Generally, lands that do not qualify as Indian lands under IGRA are subject to state gambling laws. See *National Indian Gaming Commission: Definitions Under the Indian Gaming Regulatory Act*, 57 Fed. Red. 12382, 12388 (1992).

Lands acquired by an Indian tribe after October 1988 were ineligible for gaming unless they met one of the narrow exceptions set out in 25 U.S.C. 2719.

The state defendants mischaracterize Plaintiffs complaint at the outset in their Motion to Dismiss when they assert that "***the complaint's central theme is that the Buena Vista Rancheria is not a tribe legally entitled to recognition and that the site of the tribe's proposed casino is therefore not eligible for gaming under federal and state law.***"

To the contrary the gravaman of Plaintiffs complaint in this case is that the 67.5 acre site-specific parcel of fee land located at Buena Vista upon which the State has now approved and sanctioned a class III gambling casino, is not eligible for gaming at all by anyone, was never a reservation, has never been placed in trust and is nothing but a parcel of fee simple land owned over the years by various people. It was always held in fee simple title since at least the late 1800's right up to the time it was ostensibly acquired by deed in May 1996 by an entity created and controlled at the time by DonnaMarie Potts and which she called the "Buena Vista Rancheria of Me-Wuk Indians" [hereinafter simply the tribe].

The questions concerning the erroneous organization of this fictitious tribe and its purported federal acknowledgement and recognition is a separate issue. That issue is raised by Plaintiffs Crabtree and Guery who are the true Indian descendants entitled to

organize any Indian tribe under the Indian Reorganization Act 25 USC 465 through 479.

II. SUMMARY OF RELEVANT FACTS AND RELEVANT PRIOR PROCEEDINGS

[All references to Plaintiffs Request for Judicial Notice will be referred to by the abbreviation PRJN, followed by an EXHIBIT number 1-46.] All references to the National Indian Gaming Commission and Department of Interior will be by the abbreviations N.I.G.C. and D.O.I. respectively.

On 9 Nov. 1927 the Department authorized the purchase of 67.5 acres of land for the use and occupation of any homeless and itinerant Indians [PRJN #1]

That land was purchased from the federal government in fee from Louis Alpers and Marjory Alpers. [PRJN #2]

Any Indian seeking to use and occupy a Rancheria parcel would apply for and be given an "assignment."

The Oliver family, Indian descendants, occupied that land and were given an informal assignment. [PRJN #5]

The Olivers requested they be given a fee patent to the 67.5 acre parcel of land at Buena Vista. [PRJN #6]

When Congress enacted the Rancheria Act in 1958 a plan to distribute that land to Louis and Annie Oliver was proposed and consented to by all of the Oliver family. [PRJN #7]

On Oct. 19, 1959 a deed was given the Olivers conveying title to the entire parcel to Louis Oliver and Annie Oliver Husband and Wife[2] as joint tenants.[3] [PRJN #8]

On 19 Oct. 1959 a letter was sent to the Olivers confirming the land was their property, completely unrestricted and they could do what they wanted with it. [PRJN #9]

The following year, 1960, the Olivers mortgaged the land. [PRJN #10]

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[2] In California this designation is an indication of community property.
[3] This title creates a right of survivorship in the surviving tenant.

Subsequently Annie Oliver died and the land became Louis Oliver's property as the surviving joint tenant.

On 31 August 1973 Louis Oliver died intestate and the land was admitted to Probate. [PRJN #12 & #13]

Louie Oliver left two surviving children Lucille Lucero [nee Oliver] and Enos Oliver. During the probate process a grandson, Jesse "Flying Cloud" Pope relinquished any and all right title or interest he might have by grant deed.

On 27 November 1978 Lucille Lucero made a Will bequeathing her right title and interest in the Buena Vista land to DonnaMarie Grove[4] (nee Potts). [PRJN #14]

Enos Oliver, Louie's only son, died intestate on August 31, 1978 and his estate was administered in Amador County Probate Court, which assumed jurisdiction over his undivided interest in the land subject to his sister Lucille Lucero's expectancy on final distribution.

On 10 July 1979 a lawsuit was filed by attorney Rappaport of the California Indian Legal Services on

[4] At this point her interest in the Buena Vista property was her right to distribution of an undivided ½ interest along with her brother Enos Oliver's interest before the County Probate Court.

behalf of several named individual Plaintiffs and against the United States, Secretary of Interior and other federal officials as well as the County of Mendocino California tax collector and assessor. [PRJN #15] The body of the complaint also contained specific allegations concerning the Pinolville, Redwood Valley and Big Valley Rancherias and breaches of alleged agreements made with these Indian occupants, residents and assignees.

In relevant part that lawsuit alleged certain groups of Indians living on Rancheria lands were made promises of improvements to the land being distributed to them and which were not done as promised and they further alleged other benefits and requirements of the Rancheria Act were not complied with and that Plaintiffs had been damaged as a result. Among other things that complaint prayed for relief which included at item d. of the prayer that:

> ***"the deeds conveyed to individual Indian distributes to lands on the subject Rancherias and other trust allotments are voidable and the Secretary of Interior is under a duty to notify each distributee of***

> ***this fact and offer to take said lands back into federal trust status at the option of each distributee.*** [Emphasis by italics]

At some point that action was apparently certified as a class action for 17 named Rancherias including Buena Vista. A stipulation and judgment based thereon, was entered into between the Plaintiffs and their attorneys and the federal defendants on or about 2 August 1983. [PRJN #16]

That stipulated judgment provided that the 17 named Rancherias and individual persons who received a distribution of assets of any of the Rancherias were a "class." The individual Indian defendants who lost status and rights as Indians by the provisions of the Rancheria Act distribution were restored to their prior Indian status. The judgment provided as follows:

> paragraph 3.
>
> 3. That "the Secretary of Interior shall recognize all tribes, bands, communities, groups (sic) of the seventeen Rancherias listed in paragraph 1 as Indian entities with the ***same status they possessed prior to distribution of the assets of these rancherias*** …" [Emphasis added by italics]

paragraph 4.

4. "Any named individual Plaintiff or class member who received or presently owns fee title to an interest in any former trust allotment by reason of the distribution of the assets of any of the Rancherias listed in paragraph 1 ***shall be entitled to elect to restore any such interest to trust status, to be held by the United States for the benefit of such Indian tribes***. PRJN [Emphasis added by italics]

paragraph 6.

6. ***Any named plaintiff or other class member herein may elect to convey to the United States any land for which the United States issued fee title in connection with or as the result of the distribution of assets of said rancherias to be held in trust for his/her individual benefit or any other member or members of the rancheria***, authority for the acceptance of said conveyances being vested in the Secretary of the Interior under Section 5 of the act of June 18, 1934, "The Indian Reorganization Act," 48 Stat. 985, 25 U.S.C. 465 as amended by Section 203 of the Indian Land Consolidation Act, Pub. L. 97-459, Title II, 96 Stat. 1512 and/or the equitable powers of this court. [emphasis added by italics]

paragraph 8.

9. Upon entry of judgment herein the United States shall give personal mail notice to each individual plaintiff and other class members (to the extent such persons can be identified and located through the exercise of reasonable efforts) ***that said individuals may elect to return their lands to trust pursuant to the judgment entered pursuant to***

> ***this stipulation. Said notice shall advise that the Bureau of Indian Affairs will assist those individuals desiring to convey lands to the United States, including providing for forms and instructions***. [Emphasis added by italics]

The Secretary of Interior gave these notices as required and offers of assistance to those who desired or elected to convey their fee titles to Rancheria lands, back to the United States in Indian trust status. [PRJN #17]

The court allowed a two year period in which those individuals who were distributed fee lands could re-convey that land back to the U.S. "in trust" and also to settle the boundaries of those rancherias which boundaries would necessarily have to be re-set once it was determined which lands remained in private fee ownership and which parcels, if any, were conveyed back to the United States. The court retained jurisdiction to determine the Rancheria boundaries until they were settled later as to those affected by re-conveyance.

On 24 July 1985, Lucille Lucero conveyed all of her right, title and interest in the Buena Vista land to DonnaMarie Potts by Grant Deed.[5] [PRJN #19]

On 14 May 1987 a second stipulation was entered into between the ostensible class of Plaintiffs and their attorneys and various counties and county tax officials who agreed to the disposition of taxes collected previously and to the tax status of the Rancheria lands including the Buena Vista fee parcel which at the time was still under Probate Court Administration. The United States did not participate in this stipulation.

A second stipulated judgment was entered with the various County defendants including Amador County. [PRJN #20 and #21]

During the 18-year long pendancy of the estate of Enos Oliver his wife Lydia Oliver also died **testate** necessitating the creation of another probate to administer her Will and on 19 March 1995 Lucille Lucero

[5] This was the expectancy to be obtained from the final Distribution of the Estate of Enos Oliver still pending the Amador County probate court.

also died **testate**. [PRJN #22] requiring yet a fourth probate to administer her 1975 Will.

The estate interest in the Buena Vista land under court jurisdiction then passed or was distributed to the estate of Lucille Lucero also pending at that time and also to the estate of Lydia Oliver pending at that time. [PRJN #23 & #24]

Donna Marie Potts then acquired title to the vast majority of the Buena Vista land by Will and the earlier grant deed. She made an agreement with Lydia Oliver's only son John Fielder to pay him some $15,000 as consideration after which he would relinquish any claim or interest in the land to be distributed from his mother Lydia's estate to DonnaMarie Potts.

This agreement, made prior to May 1996, became final on 1 August 1996 by final order of distribution in the Amador County Probate Court.

As of August 1996 DonnaMarie Potts became the sole owner having united the fractionated title of the Buena Vista land in fee simple ownership.

Prior to the final Judgment of distribution, DonnaMarie Potts made and recorded a deed in the Amador County Recorders Office conveying the entire Buena Vista parcel to a so-called "Buena Vista Rancheria of Me-Wuk Indians," a putative tribe consisting of her and her two children and that she had begun seeking federal acknowledgement and recognition for since about 1985 or 1986. [PRJN #26]

DonnaMarie Potts then purported to immediately deed the entire Buena Vista fee lands of this "tribe" to the United States in trust, executing and recording that deed as "tribal spokesperson" just moments after recording the first deed. [PRJN #27]

The attempt to convey that fee land into trust was rejected by the United States when submitted by the County recorder. [PRJN #28.]

On or about 2000 Donna Marie Potts submitted for federal approval a final version of a "tribal gaming ordinance" to the federal government and that ordinance was approved but only **for gaming on "Indian Lands."**

Potts then announced her intent publicly to construct and open a gambling casino on that Buena Vista land.[6]

In September 1999 and prior to approval of the gaming ordinance DonnaMarie Potts, purporting to act for the "Buena Vista Rancheria of Me-Wuk Indians," obtained a class III tribal-state gaming compact from former governor Gray Davis along with 58 other California Indian bands. [copy set out in the State Defendants Request for Judicial Notice.]

DonnaMarie Potts' claimed to be **THE** "Indian descendant" entitled to organize a Buena Vista Rancheria of Me-Wuk Indians" but was later challenged by Rhonda Morningstar Pope, who complained to the B.I.A. The B.I.A. wrote to the attorney for Potts indicating DonnaMarie Potts was after all, not the lawful descendant of the Olivers, the original grantees and assignees.

[6] That land was considered by many Indian descendants in Amador County, such as Plaintiffs Bea Crabtree and June Geary, as a sacred burial ground where it is documented that many graves currently exist. [PRJN #34]

Originally Rhonda Pope had complained that Potts' intent to build a gambling casino on sacred Indian burial grounds was offensive and inappropriate.

A lawsuit was then filed by her on 12/7/2001 and a preliminary injunction was issued on 3/7/2002. [PRJN #30]

Plaintiffs Crabtree and Geary were not parties to that suit and had no notice of it or any of the asserted "tribal decisions" made by either Potts or Pope. Nor were they contacted by anyone from the B.I.A.

That lawsuit by Pope was purportedly settled by an agreement that Potts would be paid some Twenty-Five Million Dollars with Fifteen Million up front[7] and more to be received later. Potts was also to become a "historic member" of the putative "Buena Vista Rancheria of Me-Wuk Indians" along with her children. Rhonda Pope would become chairperson of this tribe and her children would become enrolled members. [PRJN #31]

[7] The hilly and rural, remote and undeveloped 67.5 acres of Buena Vista land was valued at the time at approximately $3,000 an acre or a total market value of only around one-hundred sixty thousand dollars [$160,000].

The stay in effect was lifted for one day in 2004 to allow Rhonda Pope to execute and amend the 1999 tribal-state compact procured and executed originally by DonnaMarie Potts.

On December 29, 2004 some 4 years after the Secretary had approved a site-specific gaming ordinance and tribal-state compact, attorney Judith Kammins Albeitz, acting on behalf of "the tribe" wrote to the N.I.G.C. for an opinion whether or not the fee property at Buena Vista was eligible for class III casino gambling. [PRJN #32]

On 30 June 2005 Penny Coleman, staff legal counsel for the NIGC wrote attorney Albeitz a letter, opining that the Buena Vista fee land owned by the putative tribe, the "Buena Vista Rancheria of Me-Wuk Indians" was eligible for class III Indian gambling. [PRJN 38]

The D.O.I. takes and the N.I.G.C. take the position that a determination that a tribe's land is eligible for gaming must be made. [See letters from James Cason to Oregon Governor Kulongowski and from

Michael Olsen to then Speaker of the House Dennis Hastert. [PRJN #43]

Despite the execution of two Memoranda of Understanding between D.O.I. and N.I.G.C. [PRJN #42], much confusion exists between the two agencies as to who and how an Indian Lands eligibility determination is to be made and when it must be made. [PRJN #44]

III. DISCUSSION

A. WHERE THERE IS ABUNDANT EVIDENCE THAT GAMING PROPOSED BY AN INDIAN TRIBE IS NOT ON ELIGIBLE "INDIAN LANDS" THEN THE STATE MAY NOT ENTER INTO A TRIBAL-STATE COMPACT TO ALLOW OR PROMOTE SUCH ILLEGAL GAMBLING ACTIVITY IN VIOLATION OF STATE ANTI-GAMBLING LAWS AND TO DO SO IS AN ULTRA VIRES ACT.

The federal defendants filed their answer in this case putting the allegations raised by Plaintiffs' complaint in issue as to them. The State defendants have filed this Motion to Dismiss based upon four assertions. (1) The Eleventh Amendment bars

Plaintiffs' State law claim; (2) there is no right of action available to Plaintiffs under the tribal-state compact; (3) Plaintiffs have failed to join a required and indispensable party; and lastly (4) collectively this establishes Plaintiffs' complaint fails to state any grounds for relief.

It is well settled that in any Motion to Dismiss a complaint, that the factual allegations must generally be taken as true. See Bell Atl. Corp. v. Twombly [2007] 127 S.Ct. 1955. See also for example Wolfe v. Strankman 392 F.3d 358 [9th Circ. 2004]. This results largely because the law favors all matters be heard on their merits and dismissal is the harshest of remedies.

As set out in the statement of relevant facts and prior proceedings above and as supported by EXHIBITS in Plaintiffs' Requested Judicial Notice [PRJN] as well as the Declaration of Counsel, the 67.5 acres of real property at Buena Vista is not now and never was an Indian reservation. Indian reservations can only be created by Act of Congress or special powers given to

the Executive Branch to create reservations by specific declarations of "set-aside" approved by the President. Originally Indian Reservations were created by treaty between a recognized tribe of Indians and the United States, the terms of which designated, reserved or set aside lands for specific Indian tribes. These treaties would be executed by the United States and the tribal government and usually were made in exchange for lands being ceded to the United States by these same tribal governments. Essential to the creation of an Indian reservation was the government to government agreements between an acknowledged tribal government and the United States. Congress was originally given authority to deal with Indian tribes by the U.S. Constitution Art I section 8.

In 1864 Congress passed an act that established and limited to, only four (4) Indian reservations in California. See the California Reservation Act of April 8, 1864, 13 Stat. 39. See also Mattz v. Arnett [1973] 412 U.S. 481, 489.

On 3 March 1871 Congress enacted a law prohibiting the further creation and execution of any more treaties with Indian tribes. Following that Act, however, the President was empowered from time to time to create special, temporary set asides of land for Indian tribes pending implementation of the Dawes Act. The Dawes Act sought to allot parcels of reservation lands to individual Indians and families by their tribal governments with a view to assimilate Indians into American society. Once all parcels of a reservation's land were allocated by the tribal government to its members, the "tribe" and the tribal government ceased to exist as a political entity. [See 25 U.S.C. 345] There were only 18 Presidential set asides for Indians in California and almost all were created in the Southern part of the state as a result of the Mission Indian Relief Act of 1891. [26 Stat. 712]

From time to time Congress would make special appropriations of funds to acquire temporary lands for the use and occupation of homeless or itinerant

individual Indians or families not of any particular tribe. In 1921 Individual Indians were made full citizens of the United States.

[See also for examples the Act of June 30, 1919 which provides at sec. 27. ***"That hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for, or as an Indian Reservation except by Act of Congress."*** [See Charles Kappler's Indian Affairs: Laws and Treaties, vol. IV pages 225 and 936] There was no reservation status to the fee lands procured for homeless Indians as "Rancherias".

The various Rancheria appropriation Acts were enactments clearly for the relief of homeless Indians **NOT a creation of any reservations** or for any identifiable and acknowledged Indian tribe or tribal government. See the original 1960 Opinion of the United States Solicitor [PRJN #46] and the published opinion at 1883 Opinions of the Solicitor August 1, 1960. If there was any thread of reservation status to

fee owned Rancheria lands, any attempt by the Secretary of D.O.I. to convey such lands to individual Indians after the 1934 enactment of the I.R.A. [25 U.S.C. 465 et.seq.] would be direct violations of that Act except as provided for in section 4 or as an exempt transfer provided for in section 8.

In addition during this period between 1880 and 1930 Congress enacted and implemented the Indian Homestead Act allowing Indians to acquire tracts of land from the public domain using essentially the same process as that used for homesteading public domain lands by non-Indians.

In 1934 Congress enacted the Indian Reorganization Act 25 U.S.C. 465 et. seq. giving authority to the Secretary of Interior to acquire lands in trust to re-establish previously recognized and acknowledged ***Indian tribes*** and their governments and to promote Indian tribal self-sufficiency. Rancherias were not purchased in the name of any tribe or to be held "in trust" for any tribe or any particular named individual, bands,

communities or groups of Indians. [See the discussion in the recent Supreme Court case of Carcieri v. Salazar [2009] 129 S.Ct. 1058, 172 L.Ed.2d 791.]

Under the Rancheria Act, these lands, owned by the U.S. in fee, were to be given for free to the current occupants and assignees except in some cases the federal government had agreed to make certain improvements to roads and utilities on the Rancherias and to provide other forms of aid and benefits to the assignees receiving distribution of the lands. In some cases these agreements, promises and obligations were apparently breached by the United States. The Oliver family, in residence on the Buena Vista fee lands under informal assignment at the time, had no such agreements to make improvements and had previously, asked the D.O.I. for fee patent to the land. [PRJN #6] There were no remaining obligations by the United States involved in the distribution of the Buena Vista land to the Olivers nor had they complained of any.

The Department of Interior [D.O.I.] then informed the Olivers by letter the land was theirs, unrestricted in any way to do with it as they liked. [PRJN #6] They mortgaged it the following year.

Assuming for the sake of argument that the June 30, 2005 opinion letter of Penny Coleman [PRJN 32] was correct, that is that Rancherias, like Buena Vista, were somehow "like reservations," then whatever shred of that status that may have existed was eliminated by the voluntary de-establishment by the assignees, first in the initial conveyance of the grant deed from the U.S. to them, or later when they elected not to avail themselves of the 2-year re-conveyance option created by the Tillie-Hardwick stipulated judgment. Tribes can also voluntarily dis-establish reservations. [See for example State of Wisconsin v. Stockbridge-Munsee Community [2009] 554 F.3d 657.] In addition former trust property can be transmuted to fee simple property free of trust by being processed through state court probate proceedings. [See for example the I.B.I.A.

decision in Ruth Pinto Lewis v. Eastern Navajo Superintendent 4 I.B.I.A. 147.

It is clear that neither the Secretary nor the N.I.G.C. is empowered to materially vary the requirements of the I.G.R.A. through an administrative fiat. See Texas v. United States [Kickapoo Traditional Tribe Real Party in Interest] (CA Fifth Circ. Texas 2007) 497 F.3d 491.

Judge Williams was quite careful in his approval of the 1983 stipulated judgment in the Tillie-Hardwick case. With regard to any tribal entity he neither restored or created anything specific. Rather he restored any such entity to ***whatever status they had before distribution*** and termination under the Rancheria Act as determined by the applicable federal laws.

Similarly in approving the second stipulation of 14 May 1987 affecting only County governments and County issues, he did not require the joinder of the United States in that stipulation. That is because neither the County nor its attorney or Plaintiffs and their attorneys had any authority to affect or create

Indian tribes or reservations or Indian lands of any kind except as provided by existing federal law and processes.

The federal court only retained jurisdiction, following the 1983 stipulated judgment, for purposes of waiting too see if any of the Plaintiffs elected to convey their fee lands they received by distribution, back to the United States in trust and whether the boundaries of a particular Rancheria needed to be reset after that or re-established once it was determined what lands went back to trust and what lands were kept by the fee owner distributees.

Once the last of the Oliver estates closed, DonnaMarie Potts ultimately became the sole owner in fee of the fractionated interests in the land. She then purported to deed the land to a fictitious Indian tribal entity she had previously named the "Buena Vista Rancheria of Me-Wuk Indians",[8] although she apparently was a Maidu Indian herself. She then (purportedly on behalf of this "Buena Vista Rancheria tribe") attempted

[8] DonnaMarie Potts had been making attempts to obtain federal recognition for this putative tribal entity since 1985.

to convey the Buena Vista fee lands to the United States in trust. [PRJN #27] That attempt was rejected by the D.O.I. [PRJN #28]

B. THE ELEVENTH AMENDMENT TO THE U.S. CONSTITUTION DOES NOT GIVE THE GOVERNOR OR THE STATE AND IT'S OFFICERS IMMUNITY FROM ULTRA VIRES ACTS

As set out in Artichoke Joes Grand Casino v. Governor Gray Davis [2002] 261 F.Supp.2d 1084 illegal and ultra vires acts cannot be shielded by the claims of Eleventh Amendment legal immunity.

It is undisputed that to be eligible for either class II or class III gaming under the I.G.R.A. the gaming operation must be located on land defined as eligible "Indian Lands" by the I.G.R.A. [25 USC 2703 and 2719] The Buena Vista land has always been fee lands and was never an Indian "reservation," is not now, and never has been held, "in trust" and was never subjected to restriction or control by the federal government since it was deeded in fee to the Olivers in 1959.

If, as claimed in the Penny Coleman opinion letter of June 30, 2005, the Buena Vista land had somehow been a "reservation", or rather more accurately "like a reservation", prior to it's being deeded in fee to the Olivers, why would there have been any need for a provision in the Tille-Hardwick stipulated judgment creating an election for those individuals like the Olivers (or their descendents) to have the fee land they were deeded, ***reconveyed back into "trust" if they elected to do so within the two year period provided***? A true Indian reservation is the broadest category of Indian Lands which subsumes any benefit or advantage that might have been obtained had the Olivers elected to convey their fee land back to the United States ***in trust***?[9]

Similarly if there actually ever was any entity or group called the "Buena Vista Rancheria of Me-Wuk Indians" before DonnaMarie Potts created this name out of whole cloth why is there is no record of any such an

[9] Many criminal statutes in title 18 chapter 53 use the broad term "Indian country" as does some specific benefit statutes, however "Indian country" is not necessarily eligible "Indian Lands" under the I.G.R.A.

entity before 1986. The large volume of documents and correspondence, some of which is contained in Plaintiffs request for Judicial Notice, never makes historical reference to, nor do they contain any evidence of any tribe or band by the name "Buena Vista Rancheria of Me-Wuk Indians" dating back to 1900, as is required by law for lawful recognition. [See 25 C.F.R. part 83 and the former 25 C.F.R. part 54 all required a substantial, unambiguous history of tribal government to government relations between the United States government and the government of any tribe, band or community of Indians dating back many years, usually to 1900.]

These are all matters of public record which were easily obtainable or discoverable by the State defendants by the exercise of diligence prior to approving the 1999 compact with DonnaMarie Potts to allow casino gambling on ineligible land as they did here without verifying either the status of the land or legitimacy of the "tribe." In fact, the status of the

land at Buena Vista should have been addressed as part of the Tribal Environmental Impact Report (TEIR) required by the state as part of the compacting process. [See for example 25 C.F.R. 502.22 and in particular 25 C.F.R. 559.1] [See also the letter from attorneys Hanson & Bridgett submitted as comments on the proposed TEIR on behalf of Plaintiffs herein.

In Artichoke Joe's California Grand Casino v. Gail Norton, U.S.A. Governor Gray Davis, California et.al. [9th Circuit C.A. 2002] 355 Fed.3d 712, the Ninth Circuit upheld the trial court decision that the I.G.R.A. and California's Constitution could lawfully discriminate in favor of Indian tribes over non-Indians in the area of casino style gambling.

In the course of reaching that holding the court described the I.G.R.A. as a federal law which enabled States to impose certain state laws on Indian lands in the area of gambling activities and which the court classified or described as a "vice" much like alcohol and cigarettes. This was permitted because Congress

empowered the States to regulate various aspects of Indian gambling activities through the compacting process I.G.R.A. 25 USC 2710 d. Were that not the case, class III Indian gambling would be wholly unregulated. [See Colorado River Indians v. Commissioner Hogen N.I.G.C. [2007] 466 F.3d 134. The court in Artichoke Joe's found, that matters which touched on the public health and safety, like gambling, were matters clearly of state concern. They put it this way:

> "…in Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) ("Yakima III"), the Supreme Court described the circumstances in which rational-basis review applies to Indian-related state laws. The Court applied rational-basis review to an equal protection challenge to a state law where federal legislation extended that law into Indian country."

and

> "As a constitutional matter, the state interests that justify, as a valid exercise of a state's police power, California's restriction of class III gaming operations to those conducted by Indian tribes on Indian

> lands are absent in the field of general commercial activities. Most economic activities historically have not been deemed harmful. Thus, we do not believe that Plaintiffs' parade of horribles - tribal monopolies on automobile dealerships, for example - is a likely consequence of our conclusion that legitimate state interests support a restriction of casino-style gambling to Indian lands. Of course, in this case we need not and do not decide whether states constitutionally could grant tribes exclusive rights to conduct enterprises other than casino gambling.
>
> Were the tribal lands a political subdivision of the State, California's exemption of tribal lands from its state-wide prohibition on class III gaming activities easily would withstand constitutional scrutiny. When enacting substantive regulations or prohibitions of vice activities, the interests implicated lie "at the heart of the state's police power." Helton, 330 F.3d at 246."

The court iterated at least a dozen times, during their decision in this case, that such gambling activity sanctioned or permitted by California's amended Constitution Art. 4 section 19 [amended by Proposition 1-A] were ***to permit such gambling only on "Indian Lands"***. The Plaintiffs in that case had sued the federal defendants ***and State defendants in District***

Court much as Plaintiffs have done here. Also, as the State has done here, they made a Motion in the trial court to Dismiss Plaintiffs complaint there on many of the same grounds they have raised in this Motion. See Artichoke Joe's Grand Casino v. Gale Norton, Gray Davis, Bill Lockyer, et.al. 216 F.Supp.2d 1084 supra. In a detailed analysis, the trial court found that the State defendants were proper parties and refused to dismiss them. In deciding that lengthy case before the District Court, the court made a number of points material to this present case. The following excerpts are some of those points.

> "Finally, IGRA explicitly prohibits gaming on lands taken into trust for the benefit of a tribe after October 17, 1988. Id. §2719(a). This restriction does not apply, however, if the Secretary, having consulted with tribal and state and local officials, and having secured the agreement of the Governor, determines that gaming on the newly acquired lands would benefit the tribe and would not be detrimental to the surrounding community."

and further;

> "The State Gaming Agency, defined as the "entities authorized to investigate, approve,

> and regulate gaming licenses" under Cal. Bus. & Profs. Code § 19800 et seq., includes the California Gambling Control Commission and the Division of Gambling Control in the California Department of Justice. Id. at §2.18; Cal. Bus. & Profs. Code §§ 19809, 19810A. Members of the Commission are appointed by the Governor, subject to confirmation by the State Senate, and serve four year terms. Cal. Bus. & Profs. Code §19812A."

furthermore;

> "Also, because California prohibits class III gaming under Cal. Cons. Art. IV, sec 19(e), and Cal. Penal Code §§ 330, 330a, 330b, California voters must approve the California Senate's proposed Constitutional Amendment 11 ("Proposition 1A"), that would permit the Governor to enter into class III gaming compacts, thereby exempting Indian tribes from the general prohibition on gaming. Id. at §11.1."

furthermore;

> "With respect to the existing compacts and the Governor, the Plaintiffs have properly alleged an injury in fact which could merit declaratory relief under the Declaratory Judgment Act, 22 U.S.C. §§ 2201 et.seq. Plaintiffs allege both a violation of their right to equal protection of the laws and economic injury. Together these allegations form an adequate basis for standing to seek declaratory relief."

furthermore;

> "With respect to count II of the complaint, Plaintiffs' claim against the Governor satisfies the causation requirement because the Governor approved the compacts that gave rise to the Plaintiffs' injuries … It is enough that his past approval of the compacts caused the Plaintiffs' alleged injuries."

furthermore;

> "Also, because California prohibits class III gaming under Cal. Cons. Art. IV, sec 19(e), and Cal. Penal Code §§ 330, 330a, 330b, California voters must approve the California Senate's proposed Constitutional Amendment 11 ("Proposition 1A"), that would permit the Governor to enter into class III gaming compacts, thereby exempting Indian tribes from the general prohibition on gaming. Id. at §11.1."

furthermore;

> "The Governor is a proper party to suit under the Young doctrine because the Plaintiffs' claims are "not based on any general duty to enforce state law." Id. Rather, the Governor is alleged to have "a specific connection to the challenged statute." Id. Indeed, for the same reasons that the governor is claimed to have caused the Plaintiffs' alleged injuries for purposes of Article III standing, he is also a proper defendant under Young: The Governor negotiated and approved the compacts

> that give rise to the Plaintiffs' alleged injuries."

furthermore;

> "Nor have the federal defendants demonstrated that the Plaintiffs' APA claims would undermine IGRA or the Johnson Act. Noticeably absent from the list of IGRA-created remedies is one that addresses the type of claim brought by the Plaintiffs - a mechanism for challenging the Secretary's approval of a compact on the basis that the compact violates IGRA."

The state defendants claim here that the Eleventh Amendment bars all claims made by Plaintiffs for relief against the State and its officers. These Plaintiffs, however, are **NOT** citizens of another State or a foreign country. They are United States citizens and citizens of the State of California, living and working in Amador County and are entitled to file suit against their own government for acts inimical to their health and welfare. [See California Constitution Art. 3 sec. 5.]

Although Art. 3 section 5 of the California Constitution is not necessarily a waiver of Eleventh Amendment immunity, a suit by citizens for declaratory

relief and mandamus (or prohibition) is generally not considered to be barred and is the kind of lawsuits authorized by Art 3 section 5. [See Los Angeles County v. State Dept. of Public Health [1958] 158 Cal.App.2d 425, 322 P.2d 968.]

Plaintiffs have alleged in their complaint that the governor unlawfully approved and executed a tribal-state compact at a specific ineligible site in the County of Amador at Buena Vista in violation of the California Constitution Art. 4 section 19 and executed and adopted a tribal-state compact pursuant to 25 USC 2710 d.[10] Plaintiffs have further alleged that it was erroneous and unlawful to have approved the compact allowing a casino development to move forward to fulfillment and to imminent completion which is made possible by the State's approval. That State approval was an ultra vires act. [See EX PARTE YOUNG [1908] 209 U.S. 123]

See also Larsen v. Domestic & Foreign Commerce Corp. 337 U.S. 682 [1949] 69 S.Ct. 1457, 93 L.Ed. 1636.

[10] California Constitution does not contain a definition of Indian lands to which Art. 4 sec. 19(e) applies.

This action is one primarily seeking declaratory relief to determine the legality and eligibility for gaming on the Buena Vista lands under the I.G.R.A.'s compacting requirements set out in 25 USC 2710 d (3) and pursuant to California's Constitution Art. 4 sec. 19 (f) permitting gambling operations and activities ***only on "Indian Lands."*** Art. 4 section 19 f provides

> "(f) 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.***" [emphasis added by italics]

The original 1999 Gray Davis compact in this case, was executed by DonnaMarie Potts who was not even a lawful representative of any "Buena Vista Rancheria of Me-Wuk Indians." Even assuming she had lawfully fulfilled the requirements of 25 CFR part 83 to obtain federal acknowledgment, which is disputed, it is clear she had no lawful authority to submit a gambling ordinance or

execute a tribal-state compact which would require approval of at least a majority of the lawful enrolled members of such a tribe. The governor's amendment to that compact in 2004 and the subsequent approval of the State required TEIR in 2007 required to be part of the compact does not remedy the fact the compact was void ab initio nor does that unlawful approval somehow render the Buena Vista lands eligible "Indian Lands." Neither does it excuse the Governor's non-compliance with the procedures mandated by 25 USC 2719 and 25 C.F.R. section 20 rules requiring special findings by the Governor in light of the prima facie showing the Buena Vista land was acquired in 1996.

Plaintiffs F.O.A.C. seek no damages nor retroactive relief other than the Declaratory Judgment voiding the current compact and then imposing such injunctive relief as would be appropriate once Declaratory Judgment was entered to establish if the Buena Vista land is eligible for gaming or not, and further that the putative tribe, the "Buena Vista Rancheria of Me-Wuk Indians" was lawfully organized and

meets the 25 C.F.R. part 83 criteria for federal acknowledgement. Plaintiffs Crabtree and Geary seek only to have any state or federal funds being paid over to DonnaMarie Potts or Rhonda Pope paid into court, pendente lite, to preserve the status quo until a determination is made whether the tribal organization by DonnaMarie Potts, that led to a purported federal acknowledgement and recognition of her and her two children as the "Buena Vista Rancheria of Me-Wuk Indians," is determined to comply with 25 CFR 83.

Moreover, Plaintiffs Bea Crabtree and June Geary, as the lawful descendants of the heretofore un-organized community of Indians and assignees formerly occupying the rancheria lands at Buena Vista, seek to determine under what lawful authority a non-Indian New York casino developer named Wilmot and his company and the federal defendants had to "settle" a tribal enrollment lawsuit by stipulation, one which Plaintiffs were not parties to or even had notice of.

C. THE ARGUMENT THAT PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE THEY ARE PRECLUDED FROM SUING ON THE COMPACT WHICH PROHIBITS THIRD PARTY SUITS, IS MERITLESS

Plaintiffs' complaint does not sound or purport to sound in the compact, nor any of its terms and conditions therein. Neither do Plaintiffs assert rights arising under the contract. Their allegations here are essentially that there never should have been any compact authorizing Indian gaming operations at the site specific fee lands at Buena Vista as a matter of federal and state law. As set out above, the gravamen of their complaint is in the requirements and rules created by federal law, the I.G.R.A., the Administrative Procedures Act 5 USC 702 et.seq. and various sections in 25 Code of Federal Regulations as well as State law, Art. 4 section 19 of the California Constitution have not been met or have been violated.

Every compact must be lawfully in affect under state law before Indian gaming is allowed. [See 27 USC

2710 d (3).] [See also Pueblo of Santa Ana v. Kelly 129 F.3d 535.]

D. THE PUTATIVE "BUENA VISTA TRIBE" IS NOT A REQUIRED PARTY WHOSE ABSENCE PREVENTS THE DECLARATORY JUDGMENT SOUGHT

The state defendants contend further that Plaintiffs' complaint must be dismissed for failing to join a Required and Indispensable party. Originally federal rules of civil procedure required dismissal for failure to join necessary and indispensable parties. Following several case decisions discussing this issue the rule of Federal Procedure was amended to use the more accurate term "***required party***."

That is because the key to its application is, that if the absent party is **NOT** required to be present or participate in order to resolve the issues raised by a complaint then they are neither required, necessary, or indispensable to the case. The federal and state defendants were all informed and repeatedly appraised of the facts and reasons why the land at Buena Vista is not

and never was eligible for gaming under the I.G.R.A. or Art. 4 section 19 of the California Constitution. Both the State and federal defendants are capable of adequately representing the interest of the tribe and that interest is the establishment of either the lawful or unlawful nature of the compact and Declaratory Judgment determining whether the Buena Vista land is in fact eligible by law for class II or class III gaming. There is no conflict as between the State or federal defendants nor the putative tribe. In fact the issues are identical to the interests of both the federal and state governments and the tribe. See Shermoen v. United States [9th Circ. 1992] 982 F.2d 1312.

Merely having a legal or financial interest in the outcome of litigation does not make one a required party to the determination of the legal issues involved, particularly where the action is one for Declaratory Relief. See Makah Indian Tribe v. Verity [9th Circ. CA 1990] 910 F.2d 555.

As set out above the key question for jurisdictional determination purposes is whether the

tribe's participation ***is required*** to determine if the Buena Vista land is eligible for gaming pursuant to the IGRA. Where the entire relevant history of the land and its status is now before this court and it is the federal and state defendants who are required to explain and justify how they concluded it was in fact eligible for gaming under either 25 USC 2703 or was not prohibited by 25 USC 2719. And it is up to them to explain why they did not follow the required specific joint procedures and determinations required under 25 USC 2719 for exempting land acquired after October 1988 as the Buena Vista land was.

Defendants only raise the issue of joinder of the tribe so they can claim an Indian tribe cannot be joined because of the common law tribal sovereign immunity doctrine and make no effort to demonstrate what "inconsistent" events they would be subjected to.

The I.G.R.A. and the Amended California Constitution Art 4 section 19 provide a clear interplay between federal and state laws. Artichoke Joe's v. Norton 353 F.3d 712 supra. Where, as here, the state

and its officers and the federal government and its officials have failed and neglected to do their statutory duty, or in the course of those duties have engaged in ultra vires acts not authorized by law, this court has jurisdiction over them both. EX PARTE YOUNG [1903] 209 U.S. 123 supra. See also Larson v. Domestic & Foreign Corp. [1949] 337 U.S. 682, 69 S.Ct. 1457 93 L.Ed. 1628 supra and Boisclair v. Superior Court, 51 Cal.3d 1140 supra.

In this case all the Defendants were required to insure that before approving a very site-specific gambling casino to be located in Amador County near another existing Indian casino at Jackson, that they require it be on eligible Indian Lands beforehand. The residents of Amador County are the persons negatively impacted by the numerous imminent detrimental impacts of the unlawfully approved casino in their community.

IV. CONCLUSION

The land at Buena Vista is not now and never has been eligible Indian lands upon which the acknowledged

"vice" of casino gambling is allowed. The imminent construction of such a casino will negatively impact the Plaintiffs in several particulars. Those negative impacts will be remediated by a Declaratory Judgment finding that land ineligible for such a casino. Contrary to Defendants assertions the Eleventh amendment of the United States Constitution does not give the state and its officers immunity from complying with the mandates of 25 USC 2703 that all Indian gaming be on eligible "Indian Lands" and the prohibition set out in 25 USC 2719 precludes the Buena Vista casino. The Eleventh Amendment protect them from lawsuit by the citizens of this state from challenging the State and governor's failure to comply with 25 USC 2719 and 25 CFR 502.12. Where the record is clear the putative tribe of 3 people calling itself the "Buena Vista Rancheria of Me-Wuk Indians" acquired fee title to the land in May 1996, some 8 years after the cut-off date of October 1988. Plaintiffs have a legal right and have standing to challenge the state's failure and

have standing to challenge the state's failure and refusal to abide by the applicable law and to commit the ultra vires acts of entering into a gaming compact.

Plaintiffs do not sue under the terms and conditions of the compact but rather challenge the legal authority of the Governor and the State to have entered into that compact in the first place. The "tribe" here is not a required party.

The relevant issues in this lawsuit can be determined and decided without the participation of the putative tribe even though they may have a monetary interest in the outcome.

The State Defendants Motion to Dismiss should be denied.

Respectfully submitted,

James E. Marino
Attorney for Plaintiffs

PROOF OF SERVICE

I am, and was at the time of the service hereinafter mentioned, over 18 years of age and not a party to the above-entitled action. My business address is 1026 Camino del Rio, Santa Barbara, California 93110. I am employed in the County of Santa Barbara.

On 30 August 2010, I served the within OPPOSITION TO STATE DEFENDANTS MOTION TO DISMISS, PLAINTIFFS REQUEST FOR JUDICIAL NOTICE VOLUMES I, II & III, and DECLARATION OF PLAINTIFFS COUNSEL on the following as follows:

Jennifer Henderson
Deputy Attorney General
Attorney General of California
1300 I Street, Suite 125
Sacramento, CA 94244

By: Electronically

United States Attorney
Judith Rabinowitz

By: Electronically

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 30 August 2010.

James E. Marino