IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MADERA

STAND UP FOR CALIFORNIA!; BARBARA LEACH,

Plaintiffs,

v.

STATE OF CALIFORNIA et al.,

Defendants.

NORTH FORK RANCHERIA OF MONO INDIANS,

Intervenor-Defendant and Cross Complainant,

v.

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

Cross-Defendants,

CHERYL SCHMIT, an individual,

Real Party in Interest.

Case No.: MCV062850

RULING ON DEMURRERS TO FIRST AMENDED COMPLAINT

Background and Procedural History:

This case concerns the North Fork Rancheria of Mono Indians' ("North Fork Tribe") effort to build a casino with Class III gaming on property which is now held in trust by the federal government for the benefit of the North Fork Tribe. This property is near S/R 99 and

Avenue 17 in Madera County and is not part of the North Fork Tribe's land historically known as the North Fork Rancheria. Pursuant to 25 U.S.C. section 2719 (b)(1)(A) (Indian Regulatory Gaming Act ("IGRA")) the Secretary of the Department of the Interior determined permitting Class III gaming on the land taken into trust would be in the best interests of the North Fork Tribe and its members and would not be detrimental to the surrounding community. Under the IGRA, this two part determination is not effective unless Governor Brown concurs – which he did on August 31, 2012. [1]

In short, Plaintiffs contend Governor Brown had no authority to "concur" with the Secretary of the Interior as such "concurrence" power rests firmly with the Legislature (Complaint, paras 20, 21, 22; *See also* FAC paras 31, 34).

This case commenced with the filing of a complaint by Plaintiffs. This complaint sought Declaratory Relief and a Petition for Writ of Mandate. Plaintiffs alleged via their complaint that Governor Brown (then, the only defendant), violated Article IV, section 19(f) of the California Constitution when he "concurred." Governor Brown demurred to Plaintiffs' complaint.

At the Demurrer hearing on July 16, 2013, Plaintiffs' counsel informed the court he intended to seek leave to amend. The court ordered additional briefing, and set a further hearing on Defendant's Demurrer for October 25, 2013.

On August 15, 2013, the North Fork Tribe filed an Ex Parte Application for Leave to Intervene, which was heard and granted on August 23, 2013. The Demurrer briefing schedule was further amended.

[1] This summary is taken from Plaintiffs' complaint and the Preamble to the Tribal-State Compact Between the State of California and the North Fork Rancheria of the Mono Indians of California, which compact is located at Exhibit A to Plaintiffs' Request for Judicial Notice in Opposition to Demurrer, filed July 16, 2013.

On August 21, 2013, Plaintiffs' filed their Motion to File First Amended Complaint ("FAC"), which was heard and granted on September 24, 2013. The FAC kept the original first two causes of action against the Governor (Ct 1- Violation of California Constitution and Ct 2- Writ of Mandate) and added two new causes of action as well as new defendants. The new causes of action (Ct 3- Violation of California Constitution and Ct 4- Writ of Mandate) were alleged against the Governor as well as the new defendants, State of California, Kamala D. Harris, California Gambling Control Commission, and the Bureau of Gambling Control.

A separate round of Demurrers were filed by Defendants and Intervenor and opposed by Plaintiffs.

The court prepared a Tentative Ruling which was provided to the parties in advance of the hearing on the Defendants'/Intervenor's Demurrers on February 28, 2014 at 8:30 a.m. in Department 4. At that hearing, the following parties appeared:

On CourtCall: William Torngren for Defendants; Christopher Babbit for Intervenor
In Person Appearances: Sean Sherlock for Plaintiffs; Timothy Muscat for Defendants; Fredric Woocher for Intervenors.

The Parties' Positions:

Plaintiffs' Position: Plaintiffs contend the Governor had no authority to "concur" with the Secretary, this being in the province of the Legislature. This lack of authority makes the compact invalid, Plaintiffs argue. Plaintiffs also contend permitting Class III gaming on off-reservation land under 25 U.S.C. 2719 (b)(1)(A) was never contemplated by Article IV Section 19(f) of the California Constitution, citing to a "latent ambiguity" in Sections 19(e) and (f) such that extrinsic evidence (e.g. voter guides) must be considered to determine the voters' intent.

For the first time at the demurrer hearing on February 28, 2014, Plaintiffs cited to the following two cases, which Plaintiffs contended support a "patent ambiguity" argument applicable to Article 4 Section 19 of the California Constitution: *In re Austin P v. N.B.* (2004) 118 Cal.App. 4th 1124, 1130 and *Romano v. Mercury Insurance Company* (2005) 128 Cal.App. 4th 1333, 1340.[2] Plaintiffs contend the terms "Indian lands" and "tribal lands," both of which are used in Section 19(f), have different meanings: "Indian lands" is defined under IGRA, but "tribal lands" is not so defined. Plaintiffs argue that "tribal lands" must be narrower in meaning than "Indian lands" such that an ambiguity is created as to whether off- reservation lands were contemplated by the voters when Section 19(f) was approved. Plaintiffs also argued the phrase "....recognized Indian tribes on Indian lands in California ...." did not refer to "Indian lands in California" but rather could refer to Indian tribes in California -- or, at the very least, that the meaning of this phrase is patently ambiguous so as to require a reference to the voter guide.

Defendants' and Intervenor's Positions:

Defendants contend the first two causes of action fail to state causes of action against the Governor as (among other arguments) the Governor's power to "concur" with the Secretary of the Interior's two part determination flowed from his authority under California Constitution article IV, section 19(f)[3] to negotiate and conclude compacts, subject to ratification by the Legislature, for Class III gaming by federally recognized Indian tribes on Indian lands in California in accordance with federal law, as well as under IGRA (25 U.S.C. section 2719 (b)(1)(A)). See Defendants' Points and Authorities in Support of Demurrer, pages 7-8.

Defendants contend the second two causes of action fail, first, because

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[2] Defendants' and Intervenor's counsel both addressed these cases, and the "patent ambiguity" argument, at the hearing and both stated on the record they did not need further time to brief this issue.

[3] Defendants also cite to Government Code sections 12012.5(d) and 12012.25(d).

Article IV, section 19(f) is constitutional as it means what it says - arguing that "Indian lands" does not place a limit on when those lands were acquired or where they are located, and "in accordance with federal law" includes the IGRA. Defendants argue there is no latent ambiguity in the Constitution, so as to require an analysis of voter guides or legislators' comments – and that even if those secondary sources were considered it would not change the outcome. Secondly, Defendants submit the dispute as to the third and fourth causes of action is not "ripe," because a referendum has qualified to put AB 277 (the law ratifying the compact at issue) on the November, 2014, ballot. As AB 277 is not presently the law and cannot become the law until, at the earliest, after the November, 2014, election, Defendants argue, there is no present controversy for the court to resolve. *See* Defendants' Reply to Plaintiffs' Opposition to Demurrers to FAC, pages 3-7.

North Fork Tribe's Position:

The Tribe's position as to the first two causes of action is identical to that of Defendants (Section 19(f) authorizes the Governor to negotiate and the legislature to ratify this compact, and, even if the voter guide were to be considered, it does not suggest Class III gaming was to be limited to pre existing Indian lands). See North Fork Tribe's Memorandum of Points and Authorities in Support of Demurrer to Plaintiffs' FAC, pages 2-8. The Tribe further argues *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States of America* 367 F.3d 650, 664-665 (7th Cir. 2004), stands for the proposition that under IGRA (specifically under 25 U.S.C. 2719 (b) (1) (A)) there is no "separation of powers" concern as federal law itself authorizes the concurrence by the Governor of the Secretary of the Interior's decision to take land in to trust. The Tribe also asserts there is no "latent ambiguity" in section 19(f) so as to require external information to interpret the constitution. *See* North Fork Tribe's Reply in Support of Demurrer to FAC, pages 4-5.

Concerning the third and fourth causes of action, while the North Fork Tribe agrees with the Defendants' position the Governor's "concurrence" actions were permitted by the Constitution, the Tribe diverges from Defendants concerning the ripeness of AB277, in light of the referendum. The North Fork Tribe argues the third and fourth causes of action are still ripe for decision (ie, ruling on the demurrer). *See* North Fork Tribe's Reply in Support of Demurrer to FAC, pages 5-8.

Legal Analysis:

Standard in ruling on a demurrer:

In ruling on a demurrer, the Court must accept as true all allegations of fact contained in the complaint. *See Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318. The Court must interpret the complaint reasonably, reading it as a whole and considering all parts in their context. *See Courtesy Ambulance Serv. v. Superior Court* (1992) 8 Cal. App. 4th 1504, 1519. However, a demurrer does not admit contentions, deductions or conclusions of fact or law alleged in the challenged pleading. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1149.

Separation of Powers:

The cornerstone of Plaintiffs' argument is the Governor had no power to "concur" with the Secretary of the Interior without usurping the legislature's powers. However, the California Supreme Court has made it clear that each branch (executive, legislative and judicial) "for its own existence must in some degree exercise some of the functions of the others" (*See Younger v. Superior Court* (1978) 21 Cal. 3d 107, 117; *quoting from and citing with approval Laisne v. Cal.St. Bd. Of Optometry* (1942) 19 Cal.2d 831, 835). *Younger* continued that "the purpose of the doctrine (of separation of powers) is to prevent one branch of government from exercising the *complete* power constitutionally vested in another…; 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." *Younger, supra*, at 117 (emphasis in original).

Here, the court does not believe it is necessary to reach the separation of powers argument. The language of the California Constitution is clear. Under California Constitution article IV, section 19(f), the Governor has the power to "negotiate and conclude compacts, subject to ratification by the Legislature, for [Class III gaming] by federally recognized Indian tribes on Indian lands in California in accordance with federal law..." Under the two part test of the IGRA (federal law), land can be taken into trust by the federal government (to become Indian lands) subject to the concurrence of the Governor. To the court, the plain meaning of section 19(f) is as follows: the Governor may negotiate and conclude compacts on Indian lands – regardless of when those lands become "Indian lands" – or whether they are "off-reservation" - so long as such actions are in compliance with federal law (e.g. the IGRA). To hold otherwise would make the phrase "negotiate and conclude compacts" meaningless, where concurrence is necessary under, for example, the two part test of 25 U.S.C. section 2719 (b) (1) (A) (federal law). If the Governor cannot "concur" with the Secretary of the Interior in the Secretary's decision to put the land into trust, how can he then "negotiate and conclude" a compact that, to be enforceable, depends on the concurrence? The court finds Plaintiff's argument (reserving concurrence to the legislature) to be beyond the plain meaning of the language of section 19(f).

Concerning the Tribe's argument that *Lac Courte, supra*, essentially provides federal authority for a state's Governor to "concur" with the Secretary of the Interior's decision to take land into trust – such that the "executive v. legislative" power analysis is not necessary, this court does not read *Lac Court* so broadly, In particular, *Lac Court* states: "The Tribes erroneously assume that § 2719(b)(1)(A) vests the Governor of Wisconsin with authority to act outside of the strictures of the gaming policy that Wisconsin has already established through legislation and amendments to the Wisconsin Constitution." *See Lac Courte, supra*, at 664. This court finds

while federal law may permit a Governor to concur, the concurrence authority must initially come, at least in California, from the State.

The "Patent Ambiguity" argument:

The court has reviewed both the *In re Austin P., supra*, and *Romano, supra*, cases and fails to find a patent ambiguity in Article 4, Section 19(f). Both *In re Austin* and *Romano* start their analysis with the basic statutory construction rule that if statutory language is not ambiguous, it means what it says and the analysis goes no further. More particularly: "We begin by examining the words of the [statute]; if the statutory language is not ambiguous, then we presume the legislature meant what it said, and the plain meaning of the language governs." (*In re Austin P., supra*, at 1129.) Further: "Language is language, and the plain meaning rule is the first step in not only common law insurance analysis [citations omitted]; We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent.... "In determining intent we look first to the language of the statute, giving effect to its "plain meaning" ...Where the words of a statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statue or from its legislative history." (*Romano, supra*, at 1342.)

Plaintiffs cited to these cases to support their argument "Indian lands" and "tribal lands" must have different meanings (creating a patent ambiguity). Plaintiff's referred the court to the following quote in *In re Austin P.*, which concerned the meaning of the terms "custody," place" and "placement" in the context of a juvenile proceeding: "When different terms are used in parts of the same statutory scheme, they are presumed to have different meanings." *In re Austin P., supra*, at 1130. However, before the In re Austin court made the above comment, it reached the following conclusion: "Because the language of the statute is ambiguous, we must determine its meaning and scope." The statute at issue in that case was Welfare and Institutions Code section 361.2(a):

"When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume *custody* of the child. If that parent requests *custody*, the court shall *place* the child with the parent unless it finds that *placement* with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." See *In re Austin P., supra*, at 1129 (emphases added by *In re Austin P).*

The court found the words "custody, place and placement" to be sufficiently ambiguous to deserve further review and analysis to determine their meanings, in the context of the juvenile proceedings then before the court. Here, this court does not find "Indian lands" and "tribal lands" to be ambiguous, in the context of their use Section 19(f). The sentence which uses "tribal lands" states, in its entirety: "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." First, "Accordingly" ties this sentence back to the sentence above, which the court reads as permitting off reservation Class III gaming on "Indian lands in California," so this court sees no ambiguity. "Tribal" and "Indian" lands are, to this court, intended to have the same meaning. More critical to the analysis, perhaps, is the phrase "....tribal lands subject to those compacts." in the second sentence. "[T]hose compacts" would include the off – reservation Class III gaming compacts contemplated "in accordance with federal law." This means (at least to this court), the reference to "tribal lands" in the second (last) sentence is section 19(f), refers to the same compacts for off reservation gaming on "Indian lands in California" which are established "in accordance with federal law." In short, the court finds that "language is language" and, under the "plain meaning rule" (*Romano, supra*, at 1342), there is no patent ambiguity here and therefore no need to conduct an analysis of what the voters meant by the use of "Indian lands" in one sentence and "tribal lands" in another.

The "Latent Ambiguity" argument:

Plaintiffs argue Article IV, Section 19(f) of the California Constitution contains a latent ambiguity. Plaintiffs' point to what they see as a conflict between Section 19(c) and Section 19(f) concerning the definition of "Indian lands in California" and whether Section 19(f)'s "exception" to the restrictions of Section 19(c) [otherwise prohibiting "casinos of the type currently operating in Nevada and New Jersey"] can be read to go so far as to permit "off reservation" gaming as intended by this compact. *See* Plaintiffs' Opposition to Demurrers to FAC, pages 9-10.

The rule of statutory (or, in this case, Constitutional) interpretation starts with the general rule that "Courts may look to [extrinsic sources] to construe a statute only when the statutory language is susceptible of more than one reasonable interpretation." (Plaintiffs' Opposition to Demurrers to FAC, page 8, lines 6-8, *citing Pacific Gas & Electric Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 86, 92.) Plaintiffs argue the interplay / conflict between Article IV, Sections 19(e) and 19(f) create such a condition (see immediately preceding paragraph). Plaintiffs then argue that even if a statute is "clear and unambiguous on its face," it may still have a "latent ambiguity" when some "extrinsic factor creates a need for interpretation or a choice between two or more possible meanings." (Plaintiff's Opposition to Demurrers to FAC, page 8, lines 9-12, citing to *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal. App.4th 635, 644.)

Preliminary, the court does not read Section 19(f) to be "susceptible of more than one reasonable interpretation." As indicated above, to the court Section 19(f) permits Class III gaming on Indian lands in California taken into trust by the Secretary of the Interior, where the two pronged findings are made, the Governor concurs, and the legislature ratifies a compact negotiated by the Governor.

The "latent ambiguity" route to finding an ambiguity in an otherwise "clear and ambiguous" writing requires facts the court does not find present in this case. Plaintiffs cite to

Varshock, supra, when advancing this argument. However, the court in *Varshock* addressed two statutes (VC 17001 and GC 850.1) and the question of how to apply, or limit, the immunity provided firefighters when it came to operating firefighting vehicles. The court refused to apply the "exception" in VC 17001 to the immunity granted in GC 850.1 because to do so would "eliminate a very large portion of the immunity the Legislature intended to confer under [GC] 850.4" and would "expand liability beyond that recognized in the case law pertaining to tortuous operation of motor vehicles used for firefighting." (*Varshock, supra*, at 645.)

Here, we are not confronted with two statutes in different codes. We have two paragraphs, one immediately following the other, in the Constitution:

> "...
> (e) The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey.
>
> (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. 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." (emphasis added.)

From this language, it is clear, at least to this court, that the people intended to expand Class III gaming to Indian lands in California where permitted by federal law. Federal law permits casinos (Class III gaming) on off reservation lands placed in trust by the Secretary of the Interior (*see* 25 U.S.C. section 2719 (b)(1)(A)), with the concurrence of the Governor.

The court finds no latent ambiguity.

Ripeness as to the Third and Fourth Causes of Action against all Defendants:

Plaintiffs and North Fork Tribe argue the issue is ripe for determination by this court, notwithstanding the fact sufficient signatures were gathered to qualify AB 277 for the November, 2014, ballot. Defendants argue a decision by this court would be merely "advisory" to the voters – because AB 277 is not presently the law, it cannot be in violation of the constitution (referencing the third and fourth causes of action in Plaintiffs' FAC). Defendants cite to *Pacific Legal Foundation v. California Coast Com.* (1982) 33 Cal.3d 158, 170 as supporting this proposition. *Pacific Legal Foundation* does indeed state that courts are not to issue "purely advisory opinions" (*Pacific Legal Foundation, supra*, at 170). However, it also says:

> "On the other hand, the requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." See *Pacific Legal Foundation, supra*, at 170.

Here, the court concludes there is indeed a "concrete dispute" which, if unresolved, will result in "lingering uncertainty," especially given the "widespread public interest in the answer." To put it differently, regardless of the outcome of the referendum/November election, the issue of the constitutionality of "off reservation" Class III gaming pursuant to Governor "concurrence" and the IGRA "two part test" contemplated by 25 U.S.C. section 2719 (b) (1) (A) is sufficiently "concrete" a topic such that any "lingering uncertainty" should be resolved – whether by this court, or a court of review.

Defendants' argument that the third and fourth causes of action in Plaintiffs' FAC are not "ripe" for determination is rejected for the reasons set forth above.

Conclusion:

Plaintiffs have failed to state facts sufficient to state a cause of action as to all four causes of action in the FAC. Plaintiffs have requested leave to amend. However, at the hearing on February 28, 2014, Plaintiff's counsel acknowledged that if the [Tentative] decision was adopted, he would not be able to successfully amend to cure the defects in the pleading. See Blank v. Kirwan (1985) 39 Cal.3d 311, 318, holding a demurrer may be sustained without leave to amend where there is no reasonably possibility that the defect can be cured by amendment.

While this court's ruling is not identical to the tentative, the reasons given in the [Tentative] for sustaining the demurrer, remain here. However, the court has also added additional reasons for sustaining the demurrer (such as rejecting the new "patent ambiguity" argument advanced by Plaintiff at the hearing – finding no patent ambiguity on the fact of Article IV Section 19(f)). Accordingly, Plaintiffs counsel is provided until 4:00 p.m. on March 11, 2014, to notify Department 4's clerk, via facsimile (559-675-6565) whether he contends his clients should be provided leave to amend. This written notice is also to be copied to all other counsel. If Plaintiffs' counsel concludes his clients should be entitled to leave to amend, the court clerk will contact all counsel and set a date on which the parties may appear via CourtCall. At that hearing, a hearing date will be set on Plaintiff's request for leave to amend. The court will then send notice. Should Plaintiff's counsel conclude amendment is not possible, the court will send notice the demurrers are sustained without leave to amend.

The court had reserved April 29, 2014, at 8:30 a.m. for a further Case Management Conference and as the date for the court to announce its ruling on the demurrers. Since the court has now issued that ruling, the only item on calendar for the April 29, 2014, hearing is the Case Management Conference.

IT IS SO ORDERED

Dated: 3/3, 2014

MICHAEL J. JURKOVICH

MICHAEL J. JURKOVICH
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MADERA
209 West Yosemite Avenue
Madera, California 93637-3596

PROOF OF SERVICE

CASE NO: MCV062850

I hereby certify that I am a Deputy Clerk of the Superior Court, County of Madera, for the State of California, and not a party to this action; that on the date set forth below, I served the ***[TENTATIVE] RULING ON DEMURRERS TO FIRST AMENDED COMLAINT*** on the parties named by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the Superior Court mail basket for deposit in the United States Post Office at Madera, California, addressed as follows:

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☒ **VIA MAIL**

☒ **VIA FACSIMILE**

Dated: March 3, 2014

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

CARLA L. RUIZ
Carla L. Ruiz, Deputy Clerk