SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MADERA

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

Plaintiffs,

vs.

STATE OF CALIFORNIA et. al.,

Defendants.

NORTH FORK RANCHERIA OF MONO INDIANS,

Intervenor-Defendant and Cross Complainant

vs.

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 CROSS-COMPLAINANT'S CROSS-COMPLAINT

This matter came on for hearing before this court on June 19, 2014, on the 8:30 a.m. calendar. Sean Sherlock appeared personally for Plaintiffs STAND UP FOR CALIFORNIA! and BARBARA LEACH as well as Real Party in Interest Cheryl Schmidt. Timothy Muscat appeared personally and William Torngren appeared via CourtCall for Defendants and Cross-Defendants STATE OF CALIFORNIA, EDMUND G. BROWN, JR., KAMALA D. HARRIS, CALIFORNIA GAMBLING CONTROL COMMISSION, and the CALIFORNIA BUREAU OF GAMBLING CONTROL (hereafter "State Cross-Defendants"). Fredric Woocher appeared personally and Christopher Babbitt as well as Danielle Spinelli (having been admitted Pro Hac Vice just prior to the hearing) appeared telephonically via CourtCall on behalf of Intervenors and Cross-Complainants NORTH FORK RANCHERIA OF MONO INDIANS.

On calendar for hearing were Plaintiff's and State Cross-Defendants' Demurrers to Intervenor/Cross-Complainant's Cross Complaint. The court, having considered the papers in support and opposed to these demurrers, and the arguments presented at the hearing, issues the following ruling.

Procedural History:

In June of 2013, the California State Legislature passed AB 277, a statute which ratified a gaming compact between the State of California and North Fork Rancheria of Mono Indians ("The Tribe"). In July of 2013, Real Party in Interest Schmit submitted a request for title and summary for referendum to overturn AB 277 to the California Attorney General's Office. The Attorney General issued a title and summary, and the proposed measure was entitled "Referendum to Overturn Indian Gaming Compacts." Schmit then circulated a petition to qualify the measure for the November 2014 ballot. The short title appearing on the Petition read "Referendum to Overturn Chapter 51, Statutes of 2013, Relating to Amended Tribal-State Gaming Compacts." See Exhibit A to North Fork Rancheria's Request for Judicial Notice. In November 2013, the California

Secretary of State certified that the Referendum Petition qualified for the November 2014 election.

Meanwhile, Stand Up for California filled a lawsuit against the State of California challenging Governor Brown's authority to enter into the compact. The Tribe intervened in the lawsuit, and both parties demurred to the First Amended Complaint. Shortly before the hearing on the demurrers[1], the Tribe filed a cross complaint against Real party in Interest Schmit and the State Cross-Defendants. The cross-complaint alleges one cause of action for declaratory relief that the referendum on AB 277 is invalid. Plaintiffs and State Cross-Defendants filed demurrers to the Cross-Complaint.

Standard of Review in Ruling on 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.

Parties' Positions:

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[1] On March 3, 2014, this court issued its Ruling on Demurrers to First Amended Complaint, sustaining the demurrers. On March 12, 2014, the court issued its order sustaining the Demurrers without leave to amend, and entering Judgment of Dismissal of Plaintiff's First Amended Complaint. Plaintiff filed its Notice of Appeal of this court's ruling on April 11, 2014. That appeal is currently pending.

The Tribe:

The Tribe's main contention is that the legislature's ratification of the Compact cannot be undone by referendum. The Tribe first argues that ratification is not a "legislative act," and thus the portion of AB 277 which ratifies the Compact is not subject to referendum. Secondly, the Tribe argues that California law must be interpreted to exclude compact ratification from the referendum process or the law will be internally inconsistent, conflict with the Indian Regulatory Gaming Act's ("IGRA") 45 day evaluation requirement, and IGRA's requirement that states negotiate in good faith. Lastly, the Tribe argues that the short title which appeared on the petition qualifying the referendum for the ballot violated Election Code §9011. The Tribe alleges that the short title was misleading in that it referred to "Amended Tribal-State Gaming Compacts" when, it argues, the compacts at issue are not amended.

The State:

The State's position on demurrer is because AB 277 is a statute, it is necessarily a legislative act subject to referendum under California's Constitution. The State notes that under Article II § 9, all state statutes are subject to referendum unless specifically exempted. The State also argues that the act was legislative, rather than administrative in nature. The State argues the referendum process does not conflict with IGRA because, under IGRA, state law controls when a compact has been approved by the state, and federal precedent shows that a compact which was never valid under state law does not take effect when it is entered in the Federal Register. Lastly, since The Tribe does not assert any wrongdoing on the part of the state in their Elections Code §9011 argument, the State asserts that The Tribe has not asserted there is any actual controversy between the parties on that basis, so it cannot be used to state a cause of action against the State.

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Schmit:

Schmit's Position regarding the legislative nature of AB277 and the conflicts with IGRA are substantially similar to the State's position. On the Elections Code §9011 claim, Schmit argues that the title cannot be misleading as a matter of law because there is no legal distinction between a "compact" and an "amended compact," and that North Fork Tribe has not alleged that any actual confusion was caused by the wording. Additionally, Schmit argues that because the State and The Tribe negotiated a compact in 2008 which differs from the current compact, the use of the term "amended compact" in the short title is accurate.

Schmit raises an additional argument that pre-election review is improper because challenges to a ballot measure's validity are more appropriately addressed post-election. Schmit asserts that the court may decline to grant declaratory relief as The Tribe has an adequate pre-election remedy in filing for a writ of mandate under Elections Code §13314.

Analysis

Whether the Cross-Complaint is suitable for pre-election review

Whether the Cross-Complaint is suitable for pre-election review is a threshold issue. Accordingly, the court will consider that issue first.

The general rule is that challenges to initiatives and referenda should be brought only after they are passed in an election. *American Federation of Labor v. Eu* (1984), 36 Cal. 3d 687, 695("A.F.L. v. Eu" or "A.F.L."). However, when the challenge is based on the electorate's power to vote on the measure in the first instance, pre-election review may be appropriate. *Id.* In this case, The Tribe's claims relate to whether the referendum is properly before the voters. The

Tribe's claim that the legislature's ratification of the compact was not a legislative act, as well as its claim that interpreting California law so as to allow a referendum may conflict with IGRA, both directly relate to whether the electorate have the power to subject AB277 to referendum[2]. The Tribe's claim that the proponents of the referendum failed to follow Election Code §9011 also relates to the measure's qualification for the ballot. Both of these types of claims have historically been found appropriate for pre-election review. *See Id.*; *Costa v. Superior Court* (2006), 37 Cal. 4th 986, 1006.

This being said, the court may still decline to grant declaratory relief under Code of Civil Procedure §1061 when its determination is not necessary or proper at the time under all the circumstances. This court declines to exercise its discretion in this matter, and will instead hear this dispute. Demurring parties argue The Tribe has an adequate remedy at law, by utilizing the Petition for Writ of Mandate remedy in Elections Code section 13314. However, to do so, the Tribe must be an "Elector" (E.C. 13314(a)(1)). It is not.

Whether AB277 is a Legislative Act Subject to Referendum

The Constitution of the State of California reserves the power of referendum in the people of California. Cal. Const., art. IV, §1. The scope of the referendum power is to be liberally construed to avoid improperly invalidating the people's right to vote. See *Independent Energy*

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[2] Schmit argues The Tribe's contention that the referendum process conflicts with IGRA has to do with the validity of the referendum rather than the electorate's power to adopt it, and it is accordingly not appropriate for pre-election review. However, The Tribe's ultimate argument is that the court should interpret Article IV, §19(f) of California's Constitution as exempting ratification of compacts from the referendum power in order to avoid a conflict with IGRA. Since The Tribe has not asked the court to resolve the underlying preemption issue, the matter may properly be resolved prior to the election. In its purest sense, The Tribe is arguing the populace is powerless to put this dispute to a referendum, because the ratification of AB 277 was not a legislative act.

Producers Ass'n v. McPherson (2006), 38 Cal. 4th 1020, 1032; *Martin v. Smith* (1959), 176 Cal. App. 2d 115, 117("Thus it is the duty of the courts to jealously guard this right of the people and to prevent any action which would improperly annul that right.") Accordingly, the court should resolve doubts in favor of the referendum process whenever it may reasonably do so. *Independent Energy Producers Ass'n* at 1032.

The scope of the referendum power is defined by the California Constitution Article II §9(a), which reads as follows: "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." The State and Plaintiff both argue that the plain language of the Constitution conclusively shows that AB277, which was passed as a non-urgency statute, is subject to referendum.

The Tribe argues that the form of the enactment is not determinative of whether the act may be challenged by referendum. Instead, it argues, the substance of the act must be legislative in nature, even if the form of the act is a statute. For the reasons that follow, the court holds that because AB277 was enacted as a statute, it is subject to referendum under the State Constitution.

The court begins by considering the plain language of the Constitution. By its terms, Article II §9(a) applies to "statutes and parts of statutes" with the exception of "urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." Because the court must construe Article II §9(a) so as to protect the right to referendum, the court interprets the referendum power to extend to all statutes which do not fall into one of the three specifically enumerated exceptions. Statutes ratifying tribal-state gaming compacts do not fall into one of these exceptions.

The Tribe argues that *A.F.L. v. Eu, supra,* 36 Cal. 3d at 710 demonstrates it is the

substance of the act rather than the form which determines whether the act is subject to referendum. But *A.F.L.* analyzed parts of an initiative which required the California Legislature to pass a resolution. In discussing the difference between a statute and a resolution, the California Supreme Court suggests that a statute is always legislative:

> "A statute declares law; if enacted by the Legislature it must be initiated by a bill [Citation], passed with certain formalities (id.), and presented to the Governor for signature [Citation]. Resolutions serve, among other purposes, to express the views of the resolving body. [Citation]. A resolution does not require the same formality of enactment, and is not presented to the Governor for approval."

A.F.L., *supra*, at 708-709. Likewise, the court strongly suggested that enactments passed with the formality of a statute are always subject to referendum:

> "Thus as of the 1920's, the majority view was that under constitutional provisions such as that in California, the reserved power of initiative and referendum was limited to such measures as constituted the exercise of legislative power to create binding law -- **the kind of measure that would be introduced by bill, duly passed by both houses of the legislature, and presented to the governor for signature."**

A.F.L., *supra*, 36 Cal. 3d at 711 (emphasis added). AFL-CIO draws a distinction between statutes and other types of legislative acts, and nothing from the language of the case leads the court to hold a non-exempt statute is not subject to referendum based on its substance.

None of the other cases The Tribe cites stand for the proposition that a measure passed with the formality of a statute by the State legislature is not subject to referendum (excepting those specifically exempted). In absence of clear authority on that point, and interpreting Article II §9(a) so as to preserve the referendum process, the court holds that AB277 is subject to referendum under Article II §9(a) because it is a non-exempt statute.

The Tribe also argues that Article IV, §19(f) of California's Constitution exempts statutes that ratify tribal compacts for referendum because at the time the provision was adopted, ratification was understood to be a non-legislative act. Given the court's duty to "jealously guard" the people's right to referendum (*Martin v. Smith, supra,* 176 Cal. App. 2d at 117), the court

declines to read such an exemption into Article IV, §19(f). If the electorate had intended to exclude statutes ratifying state-tribal compacts from the referendum process, it would have explicitly excluded them either in that provision or in Article II §9(a).

Because the court holds that AB277's non-exempt statutory form is dispositive of the issue, the court need not reach The Tribe's other argument concerning whether the ratification of a Tribal-State compact is a legislative act. This being said, the court is mindful of the implications of its ruling and the desire of the parties for direction on the issues presented, so it will address this question.

Whether Ratification of this Tribal-State Compact is a Legislative Act

Fishman v. City of Palo Alto (1978) 86 Cal. App. 3d 506, at page 509 held:

> "Legislative acts generally are those which declare a public purpose and make provisions for the ways and means of its accomplishment. Administrative acts, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body. (See *Lincoln Property Co. No. 41, Inc.* v. *Law, supra*, 45 Cal.App.3d 230, 234, and cases cited.) *Seaton* v. *Lackey* (1944) 298 Ky. 188, 193 [182 S.W.2d 336, 339] stated the classic and often quoted test: "[The] power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." (See, e.g., *Lincoln Property Co. No. 41, Inc.* v. *Law, supra*, 45 Cal.App.3d 230, 234.) The test is not precise, and there is some inconsistency of approach between the published decisions. (See Note, *supra*, 3 Stan.L.Rev. 497, 503, and cases cited.)"

The question to be answered, then, is whether the ratification of AB 277 "prescribes a new policy or plan" or "merely pursues a plan already adopted by the legislative body itself, or some power superior to it".

To the court, AB 277 does indeed prescribe a new policy or plan. It permits Class III "off reservation" gaming. At the outset, the court notes The Tribe's delicate position. The Tribe supports the Legislature's ratification of AB 277 and the Governor's "concurrence" which led to

the land being placed in trust by the U.S. Government. At the same time, it challenges the Legislature's act as "non legislative" to defeat the referendum process. The court gives weight to the State Cross-Defendant's argument at page eight (footnote 4) of its Memorandum of Points and Authorities in Support of Demurrer. The State Cross- Defendants remind the court that during prior proceedings in this court, The Tribe has acknowledged the Legislature's use of its "own legislative prerogative" to independently validate the Governor's concurrence, when it ratified AB 277. This argument is more consistent with a "new policy or plan" than one which "merely pursues a plan already adopted by the legislative body itself." Also, the compact itself contains language indicating its intent to "prescribe a new policy or plan". Some of those provisions are listed in the State Cross-Defendants' Reply Memorandum of Points and Authorities in support of their Demurrer, page 6, lines 14-28; page 7, lines 1-10 – i.e., certain types of gaming permitted, conveyance of new powers and duties to state agencies, implementation of a revenue sharing agreement with the Wiyot Tribe, and the like.

In the end, if this court were required to reach this question, it would find the ratification of AB 277 to be "legislative" and subject to the referendum process.

Whether California's Referendum Process Conflicts with IGRA

The Tribe also argues that the court should interpret California law to exclude the ratification of tribal-state compacts from referendum because otherwise California law will be internally inconsistent and potentially conflict with IGRA. The Tribe identifies two potential areas of conflict: First, the Tribe claims that the referendum process conflicts with the time limits on the compact review process under both California law and IGRA. Second, the Tribe argues that the referendum process conflicts with the State's duty to negotiate in good faith under IGRA.

The court recognizes that when State law arguably conflicts with a Federal law, the court

should interpret the State law so as to avoid the conflict when possible. *Wainwright v. Superior Court* (2000) 69 Cal.App.3d 325, 333-334. However, the court is also mindful of its responsibility to interpret California law in favor of the referendum process. *Independent Energy Producers Ass'n v. McPherson, supra*, 38 Cal. 4th at 1032.With both these principles in mind, the court considers whether the referendum process can be read harmoniously with IGRA's timing requirements and the State's duty to negotiate in good faith.

a. Timing Requirements Under IGRA

Under California law, once California's Secretary of State receives a statute ratifying a tribal-state compact, he or she is directed to forward a copy of the compact to the Secretary of the Department of the Interior. Cal. Gov. Code § 12012.25(f). The Secretary of the Department of the Interior then has 45 days to review the compact and either approve it or disapprove it. Once approved, the compact is entered into the Federal Register and is put into effect under Federal Law.

The Tribe argues that because Cal. Gov. Code § 12012.25(f) does not allow the Secretary of State to wait until the 90 day period for referendum passes before forwarding the compact to the Department of the Interior, subjecting compact ratification statutes to referenda would make it impossible for such compacts to be reviewed within the 45 day time period. 25 U.S.C. § 2710(d)(8)(C). Furthermore, the Tribe argues that ratification was effective immediately when the legislature passed AB 277, and that the compact went into effect as soon as it was entered in the Federal Register by the Secretary of the Department of the Interior. A referendum then would constitute an ex post facto nullification of the compact, which frustrates IGRA's purpose, according to The Tribe. The court, it argues, should interpret Section 19(f) of California's Constitution as excepting ratification of compacts from referendum in order to avoid these conflicts with state and federal law.

Pueblo of Santa Ana v. Kelley (10th Cir. 1997), 104 F.3d 1546 is instructive. In *Pueblo of Santa Ana*, the governor of New Mexico entered into gaming compacts on behalf of the state. The 10th Circuit held that because the governor lacked authority under New Mexico law to bind the state to the compacts, they were never validly entered into by the state. *Id.* at 1055. Thus the compacts were not in effect even though they had been approved by the Secretary of the interior and entered into the Federal Register. *Id.*

Under California law, a non-exempt statute is not effective until January 1st following the 90 days after it is enacted, or the day after it is adopted by referendum. Cal. Const., art. IV, §8 (c)(1), art. II, §10(a). Because the compact at issue in this case was ratified by a non-exempt statute, the ratification will not take effect, and the compact will not be entered into, unless or until it is adopted by referendum. If the referendum invalidates AB 277, it will not be an ex post facto un-ratification; the ratification was never effective to begin with. The court has considered the Tribe's argument that *Pueblo* is distinguishable because it dealt with a compact which was void *ab initio*- a circumstance which is not repeated here. The court has considered The Tribe's argument, but balancing the policy of the courts to "jealously guard" the people's right to referendum, it finds this is a distinction without a difference. Whether a compact is "void" or "voidable" does not impact the analysis. Whether (or when) the compact goes into effect depends on the outcome of the referendum process.

With this in mind, it is clear that California's referendum process does not conflict either with Cal. Gov. Code § 12012.25(f) or with IGRA's timing requirements. The Secretary of State is not in receipt of a statute ratifying a compact for purposes of Cal. Gov. Code § 12012.25(f) until that statute takes effect. In the case of a non-exempt statute which has qualified for referendum, the Secretary of State's obligations under Cal. Gov. Code § 12012.25(f) do not apply until the day after a referendum adopted the statute. The fact that in this case the Secretary of State forwarded the statute to the Secretary of Interior before it was in effect does not change that result. Also,

under *Pueblo of Santa Ana, supra*, 104 F.3d at 1055, the fact that the Secretary of the Interior published the compact in the Federal Register likewise does not give it effect when it was not effective under state law. Accordingly, the court holds that California's referendum procedure does not conflict with the timing requirements of Cal. Gov. Code § 12012.25(f) or IGRA.

a. Good Faith negotiations

The Tribe argues that allowing a referendum on a tribal-state compact would improperly give the electorate veto power over the negotiation process. Since the electorate cannot participate in negotiations, they argue, the state cannot in good faith allow them to unilaterally reject a negotiated compact.

The Tribe argues that the duty of a state to bargain in good faith with a tribe under IGRA is analogous to the duty to bargain in good faith under California's Meyers-Milias-Brown Act ("MMBA"). The Tribe then cites *Voters for Responsible Retirement v. Bd. Of Supervisors* (1994), 8 Cal. 4th 765 to argue that under the MMBA, subjecting a negotiated agreement to a referendum is incompatible with good faith negotiations. *In Voters*, the court upheld a statute which exempts from referendum ordinances adopting a Memorandum of Understanding ("MOU") between a county and an employee organization. In dicta, the Supreme Court raised concerns that allowing a referendum on such an ordinance would interfere with the duty of the county to meet and confer in good faith imposed by the MMBA. *Id.* at 782.

The court finds that this case is distinguishable from *Voters for Responsible Retirement. Voters* dealt with a statute that specifically exempted county ordinances approving MOUs from referendum. There is no similar law exempting statutes ratifying tribal compacts from referendum. Additionally, the court's analysis in large part was premised on the fact that normally when counties negotiate an MOU under the MMBA, the same government body that negotiates the

MOU is also responsible of accepting the MOU. *See Voters for Responsible Retirement, Supra,* 8 Cal. 4th at 782. The process by which States negotiate with Tribes is not the same; only the Governor is given the power to negotiate compacts with Tribes, and only the Legislature may ratify the compacts. Cal. Const. Art. IV §19(f). While The Tribe argues that negotiations can take place "in the shadow of the legislature," there are two problems with this argument. First, under the separation of powers doctrine, it would be no more permissible for the Legislature to inject itself into the negotiation process than it would be for the electorate to do so. Secondly, because the California Legislature is a representative body, to the extent it can permissibly make its views known to the Governor during the negotiation process, it does so on behalf of the electorate. A referendum on a statute ratifying a tribal-state compact therefore does not undermine the bargaining process any more than legislative ratification does on its own.

The court also notes that *Voters for Responsible Retirement* explicitly declined to hold that referenda on employment agreements would always violate the MMBA. *Voters for Responsible Retirement* , supra, at 784 fn. 6. In fact, a referendum on an MOU made under the MMBA was upheld in *United Public Employees v. City and County of San Francisco* (1987), 190 Cal.App.3d 419. In *United Public Employees*, the plaintiffs challenged a portion of the San Francisco city charter which required the city to submit MOUs to the electorate. The plaintiffs argued that subjecting employment agreements to the public for approval violated the MMBA. The court of appeal rejected this argument, holding: "...the MMBA does not prescribe the manner in which an agreement between a local government and an employee organization should be put into effect." *Id.* at 423.

Similarly, IGRA allows California to determine its own means of entering into compacts. The court finds *United Public Employees* to be more analogous to the current case than *Voters for Responsible Retirement*. Accordingly the court finds that IGRA's good faith bargaining requirement does not conflict with California's referendum process.

Because the referendum process does not interfere with IGRA's timing requirements or the State's ability to bargain in good faith, and does not render California's statutory scheme internally inconsistent, The Tribe does not state a cause of action on those grounds.

Whether the Addition of the Word "Amended" to the Petition's Short Title Invalidates the Referendum

The Tribe contends Plaintiff's insertion of the term "Amended" in front of "Tribal-State Gaming Compacts" makes the referendum invalid under Elections Code 9011. See The Tribe's Cross-Complaint, page 5, paragraph 8.

In its entirety, the Short Title states: "Referendum to Overturn Chapter 51, Statues of 2013, Relating to Amended Tribal-State Gaming Compacts". Tribe argues there was no prior compact to "amend" and, as a result, this improper title "may have misled voters into signing the petition, particularly given that a State may not *deny* an eligible tribe a compact to conduct class III gaming on Indian lands in the first instance, but is under no obligation to *amend* a tribe's existing compact." [Emphasis in original.] See Tribe's Cross-Complaint, pages 5-6, at paragraph 8.

Elections Code section 9011 states, in full:

> "Across the top of each page after the first page of every referendum petition or section of a referendum petition, which is prepared and circulated, there shall be printed in 18-point gothic type a short title, in 20 words or less, showing the nature of the petition and the subject to which it relates.
> A space at least one inch wide shall be left blank at the top of each page and after each name, for the use of the county elections official, in verifying the petition.
> *(Enacted by Stats. 1994, Ch. 920, Sec. 2.)"*

Factually, there is a difference of opinion between counsel as to whether there was or was not a prior compact, such that the term "amended" is accurate. Plaintiff says "yes" and points to

Exhibit 4 to its Request for Judicial Notice (the 2013 Compact which is at issue in this litigation) and, in particular, to the Preamble. The court notes that on page 3 of the 2013 Compact there is a recitation of a 2008 compact executed "between the State and the Tribe." Tribe disputes this was an enforceable compact and therefore argues the term "Amended" is misleading.

The court need not determine whether there was in fact a 2008 compact, as it may resolve this dispute without that information.

To the court, the question is whether the Short Title complies with Elections Code section 9011. In other words, does it show "the nature of the petition and the subject to which it relates"? In the context of reviewing an initiative petition, *California Teachers Association v. Collins*, (1934) 1 Cal. 2d 202 at 204-205 stated:

> "The requirements of both the Constitution and the statute are intended to and do give information to the electors who are asked to sign the initiative petitions. If that be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law."
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> ....
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> "In a recent proceeding in the District Court of Appeal of the Third Appellate District, the court applied the rule of liberal construction to the "short title" on an initiative petition then before it, and held that certain words included therein might "be disregarded as not descriptive for any purpose". (*Hunt* v. *Jordan, Secretary of State*, Civ. 5192 -- June 11, 1934, 139 Cal. App. 200.) In the proceeding before us, the attorney-general was able to summarize the title of the proposed measure in seventeen words. We are of the view that the omission in the "short title" of the words "Constitutional Amendment" and the phrase "Submitted Directly to the Electors" would detract nothing from its descriptive feature. Therefore, regarding the inclusion of these words and the phrase as surplusage, we are of the view that the mandate of the legislature has been substantially complied with, and that the purpose of the "short title", which is to prevent the deceiving of electors by the use of misleading pages and titles after the first page, which may strictly comply with the law, has been served. We are more strongly inclined to so hold in view of the fact that the present initiative petition was prepared and is being circulated in good faith, that many thousands of signatures thereto have already been secured, and the time is short within which the large number of required signatures can be again secured."

From this case, and its references, we learn that "substantial compliance" with Election Code requirements, including the usage of "surplusage" language, will not invalidate a Short Title. We also know that even with this broad interpretation, a Short Title may still be invalidated if it is misleading to the voters. *See Assembly v. Deukmejian* (1982) 30 Cal. 3d 638 at 654.

At the hearing on June 19, 2014, this court asked counsel for The Tribe whether, should the demurrers be overruled as to this issue, he intended to put on evidence of just how the insertion of "Amended" (assuming it to be inaccurate) "may well have misled voters". Counsel for The Tribe indicated The Tribe would be submitting this issue on the pleadings for the court's decision, without introducing evidence at a trial.

From this, it appears then the court must determine, as a matter of law, whether the insertion of the word "Amended" into the Short Title precluded the petitioners from: "showing the nature of the petition and the subject to which it relates." See E.C. 9011. The court finds it does not. The court also finds the insertion of this word (if inaccurate) was mere surplusage, such that by its insertion the petitioners were still in "substantial compliance" with E.C. 9011 (*California Teachers Association, supra, at 204).* Most importantly, this court finds voters were not/will not be misled by the insertion of the word "Amended" (see *Assembly v. Deukmejian, supra, at 654).*

To come to this conclusion, the court considered the fact no evidence was produced by The Tribe that anyone was actually mislead, nor does The Tribe intend to introduce such evidence at trial. Also, the court reviewed the petition itself, which is located at Exhibit A to Tribe's Request for Judicial Notice. The court notes while the term "Amended" does exist in the Short Title, on the same page, three lines below, in the text prepared by the Attorney General, it states:

"(13-0007) REFERENDUM TO OVERTURN INDIAN GAMING COMPACTS". There is no mention of the word "Amended" as to the gaming compacts. Further, in the middle of the same (first) page, in bold, it states: "TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE NORTH FORK RANCHERIA OF MONO INDIANS OF CALIFORNIA." This also does not say "Amended" compact. The court's point is IF the term "Amended" was noted (and was not seen as surplusage) by the voter, reasonably, the voter also saw three lines down "REFERENDUM TO OVERTURN INDIAN GAMING COMPACTS" and in the middle of the page: "TRIBAL-STATE COMPACT BETWEEN THE STATE OF CALIFORNIA AND THE NORTH FORK RANCHERIA OF MONO INDIANS OF CALIFORNIA." These two headings make it clear to a voter considering signing the petition that the subject of the referendum is a compact, not an "Amended" compact, to the extent the insertion of such a term would make a difference (i.e., be misleading to a voter).

In the end, the court is also mindful of its obligation to "jealously guard" the public's right to express their opinions via the referendum process (*Martin v. Smith*, supra, at page 117).

Conclusion

For the reasons given above, the Court sustains the demurrers as to The Tribe's sole cause of action in its Cross-Complaint for Declaratory Relief.

The Tribe in its Opposition to the Demurrers of the State Cross-Defendants and of the Plaintiff, did not seek leave to amend if the Demurrers were sustained. However, a demurrer may only be sustained without leave to amend if there is no reasonable possibility the defects raised can be cured by amendment. To provide The Tribe sufficient time to consider this matter, counsel

for Tribe is provided to 4:00 p.m. Monday, July 7, 2014, to notify Department 4's Clerk, via facsimile (559-675-6565) whether he[3] contends his client should be provided leave to amend. This written notice is also to be copied to all other counsel. If The Tribe's counsel concludes his client 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 The Tribe's request for leave to amend. The court will then send notice. Should The Tribe's counsel conclude amendment is not possible, the court will send notice the demurrers are sustained without leave to amend, dismissing the Cross Complaint, and entering judgment in favor of Plaintiff and State Cross-Defendants. Depending on the response by counsel for Tribe, the court will decide whether to set a further Case Management Conference.

DATED: June 26, 2014

By: **MICHAEL J. JURKOVICH**
Michael Jurkovich
Judge of the Superior Court

[3] Or "she".

MADERA SUPERIOR COURT
209 W. YOSEMITE AVE., MADERA, CA 93637

CASE NO: MCV062850

CASE TITLE: Stand Up For California! v. State of California et. Al.
North Fork Rancheria of Mono Indians v. State of California, et. Al.
Cheryl Schmit.

CERTIFICATE OF MAILING

I hereby certify that I am a Deputy Clerk of the Superior Court, County of Madera, for the State of California, and not party to this action; that on the date set forth below, I served the **RULING ON DEMURRERS TO CROSS-COMPLAINANT'S CROSS-COMPLAINT** 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: *Denotes: the document was placed in the mail receptacle at Clerk's Office. **Denotes: the document was in the inter-departmental mail receptacle.

Sean M. Sherlock, Esq. *
SNELL & WILMER L.L.P.
600 Anton Blvd., Suite 1400
Costa Mesa, CA 92626-7689

Fredric D. Woocher *
Adrienna Wong
STRUMWASSER & WOOCHER L.L.P.
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90025

Christopher E. Babbitt *
Danielle Spinelli
WILMER CUTLER PICKERING
HALE AND DORR L.L.P.
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Kamala D. Harris *
Sara J. Drake
William P. Torngren
Timothy M. Muscat
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

John Maier *
James E. Cohen
MAIER PFEFFER KIM GEARY & COHEN L.L.P.
1440 Broadway, Suite 812
Oakland, CA 94612

June 27, 2014

JEFFREY SIMIONE

JEFFREY SIMIONE, Deputy Clerk