C074506

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Third Appellate District

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS,
Plaintiff and Appellant,

v.

EDMUND G. BROWN, Jr., as Governor, etc., et al.,
Defendants and Respondents;
NP FRESNO LAND ACQUISITIONS LLC,
Real Party in Interest and Respondent.

Sacramento County No. 34201280001326CUWMGDS

RESPONDENT'S BRIEF

Madera County Counsel
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ATTORNEYS FOR RESPONDENT/APPELLEE
County of Madera

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

1. Madera County is a governmental agency and is not an entity according to the definition of "entity" found in Section (b) (2) of California Rules of Court, Rule 8.208.

2. Madera County does not know of any person or entity that has a financial or other interest in the outcome of the proceeding that Madera County believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Douglas W. Nelson
Attorney for Respondent
Madera County

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INTRODUCTION

Appellant's petition in the trial court did not allege that Madera County approved the North Fork Tribe's casino project, concurred in the federal government's decision to take property into trust for that project, nor that it was presently taking or threatening to take any action to implement the North Fork Tribe's casino project. Therefore, the petition failed to state a cause of action against Madera County under CEQA and further failed to identify any conduct to be enjoined.

1. PROCEDURAL HISTORY

On November 30, 2012, Petitioners Picayune Rancheria of Chukchansi Indians and Jennifer Stanley (Petitioners) filed an amended petition for writ of mandate and complaint against the Governor Edmond G. Brown, Jr., the Department of Transportation, the Department of Fish and Game, the City of Madera, the County of Madera and NP Fresno Land Acquisitions [sic], LLC as a Real Party in Interest, challenging the Governor's concurrence in the decision of the federal Secretary of the Interior to take land located in Madera County into trust for a casino and hotel for the benefit of the North Fork Rancheria of Mono Indians (1 JA 63-77).

Insofar as the petition concerns Madera County, the petition alleges that in August of 2004 Madera County entered into a Memorandum of Understanding with the North Fork Rancheria of Mono Indians for compensation to purportedly mitigate potential and perceived environmental impacts of the casino and hotel, and further

alleges that the Madera County's approval would be necessary to implement mitigation measures (1 JA 65 L 27-66 L 6) .On January 28, 2013 Madera County demurred to the amended petition and complaint (1 JA 141-151). Madera County's demurrer asserted that the petition did not allege that Madera County was a lead agency or had authority to approve the project (1 JA 147). Madera County's demurrer alleged that Petitioner's claims were not ripe in that it sought injunctive relief against unspecified actions that the County might engage in (1 JA148-149).

On June 6, 2013, the trial court entered its order sustaining the demurrers of all respondents without leave to amend and dismissing the action. (4 JA 787-811). The court's ruling determined that the governor's concurrence did not constitute a CEQA project under Public Resources Code § 21065 that the Governor was not a public agency under CEQA (4 JA 800) and that petitioner's claims against all other respondents were dependent on the claim against the Governor (4JA 805). The trial court further held that the petition and complaint contained no factual allegation that would establish that the other respondents had taken any action to approve a project under CEQA (4 JA 806 L 5-6), and that at most the petition and complaint alleges that the remaining respondents may intend to take some action in the future that would be subject to CEQA but that these claims were not ripe as the petition and complaint did not allege that any such action had occurred (4 JA 806 L 7-11).

STANDARD OF REVIEW

Because a demurrer tests both the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review

on appeal (*Blank v. Kirwan* 39 Cal 3d 311, 318). Appellate courts first review the complaint de novo to determine whether or not the complaint alleges facts sufficient to constitute a cause of action (id at page 318).

When the trial court sustains a demurrer without leave to amend, the appellate court also reviews that ruling for abuse of discretion. No abuse of discretion is found to exist if the facts are clear but no liability exists (*Kately v. Wilkinson* 148 Cal App 3d 576, 581). The burden is on the plaintiff to show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading (*Cooper v. Leslie Salt* 70 Cal 2d 627.)

ARGUMENT

1. The trial court correctly determined that the petition and complaint contain no factual allegations that Madera County or any other respondent had taken any action to approve a project subject to CEQA.

Insofar as the petition and complaint concern Madera County, it alleges only that Madera County is a general law county located in central California, and that on August 16, 2004, Madera County and the North Fork Mono Indian Tribe signed a memorandum of understanding whereby the Tribe agreed to provide compensation to the County to purportedly mitigate potential and perceived environmental impacts of the proposed casino/hotel resort. (1 JA 65-66) The Petition goes on to allege that County approval would be required to reduce the casino/hotel resort's potential environmental impacts (1

JA 66) but fails to allege that any such approval was given or sought. The petition does not allege any facts to establish that Madera County was the lead agency, i.e. the agency which has the principal responsibility for carrying out or approving the project (Pub. Resources Code § 21067). The petition does not and cannot allege that Defendant Madera County had or exercised any statutorily conferred power of approval. Nor is it alleged or can it be that Madera County committed itself to carry out the project, improperly provided assistance to the project, or issued any permits, authorizations or approvals of the project. Accordingly, Madera County is not a proper respondent in an action challenging the Governor's concurrence. *Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation and Parks District* (1994) 28 Cal App 4th 419.

2. The trial court correctly determined that petitioner's claim for relief was not ripe for adjudication.

The trial court correctly determined that the petition contained no allegations that any respondent had taken any concrete actions to implement a CEQA project and that in the absence of such allegation, such claims were not ripe for adjudication (4 JA 783). A CEQA challenge may not be maintained under the ripeness doctrine, before an agency has made a final decision whether to approve or carry out a project (*McAllister v. County of Monterey* (2007) 147 Cal App 4th 253, 274. Cited in 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2008) § 23.110, pp. 1252-1253.)

3. The trial court did not abuse its discretion by denying petitioner leave to amend its petition.

The trial court correctly noted that the petitioner could not state a cause of action against any respondent based on the Governor's concurrence decision and that no amendment would cure that deficiency (4 JA 784). Insofar as the petition concerns Madera County, petitioner's request to file an amended petition did not suggest that it could be amended to allege that Madera County was the lead agency on the project, nor that Madera County was engaging in any action in violation of CEQA that would be subject to an injunction. The trial court properly found that a demurrer should be sustained without leave to amend under the authority of *Keyes v. Bowen* (2010) 189 Cal. App 4th 647, 655.) in that the facts alleged in the petition were not in dispute and the nature of the claim was clear but under substantive CEQA law, no liability exists. The burden was on the plaintiff below to show in what manner he could amend his complaint and how that amendment would change the legal effect of his pleading (*Cooper v Leslie Salt* 70 Cal 2d 627). Plaintiff did not meet that burden.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be upheld.

Dated: 2/20, 2014

Respectfully submitted,

DOUGLAS W. NELSON, County Counsel
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.204(c)]

This Brief consists of 1,269 words as counted by the Microsoft Word program used to generate the Brief.

Dated: February 20, 2014

DOUGLAS W. NELSON
MADERA COUNTY COUNSEL

Douglas W. Nelson
Attorney for Respondent
Madera County

PROOF OF SERVICE

1. I declare under penalty of perjury of the laws of the State of California that I am employed in the County of Madera, I am over 18 years old, and not a party to the within action. My business address is 200 West 4th Street, Madera, California 93637.

2. On February 21, 2014, I served the foregoing Respondent's Brief (Third Appellate District Court of Appeal C074506) on the persons named below by enclosing a true copy thereof in a sealed envelope addressed as shown below AND

_____ Depositing said envelope(s) with the United States Postal Service with the postage thereon fully prepaid.

__X__ Placing said envelope(s) for collection and mailing on the date and at the place shown in item 3 following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

_____ By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

_____ By E-Mail or Electronic Transmission. I caused the documents to be sent to the persons (at the e-mail addresses) listed below.

_____ personal service on the person listed below.

3. a. Date of Service: _____

b. Time of Service: _____

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED:

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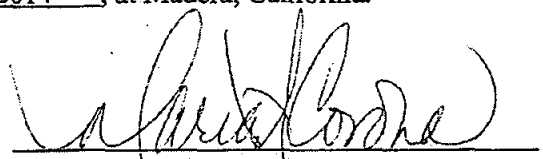
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on February 21, 2014, at Madera, California.



Maria A. Corona